Overcoming Three Common eDiscovery Challenges

When you know where your data is, that it is secure and that there are solid processes in place to handle it, you are in control.

Barry Schwartz | April 29, 2020

Every time an email is sent, a note is taken, a call is recorded, a vaccine is tested, or a tweet is posted – data is created. Some of that data may be more important than others, but many corporations keep all of their data, no matter what. In the pharmaceutical industry, that can mean terabytes of new electronically stored information (ESI) being created on a regular basis. That ESI may contain research, correspondence, product details and more. When litigation arises, there's a good chance all that data will have to be collected and analyzed for relevance.

Electronic discovery, or eDiscovery, is the process of identifying where data resides, gathering that data and then narrowing it down to only the relevant data. That relevant data may then be used in an investigation, regulatory or legal matter. That process can come with unique challenges in the life sciences industry.

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Mountains of Data

The amount of data grows exponentially every year. It lives in computers, machines, phones, cloud environments, software applications, social media and more. That means the first step is to understand what data is where. This is not as easy as it seems due to various data resources that typically exist in corporations. Even when companies have a detailed information management system, it can take some investigative work to make sure you have all the information you need.

The best way to start your gumshoe operation is to query the people, or "custodians," who work with the potentially relevant data. That may mean conducting interviews, which can become expensive, or using detailed questionnaires. When done correctly, custodian questionnaires reduce costs, increase efficiency and are less disruptive, especially when they are part of an automated legal hold system. However you administer the questions, make sure to include some that go beyond asking where data resides. Use this time to see if anyone has insight into the case or was involved in key activities related to it. This process will help ensure the subsequent data collection is targeted to the right data, which will save costs. It can also assist with gaining business intelligence and determining case strategy. And, when the questionnaires are sent at the direction of counsel, the responses are protected by the privilege doctrine.

Once collected, eDiscovery platforms with machine learning technology can cull through the data, provide deep analytics and help you quickly find what is relevant to your case. Work with a platform that can accommodate all kinds of data, including emails, Excel files, social media posts, texts and more. That kind of review tool can help you ensure each piece is coded, tagged, redacted and organized correctly.

Privacy and Regulatory Issues

Data security is always a concern, but especially so when it comes to any litigation or investigation when files will leave your building. Make sure you're working with an eDiscovery company that encrypts data right from the first data collection and keeps your data in a safe environment that is guarded against bad actors. Ideally, the data is forensically collected through a secure cloud portal so there is no chance of something happening to a hard drive. Remote data collections have the added bonus of being less expensive than having a technician travel to defensibly collect something in person.

The pharmaceutical industry works with both intellectual property and personally identifiable information (PII), so the process must also have top-notch quality control (QC) measures. The QC process should start with the first file collected, continue during the filtering and review process, and last until the final documents are presented to the court or governmental body. It should

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ensure that all data maintains hash codes and encryption and that sensitive and privileged files are not accidentally produced. Work with your eDiscovery team — which should include legal counsel, eDiscovery professionals and forensic and technical experts who know your industry — to outline a detailed protocol for data handling. When that is correctly created and followed, your data will stay safe, and all processes will comply with industry regulations.

Persistent Litigation and Investigations

Legal and investigatory matters are all too common for pharmaceutical companies. While there is no getting around them, they can be managed efficiently with documented processes that ensure consistency, compliance and accuracy.

Create a detailed eDiscovery playbook that outlines best practices — not just for eDiscovery as a whole, but one that is tailored to your organization specifically. Get detailed with it. Define what triggers eDiscovery, how legal holds are handled, what's covered at the meet and confer, what platforms are used, etc. Then include the names of each person or vendor involved in each step.

Additionally, create related policies and procedures for information management, mobile devices, working remotely, data retention and anything else that has to do with ESI. Once everything is set up, make sure they are fully and correctly implemented and overseen. These protocols are more than a smart way to do business; not only can they reduce your overall costs, but they guard against sanctions and help you be better prepared for a lawsuit or investigation. They make eDiscovery just another business process instead of a nightmare where you're herding cats on a deadline.

Bottom line: When you know where your data is, that it is secure and that there are solid processes in place to handle it, you are in control. You have the upper hand for future legal matters because you know the way your organization handles the eDiscovery process. That ensures your eDiscovery is conducted successfully and efficiently every time.

About Barry Schwartz

Barry A. Schwartz, Esq., CEDS is SVP, Advisory Services at BIA, a leading national eDiscovery and digital forensics company. Barry Schwartz is highly proficient in discovery and document review matters and holds more than 35 years of legal and business consulting management experience. He oversees BIA's advisory division and is primarily responsible for providing consulting and advisory services to BIA's clients. Barry is able to provide experienced, sound insight in multiple areas, including information management, litigation & discovery, document retention and management, regulatory compliance and IT security.