

Proactive Discovery Begins With Information Management

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You are in-house counsel at an organization and have just received a complaint filed in Federal Court. The complaint raises product liability claims, and the allegations implicate the engineering, manufacturing, marketing and sales organizations. Relevant information needs to be identified and preserved, and the clock has started ticking – what do you do? This scenario, or a variation of it, plays out daily in organizations around the country. Whether the information request comes in the form of formal discovery, a request for information from a government agency, or the need to identify information relevant to a pending internal investigation, the steps you have taken to manage your information before such a request materializes will have a direct impact on your ability to respond.

Today, information is being generated at such a rapid pace that the typical reactive approach to discovery no longer makes sense. As courts and practitioners have struggled to interpret the practical application of the revised Federal Rules of Civil Procedure, the challenges of handling these issues have highlighted the need for a different, more efficient approach to the discovery process. This has become even more apparent given today's economic climate and the need to reduce costs and promote efficiencies. If thoughtfully evaluated and implemented, a proactive information management strategy can greatly improve preparedness and increase an organization's cost savings during the discovery process.

Historical Response To Discovery Requests/Requests For Information

For many organizations, responding to discovery or requests for information has been something of a fire drill. The typical response was a shotgun approach where information was over-preserved and then provided to outside counsel for review. While this approach may have worked when the scope of the information requested was narrow or the amount of potentially relevant information was small, in today's world of electronically stored information, these practices do not scale. The reactive approach is time-consuming and expensive, and it diverts resources (both human and financial) from other critical functions within the business.

Historically, as the economic climate fluctuates, the probability of litigation tends to increase. However, in this most recent recession just the opposite may be true. Why? Because counsel is afraid of the cost of litigation. Regardless, heightened government scrutiny of various industries and the new administration's emphasis on transparency all point to the likelihood that an organization will need to

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test its discovery response plan in the very near future.

The Benefit Of Being Proactive

An e-discovery response plan should begin by contemplating how information is created and managed. By understanding how its users are creating and storing information, an organization can truly evaluate its risk and implement a discovery process to address and minimize these risks.

Information Management

Information management is relevant to all layers of an organization. No matter what a person's job function entails, it is imperative that end users are able to access the information they need to do their jobs. However, retaining too much information can overwhelm an organization's systems and increase risk in the event of litigation or regulatory scrutiny. As a fundamental matter, the organization needs to evaluate its requirements – both from a business perspective and with respect to any legal and regulatory requirements that may be applicable. Once requirements have been identified, the organization can develop retention policies around those requirements. Generally speaking, the process of determining appropriate retention policies will require the input of business unit leaders, the IT team, as well as stakeholders from legal and records management.

Implementing technology, such as an archiving tool, can provide the foundation to support an organization's information management policies by providing greater control over the information being created and retained. Once retention policies have been established, these policies can be applied within the archive to enable an automated and repeatable expiration process.

Centralized Identification/Preservation/Collection

One of the most significant challenges an organization faces in its discovery process is the ability to quickly identify information that may be relevant to a pending matter and the ability to preserve and collect that information. Oftentimes, the costs associated with identifying and preserving data can be extraordinarily high from both a monetary and a human resources standpoint.

Legal Hold

An organization must make a good faith and reasonable effort to preserve information that may be relevant to a legal or regulatory matter once litigation is reasonably anticipated. Unstructured data and data dispersed across multiple locations makes it extremely difficult to determine what is relevant. In addition, securing relevant information from normal destruction practices can test an organization's ability to identify which systems and processes may be affected. Oftentimes, the only way an organization could reasonably determine what information might be relevant to any given matter was to rely on information provided by individual custodians. This challenge was highlighted earlier this year in *ACORN v. Nassau County* (E.D.N.Y. March 9, 2009). In the *ACORN* case, the defendant failed to take adequate steps to implement a legal hold. The defendant asserted it had not yet con-



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ducted a full investigation into the matter, and thus did not have complete information on the potential custodians and facts involved. The court found defendant's inaction amounted to gross negligence and awarded plaintiff's costs and attorney's fees stemming from the motion. An archiving solution, implemented in conjunction with a proactive approach to information management, may have helped avoid this situation by providing the ability to identify relevant information much sooner.

Using an archiving tool, information across the organization is stored in one centralized location. This information can then be accessed and searched by a designated user with the appropriate permissions. This approach provides greater consistency in the discovery process and potentially relieves the burden and distraction to the individual custodians of having to go out and search their environments. In addition, archived information is essentially pre-collected and pre-indexed, thereby reducing the time and cost related to early assessments.

Once the relevant information has been identified, it can then be preserved in the archive until such time as the matter is concluded or the hold is otherwise lifted. This ability to preserve information within the archive alleviates the need to create additional copies and reduces the risk that the information will end up on a hard drive in a storage facility, never to be expired. Rather, once a hold has been lifted within the archive, the information will be expired pursuant to the automated policies already established.

Use of Information During the Discovery Process

Traditionally, there was no means during the discovery process to reduce the volume of data without an exhaustive review or the help of third party e-discovery vendors or outside counsel. Today, given the high cost of these services and the ever-expanding corpus of data on enterprise systems, organizations are looking for ways to bring some of this functionality in-house. Even for organizations that are not staffed to conduct extensive in-house review, an archiving solution can help reduce the amount of data that is ultimately exported to outside counsel. A corollary benefit is the ability the archive provides for information gathering and strategizing in the early stages of the discovery process.

Early Case Assessment and Meet and Confer Preparedness

The Federal Rules of Civil Procedure require that parties meet and confer to discuss various e-discovery issues early in the discovery process. In addition to these legal requirements, there is a strategic advantage to being able to review and analyze the facts surrounding your case as quickly as possible. Whether an organization is sued or is evaluating bringing a cause of action against someone else, knowing which information supports your case and which information may harm it can help you evaluate your position and risk.

In addition, conducting early case assessments can help guide the legal hold process and protect a company from the risk of spoliation claims and potential sanctions. By searching the archive, counsel can quickly determine the key custodians and issues in a matter and can broaden

or tailor its legal hold notices as appropriate. An effective early case assessment process requires a combination of professional experience and judgment, and ready access to the underlying information in the case. This is where an archiving tool can have a significant impact on an organization's ability to be proactive. Using an archive, an organization can search for information as soon as it learns of a matter and quickly retrieve relevant data for review and analysis. Because archived information has already been indexed and collected, organizations can quickly assess an issue without the time and expense associated with a manual or third-party collection process, allowing the organization to make informed decisions and determine case strategy with confidence very early on.

Review and Production

The right archiving solution can also provide an organization the ability to review information internally, relieving the need to rely so much on third parties. Given that the bulk of e-discovery costs can be attributed to the review process, the ability to proactively manage some of this workflow in-house can result in tangible cost savings. For organizations that are not staffed to do review in-house, an archiving and review tool can still provide substantial benefit. In these cases, an in-house legal or IT team can simply search the archive for relevant information using specific keywords, date ranges or custodians. This allows much larger data sets to be culled down to more manageable volumes and reduces the amount of information that is ultimately exported for review by outside counsel. Organizations not routinely involved in litigation can take similar advantage of search and review capability in order to avoid costly identification, processing and review costs. The right tool will also provide an auditable chain of custody of the key activities performed on the information.

In addition to enabling a proactive response to formal information requests, an archiving tool has several collateral uses that often provide a quick return on investment. For example, in many organizations the archiving tool is used to improve the internal audit investigation process. As with formal information requests, once a claim or issue arises, information can quickly and easily be pinpointed and reviewed to determine the appropriate course of action. Likewise, internal human resources issues can be researched and analyzed without extensive disruption.

Conclusion

Now, imagine you are the same in-house counsel we introduced at the beginning of this article. The same complaint arrives on your desk, but now, because of the work you did upfront, you have a process and the tools in place to respond. Using the archive, you can quickly search for information and place legal holds. As the case progresses you will learn more about the facts and custodians involved, and all of that information can be used to further identify relevant information in the archive. At the outset you will have met your legal obligations to preserve data, you will be able to meet your discovery deadlines, you will better be able to control your spend on outside vendors, and most importantly, you will be able to sleep at night.

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