

Overcoming E-Discovery Challenges

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Yet only 29 percent of legal professionals judged themselves to be “extremely prepared” for e-discovery despite federal legislation that mandates the retention and retrieval of documents, according to a survey commissioned by Xerox Litigation Services. Of those who were less than prepared, 42 percent blamed slow turnaround for their problems, while 38 percent blamed IT for its inability to support document review systems. More than 40 percent said these systems lacked important features such as expanded search options and software updates.

‘E’ for Enormous

The root of the problem is the enormous amount of data stored by the typical organizations. Over the last decade, the courts have expanded the definition of “documents” to include electronically stored data such as e-mail, forcing organizations to sort through vast data archives in response to discovery requests. The Federal Rules for Civil Procedure (FRCP) have been amended to help avoid potential e-discovery disputes and to control the length and expense of the e-discovery process — amended Rule 26 states that a party to a lawsuit doesn’t have to provide electronic information from sources that are “not reasonably accessible because of undue burden or cost.” However, a court may still require such information if the requesting party shows “good cause” for its discovery or challenges the inaccessibility claim.

Often, the timetable for e-discovery is short, driving up expenses and increasing the risk of costly court sanctions. Furthermore, the FRCP requires that e-discovery issues be addressed early in the litigation process. Organizations must thus adopt a proactive

approach that anticipates potential litigation by effectively categorizing and archiving information throughout its lifecycle. With the volume of stored data skyrocketing and litigation on the rise, organizations need an effective strategy for data retention, compliance and risk management as well as proactive and reactive litigation readiness.

“Not only must organizations know where their data is located, but they must also know the degree to which that data is accessible or inaccessible,” said Smith. “For example, data residing on live file systems on functioning servers is far more accessible than deleted or encrypted files, corrupted data, or data archived to tape or other offline media. The burden and costs to produce obviously increase in relation to the extent to which data sets are inaccessible.”

Reducing Legal Costs

By developing an ESI data map, organizations can relieve some of the e-discovery burden and reduce legal costs. An ESI data map helps counsel understand what data exists, where and how it is stored, who created it, how it is preserved and how it can be collected to respond to a discovery request. Far from a static “directory” of data, a well-developed ESI data map is designed to grow and evolve.

“A logical starting point in the pursuit of e-discovery readiness is to focus on building an ESI data map. Although data mapping might not seem that important now, you’ll appreciate the upfront planning when you receive a ‘litigation hold letter’ and the court’s discovery clock starts ticking. The time to start thinking about data locations is before you’re under the gun,” said Smith. “Sanctions can be costly. It is

very important to proactively work on ESI data mapping and not to wait for production orders in a legal process.”

Efficient e-discovery processes also reduce the odds of inadvertent disclosure that effectively waives any privilege surrounding that topic or even the entire case. Federal Rule of Evidence 502, enacted September 19, 2008, strengthens so-called “claw back” provisions that enable litigants to reclaim inadvertently disclosed documents without penalty, but the rule requires that litigants take “reasonable steps” to avoid inadvertent disclosure. It is unlikely that the courts will allow FRE 502 to be used as a shield against shoddy e-discovery and document review practices.

“At Ispirian, we have the necessary tools and experience to help customers with ESI data mapping. We can also advise customers on the subsequent steps of collection and preservation,” Smith said. “Let us help you create an e-discovery strategy that will ensure you’re prepared for litigation.”

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