



BY CATHERINE MUIR AND COURTNEY INGRAFFIA BARTON



CORPORATE STRATEGIES

for Reducing

Now that the amended Federal Rules of Civil Procedure addressing electronically stored information have been in effect for just over a year, case law is trickling in and companies and their attorneys are focusing more than ever before on the actual business of electronic discovery.

What they are finding is the need to balance compliance with the cost of full and thorough reviews. Some believe that increased costs are a *fait accompli*, and that companies will simply have to brace themselves for this expense. The truth is, however, that while preparation may require an initial investment, a company that formulates sound strategy and executes well can actually save money in the ediscovery process.

In general, costs associated with ediscovery can be minimized in two ways:

- by decreasing the volume of electronically stored information that has to be retrieved and reviewed, and
- by minimizing the risk of sanctions.

EDISCOVERY COSTS

Records Retention Policy

First, it is important to have a comprehensive document retention and information management policy. This is a company's first line of defense for ediscovery cost savings. Although the up-front cost and time investment required to generate such a policy and schedule can seem daunting, creating a document retention and information management policy will likely be the biggest overall investment in any quality litigation preparedness effort. The money will be well spent, however, as the retention policy will act as an invaluable roadmap and plan for managing information that ultimately may be central to litigation now and well into the future. Additionally, training employees and monitoring their compliance with the policy is every bit as important as creating one in the first place because a policy is only as good as how it is practiced or adhered to.

The obvious cost savings outcome from this investment in policy development and training is a reduction in the overall volume of information a company or its outside counsel has to search for, collect, and ultimately review when litigation is pending. To ensure utility, a company's records retention policy should also be a living document, one that changes frequently to meet legal requirements and operational needs, but also one that sets the policies and procedures for all ediscovery projects.

Create a Data Map

Next, knowing what you have, where and how to access it is vital. More and more this idea is becoming known as "data mapping." Traditional information technology architecture was not designed to track documents or index material by its content, which makes knowing where data resides in an organization challenging. A comprehensive information management plan should mandate not only *how long* documents and information should be kept, but also should contain a thorough description of *where* a company keeps its information. The latter, often referred to as a data map, is an invaluable part of litigation preparedness. As such, mapping can reveal where pockets of information might be stored that, if needed, would be costly to retrieve.

For example, mapping data sources can illuminate the need for employing a "metacrawler" solution to locate where documents reside, or a centralized document management system that will prevent information from being stored on individual hard drives and in places difficult



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and costly to search and collect. Likewise, consideration should be given to archiving data so that it is easily retrievable and accessible, and consolidated for destruction at the end of its lifecycle. This also allows a company to use back up tapes for disaster purposes only, so that they can be recycled on a frequent basis and do not have to be restored for data collection in litigation. In this same vein, companies should consider conducting an audit of back-up tape facilities.

Data mapping can also help a company appreciate where different types of information—relevant to different types of litigation—are, such that discovery efforts for employment, product liability, or patent/trademark cases can be more carefully targeted toward pre-identified data stores. Conscientious data mapping prepares a company for a Rule 26(f) conference, can help prepare for Rule 30(b)(6) IT and Records Management witness interviews, and reduces its risk for sanctions due to the non-production or late production of relevant data. Like the records retention policy, the mapping of data sources can also help identify quick retrieval strategies and cost-consuming data pools that may need to be revised.

Ediscovery Protocol

Following on the heels of the records retention policy, companies should also have an ediscovery protocol. This protocol establishes the procedures for identifying, preserving, and collecting data when litigation is anticipated. Similar to the other activities previously discussed, the protocol also helps a company reduce costs by streamlining typically laborious and time consuming activities; a company can also leverage prior experiences to maximize efficiencies in their processes.

An effective protocol begins by taking a close look at a company's litigation history and creating a procedure that makes sense for the types of matters that a company is involved with the most. Although this protocol can and should also go hand in hand with data mapping efforts, it should go much further by providing for the treatment of documents once litigation begins.

With this in mind, below are foundational elements of an effective corporate ediscovery protocol.

- *Establish an Ediscovery Committee or Liaison.* By bringing the right group of people together, you can ensure that all departments that are affected are working together for the same goal. At a minimum, this would include representatives from the general

counsel's office, the IT department, and records management. Companies should also consider hiring or training an interdisciplinary professional to lead this group to make sure that everyone not only speaks the same language, but also that the priorities of each group are understood in light of conflicting business concerns. This individual may also serve as a litigation project manager to oversee all ediscovery projects—someone who can act as a liaison with the committee and with outside ediscovery counsel and also help vet ediscovery service providers. The committee should help establish a protocol that will work for all concerned and act as a clearinghouse so that each project is handled consistently. The ediscovery committee is an ideal forum for identifying the company's Rule 30(b)(6) witness—someone who is knowledgeable about both the company's litigation preparedness and document repositories. The cost-savings outcome of an ediscovery committee is that litigation needs are managed in the context of business priorities. For example, a committee can help identify that an IT department does not have the resources for data collection, so a decision can be made to outsource these projects. This type of coordinated approach will allow the company to continue business operations and make informed decisions about how to spend its resources.

- **Create a Litigation Hold Policy.** Companies should establish a basic litigation hold policy. In general, the *trigger* or *time* for implementing a litigation hold will typically be made on a case-by-case basis by the general counsel's office. Decisions made about when the hold was implemented should be well documented should they need to be defended at a later date. However, the policy or protocol for *implementing the litigation hold* should be signed off on by the ediscovery committee or liaison, disseminated throughout the company, and carefully adhered to by each department when facing legal actions. This protocol should include, among other things, a list of *who* is responsible for implementation of the policy, *how and how often* it will be monitored, and a procedure for rigorous supervision of compliance with the policy and procedures.
- **Consider a Document Repository.** Many companies, after considering their litigation history, find that many documents are used over and over again. This is especially true in the context of multi-district litigation, products' liability, and securities' litigation. Yet each time a case is filed, that information must be retrieved, processed, and reviewed for relevance and privilege. Document repositories can be used to process

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Steps to Create a Coordinated Discovery Preparedness Process

Initiate a Data Map

Corporate preparedness for legal discovery all starts with knowing what you have, where it is, how it can be accessed, and by whom. These questions can be answered by creating what is commonly referred to as a “data map” system profiles or inventories.

Create an ESI Roadmap and a Core Preservation Team

Coordinate IT, legal, and business groups into your preservation and collection process to maximize efficiencies, realize vendor discounts, and create a more complete discovery preparedness system. Include representatives from different IT application groups such as email, desktop, enterprise, etc.

See Who Else in the Company Is Doing the Same Thing

Cast the net broadly. Go beyond the usual suspects. Legal and IT may not be the only organizations within your company seeking systematic ways to find ways to identify, store, and manage data or documents.

Engage Specialized Outside Experts

Seek input and expertise from ediscovery experts to inform your corporate program. Seek out a consultancy or law firm that specializes in discovery preparedness.

Seek C-Level Support for a Unified Effort

Any time cross-company, cross-functional cooperation is needed, executive buy-in and sponsorship is vital. This is especially true when considering the disparate and technical issues involved in company-wide document management.

Initiate a Steering Committee

Following executive sponsorship, create a steering committee comprised of all relevant parties. For Sprint, that includes legal, HR, IT, and corporate communications. This committee will provide the overall direction and decision making, as well as final budget responsibility.

Managing Forward

Litigation preparedness and data management is an ongoing process. Ensure that your data profiles and roadmaps are kept up-to-date. Provide training to employees so they know your company’s policy for keeping, deleting, and managing data.

information once, review once, and then information about that document, such as relevance, attorney-client privilege, and work product, including Bates numbers and redactions, can be retained and used from case to case. This type of consistency is invaluable, especially as it relates to potential waiver of privilege. With information already indexed, sorted, and ready to be used to respond to a discovery request, a repository can clearly contribute to discovery cost savings for many companies facing serial litigation.

Establish Partnerships

Another way to maximize corporate litigation preparedness is to partner with law firms with ediscovery expertise and ediscovery service providers.

Many law firms have started developing expertise in the area of ediscovery. Tapping this expertise for the discovery portion of a case can add to your savings, as many of these firms have worked on a variety of discovery projects and can provide effective strategy and efficiently manage an ediscovery project. Typically, these firms have vetted the service providers and may even have partnerships with some of them, providing additional savings. A service provider with end-to-end and scalable solutions can help a company create a cost efficient ediscovery plan. Moreover, working with a handful of service providers will allow a company to negotiate master service agreements that can leverage buying power to reduce overall costs.

Some additional considerations when selecting vendors to help with cost savings include:

- *Records Management Consulting.* These consultants, typically legal, records management and IT professionals, can work with in-house and outside counsel to help companies create records retention and data maps with ediscovery specifically in mind. Engaging consultants in your planning process can help facilitate the collection and retrieval process in litigation.
- *Data Collection/Forensics.* Not all cases require forensic data collection, but in large litigation or certain types of litigation, forensically sound collection can save money because data only has to be collected once; there is no need to go back to the data if deleted files become an issue. With forensically sound data collection, the evidentiary integrity is maintained and metadata is preserved. Indeed, forensic collection, if done strategically, may not cost more than any other outside collection because of the efficiency of forensically sound collection tools. A third party data collection team, should you choose to engage one, will also prevent your spending valuable internal IT resources, and can act as a neutral witness should issues arise concerning data collection and chain of custody.

- *Data Filtering.* Once data has been collected, make sure that your service providers have robust data filtering so that only the data that may be relevant to the matter is processed. Data filtering can dramatically cut down on the amount of information that has to be reviewed. Filtering can be accomplished in a variety of different ways including date range, file type, extension, document type, and key words.
- *Employ Scalable Solutions for Review.* Most companies want a combination of in-house and outsourced solutions. Look for service providers that can provide you with both so that both in-house and outsourced reviews are coordinated and fit into your overall protocol. Moreover, coordinated solutions can save time and money if a matter that starts out small and is being managed in-house needs to be outsourced due to volume and capacity. Compatibility is also key when a matter needs to be put on hold and the company wants an economical way to host data in the interim.

The **cost-savings outcome** of an ediscovery committee is that **litigation needs are managed** in the **context** of business priorities.

Create a Discovery Process

When working with outside counsel, your team can save time and money by creating a clear and mutually agreed to ediscovery process or action plan for outside counsel. Traditionally, outside counsel has had autonomy over discovery projects. Now, because the stakes are so high and costs are under increasing corporate scrutiny, corporate counsel can and are dictating how these projects should be completed. Consider implementing ediscovery guidelines that work across all of your outside counsel such as:

- *Define budget parameters.* Based on an analysis of past successful ediscovery projects, your own vendor research, and recommendations from ediscovery consultants or, counsel and corporate counsel outside your company with ediscovery expertise, decide what each step in the process workflow should cost. Look for service providers who can achieve the quality of service you expect at your defined rates. Because service providers may use different methods throughout the workflow, the hard part is ensuring that you are getting an apples-to-apples comparison.
- *Mandate the use of a particular review platform(s).* If lawyers and law firms are required to use a particular platform, attorneys or reviewers will have to learn the system only once, thus saving time and expense on trainings and learning curves. Plus, many platforms have features where in-house counsel can monitor the review of outside counsel online and check progress against billing invoices. Managing multiple matters and multiple firms can be handled all in one place.
- *Consider Outsourced Review.* Many companies are now requiring outsourced review, either in other states where costs of contracting or reviewing attorneys are less, but also, increasingly, abroad. Considering that the hourly rate of reviewers in India can be one-fifth of that in

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the United States, this is a very attractive option for companies that have to review a tremendous amount of information. This type of review may not be appropriate for every matter (especially when the subject matter is highly complex) and there are some ethical implications that must be considered.

- *Establish consistent guidelines for the handling of privileged information.* Waiver of privilege is one of the biggest concerns of corporate counsel. These documents should be handled consistently from one firm to another. Technology can help in this process, but having a consistent policy that firms know and adhere to can reduce the risk of waiver.

Use Technology to Your Advantage

Finally, let technology and functionality work to your advantage. While technology has created some of the burdens in ediscovery, it has also led to ways to reduce that volume by harnessing the metadata for more efficient review. In larger cases, the exclusive use of native files for review can add to the cost of review because there is no way to search across file types, create an index, keep family groups together, de-duplicate, or bulk tag. When considering functionality, make sure the ediscovery software or service provider offers the following options, all of which can dramatically cut down on attorney review time and ultimately cut down on the costs of review.

- *De-Duplication.* By running a hash value across your

document set you can identify all true duplicates, resulting in the need to review only one document for every duplicate set.

- *Bulk Tagging.* Once information is “de-duped,” bulk tagging allows all duplicates to be treated the same. Not only does this save time, but in the case of privileged documents, can help preserve privilege. Privileged documents have to be reviewed only once and all the true duplicates can be consistently bulk-tagged, thus reducing the risk of inconsistent privilege determinations.
- *Family Groups.* Similar to duplicates, family groups harness metadata to keep emails and attachments and email conversation threads together. Again, this functionality helps to cut down dramatically on review time as emails and attachments can be reviewed for privilege and relevance in context.
- *Exceptions Report.* All ediscovery service providers process data. Typically this processing can be automated and should not be extremely expensive. What can be time-consuming and expensive is if a service provider needs to spend time on password protected files, corrupted files, or other difficult-to-process formats. One way to address this cost is to ask your service provider for an exceptions report. This report should come after a first attempt to process data. Once the exceptions report is in hand, the company can then decide whether to pay to process the exceptions, or whether to discuss options with their counsel. Asking for an exceptions report before time and money is spent can help with cost predictability and budgeting.
- *Concept Searching.* While concept searching to initially filter data is not yet widely accepted, concept searching is being used to organize data once the dataset has been established. Concept searching determines the relevance of electronic documents by analyzing relationships between each word and every other word in sets of documents. This contextualizing of words allows the product of a search request to be presented in conceptual groupings, making it easier to identify and weed out irrelevant documents. Conversely, concept searching can help identify similar documents so that they can be reviewed in context, which, again, can be extremely helpful for review for relevance and privilege.

While many companies and their counsel look at the amended rules and the electronic revolution as a burden on litigation, this is not a certainty. Rather, these changes offer an incredible opportunity to establish procedures for streamlining not only a company’s litigation procedures, but also its overall business processes. Each of the steps outlined above empower corporations to do so, as well as help manage costs associated with discovery more effectively than in the past.

ACC Extras on... Ediscovery

Quick References

- *Ediscovery Checklist* (2007). This checklist lists the practical steps a lawyer needs to take during all phases of litigation. www.acc.com/resource/v8318
- *Top Ten Reasons for Corporate Counsel to Outsource First-Pass Document Review* (2007). In-house counsel are increasingly outsourcing first-pass document and email review. With the explosion of email and electronic documents to be sorted through, document reviews done by outside counsel law firms can be one of the most expensive parts of a litigation or investigation. www.acc.com/resource/v8914

ACC has more material on this subject in our Virtual LibrarySM. To create your personalized search, visit www.acc.com, click on the “Research” pull down menu button, then select Virtual Library. Type in your keywords and search to see the other resources we have available.

With this challenge and opportunity at hand, now is the time for companies to take action to proactively put together their teams, roll up their sleeves, and put in place a protocol that works for their business. In the end, good planning, communication, and effective processes will go a long way toward reducing costs in ediscovery.

Case Study: Ediscovery Rules Compliance Leads to Improved Collaboration Across Sprint

At Sprint, the risks inherent in electronic discovery, and the desire to avoid the sanctions and fines that can follow ediscovery missteps, have actually served as a key driver for positive change throughout the organization. Collaboration across functions and the development of repeatable processes for information management are resulting in efficiencies with measurable ROI and risk mitigation that is less quantifiable but equally important. All this has come about because of buy-in from top management, the key to affecting the kinds of changes required to get the corporate house in order for the discovery of electronically stored information. Our experience is that the legal department is the one group that can, and should, be proactive in initiating and coordinating cross-company efforts to realize the benefits a sound litigation preparedness process.

It Began with System Profiling and Ended With a Roadmap

We began the process of preparing for the new Federal ediscovery rules by putting together system and application inventories. As legal worked with IT to put these together, we got the first inkling that a number of disparate groups within IT were working on information management projects, each with its own imperative about what needed to be done. From these efforts, what we originally called an ESI (electronically stored information) Roadmap evolved to help consolidate and prioritize projects and focus efforts and expenditures on a cohesive goal.

Traditional IT architecture typically is not designed to track data or organize information. Consequently, most IT departments work in silos when it comes to an information management initiative, with, for example, the email group trying to figure out an archiving solution, the desktop group looking at information on PC hard drives, the capacity management group looking at storage and infrastructure needs, etc. In many cases, the groups were unknowingly talking to the same vendors about technology that could satisfy their individual requirements. As a result, they were not leveraging the volume discounts that they might have received. In addition, one group did not understand the impact that its initiative had on the rest of the IT organization, much less on the company's overall litigation preparedness needs as a whole.

IT Coordination Ensued

Once the legal department started talking to the various IT groups and explained the legal obligation to meet certain standards for preservation, retention, and destruction of documents, data and records, the different IT groups began to come together. But, this didn't happen right away. Legal had multiple meetings with IT to explain the need for coordination on the ESI Roadmap, then solicited and earned endorsement from a high-level group consisting of the general counsel, the chief information officer, the chief compliance officer, and the vice president of litigation. Once that happened, IT identified the best people to work on the project.

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While **technology** has created some of the **burdens** in ediscovery, it has **also** led to ways to **reduce that volume** by harnessing the **metadata** for more efficient review.

Concurrently, we developed the Preservation Team. It consisted of representatives from legal, from each of the IT areas that owned media frequently implicated in litigation and from application owners—some from the business side and some from IT. This core team of about 12 met weekly while we were getting our processes down. To assist the team, we hired a consulting group specializing in ediscovery matters to help define the preservation processes that we needed to put into place. This same group had also helped perform the initial system profiling.

More Collaborators Found

As the ESI Roadmap team worked away, we discovered that part of our human resources organization, the knowledge management group, was pursuing initiatives around information and how it is retained and stored. They were trying to document systems so institutional knowledge could be retrieved and reused—a very similar process to our ESI Roadmap project. We also realized that any documents they created about our systems would be discoverable. Therefore, it was essential that we work together with Knowledge Management on how we were going to store, retain, and access information.

Cross-Company Collaboration Needed

Ultimately, in the spirit of bringing all the disparate groups in the organization together, we solicited and earned the buy-in to form a steering committee to oversee all the information management initiatives and to make sure they're all going down the same track. Again, this buy-in came from the highest levels in the organization.

At Sprint, we have an integrity counsel made up of all the “C-level” executives and senior vice presidents from the major business units. When we laid out the problem statement, requesting the formation of a unified information management task force to oversee our overall litigation preparedness and information management needs, the integrity counsel agreed to appoint key players, director-level or above, to that committee.

A Steering Committee to Unify Efforts

The information management task force is made up of representatives from legal, IT, human resources, and corporate communications. This last group is essential because so much of what we are doing requires a cultural shift. We're


putting new processes, policies and tools into place, and we need to educate the organization on how to use them.

This new team is designed to have visibility into all information management initiatives, and the authority to make recommendations and to decide on budget impact. The team ensures that all processes, dollars, and objectives are going toward the same goal. It also ensures sufficient awareness and training for employees. The makeup of the team acknowledges that document retention issues are not just a legal issue; they are a company-wide issue.

With input from all disparate and relevant groups now included, we can identify and assess all the gaps that need to be addressed. The task force will prioritize the order in which the gaps are filled, decide whether to address those gaps with technical, process or people solutions, and will come up with cost estimates and the budget.

Managing Budget, Managing Process

The new structure means that the budgetary burden for addressing information management and compliance issues will not always fall on the legal department. In the past, legal has had to pay for cleaning up compliance issues. For instance, one of the first decisions that we made was to bring in software to automate our legal holds process. Manually tracking all the processes for legal holds was laborious and risked inconsistencies. Legal determined the existing legal hold process was our biggest risk. The money for the software to automate the legal holds process came out of the legal department's budget. But, we made this determination and purchase before the formation of the information management task force. Moving forward, such decisions—and the budget to pay for them—will be more of a shared responsibility.

Each of the steps outlined above was taken not as a pre-planned strategy, but rather happened as issues and needs arose from our original intent to create an effective ESI Roadmap. Additionally, the mission of the task force we created has grown into something larger than only mitigating electronic discovery risks. However, we believe that our experience at Sprint can serve as a useful lesson on how corporate litigation preparedness is truly a company-wide endeavor that goes far beyond legal and a few key IT groups. 

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