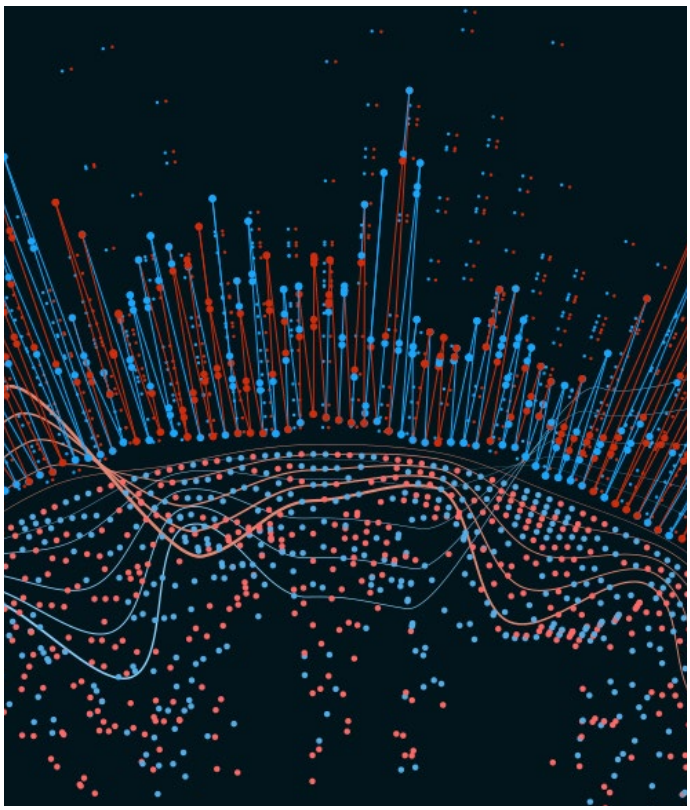
How to Better Manage Discovery and Save Costs in the Era of Expanding Data

By Mike Lieberman, Shelley Rosenberg and Leigh Colihan



Ninety percent of data in the world has been created in the past two years, according to some scientific estimates. We are confronted daily with this reality. Overflowing email inboxes, growing company databases and expanding use of mobile devices and social media present a range of challenges for companies and counsel trying to manage risk and costs, especially in litigation. The good news is that recent federal rule changes may help mitigate these risks and costs, and relatively simple steps to improve data management now can prevent significant headaches down the road.

KEY RULE CHANGES

Proportionality

In 2015, Federal Rule of Civil Procedure 26(b)(1) was amended to expressly state that to be discoverable, information must be relevant to a claim or defense and "proportional" to the needs of the case. In weighing proportionality, courts are directed to consider the following:

- The importance of the issues at stake
- The amount in controversy
- The parties' relative access to the information
- The parties' resources
- The importance of the discovery in resolving the issues
- Whether the burden of expense of the proposed discovery outweighs its likely benefit

While proportionality is not a new concept, this rule change sharpens the focus on it. In essence, courts are asked to determine how much discovery makes sense in the context of each case, and to serve as gatekeeper to prevent burdensome and expensive forays into a growing sea of company data.

Spoliation

Also in 2015, Federal Rule of Civil Procedure 37(e) was amended to clarify that spoliation sanctions are only permitted for loss of electronically stored information when a party failed to take reasonable steps to preserve it. If a party suffered prejudice from the loss of information, the court may order measures no greater than necessary to cure the prejudice. More severe sanctions are reserved for when the party acted with intent to deprive the other party of the information's use in litigation.

The Advisory Committee's note to this rule makes clear that these changes are intended to address the "ever-increasing volume of electronically stored information and the multitude of devices that generate such information." Faced with this challenge, the committee recognized "perfection in preserving all relevant electronically stored information is often impossible." Rather, a litigant must take "reasonable steps" to preserve evidence, measured in part by whether preservation efforts are proportional to the needs of the case.

Faced with these new rules and the growing volume of data, legal managers can take steps now to significantly mitigate risks and costs.

WHAT CAN LEGAL MANAGERS DO NOW?

Faced with these new rules and the growing volume of data, legal managers can take steps now to significantly mitigate risks and costs. A few simple examples include:

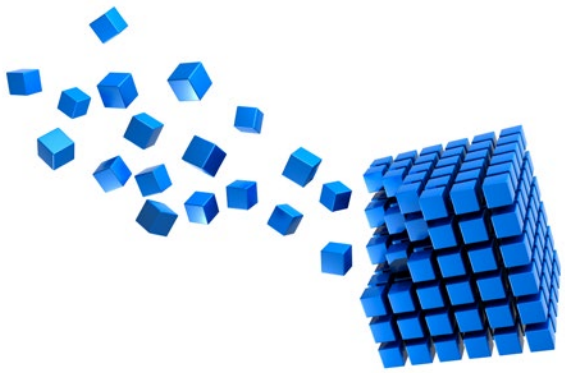
1. **Adopt and enforce a record retention policy.** A company need only retain information in existence at the time the duty to preserve arises i.e., when the company reasonably anticipates litigation. This means that if data is no longer in the company's possession when the duty to preserve arises, there is no need to produce that data in discovery. If a company adopts a record retention policy and then appoints an officer to rigorously enforce it, the company can get rid of large amounts of data before the duty to preserve arises. This not only decreases the cost of data storage but also limits the amount of data that must be held, searched and reviewed in the event of a lawsuit.

2. **Adopt policies limiting use of mobile devices, instant messaging and company work outside the office.** If an employer has policies that prevent substantive work communications in text messages, via instant messaging or via home computers, that can significantly strengthen the company's argument that review of these media in discovery is not proportional or necessary.

3. **Improve searchability of document systems.** If a company deploys software that allows targeted retrieval of records, the company can use this software in discovery to home in on the documents at issue in litigation and argue that broader searches are not proportional. This thereby limits the amount of data the company needs to collect and decreases the costs of review.

4. **Consult with an e-discovery expert.** Not surprisingly, increasing data volumes are also driving development of new technology to more efficiently process and cull large data sets. Beyond traditional search terms, new tools such as predictive coding, email threading, email clustering and concept searching can significantly limit a review universe. Consulting an e-discovery expert early and employing these new tools can save significant time, effort and money in litigation, and help counsel reach a review universe more proportional to the needs of the case.

In the era of expanding data, the key is to be proactive. We encourage legal managers to consult with counsel now to analyze their options and to develop a data management and discovery response plan that makes sense for them. ■



ABOUT THE AUTHORS

Mike Lieberman is a Partner in Crowell & Moring's Litigation, Health Care and White Collar & Regulatory Enforcement groups.

mlieberman@crowell.com

Rochelle-Leigh "Shelley" Rosenberg is an Associate in Crowell & Moring's Litigation and Health Care groups.

rrosenberg@crowell.com

Leigh Colihan is an Associate in Crowell & Moring's Antitrust and Litigation groups.

lcolihan@crowell.com