

“Do It Yourself” ESI Collection – Risky Business for Clients and Counsel

By Aaron Lawlor and Sharon Nelson

Self-collection of discovery has a nice ring to clients' ears. Early in a case, it appears to represent a prime opportunity to control outside experts' costs, leverage in-house IT resources, and maximize control over the matter. For a limited group of clients, it also presents a splendid chance to “hide the ball” without outside interference or knowledge. While some clients are drawn to self-collection, it's critical that counsel point out its shortcomings, which can result in wasted time and money, and exposure of both client and attorney to unnecessary legal risk.

While we're still calling it “e-discovery,” discovery today includes the preservation, collection, review, and production of paper and electronically stored information (ESI). Collecting ESI requires an understanding of a client's IT infrastructure and the technical capability to identify and copy data from both a network (desktops, email and file-share servers, mapped drives, other data repositories) and custodian level (thumb-drives, PDAs, DVDs).

Counsel has a good faith obligation (and a duty of competence!) to conduct or manage the collection process. Failure to properly do so has subjected many clients and their attorneys to sanctions. Penalties include a court's refusal to allow in certain evidence, adverse inferences, and even dismissal of the case. Courts are granting sizable monetary sanctions (some in multimillion dollar amounts) against clients and counsel alike. And in numerous opinions, judges are admonishing attorneys that they can no longer be “hands off.” Counsel must become competent in e-discovery. Failure to abide by the requirements of a litigation hold and the consequent preservation and collection duties will simply not be tolerated.

The risks associated with client self-collection are numerous. Clients virtually always over or under-collect discovery, owing to their lack of legal and technical expertise. They often fail to preserve critical metadata and use poor collection methodologies and tools. They do not adequately document their process, nor do they generally “sample” their data to ensure that they are genuinely preserving and collecting relevant information. Worst of all, clients have a vested interest in the result – time and time again, courts have issued sanctions where it is clear that the clients have succumbed to the temptation to withhold damaging ESI.

Clients also tend to rely on their own IT staff, who will generally “oversell” their e-discovery capabilities. It has been our experience that IT staff tends to “stomp” on the evidence, impacting dates of last access and other metadata that may be material to the case. IT experts are one thing and EDD (electronic data discovery) experts are another. Despite the distinction, however, it's imperative that EDD experts work with in-house IT folks, since the latter know where the data is and how it is structured within the client's network.

EDD experts offer a variety of solutions that can simultaneously increase the accuracy and efficiency of a collection project. They conduct interviews with key players to assist in the identification of relevant ESI and relevant time periods. Done correctly, these interviews will also yield keywords and concepts that will assist in narrowing the universe of data of potentially relevant ESI. The smaller the volume of data, the less there is that requires manual attorney review. Make no mistake about it - the largest cost associated with e-discovery is attorney review! As such, applying appropriate expert analysis and technological filters at the front end of a discovery project will result in savings.

The challenge for attorneys is that they must convince the client that self-collection is expensive and dangerous – and that the use of experts ultimately saves money and limits risk. It is helpful for attorneys to have preferred vendors on board prior to the commencement of litigation. Once litigation is in play, counsel must educate the client about and stress the need for a systematic, repeatable, defensible and transparent process.

True e-discovery experts offer the enormous value of a compendium of experience and resources. They have already tested their processes and know how to document them. They are objective, have great technical capacities and are accustomed to interfacing between clients and outside counsel to ensure that ESI is properly preserved, collected, reviewed and produced. Generally, after the first use of an expert, both attorney and client are better educated, saving time and money in any subsequent litigation. Most importantly, recognized experts who appear in court and who have done their jobs well generally keep clients and attorneys from becoming subject to e-discovery sanctions.

DIY is great for some things, but it is rarely wise in the world of e-discovery.

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