



Measure twice, cut once

BY PETER VAKOF

Over the last few years, the document discovery focus has shifted from hundreds of boxes of paper documents to terabytes of data. Although the objective remains the same (exchange/production of documents relevant to the case), the process has become onerous and complex. As a result, the risk of disclosure non-compliance has increased.

The prevalence of e-discovery in the US has led to cases where the courts have not only sanctioned parties for withholding documents, but have also addressed/sanctioned outside lawyers for not applying appropriate due diligence to ensure all relevant information is preserved and produced (e.g. *Zubulake v. UBS Warburg*, 2004; *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co, Inc.*, 2005; and *Qualcomm Inc. v. Broadcom Corp.*, 2008).

Two significant factors that reduce the risk of non-compliance are adequate planning (measure twice, cut once) and proper case management (discover facts; don't make assumptions).

1. Planning

The importance of planning cannot be overemphasized. Since the process is rather complex it is important to appreciate the nuances and challenges presented by electronically stored information (ESI). Planning starts with formation of the e-discovery project team. The team's initial objective is to assess/determine the scope of the discovery. The preservation of potentially relevant ESI should follow immediately after sending the notice of preservation. It is important to ensure that ESI is preserved properly. Otherwise, the data may be deliberately or inadvertently altered or destroyed — one may not get a second chance.

Due to the characteristics of electronic documents and the way we create, store, transfer and communicate them, one has to consider factors that may impact their e-discovery process. For example, in identification and preservation of the sources of potentially relevant ESI, one may need to consider (not an exhaustive list): nature, type and format of data; type and location of storage media; data ownership; data comingling; personal data privacy acts and policies; privilege; confidentiality; access restriction; other litigation holds.

2. Case Management

If US trends continue, Canadian courts may start to look to

outside counsel to shoulder more responsibility for the preservation and production of relevant documents, including ESI. Hence, outside counsel should ensure that objectives are clearly communicated to client staff and other parties subject to e-discovery, and that the subject parties have taken appropriate steps in identifying and preserving potentially relevant documents (paper and ESI).

It may be necessary to involve a project manager to ensure compliance with the document discovery/production order and help bridge the gap between legal and IT. The project manager should be familiar with legal terminologies, understand the rules of evidence and civil/criminal procedures, and have an understanding of electronic/computing environments, ESI characteristics and their handling requirements. Ideally the project manager is a member of the e-discovery team.

Whether relying on client staff, their in-house litigation support staff, or an independent e-discovery advisor, one needs to ensure that those involved have the necessary skills and experience to reduce the risk of non-compliance.

A project manager's responsibilities may include (not an exhaustive list): understand the nature of the case/request for preservation and/or production; understand the scope of the discovery; ensure identification of potentially relevant ESI sources; ensure proper preservation of ESI; ensure appropriate custody and safeguard of ESI; perform cost/risk/benefit analyses; manage preparation of the ESI for analysis and assist with keyword searches and classification of responsive (to keywords) documents; ensure timely production of ESI.

As outside counsel, one should consider retaining an experienced e-discovery advisor to support their case and help navigate through what can be a complex process. Effective e-discovery process management will not only reduce the risk of non-compliance, but will assist with the preservation, reduction of volume and preparation of ESI for keyword searches, and the timely production of relevant ESI in the agreed-upon format. ▀

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