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eDiscovery Predictability in an Unpredictable World

Litigation and Dispute Resolution

Technology, Privacy, and eCommerce

Many aspects of litigation are uncertain, but failing to plan ahead certainly leads to higher costs and risks. A few hours of thoughtful planning minimizes litigation risks, provides better budgetary predictability, and reduces the number of costly surprises.

Legal holds

A thorough and defensible legal hold effort reduces risk and provides insight that can be leveraged later in the process. The duty to preserve data arises when a party reasonably anticipates litigation. Preservation applies to potentially relevant information within the party's possession, custody, or control.

Written legal hold notices should be issued to all custodians who may possess relevant data, including organizational data stewards and systems administrators who need to disable auto-delete functions. Recipients should understand the confidential nature of the notice and the importance of not discussing the matter with others unless requested by counsel.

Counsel may encourage recipients to alert them to others who should receive the notice. Recipients should acknowledge the notification and periodic reminders should be sent and acknowledged during the life of the matter. Compliance should be audited, and the hold refined as needed.

Newly identified custodians or data sources should be immediately added to the legal hold. Finally, the hold may be terminated when it is no longer needed so that data is not retained unnecessarily.

Failure to properly preserve evidence can be costly. Spoliation occurs when a party with an obligation to preserve evidence does not do so or destroys or materially alters the data. It can be time-consuming and expensive to attempt to restore or replace the data through additional discovery.

Upon a finding that a party is prejudiced by irreparably lost information, a court can impose a variety of curative measures or sanctions, including monetary awards, adverse inferences instructions, limitation of claims and defenses, default or dismissal, and attorneys' fees.

Early case assessment

All litigation matters benefit from performing an Early Case Assessment (ECA) that is proportional to that matter. ECA is a collaborative effort between in-house and outside counsel to assess the situation, outline goals, and put a tentative plan in place.

ECA typically involves assessing facts, analyzing claims and legal issues, identifying objectives of the litigation itself, and risk management. Timing and budgeting considerations should also play key parts in your planning effort.

Early decisions can have a dramatic impact on litigation costs and logistics. Proactive planning is your best opportunity to balance those objectives and ensure that legal strategy and budgetary constraints are realistic. While the overall value and importance of the matter is an obvious driver, also consider how this matter fits into the overall legal portfolio and business environment:

- Risk of additional claims or related lawsuits;
- Timing of litigation spending in relation to the business cycle;
- Attrition or availability of key personnel;
- Impact of pending litigation on upcoming business deals;
- Broader legal or business issues that may warrant spending more on this matter than its perceived value;
- Significant upcoming changes to IT systems or physical facilities;
- Data accessibility and the company's information policies and practices; and
- Business interruption that accompanies litigation.

Be mindful that there are factors outside of counsel's control that can impact the litigation, such as uncooperative opposing counsel, unfavorable judicial rulings, a high volume of data received from the opposing party or third parties, and unexpected world situations, such as pandemics and natural disasters.

ESI agreements and protective orders

Agreements on collection, production, and use of Electronically Stored Information (ESI) and protective orders are frequently churned out as routine, template-based documents without regard to the impact on discovery costs and efforts. However, these are powerful tools to get ahead of anticipated challenges, minimize pain points, and secure a usable production format from the other party.

These documents can help parties collect and produce information in a manner that is reasonable and useful. They can limit the scope of discovery, set realistic timelines for document productions, and prevent parties from inadvertently committing to a production format that is unnecessarily expensive or poses technical or logistical challenges given the nature of the documents.

ESI agreements and protective orders can be used to establish a phased approach to discovery. This allows the parties to exchange the information that is most helpful at various stages of the litigation

and avoids shoehorning document productions into a very narrow window of time. A one-and-done approach typically leads to higher overall discovery costs, results in less usable information on both sides, and rapidly depletes monetary resources that both parties could otherwise use to close a settlement gap.

Before entering into any ESI agreements or stipulated orders, it is imperative to understand the types and volume of potentially relevant information and how accessible it is. These documents can establish alternative production options and heightened confidentiality protections to address sensitive information of the parties, their customers and business partners, and protected privacy information.

These measures can save tens of thousands of dollars in review, redaction, and production costs. Moreover, some data might be redundant, difficult to access, or pose review and production challenges. Addressing these challenges early can minimize future disputes and provide opportunities to streamline data collections, review, and productions.

Data collections

While the scope and complexity of data collections can vary, there are three primary considerations for all matters

1. Determine what information may be relevant to the matter.

This is often best done by talking to business people with knowledge of the underlying subject matter. Relevant data can also include organizational documents, such as policies, financial reports, organization charts, contracts, insurance policies, and personnel records.

2. Identify where this information is stored.

Data sources are unique to each organization. Common data sources include email, hard copies, hard drives, network drives, external storage devices, database applications, mobile devices, instant messages, team collaboration applications, and accounting records.

3. Assess data collection capabilities.

Some organizations have internal eDiscovery professionals or systems administrators who are qualified to perform this work. Others may need to use an outside vendor to assist with some or all of the data collection. Data must be collected in a defensible manner, which typically involves meeting technical file capture standards and reasonable oversight by counsel of record.

Counsel should consider these factors early to ensure that appropriate collection methods and processes are utilized. For organizations with frequent or significant litigation, investing in discovery and information management solutions that can perform or facilitate defensible data collections prior to actually needing them may reduce litigation costs and headaches. The business case becomes abundantly clear after the need arises.

Data collections can be time consuming and pose unexpected technical and logistical challenges. In addition to the human time involved, there is also machine time required to download and transmit the data, process it to a review database, and prepare the final production files.

Some of the machine processes can take many hours, days, or even weeks to complete. Planning ahead or ideally collecting data before requests for production are served greatly reduces chances of missed deadlines and increases the options available to reduce the document review burden.

Document review

Parties who use some of these planning methods generally reap significant cost savings and strategic benefits in document review. Counsel can considerably reduce overall review populations, select review tools that best suit the characteristics of the particular data collection, and test search terms prior to agreement with opposing parties.

Project managers can design an efficient review process using attorneys whose skillsets are well suited to the specific review. This allows the legal team to focus on minimizing the risks inherent in producing information to an adverse party and glean meaningful insight from the review that can advance the overall case objectives, rather than racing through unfiltered documents to meet a tight deadline.

Parties who are not optimally prepared when document review and production deadlines approach can still benefit from proceeding thoughtfully and promptly. The review platform and the review team both have a significant impact on how accurately and cost-effectively a review can be completed.

Pausing briefly to ensure that the right technology and review resources are in place to meet the challenges of the particular review will yield better outcomes. Furthermore, they may be less expensive in the long run than retaining many reviewers immediately at the lowest possible rate and sprinting toward the deadline.

A specialized review group that is properly briefed on the matter, is familiar with the selected review tool, and has an ongoing relationship with the primary legal team can typically complete the review quicker and with better accuracy than a much larger group. They can also provide ongoing assistance with subsequent discovery requests, deposition preparation, motion practice, and later phases of litigation without having to start from scratch.

Conclusion

Litigation matters can extract high business and financial costs, but effective early planning can reduce overall legal spend, enhance objectives, and provide better predictability. Open and data-driven conversations between in-house and outside counsel can yield optimal outcomes that don’t break the bank.

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Dan Happe has been general counsel, secretary and VP – Export/Import Compliance of TSI Incorporated since 2014. TSI Incorporated is a leading manufacturer of precision measurement instrumentation. Prior to TSI, Happe held roles at Lake Region Medical, Surmodics, Inc., Rockwell Collins, and the University of Iowa. He is a graduate of William Mitchell College of Law, now Mitchell-Hamline School of Law. TSI is instrumental in the fight against COVID-19 with products such as the PortaCount° Mask Fit Tester, Model 8130A Automated Filter Tester, which tests the N95 media, and Flowmeters that go into ventilators.

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