Electronic Discovery Best Practices

The Secret to Success

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The concept of electronic discovery is still somewhat intimidating to many attorneys, but those who have learned to implement electronic discovery best practices are enjoying the advantages it offers—including greater control over document review and production processes as well as significant cost reductions. Whether you come to the discovery process as in-house or outside counsel, you can anticipate some of the issues involved in responding to electronic data requests. Pre-review cooperation among in-house counsel, their litigators, and IT personnel is ideal for planning a successful electronic discovery response.

The abundance of electronic information makes pre-litigation planning for corporate counsel and their outside attorneys more important than ever before. Indeed, the Federal Rules of Civil Procedure ("FRCP") require parties to meet and confer early regarding the production and preservation of electronically stored information. Accordingly, litigators and in-house counsel alike should familiarize themselves with the amended rules related to electronic discovery and the FRCP committee notes.

Finding and producing information in response to electronic document requests can initially appear to be an enormous undertaking, and a disorganized or untimely response can have disastrous consequences. However, with preparation and the right technology, the document review and production process can be easier and more efficient than procedures used in the "paper world." Counsel can streamline discovery response, minimize its impact upon ongoing business operations, reduce costs of review and production, and gain a strategic advantage in the process. Proper planning among corporate counsel, IT departments, and outside counsel integrates preparation for discovery with daily operations. When litigation arises, rather than facing a crisis, corporate management and its counsel are instead ready to respond, leveraging the advantages of electronic discovery.

Discoverability of Electronic Documents

The basic legal framework for electronic discovery under FRCP Rule 34 permits parties to request and produce relevant electronically stored information as it is "ordinarily maintained" or a "reasonably usable" format. Generally, a party that produces electronic data is under no obligation to produce the identical information in paper form. Nonetheless, a requesting party must use good faith efforts to identify all discoverable information—paper and electronic—and to inform opposing counsel when data is available for production in electronic form. *See, e.g., In re Livent, Inc. Noteholders Sec. Litig.*, 2002 U.S. Dist. LEXIS 26446 (S.D.N.Y. Dec. 31, 2002). Even deleted computer data may be discoverable under Rule 34. *Simon Property Group v. mySimon, Inc.*, 194 F.R.D. 639, 640, 2000 U.S. Dist. LEXIS 8950 (S.D. Ind. 2000).

Duty to Investigate and Disclose

At the commencement of litigation before receiving any formal discovery request, a party must disclose to opposing parties certain information such as a description by category and location of all documents, including electronic data. FRCP 26(a)(1)(B). This requirement means that a party must affirmatively search its available electronic systems for relevant information. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 374 (S.D.N.Y. Feb. 6, 2006). Such an undertaking can be burdensome as multiple copies of responsive electronic information may be stored in hard drives, networks, backup tapes, laptops, floppy disks, employees' home computers, and PDAs.

What role does counsel play in assisting in the client's quest for information?

The court addressed this question in *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 23, 2006), in which the plaintiffs requested information about Strategic Resources Corporation's ("SRC") business practices. SRC was no longer in business at the time of litigation and abandoned

hard copy documents and 10 computer workstations when it vacated its office. *Id.* at *5. SRC's attorneys discussed with its former board members the need to locate and produce responsive information, including electronic data. Counsel and one of the board members searched the member's computer system and failed to locate any responsive documents. They did not search any of the SRC servers. Six months later, a freelance computer technician making a service call discovered about 25 gigabytes of data—approximately 2,500 boxes—stored in a partitioned section of the server. Defendant's counsel received the data three days after the case discovery cut-off. *Id.* at *7.

The court held that SRC's abandonment of evidence was an act of gross negligence that was not excused by the fact that SRC went out of business.[1] *Id.*[1] at *15. The court, citing *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004)("*Zubulake V*"), also ruled that counsel had the duty to properly communicate with its client to ensure that all sources of relevant information were discovered.

Thus, it is fully incumbent upon counsel to become fully familiar with its client's document retention policies and the client's data storage systems. This effort would necessarily involve communicating with IT personnel and the key players in the litigation to understand how electronic information is stored.

The *Phoenix Four* court sanctioned both the defendants and their counsel, calling counsel's failure to take affirmative steps to locate relevant documents "an act of gross negligence." *Id.* at 20 (citing *Hous. Rights Ctr. v. Sterling*, 2005 U.S. Dist. LEXIS 31872 (C.D. Cal. Nov. 2, 2005) (finding that counsel's failure to verify with client whether there was an email backup system "cannot be countenanced," and that the failure to search backup tapes because of a "honest miscommunication between client and counsel" as to whether such tapes existed "was at least grossly negligent.")

See also *GTFM, Inc. v. Wal-Mart Stores, Inc.* 2000 U.S. Dist. LEXIS 3804 (S.D.N.Y. 2000)(Defendant's representation to counsel that certain electronic data was no longer available turned out to be erroneous. The court chastised counsel for failing to consult defendant's MIS personnel and imposed sanctions upon defendant, including all the plaintiffs' expenses and legal fees caused by the inaccurate disclosure).

In addition to initial mandatory disclosures, the parties' Rule 26 conference, and subsequent responses to specific discovery requests, a further vehicle for discovery of an opponent's computer systems is a Rule 30(b)(6) deposition of a designated IT person. This deposition can provide substantive information about systems and document management protocols that could elaborate on initial disclosures, determine the accessibility of electronic information and shape further discovery. FRCP 30(b)(6); *see, e.g., In re CV Therapeutics, Inc., Sec. Litig.*, 2006 U.S. Dist. LEXIS 38909, n.5 (April 4, 2006)(designee testified to location of data and backup tapes as well as what methods were being undertaken to search for responsive documents); *In re Carbon Dioxide Indus. Antitrust Litig.*, 155 F.R.D. 209, 214 (M.D. Fla. 1993) (depositions aimed at acquiring information about data maintained on defendants' computers, including hardware and software, were needed to access the information necessary to proceed with substantive discovery); *Alexander v. FBI*, 188 F.R.D. 111, 1998 U.S. Dist. LEXIS 22562 (D.D.C. 1998) (court permitted deposition to learn about email systems and system for acquisition, location, and disposition of computers so as to guide substantive discovery.)

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[1] The court's "gross negligence" ruling does not reflect a general standard among Federal courts. For example, the Fifth Circuit requires a showing of bad faith. See Consolidated Aluminum Corp. v. Alcoa, Inc., 2006 U.S. Dist. LEXIS 66642 (M.D. La. July 19, 2006). It should also be noted that the court subsequently granted SRC's motion to dismiss Phoenix Four's complaint for lack of subject matter jurisdiction.446 F. Supp. 2d 205.

Scope of Discovery

Parties may obtain discovery related to any non-privileged information that is relevant to the claims or defenses of any party. FRCP 26(a)(1). Nonetheless, counsel must take care to avoid generating blanket or boilerplate document requests for electronic information. *See e.g., Pittman v. Horton*, 2001 Mont. Dist. LEXIS 3074 (Dist. Ct. Mont. 2001)(document demand seeking electronic discovery deemed overly broad as it failed to describe the items sought with reasonable particularity). Counsel must also be cognizant of the breadth of their interrogatories. *See e.g., India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190 (E.D. Wis. July 13, 2006)(court held that plaintiff's interrogatories requesting defendant to describe in detail the configuration of its entire computer system since January 1, 1998, including each brand and model of computer, whether desktop or laptop, the amount of memory and capacity of the hard disk, the type and version of operating system, and the brand and model of all peripheral devices were overly broad and burdensome given the size of the company and the nature of the case).

Similarly, when requesting that an opposing party incorporate a set of pre-determined search terms, counsel must make sure that the requesting search terms are words that are not commonly used in the responding party's business or commonly used words that routinely appear in emails. *See, e.g., Quinby v. WestLB AG, 2006 U.S. Dist. LEXIS 64531 (S.D.N.Y. Sept. 5, 2006).*

On the other hand, when a requesting party demonstrates a good faith effort to furnish reasonably tailored electronic discovery requests, courts will hold the responding party to a high standard in providing a full response. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 2002 U.S. App. LEXIS 20422 (2d Cir. Conn. 2002) (discovery sanctions, including an adverse inference jury instruction, may be given when ordinary negligence leads to a failure to produce electronic information).

A party that is unable—or unwilling—to produce responsive data may open itself to intrusive measures: an opponent's expert may be given direct access to its computers. For example, in *Balboa Threadworks, Inc. v. Stucky*, 2006 U.S. Dist. LEXIS 29265 (D. Kan. Mar. 24, 2006), the court ordered such an inspection after the defendants refused to produce electronic data due to defendants' mistaken belief that their personal computers were not relevant to the action. *See also Playboy Enterprises, Inc. v. Welles*, 60 F.Supp.2d 1050, 1999 U.S. Dist. LEXIS 12895 (S.D. Cal. 1989)(court ordered inspection after defendant testified that she routinely deleted emails and could not retrieve them). However, access to an opposing party's computer system is the exception rather than the rule as courts are concerned with protecting the legitimate privacy, privilege and safety concerns and minimizing disruption. *See also Advante International Corp. v. Mintel Learning Technology*, 2006 U.S. Dist. LEXIS 45859 (N.D. Cal. Jun. 29, 2006).

If a corporation's own information management—or lack thereof—contributes to its discovery difficulties, it is especially unlikely to find a court sympathetic to its pleas for relief. *See, e.g., Itzenson v. Hartford Life and Accident Ins. Co.*, 2000 U.S. Dist. LEXIS 14680 at 3, (E.D. Pa. 2000) (court found defendant's assertion that it could not retrieve certain statistics "difficult to believe … in the computer era"); *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 U.S. Dist. LEXIS 8281 (E.D. Ill. 1995), at 6 (defendant should pay to devise email-retrieval program because this expense was "a product of the defendant's record-keeping scheme"); *Toledo Fair Housing Center v. Nationwide Mutual Ins. Co.*, 94 Ohio Misc. 2d 17, 41, 703 N.E.2d 340, 1996 Ohio Misc. LEXIS 113 (Ohio C.P. 1996) (defendant could not "frustrate discovery of relevant material because the method it has chosen to store documents makes it burdensome to retrieve them"). In *Brand Name Prescription Drugs*, the defendant acknowledged that part of its problem retrieving stored information was the limitations

of the software it was using. The court reasoned that it would be unfair to impose upon plaintiffs the cost of defendant's choice of inferior electronic storage media. *Id.* at 6.

Under FRCP 26(b)(2), a party does not need produce electronic data from sources that are reasonably inaccessible because of undue burden or cost.

In the context of electronic discovery, questions of burden and expense typically arise when a request calls for data that is "offline" such as information stored only on backup tapes or on an outdated system or is no longer available in electronic form. Production might require, for example, restoration of backup tapes or creation of programs to search for and retrieve responsive data. However, if the parties cannot agree on the accessibility of the electronically stored documents, the producing party bears the burden of demonstrating that the information is not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce potentially responsive information. If the burden is met, the court may still order the production of the data if the propounding party shows good cause. *See* FRCP 26(b)(2)(B).

While the rule does not define good cause, it provides a set of factors for the court to consider, including the determination of whether the request is cumulative, whether the propounding party has a sufficient opportunity to obtain the requested information and whether the burden or expense outweigh the likely benefit, taking into account the needs of the case, the amount of the controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *See* FRCP 26(b)(2)(C).

Cost-Shifting

Traditionally, a responding party bears the cost of producing relevant information in discovery. However, FRCP 26(b)(2)(B) authorizes the court to specify conditions for discovery, including shifting all or part of the cost to the requesting party. The rule essentially codifies the court's ruling in *Zubulake v. UBS Warburg LLC ("Zubulake I")*, 217 F.R.D. 309, 317-318 (S.D.N.Y. 2003).

In *Zubulake I*, the court held that cost shifting was appropriate in cases where the plaintiff requests inaccessible information contained only on backup tapes. *Id.* Conversely, the court ruled that when a discovery request seeks accessible data—active online or near-line data—cost shifting would typically be inappropriate. *Id.* The *Zubulake I* court considered a seven-factor test to determine the applicability of cost shifting. The committee notes to Rule 26 set out a similar test which directs the court to weigh the following factors to determine whether the costs and burdens of production can be justified given the circumstances of the case: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

In addition, courts have recognized that Rule 26(b)(2)(B) may encourage companies to intentionally store data in an inaccessible format in an effort to discourage or limit opposing discovery. *See Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006) (court noted that sanctions for violation of the preservation obligation, not cost shifting, are appropriate when a party downgrades data to a less accessible form that systematically hinders future discovery by making the recovery of the information more costly and burdensome); *Quinby v. WestLB AG*, 2006 U.S. LEXIS 64531.

In *Quinby*, defendant sought to shift the costs it incurred in restoring and searching backup tapes after defendant had taken employee emails offline and put them on the tapes. The court found the defendant should have reasonably anticipated having to produce all of the emails of its former employees, with one exception. Thus, a 30% cost shifting was available only as to restoring, retrieving, and searching the emails of that single employee. Nonetheless, if the storage system is reasonably related to the purpose for which the information is retained (e.g., backup tapes for disaster recovery), the court will not automatically require the party who holds it to bear the cost of retrieval. *See Semsroth v. City of Wichita*, 2006 U.S. Dist. LEXIS 83363 at *14 (D. Kan. Nov. 15, 2006).

Form of Production

A producing party should not expect to meet discovery obligations by providing hard copies of electronic data. The amendment to FRCP 34 introduces an entirely new category of documents called "electronically stored information" that includes, among other things, writings and other data stored electronically. Thus, upon request, a responding party is obligated to produce relevant information contained on their computer storage systems, irrespective of whether the information is available in hard copy form. The requesting party is given the option to choose the form of production under FRCP 34. Otherwise, the responding party must produce electronically stored information in the manner in which it is ordinarily maintained or in a reasonably usable format.

Generally, a party is under no obligation, absent agreement or a court order, to produce metadata. *See Kentucky Speedway v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 2006 U.S. Dist. LEXIS 92028 (E.D. Ken. Dec. 18, 2006)(court held that with the benefit of the newly amended rules, advisory notes, and commentary by scholars, a clear trend has evolved, with the general presumption now being against the production of metadata). Thus, a party seeking production of metadata must show that the information is relevant to the litigation. *See Wyeth v. Impax Labs., Inc.*, 2006 U.S. Dist. LEXIS 79761 (D. Del. Oct. 26, 2006) (District of Delaware's "Default Standard for Discovery of Electronic Documents" requires showing of particularized need to warrant metadata production).

In *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005), the court held that a party producing documents maintained in the ordinary course of business should also produce its accompanying metadata. The Williams court placed the burden on the producing party to object or seek protective measures to withhold metadata. Kentucky Speedway specifically rejected the Williams' approach. "In the rapidly evolving world of electronic discovery, the holding of the Williams case is not persuasive." 2006 U.S. Dist. LEXIS 92028 at *23 (E.D. Ken. Dec. 18, 2006). Nonetheless, it should be noted that the Williams' court found that the requesting party demonstrated the relevance of metadata in Excel® spreadsheets plaintiffs needed to manipulate the data without going through the laborious process of keying in all the relevant data again. 230 F.R.D. at 642 – 643.

Document Retention and Spoliation

Besides anticipating the logistics of discovery response, a corporation must consider its legal duty to preserve evidence. If a corporation knows or should know that particular documents, including electronic data, may eventually become material in litigation, it must preserve them. *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1988 U.S. App. LEXIS 83 (8th Cir.1987); Zubulake v. UBS Warburg LLC ("Zubulake IV"), 220 F.R.D. 212 (S.D.N.Y. 2003).

Once litigation is pending or imminent, a party must take affirmative measures to preserve potential evidence that might otherwise be destroyed in the course of business. *Id.* at 216. Usual procedures for data destruction

or recycling may have to be suspended. *Id.* at 217 – 218. In *Procter & Gamble v. Haugen*, 179 F.R.D. 622 (D. Utah 1998), for example, the company initially disclosed that emails of five key employees might be relevant. Then, however, it failed to preserve the emails. Though the court had not issued a specific preservation order, it imposed a $10,000 fine for this "sanctionable breach of P&G's discovery duties." *Id.* at 632. See also *Applied Telematics, Inc., v. Sprint Communications Co.*, 1996 U.S. Dist. LEXIS 14053 (E.D. Pa. 1996) (Sprint's normal procedure of recycling backup tapes should have been suspended during litigation); *Linnen v. A.H. Robins Co., Inc.*, 10 Mass. L. Rep. 189, 1999 Mass. Super. LEXIS 240 (1999) (defendant continuing customary recycling of backup tapes after plaintiffs' discovery request was "inexcusable conduct").

In re Prudential Sales Practices Litigation, 169 F.R.D. 598, 1997 U.S. Dist. LEXIS 80 (D.N.J. 1997) dramatically illustrates the duty to preserve electronic evidence. Prudential, alleged to have engaged in deceptive sales practices, was ordered to preserve all potentially relevant records. In spite of the order, its employees in at least four locations destroyed outdated sales materials. Further discovery revealed that Prudential had distributed document retention instructions to agents and employees via email—but that some employees lacked access to email and others routinely ignored it. Prudential also distributed a hard copy memorandum, though not universally. Senior executives never directed distribution of the court's order to all employees.

The court found Prudential's efforts inadequate, noting the lack of a "clear and unequivocal document preservation policy." *Id.* at 614. Though the court found no willful misconduct, it nevertheless inferred that the lost materials were relevant and would have reflected negatively on Prudential. Citing Prudential's "gross negligence" and "haphazard and uncoordinated approach," the court imposed a sanction of $1 million. *Id.* at 617.

The *Zubulake IV* court examined the standards for spoliation of information stored on backup tapes:

> Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every email or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.

Zubulake IV, 220 F.R.D. at 216. However, the court noted that anyone who is a party or anticipates being a party to a lawsuit "must not destroy unique, relevant evidence that might be useful to an adversary." *Id.* at 219. Noting that the duty to preserve extends to all employees likely to have relevant information, or the "key players" in the case, the court determined that all the individuals whose backup tapes were lost fell into this category in this case. *Id.*

In assessing the duty of a litigant to preserve evidence, the court noted that electronic data presents some unique issues.

> A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter. In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished.

The court went on to summarize a party's preservation obligations with regard to electronic data in general, and backup tapes in particular:

The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g. those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes would likely be subject to the litigation hold.

However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.

Id. at 220 (emphasis in original).

Though they may harshly punish litigants for failure to preserve evidence, courts also recognize that certain documents are destroyed in the ordinary course of business. *See, e.g., Linnen*, 1999 Mass. Super. LEXIS at *3 (recycling of backup tapes is, under normal circumstances, a "widely accepted business practice"). Not every missing document supports a finding of spoliation. A party may defeat a claim of spoliation by showing that evidence was destroyed as a result of the routine, good-faith operation of an electronic information system. See FRCP 37(f). The term "routine" relates to ordinary use. While the good-faith requirement means that a party may not exploit its computer systems' routine operations in an effort to thwart discovery efforts by a party's existing preservation obligations.

Ten Tips for Implementing Electronic Discovery Best Practices

Reading the Federal Rules of Civil Procedure related to electronic discovery and keeping up with the quickly changing law in the area is a good start, but knowing how to put these lessons to work in practice is the key to conducting electronic discovery successfully. Effective planning requires a new working relationship among internal and external legal and technical resources.

Tips for In-house Counsel

1. Consider implementing a formal document retention policy to formalize rules for saving and destroying electronic documents. Be sure that the policy includes electronic information, and that employees understand the purpose of the policy and the importance of compliance. If your company opts not to formalize such a protocol, be sure you have outlined the pros and cons of this decision for the management team, including advising them that a formal document retention policy is a necessity.
2. Focus on making litigation preparedness a part of employees' daily work. Increase company-wide awareness of the types of information that must be disclosed in litigation. Educate all employees about the pitfalls of carelessly destroying or retaining information. Train employees to document and store their work in an organized (and ultimately defensible) fashion.

3. Establish an ongoing working relationship between in-house legal and IT personnel. Provide guidance to IT personnel about document retention and destruction and enforcement of a formal document retention policy if one is in place. Make IT employees aware of the most common electronic data problems: retaining unnecessary information for too long, or failing to retain information that the company has an obligation to keep. Striking the right balance here is critical to avoiding problems in court.
4. Organize data storage efforts and establish systems that simplify later identification, retrieval, and production of responsive information. Talk to IT personnel about the implications of choosing software and changing systems. Consider capabilities that may be relevant to a discovery response: How is data stored? In what format is it stored? Is it accessible or inaccessible? Do you want to have ready access to information from systems no longer in use?
5. To preserve evidence when necessary, outline a specific plan for the suspension of usual document destruction and backup tape recycling protocols. Identify key employees from the legal and IT department to be involved as soon as litigation is pending or imminent. Determine how best to distribute evidence preservation instructions to all employees, and ensure that enforcement mechanisms are in place.
6. Designate and train an IT representative to act as the company's 30(b)(6) deposition witness when electronic data storage may be at issue. Advise key IT employees that clear communication with outside counsel will be necessary to properly respond to electronic document requests.

Tips for Outside Counsel

7. Expand working knowledge of client operations to include client information systems: What information is maintained? How is it stored? What will the procedures for and costs of retrieval be if an electronic discovery request is received? With a solid working knowledge of client systems, outside counsel will be equipped to establish discovery parameters with opposing counsel early in the case and challenge overbroad requests if necessary.
8. Maintain a focus on minimizing disruption of client operations. Work with IT personnel and inside counsel to reduce the time individual employees must divert to examining their files for responsive information. Know how to use technology to protect employees' time and produce timely, accurate responses. Prompt and complete discovery responses can prevent the imposition of intrusive measures, such as on-site inspections.
9. Before and after a document request is received, adequately explain the scope of the obligation to preserve electronic data and the duty to search different systems and storage media. Do not expect a written document request to be self-explanatory. Be a partner in the data retrieval process, not just the vehicle for the message.
10. Become acquainted with key IT personnel. Educate them about the types of documents most frequently requested in litigation as well as questions they can expect if deposed. Prepare with them to make a prompt and thorough inventory of stored information when litigation arises.

Conclusion

While electronic discovery disasters—crushing costs, harsh sanctions, and even default judgments—can strike those caught unready, great benefits are available to those who prepare. In-house counsel, litigation attorneys, and IT personnel all have a role to play. Electronic discovery response planning is not just a matter of gathering responsive information, but of working in advance to control what information is created and how it is stored. Electronic discovery best practices begin with making data management a part of daily business operations. Attorneys cannot accomplish this objective without involving IT personnel, nor can IT personnel properly maintain electronic data without guidance from counsel about what should be kept or destroyed. Outside counsel can help by providing ongoing advice about the law of electronic discovery and what to expect in the process.

As a part of discovery planning, attorneys and IT personnel should also educate themselves about how available technology can streamline the discovery process. When litigation arises, they can take advantage of technology to gather and review information without substantially disrupting operations. Technology exists to provide lawyers with tools and resources to handle complex discovery in a speedy, cost-efficient manner without interrupting the workflow of familiar business and discovery practices. With the use of such tools, in-house lawyers can gain control over data retrieval and review processes, while outside counsel can enjoy a tremendous advantage in preparing client cases for the best resolution.

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