

Electronic discovery poses fresh legal risks

By Judy Greenwald

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As companies store more information on their computer systems, the costs and possible sanctions stemming from court orders demanding electronically stored documents can become a major issue, observers say.

But having an e-discovery policy and a task force, among other measures, can mitigate, if not eliminate, many of the risks, observers say.

Companies' effectiveness in this area has been mixed, say observers.

Gilbert S. Keteltas, a partner with law firm Howrey L.L.P. in Washington, said there are firms with significant litigation dockets "who have prepared for electronic discovery for years," while others "wrestle with electronic discovery issues for the first time when faced with litigation."

Failure to properly preserve and produce electronic documents can lead to court-imposed sanctions totaling millions of dollars and even jail terms for company executives, say observers. In addition, improper document retention also has forced firms to settle cases "long before the merits of the case are ever visited," said Peter G. Gronvall, managing director of Washington-based consulting firm AdamsGrayson Corp.

In addition, failure to produce documents can lead to an adverse inference ruling, in which a jury is instructed to view the missing material in a light favorable to the plaintiff, experts say.

Complying with orders to produce e-documents can be a challenge. The vast amount of data available has "actually made complying with discovery requests more difficult, more time consuming and more expensive in many cases," said Daniel V. Ward, an associate with law firm Cozen O'Connor in Seattle.

According to Kroll Ontrack Inc.'s fourth annual "ESI Trends Report," more than half of the respondents reported that their companies do not have an inventory listing where all data is stored, or said that they are unaware of such an inventory.

It is important for a company to have a data map, which outlines its information systems and processes and permits the quick identification of important sources of potential electronically stored information, according to J. Jason Straight, New York-based vp of legal technologies business development at Kroll Ontrack, a Kroll Inc. unit.

Mergers or systems upgrades can further complicate the process of providing e-documents, said Mark Scroggins, an attorney with Hammerle Finley P.L.C. in Lewisville, Texas.

Companies should have a thorough policy on e-discovery practices, observers say.

Firms should establish a protocol to follow when litigation is filed, a fundamental component of which is data preservation, said Mr. Gronvall. It should specify when the duty to preserve the data kicks in, the scope of the data preservation, implementation of the preservation process, and ways to ensure that relevant files are not deleted, he said.

If an organization can demonstrate that it has taken steps to comply with discovery requests, it can protect itself against sanctions, said Mr. Ward.

"It's about having a system in place that's defensible, that demonstrates a strong effort to comply with the discovery obligations, and basically makes it clear that the company isn't just making it up as it goes along, because that's not going to look very good," he said.

Observers say companies should form an e-document interdisciplinary team made up of representatives from the risk management, legal, information technology and regulatory departments. The in-house counsel, in particular, should be familiar with the federal rules of civil procedure and applicable state law, Mr. Ward said.

Mr. Scroggins said these groups should meet monthly to discuss matters and update document retention requirements, protocols and technologies.

One trend that has become popular is to designate a particular law firm as a firm's national e-discovery counsel, even if the same firm does not necessarily litigate the case, said Mr. Scroggins. This "really promotes accuracy and efficiency and is a cost savings in the long term, because you have that one firm that is very familiar with everything that is going on" within the company, he said.

When companies are notified in the course of litigation of the duty to preserve documents, "take immediate steps to preserve the data," said Leonard Deutchman, general counsel and administrative partner at consulting firm LDiscovery in Philadelphia. Relevant data should be copied to another location to avoid the "tremendous temptation" for staff to tamper with the material, he said.

Eric J. Sinrod, a partner with law firm Duane Morris L.L.P. in San Francisco, said it is critical once litigation begins that opposing counsel "try to work out a meaningful and logical discovery plan that provides access to important electronic information" without creating a significant cost burden.

Companies should be strategic in the electronic documents they produce because of the costs involved, experts say. Focusing proportionately on what is at stake in the litigation and what is reasonable can save hundreds of thousands of dollars, said Mr. Keteltas. Finding every potentially relevant document "comes at a significant cost that's rarely in line with what's at stake in the litigation," he said.

Focus on the entire case, Mr. Keteltas said. "You might make some decisions that seem to make economic sense at the beginning of the case to preserve data in a certain way, but not realize that decision will create greater costs down the road," he said.

Christopher J. Spizzirri, an associate with law firm Morris James L.L.P. in Wilmington, Del., said introducing and enforcing a policy of destroying all e-mail after a certain period of time, rather than leaving that to individual users' discretion, will help cut down the risk of whatever may be found, as well as the cost of document review by attorneys. An organization that faces litigation for an event that occurred three years ago will be provided with some protection if its e-mails go back only one year, Mr. Spizzirri said.

Copies of the Kroll survey are available at www.krollontrack.com/library/esitrends4_kroll_ontrack2010.pdf.