

Putting ESI on the Map

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By now, Qualcomm's \$8.5 million sanction for failing to produce tens of thousands of documents during discovery--because it didn't search the computers of deponents and witnesses--has become something of a cautionary tale (Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932 (S.D. Cal. Jan. 7, 2008)).

If Qualcomm had had a data map--and therefore knew what kind of electronic data it had and where it was stored--the tech company arguably could have prevented the e-discovery disaster altogether. But Qualcomm's predicament isn't unusual. According to the 2010 ESI Trends Report published by Kroll Ontrack, more than half of the 203 information technology (IT) and legal professionals surveyed said their company didn't have a data map, or they didn't know if it had one.

Given that data maps are necessary for compliance with Federal Rules of Civil Procedure 26(a)(1)(A) in the event of a lawsuit, there are increasingly fewer reasons for not having one at the ready. They are not difficult to create if key strategies are kept in mind.

Pave the Way

First, you'll need the executive committee's endorsement, since the initiative will take employees away from their normal duties for a short period. General counsel and chief technology officers can serve as advocates for the project by explaining the potential legal risk that's being avoided--and the cost savings that can be had--by drafting one.

Once there's top-level approval, select a legal project manager to oversee the data mapping team. This group should consist of stakeholders across all departments, including human resources, tax and accounting, and, most crucially, IT.

Data Dig

There are two kinds of electronically stored information (ESI). The low-hanging fruit is "structured data," where business records are stored in formal databases--PeopleSoft or accounting databases, for example. The second type of ESI is "unstructured data," the unorganized information that exists haphazardly on shared servers or computer drives.

The ultimate goal of data mapping is to find and document the location of both structured and unstructured ESI, plus the legacy data from previous systems that everyone has forgotten about.

With that end in mind, the sleuthing begins. Focus first on departments that have been most affected by litigation in the past. Through interviews and discussions with the data mapping team and other key stakeholders, identify the records and data that each department maintains and uses.

Next, document the physical whereabouts of each department's ESI. This can be done in myriad ways, depending on the data itself and the needs of the company. Some corporations create charts for this purpose; others make straightforward lists.

The Biggest Challenge

The hardest part of creating a data map is locating the forgotten legacy data that may be buried in closets or stored with outside counsel and other consultants.

Begin by working with the IT department to identify where the old server tapes and CDs are stored. Next, physically check all closets, off-site storage facilities, servers, and portable drives for lingering data. Contact entities that may be harboring ESI, including accounting firms and moving companies. Discard any ESI artifacts that serve no business, regulatory, or legal purpose.

It's also important to incorporate newly acquired companies into a parent company's data map. Ask the acquired company for its data map, or initiate a similarly comprehensive sweep for ESI.

Preventive Benefits

Documenting a company's ESI can even preempt litigation if the data mapping team proactively identifies the potential legal risk related to records it discovers. For example, someone from human resources may be able to identify a weakness in the timing of a database purge of information on ex-employees that could make defending against a future lawsuit more difficult. Strategic tweaks can then be made to the company's data retention policy to curb legal risk.

Many Payoffs

Data maps are the most straightforward way to create an inventory of a company's ESI for litigation, for government or internal investigations, and to respond to third-party subpoenas. Data mapping also can help centralize data for better information management, reinforce proper records retention by employees, as well as cut data storage costs, among other benefits.