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BNA INSIGHT

Despite a rapidly developing body of case law, procedural rules, and ramped-up enforcement of industry regulations, Kroll Ontrack's Fourth Annual ESI Trends Report suggests that corporate lawyers are behind the eight ball when it comes to issues involving the discovery of ESI. Regina A. Jytyla suggests some strategies for bringing them up to speed.

The Need for the Legal Department to Get Schooled on Technology



BY REGINA A. JYTILA

Results of a recent survey of corporate counsel and IT in the United States reveal that corporate lawyers remain alarmingly ill-informed about steps necessary to protect organizations from rapidly escalating risk and cost in preparing for and responding to requests for electronically stored information (ESI). The Kroll Ontrack Fourth Annual ESI Trends Report reveals that in nine out of 15 survey questions, legal was less

informed than IT on topics concerning litigation preparedness and response, technology, and policy testing.

Despite a rapidly developing body of case law, procedural rules, and ramped-up enforcement of industry regulations, why are corporate lawyers seemingly behind the eight ball when it comes to issues involving the discovery of ESI? One school of thought is that the attitudes that result in good performance on LSAT examinations, high marks in law school, and interest in prac-

ting law do not correlate well with the skill set of an information technologist. In other words, topics concerning technology are intimidating, hard to grasp, and lawyers don't (or don't want to) make the effort to understand them.

Another more likely theory postulates that a lack of effective education on how technology can help corporations defensively and cost-effectively plan for and respond to discovery requests accounts for the disparity in knowledge between legal and IT professionals. Despite a growing body of case law, journal articles, and reports showing a need for awareness, the message is not being *effectively* communicated. Or, perhaps the information is being disseminated but so overwhelms lawyers that they don't know where to start.

Regardless of the reason, the uncontrolled proliferation of data and concomitant costs and risks necessitate that corporate lawyers become schooled on the available tools that will enable their corporation to cost-effectively anticipate and respond to impending litigation as well as efficiently engage in legal discovery. Four distinct areas of concern are discussed below, along with practical steps for corporate legal counsel to become better versed in the issues no longer isolated to IT.

. . . 28 percent of corporate legal respondents (compared with 18 percent of IT) do not know whether their company possesses legal hold capabilities, i.e., a mechanism to suspend document retention and destruction policies when litigation is anticipated or ensues.

Preserving Data When Litigation is Anticipated. The bedrock e-discovery case of *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*) instructs corporations that they have a duty to take reasonable steps to preserve relevant data when litigation is anticipated. Despite this well-settled rule of law, 28 percent of corporate legal respondents (compared with 18 percent of IT) do not know whether their company possesses legal hold capabilities, i.e., a mechanism to suspend document retention and destruction policies when litigation is anticipated or ensues. This statistic is alarmingly high, given that failure to preserve ESI results in more sanctions than any other e-discovery transgression.

In a September 2010 Order in *Victor Stanley v. Creative Pipe*, Civil No. MJG-06-2662, 2010 WL 3703696 (D. Md. Sept. 9, 2010), Judge Paul W. Grimm of the U.S. District Court for the District of Maryland found the defendant's willful violation of several court orders to preserve ESI warranted imprisonment for a period not to exceed two years unless and until he paid attorneys fees and costs. While the portion of Judge Grimm's Order and Recommendation that treated the defendant's acts of spoliation as contempt of court and ordered his imprisonment was rejected by the court Nov. 1, the case

serves as an example of extreme consequences for willful disregard of court orders.

There are, however, several recent cases where sanctions for failure to preserve ESI have been issued absent any finding of willful misconduct. For example, in a 2009 case from the Western District of Louisiana, *Tango Transp., LLC v. Transp. Int'l Pool, Inc.*, Civil Action No. 5:08-CV-0559, 10/8/09, the plaintiff was ordered to pay monetary sanctions for failing to timely preserve data from three key custodians. Citing the plaintiff's failure to issue litigation holds, the court determined sanctions were appropriate and awarded the defendant almost \$13,000 in attorneys' fees and costs to serve as a deterrent against future discovery abuses.

Updating Retention and Destruction Policies to Include 'Outlier' Data. Data once considered "outlier" or inaccessible may be fully discoverable and is becoming commonplace in today's civil lawsuits. In fact, there are a number of recent cases where parties have been fined for negligently failing to preserve and produce data other than e-mail, such as text and instant messages and voicemail data.

For example, in an April 2010 case from the Southern District of New York, *Passlogix, Inc. v. 2FA Tech. LLC*, No. 08 Civ. 10986 (PKL), 708 F. Supp. 2d 378 (S.D.N.Y. 2010), the defendants were fined \$10,000 for failing to preserve e-mails, text, and Skype messages.

Despite the discoverability of text messages, instant messages, social media postings, and other emerging data types, over half (51 percent) of the legal respondents to the Fourth Annual ESI Trends Survey cannot say whether their organization has updated its document retention, destruction, and use policies to contemplate new tools and technologies (compared to 27 percent of IT). The increasing reliance upon and usage of new technologies and communication media, in addition to the complexity of the issues that arise in the discoverability of their content, make it necessary for legal counsel to routinely revisit policies to ensure their efficacy.

Planning for Discovery and Testing Whether the Plan Is Defensible. When good cause is demonstrated, courts routinely force corporations, especially those that are well-established, to respond to requests for ESI that might otherwise be considered inaccessible due to cost or burden. For example, in the April 2009 Western District of Washington case of *Starbucks Corp. v. ADT Sec. Servs. Inc.*, No. 08-cv-900-JCC, 2009 WL 4730798 (W.D. Wash., Apr. 30, 2009), the defendant objected to the plaintiff's request for e-mails, arguing the e-mails were archived on the company's "cumbersome" old system and were not reasonably accessible under Fed.R.Civ.P 26(b)(2)(B).

After rejecting testimony from defendant's expert that e-mail restoration could take nearly four years, the court found that the plaintiff should not be disadvantaged because the defendant, a "sophisticated" company, failed to migrate the e-mails to a functional archival system, and determined that the e-mails were reasonably accessible.

Litigation is no longer an occasional, unpredictable event. Today, corporations must manage data in a way that contemplates the near certainty that they will need to produce ESI to a government agency or opposing party in a lawsuit. Despite this fact, 27 percent of the legal respondents (18 percent of IT) to the Fourth Annual

ESI Trends survey can't say whether their organization has an ESI discovery strategy in place, i.e., a pre-defined, systematic process for responding to discovery requests for ESI.

Of the legal respondents that have a strategy, more than half have no idea whether the strategy has been tested and deemed repeatable and/or defensible. This suggests an organization with a discovery strategy in place may be relying on a false sense of security that its policy does what it is intended to do. How can an organization be reliably confident in its plan without putting it to the test?

Reducing Costs by Decreasing Data Volume. In today's difficult economic climate, cost-containment is a top priority for corporations—especially those in heavily regulated and litigated industries. One well-accepted way to reduce the cost of responding to a request for ESI is to limit the volume of data to be processed and reviewed, often through Early Case Assessment (ECA) or Early Data Assessment (EDA) technologies.

A disconcerting revelation of the ESI Trends survey is that 43 percent of legal respondents (27 percent of IT) reported they were unaware of whether their organization has leveraged these technologies. This finding exemplifies that corporations are failing to grasp and use “low-hanging fruit” to significantly reduce costs and make more accurate and defensible decisions about data preservation, retention, and document review search parameters.

Looking Ahead. Corporate lawyers seem to be falling behind in their knowledge of processes and technology that may reduce the expense and burden of discovery. However, all is not lost. Attorneys must seek guidance from people who can offer the educational building blocks to help them get on track.

Specifically, legal departments should look to internal technical staff, outside counsel and business partners, including consultants and outside experts, to assess needs, identify gaps, and define systems deficiencies. With heavily regulated or litigated companies, it may even make sense to create or enhance legal roles that are designed to work and communicate with IT, other functional areas, and outside experts regarding the myriad of technical and legal issues involving ESI. The time has come for corporate attorneys to seek the instruction that will help them to best position their organizations to reduce the cost and risk attendant to ESI and legal discovery.

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