

Document protection is vital to a company's success

By Kelly D. Kubacki and Neil Vachhani
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Electronic discovery has rapidly evolved over the past decade, catapulting from a rare occurrence few worried about to a full-fledged, burdensome reality for corporations and legal practitioners. File rooms have been replaced with server rooms, and the evolution of technology has impacted the way business is conducted in every part of the world. As a consequence, law firms and corporate counsel have been forced to educate themselves and their clients in the way electronic data is properly stored, collected, filtered, processed and produced in discovery.

Further complicating the scenario presented by the modern digital world is the increasing complexity associated with the stages of the discovery process, which has prompted a cultural shift in the law, the technology and the way organizations conduct their business. No longer can people remain on the discovery sidelines. They must act proactively to document, implement and update important policies, utilize emerging technologies, and enact cost-control measures to manage and contain the exploding volumes of data.

Policy enactment: a must

Vital to an organization's success in both discovery and storage optimization is the development of a document retention policy that regulates the proper preservation and disposal of electronically stored information. According to Kroll Ontrack's annual trends report, a majority of organizations have a systematic policy in place for the preservation and disposal of their print and electronic documents in accordance with their designated retention schedule.

Companies should implement a document retention policy as well as data and document retention schedules that establish governance and compliance with applicable regulations. The policy must be practiced, understood, enforced appropriately and routinely updated. In addition, all employees must be educated and trained on the retention policy, and must comply with the applicable retention schedule for their position.

Another important policy responsible corporations should implement is a discovery strategy. More than half of the companies surveyed for the report indicated they possessed a formal strategy for responding to litigation or investigatory matters. This represents an in-

crease of 13 percent from the 2009 survey. Interestingly, 27 percent of legal respondents were not aware of whether their organization had a policy in place. Given that 44 percent of the respondents view creation, implementation, and enforcement of electronic stored information discovery strategy as a shared responsibility between legal and information technology, legal must become more educated regarding relevant protocol and policy within the organization. Discovery is not an isolated issue and requires cross-functional collaboration among a broad array of stakeholders within an organization.

While creating a policy is an important first step, it is certainly not the last. Companies need to test their policies to ensure they are operating properly and meeting the needs of the business. However, only 38 percent of the survey respondents reported having tested their policies, despite 63 percent reporting that they believed their discovery strategy to be repeatable and defensible. Corporations may believe their discovery strategy is repeatable and defensible, but cannot be confident in policy effectiveness without conducting the necessary confirmatory tests. Policies should be routinely evaluated and tested to ensure they continue to meet

the needs of the company.

As corporate dependence on technology expands, so does the world of discovery, which makes updating these policies – in addition to testing them – an absolute necessity. For instance, cloud computing and social networking sites have received heightened attention over the past year, with a particular focus on the impact to both corporate security and discovery. Despite this increased attention, many companies are not updating policies to reflect the changed environment. Only 21 percent of companies have revisited policies to reflect social networking, while only 16 percent have done so for cloud computing. A further 55 percent of respondents either have not updated policies at all or do not know if updates have occurred. Sidestepping or delaying efforts to update policies to reflect emerging technologies exposes companies to unnecessary risk. Waiting to act until something goes wrong is simply not sound business strategy. It will be significantly more difficult, time-consuming and expensive to implement corrective policies than it would have been had the company acted proactively.



Discovery

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Implementation of efficient tools

Companies face increasingly complexities associated with the discovery process, but are not alone in their efforts to navigate discovery more effectively. New tools have emerged that allow companies to efficiently organize their data, applications and systems, while excavating through the mountainous volumes of electronically stored information.

One such tool is a data map, which delineates and inventories a company's information systems and processes, allowing for a quick identification of important sources of potential electronically stored information. Surprisingly, more than half of the respondent companies did not have or did not know if their organization had an inventory of where all data is stored. IT (53 percent) was more aware of the existence of a data map than legal (35 percent). Although not surprising given the closeness of IT to the company's applications and systems, legal needs to engage when a data map is being implemented and updated, as the data map can help generate a more effective response to litigation and regulatory requests. Moreover, an effective and thorough data map may help facilitate the efficient and targeted implementation of legal holds. Without knowing where the company's data lives, legal is exposing itself to significant risk, given that numerous court decisions have recognized an attorney's duty to understand their clients' or their company's IT systems; this can ensure salient data is identified quickly and competently while decreasing discovery response times and preventing costly errors.

In addition to a data map, Early Case Assessment technology has proven vital in the management and reduction of costs associated with discovery, particularly in document review and production. Surprisingly, only 29 percent of companies reported taking advantage of ECA in the trends report, while 37 percent of companies have not used this technology and 34 percent were not aware of tool use. ECA provides an earlier and deeper understanding of the data involved in any given case and leads to more accurate and defensible decisions regarding preservation, retention and search parameters in discovery, decreasing the likelihood of sanctions. Companies should begin to take advantage of this technology now to start realizing a reduction in time and costs spent on discovery.

Cost control

Another significant finding from the trends report centered on cost-control – a hot topic for many as the exponential growth in data volumes continues to strain litigation budgets and put pressure on companies to maximize efficiencies while cutting costs. Despite this fact, more than half of the survey respondents either did not implement or were unaware of whether they are implementing cost-control measures. If cost is a primary driver, why are companies not taking more action to help achieve a reduction in discovery costs?

Interestingly, the most common discovery cost-control measure was the implementation of an archiving solution (28 percent). A properly implemented and managed archiving solution enables records management that not only facilitates business and

storage efficiency, but also ensures compliance with legal and regulatory requirements. However, not all archiving tools are created equal. Investing in an archive without thoroughly analyzing and evaluating the system's fit with an entity's business and legal needs can lead to a poor decision that may end up costing the company. One important feature most effective archiving tools possess is the ability to automatically administer legal holds once litigation or an investigation is anticipated. This will allow companies to better meet their discovery obligations regarding preservation of data, which is especially important given recent court opinions dealing with the issue, including *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2010 WL 3703696 (D. Md. Sept. 9, 2010). In that case, Chief Mag-

istrate Judge Grimm found the president of the defendant company had pervasively and willfully violated court orders pertaining to evidence preservation and ordered him imprisoned for up to two years, or until he paid the plaintiff's attorneys' fees and costs, estimated to be a "significant amount."

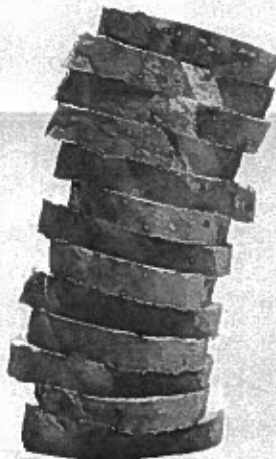
Although the *Victor Stanley* case represents an extreme example of willful discovery misconduct, many cases across diverse jurisdictions have imposed significant sanctions on parties who are merely negligent in fulfilling their discovery responsibilities. Acting proactively to implement, update and test important policies, in addition to utilizing cutting-edge technologies during the discovery process, demonstrates a thoughtful and systematic approach to achieving discovery efficiency and com-

petency, and will help provide an argument in opposition to sanctions if discovery conduct is called into question. Now is the time for less talk and more action to ensure your organization is prepared for the next decade of discovery.

Kelly D. Kubacki serves as staff attorney for Kroll Ontrack. She helps attorney, litigation support and IT professionals understand the pressing legal and practical issues involved in corporate information management and electronic discovery.

Neil Vachhani is a discovery services consultant at Kroll Ontrack. He works with clients to leverage technology when navigating the legal and technical intricacies of managing complex discovery requests, and serves as a conduit between corporate IT and legal teams.

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*A machine for slicing an entire loaf of bread at a single operation. Filed 11/26/28 by Otto F. Rohwedder; Patent Issued 7/12/32.