

Information Tech and Legal Need to Function as Team

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THE ROLE of the corporate attorney has always been that of a trusted advisor who counsels principals across the organization, in an effort to avoid or mitigate corporate risk. Traditionally corporate attorneys have focused on legal issues in areas like human resources, financial reporting, contracts, tax and regulatory compliance.

But in a rapidly evolving digital environment, they have been forced to don another hat. Now corporate attorneys are also responsible for creating and implementing litigation preparedness strategies and policies that will enable

the company to respond quickly and efficiently to requests for electronically stored information (ESI), whether in a civil suit or regulatory investigation.

Until recently corporate attorneys routinely, and almost reflexively, de-

ferred to information technology professionals on issues involving electronic data. In fact, up until a few years ago the legal department's interaction with IT was mostly limited to requests for help-desk assistance. This is definitely no longer the case.

Similarly, the role of IT has evolved in recent years, as the complexities of managing electronically stored information have forced increased interaction with legal. Traditionally the IT professionals limited their focus to matters relating to maintaining the company's information infrastructure and ensuring that information was available as

needed, to operate the business. Now IT is teaming up with the attorneys to tackle such topics as data archiving, accessibility and collection.

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The primary driver of these developments has been the evolution of jurisprudence in the area of electronic discovery. The 2006 revisions to the Federal Rules of Civil Procedure and the rapidly multiplying volumes of case law addressing ESI management in litigation are the most obvious manifestations of

these dramatic changes. Perhaps not as obvious is an increasingly tech-savvy and sophisticated judiciary that is less tolerant of ESI discovery indiscretions – notably of any failure to preserve potentially relevant ESI in response to impending litigation.

Meanwhile, economic conditions during the past two years have forced many corporations to slash discretionary spending, including outlays for information management and litigation response. Corporations have tried to address this development with policies that routinely purge needless data, while still safeguarding information that is necessary for business continuity and legal purposes. Companies also continue to invest in infrastructure and new technology to optimize ESI management.

With tighter budgets and greater judicial expectations as a backdrop, cor-

porate attorneys and IT professionals, out of necessity, are attempting to both reign in expenditures and minimize risk. Working together, they have been creating internal policies to effectively reduce and organize stored corporate data as well as prepare for and respond to litigation and investigatory inquires.

There is no question they are having some success. The third annual Kroll Ontrack ESI Trends study confirms that corporate counsel are teaming with IT in ways not imagined just a few years ago, and that the great majority of U.S. corporations believe legal and IT professionals do work effectively together when responding to ESI requests.

In addition, most corporations believe their discovery readiness tactics are repeatable and defensible – although courts continue to identify instances where corporate litigation preparedness and response have fallen short.

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THE IT-LEGAL TEAM

The Kroll Ontrack study polled approximately 500 corporate and IT representatives. Thirty-five percent of responding companies reported that responsibility for formulating an ESI discovery strategy now lies jointly with IT and in-house legal counsel.

This bespeaks a significant evolution. Two years ago, the same study found that corporate counsel in the majority of corporations reporting were solely responsible for ESI strategy.

According to the study, the new partnership is going well. A significant majority (84 percent) of corporations now report that IT and legal teams work effectively when responding to ESI requests.

However, while this alliance is strengthening, it is not without challenges. Conflicting priorities, role confusion and communication issues that arise from the use of legal and technical jargon continue to present barriers to effective management of ESI. Case law is peppered with examples of legal and IT departments that did not work together effectively and consequently incurred sanctions for failing to safeguard potentially responsive information.

In a July 2009 case, *KCH Services, Inc. v. Vanaire, Inc.*, Judge Jennifer Coffman of the United States District Court in the Western District of Kentucky granted the plaintiff manufacturer's motion for adverse-inference sanctions, holding that the defendant's failure to preserve ESI after the receipt of a preservation letter evinced a "continued unwillingness to place a meaningful litigation hold" on potentially responsive data.

In the same month, Magistrate Judge Paul Cleary in the Northern District of Oklahoma ordered that the defendant staffing company in *Pinstripe Inc. v. Manpower Inc.* fund a training program on effective litigation holds for the Tulsa County Bar Association, after the company had failed to implement a litigation hold that had been drafted by outside counsel retained for that very purpose.

READINESS QUESTIONABLE

Nearly all respondents reported having a document retention policy, but, startlingly, only 50 percent of the U.S. corporate counsel respondents and 25 percent of IT professionals reported having an ESI discovery-readiness strategy or plan in place.

The reported disparity in the beliefs of legal vs. IT personnel suggests a discrepancy in understanding as to what actually constitutes such a plan. This, along with the fact that nearly all respondents reported having a document retention policy, may suggest a failure on the part of some to distinguish between the concepts of document retention and discovery readiness.

This suggests that some of the important decision makers and legal tacticians in corporate America may have a false sense of security, believing that the existence of a document retention policy is sufficient to protect their organization in the event of a legal inquiry. As a practical matter, the strength and effectiveness of an organization's ESI management, discovery-readiness and document retention policies can be determined only when put to the test.

Several recent cases serve as cautionary tales for the complacent or misguided, and a reminder that an effective strategy for addressing any scenario where documents must be preserved and produced under close scrutiny is now an imperative.

In *Micron Technology, Inc. v. Rambus, Inc.*, a recent Delaware patent-infringement suit, a defendant microchip technology manufacturer authorized "shred days" where relevant documents were destroyed after litigation was deemed "inevitable" and "reasonably foreseeable." The court found the defendant's destruction of documents to have been in bad faith and imposed a sanction declaring the patents unenforceable against the plaintiff.

In a recent Utah patent-infringement case, *Phillip M. Adams & Assocs. LLC v. Dell Inc.*, a software manufac-

turer argued that e-mail servers were not designed for archival purposes and encouraged employees to locally preserve e-mails of long-term value (as determined by each individual employee). The court held that the defendant's "irresponsible data retention practices [were] responsible for the loss of significant data," but it delayed the decision of whether sanctions were warranted until after discovery closed.

The union between corporate IT and the legal function is still new and rather immature, and recent case law indicates that sometimes corporations fall short in preparing for ESI requests. But the Kroll Ontrack study suggests that the coming together of these formerly disparate professions is having some success in promoting economy, efficiency and better outcomes.



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