

# ELECTRONIC DISCOVERY

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## Corporate IT staff can play crucial role in discovery

Information technology team has best knowledge of strengths, weaknesses.

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FOR CORPORATIONS faced with reviewing and producing potentially millions of pages of electronic evidence, having input and cooperation from their information technology (IT) department is an essential part of the electronic discovery process. All too often, the litigation team tends to overlook the benefits IT can bring to a discovery project. In most cases, IT involvement is critical. In reality, no other department in the company possesses more complete knowledge about company policies, procedures, capabilities and vulnerabilities related to technology systems than the IT department. As the company has grown and evolved over the years, the IT department has helped shape the technology within the organization and knows its capabilities inside and out.

Despite having priceless knowledge about the technologies in use, IT experts are in fact, experts in IT. While they may know the company's document retention, backup-tape recycling, data collection and production procedures better than any other department, they frequently do not possess the expertise required for developing and implementing a comprehensive plan for identifying, preserving, collecting and producing electronic evidence in a case or regulatory proceeding. IT may not always understand how to best handle data subject to legal discovery. Additionally, IT departments with limited resources, training or experience may be overwhelmed by the volume, complexity and expense associated with digital discovery.

For example, in *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.*, 2005 WL 679071 (Palm Beach Co., Fla., Cir. Ct. March 1, 2005), a case involving volumes of information and strict regulatory compliance issues, the company's IT and legal departments mishandled electronic data—a mistake that proved incredibly costly. The court found numerous instances of discovery misconduct and ultimately

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granted an adverse-inference instruction against the defendant, noting "[t]he conclusion is inescapable that [the defendant] sought to thwart discovery."

The court further declared that Morgan Stanley "gave no thought to using an outside contractor to expedite the process of completing the discovery, though it had certified completion months earlier; it lacked the technological capacity to upload and search the data at that time, and would not attain that capacity for months." See also *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.*, 2005 WL 674885 (Palm Beach Co., Fla., Cir. Ct. March 23, 2005). In May 2005, relying in part on that instruction, the jury awarded \$1.45 billion in total damages against Morgan Stanley. Regardless of what the right role is for IT in any corporation in any specific legal matter, its actions should always be driven by communication with counsel, whether in-house or outside.

### Appropriate use of IT personnel

The e-discovery process can be lengthy, costly and complicated, even for the most sophisticated legal professional. Too often, IT professionals are brought into the mix and expected to undertake duties they should not be expected to perform. However, there are many tasks in which IT can and should be engaged.

Companies commonly commit mistakes by not engaging IT professionals early or often enough, or by engaging them for duties for which they are not qualified. IT professionals can be an invaluable resource in discovery projects, and they can offer tips and strategies from all sides—legal, IT and third-party experts—on how best to work together and come out on top. IT can help alleviate much of the length, difficulties, expenses and complications e-discovery can sometimes present.

As the technology to support e-discovery evolves, discovery requests have become increasingly complex. The IT department may not fully comprehend the legal and technical implications of a given request. If a corporation has someone in the legal department tasked with and responsible for working directly with IT on a regular basis and vice versa, the corporation may be in a better position to conduct internal e-discovery in some cases. If the project is complex, an electronic evidence expert may be in order to help determine what information is reasonable to collect, what information would

be required for production and the best format for that production. The scope and complexity of the discovery request should be taken into account when deciding whether to outsource digital discovery needs. When faced with discovery requests—and the decision of whether to conduct discovery exclusively in-house—companies should consider the following factors:

■ *Experience and training.* Asking someone with little or no e-discovery experience to comply with a comprehensive electronic data request can be a weighty demand. Data collection experts are specially trained to understand the various network arrangements of IT systems and have experience with almost every hardware and software platform. Also, experts are trained to ensure that the evidentiary integrity of data is maintained throughout the gathering, sorting, filtering and production processes.

An expert often also provides legal and technical consultants to assist in developing a comprehensive e-discovery strategy. These individuals can work with a company to determine what information is reasonable to collect and process, as well as what information can be winnowed down using filtering technology and the best format for the production. They can also provide expertise on demonstrating to the court or opposition that a document-production strategy is appropriate to the case at hand. In addition, an expert can often act as a project manager and a single point of contact throughout the entire project. A qualified project manager will have experience managing complex e-discovery projects involving multiple storage locations, large volumes of data and various media and data types.

■ *Technology and equipment.* In addition to considering the expertise of the IT staff, the available technology is also a factor in determining if a discovery request can be satisfied internally.

For example, e-discovery professionals utilize specialized software to ensure the fastest and most accurate collection and filtering processes—on average reducing the volume of documents to be reviewed by up to 75%. Electronic evidence specialists also typically maintain libraries of out-of-date software so that data created on antiquated systems is more likely restorable. Further, reputable experts will use best practices and strict security protocols to ensure that the data or hardware is not damaged. Moreover, the majority of electronic evidence specialists offer multiple output options for legal-document review, including printed documents, litigation support software, and/or online electronic repositories.

Still, they may not have legal expertise to oversee process.

The e-discovery process can divert the focus of IT staff.

## In-house or outside

If these resources are available in-house, the likelihood of a successful internal discovery project dramatically increases. However, purchasing and maintaining proper equipment can be expensive, and a company may not be able to afford to maintain necessary software, hardware, and other rapidly changing technology tools. A corporation may want to consult an outside e-discovery expert if the requisite technology and equipment is not readily available.

■ *Diverting IT staff and resources.* Companies must also weigh organizational and opportunity costs of redirecting IT workers when calculating the cost of fulfilling the discovery requests in-house. Conducting e-discovery while maintaining business operations can be a difficult juggling act. Requesting an in-house IT team to collect, analyze, organize and prepare electronic data for review in legal matters can acutely divert the focus of the whole IT department. The IT team must keep the current systems running while also attempting to identify (and possibly restore) and search weeks, months or even years of requested data. On the other hand, in most cases, an electronic-evidence expert can complete a data collection during non-business hours. This allows for minimal (if any) disruption to company operations.

■ *Ability to meet tight timeframes.* E-discovery timelines are usually aggressive, and a company must determine whether its IT department will be able to meet the logistical demands of data gathering and production. Satisfying the time limits required by the bench or opposing party may be feasible for an in-house IT department in smaller, less complex projects. Keep in mind that the IT personnel must also attend to daily company operations, which could present problems for sizable projects with strict production deadlines. On the other hand, an expert with large processing capacities and a track record of meeting tight deadlines will be better equipped to meet narrow production restraints. When the stakes and data volumes are high, the ability to meet deadlines must be a major factor in deciding if a company's IT group can manage a project alone.

■ *Conflicts of interest.* Searching a company's own systems for responsive data creates potential conflicts of interest for IT personnel. Asking IT employees to access their co-workers' or supervisors' electronic-based communications opens up a variety of privacy and bias concerns. In some cases, having IT perform evidence handling may be appropriate. However, before making that decision, counsel should consider whether the impartiality of a third-party expert is necessary at trial.

■ *Chain of custody and trial testimony.* It is crucial that a firm or company properly track a chain of custody for the electronic documents and media at issue. Usually this means capturing information about every person that accessed the documents and media on various times and dates.

A faulty chain of custody or other electronic evidence handling mistakes could subject the firm or its client to being called as a witness in the event that someone is needed to authenticate the collection process or introduce documents into evidence at the time of trial. Given these risks, organizations often seek outside assistance from an electronic evidence expert with staff members with training and experienced in presenting chain of custody and other technical

information to judges and juries. These experts will typically have significant experience in both legal and technology issues.

## When IT personnel testify

Should an IT person need to testify, the topics should be limited to the company's information technology processes, document-retention procedures, and other corporate-technology protocols. IT professionals could testify as experts in the company's technology and infrastructure, but should not be expected to testify as experts on legal technology issues.

## IT's role in discovery process

Although IT may not always be qualified to handle an entire e-discovery project, it is important to remember how and when to engage the IT professionals when electronic evidence becomes a component to a case. In many respects, engaging IT as early as possible, utilizing their expertise and keeping lines of communication open among IT, counsel, paralegals and third-party experts can end up making or breaking a case. But there are also limitations to what should be expected of them.

It is important to maintain ongoing communication with a client's IT department about where company records reside, how they are maintained, when they are destroyed and how to best preserve selected records that may be relevant to a prospective or existing lawsuit. Here are some tips for working with a client's IT department:

■ *Prelitigation planning.* Long before a lawsuit surfaces, it is vital that a company comprehensively interview the IT team regarding a company's IT topology and systems architecture. The IT department is a valuable resource for identifying records-retention practices, hardware and software conventions, and the accessibility of data. An interview with the IT staff can shed light on external data sources (such as personal computers used for remote access to the network) and on other sources of hidden data that might become of crucial importance. In addition, it is important to be aware of a company's legacy, archive or nonstandard data and systems. If not addressed with IT early on, these data types can potentially delay any e-discovery investigation for weeks or months.

■ *Designate a 30(b)(6) witness in advance.* Identifying someone in the IT group to act as a Fed. R. Civ. P. 30(b)(6) witness is becoming a modern business practice. In many instances, the initial depositions taken are those related to a company's technology infrastructure and their data-retention practices.

## IT staff must still attend to daily operations.

## Once litigation begins, IT staff can be valuable players.

Designating and preparing a 30(b)(6) witness ahead of time or having the materials together in advance to prepare this person, before the deposition notice hits the door will put a company ahead of the discovery response game.

■ *Preservation, preservation, preservation.* Once litigation ensues, the IT team is potentially the most valuable player when implementing a preservation hold. Counsel should work with IT to determine what is feasible to preserve and how such preservation can best occur. They should seek input from the IT staff when crafting preservation notices. As the case progresses, they should follow up with the IT staff at regular intervals to determine if their preservation responsibilities are still being carried out.

■ *Implementing e-discovery plans.* As soon as a litigation hold is created, IT must immediately be notified about the scope of the information to be protected and the identity of "key players," individuals in the corporation likely possessing discoverable data. If a client operates in multiple locations, utilizes different types of technologies, or has employees with disparate access to these technologies, it can be difficult to ascertain where relevant electronic records are being kept. Counsel should inquire about all potential data locations, including geographical locations and storage locations (such as shared network drives where multiple employees can save and share documents), communication devices, archival tapes, hosted e-mail and attachments. Providing this information as early as possible will avoid unnecessary delays and extra costs down the road.

■ *Form a trusted partnership.* Most importantly, the IT department can be a key ally when navigating a corporate document production. Counsel should keep communication channels open, seek technical input and convey status updates about the case, as needed, to this group. Keeping them informed puts them in a much better position to assist counsel in all facets of an electronic discovery project.

The volume, complexity and expense associated with e-discovery may present enormous challenges for IT departments with limited resources, training or experience. With the vast majority of today's corporate data residing in electronic media, an IT department's failure to handle, process and produce digital data properly could result in monetary sanctions, adverse inference instructions, or even default judgment. However, with the correct guidance from internal and external counsel, the IT team plays a vital role in e-discovery projects today. Formulating an e-discovery strategy that focuses help from IT in areas where they are best equipped and qualified to respond will put organizations in the best position to deliver successful, case-winning results in the digital age. **NLJ**

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