

The Gap Between Planning, Implementation of E-Discovery Programs

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This year saw a big jump in the number of companies that have a strategy for finding electronically stored data when it comes time for discovery, but a good portion of those companies have never tested their strategy or don't know if it has been tested.

These findings come from a study conducted by technology provider Kroll Ontrack and show that 52 percent of responding U.S. companies now have an ESI discovery strategy, which is up from 46 percent in 2009. That is a move in the right direction, Kroll's vice president of business development, Jason Straight, said, adding that it is the first time more than half of the respondents have had such a strategy. He said the figure probably would have grown even more had the recession not put a hold on what many companies view as a discretionary expense.

But despite an increased awareness of the need to track and find electronic data, the survey found only 38 percent of respondents have tested those policies and 45 percent don't know whether the policies were tested.

"I think some companies invested in coming up with a strategy and checked that box and moved on, when really what's required to maintain a sound program is continual vigilance," Straight said. "The only thing worse than not having a strategy is having one that isn't properly implemented."

The other concern for Straight, he said, was that only 44 percent of respondents had data mapping in place. Data mapping is an inventory of where data is stored within a company. That 44 percent is probably an overstatement, Straight said, because the information technology department knowing that there are 40 servers in Toledo with 100 users is not enough information to help a general counsel drill down into what is contained in those different areas when specific discovery requests roll in. This becomes even more complex now that companies are using cloud computing and the servers may not even be on site or in their immediate control, he said.

And while 72 percent of companies say they have a document retention policy and 52 percent have a discovery strategy, Straight asked how useful those policies were if only 44 percent have a data map telling them where that information is.

Another key finding from the survey, Straight said, relates to the evolving cross-section of social networking and electronic discovery. According to the results, 21 percent of respondents have revisited their ESI discovery strategies to address social networking, and 16 percent have looked at cloud computing.

"I think that there's always a lag between the adoption of new technology by users and corporations on the cutting edge of technology to make themselves more efficient and then when the legal side of things starts to catch up," Straight said. "I think right now we're still in the catch-up phase."

It Ain't Easy

David J. Walton, co-chairman of Cozen O'Connor's e-discovery task force, said finding the relevant information to respond to discovery requests is very difficult for most companies.

The Fortune 50 or 100 companies that are more frequently involved in large-scale litigation have the best experience with electronic discovery and oftentimes have one person solely dedicated to that within the legal department, he said.

But for everyone else, it's more of a fly-by-the-seat-of-our-pants approach.

"The companies that don't have as much active litigation, they aren't prepared," he said. "I can't blame them. We are in a bad economy right now, none of this is revenue-generating."

These companies aren't going to invest in data mapping or discovery technology, he said. It's not until they are faced with litigation that they learn of the need for these things and implement them as they go, Walton said. They will piggyback what they learn during litigation and through working with e-discovery specialists and attorneys during the case and create broader policies moving forward, he said.

The amount of money involved in a case has no correlation to the amount of e-discovery, so even a small case teaches the lesson of the need for e-discovery tools, Walton said.

Cloud computing isn't as much of a concern to Walton when it comes to the impact on e-discovery because he said the information is still readily accessible. The bigger concern is social networking. There are more and more sites to surf through for information and more are being developed all the time. And that's not going to stop.

"People are going to have to get better at managing e-discovery, because otherwise no case will go to trial because of the cost," Walton said.

The biggest discovery concern among the respondents, coming in at 24 percent, continues to be the preservation and collection difficulties with electronic data. So despite all of the advances in technology and best practices in this area, it's still not an area most companies are comfortable with, Straight said. That makes sense, he said, because it is the area that is fraught with the most risk, where the stakes are the highest and where the most mistakes can be made.

Additional Survey Findings

When it comes to litigation budgeting, 40 percent of respondents said they budget discovery costs into total litigation spending. On average, companies spend \$1.25 million per year on discovery. That figure doubled between 2008 and 2009 but held steady in 2010, according to the survey.

"Gone are the days where you can review every document in every case," Walton said. "You just can't do it."

That creates the need for better management of the documents you have, he said.

The survey showed the most common cost-control measure when it comes to discovery is an archiving platform. Litigation response planning is the second most popular area. Archiving platforms allow businesses to update and modify retention and disposal parameters within their document retention policies as the company's business changes.

There was a drop this year in the number of companies that have legal hold technology that would stop the deletion of information when a discovery request occurs. According to the results, 53 percent of respondents have this technology now, while 57 percent did last year.

"The fact that only 53 percent of companies possess a legal hold technology is alarmingly low, especially given the increased attention preservation and spoliation sanctions has received in the past year," Kroll said in its survey analysis. Perhaps that figure is not surprising considering that only 5 percent of respondents said the fear of sanctions is their biggest discovery concern.

The survey was conducted on behalf of Kroll by Echo Research Inc. A total of 203 online interviews were conducted among IT and in-house counsel at commercial businesses in the United States. The interviews were completed between June and July of this year.