Strategic Management of Electronic Discovery for the Reduction of Outside Spend

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Absent escaping to the woods or travelling back in time, there is no meaningful way to avoid electronic discovery in modern litigation. Think for a moment of all that you do in the digital world: email, text messaging, instant messaging, website surfing, e-commerce, social media, gaming, video conferencing, cloud computing, and the internet of things (e.g., wearables that monitor your activity, appliances that track your usage, thermostats that control your climate). Any tween will tell you that this is hardly an exhaustive list.

More seriously, electronic discovery—the preservation, collection, review, and production of electronically stored information (ESI)—represents a massive expenditure for corporations. An estimated $40 billion annual spend in the United States illustrates the need for a careful and measured approach in the way ESI is preserved, collected, reviewed, and produced. Businesses experienced with litigation understand this. Those that are not can be especially overwhelmed and frustrated by the process.

As we all know from firsthand experience, as digitization continues to expand into every aspect of our lives, and more business is conducted online, through mobile apps, and through computerization generally, the volume of data continues expands with it. Consequently, even small businesses can now generate voluminous electronic data sets regardless of whether it relates to operations, financial management, business-to-business dealings, and customer and client interactions. If we have learned anything during the pandemic, it is that work relies on the creation, transmission, and storage of digital data. Now, as the types of applications, their resulting data, and their distribution methods continue to evolve, especially with the increasing use of unstructured and cloud-based software and storage, an efficient approach to eDiscovery is more needed than ever by companies and organizations.

A proactive approach to eDiscovery is best. This may occur organically when a company dedicates efforts to thoughtful information governance, such as through the implementation of record retention policies or through the systematic management of data. The degree of that dedication, of course, depends on the nature of the business. The reality, however, is that unless a company, as a result of its business, regularly anticipates litigation, an eDiscovery project is often reactive. A consultative approach with legal counsel in close cooperation with an experienced eDiscovery service provider is a strategy that can help manage what may otherwise be an overwhelming demand on time and resources, and it can reduce the costs associated with eDiscovery in a litigation. The following discusses some of the overarching strategies counsel and an eDiscovery vendor may propose.

Evaluate and prioritize data sources

Chances are that initial discovery requests will be very broad. Counsel will usually focus on the appropriateness of the scope of discovery (generally looking to limit that scope to reduce time and expense, and focus on what matters in a given litigation) through a negotiation process with opposing counsel. In fact, counsel should be making efforts to narrow the scope of discovery, whether that might be date restrictions, custodians, or data sources. The eDiscovery vendor will

usually focus on constructing an efficient and thoughtful preservation exercise with minimal business disruption that can be performed in a way that prioritizes the data sources for the potential effective collection and identifies strategies to offer a meaningful and cost-effective data project plan.

Of special consideration are the new complications associated with the ongoing COVID-19 pandemic, where the ability to collect data from data centers and mobile devices are impacted. This, however, may be addressed by remote collections. More challenging is the increasing corporate reliance on unstructured cloud-based solutions such as *Slack* in place of more conventional email communications, which presents challenges as these applications do not easily lend themselves to traditional preservation and collection, and the usage of additional tools and strategies may be needed.

Strategies for the cost-effective approach will vary here. They may range from the use of "sunshine letters" prepared and negotiated by your legal team to the creation of the data layout protocols by the eDiscovery provider. Consultative project management will guide the process, describe how systems work, determine what ESI is reasonably accessible, help identify what is meaningful ESI, advise on what is necessary and what is not, manage deadlines, and carefully track the spend. Some of the benefits this may provide to a client include reducing collections, avoiding unnecessary disruptions to a client's operations, and minimizing ingestion and ongoing hosting costs.

Experienced eDiscovery vendors should be a must when navigating necessary support from corporate IT departments. An eDiscovery project is a major disruptor for them; however, without their knowledge of data layouts and supporting applications the successful delivery is unlikely. When working with your eDiscovery provider, look for data specialists that appreciate corporate culture, speak the necessary IT lingo (and can translate it to English for the non-IT professional), understand the common data management systems, and know how to work with IT professionals.

Data analytics tools and best practices

Once the data is properly preserved and the collection is underway, it may be helpful to select and implement advanced data analytics tools and develop best practices of their utilizations.

Assure that usage employs the most appropriate algorithms and reporting enhancements to quickly classify and organize documents through a rapid and efficient assessment. This may constitute significant savings when dealing with large volumes of data. There are a wide variety of tools that can be leveraged in the eDiscovery continuum, and careful consideration should be given to what tools are the most appropriate.

For example, by utilizing tools such as *Brainspace*, continuous multimodal machine learning will assist in quick and reliable ranking and classification of large volumes of documents for review using supervised machine learning and iterative relevant feedback leveraging continuous strategy of training on top-ranked documents from predictive models to find the most relevant topic rich data, while enhanced concept clustering would help to isolate and prioritize documents dealing with specific issues or concerns.

Your legal counsel will assemble cascading search parameters and identify required syntaxis that would underline transparent concept searching to identify related concepts and terms, focusing only on those that are most relevant. Relevant parties can be quickly identified by creating communication grids while determining who is talking with whom and about what, isolating key or problematic communications by person, location, and concept as part of an adaptive communications analysis.

Effective document review and production

While days of linear review, where every document is actually looked at and tagged by a reviewer should be over, document review and production still constitute a significant part of the cost of any eDiscovery project.

Utilizing analytics technologies such as predictive coding otherwise known as technology-assisted review (TAR) or computer-assisted review (CAR), allows identification of responsive documents following an established pattern as it learns and makes better decisions based on choices the reviewers make. A well implemented TAR protocol would only necessitate a human review of 5-10% of document population, which, given the high cost of reviewers' rates, may provide significant savings.

While the technology is not new and is more widely adapted, it is critical that a legal counsel and the eDiscovery provider write a clear TAR protocol augmented by subject matter expert testimony if needed. The technology of predictive coding is very complex and requires knowledge of advanced data science, which could potentially impact the acceptance of the approach by the courts, especially when a judge is not familiar with advanced eDiscovery know-how.

Conclusion

A successful eDiscovery project requires subject matter expertise, both in legal and technology, knowledge of advanced data analytics, understanding of available tools, and implementation of consistent project management. The task becomes more challenging as new applications, ways of communication, and data storage and dissemination are introduced, and as the volumes of data continue to grow. A client's management of the eDiscovery process can benefit greatly from a consultative approach with experienced and adept professionals. They can help not only by minimizing the business interruption of eDiscovery, they can help with minimizing its expense.

Chris Torres, Greenberg Traurig and George Rudoy, BDO will present a virtual CLE program on eDiscovery on December 3, 2020 to the ACC Tampa Bay Chapter.