Business & Careers

DIY e-discovery still possible, but with limits

A question of collection tools, in-house expertise, volume of work

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Hi-Tech

The legal industry has adopted the Electronic Discovery Reference Model, a structural workflow that professionals can follow (www.edrm.net).

Before the EDRM, discovery was a do-it-yourself process. Those were confusing days.

"Different vendors and law firms took different approaches to doing what we now call e-discovery," says Harrington LLP information governance lawyer Martin Felsky. "But there was no consensus or understanding of what e-discovery really was or how to do it."

Some companies balk at the cost of discovery, so they consider the DIY route. But should they?

To answer this question, they first need to consult an e-discovery expert to ensure they don't cause greater costs and risks in the future by trying to save money now. Aside from designing a discovery project, experts can tell companies what steps they can do themselves and what steps they should leave to experts.

"Perfection is not required in e-discovery," writes Matthew Nelson, senior e-discovery counsel for Symantec, in his book *Predictive Coding for Dummies*. "The goal should be to create a reasonable and repeatable process to establish defensibility in the event you face challenges by the court or an opposing party."

While software systems are designed to aid this process, they sometimes usurp the focus that rightly belongs to the process. "Once you design a process that's appropriate for a case, then the software choices become easier, they flow naturally from what is needed in your case," Felsky advises.

"Many people, and not just in law, use software as shorthand for process, and that just doesn't work."

Becoming an e-discovery-ready organization will likely have the greatest cost reduction impact on any e-discovery initiative. Such readiness is an offshoot of a company's records management program. Handling information management proactively enables organizations to both respond quickly and plead proportionality when they face e-discovery demands.

"[In court, you can] say that you've identified risk areas and set up systems to bring back 80 per cent of the information using 20 per cent of the time [and costs] and here it is," says KPMG information services national practice leader Dominic Jaar. "You can argue the inverse of the 80-20 rule if your opponent demands searching the other 20 per cent of your systems."

Both Jaar and Felsky call e-discovery "ex post facto records management." Felsky likens the process to one we're all familiar with. "It's the same as an accountant who prepares tax returns," he explains. "One client has a big shoebox of documents, another has everything organized in labeled file folders. You spend less time going through documents with client 2, so you charge him less."

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Harrington LLP

While he lauds the practice, Jaar cautions against going overboard. "Information management projects look at everything, and I think that's a mistake," he says. "These projects never come to fruition because they're way too big."

He recommends such projects focus on the information that is most likely to be called upon for discovery and leave other, "lower-risk" data out of such projects.

Plenty can go wrong during the EDRM preservation stage, especially with metadata.

"I've seen clients do their own discovery, go into their e-mail system, create a folder called 'litigation' and drag e-mails into the litigation folder," says Felsky. "They're changing the nature of the evidence itself."

There is a way around the metadata minefield, though, as Jaar explains in his 2008 article "Small case e-discovery: Re-discovering e-discovery": "...The time and skills needed to collect the electronic documents with their metadata can be deterrents...Therefore, in circumstances where metadata are of low marginal utility, parties could agree that they won't guarantee the perfect preservation of all of the metadata."

Performing forensic collection on a computer requires sophisticated software and training. For instance, consider all the places information could be stored. Not long ago, these would have been limited to computers, file servers and e-mail. Today, Jaar says, they include social media sites and smartphones.

Whether an organization has the necessary collection tools and expertise in-house often depends on volume of work. Those that don't can effectively outsource collection for competitive rates.

Jaar figures it costs $500 per computer or mobile phone for forensically sound data capture — "cheaper than the lost productivity of employees charged with capturing their own data," he says.

Regardless of cost, calling in outside experts helps reduce the risk of moral hazard, especially if the people charged with e-discovery are the same people who have something to hide.

"People don't always know how to find their own documents," Felsky points out. When checking for e-mail, "people may look in their inboxes and overlook Sent Items. They may not know how to restore items that have been archived or deleted."

Not understanding a search tool's limits can also cause problems. For instance, any search for relevant e-mail remains incomplete if the search tool only scans the body of a message and not its attachments.

"Right now, people aren't savvy enough to properly perform collection," says Jaar. "But I don't believe it will stay like this. Organizations will become savvier, better able to manage and collect information by themselves."

Processing documents can involve simple operations such as de-duplication and filtering by date range. Nelson notes that this job used to be relegated to an outside service provider. "Now, [culling] tools are easy enough to use and deploy within an organization," he says.

Document review, the priciest part of EDRM, can accommodate some DIY. It makes sense for clients to review their own documents, since they know these well and can point lawyers in the right directions. "That's a huge time saving," says Felsky.

Clients can avoid moral hazard during review if collection was done properly. "I've already collected all of your documents, and now you're directing me to key resources," Felsky explains. "That doesn't stop me from browsing through everything else to confirm there's nothing I'm missing."

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