BUSINESS & CAREERS

Getting litigation ready matter of planning

Litigation-prone businesses stand to save money with each case if they both make themselves litigation-ready and work with discovery-savvy counsel.

On the latter point, Dominic Jaar brooks no debate. "In 2011? There is at least one email that is relevant to your litigation," says KPMG's national leader, information management and e-discovery.

The drive to control costs in companies that regularly litigate has led to a better understanding of litigation-preparedness best practices. Davis LLP partner Kelly Friedman insists that to meet "Kelly's gold standard in litigation readiness," a business must have two things: A records management policy implemented using automation; and a litigation readiness plan.

What types of documents are most frequently requested during discovery? According to the *2011 Information Retention and eDiscovery Survey* from Symantec Corporation, the top six are: files and documents, database or application data, email, SharePoint files, social media, instant messaging and text.

HI-TECH

LUIGI BENETTON

How do you keep track of it all? Run your records management system according to GARP.

Published by the information management group ARMA International, GARP, or Generally Accepted Record-keeping Principles, offers an information management maturity model featuring five levels, in which level five is the gold standard.

Friedman outlined her gold standard when she spoke at a November ARMA event in Ottawa. One of her slides defined a records management system as one in which each record is automatically classified by the computer system, retained for the period of time determined by a well thought-out retention schedule and automatically destroyed when its value comes to an end, unless a legal hold has been triggered.

Records management systems aren't as widespread or as well-tuned as Susan Nickle would like. She figures the recession forced companies to shelve plans for systems.

But "if you're a small company, it's quick and cheap to do," said the co-founder of Wortzman Nickle Professional Corporation. "If you don't do this and you're in a litigious environment, you're just deferring these costs. They'll just pop up in litigation."

Litigation readiness plan

For many Canadian corporations, "every case is the first case all over again," says Nickle.

It need not be that way. According to Friedman's November ARMA presentation, litigation readiness plans enable organizations to proceed in a defensible manner with the preservation and collection of potentially relevant ESI (electronically-stored information) and enable outside counsel to represent accurately to judges and regulators the status of discovery in a matter.

Plans also allow for the flexibility to handle each case according to its nature. Perhaps most importantly, they make early case assessment easier and help companies swiftly figure out whether they have exposure. "If you know up front, you can settle quickly," says Friedman.

Several key parts make up the foundations of litigation readiness plans.

Data map

Friedman says every plan needs a data map that documents the company's IT infrastructure, shows where each type of information is in terms of both the hardware and software housing it and its physical location, and explains how it can be accessed and by whom.

Certain factors make modern IT infrastructures difficult to map. For instance, Nickle wrote on Wortzman Nickle's e-Discovery blog about a study that noted 40 per cent of workers use their personal devices for business purposes, and "50 per cent of those workers…access company networks without their employer's knowledge." (Nickle referred to these people as "rogues.") "Potentially relevant evidence is stored on devices your organization does not ultimately control."

Friedman encourages people to simply start data maps, which can be as sophisticated as a database or as simple as a spreadsheet.

Under a sample spreadsheet setup, vertical axis could record data locations, while the horizontal axis listed types of data, data retention status, backup status, people who can access the data, and other pertinent information.

Records management policies

Policies can pre-empt excessive discovery costs by stipulating guidelines for activities like document retention and destruction, email use, social media use and dealing with the data of departing employees.

Setting up a team ahead of time helps keep the number of people involved in discovery to a minimum, thus reducing the

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Avoid DIY approach to e-discovery

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productivity hit when team members get taken away from their regular responsibilities.

Nickle offers this list of people who can help respond to litigation: in-house counsel, external counsel, records manager, security and compliance people, IT.

"At least one person internally must speak e-discovery," Jaar notes.

Nickle also suggests adding people who know how records are used and stored. "I've seen this mistake before," she says. "Everybody around the table is very senior but doesn't actually work with records."

Once counsel deems a hold necessary, the team swings into action "so that all potentially relevant documents are taken out of the normal destruction cycle and preserved," Friedman noted in her ARMA presentation.

Collection procedures

It might seem cheaper, but companies may want to avoid the do-it-yourself approach to collection.

DIY collectors often unintentionally modify metadata like the creation data, modification date and author name. Such changes can drive up the overall cost of discovery.

"If you ask me to provide a chronology of events, I'll filter emails by date and within ten seconds we'll have it," Jaar offers by way of example. "If I need to do that with a bunch of documents that all have the same dates, I'll be forced to look at each of them individually and manually create a timeline. That could take a day, a week, a month."

Outside counsel

Jaar would like more lawyers to use up-to-date defensible document review technologies. "We still see lawyers doing linear review at a really steep cost to the client," Jaar says, adding that 80 per cent of e-discovery costs come from document review.

"If lawyers still review documents one at a time, discovery won't be any cheaper even if the client is litigation-ready." ■

Political run fell just short

Eby
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banning multiple marriage in a November ruling.

"We took a principled position around the use of criminal law, which should not be misconstrued as an endorsement of polygamy," Eby explains. "The *Criminal Code of Canada* should be concerned with sexual abuse and lack of consent, not how many people someone is married to."

Most of BCCLA's advocacy work involves bigger threats to Canadians' civil liberties than polygamy. The association is much more concerned with anti-terrorism legislation and mandatory minimum sentences. "Tough on crime rhetoric resonates very strongly," Eby says. "Prisons are the most expensive way of dealing with the problems of mental health, addiction and poverty."

Last Spring, Eby took a leave of absence from the BCCLA to run in the provincial by-election for Vancouver-Point Grey as the candidate for the BC New Democratic Party. On May 11, 2011, he came within about 500 votes of defeating B.C. Premier Christy Clark — or less than three per cent of the 14,147 votes cast. "I knew running for office was a long shot. My priority was to raise the profile of issues I care about, like homelessness and the environment," he says.

Eby, who is 6-foot-7, towers above his supporters in campaign photos. But don't look for him shooting hoops when he's not in the office. Instead, he plays guitar and sings for an indie rock band, is an avid reader, cyclist, yogi and user of public transit who frequents farmer's markets and rock concerts. ■