Tech Audit

Don’t Try This at Home

Doing E-Discovery Is Best Left to Outside Experts

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Hunton & Williams has 17 offices for its Richmond, Va.-based firm, with one central litigation support center for helping its lawyers with their caseloads. That center is a 10,000-square-foot facility with between 35 and 40 staffers who handle complicated tasks, and that increasingly has meant collecting, sorting and analyzing electronic evidence.

Hunton is rare in that it does electronic discovery in-house. However, even this firm does not handle all of its own workload for e-discovery issues. For really big or complicated cases, the firm will turn over evidence to e-discovery consultants.

In the paper world, discovery was something law firms did themselves. When it comes to electronic discovery, however, firms need to have a certain amount of in-house expertise, but most will probably find e-discovery is best left to outsiders.

“We make arrangements with outside vendors whenever we need to,” says Sherry Harris, senior case management specialist with Hunton.

“You can’t expect 850 lawyers to be up to speed on all the issues with electronic discovery,” she adds. “It’s not about producing revenue; it’s about making our attorneys’ lives easier and giving them the support they need for complex cases.”

Perhaps nothing of recent vintage has changed pretrial procedures more than the process of requesting, producing and sorting electronic records for litigation. Whole new types of data--from e-mail to database records to Palm Pilot contact information--are now discoverable. And thanks to technological advances, all that data is readily searchable.

Lawyers need to know what documents to save when clients are served with preservation orders, as well as what electronic evidence is discoverable from the other side. But e-discovery is often such a complicated, technical affair that no one should try to do it without help.

“The important thing is to know what to do first. Preservation orders happen quickly,” says Harris. “You have to know right away that your client knows what to do. Have legal notices gone out? Have you talked to the client’s IT director to make sure the staff is not just mindlessly deleting documents?”

Courts have made it clear that attorneys can be sanctioned if their clients fail to produce electronic documents. In Zubulake v. UBS Warburg, No. 02 Civ. 1243 (S.D.N.Y. July 20, 2004), a widely noted e-discovery ruling, the federal court in New York reprimanded the defendants’ attorneys for failing to preserve and produce documents in a timely fashion. “If you can’t spell Zubulake, you probably shouldn’t be in the courtroom,” says Michael Clark, an industry analyst with EDDix LLC, an e-discovery research firm in Milford, Conn.

Zubulake is a sex discrimination case originally filed in 2002, but it is still tied up in pretrial discovery motions. In a series of rulings, U.S. District Judge Shira A. Scheindlin held that courts must consider factors such as the likelihood of discovering critical information and the cost of producing documents to each party.

In the July 20 ruling, the court issued three basic rules for anyone subject to an e-discovery request:

• Counsel is responsible to preserve data as soon as litigation is reasonably anticipated.

• Lawyers must communicate this to all people likely to have relevant information.

• Counsel should instruct employees to produce relevant electronic copies, including backup copies.

Clark warns of problems for law firms that try to store and analyze the electronic documents. Law firm employees who do the forensic analysis may be called to testify about how it was done, which can be uncomfortable if something goes wrong. Mistakes also may open firms up to malpractice liability. “Stick to your core competency,” says Clark. “A law firm’s core competency is its intellectual property. Why build a massive infrastructure to handle e-discovery?”

The production of electronic records from corporate litigation is not a trivial matter. A typical discovery phase of a trial involving a large corporation might turn up hundreds of CD-ROMs of material, each containing the equivalent of 30,000 to 40,000 printed pages. In Zubulake, UBS Warburg claimed that e-mails requested by the plaintiff are stored on 94 separate backup tapes, and the cost of retrieving them is $300,000.

Need To Know More?

Some firms obviously need more in-house knowledge than others. “If a firm does a lot of tech, antitrust, securities or intellectual property,” says Scott Kallander, senior consulting attorney with Bellevue, Wash.-based Applied Discovery, “they’re going to need a greater expertise in-house.”

According to EDDix research, 75 percent of the top 200 law firms do not have basic expertise in e-discovery. But Clark recommends law firms brush up on their business skills rather than their computer skills. He says firms should learn to use the “request for proposal” process to find the best firm to handle their e-discovery workload. He’s found that law firms use the RFP process of competitive bidding only about 20 percent of the time.

There are hundreds of firms that will store, analyze and process electronic documents for litigation. For smaller cases, it might be preferable to use a smaller firm that can spend more time working on your case. A law firm should also make sure that an e-discovery firm works with the document management program or other software the law

firm uses. It’s also important to find an outsourcer who understands and can work with a law firm’s processes for handling evidence.

But Clark says just one outside vendor probably isn’t enough. “It’s good to work with an outsourcer you trust, but it’s not good to be beholden to a single source,” he says. “We recommend selecting two or three to use on an ongoing basis, depending on the different strengths of each firm.”

Comments