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Information Management Best Practices and the Generally Accepted Recordkeeping Principles

By John Isaza

Information Management sits at the cusp of the well-known E-Discovery Reference Model. In fact, this has been the most neglected aspect of the EDRM.net model for the last several years. However, in the past couple of years, Information Management finally has started creeping into the radar of General Counsel and others at the C-level of most organizations. This is brought on not only by the 2006 amendments to the Federal Rules of Civil Procedure, but more recently by new recordkeeping and compliance requirements under the Dodd-Frank Act (the "DFA") and the anticipated recordkeeping regulations to be promulgated by the 20 or so agencies (at last count) created or affected by the DFA. *Read more*

Third Party Discovery

By Greg Dickenson

With litigation discovery bloating into a seemingly uncontrollable monster, issues that previously seemed relatively clear cut have become the subject of worry. When third parties hold evidence, Federal Rule of Civil Procedure 45 ("Rule 45") and its state analogues, address the issue of subpoena. But while Rule 45 considers the discovery of electronically stored evidence, third parties, whether service providers in the cloud, or elsewhere, will want to consider their retention obligations; and issues that once seemed clear cut now appear (I am obligated to make this pun) *cloudy*. This article is intended to provide a starting point for a third party to litigation regarding issues to consider. As such, the topics of discussion are the context of Rule 45, *Read more*

U.S. E-Discovery and Data Privacy: Solutions for Navigating Cross-Border Conflicts

By Alexander B. Hastings and Edward H. Rippey

Foreign data privacy and blocking statutes may present significant hurdles for entities conducting discovery pursuant to federal and state rules. And, such statutes may result in United States courts and foreign jurisdictions imposing civil and criminal penalties on parties conducting discovery. Consequently, entities must be mindful of potential conflicts as they navigate a litigation or government investigation that involves discovery of materials stored abroad. The first step in remaining vigilant of conflicts lies in identifying sources of tension between foreign privacy and domestic discovery rules. *Read more*

The Three-Legged Stool of eDiscovery Success: People, Process, & Technology

By Sonya Sigler

eDiscovery success depends on many things, but basically boils down to three essential ingredients: people, workflow/processes, and technology. I think about each of these three areas as the leg of a stool. Just as properly functioning legs are essential to be able to sit on the stool, each of these items is an essential ingredient to eDiscovery and eDiscovery won't go well if one of these is missing or is done poorly. **People.** It is important to reiterate that successful eDiscovery (which I define as finding the most relevant information in a timely and cost effective manner) is a delicate balance and mix of people, workflow and technology. *Read more*

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People

It is important to reiterate that successful eDiscovery (which I define as finding the most relevant information in a timely and cost effective manner) is a delicate balance and mix of people, workflow and technology. It appears to me that lawyers currently have overly rely on people (performing linear (i.e. page-by-page) document review), thinking that an "eyes-on" review of documents is better than a technology assisted document review.

As an essential element to the success of any litigation lawyers can add significant success to the eDiscovery subset of that effort. Corporations and individuals hire lawyers for a variety of reasons but lawyers are hired primarily for their experience and judgment. That experience and judgment matters. Would you hire a lawyer for a specialized matter who did not have experience in that particular subject matter? Probably not.
Similarly, the more experience that your lawyer (or their team) has with eDiscovery the increased likelihood of success on the path to determine responsive and relevant information.

Although lawyers are hired for their expertise, the skills of a successful lawyer often don't translate to eDiscovery, which consists mostly of project management skills, a deep understanding of the litigation process (garnered through experience), plus subject matter experts if you use particular technologies (more on that later). Lawyers are hired for these primary purposes for litigation:

- Legal Advice – this, obviously, is the substantive advice for your case and case strategy. This reason is probably the most important reason lawyers are hired.
- Manage eDiscovery - this is a behind the scenes activity for a portion of a case that isn't considered as an important function until something goes wrong. This, of course, is critical to get right.

- Motions Practice - how to lead this case to a successful end with a motion to dismiss or motion for summary judgment or any number of other types of motions that may lead to the disposal of a case. The substance of these motions comes from what is happening in the eDiscovery phase; it becomes the evidence to support these arguments

- Negotiation – given that more than 95% of cases settle and never make it to trial, the ability to resolve a matter through negotiation, mediation, arbitration is ver y important in bringing a matter to a successful end.

All of these skills are valued and appreciated (and paid for handsomely) except for the Manage eDiscovery one – this is generally delegated to a second year associate who has very little experience in eDiscovery except, perhaps with actual document review, and very little understanding of the overall litigation process and what evidence leads to settlement. The purpose of eDiscovery is to find evidence that will help make your case. Experienced lawyers are an essential part of that eDiscovery success and are only going to become *more* important to the successful deployment of technology assisted review or predictive coding solutions.

Workflow/Process

Not only is finding the right people vitally important to a successful eDiscovery effort, but deploying the right workflows and processes is also vitally important to eDiscovery success. There seems to be an unhealthy reliance on doing things the old way (manual or linear review) and that there aren't very many consistent or vetted workflows being used to move document review systems forward. For example, in the recent Google privilege email debacle, a simple near duplicate technology run over the entire Privilege Log document population would have clustered near duplicates together with the documents on the “Priv” List, enabling the reviewers to catch the 8 drafts related to the one email that ended up on the “Priv” list.

I don’t want to start down the path of Monday morning quarterbacking eDiscovery reviews, but I do want to say it is vitally important that a repeatable process be used in document reviews, no matter which people are involved or which technology is involved.

An effective workflow can greatly enhance the speed and efficiency of your eDiscovery effort. It can also effect the deployment of high priced resources such as lawyers with certain subject matter expertise or foreign language expertise. Documents in a different language can be clustered and sent to a particular reviewer with that language skill set. This is just one example of many that can be implemented in a case workflow using technology to build in efficiencies. A well thought out process and one that includes some type of quality control effort is key to eDiscovery success and one that receives far too little thought and that thought is often too late in the process.

Technology

Even if lawyers want to use technology to help them move forward in their approach to eDiscovery, they are afraid to use technologies they do not understand. Notwithstanding Judge's Peck's recent decision[1] that the EDDE committee discussed when it met in February, I have found that lawyers are waiting for a case that says it is OK to use a *particular* technology. I hope Judge Peck's recent decision squelches these types of objections with his point that no matter which technology you pick, they are all better than human review. I don't understand this objection to using technology to assist in document review because there NEVER was a case that keyword search was an OK way to find relevant data. In fact, the best case to use these advanced technologies is built into the note of FRE 502, which says it is OK to use advanced search and retrieval technologies.

I also think that lawyers don't understand the underlying search technologies and are reluctant to use them in a way that puts them and their reputation on the line for a document production. I see movement in this area mostly with corporations choosing to use technology to lower their costs and control their limited resources. I think law firms will move in this area but it will be slowly or until their clients push them to do so. I would hope that with Judge Peck's recent decision that lawyers will move more quickly towards the adoption of search and retrieval technology within the legal industry but I haven't seen it yet. I'm hoping that in a year, we can look back and say wow, that was a fast adoption, but I don't generally think lawyers are on the forefront of the technology adoption curve.

Specifically, technology can be used to sort through data, categorize it, and tag it for litigation purposes. Predictive coding and technology-assisted review are all the rage in eDiscovery discussions and conferences these days. These tools are only as good as the data that comes into the database. It is a garbage-in, garbage-out situation. Lawyers need to know what data is coming into their database system no matter what technology is used and particularly in cases where certain types of technology are used. For example, lawyers need to understand how punctuation is treated, how stop words are ignored in certain search indexes. All of these types of things affect how their data is used with a particular technology.

As always, with eDiscovery, there is no easy button here. No one wants their eDiscovery stool to fall over because one of these parts failed. Deciding who to hire, what workflow or process to implement, and which technology to use in this particular case is a puzzle that lawyers are paid to put together. It requires hard work and understanding of how the parts can work together consistently and effectively.

[1] *Da Silva Moore v. Publicis Group*, No. 11-CV-1279 (S.D.N.Y. Feb. 25, 2012).

Sonya Sigler is Vice President, Product Strategy with SFL Data. Sonya joined SFL Data in 2011 to refine its predictive coding offering. Sonya was a founder of Cataphora in 2002 and has enabled clients to utilize technology-assisted review in internal and government investigations as well as complex, criminal, and class action litigations. She is a frequent writer and speaker on advanced search and retrieval techniques, electronic discovery issues, meet & confer techniques, and other topics. Prior to Cataphora, she worked in-house at Intuit and Sega supporting the legal needs of the business development, sales, product development and marketing teams. Sonya is a member of the Association of Corporate Counsel, the American Bar Association, and The Sedona Conference Working Group 1 on Electronic Document Retention and Production.