The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

Volume 19, No. 1 © 2011 The Metropolitan Corporate Counsel, Inc. January 2011

Basic Steps In E-discovery Preparation: Creating The Team And Knowing When To Pull The Trigger

Mark L. Austrian and Martin Krolewski

KELLEY DRYE & WARREN LLP

Mark L. Austrian

Martin Krolewski

Introduction

Corporations face challenging and expensive problems identifying, preserving, collecting, reviewing and producing electronically stored information in civil litigation ("e-discovery"). While the courts have attempted to create "reasonable" parameters to permit compliance within the bounds of financial practicality, these ground rules are often vague and unpredictable and focus on processes after a "triggering" event has occurred. This article examines two cost-reduction techniques that can be put into place before the case begins: creating an e-discovery team and setting forth triggering event guidelines.

The E-Discovery Team

Corporate counsel alone cannot coordinate all of the complex e-discovery issues, consider all of the company stakeholders' interests, and get sufficient management support to insure that employees will understand and comply with all of the corporation's e-discovery obligations. Nor is it practical to assemble new e-discovery teams each time a matter arises. An ongoing team process will allow the company to learn from prior experience, better plan and budget for future e-discovery matters, and demonstrate to the court that its decisions were reasonable should particular decisions be challenged. Membership on the team can change based upon the subject matter of the dispute, but it certainly should include representatives of in-house counsel, management, records and information management, and outside counsel familiar with the company's business objectives and potential e-discovery issues. The company should also consider including third-party experts and service providers. One of the most critical elements of any e-discovery team is corporate "buy-in." If the leaders of the major corporate stakeholders do not support the process and emphasize its importance, then the policies will not be followed and this situation can become worse than if there were no policies in place at all.

The e-discovery team can also lay the groundwork for determining whether a discovery request in an individual case may be unduly burdensome. The issue of burden is usually quantified by the cost of responding. The team may develop defensible cost parameters for the production of what the company will claim is not reasonably accessible. These cost factors can be applied once litigation is commenced and can be used during negotiations in the Rule 26(f) conference and, if necessary, in response to a motion to compel or in support of a motion to shift the costs of production. All too often counsel exaggerates and cannot support claims of undue bur-

__Mark Austrian__ is a Litigation Partner at Kelley Drye & Warren. He serves on the Board of the Georgetown Law School's EDiscovery Advisory Board; is a Member of the Sedona Conference Working Group on Electronic Document Retention and Production; and teaches e-discovery at American University, Washington College of Law. __Martin Krolewski__ is an Associate of Kelley Drye and has been active on numerous e-discovery matters.

Please email the authors at maustrian@kelleydrye.com or mkrolewski@kelleydrye.com with questions about this article.

den early in the litigation with the resulting loss of credibility with opposing counsel and the court.[1] In addition, the team can develop creative solutions which may involve, for example, sampling techniques to support particular e-discovery solutions. [2]

The standing e-discovery team need not, and cannot, be involved in every case. Nor can the e-discovery response be crafted without considering the specific facts of an individual case. However, one advantage of assembling such a team before litigation is imminent is that the company will have identified individuals who have expertise and experience in this area when events unfold very quickly. For example, one of the more difficult decisions is when the obligation to preserve information arises. Members of the e-discovery team can provide significant practical advice to those who are primarily involved in the dispute.

The e-discovery team can also contribute to the identification of knowledgeable and reliable outside counsel and e-discovery vendors who may assist with the early case assessment and information processing on a cost effective basis. One of the major problems is that there are hundreds of vendors ranging from individual practitioners to large technology corporations, and it is extremely difficult to begin the RFP project either for the development of an e-discovery plan or for a specific case-related project. The basic burdens of this process fall squarely on the company which must do the necessary research and analysis to define the scope of the project, collect and prioritize requirements, and understand and communicate the IT landscape to a potential supplier so that there will ultimately be the best possible match of problem and solution.

Triggering Event Guidelines

The law surrounding when an obligation to preserve ESI arises, or the "triggering event," is broadly stated in FRCP 26:

> Whenever litigation is *reasonably anticipated,* threatened, or pending against an organization, that organization has a duty to undertake reasonable and good faith actions to preserve relevant and discoverable information and tangible evidence. (Emphasis added)

In *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc*., 244 F.R.D. 614 (D. Colo. 2007), the court rejected the idea that the "mere possibility of litigation" triggered the duty to preserve. This determination, however, is often critical in determining whether a court will enter sanctions for spoliation.[3] The application of this rule, when no complaint has actually been filed, is far from precise, and the triggering event will vary from case to case. Common, identifiable triggering events include: the actual filing of a lawsuit or arbitration, or initiation of a dispute resolution proceeding; notice of a governmental inquiry or proceeding; receipt of a subpoena or investigatory demand; or a specific and credible written threat of a specific identifiable lawsuit or governmental investigation received directly from the party, agency or from an attorney. Other potential, less clear-cut triggers include: a general demand letter from a party or a party's attorney; media coverage of rumors of a defect in a product or service; customer complaints, without specific litigation threats, received through channels such as toll-free customer service numbers or website feedback forms; or threats of litigation not attached to any specific incident, product, service or set of facts.

The Sedona Commentary sets forth a series of broad guidelines emphasizing the importance of the process:

Guideline 1

Reasonable anticipation of litigation arises when an organization is *on notice* of a credible probability that it will become involved in litigation, or anticipates taking action to initiate litigation.

Guideline 2

Adopting a *process* for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.

Guideline 3

The determination of whether litigation is reasonably anticipated should be based upon *good faith* and *reasonable* evaluation of relevant facts and circumstances.

Guideline 4

Evaluating an organizations preservation decision should be based on the good faith and reasonableness of the decision *at the time it was made*.

The factors for reaching a decision as to whether a triggering event occurred is inherently fact specific. The point is that the effective triggering guidelines would contain policies concerning notice of a potential triggering event so that the decision-maker can make a reasonable, good faith investigation of the facts as of the time the event occurred.

"Common, identifiable trigger events include: the actual filing of a lawsuit or arbitration, or initiation of a dispute resolution proceeding; notice of a governmental inquiry or proceeding; receipt of a subpoena or investigatory demand; or a specific and credible written threat of a specific identifiable lawsuit or governmental investigation received directly from the party, agency or from an attorney."

Conclusion

There may someday be universal guidelines for the e-discovery process that companies may rely upon. But not yet. The best advice is the same as given to new Boy Scouts: "Be Prepared."

---

[1] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010); *D'Onofrio v. SFX Sports Group, Inc.*, 2010 U.S. Dist. LEXIS 86711 (D.D.C. Aug. 24, 2010).

[2] See The Sedona Conference® Best Practices Commentary On Search And Retrieval Methods *available at* http://www.thesedonaconference.org/ content/miscFiles/publications_html. (Aug. 2007). (Hereinafter "2007 Sedona Commentary").

[3] See *The Pension Comm. of the Univ. of Montreal Pension Plan v. Bank of America Sec., LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) ; *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).