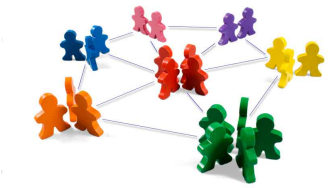
"It is not necessary to change. Survival is not mandatory."
- W. Edwards Deming

Requesting and producing discovery material in litigation has undergone a radical change - yet most practitioners cling to the paper past. In the 1850's when Abraham Lincoln practiced law he managed his client's information using paper folders. Today, most practitioners still adhere to this way of practicing law, though now we see boxes upon boxes of paper documents. Times have changed.



Computer technology and the Internet have transformed litigation from a sea of paper to a sea of electronic evidence. "According to a University of California study, 93% of all information generated during 1999 was generated in digital form, on computers. Only 7% of information originated in other media, such as paper." *In re Bristol-Myers Squibb Securities Litigation,* 205 F.R.D. 437, 440 n.2 (D.N.J. 2002).

The volume is expanding at a dizzying rate. In 2002 alone about 5 exabytes of new information was created. "How big is five exabytes? If digitized with full formatting, the seventeen million books in the Library of Congress contain about 136 terabytes of information; five exabytes of information is equivalent in size to the information contained in 37,000 new libraries the size of the Library of Congress book collections." Peter Lyman & Hal R. Varian, *How Much Information,* University of California at Berkeley, School of Information Management and Systems (Oct. 27, 2003) available at http://www.sims.berkeley.edu/how-much-info-2003.

Now, whether your clients are facing regulatory compliance, litigation holds or internal investigations the steps of identifying, preserving, collecting, processing reviewing and disclosing information is different. Understanding concepts such as "native file format," "metadata" and "residual data" and others will have to become part of your discovery protocol. More importantly, this transition to handling the huge volume of electronic evidence requires timely collaborative action. In two leading discovery cases, we see the failure of collaborative action between in house counsel, outside counsel, IT personnel, witnesses, etc. resulting in severe court imposed sanctions. In both the *Zubulake* and *Morgan Stanley* cases, the failure to preserve and disclose electronic discovery resulted in an adverse and a burden of proof inference instruction that resulted in a 29 million dollar employment case and a 1.4 billion dollar commercial case verdicts. Was this lack of timely collaboration unusual? Maybe not, one survey has noted that 75% of AmLaw 200 law firms were not qualified to handle complex EDD matters. EDDix, LLC Survey, Sept. 2004. In fact, the courts have increased the risks to practitioners themselves by suggesting that failure to preserve and disclose "finds expression not only in the rules of discovery, but also in this Court's Rules of Professional Conduct, which prohibit an attorney from "suppress[ing] any evidence that the lawyer or client has a legal obligation to reveal or produce . . . "
Danis v. USN Communications, Inc.,
2000 WL 1694325 (N.D. Ill. Oct. 20, 2000). This coupled with malpractice risks for not properly advising your clients re electronic evidence can lead to devastating firm wide consequences. No longer can counsel sit back after notifying their clients about a preservation mandate and

assume their clients are fulfilling their discovery obligations. Instead, as expressed in several leading federal discovery cases, the courts have imposed mandates requiring outside and in-house counsel, IT personnel, witnesses, and other stakeholders to timely collaborate on discovery. As a result, counsel and their clients and electronic discovery specialists have to re-engineer the discovery and production process to prevent the management and cost risks in handling electronic discovery. This simply requires a new way of thinking and immediate change on the part of companies and other stakeholders.

At a minimum, it is necessary to develop a set of litigation hold or regulatory compliance best practices focused on legal obligations, technology advancements and a commitment to work together. In an unprecedented fashion, the courts in several federal decisions have set forth in surprising detail discovery and compliance obligations for legal counsel. These obligations call for development of best practice protocols to ensure the preservation and disclosure of electronic evidence. These past decisions and future mandates have to be woven together with a corporation's document retention policies to ensure preservation and avoid spoliation charges. With paper discovery, one could compartmentalize the requisite identification, preservation and other production steps. Not so with electronic evidence, all of the stakeholders must be part of the procedural and substantive answer to data preservation. This will ensure that you have a "legally defensible collection".

Without changing your methodology of handing evidence, it is highly unlikely that your firm or clients will survive this transition.

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