



Practical Approaches to Managing Electronic Evidence

Jon P. Christiansen, Partner, Foley & Lardner LLP
Mark F. Foley, Partner Foley & Lardner LLP
Theodore (Ted) Jankowski, Johnson Controls Incorporated

April 10, 2008

1. Five Ways to Train Employees to Handle E-Discovery While Minimizing Sanctions

a. ***Train management.*** Establish Sr. management buy-in to the litigation preparation process, record retention and destruction policies, litigation holds, and litigation management process.

i. Educate senior management on the process, requirements

ii. Educate senior management on the cost; budget

iii. What's required will vary by firm culture; does management trust in-house counsel to structure and manage this activity, or is there a profound distrust of lawyers?

b. ***Train the In-house legal department*** representative to captain the internal activities

i. Must have authority to obtain cooperation and compliance from IT and record custodians.

(1) Use writing from high level executive to confirm authority where established procedures, culture, etc. do not assure that instructions will be followed

ii. Must understand technology

(1) The company's technology





(2) The technology for preserving, collecting, reviewing, and producing ESI

iii. Must understand the legal responsibility

(1) What does the law require with regard to identifying, preserving, and producing ESI

(2) When are sanctions for spoliation, failure to produce, etc. likely; how to avoid them

(3) When can/will trial counsel reveal attorney client communications in order to protect against imposition of sanctions due to client control of discovery process, client decisions, etc.

iv. Must understand the options for internal/external record collection, review and production

c. ***Train the IT representative***

i. Must report through the committee chair

ii. Must have sufficient resources: expertise, head count, financial

iii. Must have sufficient authority to cause litigation hold to be put into place and enforced

iv. Must understand the legal requirements

v. Is this person the appropriate one to testify in court concerning the appropriateness of steps taken to identify, preserve, collect, and produce relevant materials

d. ***Train your business people.***

i. Representative of the business unit concerned with the litigation



ii. Must understand the business processes used that generate potentially relevant data

iii. Must help identify the data custodians, data types, locations

e. ***Train outside trial counsel***

i. Find a multi-lingual person capable of speaking law, technology, and ordinary English

ii. Clearly defined responsibilities vis a vis the internal discovery process: conflicts between outside counsel responsibilities and clients doing discovery can be severe

iii. Consider standardizing document preservation, collection, production and review processes

2. Implement Pre-litigation Procedures

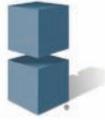
a. Prepare for your anticipated needs: Once size does not fit all

i. The occasional litigant needs to set up organizational structure, map data systems, establish and implement retention and destruction policies, conduct a dry run litigation hold procedures

ii. Frequent litigants need to set up systems with early attention to managing multiple litigation holds, cost reduction

iii. Size, frequency, and nature of litigation will determine the best way to use in-house and external resources alone, or in combination

(1) Frequent, recurring small matters may best be handled with an in-house staff knowledgeable about e-discovery rules and technology



(2) Larger, less frequent matters are most cost effectively handled using outside vendors because of the need for “surge” capabilities

(3) One or more vendors may be used for data mapping, preservation, collection, de-duplication, production, or review

iv. Pre-qualify vendors based on capabilities, technology, needs, frequent RFPs to establish market pricing

v. Draft a contract with the usual provisions to be found in an outsourcing agreement. A partial list includes:

(1) Statement of Work

(2) Warranties re training, supervision, and performance of personnel; non-infringement, no conflict of interest, no subcontracting without prior approval

(3) Deliverables and deadlines

(4) Timely performance

(5) Indemnification

(6) Confidentiality

(7) Insurance

(8) Term and Termination

(9) Remedies

(10) Conflict Resolution

vi. Use vendors to establish reasonableness of the design of the preservation, collection, and production activities, even if they do not perform the services themselves.



b. Establish data/document retention and destruction policies based on reasonable business needs

i. Establishing and implementing such policies will reduce litigation exposure and cost

(1) Data storage and destructions policies are required for coming within the safe harbor protection for inadvertent loss of relevant data.

(2) A “good faith” system requires effective litigation hold mechanisms

(3) Establishing where information of a particular kind exists will help reduce the need to search inaccessible data repositories, such as back up tapes

ii. Having a well-formulated and implemented program may reduce your insurance costs

(1) Insurers are beginning to take litigation preparation into account in making underwriting decisions

(2) Insurers are beginning to negotiate deductibles and self-insured retentions for e-discovery costs.

iii. Make email archiving a priority: most sanctions, excess costs, and high profile cases involve email.

iv. Fully explore data repositories

(1) Databases, static and dynamic

(2) Document management systems

(3) Personal storage devices (PC hard drives, removable media, Websites, server space, home email and computers, etc.)

v. Training is essential



-
- c. Establish data recovery procedures and costing models
 - i. The ability to avoid undertaking expensive back up reconstructions, or to shift the costs to the opposing party, will depend upon the quality of the information you can provide concerning the cost, complexity, and time need to complete such procedures.
 - ii. Establishing the procedures in advance helps quantify and limit the cost.
 - iii. Establishing cost accounting procedures in advance will give credibility to the numbers you provide.

3. Train employees to establish and implement litigation hold procedures

- a. Contrast two very different types of cases:
 - i. You are the archeologist – The case dealing only with past events
 - ii. You are the ringmaster – The case involves the ongoing creation of documents and messages.
- b. Six Basic Questions you will need to answer:
 - i. What types of electronic data does the company have or have access to?
 - ii. Who has access to or control of each subject of hardware, software and data?
 - iii. Where are the hardware and people located?
 - iv. What hardware, software and procedures are used to collect, access, archive, backup and restore the data?
 - v. When do these activities occur?



-
- vi. How are they carried out?
 - c. How can the company maintain relevant emails in ongoing matters without bringing company business to a halt or saving everything?
 - i. An email vault system for persons of interest
 - ii. Procedures to retain other documents
 - d. Establish litigation hold notification procedures
 - e. Establish litigation hold reminder procedures
 - f. Establish litigation hold audit procedures