REDISCOVERING E-DISCOVERY: WHAT DO I DO WITH THIS MESS?

Kathryn Walker
Bass Berry & Sims (Nashville, TN)
615.742.7855 | kwalker@bassberry.com

Best Practices for Working in the Ever-Changing World of E-Discovery
Kathryn Hannen Walker

Changes in the world of E-Discovery: E-Discovery grows more complex—and more expensive.

As legal disputes continue to increase, e-discovery demands during the investigation and discovery phases of these disputes continue to grow in parallel. Indeed, the legal demands on businesses, and their in-house legal teams, are rising. While the number of lawsuits was down in 2018, organizations are facing more regulatory proceedings and arbitrations than in the past.[1] It is estimated that for every $1 billion in revenue, a company may spend $1.2 million on disputes.[2] Likewise, it is estimated that the e-discovery industry will grow from $10 billion in 2018 to almost $19 billion in 2023.[3] The increase in legal disputes coupled with growing volume of electronic data continues to necessitate that counsel stay ahead of the curve and employ best practices in managing e-discovery demands to control costs.

These costs are in large part due to the exorbitant amount of data that is now being created by each individual within an organization. It is estimated that by 2020, each person will create 1.7 MB of data every second.[4] This large amount of data is coming from an array of sources, and new sources are created every day. These include typical sources like emails and Word documents created and stored on the employee's computer hard drive or servers of the company, but it also includes cloud-based applications, text and instant messages, data on tablets, social media, websites, electronic calendars, smart phone applications, and even streaming services. When facing a large e-discovery project, it is important to think creatively and capture the necessary data from all of these sources. Unfortunately, most companies are not staying ahead of the curve. Indeed, only 51% of enterprises with over 10,000 employees can collect from social media and instant messaging.[5] Recent case law, however, makes it clear that courts are holding parties to a higher standard, and thus, it is crucial to ensure you are capturing potentially relevant data from these new and ever-changing sources.

The exponential growth of electronic data is driven by the internet of things.[6] For example, courts are holding that text messages are discoverable and, to the extent they are relevant, must be produced. Lawrence v. Rocktenn CP LLC, No. 16-821, 2017 WL 2951624, at *1(W.D. La. Apr. 19, 2017), Walker v. Carter, No. 12-cv-05384, 2017 WL 3668585, at *2 (S.D.N.Y. July 12, 2017), and Dennis v. Red River Entertainment of Shreveport, LLC, No. 14-cv-2495, 2016 WL 8729956, at *1-2 (W.D. La. Jan. 8, 2016). Further the consequences for not appropriately preserving text messages can be serious. A court recently imposed monetary sanctions on defendants who failed to preserve relevant text messages after litigation was

1 Norton Rose Fulbright, 2018 Litigation Trends Annual Survey: Perspectives from Corporate Counsel, p. 3 (available at: https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20181105--2018-litigation-trends-annual-survey-pdf.pdf?la=en&revision=78851eda-508b-4dc5-b9a2-35a430bc45e4).

2 Id. at 4.

3 FTI Consulting + exterro, The State of E-Discovery 2019: A Survey of Industry Trends, Practices, and Challenges, p. 7 (available at: https://www.exterro.com/state-of-e-discovery-2019/).

4 DOMO, Data Never Sleeps 6.0, p. 2 (available at: https://www.domo.com/assets/downloads/18_domo_data-never-sleeps-6+verticals.pdf).

5 The State of E-Discovery 2019, at 10.

6 The Internet of Things refers to the ever-growing network of physical objects that feature an IP address for internet connectivity, and the communication that occurs between these objects and other Internet-enabled devices and systems.

reasonably foreseeable and later wiped and destroyed their phones, leaving no method of obtaining the deleted messages. Paisley Park Enterprises, Inc. v. Boxill, 2019 WL 1036058 (D. Minn. Mar. 5, 2019). Another court imposed an adverse inference instruction and awarded attorney's fees and costs after finding that defendants had intentionally spoliated evidence by, in part, deleting relevant text messages. Experience Hendrix, L.L.C. v. Pitsicalis, 2018 WL 6191039 (S.D.N.Y. Nov. 28, 2018). Relatedly, employers are expected to preserve and produce relevant data from instant messages sent by employees. Franklin v. Howard Brown Health Ctr., No. 17 C 8376, 2018 WL 4784668, at *1 (N.D. Ill. Oct. 4, 2018), report and recommendation adopted, No. 1:17 C 8376, 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018). This is made even more complicated when employees use their personally owned device to conduct business and mingle work and personal data.

Social media is also becoming an increasingly hot topic in discovery disputes. In Locke v. Swift Transportation Co., 2019 WL 430930 (W.D. Ky. Feb. 4, 2019), the magistrate allowed the defendants to obtain limited, relevant information from the plaintiff's social media accounts. The magistrate stated, "Social networking site content ("SNS") is subject to discovery under Rule 34. To fall within the scope of discovery, SNS information must meet the relevance standard, and the burden of discovering the information must be proportional to the needs of the case. Put simply, social media information is treated just as any other type of information would be in the discovery process." Id. at *2. See also Gordon v. T.G.R. Logistics, Inc., 321 F.R.D. 401, 406 (D. Wyo. 2017); Smith v. Hillshire Brands, No. 13-2605-CM, 2014 WL 2804188 (D. Kan. June 20, 2014.

Finally, parties may even be required to produce non-communicative data from applications on smart phones and other technology. For example, the court in Cory v. George Carden International Circus, found that "a mobile app that indicates a Plaintiff performs strenuous activities may be relevant to claims of injury or disability." 2016 WL 3460781, AT *2 (E.D. Tex. Feb. 5, 2016). The court also ordered that the defendant be given access to the plaintiff's fitness monitoring accessories, such as a Fit Bit. Id. at *3.

In this ever-evolving landscape, it may seem impossible—and costly—to keep up with the exorbitant amount of data that may be relevant to a dispute. However, there are some best practices that can make any e-discovery project more efficient and (hopefully) less expensive.

Best Practices: How to be efficient and cost-sensitive in today's world.

When engaging in e-discovery, it is important to think creatively and capture the necessary data from all of the types of sources—including those mentioned above. However, it is also important to collect this data in the most efficient and cost-effective manner. Whether you are in-house counsel or advising a business client, there are a few ways to efficiently manage your ESI projects by employing proactive measures to limit the amount of data a company stores and best practices to limit the scope of ESI being culled and reviewed after a legal dispute arises:

1. Create and implement reasonable data deletion policies.

In the course of running a business, employees' personal purging practices vary vastly from one to another. Some may routinely clear out their inboxes, while others keep emails forever. In order to avoid having to collect and review decade-old emails from multiple custodians, entities should implement organization-wide policies where unnecessary data is routinely purged. Furthermore, if a policy is implemented is important that the company not only enforce the policy, but also give employees time to do so.

2. Control employees' use of mobile and electronic devices and the types of applications available on those devices.

There are several policies that can be implemented that will control the amount and sources of data that employees regularly create. For example, an organization can limit the number of devices employees may use for business activities. Additionally, an organization can control what applications employees are allowed to use for work purposes. For example, providing employees with instant messaging applications on their work computer may create a large amount of additional data to collect and produce. By not allowing such applications, a company can limit at least one channel of communications that may later have to be produced.

With respect to mobile phone usage, many companies prefer a "bring your own" device scheme because it saves the company money; however, if employees regularly conduct business using their own mobile phones and co-mingle business and personal data, your entity might consider instituting a policy where the company provides its employees with mobile devices and prohibits using company phones for personal use.

3. Identify key custodians and their particular data practices early on in the process.

At the beginning of any discovery project, it is crucial to identify the key players in the dispute so you can immediately begin preserving their data. By identifying the specific individuals who possess and control the relevant data early on in the matter, you can begin to understand the data landscape for the matter and make a defensible and efficient plan. After identifying these individuals, it is important to talk to them about how they communicate, what they create, and how they store it. For example, one custodian may save all of his relevant notes within one running Word document and only communicate with other relevant individuals via email. However, a second custodian may communicate with relevant individuals via several smart phone applications and save all of his notes on an application on his tablet. By identifying the types of data and communication habits of your custodians, you can execute targeted collections that will save you time and money while avoiding missing relevant data or learning about it for the first time in a deposition.

4. Establish applicable date ranges, available data types, and search terms early on in the process, but test them before agreeing to any protocol.

Many lawyers agree to data protocols with custodians, search terms and date limitations without testing them first. While it may seem like it wouldn't be a big deal to make such an agreement without any diligence, this is a mistake and in many instances, it can substantially increase your ESI spend. While some custodians are essential regardless of their data volumes, some secondary custodians may give you more flexibility. If you know that custodian A and custodian B are essentially in the same position, but one has far more data than the other, you can suggest the one with the smaller data universe. However, if you agree without having the data to analyze, you might unnecessarily agree to something that only serves to increase your cost.

The same is true with search terms. One wrong search term can mean collecting and reviewing tens of thousands of unnecessary documents. You can avoid this by testing your terms and even reviewing sample sets of data before settling on a final agreed upon search.

5. Think outside the box (or outside the office) for your document review.

One of the largest expenditures for a document review project is attorney review; however, there are options available to reduce these costs. One option is foregoing a document-by-document linear review altogether. Instead, the parties agree to a protocol where the parties first apply search terms to the data and then apply privilege screens prior to production. To the extent a document contains a search term, but does not fall within the privilege screen, it gets produced without further review. Those documents that were captured by a privilege screen are withheld from production. While the producing attorneys might review small samples of the production set, this can be a cost effective way to produce a large volume of data in a short period of time. To the extent a privileged document is produced, the parties rely upon a clawback provision to retrieve any privileged documents.
Another option is to consider relying upon an international review team, which is supervised by trial counsel. The benefit of an offshore review team is not only a lower cost review, but also the benefit of a 24 hour review cycle. To the extent your team is in Asia, while the U.S.-based trial team is sleeping, the review team is working. When the trial team arrives at work, they can respond to questions and quality check the overnight review. In order for this type of review to be successful, it is essential that the trial and review teams are in close contact with one another.

6. Create a unique and dispute-specific plan for each new dispute.

Just because a certain process or protocol worked in one case, does not mean it makes sense for all cases. ESI discovery is ever-changing and lessons learned in one matter inform those that follow. It is important to start each new e-discovery project with fresh eyes and to always analyze the bigger picture before creating a specific plan. While several of these suggested practices may delay the actual collection and processing of data, you will save both time and money by making a creative, tailored plan to your dispute.

KATHRYN HANNEN WALKER

Member

BASS BERRY & SIMS (Nashville, TN)

615.742.7855 | kwalker@bassberry.com

Kathryn serves as assistant chair for the Litigation & Dispute Resolution Practice Group. Her practice focuses on complex commercial litigation and internal investigations, including international investigations. Kathryn has represented U.S. and foreign clients in jury and bench trials, mediations and arbitrations. She has extensive experience in data management and e-discovery, leading massive electronic data analysis projects in high-stakes litigation and investigations.

- Intellectual Property and Technology – Kathryn regularly advises clients on efficiently and effectively managing their data and has exceptional experience leading major discovery projects in complex litigation and investigations. Kathryn has litigated multiple intellectual property rights disputes involving copyright and trademark infringement, and counsels clients on IP issues, including contests and sweepstakes.

- Commercial – Kathryn represents businesses in complicated commercial litigation matters in a wide variety of industries, including insurance and healthcare. She has experience litigating substantial contract and insurance coverage disputes—with an extensive experience in both federal and state courts. She has successfully negotiated sophisticated and creative settlements in a variety of contract disputes and business transactions.

- Investigations and Foreign Corrupt Practices Act (FCPA) – Kathryn has extensive experience conducting internal investigations. She has led multiple document collection and data review teams in high-stakes domestic and international investigations, including multiple FCPA matters. She has significant experience with foreign data privacy laws and delivering cost effective, time-sensitive data-based fact-finding.

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Accolades
- The Best Lawyers in America© — Commercial Litigation (2015-2020)
- Leadership Council on Legal Diversity (LCLD) — Fellow (2013)
- Nashville Business Journal “Best of the Bar” (2008)

Education
- Vanderbilt Law School - J.D., 2000 - Order of the Coif
- Vanderbilt University - M.A., 1995
- Augustana College - B.A., 1993