

TEXAS LAWYER

July 1, 2013

An **ALM** Publication

PRACTICE FOCUS

REDUCE RISKS, COSTS WITH HOLISTIC E-DISCOVERY PROGRAM



BY PAULA W. HINTON AND CHRISTOPHER C. COSTELLO

E-discovery poses risks and imposes costs on businesses. But in-house counsel who implement a comprehensive approach to data retention, collection, processing and review can lower those costs and risks significantly.

An e-discovery program should reduce the amount of data potentially subject to collection, preservation and review, and it should do so in a defensible manner. The end result is a lower-volume, lower-cost approach to e-discovery that reduces litigation risks.

In-house counsel can reach this goal with comprehensive planning and partnerships with its outside counsel and/or vendors. There is no one-size-fits-all program and no silver bullet. However, there are several steps that companies can take to achieve this goal.

- *Decrease stored data.* In-house counsel should lead their companies to adopt document-retention policies that reduce the overall amount of data they retain. Crafting these policies requires integrating legal and regulatory requirements with business needs.

In-house counsel should obtain participation from business-unit stakeholders, so the resulting policies do not deprive the business units of information they need.

These policies should address all forms of electronically stored information (ESI),

such as email, shared files, cloud-based repositories, social media, instant messages, texts and voicemail messages, among others.

- *Create a robust process for legal holds.* All too often, managers make decisions regarding the scope and extent of a company's responses to actual or threatened litigation on an *ad hoc* basis. This approach leads to inconsistency in responses to similar actions, and it often results in the failure to preserve relevant information and, ultimately, to claims of spoliation.

This is particularly unfortunate, given that courts tend to give the benefit of the doubt to parties with comprehensive, reasonable e-discovery processes. A uniform, consistent approach should

include steps for evaluating the specifics of each legal matter and for documenting the reasons for including or excluding certain custodians and data sources. This will bolster the company's position



A UNIFORM, CONSISTENT APPROACH SHOULD INCLUDE STEPS FOR EVALUATING THE SPECIFICS OF EACH LEGAL MATTER AND FOR DOCUMENTING THE REASONS FOR INCLUDING OR EXCLUDING CERTAIN CUSTODIANS AND DATA SOURCES.



TAME E-DISCOVERY:

- **Prepare, document and implement** an appropriate document-retention program, including a robust legal-hold process
- **Retain an appropriate** outside law firm or vendor
- **Document decision-making** relating to the collection's process and scope
- **Conduct and document** targeted collections
- **Reduce total volume** of data through analytics
- **Streamline e-discovery** responses and representations

that it made reasonable efforts to comply with its e-discovery obligations.

More importantly, a critical component of any defensible legal hold process is the ability to suspend existing document-destruction and automatic-deletion practices.

- *Collect wisely.* In-house counsel can help their companies reduce their overall e-discovery burden by utilizing a targeted approach to collection, instead of collecting from too many custodians and data sources. A focused approach should reduce the total volume of ESI subject to preservation and review.

Targeted collection should involve, among other things, discussions with the relevant custodians concerning the sources of data related to the specific matter and close coordination with a company's IT department. Getting the IT department involved from the beginning will reduce misunderstandings and prevent inadvertent deletion of data through routine IT operations.

Reducing the total volume of data subject to processing and review will lower a company's overall e-discovery costs. Here again, it is important to document collection and preservation efforts and ensure that such efforts are reasonable under the circumstances.

- *Control data and maintain security.* Some companies handle initial filtering and culling themselves. Others select a single outside law firm to handle the collection, preservation and review phases. This eliminates the need to educate multiple firms, and it promotes consistency in representations to opponents and to courts.

With respect to the actual review of documents, the legal department can cut costs further by insisting that outside law firms and vendors use analytical strategies and tools to reduce the total amount data subject to review. Predictive coding and lower-cost review attorneys can make initial relevance determinations. In addition, the use of phased discovery and/or sampling can reduce costs dramatically.

Regardless of whether a law firm or vendor processes and reviews the ESI, in-house counsel should demand that all reviews maintain security of company data.

The more stops along the way, the greater chance that there will be a breach.

In-house counsel also should maintain control over the discovery process by standardizing their discovery responses, thereby eliminating the potential adverse effects engendered by having outside counsel take different approaches to e-discovery. They should also require their outside law firms to engage opposing counsel in a discussion of the appropriate scope of e-discovery, taking firm positions when necessary without indiscriminately increasing the costs and risks.

By following these steps, developing uniform processes and protocols and exercising more control over the company's ESI throughout its lifecycle, in-house counsel significantly can reduce the cost and risk of e-discovery burdens.

IN T



Paula W. Hinton is a litigation partner in Winston & Strawn in Houston. Christopher C. Costello is a senior associate with the firm in New York and a member of the e-discovery and information management practice group.