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BEST PRACTICES

As more corporations are feeling the effects of the current economic downturn and search for new ways to streamline processes and reduce costs, the entire discovery process is being approached in new ways. At the same time, legal professionals are feeling the effects of the 2006 amendments to the Federal Rules of Civil Procedure that call for greater emphasis on planning and preparing for the discovery process. Document Technologies Inc.'s Tony Merlino explains how data collection, in particular, requires attention to detail and a very methodical approach to ensure the process is not only thorough but defensible

A Methodical Approach to Data Collection

By TONY MERLINO

The days of outside counsel handling all aspects of litigation are slowly coming to an end. Corporations are often taking a lead role in their discovery projects, mainly in response to the current Federal Rules of Civil Procedure (FRCP) and, in some cases, because of today's economic conditions. This is new territory for many legal professionals, and some are learning the hard way about the importance of following a structured process every step of the way—starting at the beginning with data collection.

EDRM. Data collection on the Electronic Discovery Reference Model (EDRM), reproduced below, is depicted as a separate event from preservation. In most cases, it actually occurs simultaneously with preservation, immediately after the identification of data is completed. So much attention in the world of e-discovery is focused on the processing, review, and analysis phases

that many legal professionals lack a meaningful understanding of what is entailed in the data collection process. In the past few years, however, more emphasis has been placed on this phase in response to the amended FRCP that were adopted in 2006.

Effect of Rules Amendment. Prior to passage of the newest FRCP, electronic data had no formal definition or even acknowledgement as a specific category of evidence. Among the key effects of the 2006 amendments is the requirement that opposing parties communicate openly with one another early in the case. Rule 16 sets forth a process for discussions related to the disclosure and discovery of electronically stored information (ESI).

Similarly, Rule 26 obligates all parties to reach agreement related to potential issues involving ESI via formal planning conferences, generally referred to as “meet and confers.” They are meant to include not only docu-

ment production issues, but matters concerning privilege and evidence preservation as well. Additionally, Rule 35 requires a formal proposed discovery plan.

Recognizing that the FRCP have created a need for a responsible and defensible process, corporations and their outside counsel must adopt a methodical approach to data acquisition. Those attempting to handle this on their own are discovering what law firms have been challenged with over the past few years in regard to these newer requirements. Not only must they move quickly when a new matter arises, but they must follow a thorough and *defensible* process for collecting and preserving data. Companies with an established process may find themselves with an advantage at a meet and confer if opposing counsel has nothing comparable in place.

Team Work. With technology continually evolving, legal professionals benefit from working closely with their records and information management teams to develop a systematic approach to data collection. This helps ensure they are using the best and most appropriate tools and information for each situation. Equally important is understanding the unique nature of the data in question, which becomes more challenging because of changing technology.

Many legal teams also are turning to consultants and service providers skilled in the area of forensics. Professionals with this expertise can be invaluable in establishing defensible methods for locating, collecting, and preserving data.

One consideration is to design the process around specific project needs, rather than the familiar toolset or only solution that may be on hand. Because of the varied and diverse solutions available today, it may be helpful to segment the data collection process into specific steps, as described below.

Step 1: Consultation

A defensible data acquisition methodology starts with a consultation between the organization and its outside counsel, along with any external resources (consultants, vendors, etc.) that might be working on the project.

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Begin each project by confirming a thorough description of the matter and goals for the data collection process. Then review the parameters of the matter with emphasis on external factors, such as accessibility, that might affect the preservation of data.

While discussed as a separate step below, it is important to emphasize data preservation even at this point in the process. Although the new rules classify some data sources as inaccessible, they do not make any changes in the previous common law requirements for the preservation of data, even though at some point in the future the data source might be deemed inaccessible. The discussion on preservation should outline sources of data, present solutions that will be thorough and cost effective, and take into account the need to conduct business without interruption.

The consultation step should continue with a detailed discussion regarding the collection of data, the focus of which should be on leveraging various tools that will ensure maximum value. Today's technology allows users to preserve and collect widely to ensure all of the data potentially needed is available.

If a case has matured and the issues are sufficiently established, some service providers can collect data using a number of parameters and restrictions, resulting in a "surgical" extraction of data.

Step 2: Data Landscape

The data landscape process begins with an interview and survey of the IT staff responsible for and most knowledgeable about the key system areas containing relevant data. At this point, it's important to engage experts on each of the system types and data formats housing typically relevant data types. It also might be helpful to utilize surveys and templates created specifically for each system and data type.

Once the surveys are complete, review the information and extract the appropriate elements into a template to use in the meet and confer conferences. This information will prepare counsel to describe the information systems, retention policies and procedures, as well as an inventory of the existing data sets.

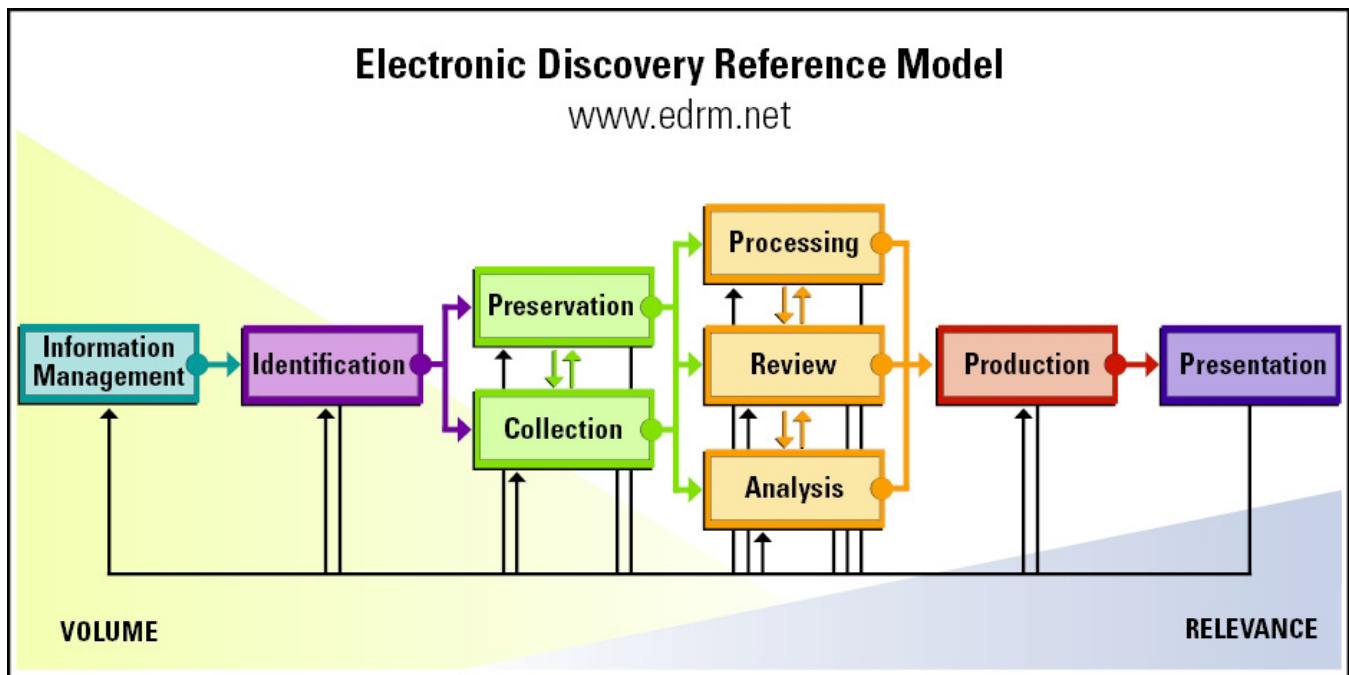
It might also be helpful to create visual depictions of the network, known as topologies, as these can be useful as demonstrative aides at meet and confer sessions and discovery hearings.

In some cases, depending on the network architecture and types of computers used, it may also make sense to execute a survey of users to help define specific data sets, locations, and parameters.

Once the landscape survey is complete and evaluated, it's time to draft preservation and collection project plans, which are reviewed and approved by lead counsel. In many cases, preservation and collection project plans can be executed simultaneously.

Step 3: Preservation

Often overlooked, preservation might be the most important step of any data acquisition project. The FRCP have proffered the concept of inaccessible data, but have not provided a description that litigants can rely on with consistency. Nor do the new rules, which are descriptive in many other respects, relieve any of the original preservation requirements.



After reviewing the data landscape, a thorough data preservation plan should be completed and reviewed by lead counsel. An effective data preservation plan protects all potentially relevant information from potential risk of destruction and spoliation.

Data preservation should be accomplished quickly and effectively. The goals of the preservation step are to:

(a) take custody, and

(b) protect the data in a format that does not alter metadata and allows for extraction, should you have to rely on it for review and production.

Using experts to identify the many types of data backup and restoration methods during this important step will ensure that the process of duplicating the data and, if necessary, removing it from the site, is handled with the utmost care and without compromising the defensibility of the entire process.

Step 4: Data Acquisition

A wide array of solutions is employed in executing the fourth step, data acquisition, among the most popular of which is the forensic image. A full forensic image is typically the best choice for data preservation; there is currently no better solution for ensuring that all potentially relevant information has been preserved.

A full forensic image is best because the result is a mirror image of the original data source, complete with chain of custody and metadata preserved in its original form and content.

The mirror image will duplicate all information on the drive, not only the data that the operating system is able to identify and locate.

The law is clear that the operating system's ability to locate data is not the arbiter of consideration for review or relevancy. For these reasons, the forensic solution and its ability to locate all available information is superior to duplication methods involving the prevailing computer operating system.

Along with the forensic image, it is extremely important that upon involvement with a potentially relevant data set, full documentation including chain of custody, be completed. The chain of custody should be established from the first encounter with the ESI, as it provides the ability to prove that data has not been altered from the initial collection point. Admission into evidence of data sets lacking accurate chains of custody might be challenged should your matter go to trial.

In addition to forensic solutions, legal teams may take advantage of newer technology providing potentially significant cost savings by using toolsets that enable preliminary culling of the document set on site, during the collection. By utilizing a targeted approach to collecting the data, exponential cost savings can be achieved by not processing and ultimately, not reviewing, nonrelevant data. The data acquisition step focuses the solution technology on a data set that is more narrowly defined than the preservation step.

While in some cases data can be culled directly from the preservation set, in other matters, large cost savings can be realized by employing a toolset that enables a surgical approach to forensically sound data collection. Some of these can isolate documents based on keywords and/or application and operating system metadata; they can cut a substantial amount of data from the collection while still providing all of the requirements of a forensically sound collection.

More capable service providers offer comprehensive solutions that combine full forensic imaging and targeted collection. The important goals are to collect data in a forensically sound manner, ensure the data or metadata is not altered, and create a complete defensible chain of custody to protect the admissibility of the data elements.

Step 5: Execution

Once these elements are in place, the final consultation with counsel will produce a project plan from the consulting expert. The project plan should contain suf-

efficient detail to re-create the personnel, dates, times, activities, toolset, and data sets to match the chain of custody and support any later needs for testimony to defend the data collection process.

Comprehensive project plans are important during the initial execution of data collection, but might also prove invaluable months or even years later if questions arise about what was collected and how.

Furthermore, experts in data collection will be armed with contingency plans throughout the process. This will make it more likely that the required data will be collected as the project progresses and challenges arise, than if the collectors had limited experience and tools at their disposal.

With the project plan in place, the consulting expert ensures proper and complete execution, involving

counsel as appropriate with changes and any additional decisions that must be made.

Need for a Framework. Few companies today have the internal resources necessary to effectively develop a comprehensive data collection plan. Consultants and service providers are available to assist legal teams with understanding how to best approach and execute the process of collection. These experts can provide insight to the newest and most appropriate technology that should be considered to achieve the best results for each unique matter, and they will complement the efforts of the internal team through each step of the way.

Whether your firm or company is handling the matter internally or leveraging the expertise of an external resource, following the steps outlined above will help establish a framework to support whatever solution is adopted to successfully execute your next project.