

Attacking the Massive ESI Project on Two Fronts



When a complex matter is filed implicating a large volume of ESI, deciding how to handle the project can be daunting.

But when in-house and outside counsel collaborate, set expectations, and divide duties, the chances for successful and efficient e-discovery are substantially increased. This article will provide the perspective of the in-house and outside attorney on best practices for managing an intensive ESI

project, as well as tips for avoiding common pitfalls and inefficiencies.

Intake and Initiation Litigation Holds

A litigation hold is a policy implemented at an organization when a dispute arises



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to ensure that potentially relevant documents are preserved for use in litigation. Although implementing a litigation hold is important in most disputes, it is very important in matters involving a large volume of ESI. The sanctions for deleting potentially relevant documents after a dispute has arisen can be severe.

For most matters, in-house counsel should issue the hold, with input from outside counsel. In-house counsel will have a better understanding of how best to disseminate the hold to his or her organization. Beyond issuing the hold, it is equally important to develop a tracking and confirmation process. The reality is that many of us receive over one hundred emails each day and most people—especially non-lawyers—are not going to read a long, boilerplate legal memo, let alone understand what their duties are. Understand how management is disseminating the instructions in the hold to their teams. One option is for in-house counsel to request time to speak at the next team meeting to go over the duties/responsibilities in person.

A litigation hold is only as good as your understanding of the organization's retention policy. Get a copy of it early on and make sure that its requirements are being followed, but also confirm that the routine deletions have been suspended. Make this confirmation again, periodically, as the matter progresses.

Identifying Custodians, Servers, Files

With the litigation hold in place, the next step is to identify and interview document custodians, *i.e.*, the subset of individuals at an organization whose ESI will be searched. While opposing counsel should ultimately be involved before ESI searches are run (to avoid the risk of having to duplicate searches), internally exploring which individuals are most likely to have relevant information will better prepare you for the eventual discussions with opposing counsel.

Similarly, learn how documents are stored on the organization's electronic and paper filing systems. Is all potentially relevant ESI stored on the organization's server? Will individual personal computers need to be imaged because custodians saved documents locally? How are company emails stored? These and other ques-

tions will need to be answered to ensure the relevant data stores are captured. And do not forget about paper documents. Those need to be part of your data gathering and preservation efforts, as well.

This stage of the intake process benefits immensely from active participation by both in-house and outside counsel. In-house

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counsel knows the organization's personnel and systems better, while outside counsel may have a better understanding of what kinds of information will be important to the litigation.

ESI Protocol

An ESI protocol is a written agreement among the parties setting forth the ESI search and production requirements. The importance of this document for cases involving a large amount of ESI cannot be overstated. Taking the time to craft the parameters of the parties' ESI obligations carefully will allow you to thwart a future argument from opposing counsel that is inconsistent with the terms of the protocol. The protocol should cover subjects such as the form of production (*e.g.*, images for emails, native files for Excel documents), what metadata must be produced (*e.g.*, "date sent" for emails, "date last modified" for Word documents), and the agreed search terms.

Outside counsel should take the lead in drafting the protocol and negotiating it with opposing counsel. In-house coun-

sel's input will be invaluable, however, especially on what search terms may be acceptable to the client organization. By consulting with the organization's IT staff and document custodians, in-house counsel should be able to provide evidentiary support for opposing certain search terms proposed by the other side.

Outside ESI Vendor

Most large ESI cases merit considering the use of an outside ESI vendor, an IT professional experienced in data storage and collection, as well as processing and hosting for review and production. Take a hard look at your client's internal IT capabilities. While you may think that having the internal IT staff collect and search the organization's ESI will save time and expense, if, for example, the original metadata is not properly preserved when collected or the search strings are not run correctly, you may find yourself having to redo the work done internally. An ESI vendor with experience in litigation support should know how to execute the needed tasks properly to produce a high-quality and thorough ESI production. And if you ever find yourself having to defend the production in court, an affidavit from an experienced, outside ESI vendor will likely carry more weight than one submitted by internal IT staff.

Related to the ESI vendor is what review platform to choose. If you are reviewing thousands (or more) documents for a case, you are going to need a platform that organizes and displays the documents and allows you to code them. For both vendors and platforms, there is a lot of competition out there. Get the best price for your client. Especially if it is a big project, the vendors will be willing to cut deals. The client is going to expect that you negotiate the deal as if it was your own money. By the same token, shop around for different platforms and capabilities. The technology is always changing, so make sure to stay current.

In-house and outside counsel should discuss what is most important in an ESI vendor and platform. Consider whether the client has worked with an ESI vendor in the past and whether it makes sense to use that outfit again. Consider what kind of ongoing support the vendor offers and whether you will be charged each time you send the

vendor an email raising an issue. For the review platform, consider how long it has been on the market, what its search capabilities are, and how much experience your vendor has with it.

Document Review

Once the documents have been collected and searched, they need to be reviewed. In-house and outside counsel should explore whether some form of technology-assisted review (TAR) should be used or whether you want human eyes on every document. This will depend on the number of documents you are dealing with, cost considerations, privilege/confidentiality concerns, and whether the client is comfortable using TAR. In-house counsel will be able to provide insight on how these options may be received by the client's decisionmakers.

You also need to decide which humans you want to review the documents. On very large review projects, it will be cost-prohibitive for outside counsel to perform all of the review. Your best bet in those situations is likely to hire contract attorneys through staffing firms. For a detailed discussion of that subject, please see "[Managing the Outsourced Document Review Project](#)," *The Business Suit* (DRI 2017). As discussed in the article, even where contract attorneys are utilized, outside counsel will continue to play a role in drafting the review protocol(s), supervising the team, and performing quality control.

Division of Labor Between In-House and Outside Counsel

As discovery progresses, consider the roles that in-house and outside counsel should play. In-house counsel will be better positioned to coordinate with non-attorney employees at the organization and to investigate the company's IT infrastructure. Outside counsel will be better positioned to communicate with the ESI vendor and the contract attorney review team.

For especially complex cases, consider dividing responsibilities even further. Consider having one attorney in-house and one attorney at the outside firm devoted exclusively to discovery. That team will not be distracted by the substantive/strategic aspects of the case. The team will make sure

that documents are reviewed and produced within the deadlines of the litigation and will be able to identify and address discovery issues before they spiral out of control.

Conclusion

Complex ESI cases demand a step-by-step approach and careful planning. Both in-house and outside counsel have roles to play and should be in frequent contact to ensure that data is properly identified and gathered, properly and timely reviewed, and produced without comprising privilege or confidentiality. 