The Power of Consistency

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Consistency is the key to success in many aspects of life: parenting, driving, cash disbursement at an ATM, team management, and eDiscovery. When it comes to eDiscovery, consistency is a key ingredient to meeting deadlines, keeping costs in check, and ensuring defensibility. But in a world where, as Greek philosopher Heraclitus noted, the only constant is change, ensuring consistency throughout the eDiscovery process can be a challenge—and it requires a combination of process and technology.

Establishing eDiscovery as a Consistent Process

The idea of establishing eDiscovery processes and plans within companies is not new. A small number of companies today have accepted the fact that eDiscovery is a necessary part of doing business and are treating it as a business process. They have established accountability and put procedures and resources in place and, as a result, they are successfully controlling costs, better managing risks, and reducing overall business disruption.

Most companies, however, still react to discovery matters as an event-driven process and rely on a patchwork of standalone activities for records management, management of electronically stored information (ESI), and eDiscovery to solve for each case. These approaches are often inconsistent, costly, and disconnected, resulting in incomplete or lost information and leaving the organizations vulnerable.

Even when policies, procedures, measurements, and audits are established, they are of little value if they are not applied consistently across the organization or results are not consistently monitored and tracked. Without eDiscovery consistency, organizations create significant risks:

- It makes it hard to ensure a complete and defensible process.

- It impedes collaboration and creates potential for miscommunication.

- It subjects the organization to greater scrutiny and possible sanctions.

The increasing prevalence of outsourced legal services can create additional consistency challenges. The more parties that are involved, the more challenging it can be to ensure consistency across the entire process. Building in a well-documented eDiscovery process at the start of a service provider relationship will help drive consistency across the board.

In short, proactively establishing eDiscovery as a consistent business process—and applying it consistently across the entire organization—enables companies to ensure a complete and defensible process.

What Consistency Means across the EDRM

The Electronic Discovery Reference Model (EDRM)[1] provides a useful framework for discussing the entire eDiscovery process. We'll use this framework to discuss what

CASE IN POINT:

Inconsistent Production Creates Massive Headaches for AIG

AIG recently suffered the consequences of eDiscovery inconsistency.* Defense counsel produced a copy of corporate minutes that had properly redacted privileged attorney-client comments. But when they produced the rest of the draft minutes to plaintiff's counsel, the privileged information was visible as metadata.

Plaintiff's counsel attempted to use the oversight to get the comments entered into evidence. Regardless of the fact that, in this particular case, the judge ultimately ruled that AIG "had a right to claw back the minutes, no matter what the circumstances giving rise to their production were," inconsistent redaction of privileged information created a big problem and threatened their case.

Other companies in a similar situation might not be so lucky.

*Brookfield Asset Management, Inc. v. AIG Financial Products Corp., 2013 WL 142503 (S.D.N.Y. Jan. 7, 2013).

consistency means across the different eDiscovery phases.

Information Management

Corporations traditionally control information management and they need consistent steps for identifying where all the ESI resides within the organization. This information is typically kept in a data map, but the challenge isn't in creating the data map, rather in maintaining it over time as systems are added, consolidated, or decommissioned. Working from an out-of-date or inconsistently maintained data map can result in incomplete or delayed production. Ensuring consistency requires assigning responsibility for data map maintenance.

Identification and Preservation

Identification and preservation are also commonly handled by corporate staff, although in recent years, some of this work has been offloaded to legal service providers. Identification and preservation entail locating potential sources of ESI and protecting against inappropriate alteration or destruction of the ESI. Failure to maintain consistent identification and preservation processes can lead to charges of spoliation and sanctions, and can potentially create a lot of headaches that aren't directly related to the merits of the case.

Collection

Collection of ESI requires the organization to gather all the data for use in the next phases of the eDiscovery process. This is often handled by multiple internal and external parties. Some larger organizations have even invested in technology — such as Guidance Software, AccessData, or Clearwell's collection module — to help facilitate the collection process. Some companies manage collection internally, others outsource it completely, and still others take a hybrid approach depending on the sources of ESI and the complexity of the case. Again, consistency is paramount. Inconsistent collection practices could lead to spoliation and sanctions.

Processing, Review, Analysis, and Production

Processing, review, analysis, and production are the phases where outsourcing is most prevalent. These are the areas where technology can provide significant benefits. Reducing the overall volume of data that needs to be sent out of the organization for these time-consuming and costly phases can greatly minimize the cost of eDiscovery, and consistency is critical to ensure that the right data is produced. Errors could result in production of privileged information (see the "Case in Point" sidebar), while incomplete production could result in sanctions. Consistent production across matters is also important. A company that produces certain documents in response to a Department of Justice request, for example, but fails to produce the same document deemed relevant in a civil suit, could face challenges.

Avoiding Consistency Pitfalls in Technology

Many technologies that purport to improve eDiscovery have emerged over the past decade or so. Some were built from the ground up specifically for discovery, while others were designed to address functions that are related to discovery, such as enterprise search, knowledge management, archiving, etc. There are a few technologies that offer basic capabilities that span the majority of the EDRM phases, but most focus their core competency within the processing, review, analysis, and production phases. These technologies can be deployed in a variety of ways, including traditional desktop installation, appliance-based, or software-as-a-service (SaaS).

Contrary to what some are saying about technology taking over, people are and will continue to be a key component of the eDiscovery process and will not be replaced by computers any time soon. Therefore, technologies must be able to provide consistent deliverables and a consistent user experience. This sounds like a no-brainer, but the truth

is that it's not uncommon for the same action to produce different results when performed by different people. This means that providing a consistent user interface is critical.

Another key component is ensuring the technology has workflows built into the system to facilitate processes and ensure consistency. Many tools focus on fitting as many features and functions into one interface as possible and this can make those systems intimidating and difficult to use. A workflow-based system, on the other hand, guides users through the steps and maintains consistent processes across all the tool's users. The ability to provide measurable results is also important so that processes can be evaluated to highlight deficiencies and expose areas that require improvement.

Consistency Creates Defensibility

Courts do not seek perfection, but they do require a good-faith effort. Ensuring and demonstrating consistency — across business processes, eDiscovery phases, employees and service providers, and technologies and their users — offers good proof of a good-faith effort.

Endnotes

[1] *http://www.edrm.net/resources/diagram-elements*

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