SEVEN COMMON DISCOVERY PITFALLS — AND HOW TO AVOID THEM

eDiscovery is complex — often involving multiple parties including enterprises, law firms, and advisory firms — which means there are many potential failure points across the process. And mistakes can have serious repercussions, including making poor decisions about the case and the potential to incur court sanctions. Here are seven common discovery pitfalls, as well as guidance to help you avoid them.

PITFALL #1: Treating discovery as an event

The problem

Most companies react to discovery matters on an event-driven basis and rely on a patchwork of standalone activities for records management, management of electronically stored information (ESI), and eDiscovery to solve for each case.

Why it matters

These approaches are often inconsistent, costly, and disconnected, resulting in incomplete or lost information and leaving the organization 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 if results are not consistently monitored and tracked. This lack of consistency makes it hard to ensure a complete and defensible process, creates the potential for miscommunication, and subjects the organization to greater scrutiny and possible sanctions.

How to avoid it

Rather than treating discovery as an event, some companies are establishing discovery as a business process by allocating resources, establishing procedures, and assigning accountability. By establishing discovery as a business process — and applying it consistently across the organization — companies can ensure a complete and defensible process, while at the same time controlling costs, better managing risks, and reducing overall business disruption.

PITFALL #2: Managing ECA and EDA as separate efforts

The problem

The goal of early case assessment (ECA) is to develop an early understanding of the case and begin formulating a strategy that is consistent with that understanding. ECA helps you make very early decisions, such as whether you are covered by insurance and which outside counsel should be retained based on the type of case. Early data assessment (EDA) includes the examination of the technology, data sources, and metadata of ESI relevant to the legal matter. The goal of EDA is to help you "right-size" your efforts so you don't under- or over-preserve by determining the types of data that potentially need to be preserved, collected, and analyzed.

Why it matters

On the face of it, ECA and EDA look like separate efforts, both offering valuable information but with little overlap. The reality, however, is that EDA should be part of ECA, as insight gleaned from EDA can be incredibly valuable for ECA.

How to avoid it

While there are solutions that tout themselves as ECA technologies, ECA isn't, in fact, a technology — it's a process. Technology itself cannot perform ECA, or even EDA. But the right process coupled with the right technology and the right people, can provide the right level of understanding at the right time. The key is to begin investigating data early in the process with iterative workflows that enable you to sample, validate, and refine data and strategies throughout the early assessment process.

PITFALL #3: Waiting until review before looking at the story the data has to tell

The problem

Many organizations go through discovery as a conveyor belt, left-to-right, hand-off-to-the-next-group process. Each stage is essentially completed before moving on to the next, with little iteration within or between phases.

Why it matters

The problem with this approach is that data is not being used to glean insights throughout the process. The data has a story to tell about the case and helps connect the dots to validate interview responses and to show key participants, timeframes, actors, and sources to assist trial counsel in developing strategy. But if the data is not explored until review, many key storylines may go unidentified throughout the process only to be brought to light at the eleventh hour — or worse, never uncovered until presented at trial by opposing counsel. By not looking into the data prior to review — and using the data to iterate and refine — teams are missing a vital opportunity to leverage subsets of data throughout the process to help drive strategy.

How to avoid it

You need to interact with the data throughout discovery to delve further into the data set. Within the review process, reviewers go through four or five iterations of each document, narrowing focus and digging deeper at each level. The same logic should be applied at a higher level to all the stages — both within and across phases — leading up to review.

PITFALL #4: Conducting custodian interviews before investigating the data

The problem

The custodian list is typically developed at the very beginning of the matter, and then the custodian interviews are used to identify and locate potentially responsive ESI. But, as previously discussed, the data typically isn't examined to validate and refine search parameters.

Why it matters

Interviewees — whether they are bad actors or not — tend to provide answers that are either self-serving or provide the information they believe you want to hear.

How to avoid it

When you start interviewing key personnel, begin developing searches from information gathered in those interviews right away so you can investigate results to find additional points of interest and low recall. Refine and re-interview as needed to understand and uncover more — then repeat if necessary. Using the data to direct custodian interviews, as opposed to letting custodians point you to where the data might live, will help you uncover more valuable and useful information and help to limit surprises during the review phase.

PITFALL #5: Treating eDiscovery search as enterprise search

The problem

Enterprise search, which is based on speed and simplicity, is designed to process a single search query and deliver results for that particular search. It's like when you use Google, you aren't privy to what the engine as actually searched, only the results. In discovery, however, while speed and simplicity are important, users also have to be able to show how their searches were executed.

Why it matters

In discovery, people tend to begin a search thinking they know what they're searching for and often don't deviate from their original assumptions. Keyword searching is used as a culling process to remove nonresponsive documents. But using search in such a linear fashion can result in key themes and documents — and even potential custodians — being overlooked.

How to avoid it

Instead, use search terms to target what you know and then investigate those results to uncover what you don't know. Broadening the scope — not narrowing it — helps identify things that might not get picked up by blind searches. The themes contained within a data set can go in many directions, but you can't reasonably find the themes if you are only chasing one of them.

PITFALL #6: Using discovery technology with sub-par reporting capabilities

The problem

Lack of quality reporting plagues the legal discovery industry. Perhaps because of this, courts are asking for increased visibility into the discovery process and clients of law firms and service providers are expecting more detailed information faster.

Why it matters

Reporting is the way you tell the story of your data. It helps provide direction and support for your case. It's also an audit trail of what you've done — insurance that you've performed all that is necessary to locate and provide evidence. And for law firms and service providers, it's integral to good customer service — reporting early and often is a differentiator and a way to reassure the client that what they're getting back is as accurate and complete as possible.

How to avoid it

Make reporting a key requirement in eDiscovery technologies, and then make sure that those systems provide reporting as a core feature that was built in from the start, not bolted on as an afterthought. Evaluate the solution to ensure that it offers a wide scope of reporting, enables you to report on anything in the system, doesn't require database scripting to create reports, and delivers reports in user-friendly formats.

PITFALL #7: Re-classifying the same data, case after case

The problem

During the course of a matter, a tremendous volume of data is classified, including a significant volume of "sensitive" and "junk" data. But at the conclusion of the matter, those classifications are essentially discarded. When another matter arises, the classification process begins again and much of the same sensitive and junk data is re-collected, re-processed, and re-categorized.

Why it matters

While "relevant" and "not relevant" classifications tend to be case-specific, "sensitive" and "junk" are not, so losing those classifications at the end of one case means unnecessary time and money spent on reclassifying that data case after case.

How to avoid it

Expanding classification beyond the eDiscovery review process, and retaining classifications within the organization outside the context of a particular case, makes the collection and processing of ESI more effective and the identification and retrieval of documents easier.

Forewarned is Forearmed

A process as complex as eDiscovery can never be completely bullet-proofed. But being aware of common mistakes — and taking proactive steps to combat them — will enable you to shore up the weak links and ensure that your discovery process is as complete, effective, and defensible as possible.

About Mindseye

Mindseye is a leading provider of eDiscovery software solutions. The company's flagship eDiscovery platform helps organizations manage risk, minimize legal exposure, and eliminate wasted time and money throughout the discovery process. Organizations that use Mindseye can quickly input and access early data to make cost and resource estimates, formulate strategy and case direction, and ultimately move less but more relevant data to review.

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