Courting e-discovery challenges and opportunities
Beth Patterson

Teamwork is required to understand the legal, technological and business implications of a new generation of e-discovery issues, writes Beth Patterson in the latest of a series of articles on e-discovery.

Electronic discovery, also known as e-discovery: relevant evidence in a court case that resides in electronic form. It includes all types of electronic files, including web pages, email correspondence, as well as database, word processing and spreadsheet files.
– YourDictionary.com

The e-discovery process is much better understood than it was even five years ago, but still it presents challenges. As the third generation of e-discovery unfolds, it is being driven by improved understanding by the courts and more defined obligations.

Whether involved in litigation or a response to a regulatory inquiry, it is highly likely these days people will be faced with the challenge of producing the relevant electronically stored information, or ESI. That ESI may come in myriad forms from an almost unlimited number of places.

You may be a litigant who, after collaborating with the legal team, determines that well over a million emails and documents in two different countries stored in five different software systems in addition to hundreds of backup tapes may be discoverable. In addition, you might find there are text messages and voicemails, as well as social networking sites, which hold discoverable information.

These days, this is not an uncommon scenario. Even when not faced with these volumes, the complexity of finding, reviewing and producing ESI can be overwhelming.

In the face of this complex challenge, businesses are demanding more efficient and cost-effective processes to collect and cull ESI for legal review. In 2006, George Socha and Tom Gelbmann developed the Electronic Discovery Reference Model (EDRM) that sets out a nine-phase process (see www.edrm.net) and is a useful guide to assist in planning stages of your e-discovery.

Now more development is focused on solutions, both legal and technical, to address the earlier phases in the EDRM. So it is clear that more options exist to make an e-discovery more efficient. In the legal and
technical worlds, these options will continue to change with the development of case law and technology.

Plotting a strategy
It is important to address some effective strategies that can be used in each of the phases of an e-discovery. In this piece we explore the initial phases of information management, identification and preservation.

Typically, although these three phases are controlled and managed within businesses, they have not been given the highest priority by businesses. This low prioritisation, combined with technological advancements, has resulted in a new opportunity for consultants, referred to as ‘litigation readiness’. Ultimately, the more time spent preparing an organisation for litigation readiness, the more efficient – both in time and in cost – the response will be to an e-discovery should a litigation or regulatory inquiry arise.

Useful strategies that may be part of a litigation readiness program include implementing a document retention policy that includes what information businesses hold and how long they need to hold that information. Document retention periods will be determined by legal obligations and risk management, but generally the policy should address the creation, retention and destruction of documents. Litigation readiness programs also address procedures for retrieval of documents.

Because ESI is often scattered across a range of disparate systems, retrieval can be complicated, time-consuming and expensive. Focus on the trade-off between storing everything versus being able to find it quickly and cheaply has resulted in the development of data maps, used to identify where potentially relevant data resides, from IT, legal and business perspectives. Key custodians, dates, systems, formats and locations are mapped out in data maps.

In-house counsel should be involved in the design of new IT systems to ensure appropriate data can be preserved and retrieved in the most cost-effective manner. New technologies that can assist the identification of ESI for both preservation and collection include enterprise search systems and archive systems.

It is imperative that potentially relevant documents are preserved, and the test for when they need to be preserved varies across jurisdictions. Your IT department will be the key in assuring preservation orders are met. A detailed understanding of the company and how it functions is imperative.

Consideration needs to be given to suspending any automatic processes, IT department procedures (e.g. deletion of emails after a certain time, or overwriting backup tapes) or employee action that overwrites...
or deletes potentially discoverable documents. Such suspension is referred to as a ‘litigation hold’. For large organisations, this can be difficult to implement and enforce; however, there are some recently developed software products that can assist with managing litigation holds.

Risks of document destruction need to be weighed against operating the business ‘as usual’. In-house counsel and their lawyers will carefully consider these issues in refining comprehensive and well-formed document retention policies and litigation hold procedures.

Understanding the overall litigation risk profile and regulatory environment may seem obvious, but understanding how business units carry out IT policies compared to actual practices is imperative. Lawyers and IT must work together to understand the IT architecture, policies, personnel and, most importantly, culture. It is common to find that employees’ actual practice does not follow policy.

**Working as a team**
As the e-discovery area matures, so too does the relationship between legal, risk management, corporate governance, IT, records management, business line leaders and senior management. The teams needs to work together to understand the legal, IT and business implications of e-discovery and each stakeholder will approach it with different drivers – risk, efficiency and profit – respectively.

A useful resource which is currently being developed is the Information Management Reference Model (see www.edrm.net/resources/guidelines/imrm). The stated goal of the project is “to provide a common, practical, flexible framework to help organisations develop and implement effective and actionable information management programs” and it seeks to “facilitate dialogue among these stakeholders by providing a common language and reference for discussion and decision-making based on the needs of the organisation”.

To date, the better understanding of e-discovery processes has improved efficiencies to the extent that discovery obligations can be met in a more timely and cost-effective manner. However, the changing legal and technical landscape will continue to present further challenges. Staying abreast of developments will help you to manage and respond effectively to those challenges.

*Beth Patterson is director of applied legal technology at Allens Arthur Robinson.*