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The Most Debated E-Discovery Issues

Preserving and Collecting New Data Types

Webcast Companion



In Exterro's latest 5-part webcast series, we look at some of the most debated topics in E-Discovery. According to a recent Exterro survey, in-house legal and IT professionals deemed Preserving and Collecting New Data Types as the most controversial e-discovery issue from 2015, with 67% of respondents listing this as one of their top 5 most controversial e-discovery issues at their organization.

Right now there is a lot of uncertainty around what is required to collect from these new data sources and how to preserve/collect this data in a defensible, cost efficient fashion.



INTRODUCTION

Almost any activity we take part in creates data; it no longer resides just on email servers or your laptop or mobile phones. Data resides in the cloud, in apps, on social media, in your watch or fitness tracker. There are a series of challenges that collectively make preserving and collecting these new data types a headache, but they can't be ignored in the hopes they'll go away. The data is still there, waiting to be collected.

BACKGROUND

To give a little background on why legal is so cautious around new data types, one only has to look at the obligation to preserve data set down in the Federal Rules of Civil Procedure (FRCP).

Case Law Example #1

Danielle Mailhoit v. Home Depot USA (C.D. Ca. 2012)

The court ruled that this production request met the requirements under Rule 34(b) by (1) placing the plaintiff on notice of what information to produce and (2) being reasonably calculated to lead to discovery.

Case Law Example #2

PTSI, Inc. v. Haley (Pa. Super Ct. 2013)

Here the court analyzed the value of the spoliated text messages and what importance it played in the court's adjudication. The court found that "substantially similar" electronically stored information was available to the plaintiff from other sources. As a result of this three part analysis, the trial court held that spoliation sanctions were not warranted.

KEY CONSIDERATIONS WITH NEW DATA TYPES

There is no question that business is conducted by alternative data sources. For example, a recent study found that 60% of merger and acquisition transactions are closed by text message. If litigation arises, then those texts have to be collected. Or if your team is using Slack as a collaboration tool, and litigation arises around that particular project, it's possible that you'll have to preserve and collect from Slack. As Lori Ryneer, E-Discovery Paralegal, Deere & Company, says, "Understanding what platforms are being used and how to preserve from those platforms before a legal hold is placed" is a vital step in successfully dealing with new data types.

With new data sources there is a tug of war between business needs and legal/regulatory obligations, but regardless, the obligation to collect remains the same. But the overall approach also remains the same, as Antonio Rega, Director of Berkley Research Group, points out: "The essence of how to deal with these new media types is not really that different from the way we've handled media types in E-Discovery all along, which is to identify data within an organization and then decide what to do with that data. Once there's an understanding of what exists, then you can plan collection strategies."

DATA TYPE CLOUD

Webcast Attendee Poll Question

What cloud applications is your organization currently using?



- 26% Gmail, Google Drive
- 45% Office 365
- 42% Dropbox
- 11% Amazon
- 42% Other

Challenges

- Avoiding metadata spoliation
- Alternative data sources within platform (such as an instant messaging tool)

DATA TYPE
SOCIAL

Webcast Attendee Poll Question

What social media applications is your organization currently using?



- 68% LinkedIn
- 61% Facebook
- 58% Twitter
- 15% Yammer
- 20% Other

Challenges

A major challenge arising with social media is that courts are demanding more specificity when it comes to collection rather than broad "fishing expeditions."

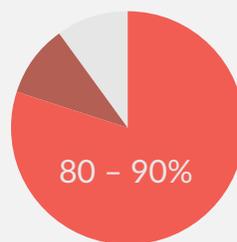
DATA TYPE
INSTANT MESSAGING

Webcast Attendee Poll Question

What instant messaging applications is your organization currently using?



- 36% Lync
- 2% Google Talk
- 33% Skype
- 40% Other



80 – 90% of all companies use instant messaging...

Of those, 80% use third-party programs

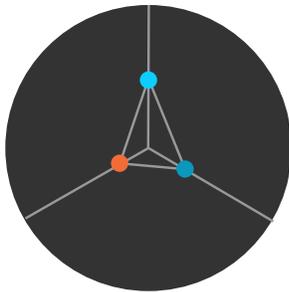
Challenges

- IM doesn't often have clear timestamps and date ranges
- Collection often takes place as a data dump into a spread sheet that doesn't contain usable information
- Most current collection methods are manual or customized applications

DATA TYPE
MOBILE

Webcast Attendee Poll Question

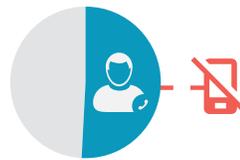
What is your organization's policy for using mobile phones?



- 46% I can use my personal phone
- 31% I am issued a company phone
- 23% I use both my personal phone and company phone for business



50% of large companies have had to preserve/produce employee mobile data.



51% of employees subject to a policy banning personal devices for work use them anyway.

HOW TO QUELL THE CONTROVERSY



Collection/Preservation Checklist

- What data is currently being stored?
- How and where is that data preserved?
- How is that data accessed?
- Put policies and procedures in place, and train/audit for compliance
- Always Communicate: Talk to IT, Talk with Peers, Talk with other Business Units
- Work with outside counsel/consultants to create a reasonable process for preserving/collecting these new data types



“Create a robust data interview spreadsheet: ask everyone what their data sources are and how each data source works.”

Lori Ryneer
E-Discovery Paralegal,
Deere & Company



“Involve everyone in conversations with policy development, and educate them on the need, consequences, and various roles surrounding these policies.”

Caroline Sweeney
Global Director, E-Discovery & Client Technology
Dorsey & Whitney LLP

HOW TECHNOLOGY HELPS

Data Mapping

- Legal and IT can collaborate for a timely, agile response to document production
- Reduce cost and workload with more efficient early identification and elimination of unneeded data sources
- Dramatically improve the accuracy of information assets and reduce the risk of missing crucial ESI.

E-Discovery Data Management

- Rapidly understand the implications of a new matter, identify key documents, and make try-or-settle decisions long before the 26(f) or other pre-trial conference
- Perform targeted collections and document review with a “one-click” ability to collect only relevant files that are identified during ECA
- Intelligently and accurately narrow the ESI “funnel” as early as possible and at multiple stages for a 50-70% reduction in document review costs