



Best Practices in Discovery Planning: The Discovery Response Team

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Executive Summary

Litigation – and, as a result, e-discovery – is a routine part of doing business today for many companies in heavily regulated or highly litigious industries. Containing cost and managing risk have risen in priority as many legal departments now look for ways to improve the efficiency and quality of their discovery responses. Proactive organizations are increasingly implementing formal discovery business processes. Integreon details a best-practices approach for establishing discovery as a business process in its white paper, “Best Practices in Discovery Planning: Establishing Discovery as a Process.” Another critical component for discovery planning is the creation of a discovery response team to efficiently execute and effectively manage the discovery process.

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Yet according to a survey conducted by the Economist Intelligence Unit for Deloitte Forensic Center, 35 percent of respondents have not created a cross-functional DRT or similar group. In fact, only 55 percent of organizations surveyed even have senior executives with some level of commitment to e-discovery.²

This paper discusses the roles and responsibilities of the DRT and recommends best practices for building the team, including tips to help set the stage for the team’s success.

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– Patrick Zeller, *Inside Counsel*, “Technology: Creating a discovery response team,” July 15, 2011

What is a Discovery Response Team?

A DRT is a cross-functional group that includes members representing different departments from across the organization, each bringing key knowledge to the team. The DRT provides governance and oversight of the discovery process and serves to ensure its consistent application. The DRT is also responsible for developing discovery policies and procedures and for guiding the organization through the discovery process whenever litigation arises or is anticipated.

Establishing an effective DRT can help your organization greatly reduce the costs associated with discovery. A DRT can also reduce the impact of litigation on daily business operations by assembling internal expertise and domain knowledge – particularly of key personnel and the IT infrastructure – and driving repeatable processes that will increase the efficiency and quality of discovery responses.

Roles and Responsibilities

For any business process to successfully take hold, it requires ownership – backed by executive sponsorship – and accountability held by someone in a position of authority and influence within the organization. In most companies, ultimate ownership of and accountability for discovery lies with general counsel, and it often must also be a priority objective for IT, records management, compliance, and other related functions. In some organizations, the CFO is also starting to take an active interest and pushing procurement to get involved as it relates to outsourcing or acquiring technology.

¹ Zeller, Patrick, *Inside Counsel*, “Technology: Creating a discovery response team,” July 15, 2011.

² Deloitte Forensic Center, “E-discovery: Mitigating risk through better communication,” 2010.

Whether the first step is initiated by the GC or by the CFO or procurement, the next challenge is to overcome organizational politics and/or inertia. For many organizations, this is most effectively accomplished by hiring or appointing an attorney or an IT or other highly technical resource to spearhead the initiative under the guidance of the GC. Alternatively, organizations can hire a consultant or a service provider can be engaged to provide guidance, expertise, and best practices throughout the planning and process development phases. Bringing in outside help can add a depth of expertise to an organization that is not available internally. In any case, it's important to bring help in as early in the planning cycle as possible.

LEGAL

Legal is essentially the “project manager” for the team and provides the legal context for the decisions made and tasks executed by the team. Some companies even hire discovery managers or coordinators, ideal candidates to spearhead the DRT. A survey of Fortune 1000 corporations found that 45 percent of respondents had hired internal staff to help manage the discovery process³, which may also include educating the DRT and the wider corporate audience about discovery.

Absent an active matter, it is legal's role to provide the guidelines for ensuring that the DRT meets its responsibilities, including:

- Identifying areas for improvement – Audit past matters and perform a gap analysis to identify areas for improvement in the discovery process.
- Establishing or refining the process – Ensure the discovery process works with current business procedures and establish new processes or make refinements where necessary. It is important to stay abreast of recent case law and the impact it may have on these processes.

INFORMATION TECHNOLOGY/INFORMATION SECURITY

In today's environment where the vast majority of information is created, transmitted, and stored electronically, the IT and IS functions also play a critical role on the DRT. IT understands the infrastructure, knows where data reside, and is the primary owner for the organization's data map (see sidebar). If you bring data collection in house, IT and IS are responsible for developing the methodologies, managing the technologies, and overseeing the process. Legal and IT/IS together are commonly the predominant drivers of the DRT.

The Data Map

A data map⁴, in the context of electronic discovery, is a detailed representation of the type and location of all ESI throughout a company that may be relevant to electronic discovery. Examples of systems that can be mapped include:

- **Servers** – Active and dynamic data, such as file servers, email servers, and voicemail servers
- **Data management systems** – Backup tapes, financial systems, and disaster recovery systems
- **Endpoints** – Desktops, laptops, and smart phones
- **Portable media** – Flash drives, hard drives, CDs, and DVDs
- **Data hosted by third-party vendors** – Payroll systems and cloud providers

RECORDS MANAGEMENT

Records management (RM) plays a mainly advisory role on the DRT. RM understands how records are classified, stored and, ultimately, destroyed, and may even have the best information on where data reside and who to contact to get access to it.

COMPLIANCE

Compliance – whose role is also primarily of an advisory nature – helps the DRT understand the relevant regulations and can advise on responsibilities and implications relative to a specific case.

AUDIT

Audit – also an advisory role – helps the DRT understand the risks associated with the adoption of new business processes and can provide feedback on mitigating identified risks.

BUSINESS UNITS

Key business units (BUs) should have representation on the DRT. It is especially important to have a liaison within each of the BUs actively involved in litigation. In the event

³Kaplan, Ari, “Advice from Counsel: Best Practices on Controlling E-Discovery Costs,” 2009.

⁴H. Christopher Boehning, Daniel J. Toal, and Ross Gotler, *New York Law Journal*, “Know Your Data: Creating a map to help identify ESI,” November 5, 2007.

that a BU is involved in litigation, the BU's representatives will help facilitate the needed steps in the discovery process while ensuring minimal disruption to the business. This is important because data collection can sometimes seem invasive to employees.

OUTSIDE COUNSEL AND THIRD-PARTY SERVICE PROVIDERS

Including external parties such as outside counsel and third-party service providers is important for maximizing the effectiveness of the DRT. Outside counsel can advise on applicable rules and provide guidance on specific matters. For example, a case at the state level may have different implications for the discovery process than one at the federal level. If you work with a large number of law firms, you may choose to include the outside counsel that you use most for matters having a significant discovery component. Include third-party service providers to ensure that you are not making decisions in a vacuum and that you involve those who are responsible for execution. Both outside counsel and service providers can bring valuable expertise and advice to the DRT, leveraging experience with other clients and matters and providing experts who can offer guidance on best practices for policies and procedures.

Keys to Building a Successful DRT

GET EXECUTIVE SPONSORSHIP

Executive sponsorship is critical to the success of the DRT. Without a top-down mandate, it is difficult to ensure that all team members will have the appropriate accountability and support to be effective.

ESTABLISH CLEAR GOALS AND OBJECTIVES

The goal of an effective DRT is to provide information in a repeatable, efficient, and timely manner regardless of the request. This requires clear roles and responsibilities for each member of the team. While team members will have varying backgrounds and expertise in discovery, they all share one objective: to better manage ESI and the discovery process.

ALLOCATE TEAM RESOURCES APPROPRIATELY

Being on the DRT gives team members new responsibilities in addition to their primary job functions, which likely require shifts in time and resource allocation. Absent litigation, team members are responsible for attending meetings and participating in short- and long-

term projects such as process improvement, RFP process management, and vendor and technology selection. During active litigation, team members will need to spend significant time on discovery-related tasks including weekly or even daily DRT meetings, depending on the matter.

ESTABLISH REGULAR MEETINGS AND COMMUNICATIONS

In order to be effective, the DRT needs to establish a routine schedule of meetings and communications. While the team will need to meet more frequently during periods of active matters, there should be a regular schedule of routine quarterly meetings. A typical agenda for the quarterly meeting includes:

- Discussion of any active matters
- Overview of relevant changes in the industry over the previous three months, including:
 - Relevant changes in case law and regulations
 - Prominent e-discovery cases going on in the industry or at comparable companies
 - New technologies or best practices
- Overview of relevant changes in the organization over the previous three months, including:
 - New or changed global policies and procedures
 - Funded and in-progress corporate initiatives that could affect the discovery response plan or require updates to the data map
- Audit protocol and updates including continuing process improvements and internal project status updates
- Regular team-building exercises to reduce friction among the team when high-pressure matters arise

Create an Employee Awareness Program

In order for the DRT to effectively manage discovery when a matter arises, it's important that all employees in the organization understand and follow the policies and procedures and know what to expect in the event they are involved in the discovery process for a specific matter. The DRT should create an employee awareness program and a series of ongoing communications and training so that employees understand:

- What discovery is and why it is important.
- What the company's discovery and legal hold policies and procedures are and how they can be accessed (e.g., on the company intranet or document repository).
- Why these policies are important and why procedures must be consistently followed. Provide examples to show the potential negative impact that non-compliance can have on the business. For example, inconsistent records retention and destruction can result in saving records that are neither needed for business purposes nor required by regulation or law, raising the burden, complexity, and cost of electronic discovery.
- What steps must be taken when litigation arises and what will be expected of employees. This includes an overview of the company's litigation hold process, as well as an overview of the DRT and its responsibilities.
- The potential consequences to the organization of improperly followed discovery processes. There is a significant volume of relevant case law where companies were sanctioned or even lost cases as a result of improperly handled discovery. DRTs help educate employees with specific examples, such as:
 - **3M Innovative Props. Co. v. Tomar Elecs., 2006 WL 2670038 (D. Minn. Sept. 18, 2006)** – “In this patent infringement litigation, the district court judge affirmed the magistrate's report and recommendation that plaintiff's motion for sanctions against the defendant be granted in part. 3M offered three bases for sanctions: (1) Tomar gave false discovery responses; (2) Tomar failed to retain, collect, and produce court-ordered documents; and (3) Tomar engaged in deposition misconduct. 3M requested that judgment be entered against Tomar, or alternatively, that the court issue multiple sanctions including an adverse inference instruction.”⁵
 - **Bd. of Regents of Univ. of Neb. v. BASF Corp., 2007 WL 3342423 (D. Neb. Nov. 5, 2007)** – Where plaintiff failed to implement litigation hold and produced responsive documents some 18 months after deadline set by earlier court order, court ordered plaintiff to (1) conduct comprehensive search and produce responsive documents, (2) certify its compliance, (3) immediately impose a litigation hold on all possibly relevant documents, (4) make certain witnesses available for re-deposition, and (5) pay the opposing party's reasonable expenses in filing the motions; court also ordered plaintiff's counsel to submit affidavits detailing what was done to ensure compliance with court orders and suspended case deadlines.⁶
 - **E*Trade Secs. LLC v. Deutsche Bank AG, Civil No. 02-3711 RHK/AJB and Civil No. 02-3682 RHK/AJB (D. Minn. Feb. 17, 2005)** – Magistrate recommended sanctions in the form of an adverse inference instruction and attorneys' fees where party committed spoliation by permanently erasing hard drives, failing to retain DVDs of relevant audio recordings, and failing to place adequate litigation hold on email boxes while making no changes to its three-year retention policy for email backup tapes.⁷

Given the potential severity of consequences, educating employees on proper discovery policies and procedures – and making sure they are equipped to follow them when a matter arises – is critical to minimizing risk in the discovery process and, therefore, represents an important responsibility for the DRT.

Conclusion

Establishing a DRT is a crucial step in discovery planning. An effective DRT follows best practices for managing the discovery process in order to meet litigation or regulatory requirements while minimizing cost, risk and business disruption. The DRT can also be a tremendous asset to outside counsel in preparing their case and helping develop a winning strategy for handling ESI.

⁵ K&L Gates, *Electronic Discovery Law*, “Failure to Conduct Reasonable Investigation for Responsive Documents and Other Discovery Abuses Warrant Adverse Inference Instruction,” September 21, 2006.

⁶ K&L Gates, *Electronic Discovery Law*, “Sanctions Warranted for Failure to Comply with Court's Production Order and Failure to Implement Litigation Hold,” December 1, 2007.

⁷ K&L Gates, *Electronic Discovery Law*, “Magistrate Recommends Adverse Inference Instruction and Monetary Sanctions for Failure to Preserve Hard Drives, Audio Recordings and Email,” March 1, 2005.

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