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Top 10 strategies to mitigate e-discovery risk in consumer class actions
In today's legal world, the risk of spoliation is ubiquitous and significant for both clients and counsel
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Increased consumer class action litigation and an exploding digital universe profoundly affect the management of data by consumer products companies and others. By all accounts, consumer class action filings continue to rise, in part due to the willingness of certain courts to permit certification in consumer and product liability class actions.

The proliferation of ESI in modern business, the breadth of U.S. discovery rules, and the availability of sanctions where discoverable information is mishandled can turn litigation into a high-stakes game of "gotcha." Too often in e-discovery, burdens are viewed as leverage and missteps are proffered where merits are lacking. In a world where nearly all complex litigation involves significant amounts of ESI, the risk of spoliation is ubiquitous and significant for both clients and counsel. For example, see *In re Pradaxa Prods. Liab. Litig.* ($931,500 sanction); *E.I. Du Pont Nemours & Co. v. Kolon Indus., Inc.,* ($920 million jury verdict); and *Barrette Outdoor Living, Inc. v. Mich. Resin Reps.* (irrefutable adverse inference instruction).

This article highlights some of the strategies that companies can use to mitigate e-discovery risk in class action and other litigation. Case needs are often fact-specific, and these tips should be considered in proportion to the needs of the case in consultation with counsel.

1. Select experienced counsel

The complexity of e-discovery and the importance of having counsel who understands technology as well as law has been widely recognized. The American Bar Association recently approved an important new revision to the comments following Model Rule 1.1 — the cornerstone requirement that an attorney shall provide "competent representation" to a client — to state that a "lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*[.]" (Emphasis added.)

2. Preservation notices and measures

When litigation is reasonably anticipated, a preservation notice should be sent. In almost all cases, the notice should be in writing. It also may be prudent periodically to send reminders of the legal hold. Steps also should be taken to disable auto-deletion, archiving, and other processes that could purge discoverable information while the hold is in place.

3. Custodial interviews

Custodians usually know best what information they have and where they keep it. As a result, defensible preservation and collection may require custodian interviews or

questionnaires, as well as interviews of persons knowledgeable about the company's IT systems.

4. Policies for departing or transitioning employees

Care should be taken to ensure that data of employees who are leaving the company or changing jobs within the organization is preserved. Deletion of such data not only may be a problem for preservation purposes, but it also may hinder the company's affirmative case. To avoid this result requires coordination among human resources, IT, legal and any business unit, department or personnel inheriting data of departing or transitioning employees.

5. Identify sources of relevant data

As new data sources are created constantly — including smartphones, tablets, cloud storage, and external media, any of which could be company-issued or personal — it is important to have policies in place for identifying, preserving and collecting from such sources if and when necessary. Employees should be asked during the interviews described above about their use of personal and/or mobile devices and non-standard storage locations. Consider also any central, shared, and offsite storage locations.

6. Adopt appropriately tailored collection methods

Data collection methods vary, ranging from photocopying, to printing, to having custodians forward documents via network storage or email, to full forensic collections performed by vendors and backed by testimony or affidavit. The collection method selected should be tailored to the needs of the case and evaluated early to avoid costly recollections.

7. Know where your data lives

As storage becomes increasingly digital, cloud-based, and multinational, counsel should consider whether relevant data is located outside the U.S. where local laws may restrict the collection and production of such data in U.S. litigation.

8. Answer technology with technology

Where available and cost-justified, consider using advanced technologies to reduce time and expense and improve quality of search and review. The more data requiring "eyes-on" review, of course, the more expensive and time-consuming review will be. Traditional linear review may make sense for small collections, while predictive coding and other technology-assisted review tools may make sense for larger collections. Also consider other technologies and techniques such as email threading; near-duplication; conceptual search and culling; global deduplication; and filtering by date ranges, file types, and other metadata.

9. Consider ESI protocols and Fed. R. Evid. 502(d) orders

A strong ESI protocol entered early in litigation can save significant time and expense and avoid disputes. Topics may include form of production and other technical issues, allocation of costs, phased discovery, dispute resolution and appointment of ESI liaisons. If the other side will not agree to a reasonable protocol, consider filing a motion, especially where the proposed terms are objectively reasonable and/or based on principles adopted or endorsed by other courts (*e.g.*, the 7th Circuit E-Discovery Pilot Program).

In any case involving significant discovery in U.S. federal court, strongly consider having the court enter a non-waiver order under Federal Rule of Evidence 502(d). Rule 502(d) is the most powerful (and, some say, most underutilized) protection against privilege waiver available.

10. Proactively govern information

Some estimate that as much as 70 percent of enterprise data is "digital debris" — expired under retention schedules, having no business value, and not subject to legal or regulatory retention. Ongoing, timely and consistent remediation of such data can reduce storage and litigation costs, mitigate legal and compliance risks, and increase efficiency. Even modest investments in effective information governance can deliver substantial returns, but must be approached carefully and thoughtfully.

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