Records, Compliance and Legal Solutions

Océ Business Services

Guide to Discovery Readiness:
A Roadmap for Successful Planning & Collection

Contents

The planning and collection phases of responding to production requests today requires approaches that address the volume, dynamic nature, complexity, and diversity of electronically stored information as well as the continuing need to address physically stored information. The efficiency of the collection phase is determined by how well the planning phase is implemented.

eDiscovery

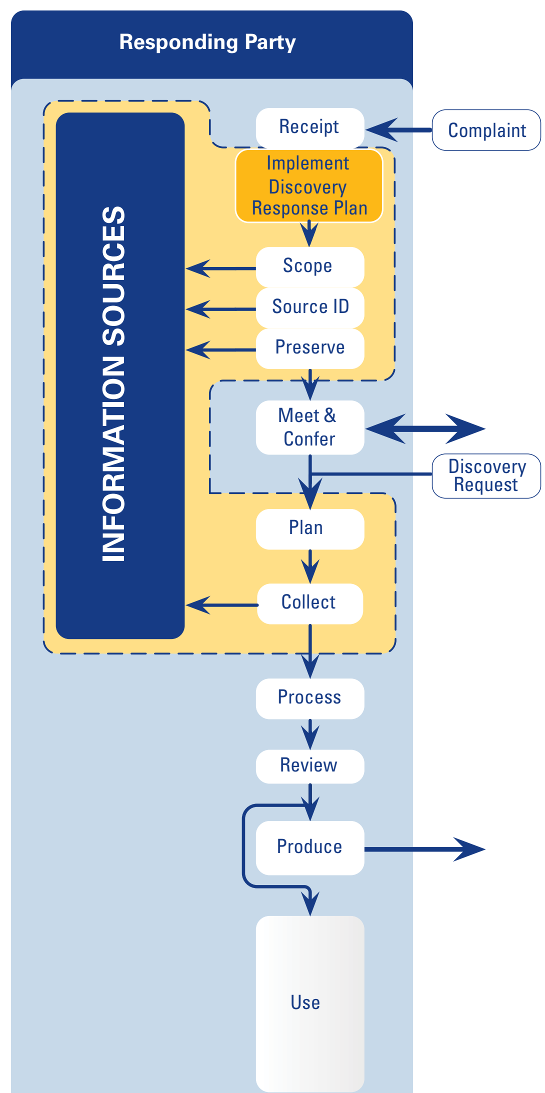
Introduction

The planning for and collection of physically stored information ("PSI") and electronically stored information ("ESI") is at the heart of the document discovery process. As with what comes before and after these phases in the discovery process the impact of ESI has left its mark on how these phases need to be conducted. The volume, dynamic and volatile nature, complexity, and diversity of ESI have rendered the continued use of PSI-based mind-sets and approaches risky and ineffective. The dominating presence and nature of ESI mandates new approaches.

Graphic 1 sets forth a contemporary document discovery process. As the Graphic indicates, receiving a discovery request and the initiation of the planning and collection phases does not occur until a responding party is well into the process. As indicated, the complete process begins with the receipt of a complaint and the implementation of a discovery response plan. This plan provides the guiding structure for determining the scope of the matter, identifying sources of information, and then implementing the duty to preserve. The activity conducted during these phases helps prepare a party for the meet and confer phase as well as sets the stage for the collection planning and collection work that feeds the processing, review and production phases of the discovery process.

As stated, the receipt of a document request triggers the planning and collection phases. The planning phase has taken on new significance because of the impact of ESI on discovery. It is no longer possible to simply "go out into the field" and conduct a collection. There are too many issues and too many details that must be addressed. In fact, the efficiency and smoothness of a collection depends on how well the planning phase is implemented. The planning phase builds upon the discovery response plan and takes it to the next level of detail. The planning phase addresses the practical details that must be dealt with in order to make the collection effort a success in the context of the case at hand. Where a discovery response plan provides general information such as the types of places to look for certain kinds of information, the collection planning phase adds needed detailed roadmap and guidebook level information that tells the collection team specifically where to go, what to do and how to do it when they get there. The planning phase also allows the benefits that flow from the existence of a records management program to be capitalized upon in conducting a specific discovery effort. If well-planned, the collection phase then becomes a straightforward logistical exercise.

GRAPHIC 1



Records Management Benefits In Collection Planning and Collection

The existence of a records management program facilitates the planning and collection of PSI and ESI. This is because a well implemented and consistently enforced records management program establishes attributes for records that facilitate the management of those records during these phases of the discovery process.

Records management programs organize records into meaningful categories based on their purpose and use, establish the time periods records are to be kept, identify where and how records are to be maintained and who owns or is otherwise responsible for the records. This information facilitates planning and collection by allowing the case team to quickly go from identifying the information needed to address the issues in a case to identifying the specific record types containing that information within the organization, the location of those record types and their owners. The existence of records management information also allows the case team to begin to measure the volumes of PSI and ESI that may be involved by looking at the volumes of relevant PSI and ESI records in storage or active use in light of the timeframe and locations involved in the case. The existence of a records management program avoids the need to address old or stale information that no longer has business value; as such information will have been disposed of pursuant to the normal implementation of the records retention schedules under the program. Consequently, how well an organization (a) develops and implements a records management program, (b) manages its records under the program and (c) integrates its records management knowledge into the discovery process will all have a direct impact on the tasks, burdens and risks associated with planning and collecting PSI and ESI in response to production requests. Given the significant role records management plays, many organizations choose to outsource records management program development and ongoing management to a service provider that is capable of providing best practice levels of service and state-of-the-art technologies.

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Planning

The planning phase of the discovery process is triggered by the receipt of a discovery request from the requesting party. The objective of the planning phase is to make sure that the collection phase is a success. To be a success a collection effort must:

- Perform within the time available
- Gather all the PSI and ESI that needs to be collected
- Occur with minimal disruption to business operations
- Accomplish the work accurately consistently and reliably
- Deliver the collected materials in a manner that allows production in the form required

Consequently, for the planning phase to be a success it must establish the manner in which the collection phase is implemented so that collection phase performance ensures meeting collection phase objectives. The objective of the planning phase is therefore focused on the following aspects of the work:

- Timeframe available
- Locations involved
- Scope and volume
- Resources required
- Performance standards required to maximize value and minimize disruption

The planning effort needs the first three basic pieces of information to begin: the timeframe available for completing the work, the number of locations involved and the scope and volume of work that needs to be accomplished at each location. Performance requirements and other case specific parameters can then be factored into the planning effort to determine the kinds and levels of staffing needed and the sequencing and scheduling required.

Inherent in the objective of the planning phase is the need to ensure that the collection effort flows smoothly. This means that those involved understand the nature of their roles and responsibilities. It also means that those involved understand what needs to occur to ensure that the transfer of work between them occurs smoothly. It is well understood in project management circles that if things are going to go wrong during a project it is likely that those things will go wrong at the transfers between the functions involved. This typically happens because the needs and requirements of the downstream function are not understood well enough by the upstream function to allow them to be satisfied. This results in the content of the transferring function outputs not matching the input requirements of the receiving function. This fundamental need to match outputs to inputs can be readily addressed in the planning phase if a case team uses a well-developed discovery response plan in combination with a unified approach. The two together provide substantial definition of the roles, responsibilities and deliverables associated with each function involved in the effective collection and subsequent processing, review and production of PSI and ESI. A well-developed response plan will also provide needed forms, templates, checklists and the like that can be tailored to case-specific circumstances during the planning phase.

As indicated, a key aspect of the planning phase is the preparation of project specific documentation and process materials that will facilitate the smooth implementation of the work. Generic versions of such materials should already exist as part of the discovery response plan and will include scheduling forms and calendars, form communications to custodians, interview questionnaires, instructions, collection logs, tracking sheets, checklists, deliverables requirements, transmittal forms and the like. The preparation and use of these materials in project specific form will promote consistency and predictability across an effort.

By the nature of its purpose, the planning phase will need to address both PSI and ESI efforts and the coordination of the two programs to the extent possible. Neither occurs in isolation and the extent to which the tasking and sequencing can be coordinated, as in dealing with removable and portable ESI devices during PSI collection efforts, will promote efficiencies and cost-savings.

Finally, effective planning allows the case team to:

- Establish the critical path for the collection phase
- Develop a considered inventory of potential sources
- Set priorities and address how to achieve them
- Assign case team members who are responsible for specific subject matters to interview and collect from relevant employees
- Minimize staffing levels to the extent possible to promote consistent performance
- Go to each location only once, thereby minimizing business disruption

To sum up, it is in the planning phase that a discovery request is transformed into a project that can be managed within the structure provided by a discovery response plan. If a case team does not feel comfortable with undertaking the necessary activities itself, it should consider the use of an external consultant to assist in the successful planning and conducting of the production response effort.

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Collection

The collection phase ideally will begin when the collection team is ready, and not before. The start will also ideally be at a point in time that will allow the collection team to meet the deadline for getting the PSI and ESI to the processing phase and then to each succeeding deadline up to the final production deadline. If meeting this series of deadlines has not been worked out in the planning phase the collection phase will be a wild, surprise-filled and disorganized ride. The return on the investment of the relatively limited time it actually takes to sort out details up front will be significant in measure because the efficiencies created and fire drills avoided during the collection work will lead to better cost control, faster cycle times and improved risk management.

Collecting PSI

The collection of PSI is fundamentally an exercise in logistics driven by the need to fit the work to be performed into the time allowed by the discovery schedule. The collection phase includes the following components:

- Training the team
- Communicating with custodians
- Conducting the collection
- Documenting the work
- Transferring PSI to and from processing
- Returning PSI to custodians

Training the team

The training of the collection team is of critical importance if conducting the collection is to go smoothly. Regardless of the experience of team members on other matters, project specific training ensures the team is on the same page regarding how the instant collection is to occur. Unique requirements can be communicated, mutual understanding of the subject matters at issue and the PSI being sought secured, site issues such as safety, security and access requirements communicated, the handling of privileged materials addressed, handling additional custodians or unanticipated sources of information, collection methodologies communicated, documentation and custody requirements set forth, team roles, responsibilities and special communications issues established, and any other pertinent information disseminated to the team to promote smooth implementation. To the extent possible, the training should be documented with appropriate checklists and guidance memos to ensure consistency of performance.

Further, when the collection is underway it is a good idea to hold daily team status meetings to allow sharing of new information and discuss issues that have come up so they may be addressed jointly to ensure

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consistent handling as the effort continues. These meetings minimize the risk of team members operating under procedural or substantive misunderstandings that result in inconsistent performance. For example, finding out after the fact that part of a team was operating under a different understanding regarding the collection of certain types of PSI than the rest can spawn considerable additional effort, cost and risk.

Communicating with custodians

Generally speaking, employees do not like lawyers and paralegals showing up at their door unannounced. It tends to throw their days off. This is especially so when, regardless of what the collection team says, what the custodian hears is that the team is there to fundamentally take his/her office apart. As a consequence, implementing a communications plan as part of the collection effort is an effective way to minimize distrust, confusion and disruption caused by the collection effort.

The first communication an employee typically receives about their PSI is a legal hold notice at the beginning of a matter. It is prudent to state in the hold notice that the individual will receive a separate notice if any collection activity is going to be required. A collection letter should then follow in advance of field work that provides basic information about the collection effort and lays out how the effort will affect the custodian. This communication should reference and be followed by direct contact by collection team member coordinating and scheduling collection dates and times. The communication should provide contact information so employees can get in touch with the collection team if they need to. The communications effort should establish lines of communication between the case team and the custodians. If a group of custodians in an area is to be collected at the same time, a meeting of all involved at the start of the work to explain what is going on, and why, can facilitate the effort and allow a degree of rapport to be established between the team and the custodians. The collection effort is an early opportunity in a case to establish trust and credibility with custodians, some of whom may very well be deponents, or even end up as witnesses at trial. It is also an early opportunity to destroy it. How well communications and interactions are handled will determine the outcome.

Conducting the collection

If properly planned and scheduled, the actual collection work should be a straightforward exercise consisting of interviews, file reviews and selection, and collection for processing. The work should consistently follow the protocols the team has established and be implemented with commonsense and professional courtesy.[1] The focus of the team should be on performing its work in a manner that allows it to get in and get out as quickly as possible with the least amount of disruption to the area being collected. Collection protocols should address how to deal with privileged and confidential materials and any other items of significant interest found during the collection activity. Slack time should be built into the schedule to allow for flexibility in dealing with unexpected developments in custodian schedules, availability and work demands as well as the possibility of finding additional sources.

[1] From a practical standpoint, it is amazing what a box of doughnuts or a bag of bagels will accomplish in facilitating a collection effort in a working group that is having its documents collected.

Typical types of locations one should expect to be potential sources of potentially responsive PSI include the following:

- Central files and file rooms
- Employee offices and work areas
- Project work rooms
- Support staff and clerical areas
- Resource libraries
- Non-work locations such as homes and cars
- Records management repositories

If an organization has a records management program the review and collection of PSI can frequently be expedited by the case team taking advantage of the capabilities and services of a records management function. Records management functions can quickly and efficiently identify, locate and make available for review records that are identified as being potentially responsive. This capability significantly reduces wasted motion during the collection process and consequently speeds up the collection effort while reducing associated costs.

Collection teams should always be on the lookout for additional custodians and other locations of potentially responsive information. It is a virtual given that new sources will be found during the collection process, whether they be custodians, information repositories, or a new type of record containing information of interest. The people involved day-to-day with the subject matter at issue will know where the information is and how best to access it. The collection team should keep this in the forefront of their thinking during the collection.

When in the field collection teams should also be prepared to deal with portable ESI devices and storage such as cell phones, personal digital assistants, external drives, compact disks and DVDs and the like. How these devices are to be handled should be worked out in advance consistent with any agreements established during the meet and confer process so their collection and subsequent processing can be integrated with centrally gathered ESI. Careful attention should be given to the custody and control of any such devices that warrant collection.

Documenting the work

It is absolutely necessary to the efficient completion of any collection that the activity be documented by the collection team as they perform the work. Capturing and centrally maintaining information about what was done, who did it, when they did it, where it happened and what the result was can prevent hours of subsequent wasted effort because everyone will know where the effort stands as it unfolds. This allows progress to be tracked, resource and scheduling adjustments to be readily made, issues to be identified for follow up, custodians who had responsive PSI, and how much, to be tracked, the presence of privileged or confidential materials noted, who conducted the interview and collection work recorded, and so on. A program of documenting the work further allows for new sources or additional custodians to be added, and those who turned out to not be of interest identified as well. Documentation efforts should be enabled by the preparation of needed checklists, questionnaires, out cards, content tracking forms and the like during the planning phase of the effort.

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Finally, if necessary, the documentation can be used to show the rationality and reasonableness of the effort undertaken should the manner in which the collection was conducted be challenged. Thorough documentation provides transparency and evidence of the good faith and reasonableness of both the scope of the effort and the approach taken.

Transferring PSI to and from processing

Protocols should be in place to ensure that collected materials are boxed, shipped, processed and then returned from processing in the condition they were received so the materials can be promptly returned when processing is finished to their sources. This is true whether the PSI is being scanned at the source location or shipped to a central location for processing.

Returning PSI to custodians

Making sure that custodians and other source locations such as file rooms and reference libraries have their materials returned to them in the condition in which they were taken is a fundamental aspect of effectively performing a collection. While it may not seem important to a harried collection team that is focused on getting a production out the door, any destruction of client goodwill that results can come back to haunt both the in-house legal function and the case team. The custodian whose PSI is taken and not returned in the same condition as when it was collected may well become a high maintenance witness the team itself created and then has to manage through the remainder of the case. As mentioned previously, how well a collection is conducted has a significant impact on how well a case team is perceived and trusted by the employees who one day may well be the case team's witnesses.

Collecting ESI

The way in which ESI is collected fundamentally depends on what types of ESI need to be collected, where it is located and the standard of reasonable and good faith conduct under the circumstances that is determined to be appropriate by the client and case team under the circumstances.[2] To understand what this means requires beginning with some basic information about ESI and ESI systems.

While PSI is static and tangible, ESI is not. ESI is not tied to the physical realities that are associated with PSI and as such cannot be seen or touched and frequently is not actually located where one might expect it to be. While it is dynamic and readily changeable, it is also persistent and can multiply enormously during its life. Most importantly, it has an added dimension that PSI does not have: metadata. While the most common PSI, a paper document, is literally two dimensional and flat, ESI has what is essentially a third dimension in the form of metadata, which is information about the information contained in the electronic file. Because metadata is part of an ESI file, its integrity as part of that file must be addressed in the collection process. ESI is stored in information technology environments that can grow to enormous size and complexity because of the forms ESI can take. ESI can be in the form of structured data that is stored in well-defined electronic environments, or take the form of unstructured data that is highly varied in nature. Examples of unstructured data are emails, digital voicemails, word processing files, spreadsheets and other files created by software typically used in office environments. The systems themselves can impact the nature and even the existence of ESI through their normal operations and the presence of janitorial and auto-delete functions. A typical ESI environment might look like something set forth in *Graphic 2*:

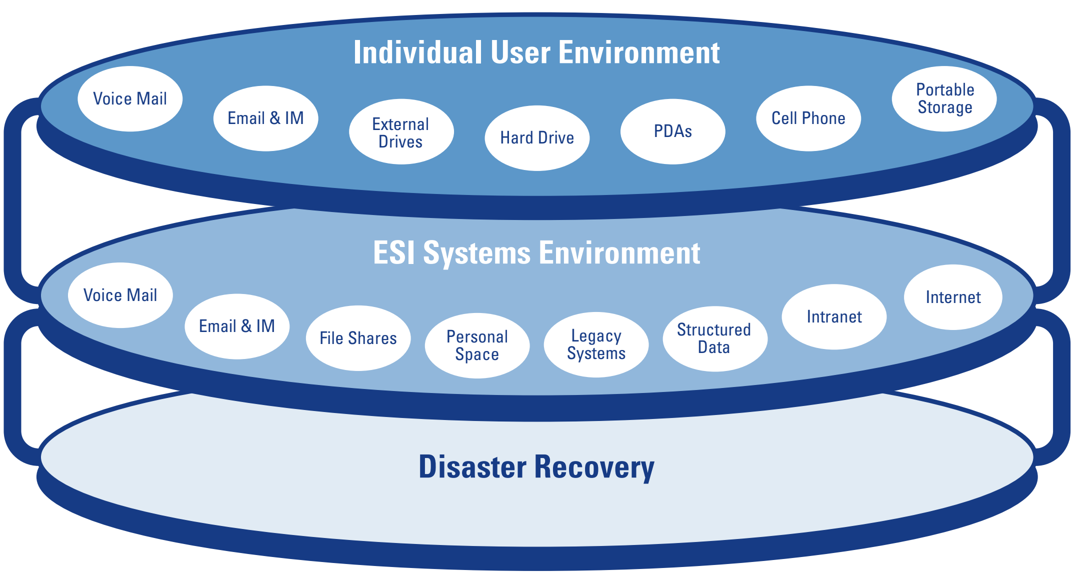
[2] This is a function of a client's approach to managing its litigation risks and is beyond the scope of this paper.

Consequently, when collecting ESI it is important to know where the ESI is located and where it can be most efficiently collected consistent with the requirements and standards of the case. This can involve collecting ESI centrally as well as at custodian/user locations depending on how the organization's ESI systems are networked and function. Collection teams must be staffed to be able to respond to either situation. This typically involves a combination of in-house information systems staff, records management staff, legal and suitably qualified service provider staff if necessary. As with PSI, the ESI collection phase will include the following components:

- Training the team
- Communicating with custodians
- Conducting the collection
- Documenting the work
- Transferring ESI to and from processing

ESI team training issues generally relate to knowing what to look for and how to ensure collection in the manner required, whether to forensic standards or otherwise. The same communications plan employed for PSI collections should be modified to reflect the nature of ESI activity and employed when ESI is being collected at user locations. Collecting ESI should follow the same standards, only with special attention being given to minimizing the disruption caused by the collection process. Documenting the work performed is essential because what is being collected is not visible. If the activity is not documented and custody tracking maintained it is virtually impossible to keep track of what ESI was collected, from whom, when, where, and so on. Without the information obtained from documenting the work as it is being conducted it would be virtually impossible to substantiate what was done. Since collection of ESI is done by making an identical copy of the ESI the need to return originals does not exist and the concern to be addressed about transferring the ESI to the point of processing is maintaining its integrity during the transfer, whether the transfer occurs physically using storage media or by electronic transfer.

GRAPHIC 2



Conclusion

Collection planning and the collection of PSI and ESI are at the heart of the document discovery process. It is in the planning phase that a document discovery request must be transformed into a collection project that can be managed using the information, knowledge, resources and structure provided by a discovery response plan and the results of the meet and confer process.

The efficiency and smoothness of the collection phase depends on how well the planning phase is implemented, for it is in the planning phase that the practical side of things is put in place to make the collection effort a success.

This need for effective planning is compelled by the overwhelming presence of ESI and the continued need to efficiently address PSI. Planning and collection are both facilitated by the existence of a well implemented and consistently enforced records management program. This makes having an effective records management program part of a best practices unified approach. Finally, conducting an effective collection requires following its plan and efficiently managing the logistics associated with collecting PSI, and the logistics and myriad details and volumes associated with ESI.

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