

Tip of the Month



Managing the Risks and Costs of E-Discovery in Multiple Related Investigations and Litigations

Scenario

The Securities and Exchange Commission (SEC) and several state attorneys general are investigating aspects of a financial institution's specific service offering. Moreover, the financial institution has been named in a number of class actions related to that same service offering. The financial institution has received subpoenas and Civil Investigative Demands (CID's) from the SEC and the state attorneys general, and is in the process of expediting a response to such requests. However, the company's general counsel has serious concerns about some of the information being produced in these investigations ending up in the civil class action litigations. Indeed, the first document request from one class action plaintiff seeks all documents produced to the SEC and other government entities related to the service offering.

The Complications with E-Discovery in Multiple Related Investigations and Litigations

Managing the competing document requests and strategic goals stemming from multiple related investigations and litigations can be overwhelming. Often, what results is a seemingly never-ending fire drill of frantic attempts to preserve and collect data in an attempt to meet unrealistic production deadlines. Key decisions about what should be produced, to whom and by when often go unaddressed until it is too late.

The general challenges related to the preservation, collection and production of electronically stored information (ESI) are compounded by several factors, including:

- The risks related to regulatory and government investigations;
- The frequency of competing and subsequent requests, which may not be consistent in what information is requested, or how it is to be produced;
- The possibility that different regulators and government agencies will share information about an organization's compliance with subpoenas or requests for production;
- The possibility that plaintiffs will request whatever has been produced in the investigations to government agencies; and
- The reality that the requesting party in such situations often does not have similar challenges on its side that can provide incentives for negotiated solutions.

In practice, the Federal Rules of Civil Procedure and their state rule counterparts fail to provide relief from unduly burdensome requests because organizations do not seek to limit these requests for fear of appearing uncooperative during an investigation. Plaintiffs in litigation, who are limited by these rules, seek to benefit from this fear and leverage the investigatory work of the government agencies and regulators. It is with these challenges in mind that an organization must prepare for and comply with requests for production in connection with multiple related investigations and

litigations.

Best Practices for Managing ESI in Multiple Related Investigations and Litigations

Effective planning, strategic negotiations and appropriate disclosure are the keys to satisfying investigators and plaintiffs that an organization has complied with its preservation and production obligations while controlling costs. The key is maintaining control—an organization should be proactive and try to dictate the terms of the preservation, collection and production of data. While obtaining and maintaining control can be very difficult to accomplish, particularly with regulators and government agencies, it is possible to do so if an organization, and its outside counsel, has a comprehensive understanding of the issues, the data addressing those issues and the location of key data within your organization.

An organization will be given more leeway to conduct all aspects of e-discovery without much interference if:

- Investigators and plaintiffs sense that the organization, or its outside counsel, knows more than they do;
- The organization and outside counsel have empirical evidence to support the assertions; and
- The organization and counsel are willing to be transparent about what steps are being taken to identify, preserve, collect and produce such information.

Formulate a Preservation, Collection and Production Plan. Prior to receiving a specific request for production, identify key data sources for ESI and develop a preservation and collection plan. Use early case assessment (ECA) tools to help identify key issues, documents and personnel. This lays the groundwork for more defensible decisions regarding preservation, collection and production of ESI from various data sources. In the end, an organization cannot preserve, collect and produce all ESI related to a matter—important decisions need to be made early in the investigation or case about what ESI is truly material to the key issues in the matter and the steps that the organization plans to take to preserve, collect and produce that data. In other words, do not be distracted by attempting to get everything—focus on the smaller set of key documents.

Consider Use of a Master Repository for Data. The use of a master repository for all data being collected may help keep track of what documents have been produced to which parties at what time. Depending upon the vendor you use and your data management planning, this can result in a major costs savings, particularly if the vendor can avoid creating multiple databases and TIFF image production sets. This may also allow for documents to be “produced” by providing adversaries with limited access to a production database, giving an organization greater control over the production sets. Having a master repository helps an organization manage the data and should lead to better documentation of defensible practices.

Consider What Documents Should Be Shared Among Investigators and Plaintiffs. It is unlikely that state and federal agencies will agree to not share key documents with other investigating agencies. Determine early on what information will be shared with which regulators and government agencies, and when the best time to share such information may be. These are key strategic decisions that should be tied into the strategic goals of the organization, not the result of *ad hoc* collection and review processes dictated by the circumstances. Also, while protective orders may limit the use of documents by plaintiffs, you should be prepared for a request by plaintiffs for you to produce what has been produced in the investigation to regulators and government agencies. An organization or counsel may have a very different view of privilege or data privacy with a regulator or government agency than it does with plaintiffs in a litigation. Consider these issues before any documents are produced, and have the plan to defend the organization’s decisions.

Document Preservation, Collection and Production Decisions and Activities. The best way to convince investigative agencies and plaintiffs that appropriate steps have been taken to preserve and collect relevant data, is to be able to explain exactly what steps were taken. Carefully documenting the organization's efforts to implement its preservation and collection plan will put the organization in a position to provide immediate and accurate answers in response to questions.

Anticipate and Plan for Future Requests. It is common to receive overlapping requests from different parties. It is good practice to anticipate the possibility of such requests and to consider, during the initial review and production, which data, if any, may be useful for later productions in response to future requests. As noted earlier, to obtain and maintain control of the process while managing the costs, consider conducting a broad culling and review protocol (e.g., broad subject-matter related search terms and a review protocol tied to the subject matter, like a service offering, product or activity). Once that subject matter set is determined, develop a plan to defend the position that this set will be the master set from which all requests will be sourced (including the use of a statistical sampling of the complete set to develop a baseline of responsiveness, sampling of the null set to establish precision and recall of any term used, or other techniques that objectively support the determination). With this targeted set of data to manage, additional data analytics can be applied to identify and review documents responsive to specific requests without reviewing the whole set again. Consider whether some type of coding will be helpful during the initial review to help with this process.

Carefully Plan for Meet and Confers with Investigators. Even though there is no rule or regulation that imposes an obligation to "meet and confer" with a regulator, regulators are often open to such discussions. Upon receiving a preservation letter or more formal subpoena, an organization (or its counsel) should immediately engage in a dialog with the regulator about the steps that the organization is taking to preserve and produce ESI. Any burdens or impediments to effective compliance should be raised as soon as possible, if for no other reason than to demonstrate that the organization intends to cooperate with the investigation.

Carefully Plan for Meet and Confers with Plaintiffs. Meet and confers with plaintiffs while there are on-going investigations are particularly critical. Key decisions need to be made about the scope of the productions, and in particular if they are going to track the scope of the productions to the investigators. Proportionality and court supervision may help limit costs and burdens, which is additional leverage. Likewise, there may be important reasons why certain documents produced in an investigation should not be produced to plaintiffs, including potentially privileged documents, documents with data subject to privacy laws, or documents outside some parameters of a case (e.g., different subsidiaries outside the jurisdiction of a court, time periods due to statute of limitations, etc.)

Be Aware of Production Guidelines. Many regulators have specific guidelines for productions. Compliance with such guidelines is presumed, and organizations and their counsel must be cognizant of them. Any burdens or challenges of meeting the production guidelines should be raised during the meet and confer, and attempts should be made to make them consistent from one investigating entity to the next. An organization also should leverage those production guidelines with plaintiffs so that productions can be consistent across litigations as well.

Negotiate to Meet Strategic Goals and Manage Costs. It is possible, and advisable in most cases, to negotiate the scope of production with any requesting party, including government agencies and regulators. Keep in mind that regulators often have staffing or budgetary limitations, as well as time constraints, that impact their ability to review large volumes of data. Counsel for an organization should be prepared to discuss the scope and limitations on the production to the most relevant ESI, which may avoid excessive costs. Generate empirical evidence to support any assertions as to the burdens and costs related to the preservation and production of documents, and why the data being

produced is the most relevant during the negotiations. This information provides more control to an organization during the negotiations around the scope, timing and format of the productions.

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