

eDiscovery and Information Governance

Practice Overview





eDiscovery and Information Governance

Electronic discovery, or eDiscovery, is increasingly changing from the exception to the norm in modern litigation. Whether a company wants to evaluate its systems and operations proactively, or is dealing with case-specific litigation or regulatory matters, Seyfarth Shaw LLP's eDiscovery attorneys can help bridge the gap between IT and legal to develop a plan to ensure that the eDiscovery spoliation risks—and their potential impact on IT operations—are minimized, while cost-effectiveness and efficiencies are maximized.

Seyfarth Shaw is one of the few law firms with a truly dedicated eDiscovery practice group—one that began well before the Federal Rules of Civil Procedure were amended in 2006.

The Changing eDiscovery Landscape — Increased Risk

Unwary companies involved in modern litigation face some very real risks related to eDiscovery. There has been a steady stream of headline-grabbing evidentiary sanctions resulting in large verdicts and forced settlements, regularly in the millions of dollars.

The fear of sanctions, and the realization that the discovery process has fundamentally changed, can lead to confusion, headaches, and frustrations for in-house corporate counsel. Organizations know they need to do something. The challenge, however, is to apply limited resources to obtain long-term efficiency and benefits, instead of responding to repeated “fire drills” for information and risking inconsistent techniques, results, and costs between different vendors and outside counsel.

Everyone has heard that in-house counsel, outside counsel, and IT personnel must effectively coordinate and work together to ensure the proper preservation, collection, and production of relevant electronically stored information. But the methods for obtaining the required synergy between attorneys and IT are not always the same, and the challenges are compounded when a discovery deadline is looming.

Attorneys Who Understand Technology — The Seyfarth Shaw Difference

Seyfarth Shaw is one of the few law firms with a truly dedicated eDiscovery practice group — one that began well before the Federal Rules of Civil Procedure were amended in 2006. Our attorneys have training, technical knowledge, and experience in a wide range of IT related areas, including computer software engineering, network administration, and data storage.

In addition to technical knowledge, we stay on top of the existing and emerging technologies available for the preservation, collection, review, and production of electronically stored information in order to recommend the most reliable, practical, efficient, and cost-effective

solutions to our clients, regardless of whether Seyfarth Shaw is representing the clients in the underlying matter.

By drawing on experience representing clients of varying size across the country, our attorneys are able to bring tremendous value in two main areas: 1) handling eDiscovery matters as they arise in individual litigation and regulatory inquiries, and 2) providing eDiscovery advisory services to organizations that face litigation on a more regular basis. In either area, Seyfarth Shaw’s eDiscovery Practice delivers value to its clients.

A Consistent Response — National eDiscovery Counsel

Seyfarth Shaw serves as national eDiscovery counsel for many of the nation’s largest companies. Centralizing the discussion of these issues leads to increased efficiency, accuracy, and consistency in dealing with eDiscovery issues across multiple jurisdictions. In this role, our attorneys have combined their general technical understanding, along with the particular knowledge we have about each company’s IT systems. We provide practical advice for clients on policy and information management issues in advance of litigation. When litigation strikes, we are able to use our specialized knowledge of our client’s IT systems in order to provide specific technical advice, as appropriate, to in-house counsel or co-counsel in specific matters.

eDiscovery Litigation and Regulatory Services

While eDiscovery issues are not litigated in every case, complex eDiscovery requests can arise regardless of jurisdiction, whether it be state court, federal court, or a regulatory inquiry. Many companies commonly rely on a variety of outside firms throughout the country and across the globe. Multiple lawsuits in multiple jurisdictions increase the likelihood of conflicting eDiscovery responses, system descriptions, or information disclosures from one case to another. Such inconsistencies can increase the risk of court sanctions. Our technologically adept and experienced attorneys regularly work with outside counsel in

order to provide reliable, accurate, and cost-effective eDiscovery responses in all cases where electronic information storage, identification, or collection methods come into question.

Practical Advice and Consultation

Studies have shown that over 95 percent of business records are created and stored electronically. Despite the fact that electronic data permeates every business function and transaction, eDiscovery issues are never uniform, and each situation must be evaluated on its own. In each client engagement, we seek to provide a reasonable and defensible approach that complies with the client's obligations while appropriately addressing the costs and realities of ongoing business operations during the pendency of litigation or an investigation. This unique approach, coupled with our extensive experience in this area, allows us to provide valuable advice and perspective for our clients and other outside co-counsel.

Given today's high-risk legal environment for eDiscovery, it is not uncommon for outside counsel to advise organizations to preserve all data for each and every case. The resulting effect can be uncontrolled costs and business interruption. We have experience coordinating eDiscovery in large and complex matters, and because we take a more practical and reasonable approach, we are often consulted to create a bridge for increased practical partnership between a company's internal IT and legal departments and their outside litigation counsel.

Reasonable Preservation

Recent decisions acknowledge that a company may not need to retain every scrap of paper and every bit and byte of electronically stored information to satisfy its preservation obligation. Doing so arguably might cripple most major corporations. Instead, a litigant must be able to explain what good faith and reasonable efforts it engaged in to ensure that it satisfied its discovery obligations.

The difficulty in developing a "reasonable" plan is that it necessarily requires a thorough understanding of the underlying technology. Because of our deep technical and legal experience, our attorneys can assist your business in the development of a preservation and collection plan.

We also work with companies to leverage what they have learned in a particular matter into the development of a broader policy to manage discovery obligations. Our experience indicates that eDiscovery costs can be reduced and risks can be mitigated through the implementation of a comprehensive process approach rather than treating each case as a "one-off."

Negotiating Realistic Preservation Plans

Counsel must be aware of the practical implications of preservation, particularly in the realm of electronic information and media. Most companies are cognizant of their obligation to preserve information that is relevant to an ongoing matter or investigation, but they

COST-EFFECTIVE DOCUMENT PRODUCTION

In a recent government regulatory investigation, we served as eDiscovery co-counsel with another large law firm. The government's initial request implicated an extraordinary amount of electronically stored information in multiple and diverse data stores.

- ▶ Because of our deeper understanding of the technical and legal aspects involved, we appreciated the potential significant costs implicated by the requests. We focused on the truly relevant information and were constantly mindful of processing, review, and production costs throughout the process.

We achieved savings for the client of several million dollars.

The most common factor contributing to a company's eDiscovery risks is the lack of an orderly approach to the management of records and data.

still have a business to run—and saving everything is not a realistic option. We have a proven track record of achieving reasonable compromises with opposing counsel for the preservation of material information. If an agreement cannot be reached, we have the technical and legal background required to develop the evidence and testimony needed for the early clarification of preservation and production obligations with the court.

Cost-Effective eDiscovery Management

In addition to increased consistency and effectiveness, significant cost savings can be achieved through the effective management of the eDiscovery process including identifying, preserving, collecting, and processing electronically stored information (ESI). Our attorneys have experience in the development of process-driven, practical approaches to eDiscovery management.

Collection and Processing. The discovery of ESI poses a number of unique issues for companies facing litigation, ranging from collection and processing to attorney review and production. Our team helps companies navigate the problems that can arise during these processes in a number of ways.

To help clients achieve significant savings through decreased process-related costs, we assist companies with the eDiscovery vendor selection process. Our team participates in the drafting of proposal requests as well as in the interviews of particular vendor candidates. We understand that the move toward a common vendor has both potential value and limitations that should be considered, and our broad experience dealing with a variety of vendors allows us to help clients weigh both aspects. Our deep understanding of their processes

allows for significant reductions in costs during a particular matter.

Negotiating the best price structure for the costs of processing data is only the first step in managing costs. The second, and perhaps more significant, step involves managing the scope of the project to ensure that processing is done in a cost-effective manner. Simply put, vendors often have little incentive to limit the amounts of processing. We have seen many instances in which the vendor's proposed plan would result in processing more data than necessary, thus increasing costs. Careful management of the scope of collection and processing is often best done by attorneys whose fees are not dependent on the amount of data processed. Clients benefit from significantly reduced costs associated with vendor engagements as a result of our close management of the amount of data that vendors process.

Review, Analysis, and Production. Data review and production is not a "one-size-fits-all" situation. A flexible approach to reviewing solutions is important, taking into account the size of a matter, as well as the type and volume of information involved. We appreciate the importance of conducting a cost-effective and time efficient ESI review. Our attorneys have broad familiarity with processing and review platforms, as well as experience outsourcing certain aspects of data review in order to better manage costs. Narrowing the available forms of production to an agreeable format can also affect the cost and risk of a case, and decisions relating to forms of production should be customized to the type of matter and the media involved. Our recognition of these issues and our ability to appropriately respond to them helps clients achieve their objectives while at the same time reducing costs.

Expert Management. Our attorneys know how to best utilize forensic and IT systems experts in litigation. We are intimately familiar with the strengths and limitations of forensic analysis and methods, as well as the appropriate use of IT witnesses in litigation. This familiarity gives us a unique perspective to retain or oppose such experts, as appropriate. Additionally, our acumen and historical experience with IT and forensic experts permits us to direct the most efficient, cost-effective, and precise use of opinion testimony, when required.

eDiscovery Advisory Services

Seyfarth Shaw has considerable experience handling eDiscovery issues both from a litigation and an enterprise risk management perspective. We have counseled some of the country's largest companies on eDiscovery issues in specific major litigation as well as broader strategic approaches to eDiscovery. This includes among other things the development of overall eDiscovery management plans, enhancement of litigation preparedness, evaluation of IT systems to reduce eDiscovery risk, and assessment of the risks associated with the decommissioning of older IT systems.

Setting a Course — The eDiscovery Roadmap

We help clients develop their eDiscovery processes through a method referred to as an "eDiscovery Roadmap." The Roadmap encompasses a series of interviews to determine where the organization stands with respect to eDiscovery issues. Interviews are conducted by Seyfarth Shaw attorneys who focus their practices on eDiscovery issues not only from a litigation-specific perspective, but also from the broader policy perspective. Interviewees are selected based upon discussions with in-house counsel and include personnel from various departments including IT, legal, records management, administration, and others, as appropriate. Interviews vary in length based on the size and

complexity of the organization and the management of its IT systems. The Roadmap also involves the review of certain policies regarding document retention, litigation hold processes, electronic information storage, backup, and data of departing employees, and assists in the documentation of key systems.

While the initial interview and policy review process is not exhaustive, we have found that a correctly targeted set of interviews and document reviews provide significant insight into the level of an organization's eDiscovery risks. Following the interviews and policy review, we can provide specific guidance on where

PROACTIVE ADVICE FOR IT

A Fortune 50 IT Group was phasing out old databases and replacing them with improved databases. The company needed to evaluate the risks of spoliation associated with the destruction of the old databases, as continued operation would incur significant costs.

- ▶ Interviews were conducted with IT specialists in order to fully understand the nature of the data migration. We provided an opinion letter and practical advice regarding the risks associated with destruction of old data. Our team reviewed rigor of data migration efforts and ensured integrity of evidence in the event the company needed to defend a later spoliation claim

The company was able to shut down old databases resulting in cost savings estimated at \$20 million per year.

resources can be devoted to address the risks. The areas may encompass a broad range, including document preservation, document collection, computer forensics, information security, cost-containment, vendor selection, and privacy issues, among others.

Management of Records and Data

The most common factor contributing to a company's eDiscovery risk is the lack of an orderly approach to the management of records and data. All too often data is stored in a wide range of places from local hard drives, home computers, portable external drives,

CDs/DVDs, and various servers to individual databases and other formats. Many times, company-wide document management systems are either non-existent or not deployed in a disciplined manner. Companies also utilize IT tape back-up systems that are designed for disaster recovery, overlooking the fact that for purposes of discovery they may be considered to be archives of potentially relevant data. Even standard IT operations can present eDiscovery challenges. For example, as new IT systems are installed, obsolete systems are decommissioned but their data is maintained and thus potentially discoverable. In addition, mergers and acquisitions can present unique obstacles when companies are required to combine diverse IT systems.

Benefit To You

Our dedicated eDiscovery attorneys both counsel on and litigate these complex matters efficiently and effectively. We have the experience and talent to craft defensible approaches to electronic discovery that comply with a company's obligations and appropriately address the costs and the realities of continuing to operate an organization during the litigation process.

Our eDiscovery attorneys partner with the overall litigation team to shape cost-effective preservation and discovery plans, negotiate with opposing counsel on eDiscovery issues, manage the spoliation risk, develop effective review and production strategies, and coordinate the use of forensic and other technology related experts as necessary, helping to ensure that the focus of the case is on the merits — not on eDiscovery. ■

GAINING EFFICIENCY THROUGH EDISCOVERY PREPAREDNESS

A large institutional client was interested in developing a standard eDiscovery process to increase response time, enhance efficiency, and to ensure a consistent approach to multiple eDiscovery requests over time.

- ▶ We conducted detailed interviews with IT personnel and consultations with business managers to develop a standard eDiscovery process plan for the client. This included standard system descriptions, recommendations for a standard litigation hold process, and department-specific processes for the identification, preservation, and collection of electronic information.

Standardization of the eDiscovery processes has led to a reliable, consistent eDiscovery response plan for the client, removing uncertainty and providing a useful tool going forward. The client has significantly increased their ability to perform early case assessments due to efficient investigation of its matters involving electronic information and messages.

About Seyfarth Shaw

Seyfarth Shaw LLP (“Seyfarth”) was founded in 1945 by three lawyers and has grown to more than 800 lawyers across 13 markets in the U.S. and abroad. We handle issues for our clients in all key areas including labor and employment, litigation, construction, corporate, employee benefits, environmental, government contracts, intellectual property, commercial litigation, real estate, securities litigation, trade secrets, trusts and estates, and workouts and bankruptcy, among others.

Our success is the result of a constant, unrelenting focus on the needs of our clients. Our commitment to excellence and our belief in the strength of a team-based approach to the delivery of our services offers an atmosphere of creative and innovative thinking.

Our clients are our partners in business and we are committed to listening to their needs and to aligning the skills and abilities of our people to respond to those needs. Our clients range from *Fortune* 100 to midsize companies, and include publicly traded and privately held companies and various types of funds. We represent clients of all sizes across all industries and we are diligent in providing the same level of commitment to each client.



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