Honing the Non-Technological Skills Needed in E-Discovery

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For over a decade, e-discovery practitioners and judges have harshly criticized lawyers for avoiding the effort required to become comfortable with the technological vocabulary and basic "geeky stuff" commonly discussed at e-discovery negotiations. Indeed, proposed revisions to the Federal Rules of Civil Procedure and to local legal ethics rules would create much stronger penalties and possibly *de facto* malpractice for lawyers who fail to properly equip themselves to effectively navigate the e-discovery landscape.

However, while technical knowledge is essential, it's just as critical to apply technical understanding in a useful and efficient way. A number of highly non-technical skills set apart the e-discovery professional from the rank novice.

1. Organization

The electronic discovery component of a legal dispute is rarely straightforward. Potentially relevant electronically stored information ("ESI") is typically found in multiple locations, and each step of obtaining, processing, and evaluating those materials tends to uncover further complications. Getting through these tasks in a defensible and reproducible manner is critical. "Shooting from the hip," which almost always overlooks something, only shoots the legal team in the foot.

Organization is the key to creating a defensible framework and structured plan of attack. Developing a checklist will permit lawyers and their legal team colleagues to have a fixed reference point for accurately gauging the status of e-discovery tasks and making sure that someone is working on all of them. Given the likelihood of complications, not all tasks will run according to the initial schedule, but an organized approach will permit lawyers to give accurate reports to requesting parties and to the courts, reducing the risks of accidental misrepresentation and any associated legal exposure.

2. Attention to Detail

Beyond organizing e-discovery projects, lawyers must also understand the critical importance of detail-work in e-discovery. A single overlooked custodian at the time of preservation or data acquisition can give rise to spoliation allegations. A failure to resolve or report ESI processing exceptions may give rise to allegations of incomplete document productions. Just like working without an organizational framework, such situations are self-inflicted (and potential lethal) wounds.

Understanding the importance of detail work doesn't mean that a lawyer must micromanage every aspect of an e-discovery project. However, it does mean that the attorney in charge of e-discovery should never represent a project as complete without first double-checking that all team members supporting the effort have completed their work, including tying down (or at least documenting) all loose ends. This is the minimum foundation needed for a lawyer's good faith report to the court or to a requesting party.

3. Team Building

Given the many different facets of an e-discovery project, it's important to accept that no single person has both the necessary skills and available time to complete everything that's required, much less competently perform all the work. Successful e-discovery practitioners understand that the most efficient way to complete a project is to match each task with the right professional. Some tasks, like forensic data acquisition, obviously require specialist training. Others, particularly the fluid but mission-critical "project management" required to monitor the progress of multi-tracked tasks and sub-tasks, may appear at first glance to be appropriate for the attorney in overall charge of the project. However, tracking all this information at a granular level can quickly bury even the hardest working lawyer under an enormous pile of details and ongoing logistical decisions. This is why many law firms have professional litigation support and e-discovery project managers to help coordinate and share these responsibilities. Even at a law firm that doesn't have these professionals available, paralegals or administrative assistants can help track many basic logistical aspects of a project.

The lead e-discovery attorney should do more than delegate work. Ideally, the lawyer should also ensure that team members are coordinating their work with each other, ensuring that the project as a whole moves forward. Mastering this task requires the attorney to understand each team member's responsibilities and how assigned tasks relate to one another.

4. Avoiding Hyperbole

Electronic discovery can be complicated, but it should not be an excuse to panic or to fabricate an answer to an unexpected question. It is far better—and provides appropriate candor to the tribunal—for an attorney to squarely state when he or she cannot answer a question and will need to research the correct answer. At a Rule 26(f) conference or Rule 16 hearing, such an answer may raise a judicial eyebrow, but any negative reaction at this still will still be far milder than, and far more preferable to, the reaction of the court after a lawyer has to explain that a previously provided answer has turned out to be incomplete or wholly incorrect.

Hyperbole is also ineffective when it is used to try to move clients into a particular action path. Some clients may be more conservative than their counsel would like in responding to e-discovery requests, but clients become even more conservative and contrarian every time they learn that a lawyer's "e-discovery emergency" is, in fact, an artificial crisis.