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Inside E-Discovery: A Q&A session with Stephanie Giammarco, Forensic Technology Services Practice Leader, BDO Consulting

How has the e-discovery landscape evolved over the past year?

Clearly the most notable evolution in e-discovery in the past year is the legal landscape, both domestically and abroad. In April, the U.S. Supreme Court approved e-discovery amendments to the Federal Rules of Civil Procedure, which are expected to take effect on December 1, 2015. The most significant amendments are to rules 26(b), defining the scope of discovery based on proportionality, and 37(e), which standardizes the sanctions imposed on litigants who fail to properly preserve electronically stored information (ESI).

On the international front, in October, the European Court of Justice ruled to immediately invalidate the 15-year-old Safe Harbor agreement granting American companies access to Europeans' data. Without this agreement, each European Union country can now establish its own set of data privacy rules and regulations. For cases involving multinational corporations, this could create an even more inefficient and costly discovery process.

These legal and regulatory hurdles are complicated by the continued expansion of Big Data, with terabytes of data coming from more sources than ever before - and more on the horizon - stored all over the globe. Many companies still have yet to implement the necessary controls and compliance measures to effectively manage the data deluge and meet regulatory requirements. Furthermore, as BDO's Inside E-Discovery Survey points out, the adoption of e-discovery tools and technologies, coupled with the right resources to manage these challenges efficiently, is not near to what it needs to be.

How does this year's survey compare or contrast to last year's results?

The management of Big Data remains a running theme. In last year's survey, corporate counsel identified managing mobile and social data as the top e-discovery issues. This year, respondents identified the "volume, variety, and velocity of data" as their biggest challenge - which encompasses mobile and social data, as well as other traditional and non-traditional data sources. The rising costs associated with e-discovery and regulatory activity also remained top-of-mind concerns for the second year in a row.

Last year, our survey found that the majority of respondents identified themselves as "late adopters" of new e-discovery tools and technologies. To build upon these findings, this year we checked in with corporate counsel to gauge to what extent they have embraced these new e-discovery tools. We found that most organizations are, in fact, late adopters, with less than half of respondents implementing technology-assisted review (TAR) and even less if you limit the population to middle-market corporations (between \$100 million and \$1 billion in revenues).

You mentioned Big Data as the biggest e-discovery hurdle for today's corporate counsel. What other factors in managing e-discovery present significant challenges?

Lack of planning and experienced resources can be a significant impediment to managing e-discovery. Even if the latest e-discovery technology is in place to deal with the big data challenges, corporate counsel and service providers may not have the expertise or experience to use the technology to its fullest potential. A good analogy would be to imagine an excel spreadsheet; some look like pieces of art, others look like calculator printouts. You want your organization to work with the artists.



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How can corporate counsel mitigate these challenges?

When we talk about the EDRM framework, we explain the left-to-right continuum, with information governance furthest to the left. Too often, organizations underestimate the importance of information governance to the e-discovery process. Corporate counsel need to move left and focus on building a robust information governance program so they can access the data they need when e-discovery is knocking at their door.

If you are already embarking on e-discovery, corporate counsel should start employing technology tools before data gets processed for review. Data analytics and visualization techniques should be used during the pre-collection and pre-processing stages of e-discovery to enable counsel to hone the data set and project scope and plan accordingly.

Finally, corporate counsel should employ innovative and forward-thinking professionals who are willing to understand and embrace available e-discovery technology. Staying on top of the developments within the e-discovery realm is a critical competitive consideration.

What advice would you give to organizations handling cross-border e-discovery issues?

First, tap into local expertise. Local professionals often have more familiarity with country-specific laws, customs, and languages that could impact the e-discovery process. As the international data privacy and security legal landscape grows more complex, having boots on the ground in the regions your business operates in is more necessary than ever.

Second, planning is absolutely essential to effectively managing cross-border e-discovery. To efficiently navigate the greater legal and regulatory complexity cross-border e-discovery entails, organizations need to put reasonable, efficient processes in place and develop a clear framework for data collection, analysis and review based on international laws.

Stephanie Giammarco leads the firm's Forensic Technology Services practice and is a member of BDO's Board of Directors with 20 years of experience in accounting, information technology, and criminology. She has worked with organizations and their counsel on many financial frauds, garnering significant media attention, and has led teams to develop data-driven solutions to achieve litigation or investigative objectives. She can be reached at sgiammarco@bdo.com.

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