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Litigation Support Technology as a Value Foundation for Clients

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The Relevant Facts – Part 1

- **Client = Mega Pharma**
 - Recently merged with NewCo.
- **Two pending suits re: potency of drug manufactured by NewCo.**
 - FDA Injunction, seeking to close manufacturing plant.
 - Class Action re: deceptive marketing practices.
- **People**
 - Current in-house counsel is not experience in e-discovery
 - Prior NewCo in-house counsel, who knew e-discovery, laid off.

The Relevant Facts – Part 2

- **Systems Information**
 - Mega Pharma has Outlook, no archiving.
 - NewCo has Symantec Enterprise Vault.
 - Reason to believe that key custodians may have deleted/modified data.
- **Litigation Hold has been distributed.**
- **Cost is a significant consideration.**

Litigation Hold

Brute Force

- Send litigation hold to as many people as possible (entire NewCo and Mega Pharma).
- Word litigation hold as broadly as possible to get maximum scope.
- Suspend auto-delete as broadly as possible.

“New Way”

- Attempt early case assessment – figure out which custodians and data actually matter.
- Use early case assessment to create litigation hold list (just relevant custodians at each company).
- Consider approaching opposing counsel to seek agreement re: search terms for preservation purposes.
- Consider using sampling as a way to test search terms or as the basis for cost-shifting.

Forensic Acquisition: What

Brute Force

- Do a forensic acquisition of all data stores.
- Even if you don't end up restoring all data stores, you have them preserved as pristinely as possible.
- Acquire custodian's full data stores – esp. for unstructured data (e-mail and electronic documents).
- In Enterprise Vault search for all documents that are sent to/from (incl. cc and bcc) to any of your custodians.

“New Way”

- Consider acquiring only active user created files for most custodians/data.
- Consider seeking agreement from opposing counsel that there is no need to preserve or produce from unallocated space.
- Seek agreement re: search terms, acquire only data that is responsive to search terms (even in Enterprise Vault).
- Only use expensive, time consuming, forensic techniques and acquire full data stores when absolutely necessary (e.g. for the custodians who are suspected to have modified/deleted data).

Forensic Acquisition: Who

Brute Force

- Use a vendor for all acquisition.
- Vendor can then testify, if necessary.

“New Way”

- Client should consider whether it makes sense for them to develop in-house capability to handle acquisition.
- Use vendor for key, potentially disputed, acquisitions (e.g. significant or questionable custodians).

Pre-Review Culling

Brute Force

- Basic Boolean searches to segregate data (e.g. likely not relevant or potentially privileged).
- Use standard de-duplication technology as part of your data processing, to group or eliminate exact duplicates.
- Convert data to .tiff before loading it into review tool

“New Way”

- Consider first-look tool to do more robust searching and clustering of documents.
- Consider negotiating search terms with opposing counsel (if you didn't already at preservation/acquisition).
- Consider using “near-dup” technology, in addition, to standard de-duplication, to group or eliminate near duplicates.
- Consider native review capable tool.

Review Tool Selection

Brute Force

- Host data internally to gain control over the data, and also potentially to limit costs.

“New Way”

- Match review tool to the needs/goals of the review.
- Since human review costs are likely to be one of the biggest ticket items, consider review tools that may enhance the efficiency of your review (e.g. concept clustering).

Review Process

Brute Force

- Use either custodian list or basic searches to prioritize review set.
- Slog through documents, making sure that each document is viewed at least once.
- Use contract attorneys to do the bulk of the review and use staff attorneys/associates to supervise the review.

“New Way”

- Consider whether you can consider using more sophisticated technologies (e.g. auto-tagging) to avoid looking at all the collected data.
- If not, consider whether you can make use of more sophisticated review technologies (e.g. concept clustering) to at least prioritize your review.
- Deploy resources in the most efficient way possible – higher cost resources to more important documents/data.

Production Format

Brute Force

- Produce in fixed format (paper or .tiff/.pdf).
- Load file containing metadata selected by producing party.

“New Way”

- Advance negotiation of metadata fields to be produced.
- Production in native format is possible – if you also produce unique hash value for each file produced.

Production Quality Control

Brute Force

- Use tags to segregate data such as privileged or redacted.
- Final review of most or all of documents to be produced.

“New Way”

- Develop documented and repeatable production QC process.
- Conduct targeted searches (and possibly create a segregated database) to make sure your review has properly identified privileged and redacted documents.
 - Priv: Names, Firms, Terms.
 - Redaction: Terms and overlay QC.
- If QC process is sufficiently tested, no final pre-production review is required.