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Strategies for Maintaining a Dynamic Data Map

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During the 1999 Kosovo conflict, a U.S. plane mistakenly bombed the Chinese embassy in Belgrade. Three Chinese citizens were killed, twenty others were injured, and U.S.-China relations were strained. How did this catastrophe happen? It happened because the plane's targeting instructions were based on an outdated map.

Does this deadly scenario relate to the world of e-discovery? Unfortunately, yes. Following the popular analogy that "litigation is war," an accurate and up-to-date map of a client's information topology is an essential component of the litigator's arsenal.

Despite remaining largely an abstract concept, the data map analogy has achieved broad marketplace acceptance as a way to address requirements stemming from the 2006 amendments to the Federal Rules of Civil Procedure. These amendments require litigants to identify "by category and location" all electronically stored information (ESI) that may be used to support a party's claims or defenses in litigation. More importantly, they also require that litigants be able to discuss meaningfully and in good faith where relevant ESI may be found and what burdens may be associated with obtaining it.

Guidance on how to develop a data map is varied and advice on how to keep a data map up-to-date is usually an afterthought, found on the last slide of a presentation or at the end of a long list of bullet points. This is unfortunate at best and disastrous at worst.

Dangers of an Ill-Prepared or Out-of-Date Data Map

Just as in combat, maps are used in litigation to make strategic decisions. The topology of a modern enterprise's information technology system that generate ESI is every bit as complex as a modern battlefield. Indeed, so dynamic and complex are the modern technology infrastructures that the map analogy has a potential drawback. It does not fully account for the changing and evolving nature of corporate IT infrastructures, which are more like human organisms than the relatively static areas usually depicted by maps. Regardless of these potential shortcomings, the analogy has taken hold.

Ideally, a data map will contain information used to shape a party's discovery strategy. It will drive decisions regarding the scope of discovery, preservation, search and retrieval and will contain valuable information regarding collection time, cost and burdens, and preferred production format(s). If this is not reasonably up-to-date, there is a substantial risk that incorrect information will be asserted during discovery (e.g., deposition, hearing, conference, interrogatory response). And incorrect statements about a company's ESI infrastructure can be like land mines that explode into costly discovery disputes. They can increase the potential for inaccurate (and later problematic) stipulations or unfavorable court rulings, and even result in court ordered sanctions. Loss of credibility and risk of sanctions, and unexpected and extraordinary costs are the two primary categories of risk that arise from an out-of-date data map.

Loss of credibility and risk of sanctions

Using out-of-date information dramatically increases the chances of making incorrect statements during discovery. Doing so may prolong meet and confer correspondence with an opponent. Or, worse, it may diminish a party's credibility with the court and may ultimately lead to serious court ordered sanctions.

GTFM, Inc. v. Wal-Mart Stores, Inc.[1] demonstrates the real consequences of relying on stale and inaccurate information.

In response to the plaintiff's request for information about the company's sales data, its attorney relied on an executive's statement that local sales data was no longer available because its five-week retention window had expired. The company argued that segregating and providing the data would be unduly burdensome.

One year later the company was severely punished when it was discovered that local sales information was available at the time of request and computers could in fact track the requested information for up to one year. Unfortunately, the data was no longer available because of the delay caused by its misrepresentation. The court ordered the retailer to pay for an on-site inspection of its computer facility. The company was also forced to pay the plaintiff's expenses and legal fees caused by its inaccurate disclosure.

Like many business challenges, sustaining an up-to-date data map comes down to properly defining and consistently following a repeatable process.

Unexpected and extraordinary costs

Even more likely than court ordered sanctions are the unexpected and exorbitant legal fees and vendor costs that may be required for a party to dig themselves out of a hole created by incorrect statements made about ESI.

Two additional real world examples demonstrate how the lack of a comprehensive and up-to-date data map can increase the cost of litigation, and conversely, how an organization can use a complete, current data map to help control litigation cost.

In one case, a corporate defendant did not have a comprehensive data map, and resisted answering interrogatories about its databases and information management systems. Fearing the court might grant a motion to compel or worse (perhaps assuming that corporate systems are as easily queried as desktop computers), the responding party then embarked on a five-month-long process of identifying databases and applications and preparing multiple witnesses for deposition. Had the defendant had an adequate data map, it could have channeled the information into forceful arguments for a meet and confer, avoided costly motion practice, and preserved its credibility with the court.

Conversely, another organization had prepared a comprehensive data map as part of a proactive litigation readiness program. When the next lawsuit arrived, corporate counsel was able to go to the meet and confer and, to the surprise of the requesting party, readily and efficiently answer every question about the systems that might house relevant information. As this client reported: "Having prepared a data map outside the litigation context and without the time pressures of court deadlines was enormously helpful. When the next case hit, we went to the Rule 26(f) conference with confidence, avoided the usual messy and costly discovery fights, and were able to address the merits, where we had a strong case."

Strategies for Sustaining an Up-To-Date Data Map

Like many business challenges, sustaining an up-to-date data map comes down to properly defining and consistently following a repeatable process. It is important to expand the definition of "map" and recognize the fact that it can be both a noun and a verb. A map is not just a visual representation of an area (a noun). It is also an activity or process (a verb).

The following four tips should help your organization or your clients map a plan of attack for maintaining an up-to-date data map.

1. **Make the data map user-friendly.** Not surprisingly, the format of a data map may determine its long-term fate. The easiest way for a data map to become stale is to put it in a binder, set it on a shelf and not think about it again until the next time it is needed. According to The Sedona Conference, "an entity should encourage appropriate cooperation among legal and other functions and business units within the organization to help ensure that preservation obligations are met and that resources are effectively utilized.[2]" A data map is the logical vehicle

[1] *GTFM, Inc. v. Wal-Mart Stores, Inc.* 49 Fed. R. Serv. 3d (West) 219 (S.D.N.Y. 2000).

[2] The Sedona Conference Commentary on: *Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, Guideline 6. 2008.

for the cooperation described by The Sedona Conference. If a data map is maintained in a format that allows for it to be efficiently leveraged by legal teams, there is a much greater opportunity for it to prove its worth and be kept up to date.

2. **Leverage technology.** Although using a database platform to maintain a data map is not required, it will likely make the process of gathering information and keeping it up-to-date much easier. If configured correctly, applications can leverage automated and intelligent workflows to ensure information is updated according to a pre-determined schedule or in response to defined events.

3. **Document critical information with a consistent methodology.** A sustainable and reliable data map is not a collection of memos prepared after a series of interviews with various subject matter experts. Legal memos describing technology are usually tailored to a particular context and often contain extraneous and overly general information. This makes them difficult to keep up-to-date in a fast-changing technology universe. Legal teams, business experts, and IT should communicate to understand the information that attorneys need during litigation, and design a set of consistent fields or criteria that can be used to describe and discuss different containers of ESI.

4. **Force verification and ownership.** Accountability is a powerful motivator. Valuable information is supported by facts, which can be verified and demonstrated. Therefore, it is necessary to assign ownership and update responsibilities for each component of the data map to specific subject matter experts. It is important to hold people accountable but also to provide them with the tools necessary to fulfill their obligations. Automated workflows, which notify owners of the need for their attention, are one way to make the information gathering and verification process efficient and help keep information up-to-date. A defined and systematic update and verification process with established responsibility or ownership can also help legal teams be more confident in the information they use from the data map. Information is much more valuable if it is clear when it was last verified.

Conclusion

When creating a data map to assist in the identification of ESI relevant to litigation, companies should invest the resources necessary to develop efficient and repeatable business processes to maintain this dynamic information. This will ensure information in the data map remains up-to-date and accurate and help provide a path out of the mine field.

Failure to maintain a sustainable data map will not necessarily result in explosions or international incidents, but it is virtually certain to diminish credibility in litigation, increase the risk of court sanctions, and increase the costs associated with discovery.