

Exploring the archives

Any attempt at quantifying the growth in electronically stored information within the business environment runs the risk of absurd understatement, such has been the shift to digital communication and record keeping in the last 10 to 15 years.

Inevitably there has been a lag in terms of business reaction to this trend, and this lag is especially noticeable in the area of litigation preparedness. Particularly in the UK, companies have been slow to recognise the legal, and ultimately financial, implications of having relevant documents ready for disclosure and, with the economic environment increasingly hostile, an awareness of those implications is ever more crucial.

The economic downturn has damaged corporate performance, and as a consequence companies are more carefully analysing expenses as budgets become more constrained. Like other expense centres in corporations, litigation budgets are under continual scrutiny. However, as most general counsel know, the risk of litigation and the corresponding cost of electronic disclosure does not diminish in a downward economy.

In fact, many corporations are facing even more risks today, especially those in highly regulated and litigious industries such as finance, banking, pharmaceuticals, transport and manufacturing. No company, large or small, is exempt from litigation or from the increasingly complex conundrum known as electronically stored information (ESI) disclosure.

Awareness and policy

The news, however, is not all bleak. Recent research commissioned by Kroll Ontrack found that there has been a considerable growth in ESI awareness and policy enactment over the past 12 months. This demonstrates that high-profile sanctions cases and education regarding ESI have been a real wake-up call to corporations and their legal teams.

However, British companies are lagging behind their US counterparts in their readiness to cope with the risks involved in legal actions, where huge volumes of computer-stored information play a crucial role. Many companies fail to appreciate the legal and logistical issues involved in the disclosure of often sensitive information in litigation or regulatory investigations, and in ensuring that they can provide details of anything that qualifies as electronic information.

The study found that while 70% of US companies have policies in place to deal with ESI in a litigation process (compared with 40% in 2007), only 53% (compared with 43% in 2007) of those in the UK can rely on a similar level of preparedness. Both figures represent an improved awareness of the need for policy relative to 2007, but they also suggest that the US is outstripping the UK.

In the UK, policy development is up only 10% in the last year, compared to an increase of 30% in the US. The fact that companies in both the US and the UK are improving their understanding of ESI is positive, and at the same time very necessary. However, given the financial crisis, litigation is, for some, an increasingly necessary option, and all companies need to be prepared in order to meet obligations in terms of data disclosure.

Responsibility

While more companies have an ESI readiness policy, there has been a marked decline in the number of organisations that included top executives in the policy's creation and enforcement. This, paired with the fact that respondents believe the company's top executives should bear responsibility if their policy is called into question during litigation or an investigation, represents a worrying disparity for organisations. Furthermore, companies are increasingly looking to IT departments to shoulder some of the ESI burden.

So while companies are increasingly looking beyond the boardroom when developing strategy for ESI, there remains a belief that CEOs and board directors should ultimately be accountable for shaping policy and its implementation. This is particularly evident in the UK, where 54% of companies say that their CEOs and board directors should be held accountable if their respective ESI policies

result in governmental fines, court-imposed sanctions or reputational damage. This is despite the fact that only 20% of UK companies allocate actual responsibility for policy development to such senior figures.

However, the shift in responsibility for development and enforcement can be seen to represent a more mature, collaborative approach to ESI and policy development. The undoubtedly complicated and technical nature of ESI requires increasing reliance on IT, but a close alliance between legal advisers and IT is also crucial to ensure that ESI strategies are legally compliant, all-encompassing and feasible. But policy discussions should also include CEOs, so they are fully informed and supportive of the policy. Waiting until a policy is called into question leaves no time to play catch-up.

Drivers

The huge growth in the number of companies in the US that say they have an ESI policy has been driven by the introduction of the new Federal Rules of Civil Procedure a couple of years ago, which has led to a number of high-profile cases. Cases such as those involving Morgan Stanley and Qualcomm, and the fines involved, have contributed to the greater numbers of US companies with policies in place.

What is interesting is that last year respondents cited a whole host of barriers to successfully executing ESI policies. This year, one-third of companies claimed that only a lack of time and resources were preventing them from successfully implementing ESI policies.

The UK has slightly different drivers to the US. Here there have been fewer cases involving ESI, but companies will act when they see a threat from the regulators, or once they have faced a difficult case themselves and realise that they need to be better prepared. There has been slower progress in the UK and this can be attributed to a lack of time and resources. In-house counsel believe that the judiciary is becoming increasingly well-informed about the importance of ESI in dispute resolution.

In the UK there has also been a formal call by the Commercial Court for increased corporate responsibility in disclosure, in an effort to control litigation costs. Judges are talking about the need for companies to have clear policies in place to justify their actions. If documents are missing and there is no plausible explanation, the Court will draw adverse inferences.

Knowledge of the judiciary

The numbers of in-house legal advisers who believe the judiciary is well-informed about ESI has grown in both the UK and the US. In 2008, 28% of UK and 44% of US (compared to 17% and 35%, respectively, in 2007) survey respondents thought the judiciary was educated about ESI.

The increased awareness of the judiciary is not surprising, given the vast array of educational opportunities concerning e-disclosure, and the increase in cases involving it. As e-disclosure has emerged as a battleground issue in court, judges are having to become involved and are calling for more co-operation between parties.

Challenges ahead

Companies in both the US and the UK are making headway in developing policies to deal with ESI, and that is clearly a positive development. Nevertheless there remain a number of obstacles to effective ESI strategies.

In 2007 the greatest concern in terms of ESI for companies was quite simply gaining the relevant information and education. The main challenge now is dealing with the sheer volume of data, suggesting that even in the face of obstacles there is a far better appreciation of the significance of ESI and the issues surrounding it.

The issues surrounding ESI have assumed a higher priority on the business agenda as the financial crisis threatens to trigger legal actions. With litigation and the amount of electronic data requested in disclosure on the rise, coupled with tightening corporate budgets and regulation, corporations cannot afford an ESI mis-step. Putting a policy in place, ensuring that the executive board is part of policy

creation and enforcement, and understanding your digital data landscape are critically important parts of risk management for the foreseeable future.

Cross-border litigation

Although there is a perception that cross-border litigation is growing, almost half of respondents in the UK and US said they were not involved in this area of law. Of those who responded that they are involved in cross-border litigation, only half said they had seen an increase in cross-border caseload. Difficulties with these cases revolve around different legal jurisdictions.

- 43% of UK and 47% of US in-house counsel said they were not involved in cross-border litigation.
- Of those involved in cross-border litigation, 47% in the UK and 42% in the US agreed they had seen an increase in multinational cases.

In an increasingly global economy, cross-border litigation and the disclosure difficulties associated with multilingual documents are expected to grow in importance over the next few years. Companies will need to include mechanisms for dealing with cross-border data storage and transfer issues in their ESI policies. This involves considering compliance with local laws and the potential conflict between disclosure rules and other duties such as data protection and privacy. Companies will also require technology to successfully trawl through mountains of multilingual documents when complying with reporting requirements, as well as conducting and responding to investigations or litigation.

Future challenges

The biggest challenge for legal departments in the next five years will be unmanageable volumes of ESI for both the UK and US.

- In 2008, 23% (compared to 11% in 2007) of UK survey respondents stated that an unmanageable volume of ESI was their greatest concern.
- In 2008, 28% (compared to 21% in 2007) of US survey respondents stated that an unmanageable volume of ESI was their greatest concern.

Companies are acutely aware of the growing burden that ESI could have on their organisations. As the world becomes increasingly mobile, discoverable data is now being collected from text messages, voicemail, blogs, instant messages, GPS and other emerging types of devices. Keeping track of where all of a company's data resides is becoming increasingly complicated. This finding alone emphasises how an e-disclosure policy and a good relationship between IT and legal advisers will pay off if and when disclosure arises.

Conclusion

The information gathered by Kroll Ontrack suggests that ESI awareness is at a high and IT and legal teams are beginning to collaborate when it comes to disclosing volumes of digital data. The prospect of absorbing the information contained in this report, as well as other industry information, and integrating it into an already responsibility-intensive role may seem a bit overwhelming for clients (and many firms!). Where should organisations go from here? Is there a single approach that works?

The following three tips will help to guide you when considering ESI policies in the year ahead.

Stay informed: the only constant is change

The law and technology related to ESI continue to evolve at a rapid pace. There are new complexities involved in litigation readiness and a real need for expert help to guide you. There are now many resources available to lawyers and the corporate community to address ESI readiness.

Keep your key players close

During ESI strategy creation and enforcement, work very closely with your clients. They, in turn, must work closely with the key players in their multidisciplinary ESI teams to reach agreements regarding ESI whenever possible. Close collaboration and participation by all involved will result in a more thoughtful and successful ESI strategy.

Embrace technology

Technologies have recently been developed to help legal teams to conduct early case assessment through e-mail analysis tools, and to execute effective litigation holds. Voicemail can now be searched, and many languages can now be processed and searched reliably.

New developments and further refinements are on the horizon as the industry continues to respond to the ever-growing volumes of ESI. New technologies will make it easier for lawyers to focus on the important documents more rapidly. These technologies will reduce human effort and cost. It is important to be able to get to the key facts quickly, assess risk early and make the right strategic decisions.

Clients and lawyers are often mesmerised by the many products on the market and may have no appreciation of the crucial differences until a lawsuit has begun, leaving very little time to select and engage a service provider and manage the project effectively.

Forming strategic relationships with providers early on makes it possible for a company facing a legal crisis to hit the 'go' button and gather key evidence without delay or panic, and makes a significant difference to litigation readiness.

How will you and your clients handle the evolution of ESI in 2009 and beyond?

The best way to manage electronic disclosure is to prepare for it before litigation occurs. Knowing what kinds of data you have, where it is stored and how to access it can significantly reduce the time, cost and effort required to respond to a legal crisis

Research methods:

The Kroll report is based on an independent survey (Kroll Ontrack Second Annual ESI Trends Survey 2008: An international survey of in-house counsel and their practices for managing electronically stored information (ESI) in litigation and internal investigations). A total of 403 telephone interviews were carried out among in-house counsel in commercial businesses, 200 of which were in the UK and 203 of which were in the US. Interviews were completed between 7 July 2008 and 1 August 2008.