

# The e-Discovery 4-1-1

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Discovery Solutions Practice



Legal Strategies. Business Solutions.

## Discovery Cost-Shifting Agreements Protect Producing Non-Parties

by Richard Griffith

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A non-party that is required to produce documents or electronically stored information during litigation may elect to mitigate associated financial burdens through a cost-shifting agreement.

A cost-shifting agreement is often drafted before expenses are incurred; therefore, it is important to include a reimbursement request for all reasonable costs associated with the collection, review and production of paper and electronic documents. At a minimum, these expenses may result from any number of the following:

- **Hard copy records collection.** Paper documents may need to be retrieved from an off-site storage facility and delivered to a location for document review and production. Related expenses may include storage vendor retrieval fees, shipping costs, and hard copy document reproduction fees.
- **Electronic data collection.** Collecting electronic data from a client will often involve working with in-house counsel and information technology personnel to identify and collect potentially relevant data. Depending on the scope of the request, electronic data collection may also involve performing numerous custodial interviews to identify additional sources of data or employees with relevant data. When salaried employees assist with collection, there are opportunity costs; for hourly employees and contractors, there are variable costs.
- **Hard copy records review.** After hard copy records are collected, they must be reviewed. This process may involve scanning original hard copy documents for review into a database or analyzing documents in paper format. The first

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## What's New at DSP

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### Discovery Cost Alignment Remains a Priority

Does e-discovery really need to be so expensive?

**Find out** by reading an article co-authored by LeClairRyan's Daryl Shetterly in *InsideCounsel*, a monthly magazine providing business insights for general counsel and in-house legal professionals.

### DSP Blog Post Wins "Pick of the Week" in *LitigationWorld*

A recent blog post about electronic data processing, written by LeClairRyan's Daryl

option may involve processing and hosting fees with a third-party vendor as well as review time. The second scenario only involves review time.

- **Electronic data review.** Electronic data can be pre-processed to eliminate system files and exact duplicates and apply key words, reducing the number of documents for review and filtering irrelevant data. Pre-processing data often involves (1) using early case assessment tools, (2) paying for a hosted vendor's technical support time (usually billed at an hourly rate), and (3) loading electronic documents into a database, which entails user account and hosting fees.
- **Hard copy document production.** Hard copy document productions involve costs associated with copying documents, Bates and confidentiality stamping, and shipping.
- **Electronic production.** Electronic productions normally generate costs associated with per-page tiffing as well as Bates and confidentiality stamping (unless the files are produced in native format), production media (e.g., hard drives, DVDs, CDs), and shipping.
- **Discovery counsel.** Another expense to consider is the time incurred by discovery counsel to manage and supervise the collection, review and production of documents. These fees will vary depending on the scope of the third-party subpoena.

## Critical Components

The effectiveness of a cost-shifting agreement depends largely on the information it includes, such as:

- Names of involved parties
- Explanation of agreement purpose
- Defined terms
- Performance scope
- Determination of project completion
- Estimate of reasonable collection, review, and production costs
- References to related agreements or court orders
- Contract severability clause
- Federal Rule of Evidence 502(b) clawback provision
- Force majeure clause

Throughout the agreement drafting process, focus on *reasonable* costs. In addition, declarations from information technology professionals or e-discovery counsel that substantiate the estimates will strengthen the agreement. If cost estimates are challenged and do not survive scrutiny, the agreement will lose credibility with the opposing party and the court. In the end, the producing non-party may

Shetterly, has been selected as the "Pick of the Week" by publishers of *LitigationWorld*, a popular weekly email newsletter.

*LitigationWorld* first selected Daryl's article as a link in one of its recent newsletters and then voted the article the best of the links for that week. Daryl's article "ESI Data Processing: Why Should Attorneys Care?" appeared in the November 7, 2011 issue of *LitigationWorld*.

Read Daryl's [blog post](#) in *The e-Discovery Myth*. This is the third article written by an attorney at LeClairRyan that has been selected as *LitigationWorld's* "Pick of the Week" this year.

find itself responsible for costs it worked so hard to avoid.

## Additional Resource

"Don't Lean on Me: Undue Burden and Cost Issues Complicates Non-Party Discovery," *The e-Discovery 4-1-1*, August 2011.

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## Document Preservation Requires Broad Scope, Continuous Effort

by Capri Miller

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It is well known that state and federal laws require businesses to preserve potentially relevant documents and electronically stored information (ESI) when they reasonably anticipate litigation. However, this is no easy task. Complying with these laws requires foresight and careful planning. Below are three points to consider when developing a document preservation plan and collecting documents for litigation.

### Remember Former Employees

The obligation to preserve extends to all documents in a company's possession, custody and control, including documents retained after an employee separates from the company. Therefore, it is important to identify former employees who possessed documents or ESI that is potentially relevant to (1) the case at hand, (2) other litigation and (3) a regular records retention schedule. If there are multiple ongoing litigations, carefully track former employees' data that may be subject to preservation and for what legal matters.

In addition, consider implementing a process to preserve documents and ESI when an employee with potentially relevant materials separates from the company *after* the data has been identified for preservation. It is important that steps to preserve such documents are taken in a timely manner and the process is carefully articulated in the company's document preservation plan. Incorporating document preservation into company separation policies and procedures will also help prevent the possible destruction and loss of data.

### Check Central Sources for Relevant Documents

Just as it is important to think about separated employees' data, it is also necessary to consider ESI stored in central locations. Often relevant ESI is retained in central sources, such as databases,

SharePoints, eRooms, network drives, and websites. In many cases, this is the only repository for some of the most essential data, including accounting, safety, quality assurance, and sales records.

Collaborate with in-house records management and information technology teams to identify and access central sources of information and conduct employee interviews regarding what documents exist and whether they are potentially relevant.

## Monitor Ongoing Preservation

Document preservation is not a one-time activity. Therefore, company employees should keep preservation in mind throughout the course of every legal matter, as documents' scope of relevance will become more apparent as litigation unfolds. For example, other custodians and central sources for collection and production may be determined as additional individuals are identified for deposition.

In today's litigious society, document preservation is a first-line defense for businesses seeking to protect their interests. Well-defined preservation plans require regular review and revision as well as continuous employee training, follow-up, and accountability. For businesses involved in litigation, effective document preservation is often a leading factor in a favorable decision.

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