Is Outsourcing e-Discovery for ESI the Smart Choice?

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Legal Process Outsourcing: Federal Rules of Civil Procedure and the role it plays with ESI and e-Discovery

We all see it. The world around us is changing, this includes the complex and ever-changing legal landscape. Modern technology facilitates mass processes influencing human life in every aspect at large. Legal processes that were once handled exclusively in-house can now be safely outsourced to trusted global services partners. Hard copies are replaced by soft copies like e-mail, electronically stored information and more. As an organic result of this, the concept of document and documentary evidences is changed, affecting Law & Judiciary as well.

So what exactly can be outsourced today? The laws governing e-discovery have been updated. Quite a few amendments have been made to the FRCP which directly affect a companyâ€™s duty to preserve and produce ESI for ongoing or in anticipation of a litigation. The rules have already been adopted in Texas, California and many other U.S. states as well.

Rules of note:

FRCP Rule 45 provides for subpoenas commanding that designated documents including electronically stored information be provided upon request.

FRCP Rule 16 allows the court to establish rules around disclosure, privilege, methods and work product prior to commencing electronic discovery. Rule 26(f) requires all parties to agree on some form of protocol before discovery commences.

As per Rule 26(a)(1), except as exempted by Rule 26(a)(1)(E) a party must without awaiting a discovery request, provide all documents including ESI to support its claims or defenses.

Companies involved in or in anticipation of litigation have an obligation to take all reasonable steps to preserve potentially relevant ESI. However, e-discovery process often can result in a delicate risk of unintentional disclosure of privileged or confidential information. Rules pertaining to this risk include:

FRCP Rule 26(b)(5) refers the scope of discovery. A Party may obtain discovery regarding any non-privileged matter that is relevant to any partyâ€™s claim or defense.

FRCP Rule 26(b)(5) sets forth procedures for repossession of information when privileged ESI is accidentally sent over to the requesting party.

As mentioned earlier, companies in litigation have an obligation to take all reasonable steps to preserve potentially relevant ESI. FRCP Rule 33(d) includes ESI as part of the business records related to answer to interrogatories, for example:

FRCP Rule 34(b) establishes protocols for how documents or ESI are to be produced to requesting parties. Requesting party gets to choose form of production.

FRCP Rule 37 provides safe anchorage if electronic evidence is lost and unrecoverable. FRCP Rule 37(f) allows for sanction against parties unwilling or fails to participate in the discovery process. But a court may not impose sanctions on a party for failing to provide electronically stored information

lost as a result of the routine operation of an electronic information system. [FRCP Rule 37(e)]

With so many rules and regulations in place, does it make sense to outsource e-discovery work? Absolutely! Today, innumerable practices and firms all around the world outsource and successfully utilize the cost effective services offered by legal process outsourcing companies. This frees up their own valuable resources and systems to allow them to concentrate on high-end legal work.

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