

# ESI PRESERVATION RISK ANALYSIS

The stakes are higher than ever with regard to the risks associated with preservation of ESI, making it even more crucial that organizations identify and quantify the risks associated with their information systems, policies, and practices. Even inadvertent loss of ESI can result in sanctions and fines if an organization does not have a comprehensive preservation plan in place.

It is recognized that risk mitigation measures should be designed to minimize impact to ongoing business practices, and avoid practices that result in accumulating massive repositories of ESI that become potential sources for litigation.

## THE SITUATION

The introduction of Electronically Stored Information (ESI) into legal discovery has created a greatly magnified risk associated with the preservation of sources of potentially discoverable ESI. In most corporations today there are vast quantities of ESI which is often not well-organized or catalogued. As parties to litigation are obligated to preserve all such sources, this presents new and difficult challenges.

Even inadvertent loss of such ESI has proven to be subject to court sanctions, as organizations are now being held to increasingly stricter standards. To complicate the situation, these standards apply to all sources of ESI, including Instant Messaging, Text Messaging, Voicemail, cell phones, and now even the rapidly expanding use of Social Networking, such as Facebook, MySpace, and LinkedIn. There are no legal standards for many of these ESI sources, and the few rulings that have occurred have varied positions.

The most frequent type of sanctions by courts related to ESI correlate to a failure to preserve or spoliation and can range from monetary to Summary Judgment against the offending party, including Adverse Inference. In addition, these sanctions can have even broader implications. For instance, legal counsel are required to perform adequate due diligence to establish that their clients' actions have been in accordance with the rules and company executives are routinely required to sign affidavits that state that the obligations of discovery have been satisfied.

## THE SOLUTION

Scarab Consulting addresses this problem in a systematic, comprehensive approach involving information gathering & gap analysis to identify and quantify the risks associated with an organization's information systems, policies, and practices. This analysis is performed in the context of the type and magnitude of litigation experience by the organization and their records management needs and obligations.

Information is gathered regarding policies, procedures, and practices related to information management, litigation response, and routine operational protocols via a combination of document review and interviews with relevant representatives from legal, IT, records management, and operations. Of special interest is the preservation of Legacy

ESI that may be relevant in litigation. This material is often vast in quantity, aging, developed with obsolete applications, and/or poorly labeled; the risks associated with its preservation can be risky to determine, and so necessitate special consideration.

Analysis and discussion identifies options available to the organization that will address these risks, their relative costs, schedules and other requirements for implementation. Options can include changes in policy or practice, development of new policies, and acquisition & implementation of new technologies that can be utilized in a manner that will mitigate risk. Scarab Consulting delivers a final report that offers an analysis of the risks and potential costs related to preservation of the organizations' ESI and will include;

- ✓ Litigation portfolio including types, sizes of litigation and relevant ESI
- ✓ Summarization of current IT and records management systems, policies, and practices
- ✓ Capabilities for preservation of ESI
- ✓ Associated risks and gaps in methods of identifying and preserving relevant ESI
- ✓ Options for corrective actions using policies, practices, and technology

### THE BENEFITS

- ✓ Strategic preparation for Rule 26(f) "Meet and Confer"
- ✓ Improved ability to negotiate with opposing counsel
- ✓ Significant reduction to risk of spoliation
- ✓ Creation of legally defensible information regarding whether certain data is reasonable accessible or discoverable
- ✓ Creation of defensible proportionality arguments
- ✓ Balance the burdens and cost of discovery against the potential benefit and value of discovery

### ABOUT SCARAB CONSULTING

Scarab Consulting provides global, results-driven, litigation and investigation oriented discovery services including collections, social media surveillance, processing (electronic and paper), hosting, managed review and court reporting/ deposition services to corporations and their law firms, managing the risks and cost before and during litigation. Scarab Consulting's professional consultants utilize their industry-proven experience inside large corporations and law firms to provide proactive, legally defensible and technically sound services relative to information governance and litigation preparedness. With a suite of fixed-priced consulting solutions, Scarab Consulting is able to custom design a solution to fit each client's needs. Legal/technology driven solutions for litigation and e-discovery including electronic data processing, review, and hosting, as well as document scanning and coding, help increase efficiency and reduce costs for organizations. Powerful technology enables Scarab Consulting's Social Media Surveillance Services to monitor web sites and collect information related to the issues and target individuals associated with a particular matter. In addition, Scarab Consulting provides accurate, timely, and quality court reporting and deposition services delivered by a highly qualified, dedicated Scarab Consulting case management team. Scarab Consulting's alliance with numerous technology providers ensures that the industry's best practices e-discovery and litigation tools are utilized, guaranteeing the best possible solution for every client. For more information, go to [www.consultscarab.com](http://www.consultscarab.com).