

The Missing Link Between Corporate IT and Legal

How to Solve the Disconnect

By Stacy Jackson and Keith Moore

In 15 years of advising corporate and government litigators on the best processes and technology to deliver discovery management solutions, our company, IE Discovery, consistently encounters a common challenge in almost every organization: *The legal and information technology departments simply do not communicate well.* This can have major ramifications in producing information in response to requests from investigators, regulators, or litigation opponents.

In the following dialogue, IE Discovery's corporate counsel, Stacy O'Neil Jackson, and its technology services and support manager, Keith Moore [the authors], discuss some of the reasons for this breakdown and provide some practical tips for improving the communication between IT and Legal.

Ms. JACKSON:

Historically, Information Technology and Legal departments worked within self-contained spheres. Rarely did the two interact — only when an attorney lost a Word file or needed desktop support. But the prevalence of electronic evidence throughout today's corporations makes such separation no longer possible. The newly implemented Federal Rules of Civil Procedure, as well as case law from around the country, are forcing lawyers to understand network architecture, how information flows through a network, where information is stored on a network, and what exactly a .pst file is. Judges are expecting that we will walk into their courtrooms and be able to speak knowledgeably and with authority about our company's data. In order for us to do that, we must build an alliance with the IT department.

Further, the new Federal Rules amendments provide a "safe harbor" for corporations when data is lost due to the "routine good-faith operation of an electronic information system." Lawyers and IT departments across America will soon be putting their heads together to discuss how their system operates and defining what is the "routine opera-

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tion." If attorneys want to take advantage of the changes to Rule 37(f), they must be on the same page as their IT staff.

Mr. MOORE:

Electronic discovery is placing a tremendous burden on IT staffs. IT managers are receiving eleventh-hour requests — written by lawyers and judges who don't understand their implications — to produce (sometimes very) detailed information in unfamiliar formats. IT managers are being placed into the deposition chair and asked to answer very complex questions, often on topics that are foreign to them, such as preserving the chain of custody, and data spoliation.

Moreover, lawyers should not expect that the infrastructure to comply with their requests is already in place. Attorneys frequently assume that all that is required is for IT to "push the button" and relevant documents will appear. Usually, nothing could be further from the truth. While the data may exist in the organization's systems, it is often unstructured and not in an easily retrievable or searchable format. It takes significant expertise and resources to search and analyze unstructured data and merge it with data in various formats. The fact is that simply saying "we have the data" does not mean that the organization can harvest it and produce it without *significant* cost and expense.

Attorneys can and do ask IT for deliverables in timeframes that are, to IT staff, extremely aggressive. They don't always understand that IT has many conflicting priorities. IT task scheduling must be driven by keeping computing systems that support the core business running smoothly. They often have more "Priority 0" issues than can realistically be accomplished, and see a discovery request as just another "urgent" item. Often, the biggest threats to a discovery request are support issues and previously committed IT projects with high-profile sponsors.

Ms. JACKSON:

When one travels to a foreign country, it is usually worthwhile to learn at least some of the language in advance. Oftentimes, merely attempting the language with the locals will win their favor and assistance. The same holds true for IT. Make an effort to speak the language.

In order to learn the lingo, you'll need to get the basics down. A good reference is *The Sedona Conference Glossary For E-Discovery and Digital Information Management* (May 2005 Version). Just recently, the glossary was cited in *Johnson v. Kraft Foods N. Am.*, 2006 WL 3302684 (D. Kan. Nov. 14,

2006) as a way for counsel to clear up ambiguities in definitions. The glossary contains a plethora of definitions, ranging from Ablate (describes the process by which laser-readable "pits" are burned into the recorded layer of optical discs, DVD-ROMs and CD-ROMs) to Zone OCR (an add-on feature of the imaging software that populates document templates by reading certain regions or zones of a document, and then placing the text into a document index).

If you understand the difference between a web server, a storage device and a network traffic routing device, the IT staff will feel more comfortable explaining other concepts to you. Once you can talk on their terms a bit and have a basic understanding of their equipment, the conversations will flow more easily.

Mr. MOORE:

Conversely, the IT staff should also make an effort to become fluent in relevant legal terminology, such as "responsive," "relevant," and "privileged." With such an understanding, IT staff can know exactly what is said in response to information requests by reading and understanding the actual requests, rather than relying on the lawyer's interpretation of the response.

Ms. JACKSON:

Legal can help here. We should make it easier for them to understand what we are saying. Take the time to define terms that may be foreign to them. For example, define "interrogatories" as "a set of questions from opposing counsel." Taking the time to speak in plain English and being careful to define legal terms will go a long way toward creating a more comfortable environment where both legal and IT can collaborate.

Recently, IE Discovery helped a large government client put together a glossary of technical terms for lawyers. Their attorneys can simply glance at it whenever they become stumped on a word. We also helped them develop a seminar for attorneys on technical issues. This allows their attorneys to interface with technical people in a calm environment where they could ask any question they wanted.

Mr. MOORE:

Similarly, IT should avoid presenting lawyers with extraneous technical details that are not germane to the work at hand. Only mention technical issues that are relevant and when doing so, refrain from relying on jargon to get a point across.

IT issues should be explained in terms that

reflect what the issue means with regard to mutually agreed upon objectives, such as deadlines and production logistics. Where nuances in IT methods can affect these objectives, they should be clearly communicated to Legal immediately. It is especially important for both parties to avoid assumptions and ask plenty of clarifying questions.

Ms. JACKSON:

Another difference that should be acknowledged is that IT people tend to see things as very black and white. In one matter, where we were assisting a government agency in a class action Title VII discrimination case with document collection, we kept asking the IT people if there were any back-up tapes of the e-mails. They kept saying "no," which was technically true. Only later did we find out that they made a copy of every inbound and outbound message and wrote them to a separate disk. They answered the question we asked, but didn't tell us what we needed to know. Instead of asking the same question over and over again in the same way, we would have been better served by helping them understand what we were looking for.

Mr. MOORE:

IT people can get tunnel vision if Legal asks questions about *how* something is done rather than *what* it is that they are after. If a lawyer asks if e-mail is backed-up to tape, then IT may give an answer whose scope is limited to a tape backup process, when what was really called for was an answer about whether the data exists. The IT person thinks the question is about tape backups but the real question was about the existence *in any form* of archived e-mail, the likelihood of a misunderstanding obviously increases. It is imperative that the lawyers share their overall objectives.

For example, one of our communications industry clients recently had to scramble to achieve its document production deadline because the attorneys grossly underestimated the volume of data that the company had. The attorneys had asked IT to find all e-mails for a certain user group within a particular time frame on all e-mail servers. IT did just what was asked and found the e-mails on the e-mail servers. However, it was discovered only at the last minute that a substantial number of e-mails were stored on users' home directories and local drives. Of course, these were needed, too. By not clearly communicating their objectives to IT, the attorneys jeopardized the case, and cost valuable time, money and other resources.

Ms. JACKSON:

Sometimes, the IT people really need to know why you need what you are requesting. If you can just answer that one question for them, it all magically falls into place. Take some time to educate the IT department on the legal process and what you need from them during each stage of the process — the return on your investment will be enormous. Advise the IT department that during the initial stages of the lawsuit you will be asking them a lot of questions such as: 1) How many back-up tapes are there? 2) Can they isolate back up tapes for certain key players? 3) Can they turn off the SPAM filters and what ramifications will that have on the daily operations of the business? 4) Have they ever restored a back-up tape and tracked the costs of the restoration?

Mr. MOORE:

To many IT staffers, questions like these will seem insane. (Why would we *ever* want to turn off our SPAM filters!) Make sure they understand that you will need to explain your IT structure and data retention protocols to opposing counsel and the court.

Ms. JACKSON:

After the initial meetings you will still need to lean on IT throughout the discovery phase. Make them aware that they may have to help you answer questions from the other side (interrogatories) and that someone may have to testify to explain the corporate IT structure. Be gentle. Whenever I have advised an IT staffer that they may have to testify, they bristled, became prickly and started spouting that testifying is not in their job description. Ease them in. Show them the big picture and tell them about the cases that have cost millions and billions of dollars because they could not locate a back-up tape or could not stop their automatic deletion of e-mail in time. Opening their eyes to what is going on out in the legal world may get their attention.

Also, I highly suggest that you spend as much time with the IT folks as you possibly can. I caution that it should be "quality time" and not "my hair is on fire, you have to help me NOW" time. If you can't spare the time to have a seat in the server room and have someone explain all of the pretty blinking lights, at least talk to the IT staff whenever you run into them. Sometimes, the non-work-related conversations are the best rapport builders. It shows them you are a human being too, not just a demanding lawyer in a pinstriped suit who always thinks her hair is on fire.

Mr. MOORE:

Because of the high dollar sanctions being handed down in courts across America, many companies are revisiting their document retention and legal hold plans and are forming "working groups." These working groups usually consist of representatives from IT and legal as well as the records manager and can be very useful in opening a dialogue. An attorney from a large regional power company recently told me about their working group, which was originally conceived to work on their data retention issues. In the beginning it was hard for them to work together, but after a year of educating and communicating — and after finding just the right people — the communication between legal and IT has grown exponentially. Sometimes, simply working together on a project or in a team environment builds the type of camaraderie that you will need in future legal endeavors.

Regular dialogue is critical for IT in order to understand the type and scope of the organization's plans. This helps the department forecast needs and develop systems and infrastructure to support those plans. In most organizations, the IT budget is closely scrutinized and IT is measured by its ability to develop and implement within budget. The legal department's requests are changing so fast that they are difficult to meet and doing so divert our resources away from projects that we may have promised to others.

Ms. JACKSON:

One of the most useful things you can do to work with the IT staff is to develop a level of trust.

Sometimes, just working shoulder-to-shoulder with them helps build that trust. So, when there's a late-night project or you know you will be asking them to work into the weekend, perhaps you should go in and help — if only to provide moral support or pizza and soft drinks.

If all else fails, get an interpreter. These people come in two forms. The first is the legal person who has a technical mind or who likes to dabble in technology. Even better is an IT person with a legal background. (Even if you have to provide the legal background). Sometimes, the best interpreter is the consultant. Engaging an outsider to bridge the gap between legal and technical can be money well spent. Recently, IE Discovery was called upon to do just that, bridge the gap between IT and legal for a major transportation company. We were able to provide "translation services" so that the departments could work more effectively together.

Mr. MOORE:

The IT department sometimes deserves its poor reputation. Here are some suggestions to assure that the IT department will earn the respect of our peers in the legal department.

- Keep commitments. Don't commit to a deadline you can't keep. Meet — or better, beat — every deadline to which you commit.
- Establish an effective prioritization scheme where priorities are set and held.
- If possible, dedicate specific resources to legal discovery whose top priority is discovery.
- Employ on-line repositories wherever possible. This will provide maximum litigation support with a minimum of IT staffing.
- Meet regularly with Legal and Records Management to understand their needs and establish a forum for addressing them.
- Work with Legal and Records Management to understand and comply with all retention regulations.
- Have a "Discovery Coordinator" within IT who has the responsibility and authority to accomplish effective discovery.
- Invite Legal to educate IT staff on chain of custody, non-alterability, data integrity, quality control and reconciliation.
- Identify, purchase and maintain the tools required for discovery in a ready state.
- Establish communication lines and escalation paths for all legal issues.

CONCLUSION

At the end of the day, we are all going to have to become a little chummier. We can no longer shun that which we do not understand. If we do so, we will be doing our mutual clients a great disservice. Although we may have been forced to delve into unfamiliar territory, it's really not so bad. Grab your cup of coffee and head down the hall to say hello to the most friendly looking IT or legal staffer. He or she probably won't bite, especially if you bring a cup for them, too. Then just start talking.

