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## TOP 5 E-DISCOVERY RISKS FOR 2013

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Mike Warnecke handles corporate crises and high-stakes litigation. He has guided Fortune 500 companies and their executives through parallel white collar criminal investigations and prosecutions, civil government investigations, internal investigations and related “bet the company” civil litigation. He has counseled clients through matters involving antitrust compliance, environmental regulation and reporting and securities regulation and reporting. Mr. Warnecke recently represented a global freight forwarder in an industrywide international antitrust investigation involving antitrust regulators in eight countries together with a purported civil class action lawsuit in New York. Mr. Warnecke also recently defended a leading telecommunication services company in merger challenges filed by two of its competitors against its proposed acquisition of another major wireless service provider. He also counseled this client in related pre-merger integration planning and antitrust compliance. Mr. Warnecke is well versed in electronic discovery and information management issues and is an active member of The Sedona Conference, the nation's premier e-Discovery think tank. He is a senior editor of *The Sedona Conference Cooperation Guidance for Litigators & In-House Counsel* (2011).

**Overpaying:** All five top e-Discovery risks for 2013 fall under this one theme. The risk of paying too much arises from failing to take sufficient advantage of the competitive forces, process management techniques, software tools, opportunities for cooperation and procedural rules that are now available to reduce costs. Below are, in the author’s view, the top five general areas where companies and law firms are not taking full advantage of their ability to reduce e-Discovery costs.

### RISK ONE: FAILING TO DELVE INTO VENDOR SELECTION AND PRICING

The e-Discovery space is extremely competitive, with innumerable service providers of all shapes and sizes fighting for opportunities. Companies should compare several vendors and negotiate aggressively. While vendors are eager to distinguish their services from those of their competitors, they also try to distinguish their pricing—both in ways that add value and, at times, seemingly in ways to obfuscate the true cost of their services. The myriad pricing options and add-on fees make conducting apples-to-apples comparisons difficult. One should estimate the expected volume of electronically stored information (ESI) (together with other related parameters) under high, medium and low scenarios and then have each vendor provide its all-in cost at those estimated levels. Also, it should be noted that proper use of dedicated vendors can actually save money over the long run—given their full attention to the task, their experience with the issues and their ability to defend the decisions made.

### RISK TWO: FAILING TO UTILIZE PROCESS MANAGEMENT TECHNIQUES

E-Discovery is a complicated process and should be treated as such. Dedicated personnel should be responsible for designing and managing the process. The rationale behind all decisions should be documented with supporting analysis. All assumptions made should be identified expressly, and their effects should be understood, as the assumptions are compared to actual results. The process should include efficiency and accuracy measures, improvement feedback loops and monitoring, deadlines and after-action

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reviews. While the process may be slightly different for different cases and different amounts of ESI, some serious thought and organization need to be applied to every e-Discovery process to minimize the risks of costly mistakes (e.g., preservation failures, over- or under-collection, improper processing and filtering, inefficient review procedures, production errors, etc.).

#### RISK THREE: FAILING TO USE TECHNOLOGY-ASSISTED REVIEW

In 2013, we are in the twilight between the official end of the brute force massive human review era of e-Discovery (which generally applied to ESI the mindset developed during massive hard copy document productions) and the beginning of the systematic, structured and targeted computer review era now permitted by the latest software and project management techniques, commonly called technology-assisted review (TAR or predictive coding). In a nutshell, TAR is the use of computers to segregate documents into subject matter categories quickly and without paying an attorney to read each document individually (at least not until the volume of documents has been reduced substantially). Increasingly, litigants are becoming comfortable with its promise, attorneys are learning to manage it and courts are viewing it as a reliable, if not superior, alternative to the old brute force approach to document review. Currently, TAR only makes sense for cases with large amounts of ESI. As the technology and associated project management skills improve, and court acceptance continues to grow, TAR will start to make sense for cases with smaller amounts of ESI as well. Not only can TAR save money, it can also save time and provide strategic speed advantages to those use it.

#### RISK FOUR: FAILING TO COOPERATE

For many reasons (e.g., general impatience with discovery, new procedural rules, new attitudes about old procedural rules and the work of e-Discovery think tanks such as The Sedona Conference®), courts are increasingly expecting litigants to agree among themselves how to handle e-Discovery. Cooperation can indeed work. Time, money, aggravation and risk can all be eliminated by sitting down and determining your own fate with your adversary. Often, having more junior members of the legal team work with their counterparts will create an environment where more cooperative discussions may occur—especially regarding the details of e-Discovery.

#### RISK FIVE: FAILING TO USE THE DISCOVERY RULES

The procedural rules and interpretive case law regarding e-Discovery are now (relatively) well developed. While dramatic sanctions cases grab the headlines, there is growing legal support for being reasonable and proportional in fulfilling one's discovery obligations. In other words, the real weight of authority is in all the denials of motions to compel, or motions that were never filed in the first place. These cases give producing parties the confidence to operate reasonably and in good faith. So, when cooperation fails, parties should not be afraid to say "no" to unreasonable e-Discovery demands or scare tactics (sometime driven by wholly internal defensive medicine reflexes). Litigants should not accept unreasonable burdens and costs for fear of standing up for their rights under the discovery rules. Similarly, making proper use of a court order blessing the parties' agreed approach regarding e-Discovery under Federal Rule of Evidence 502 is a tool that should be used more as a cost-reduction method.

So, short and sweet, these are the author's views of the top five areas where litigants have the highest risk of spending too much money on e-Discovery in 2013. We are currently caught between two worlds, unable to let go fully of the past and unable to take full advantage of the cost savings promised by project management techniques, TAR, cooperation, the procedural rules and the courts' increasing willingness to accept the concepts of reasonableness and proportionality. Litigants should press forward on these concepts to drive e-Discovery costs down.

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