

The RANE Insight Series

Getting Ahead of the Regulatory and Litigation Curves: How to Know Your Data

Conference Call Recap

Wednesday, March 9, 2016

SPEAKERS

Aaron Gardner, Vice President, Enterprise Solutions, the LDiscovery Companies

In his current role, Gardner focuses on helping law firms and corporations design and implement information governance programs in order to minimize cost and risk while maximizing value across their entire records management, regulatory compliance, ediscovery, and storage management portfolios. Gardner is an active public speaker on ediscovery and information governance and has collaborated on a number of ediscovery articles for trade publications.

Daniel Garrie, Chief Executive Officer, Law and Forensics

After successfully building and selling several technology start-up companies, Garrie has garnered a national reputation at the intersection of computer forensics and the law, and now sits as Founder and Executive Managing Partner of Law & Forensics, a legal-consulting firm that works with clients across industries on software, cybersecurity, e-discovery, and digital forensic issues. Garrie is an active advisor and board member for a number of different companies, including Get.it, Norse Corp, and Eccentex.

Timothy P. Murphy, President, Thomson Reuters Special Services, LLC

Prior to becoming president at TRSS, Murphy was a VP at MacAndrews and Forbes Inc. Murphy also spent 23 years in the Federal Bureau of Investigation (FBI) serving in various management roles, including Special Assistant to the FBI Director. As Deputy Director of the FBI, Murphy was part of the leadership team that innovated technologies and methods to improve the coordination and sharing of law enforcement data.

MODERATOR

David Lawrence, Co-Founder and Chief Collaborative Officer, RANE

The unrelenting growth of in-house data, coupled with increasing regulatory and risk management requirements, have placed a heavy burden on enterprises to “connect the dots” of their internal data and digital communications. Yet for enterprises large and small, discovery of what “should have been known” has too often been a post-hoc response to a costly and damaging event. Regardless of industry, Knowing Your Data (KYD) has emerged as an essential standard for managing legal, financial and reputational risks. Today, new technologies and processes can provide the opportunity to more effectively manage risk

ahead of litigation, investigations, whistleblower events, cyber and security threats and compliance violations.

DEFINING KNOW YOUR DATA (KYD) AND INFORMATION GOVERNANCE

- “It’s really much broader than traditional records management, [just] organizing and structuring your data, but it’s incorporating information security, compliance, electronic discovery, risk management, privacy, data storage, key enterprise architecture and other sorts of nuance pieces,” Daniel Garrie said. The process requires a multi-disciplinary approach, especially considering that corporations generate an enormous amount of information.
- “So you need to know your data to know what you want to share with the world, share with your friends, share with your family, share with your co-workers and share with your clients.” Without proper information governance, issues can arise with regulators, customers and consumers from the standpoints of privacy and compliance, both in the United States and abroad.

BEST PRACTICES FOR INFORMATION GOVERNANCE

- Aaron Gardner noted that a common trend was “dark beta discovery,” which stems from organizations often not knowing what resides in their troves of files. “They’re looking to get a handle on what is in there so that they can get rid of what’s redundant, outdated and trivial.” Determining what information is valuable can help an organization manage access to relevant documents, in the event of “a regulatory response-type scenario,” as well as for other functions such as evaluating employee productivity and other cost savings and reductions.
- Gardner shared an anecdote about one company discovering it had some 4,000 copies of a document related to a company picnic. “Ask people who have been doing this for a while, and I’m sure you can find many, many examples like that.” Gardner said that the process can begin with various techniques. “But, typically, we start at a high level with a metadata analysis which is something that’s frankly been possible for quite some time but in the broader framework can really get you some good results.” Beyond that, an analysis based in National Institute of Standards and Technology (NIST) techniques will allow organizations to identify critical files and allow the clearing of redundant ones. Next, content analysis, such as pattern matching, can help identify bulk information. Lastly, as seen in the e-discovery space, there is “predictive coding, where we apply some human judgments to a sample of documents.”

WHO OWNS INFORMATION GOVERNANCE?

- “At the CFO level, when you’re signing on the dotted line for stocks, data governance is equally important. When you’re a general counsel and you’re dealing with complex litigation and you don’t want embarrassing e-mails, or you want to know what information you have or don’t have, it’s equally important. So it’s really relative to the perspective and to managing that risk appropriately,” Garrie said.

- Timothy Murphy added that during his time in government, it was crucial to put someone in charge of data governance — an approach that can be useful in the private sector “because general counsel’s office are so busy doing their day-to-day work, because the IT shops are so busy, the business units are concentrating on what they concentrate on, the compliance group are working a lot of those issues ... the OFAC, the FCPA and the like.” Murphy said he was “kind of conflicted in this because I hate to tell organizations that they need another person in charge of something, but that’s what this has come down to in this day and age.” What is important is having a person in a role that can respond to the board on a daily basis regarding the status of an organization’s data. “So I would say you need somebody at board level or just below that reports to the CEO,” Murphy added.

THE INVESTMENT AND THE PAYOFF

- Gardner said that one client with which he’s familiar is using a keyword-based approach to scan about three million messages a day “to try to determine whether or not somebody is saying something that they shouldn’t say to a customer or breaching some internal firewall that they shouldn’t be breaching in terms of research talking to someone else in sales, things like that.” With the advent of machine learning, this client is engaged in a pilot program to take a more predictive, flexible and powerful approach that can adapt to employees speaking in coded language.
- But the cost remains a hurdle for some organizations. “It’s challenging because IT doesn’t necessarily want to lay out that money in order to prevent something that may or may not happen, right? And so, you really do need someone who can look across all those different budgets and all the different lines of business in the organization and say, ‘We’re going to be proactive about this. We’re going to spend a few million dollars now in order to prevent that \$15 [million], \$100 million — in some cases billion-dollar price tags — six months or a year [or] a few years from now.’”
- Moving from government into the private sector, Murphy found that there were ROI considerations, as well as the common question of how expenditures are going to save the organization money. But there is a risk within organizations from not being able to respond to e-discovery requests; the real issue is risk mitigation. While it was “a massive undertaking” in government because of the disparate databases and agencies involved, private enterprises can do “some great data mapping that really is not that expensive,” often in the order of tens of thousands of dollars to start.

MAPPING: THE CHALLENGE OF EXTRACTING NECESSARY INSIGHTS

- At the FBI, Murphy noted, there was a recognition that changes in technology and data collection required an evolving approach. “This is a continuing process whether you’re in government or whether you’re in the private sector.” After 9/11, the FBI focused on its ability to examine its data and “start connecting those dots and those connections” that had been missed, as well as legal and business requirements, [and] being able to respond to lawmakers, or to FOIA requests.

- Focusing on the operational side, Murphy said that as the FBI “made great strides” as it put new IT and case-management systems in place, yet “we’re still not at that point where we need to be.” The December 2009 case of Umar Farouk Abdulmutallab, the so-called “underwear bomber” who attempted to set off an incendiary device on an airliner heading to Detroit, highlighted some of the shortcomings that remained. “Everybody gets called on the Hill after this event, and sure enough across all government agencies, there — some of the highest-profile agencies, Department of State, the CIA — there was information on Abdulmutallab that we should have known about, should have been connected, wasn’t connected in internal agencies and wasn’t even connected obviously to the FBI even though some of the information was passed to a different unit.”
- Murphy said that the FBI brought in external experts to conduct data mapping over the next nine months. “And a lot of this sounds very simple. But as we know in government and the private sectors, it’s very difficult because you’re dealing with different entities; you’re dealing with general counsels, IT groups; business units; the compliance groups.” What the FBI found was that “there were 105 different databases in the FBI that weren’t communicating or talking to each other — and quickly doing a data map, you understand that 13 of those 105 were used 80 percent of the time.”

TURNING KYD INTO A COMPETITIVE ADVANTAGE

- “I think not only are there economic benefits, but I think there are some situations where knowing what your data is not only lets you monetize it, but, in some sense, it’s priceless,” Garrie said. Referencing the Sony Pictures data breach, Gardner noted that in generally accepted accounting principles (GAAP), information is “basically treated as sort of a residual. It’s not an asset. It’s not something that you can put a hard number on.” Yet for Sony, especially after the breach, the value of its data was “quite a bit more than zero.” Gardner said that while major changes to accounting principles may not necessarily be forthcoming, executives could begin to start rethinking the value of information and how to build that into financial thinking and valuing enterprises.
- In terms of cost savings, good data governance can increase productivity just by making it easier for employees to find the information they need. “There is an estimate that knowledge workers spend something like 40 percent to 50 percent of their time just trying to find information that they know they have somewhere. They can’t lay their hands on it,” Gardner said. “So if you think about that, those productivity gains from making it easier for your workers to get access to information, I mean, that, by itself, seems tremendously valuable.” Gardner said that it was important to look at the overall picture; “you have to be able to search all of your data all the time.”

MISSED OPPORTUNITIES

- Murphy noted that many companies still maintain “a huge, huge volume of paper records that they don’t understand” and yet often ship off to storage without a comprehensive plan for cataloging. In such cases, data mapping — and maybe even a digitization program — could lead to real savings. “You’re going to save in data storage because you’re going to find shadow IT, you’re going to find records electronically stored in two

different data centers or datasets. And then, you're also going to start looking at across the organization as you do your data mapping, potential savings on enterprise licenses for maybe some software you're using to use that data and run that data. And that's maybe duplicated throughout the organization."

- Garrie said that the easiest way to realize savings is simple — "just in fixed storage, hardware cost and IT support cost." Gardner alluded to the LIBOR-fixing case in noting how in many instances the data was there to be acted upon ahead of time: "If you look at a lot of these regulatory actions recently, it's not only that the information was there to be discovered, but there was someone actively calling it to their supervisor's attention or their HR department's attention or the compliance department's attention," he said. "And so, the question then arises: Well, why didn't those functions act on this information? Was there some sort of cultural issue?"
- Even a keyword-based approach to look for words associated with complaints — "words like 'fraud,' so on and so forth" — could help find red flags and provide a cost-effective way to address some of the issues. "I think the primary takeaway that would be most useful here is that understanding and knowing where your data is and how that knowledge impacts the operations of your organization is really the first step — and figuring out whether or not investing and deploying such technology in [data-management] systems is appropriate," Garrie added.

To learn more about KYD or information governance from one of the expert speakers, please contact RANE for an introduction.

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[Data Governance Best Practices,](#) *Arizona Department of Education*

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