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Managing the **Five Stages** Of **E-Discovery Grief**

BY H. CHRISTOPHER BOEHNING AND ROSS M. GOTLER

E-discovery obligations stemming from active or threatened litigations and investigations can be disruptive, life altering events for companies. Preservation and collection of potentially relevant information, along with the subsequent document review and production, can cause significant interruptions to business, challenge accepted notions of business process and risk management in an organization, and lead to costs that can be staggering.[1] Plus, companies have to deal with these obligations in the context of a constantly evolving landscape of e-discovery law and rules.[2]

Psychologist Elisabeth Kübler-Ross first introduced the model of the Five Stages of Grief in 1969.[3] Over the years this model has come to represent a popular notion for how people react not only to grief, but to other impactful events. As part of the process of understanding, considering, and managing its e-discovery obligations, a company may react in a manner that generally follows these Five Stages. In this article, we consider the Five Stages of Grief in the context of e-discovery and offer strategies for how companies can manage each of these Five Stages of E-Discovery Grief.[4]

Stage 1: Denial

The reality of e-discovery obligations can be difficult to accept for a company, especially if it is a company's first time with such an experience. In the first stage of e-discovery grief, a company encounters denial and may challenge the obligations that it faces. This may occur, for example, after first conferring with outside counsel and learning about the potential impact on the company from complying with e-discovery obligations related to a new or threatened litigation. Common reactions may include:

- "This can't be happening here."
- "We can't be expected to deal with all these requirements."
- "This is too disruptive to our business, there has to be simpler way."
- "This will cost a fortune, it can't be right."
- "We can't ask our information technology group or our other employees to do this."

E-discovery obligations in the context of civil litigations and regulatory investigations, however, are a well-established reality. The electronic information in an organization, such as email, databases and other electronic documents, may be evidence relevant to an issue or dispute. Just as they were with paper documents, companies are under various requirements, be they from regulations, rules, court orders, or common law, to preserve and manage such electronic evidence and produce it to requesting parties. A company dealing with this denial stage should focus on gathering as much information as possible about e-discovery from trusted resources, on improving its understanding of its obligations, and on beginning to formulate plans to manage those obligations. Strategies for a company to manage the denial stage of e-discovery grief include:

- Realize that the threats of litigation and investigation are a standard part of business and e-discovery is a modern reality.

H. CHRISTOPHER BOEHNING *is a litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison and* ROSS M. GOTLER *is the firm's e-discovery counsel.*

• Confer with e-discovery experts such as outside counsel and consultants to learn more about the e-discovery landscape.

• Build the costs for potential e-discovery-related obligations into legal department budgets.

• Advise executive management of the risks, threats, and costs related to litigation and e-discovery.

Stage 2: Anger

Once the reality of e-discovery obligations begins to set in, a company may be in the next stage of e-discovery grief: anger. In this stage, company representatives may display anger—at the obligations, at the situation, at counsel, or at other company employees. Such anger may be in response to many items, such as hearing about the work necessary to identify and preserve information in the organization, the related business disruption, or the possible cost of e-discovery.[5] Reactions at this stage may include:

• "How did we get ourselves in this situation?"

• "Whose fault is this? Who is to blame?"

• "Why do we manage our email like this? It makes it impossible to find what we need!"

Moving through this stage is critical for a company, both to ensure that it effectively manages the litigation or investigation at hand and that it can plan longer term for future such obligations. While anger may be justified in some instances, it is important for a company to realize that such situations are all too common given the extensive use of email and other electronic data as business tools. Companies set up email systems for the purpose of communication, not necessarily in the overall context of governing and managing information in an organization for recordkeeping and e-discovery purposes. Such communication tools are only now catching up to e-discovery reality and offering built-in technology and processes for management of records and preservation of electronic information that companies can use effectively in the e-discovery process. This is small consolation for a company, though, in the midst of an e-discovery crisis. Strategies for a company to manage the anger stage of e-discovery grief are:

Once the reality of e-discovery obligations begins to set in, a company may be in the next stage of e-discovery grief: anger.

• Understand that many organizations have experienced the same or similar situation.

• Engage e-discovery law and process experts to help triage the current situation and move forward.

• Begin conferring with departments across the organization, e.g., legal, information technology, project management, risk management, to discuss the operational responses to e-discovery obligations such as issuing a litigation hold and suspending automatic email deletion (as warranted).

Stage 3: Bargaining

In the third stage of e-discovery grief, bargaining, a company is still trying to come to terms with the scope and impact of its e-discovery obligations. Company representatives may want to minimize the obligations that they currently face or just try to hope them away. This may happen, for example, after a preliminary determination of potential key players in a dispute and a related estimate of the cost necessary to preserve and process their electronic information. Thoughts at this stage could include:

• "If this one just goes away, we'll be ready next time!"

• "Let's just do what we can and hope for the best."

• "We've done enough and spent enough already, that must be enough."

As the many e-discovery sanctions decisions have demonstrated, this can be a dangerous stage for a company. Decisions made here regarding the scope of the e-discovery response can permanently impact the case going forward. Companies, of course, should actively consider what constitutes an appropriate response to a specific litigation or investigation; there is no one-size-fits all e-discovery plan for every matter. That said, active management of e-discovery obligations is important, even in situations where the determination is ultimately made that a discovery demand is unreasonable. A company in the bargaining stage should focus on ensuring that it considers its obligations from an objective perspective, with as much guidance as possible from trusted experts. Strategies for managing the bargaining stage include:

• Understand that in the absence of rules to the contrary, broad preservation of potentially relevant information is a reality in e-discovery practice.

• Realize that delay in analyzing and managing preservation obligations can hurt a company.

• Recognize that the e-discovery process, while complex and costly, is manageable, and there are ways to ensure high quality while still controlling cost.

• Appreciate that with appropriate short-term and long-term planning, organizations can be in a position to circulate effective litigation holds, to preserve data with minimal impact on the organization's bottom line, and to effectively manage risk.

Stage 4: Depression

The next stage of e-discovery grief is depression. In this stage, a company has understood that the e-discovery obligations are real, are not going away, and are a challenge to manage. These obligations may include items

such as working with outside counsel and business unit heads to identify and interview key players related to a dispute, coordinating with the internal information technology group and external vendors to preserve all potentially relevant email and documents for these key players (which may involve significant, immediate changes to a company's electronic data management processes), and working closely with vendors and outside counsel on review and production of documents. In many situations, such obligations may be a significant drain both on company finances and on the time of staff. Typical reactions from a company during the depression stage are:

- "How has this happened?"
- "How will we get through this?"
- "This has been such a drain on our resources. We can't do this again."

Managing this stage, while difficult for a company, is a key part of being able to move forward to acceptance. Depression as an expression of e-discovery grief is a natural, understandable part of the e-discovery process – a possibly unexpected, significant event has impacted the organization, and this impact may have been sudden and extensive. A company in the depression stage of e-discovery grief should work to understand what has led to this stage and recognize and appreciate the full impact of the obligations on the company, then leverage any increased focus on e-discovery due to a negative experience into positive change. Strategies for managing this stage include:

- Understand that this reaction is common and that an organization can work through its e-discovery obligations and plan for the future.
- Engage with experienced e-discovery professionals and counsel to create discovery and document review management plans.
- Focus on controlling costs and minimizing impact on the organization while still maintaining quality and managing risk.

Stage 5: Acceptance

In the fifth and last stage of e-discovery grief—acceptance—a company has come to terms with its current e-discovery obligations, is actively managing them, and is beginning to make plans for the future. Company representatives have hopefully gained valuable experience to apply to proactive planning in the areas of e-discovery and information governance. Reactions at this stage may include:

- "This is a reality, and we'll have to do this again."
- "We've learned so much throughout this process."
- "What changes can we make so we'll be better prepared next time?"

Companies, especially those that may be serial litigants, should strongly consider implementing permanent policies and procedures relating to e-discovery and, when indicated, establishing dedicated roles to manage e-discovery and liaise across the company and with outside counsel and vendors. Launching an e-discovery readiness program at the company is one way to help ensure that the next time e-discovery obligations arise, a company is ready to handle them. Buy-in across a company is essential for such a program, as is identifying the right team members and clearly defining all roles and responsibilities. Strategies for a company in the acceptance stage include:

- Create or update the company's document retention and litigation hold policies.
- Review information governance and recordkeeping policies and technology, such as the technology and process used to archive email.
- Consider strategic projects to align activities relating to messaging, records management, compliance/archiving, and e-discovery.
- Create an e-discovery readiness team with representatives from key areas such as the general counsel's office, information technology, and records management.
- Work with this e-discovery readiness team and with outside counsel and vendors to be prepared for any new e-discovery obligations.
- Create repeatable, defensible processes for e-discovery, potentially resident in a dedicated e-discovery management team.

E-discovery obligations are complex, modern responsibilities that challenge many organizations. Companies finding themselves experiencing aspects of the Five Stages of E-Discovery Grief will hopefully find the strategies provided here helpful not only for handling any immediate needs but also for long-term management of e-discovery at an organization. By focusing on the predictable aspects of the e-discovery process, creating an enterprise-wide e-discovery strategy, and working with trusted outside counsel and e-discovery service providers, a company can find itself better prepared for handling e-discovery obligations and managing the Five Stages of E-Discovery Grief.

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1. See, e.g., Nicholas M. Pace & Laura Zakaras, "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery" (2012).

2. The Federal Rules of Civil Procedure relating to electronic discovery were amended in 2006; a new set of proposed amendments relating to e-discovery was released for public comment on Aug. 15, 2013. Proposed Amendments Published for Public Comment, http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

3. Elisabeth Kübler-Ross, "On Death and Dying" (1969).

4. The Five Stages model should not necessarily be considered a linear representation of how companies react to e-discovery obligations. Many of the stages may overlap and companies may exhibit behaviors or reactions from a particular stage more than once.

5. In a recent report, cited above, that analyzed the document review and production costs in 45 cases, such costs ranged from about $17,000 for an intellectual property matter to over $27 million for a product liability matter, with a median cost of $1.8 million. Pace, supra at 17.