Hiring to Firing Podcast — Navigating the Maze: eDiscovery Essentials for Employers
Hosts: Tracey Diamond and Emily Schifter
Guest: Alison Grounds
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Tracey Diamond:

Welcome to *Hiring to Firing* the Podcast. I'm Tracey Diamond, and I'm here with my co-host, Emily Schifter. Together, we tackle all employment issues from *Hiring to Firing*.

Emily Schifter:

Today, our guest is Alison Grounds, the founder and managing partner of eMerge, which is a wholly owned subsidiary of our law firm that handles integrated discovery services end to end. And Alison is also one of my personal heroes for coming up with this idea and having these capabilities in our firm. Alison, why don't you tell us a little bit more about eMerge and your background and practice at the firm?

Alison Grounds:

Well, thank you guys so much for having me. Yeah, eMerge is a subsidiary. But, really, we like to think of ourselves as a practice group. We are an integrated team of both lawyers and technologists that assist our clients and case teams with all things data management. It can be pre-litigation, litigation readiness, consulting around data governance issues. And then, of course, once litigation hits, helping with preservation, collection, analysis, production, trial, all the things. Really understanding the information, which is at the core of all litigation and disputes. Excited to be here.

Emily Schifter:

You are the perfect guest for this topic, truly, end to end. And for our listeners who don't know, this is not Alison's first time on our podcast. She also joined us back in 2023 for a very special in-person episode where she spoke with Tracey and our partner, Evan Gibbs, about generative AI and using clips from the movie The Matrix. And that is a highly fascinating episode. If you haven't heard it, definitely go back and check that one out. I definitely recommend it. But we're absolutely thrilled to have you here of this today, Alison. So thanks again for joining.

Alison Grounds:

Well, thanks for having me. You guys are the best.

Tracey Diamond:

All right. Well, let's get into it then. Any employer who's been involved in litigation is likely familiar with the sometimes-dreaded phase of a lawsuit known as "discovery", and particularly these days, e-discovery. But as a refresher, and for those of our listeners lucky enough to have never had the experience of going to the dentist, "Oops, I meant discovery," what is discovery and e-discovery?

Alison Grounds:

Well, Tracey, my cocktail party version of this answer, when my aunts ask me what it is I do for a living, discovery is the phase of any litigation that's required by the rules. And in the American system, the thought is more information is better. And discovery is the opportunity to exchange information between adversaries to really get to the merits of the case. It may be information related to claims or defenses. And in these days, most of that discovery process involves exchanging data, documents, emails, communications, all the fun stuff. And discovery also comes up in non-litigation and government subpoenas or investigations, and a lot of these same concepts play out in other areas like due diligence.

Tracey Diamond:

It's interesting. I've had a lot of clients who are surprised sometimes when we're dealing with EEOC charge or a state agency and they have these very long requests for information and they say, "Do I really have to answer these?" And we might be able to push back. But the answer is generally yes. I think that's a great point that it's not always just once the lawsuit is filed.

Alison Grounds:

It's definitely broader than I think those that have not been through the journey, as you say, Tracey, going to the dentist. I think there is a presumption that it's a more narrowed exploratory. You assume, for example, if you're watching TV, I know we're going to have some great clips from movies where we see that it's more than that. But until you guys found these wonderful clips, most people's idea around litigation and discovery would be that it's a fairly narrow exercise.

And I think probably one of the most common surprises for companies new to the process is how invasive it is and how broad the rules have been worded to potentially implicate sources you might not expect and airing on the side of inclusion in many instances. And certainly in recent years, because of the massive explosion of data and the expense associated with having to sift through all that stuff to find what really matters, the rules and case law have sort of been revised to think about things like proportionality. But it still is pretty unwelcomely shocking to most people how invasive this process can sometimes be. Part of our job as their outside counsel is to try to, when we can, advocate on their behalf for focusing this process and making it as useful and painless as possible.

Tracey Diamond:

Yeah, I would say even sophisticated clients of mine are often quite surprised that they can't do what probably was a pretty standard practice in days of yore where they would just sort of self-identify, they'd go in and run their own searches and think that that's enough. And I know we're going to get into this a little bit later today, but that's certainly not enough under today's rules. Right, Alison?

Alison Grounds:

No, that's a great point. I think it's one of these areas that has been the most impacted by technology. And I know I'm not supposed to use brand names here, but I think this term has become ubiquitous, is courts, I would say. Think that you can just run a Google search, right? That they think you can just type in a magic word and find information. I think sometimes, not all courts, we have some wonderful courts out there that are very thoughtful about discovery, but sometimes people oversimplify and don't realize how complicated it can be and haven't necessarily modified their workflows for discovery to address new complicated sources.

And I think because of that and because, unfortunately, bad facts make bad law, there were enough instances where self-selection and self-collection were deficient. And so now there's a little bit more of an expectation that it's going to be more like a business process and you're going to be able to document how you arrived at that universe in an objective way and be able to descend that because it's just too easy to miss things with so much information these days.

Emily Schifter:

Well, I think that's a good segue into our first clip. As you previewed, we always use some sort of pop culture reference to guide our conversation. And today, we decided to take some inspiration from some of our favorite TV show lawyers. We've got legal clips from Better Call Saul, Suits, and The Good Wife coming up ahead to help us illustrate some of these points, and best practices, and some pitfalls. Starting off with Better Call Saul, a legal drama that is a spin-off from or prequel to, many may know it, the popular TV show, Breaking Bad.

And when people think about discovery, we've talked a little bit already about how the volume of it might surprise people. But I think even backing up from there, I think people sometimes forget about the electronic piece. I think people more commonly tend to think about stacks of boxes in a conference room just filled with documents.

Alison Grounds:

Is that still true, Emily? Do people in 2025 still think about as paper? I mean, I saw that you guys previewed that, you were going to say that, and I thought, "Really? Are there people that really still think discovery is paper?"

Tracey Diamond:

I'm guessing I hear the sarcasm in your voice, Alison.

Alison Grounds:

I wonder, from your perspective, is that something people still think about as paper?

Tracey Diamond:

I think it depends on the client. I think the smaller clients are still pretty paper-focused and the larger clients are maybe more electronically based than in previous decades, maybe.

Emily Schifter:

And the type of case, I think, too. Because I think sometimes if you've got somebody who's working in a manufacturing facility and they're just one single plaintiff type case, the client's thinking, "Well, there can't be much electronic, right?" They're not sending emails. They don't have a company cell phone, but they may not be thinking about other parts of the employment life cycle that are relevant if they keep personnel files electronically, things like that. I think it depends. But hopefully, most of our steamed listeners are well aware that it's more than just boxes in a conference room.

But in this clip that we'll play next, the main characters from Better Call Saul, Jimmy McGill, who's better known as Saul Goodman, and his brother, Chuck, are bringing a class action lawsuit against an assisted living facility. AncId they are dealing with a classic document dump, which just involves being inundated with boxes and boxes of paper, lots of documents from the opposing team as a tactic just to make their case prep harder. Let's listen in.

[BEGIN CLIP]

Jimmy:

What the hell is all this?

Chuck:

There was a delivery while you were in court.

Jimmy:

Schweikart and Cokley sent this? What is it?

Chuck:

They served interrogatories on each class representative. This box is deposition notices. Documents calling into question the mental health of many of our elderly clients. Attempting to stop a class from being certified on the grounds they're not competent to file. Oh, this is just the beginning. They're going to continue this document dump until we're drowning in paperwork.

[END CLIP]

Emily Schifter:

Paper documents can make life complicated because it's a lot to go through, but now we have moved beyond physical file boxes in most cases to electronic sources, which in some cases just makes the volumes that we are dealing with bigger, more complicated, and electronic document dumps even more possible.

Tracey Diamond:

And the scale is just really infinity and beyond, right? Alison, what are some of the key things to know about discovery of electronic information?

Alison Grounds:

A great question, Tracey. And it's interesting because I think one of the first things I wrote about what is e-Discovery was many, many years ago, and it was sort of explaining to people that what that E stands for in electronic is really everything we do these days is very rare that information is being generated. What I say to people sometimes when they say, "Well, they used to." I don't hear that often anymore. "I don't think my case involves the e-Discovery. Are you guys using typewriters to create documents? Because most information is generated electronically. Whether that's communication. Or these days, you're seeing obviously the increased use of collaboration spaces in Zoom and Teams, messaging applications. Even social media has now become a way to communicate with Facebook Messenger and tools like that. It's really the volume, type, nature, format is constantly evolving and we're seeing that increase and it's a chase to keep up with that.

Most of this technology is not designed to be discovered in litigation. Understanding what may be available, how to preserve it, how to collect it, how to analyze it, even the word document. I mean, if you're a real e-Discovery nerd like me, one of my think tanks had an entire webinar on what is a document in 2025? What does that look like? It's no longer a piece of paper in a file folder. Is it just a Word document or is it the zip file that has all the things included in it? If you're having a Slack conversation, is it everything that was said in the last 24 hours or just things on a certain topic? It's an interesting topic.

And certainly, in your space, the labor and employment space, is it badge swipes? Is it audit logs of when you were working on your machine, when you logged in and when you logged out? Is it video surveillance? If you're on a manufacturing line, there's a lot more cameras happening here and AI being used for things like ensuring safety that could also be relevant in other contexts and litigation. It's definitely an expanded universe that is expanding daily.

I was trying to think for you if I had like the most interesting source that I discovered in the last few weeks. And I think mostly for me, it's just there's always a new application. Oh, the kids, they always find a new tool to use, and people are trying to stay engaged and connected, and it's definitely an ever-evolving universe of data for us to discover.

Tracey Diamond:

One thing that you and I have been talking about, Alison, is the advent of AI being used to summarize and spit back outlines of meetings, and all those new tools were AIs involved and how that is creating new pieces of evidence. Just they outline themselves. And are they accurate? And are there any privilege issues? A whole host of new issues that are arising with just that one tool.

Alison Grounds:

Oh yeah. Just yesterday, I am in a case where there are some discovery disputes. And my adverse party noted in some of the documents that had been produced a reference to meeting summaries and they, of course, said, "Those look interesting. Can we get those? It looks like we want something from this particular meeting." I definitely think it's one of the biggest areas of data management consulting we're doing right now is questions around how did we deploy these very useful productivity tools? They can record a meeting, they can summarize it, they can give us action items. How do we use those in a way that helps us with our business and efficiency, but also takes into account the potential risk?

There's certainly privacy concerns, there's discovery concerns, there's privilege concerns. And the configuration of these tools is constantly changing. We learn something new almost daily because Microsoft and other deployers of these tools are changing them almost daily, right? These are new technologies. They want the user experience to be positive. They're trying to roll out things. Again, the goal of which is to make the tool useful, not to deal with the discovery. It's a moving target on the issues around how do we set up good information governance so that we know what we have and when something's being recorded and we have a process for potentially confirming the accuracy of that and someone owns that. And/or we don't retain things that we don't need to that are really more of a temporary help for us. And if it's no longer needed or subject to other requirements, we don't accumulate even more information, which can create – it's just an unnecessary storage and burden on businesses.

Emily Schifter:

Well, moving on from the types of documents, and what is a document and data covered, your great point about what are we storing. And do we need to store things? What obligations does a company, or in our case, usually an employer, have once litigation begins to make sure that they have their arms around all the data and information that the other side might request or that they might need? But how do those obligations change with respect to electronic information?

Alison Grounds:

Great question. I mean, certainly, the duty to preserve once there's a reasonable anticipation of litigation is the same regardless of the format of the information. There is a little bit of a sentiment that there could potentially be, although this is not officially established, some proportionality considerations and preservation as there are also in what is discoverable. But that's a little bit of a risk to take because one problem with preservation is, many times, you may not know exactly what court. You could be in multiple courts. You don't necessarily know,

because in our system, complaints can be very generic. You may not yet know with enough specificity exactly which sources or custodians may be implicated.

Parties have a duty to preserve once litigation is reasonably anticipated. But scoping what needs to be preserved is the art and why we all get the phone call to sort of help walk through that and predict, look through our crystal balls. What do we think is likely to be requested? And what do we think we need for our own defense or to bring our own claims, right? Sometimes discovery gets a bad rap as only being something you're subjected to. It can also be something that gives you a litigation advantage. Who has more information? Who knows the facts sooner? And can bring either a good proposal to the table or have an advantage in the litigation.

I think that duty to preserve, which is making sure you don't dispose of things that might be relevant, whether it's intentional. Certainly not. We hope not. And also, even if it's just part of your routine disposition, that has to be suspended. Another concern with these sources is that they are frequently collaboration sources, or AI summaries, or drafts. These are things that aren't retained very long because they don't really have a business value. And that's totally appropriate if there's no regulatory reason to do so.

However, once litigation is triggered and there's a duty to preserve, you need to promptly have a process in place to find and preserve those sources that may go away quickly. And that's very hard to do on the fly, which is why we're spending a lot of our time advising clients on how to have a proactive plan in advance for if litigation arises, how do we find these sources and preserve them?

Tracey Diamond:

As you're talking, it made me really think about instances I've had through the years with video surveillance and how when players tend to tape over that fairly frequently. And they get taped over before they even realize that they may need to hold on to it because the employee maybe gets terminated a couple of months later or the employee is terminated. But by the time he or she actually grieves the termination, it's now a couple of months down the road. And then that great video surveillance that you had, the gotcha moment, is now gone and can't be found again.

Alison Grounds:

Yes. The most common sources that we see that are at highest risk of loss are, yes, video surveillance because it takes so much space, right? It's full video and sound. And so it doesn't make sense to keep that around. And the reason you're doing it is usually for safety reasons or security reasons. So if an incident hasn't occurred within a day, there's no reason to keep it around. So you see that with video recordings.

You also see with personal devices when employees leave, mobile devices, laptops, anyone that's working for a business where they're allowed to use their own device, that's very subject to risk. If they leave and take their device with them and it's no longer in your control, how do you preserve that? And if they're using communication channels or creating information in a place where the company doesn't have access to preserve it or collect it, that can also create some issues.

And then as I mentioned before, these recordings of meetings, and video trainings, and things like that, again, they take up space. They have usually limited utility, usually very frequently overwritten, and not stored in an organized way where you know how to find them. There's some information governance hygiene that's starting to really become more of an issue for clients realizing that when they have to try to scamper around and remember, "Oh wait, we used to use WebEx and now we use Slack, and then we use that thing that one time during the pandemic." The last example I'll give is when you change systems, when you're migrating to different systems or platforms and remembering a sunsetting, a legacy system, that's another risk of loss of information along the continuum.

Tracey Diamond:

Before I switch gears, I actually want to bring up something that comes up a lot in our world with payroll systems that get switched over. And I found that employers have had issues where the payroll company won't actually preserve the data and won't actually even give the employer the payroll data historically. I'm wondering whether that's something that you've had to deal with in your practice.

Alison Grounds:

I haven't had to deal with payroll data in particular, but it's certainly sometimes a case where there may be a third-party provider of certain services. And again, that upfront agreement with what they are required to do is an interesting thing to look into, because they have their own data retention and information governance policies. And again, like everybody else, they're not usually accustomed to building their systems around litigation. Sometimes that can actually be very time-consuming and cost-prohibited for them to have to do that. So they take a hard line so that they're not in the business of providing litigation documents and they can do their other job.

But I'm not surprised that that could potentially happen. We certainly have seen that in other instances. And if you don't have pressure to do your control, it may not be an issue. But if you've outsourced a core function to a third party and you can't get access, I think a court might not be sympathetic to that.

Emily Schifter:

I've had that come up before with clients. And I've also had things like badge swipe data or login data where they think, "Well, of course our vendor is keeping it for us and will give it to us." And then they don't realize until the litigation hole goes out or the discovery request comes in, actually that's a little bit harder to find than we thought.

Tracey Diamond:

Okay. Well, let's shift gears and turn to our next clip, which is from the TV show Suits. I've been wanting to do a Suits episode for a really long time. For those who haven't seen it, Suits is a legal drama centered around the fictional law firm Specter Litt, Wheeler Williams, and the show where Meghan Markle got her start. In this clip, we hear Donna Paulsen, a legal secretary, and

Mike Ross, a lawyer. Although he's not really a lawyer, right? Didn't he not go to law school? A fake lawyer.

Emily Schifter:

Plays one on TV.

Tracey Diamond:

Yeah. Discussing a confidential memo that Donna found in the file room. The memo appears to be signed by Donna, indicating that her boss, Harvey Specter, one of the firm's named partners, had potentially engaged in unethical behavior by burying evidence in a previous case. Let's take a listen.

[BEGIN CLIP]

Mike:

Tell me what happened.

Donna:

I found it in the file room that day. It has my date stamp on it, mine.

Mike:

All right. We have to tell Harvey. He'll know what to do.

Donna:

No, he won't.

Mike:

Donna, Harvey's been operating under the assumption that we never had this memo, right? At some point, that assumption is going to bite him in the ass, and the later it happens, the bigger the bite.

Donna:

Nobody is going to believe that a file that important just got lost. They'll think that I got rid of it and that Harvey told me to do it.

Mike:

This memo is part of a legal proceeding. Shredding it is a crime.

Donna:

Like practicing law without a license is a crime? Unlike you, I didn't do this on purpose. And I am protecting Harvey the best way that I know how.

Mike:

Allison Holt is going to figure out what happened. And when she does, her priority is not going to be protecting you or Harvey. It's going to be protecting the firm. You might be comfortable putting Harvey in that position, but I'm not. So either you tell him or I will.

[END CLIP]

Tracey Diamond:

Donna decides to shred the memo, destroying it to protect Harvey, which later leads to her dismissal from the firm. This is an extreme example of destroying evidence, but it helps illustrate the potentially high stakes involved in failing to preserve relevant documents. What are other examples or common mistakes that you see employers make regarding preservation?

Alison Grounds:

I think one of the most common mistakes is assuming something is preserved. Oh, we save everything. That's a common mistake. And there was a time for many clients where that was 80% possibly true, but it's definitely not true now when there's so much information being created. Lots of sources, like we mentioned earlier, would be subject to routine overwrite or deletion just for good data hygiene.

I think a common mistake is assuming something is preserved when it's not. Another mistake is, to me, I think of the e-Discovery process and preservation, collection, review, production. It's a process, and it takes a lot of different people working and collaborating together. Another common mistake I see employers make is just a failure to communicate, a drop-off of the baton, if you will.

Maybe the in-house lawyer thinks something's being preserved, but the IT person whose job is to manually flip a switch just didn't do it, and there's not a business process or a workflow to have that be confirmed. And so it makes it a little bit more challenging to do that. I also see a common mistake in the preservation piece in that not every client needs to have this because they may not be subject to a lot of litigation, but the integration between the legal hold, the communication, and the legal hold, which is the process by which the data is preserved, may not be as seamless as it needs to be.

And that means that the communication may be going out, but not enough is happening on the back end to ensure that those preservation obligations are being met. That could be that the IT department needs to take some steps or the legal department. And for many of my clients, it's multiple people. There's just a lot of room for error because it may be that a paralegal is sending the hold and applying a hold to certain data sources where it's a little bit easier to do so, and

other sources need to be preserved by IT, and yet a third needs to be preserved by the third-party company managing your security cameras, right? Those examples that we just gave. I see that as a common mistake that leads to issues.

The other piece is failing to update your preservation obligations. Like we said earlier, in the beginning of the case, you have a good idea, but not necessarily a lot of specificity around the claims. If it's a labor and employment case, there's typically some common things that happen, but you may not realize that someone changed jobs and their manager for just two months was someone different. And you realize that, as you proceed, being sure to go back and revisit the hold as the case proceeds is something a lot of times people forget to do.

On my team, that's my New Year's Day email to my whole team, like, "Have you checked the children? Have you checked your legal hold? Touch base with your case teams? Have they been refreshed recently? Compare your legal hold to any initial disclosures, or requests for production, or information you've learned during discovery just to make sure that you have expanded that." The obligation is not perfection, but reasonableness. But you want to be able to keep revisiting that to make sure that you've expanded the hold as necessary. I guess if I were giving my top list, it would be making sure you have a good process that the stakeholders are connected and that you supplement when you need to.

Emily Schifter:

I think that's such a good point because I know I have some clients who say, "Okay, we've got our standard template litigation hold. We send it out to everybody, check, and that's done." And I think you're right. There is so many ways that communication, it can fail, or the baton can be dropped. All documents relevant to this employee might be a bullet point. What does that mean? And we haven't gone through what the sources are. Or a manager says, "Hey, we were actually using this new app for communication off-cycle."

Alison Grounds:

Right.

Emily Schifter:

It's a whole new source. And then the allegations in the case change and you don't update it. I think that's definitely something that I've seen play out in practice is not having a good process in place.

Alison Grounds:

And I think you guys have also noticed when we track all the – by the way, for your listeners, our annual e-Discovery case law update is coming up in the next few weeks. So that invitation should be going out. But one of the things we always see when we monitor the case law in this space, foliation in particular, I feel like labor and employment cases have a – I don't know if disproportionate is the right word, but a high number of labor and employment cases manage to hit the highlight reel every year when it comes to e-Discovery cases. And I think that's partly

because on both ends of the spectrum, sometimes individual litigants are less familiar with the sophisticated obligations and they don't realize they have to preserve social media and their personal device. Or it conveniently falls into the ocean or whatever. You see a lot of those kinds of cases and you see sanctions obviously for failure to preserve.

Emily Schifter:

You talked about e-Discovery being a process. And we've kind of covered what might be relevant and how you preserve it. What comes next once you've got your arms around, "Here's what we think is the relevant universe?"

Alison Grounds:

We like to combine figuring out the relevant universe with collection. That's a little bit more efficient. We used to find that when we just asked people to help us identify what they needed and we gave them a survey, they were not always aware of where their information sat and weren't able to necessarily answer that question so well. We love when we can to combine a client interview with the collection. We've got the ability to do that on our team. We can send out a collection driver or collected on-site via the cloud immediately so that we're combining, learning about the case with collecting the information. That's not always ideal, or allowed, or perfect in some cases, but when we can do that.

But what we learn at that collection stage is really helpful to be able to be refined in what we review and produce. If we're interviewing someone and collecting their data and they tell us, "You know what, I keep all my notes from personnel interviews in this particular folder and I name it by the employee name." Well, then let's grab that whole folder and not rely on search terms. We need everything that's in that folder as opposed to sources that may be more disorganized. This is my giant folder of all my notes from everyone I've ever talked to, and we need to apply a little bit more diligence in making sure we find what we need in that pile.

Really being able to understand how people organize their information. And I think about it from a company perspective, they're certainly centrally stored files, personnel files or performance reviews where they have a standard workflow. And then there may be idiosyncrasies of how individual people decide to store and organize their notes. Really understanding to be able to defend the process and to feel as though you found the information that you need.

Tracey Diamond:

Searches through big volumes of electronic data can be complicated, as Alison has been demonstrating for us, and as illustrated by our next clip from the legal drama The Good Wife. In this clip, Attorney Alicia Florrick joins forces with Louis Canning, played by Michael J. Fox, to defend a website against accusations of racial profiling. The judge orders discovery on anything related to the website and race. Kind of broad, right? And the law firms associates are tasked with reviewing the company's hard drives for anything that is responsive to that request.

[BEGIN CLIP]

Alicia:

Judge Marx has ordered limited discovery, confined to racist references and chummy maps. We'll split up Chumhum hard drives and review all e-mails, software specs and memorandums.

Louis:

Mark them as either responsive or nonresponsive.

Lucca:

How narrowly are we interpreting responsive?

Louis:

Well, don't want to do the opposition any favors.

Alicia:

Well, any disagreements, we'll discuss.

Louis:

Good. Call me here. And good luck.

[END CLIP]

Emily Schifter:

This episode is one example of how search terms aren't always as straightforward as they seem. For example, a keyword search looking for the term "black" is shown to pull a large number of irrelevant documents, things like references to the company's finances being in the black and to the band the Black Eyed Peas, things that are obviously far afield from what the judge ordered the firm to look into. What do you think, Alison? Is this a realistic portrayal of running search terms through a company's emails or electronic records?

Alison Grounds:

The problems with search terms have been on my list for quite some time. They can be an excellent tool and sometimes the only option in helping to narrow down a large set of information, but they certainly have limitations. And I think there is, in some instances, an over-reliance on search terms. We find across whatever it is, 15 years of e-Discovery cases that when we use search terms across a data set, even when we think we're coming up with some really brilliant search terms, on average, the documents that are actually relevant to what we were looking for with those search terms is about 30%. 70% of it, not even what you were

looking for. And that's not counting what you missed because you didn't run a term that might have found more.

They are certainly an imprecise tool. They can be great, but they also have some limitations. And it also depends on what you're using to run the searches. Some of our clients, and more so now than ever, a lot of the technology has evolved to have a little bit better searching capabilities before you collect the data. But we've seen some opinions from special masters and others really criticizing if the search wasn't run in a tool that is properly indexing the data and it doesn't give you hit counts. Again, it really depends on the nature of your case and the amount of controversy, the benefits and risks of the different technologies that might be best suited to find the information that you need.

The example I gave earlier, there may be things where search terms are completely irrelevant. It's a targeted collection of a designated folder or a system where I've got a lot of insurance clients, and you can look up the claim number and export the claim file. I don't need to necessarily run the claim number across all the computers in the company, but not everyone is sophisticated about how this happens. Really being able to defend your search methodology, hopefully so that it never comes into question and you can feel confident about finding what you were looking for. But if and when it does become a dispute, being able to explain why you had a reasonable inquiry and you believe and feel confident in the information that you've located and produced.

Tracey Diamond:

Of course, these days, what everybody's talking about is the use of AI in e-Discovery, and that is a really big topic that really deserves its own podcast, which we've done already, and I think we're going to do again. But in 30 seconds or less, Alison, which is totally unfair, what are some of the pros and cons of the use of AI in this space?

Alison Grounds:

Well, you certainly have the use of AI creating discoverable information, which is its own separate question. And then you've got the use of AI to help manage the e-Discovery process. And I would say there are far more pros than cons. We've mentioned already the vast amount of data and data sources, the potential risks of using search terms and the imprecision of that. I would also say the most expensive part of this journey is the actual attorney review of documents.

We have rolled out and started testing AI. AI has been used for document review for a long time, or one of the first practices to use it because it was a problem that needed a solution with so much data volumes. But generative AI solutions for document review were some of the first to actually be deployed and used in the legal space. And we are actively using these on cases, and it's pretty impressive to see. You can use it for document review and it explains its reasoning as to why it believes information may be relevant to particular issues. It can also be used for helping with deposition summaries, and fact development, and creating key events and timelines. I think AI easily is the most impactful on the discovery and litigation process. And of course, it's impacting every practice as well. But very exciting use cases that we're seeing improving, not just the speed, but the accuracy of the analysis we're doing on documents.

Emily Schifter:

In many cases, but especially we see it in our L&E world, we often have the complicating factor of employees are using their personal devices for work. How does that change the e-Discovery proposition when you're dealing with a device that's not the company's?

Alison Grounds:

It's a problem. It can create more issues. And there are some courts, if you go to some of my conferences, it used to be a semi-legitimate objection to say it's not in our control, it's on the personal device. Courts have started to say, though, "If you, the company, are getting the benefit of not having to pay for these devices and you're allowing your employees to use them, then you also have the responsibility of having some way to preserve and collect data from those sources if and when litigation arises. In other words, you can't sort of pretend that you have no access by allowing the use of personal devices.

It's really a question of what policies are around that? What steps have you taken. And even with a personal device, if you're accessing an application like Teams, that can still be centrally stored on the company's side of things so they can still preserve and collect. Being thoughtful about which tools you're allowing your employees to use. Enforcing those policies and being able to defend why you feel confident that you found what you need is usually a big part of this.

And of course, we're seeing more complications, not just with the device, but the applications on the device. It's not as easy as you would think to get into everybody's personal information, which is a good thing. And so if they have a phone and they're not a willing participant, it's kind of hard to get to that data. Even if they're willing and able, some of the applications they may be using to communicate, and chat, and collaborate, and share things are constantly changing. We have to always update our software and hardware to be able to grab this information off the devices. And so that can create some delays and challenges as well, especially if the custodian has left the company and taken their device with them and maybe hasn't been very cooperative in what's happening.

Tracey Diamond:

Or the employee that conveniently forgets their password and didn't back up to the iCloud. Or the employee that really is giving you a hard time about their feeling that their privacy is being invaded. I think the comment you made about policies and making sure employees are aware of their responsibilities, that the use of their own device is really a privilege in this sense, not a right, goes a long way to help with that.

Well, this has been a super interesting conversation. Alison, as always, thank you so much for joining us. And thank you to our listeners. I hope this was helpful in thinking through all of the many complicated issues involved in the e-Discovery world. Check out our blogs and listen to our other podcast episodes. Drop us a line, tell us what you think. Thanks so much.