



The Importance of IT within the Electronic Discovery Process

ABSTRACT

Can enterprise data centers really be crime scenes? This rhetorical question is not that preposterous, given that ESG's research shows that one out of every two organizations has experienced an electronic discovery event in which digital business records have been requested by an opposing attorney or court. Traditionally, locating, reviewing, and preparing evidence is left to corporate attorneys. However, now that evidence is in the form of e-mails, spreadsheets, database tables, voicemails, and other data, IT and the systems it manages are at the center of many corporate legal matters. Organizations should consider revamping electronic discovery processes, expanding IT's role to facilitate the retrieval and restoration of critical evidence. In addition, IT can supplement the e-discovery process by working with attorneys to deploy and utilize sophisticated software that enables the review of electronic files. With e-discovery events happening more often, new processes inclusive of IT must be defined and standardized. Otherwise, organizations' legal liabilities and risk will exponentially increase.

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April 2006

Introduction

As corporate scandals rattled the capital markets in 2002, record retention regulations, including SEC Rule 17a-3 and HIPAA, suddenly surged into the limelight. The likes of Enron and MCI spurred several regulatory investigations on Wall Street where research analysts and investment bankers collaborated to boost the market capitalization of the same companies that were quickly going bankrupt. During the investigation of many prestigious banks, regulators realized that identifying the existence of certain evidence was not complicated because the brokerage houses were required by law to retain certain business records. In fact, if certain records existed, there was high probability that they could be traced through IT systems and applications.

These regulatory investigations triggered two catalysts that changed the role of IT departments. First, regulators uncovered the fact that many financial services firms were not abiding by records retention regulations and handed out hefty fines. Soon thereafter, many IT departments on Wall Street began deploying e-mail, instant message, and database archiving solutions to satisfy the newly interpreted SEC Rules 17a-3 & 4. The second impact the various regulatory inquiries and investigations had was a greater focus on electronic evidence. Regulators utilized IT systems, including storage media, as treasure chests of evidence that supported cases against bankers and brokers.

In 2002, the role of IT in supporting compliance with regulations and litigious events drastically changed. Subpoenas that traditionally requested office memos and depositions with key employees started to include requests for the production of e-mails, financial statements, invoices, and a myriad of other electronic files. Corporate attorneys were no longer able to predict the specific electronic evidence that would be requested and IT departments became a critical resource to support litigious events ranging from executive malfeasance to employee discrimination.

Searching for data is not a new concept for IT departments that are often tasked with locating backup copies of applications and files when primary data is deleted or otherwise rendered inaccessible. However, unlike a backup retrieval, legal discoveries do not end when data is located and restored. After IT finds and restores data, in-house and external counsel then begin to review the vast amount of files (e-mails, work productivity documents, etc). After identifying relevant data, a subset may require redaction to preserve attorney-client privilege, and then be turned over. Throughout this entire e-discovery process, an organization must maintain chain-of-custody over the potential evidence so that it is admissible in court.

Evidence review and preparation are not new processes to many corporate attorneys, but e-discovery events require participants from another organization, namely IT, to be involved. As regulators and litigators target the war chests of data that reside within corporate information systems and applications, Chief Information Officers and General Counsels, along with their respective staffs, will increasingly spend more time collaborating on how to improve e-discovery processes and policies. Without formal planning, organizations will continue to blindly store data, letting it sit around until a subpoena or discovery request arrives. Then, IT will scramble to find relevant data and organizations will spend exorbitant amounts of money having internal and external counsel review millions of files, and prepare evidence for opposing attorneys, and eventually for court.

E-Discovery – It can happen to you

Many industries are subject to electronic data discovery (EDD) events

Percentage of firms that have experienced an EDD request

- ✓ Telecom, 63%
- ✓ Government, 62%
- ✓ Financial, 59%
- ✓ Energy, 50%
- ✓ Health Care / Life Sciences, 42%
- ✓ Manufacturing, 40%
- ✓ Education, 38%

Percentage of firms that have experienced multiple EDD requests per month

- ✓ Telecom, 70%
- ✓ Information Technology, 30%
- ✓ Government, 28%
- ✓ Health Care / Life Sciences, 18%
- ✓ Financial, 16%
- ✓ Manufacturing, 15%

Source:
ESG Digital Archiving: End-User Survey & Market Forecast 2006-2010

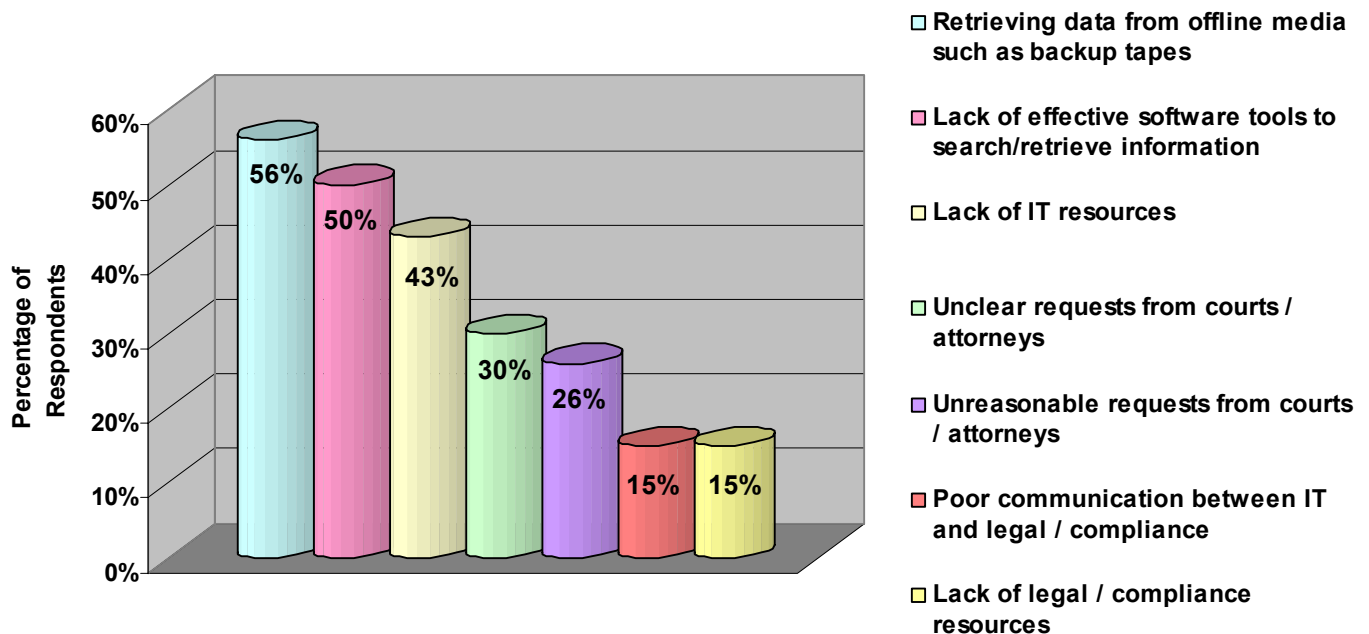
The Challenges of the Electronic Discovery Processes

The electronic discovery process technically begins when an inquiry is made via subpoena and ends when a case is settled or resolved via a trial. As part of this process, electronic files must be located, sorted, reviewed, and prepared as evidence. Because of the complexity of the e-discovery process, organizations and their IT departments face several challenges. Initially, requested files must be located within primary IT systems such as application servers and storage systems or on backup media, including tapes that may reside off-site. After IT and legal departments locate the data, it must be restored to a reviewable format. More recently, it has been mandated that files and e-mails be restored and reviewed in native file format, enabling electronic review of the files. In addition, courts may request that files be produced in native format to prove authenticity. The restoration process can be extremely expensive and time consuming, especially when dealing with off-site and older media such as tape. IT often has to restore old applications, including e-mail, to restore the files in their native format. Data restoration processes often take so long that attorneys are left with limited time to review and produce evidence to opposing counsel or court.

After the data is restored, attorneys need to sort through all the files that could be relevant to a particular matter. Sifting and reading through e-mails and files is a tedious task that can also be costly, as the review is typically performed by in-house or external attorneys. The ultimate goal of a review is to ensure that all potential evidence is evaluated, and only the most pertinent, germane data is prepared and turned over to the opposing counsel or the courts. When the review process is limited by time constraints, organizations may miss a crucial file or turn over too much evidence, creating additional legal risk and greater liability.

As organizations participate in more electronic discovery events, data collection and review process challenges constantly manifest themselves. These processes are further disrupted and complicated by broad requests from courts and opposing counsel as well as the lack of resources and communication between legal and IT departments. ESG research indicates that the data collection process and lack of effective software solutions to locate and review relevant information are the biggest challenges faced by organizations today, as shown in Figure 1.

Figure 1 - Challenges Organizations Face When Producing Electronic Records



Some of the aforementioned challenges are so burdensome that organizations have started to outsource various portions of the e-discovery process. Data restoration is often handled by service providers that restore backup tapes

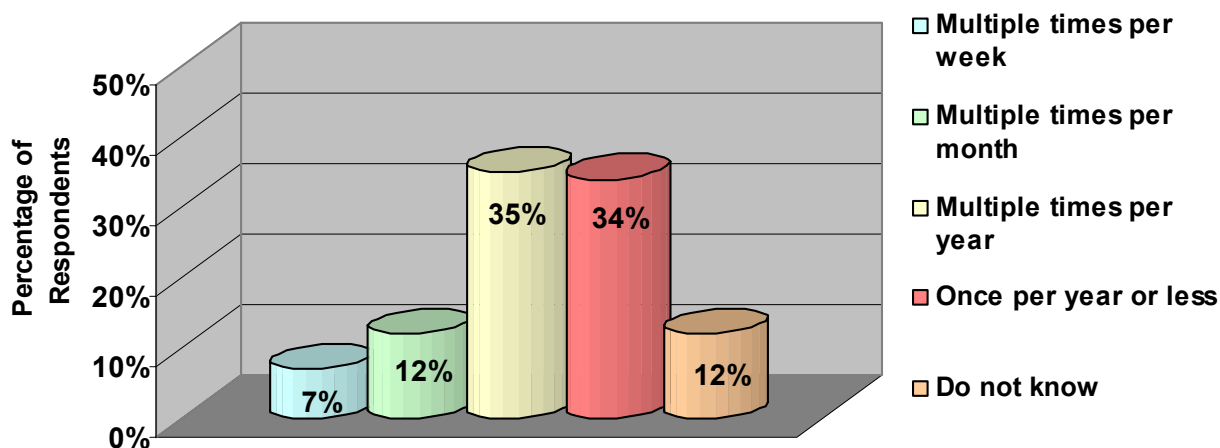
and recreate historical application environments. In addition, some legal departments outsource the review process to specialized discovery management firms or external counsel to reduce the time it takes to look at all the files. The outsourcing of these processes is usually a result of lack of internal expertise, infrastructure, and legal resources to support the increasing amount of e-discovery requests. The cost to outsource grows exponentially as the frequency of events and the amount of information to be restored and reviewed increases. Organizations that do not have repeatable electronic discovery processes with supporting technology solutions will constantly spend enormous sums of money on IT and legal services to comply with the ever-growing amount of litigious inquiries.

The Need to Manage Information More Intelligently

Whether it's due to compliance with record retention requirements, the need to improve data protection processes, or the need to increase market and customer intelligence, organizations are storing more information for longer periods of time. As a result, this information can be leveraged for market research and other business purposes. However, information assets can quickly become liabilities and subject to discovery if they are not managed more effectively. One of the times in which information can quickly transform from an asset to a liability is during a litigation event. At any time, work productivity files, e-mails, voicemails, and other business records may be held as part of a legal matter. The contents of all this data may be further reviewed and tagged as evidence.

While many organizations outside of the financial services industry believe that e-discoveries are unlikely, recent ESG research suggests that IT departments are increasingly becoming aware of litigation events. In December 2005, ESG surveyed over 450 IT professionals and 80 records managers. 42% of the IT professionals' and 58% of the records managers' organizations had been through an e-discovery. As evidentiary requests transition from traditional paper records to digital information, ESG expects more organizations and IT departments to experience e-discovery inquiries. Further highlighting the increase in e-discoveries, many organizations have responded to multiple investigations where electronic evidence was requested. Figure 2 shows the frequency with which organizations are asked to produce electronic evidence as part of a legal or electronic inquiry.

Figure 2 - Frequency of Electronic Records Produced to Support a Legal Proceeding or Regulatory Inquiry



With the risk of litigation threatening information assets, organizations need to change the way information is managed from the point of creation through its constant reuse. Organizations may need to access historical data to restore from a disaster, analyze customer buying trends, or support a legal investigation. All of these circumstances require that organizations understand where their data is and the context of the information. By improving their understanding of their information, organizations can manage it more intelligently, preparing data for analysis, litigation support, and other actions. ESG refers to the process and underlying technology solutions that enable organizations to contextually understand, prepare, and take action against data as Intelligent Information Management.

Technology solutions can be divided into two segments within the Intelligent Information Management process: Information Classification and Information Management. Information Classification solutions organize data into categories and Information Management technology takes action against the data. There are a variety of actions an organization can perform against data including archiving, encryption, searching, and migration. Electronic discovery inquiries require sophisticated searching capabilities to help attorneys quickly review and identify relevant files. Content analysis software combines information classification attributes, including a file's creator or recipient, as well as natural language processing that identifies word patterns and co-locates groupings of similar documents in a short period of time.

IT's Role Should be Expanded to Expedite Electronic Discovery Management Processes

Traditionally, IT has only been involved in the information gathering portion of an electronic discovery event. This is primarily due to the use of technology to locate and restore data. IT can certainly help organizations improve the initial part of the e-discovery management process by archiving data online and utilizing disk as opposed to tape to back up data. However, no matter how efficient IT becomes at storing and retaining data online, its absence from the rest of the e-discovery management process, including review, will continue to cost organizations millions of dollars.

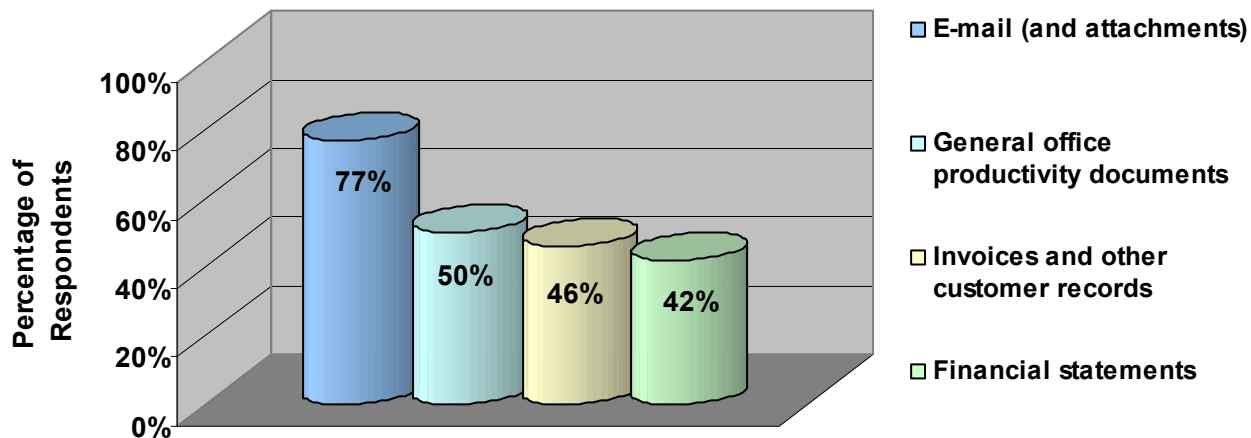
First, IT can work with legal to retain and classify data, extracting valuable intelligence that makes it easier to locate during an inquiry. After the information is located, attorneys rarely have access to technology solutions, such as content analysis software, to review the data. Even if the solutions are available, attorneys may not be familiar enough with the software to accurately load data or utilize all of the functionality the review software offers. IT departments can assign resources to help their legal counterparts identify the most appropriate technology to improve the review process. In addition, IT can develop standard, repeatable procedures for locating and loading data into comprehensive review software.

By involving IT departments, organizations can further define e-discovery processes that minimize the time and cost it takes to locate data. This can help legal teams understand the firm's information exposure earlier and more accurately, resulting in a longer review period when attorneys, with the help of sophisticated searching solutions, can spend the appropriate amount of time preparing the most relevant and accurate information for opposing counsel or trial. Enterprise-class features such as integrated audit trails or activity logs, data processing exception handling, and project reporting can be utilized during all e-discovery matters and, most importantly, help to ensure a repeatable, defensible e-discovery process. Greater participation by IT in e-discovery events creates more time for attorneys to do their jobs as the right data is found and quickly made available for review. Organizations do not have to spend money for attorneys to work with IT to locate the data, supervise complicated data restorations, and wait for data to become reviewable. And, with better technology to review larger amounts of information faster, attorneys can spend more time understanding the relevant issues than slowly reading piles of documents that are not relevant.

The increased utilization of IT's capabilities in e-discovery processes, coupled with the use of sophisticated review software, can save organizations money, but also creates opportunities for additional efficiencies. For example, if an organization experiences frequent e-discovery inquiries ranging in risk and potential liability, outsourcing a portion of the e-discovery process for a specific matter is an option. To facilitate review with a service provider, IT can locate the data and provide it to the legal partner. In this case, an organization may permit the service provider to utilize the content analysis software or, more likely, to use the service provider's own software. An organization may also need a partner to restore data quickly into a content analytics application and produce relevant data.

IT should be a welcome addition to e-discovery management processes because of the opportunities to eliminate the complexity of finding data and reduce the cost of reviewing relevant data. Many organizations forget that IT departments support a variety of business critical applications, including supply chain management, e-mail, and financial reporting. Litigation support software, including content analytic software, can be another one of those applications. IT can certainly attempt to reduce data collection efforts, but attorneys will always need to review a large amount of files for every case. Courts and opposing attorneys do not have any sympathy when establishing deadlines to respond to inquiries and often request files from many different application sources. Figure 3 shows the range of documents that organizations have been asked to produce as part of an electronic discovery.

Figure 3 - Record Types Requested and Produced to Support a Legal Proceeding or Regulatory Inquiry



Shrinking response times, multiple file types, and sheer volume create the need for organizations to internally deploy content analysis software, as part of an overall strategy to manage information more intelligently.

Summary

Organizations have gone digital, replacing memos with e-mails, general ledgers with accounting software, and pencils with Microsoft Office. The digitization of business records continues to unfold with several record retention regulations being introduced or amended to protect shareholders, stakeholders, and other constituents. It has taken some time, but litigators and regulators have finally realized that, because of these trends, more evidence resides within corporate data centers than filing cabinets. Scarily, electronic files, especially e-mail, tend to contain data that provides unique insight into everyday business operations, including hiring, mergers and acquisitions, and customer interaction.

Electronic files have certainly improved the efficiencies of conducting business, but, at the same time, have introduced significant legal risks that may be exploited at any time. Organizations cannot stop storing data, backing up systems, or deleting all e-mails because these answers also create risk, resulting in much more severe consequences than any legal event, such as financial or brand damage. Organizations must cope with the fact the electronic discovery events will happen and should begin preparing accordingly.

Because electronic discoveries involve data created and stored on IT systems, the technically savvy resources used to manage this information can assist. Initially, IT can help organizations manage information more intelligently and increase its availability. These solutions can be a combination of hardware and software that helps locate and restore data during the data collection portion of an e-discovery event. However, IT can also work with legal departments to deploy management software that also facilitates the search and review of relevant information. Content analytics solutions reduce the time it takes to review more data in a shorter period of time. As a result of IT's involvement, e-discovery processes can be standardized and repeated for all matters. With repeatable processes, general counsels can quickly determine if internal resources can support specific cases, allowing for the outsourcing of an entire case or portion of a case when applicable.

Organizations that include IT can easily rationalize the additional resources needed to support e-discoveries. Investments in people and technology can save attorneys valuable time and reduce the risk that certain evidence is overlooked or mistakenly shared. Investments in resources that improve e-discovery processes mitigate an organization's overall litigious risk and minimize potential legal liability. Organizations did not ignore or avoid technology such as e-mail to improve communication. Now, organizations cannot ignore the risk that e-mail and other applications pose, because any message or attachment has the potential to become electronic evidence.

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