

Addressing E-Discovery Challenges in Your Industry

Latest Developments in the Law and Best Practices

1. Introduction

No single recent development has simultaneously affected both legal and IT departments as profoundly as the revised Federal Rules of Civil Procedure ("FRCP").¹ The revised FRCP, with its requirements that legal departments "become familiar with" their organization's IT systems so they can "meet and confer"² to discuss those systems with the opposing side in litigation³ (for example), require an unprecedented alignment between legal e-discovery procedures, IT capabilities, and records and information management practices.

The FRCP are driving organizations to change the way they conduct litigation - and indeed how they manage electronic information on the whole. One analyst firm predicts that organizations will spend more than \$4 billion on e-discovery activities annually by 2009.⁴ On the technology side, other analysts have predicted that annual spending on e-discovery tools will reach nearly \$5 billion by 2011 as companies look for ways to reduce the burden and cost of e-discovery.⁵ On the legal side, the majority of legal departments today now look to outside vendors (and outside law firms as well) to help them take control of their e-discovery issues.⁶ Not surprising, given that nearly one-half of companies in the US spend over 5 million dollars per year on litigation, not including the cost of settlements and judgments.⁷

1.1 Improving E-Discovery Capabilities

When the revised FRCP came into effect in December 2006, some commentators speculated that e-discovery issues would become the focus of nearly every subsequent civil case. While e-discovery may not be the focus of every case today, at least one survey has found that e-discovery issues often become the focus of a matter at some point in its lifecycle.⁸ Recent case law demonstrates that e-discovery often provides a fertile battleground with high stakes for the loser. Seminal cases like Coleman v Morgan Stanley⁹ (\$1.45 billion sanction related to e-discovery failures), Zubulake v. UBS Warburg¹⁰ (\$29.3 billion award following e-discovery sanctions) and Qualcomm v. Broadcom¹¹ (\$8.5 million in attorneys fees) clearly demonstrate the price of e-discovery failure.

So, how should organizations respond to the e-discovery challenge?

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Organizations seeking to improve their e-discovery capabilities—and to comply with the requirements of the FRCP and related rules and laws regarding e-discovery in their industry—should evaluate their current information environment and identify opportunities to improve both proactive and reactive e-discovery strategies.

Proactive strategies, such as establishing a comprehensive records and information management (“RIM”) program; investing in e-discovery tools like as content analytics; and training IT staff to assist in e-discovery help to prepare your organization for e-discovery—thereby reducing costs and improving results when e-discovery is required. Reactive strategies such as establishing a Legal Hold policy and program; implementing search, collection and segregation capabilities; and improving document review processes can help to reduce the impact of e-discovery on your organization.

The following are examples of activities your organization can undertake to improve both proactive and reactive e-discovery capabilities.

- 1) **Leverage E-Discovery Tools.** E-discovery tools, such as content analytics software that facilitates the collection and review process for responsive information, can provide immediate e-discovery benefits for organizations – even those which are just beginning to get their information environment in order. According to one survey, privilege review costs account for as much as 50% of the total cost of litigation for some organizations¹²—a cost that can be substantially reduced using automated tools.
- 2) **Develop and Implement Legal Hold Policies and Procedures.** A Legal Hold policy provides the basis for your organization’s response to matters requiring the preservation and production of information. It establishes a standardized process that attorneys and IT professionals can follow when addressing the preservation of electronic information. According to a recent survey, a majority of organizations have some kind of Legal Hold directive, but all organizations should ensure that such directives are clear, specific, and are being complied with across the enterprise.
- 3) **Establish and Commit to a Proactive RIM Program.** Whereas Legal Hold policies and procedures guide your organization when it is involved in a matter, records and information (RIM) policies and procedures establish the framework for the ongoing management of information during normal business operations. Your RIM program provides a legal foundation for disposing of information that no longer has business value (and is not responsive to a matter), thereby allowing it to focus its resources on information that has ongoing value to the organization.
- 4) **Establish an E-Discovery Liaison.** An e-discovery liaison is an individual who is familiar with your organization’s systems and can assist attorneys in conducting e-discovery. They should be able to speak knowledgeably about the organization’s IT environment in the context of depositions, conferences, trials, and so on.¹³

1.2 Learning from Others

One of the most valuable ways to learn about e-discovery challenges and solutions is to investigate real-world cases. The remainder of this paper presents a series of industry-focused case studies designed to help organizations understand the e-discovery challenges faced in their industry. The purpose of these case studies is not to single out any organization or individual, but rather to help others learn from the lessons of the past to succeed in e-discovery today.

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2. E-Discovery Challenges in the Energy Industry

2.1 Overview

According to a recent survey, the majority of companies in the energy industry have 6–20 regulatory matters pending at any given time, with a quarter of those matters putting more than \$20 million at stake.¹⁵ Like other industries, the energy industry faces its share of cases involving labor, contracts, and personal injuries. Unlike other industries, however, the energy industry faces scrutiny from a host of parties from government agencies to environmental groups that can drive expansive and expensive litigation. Recent high energy prices only serve to increase such scrutiny and the potential for litigation and other matters requiring e-discovery.

“As energy prices surge – oil briefly surpassed \$120 a barrel Monday in New York – U.S. regulators are poised to expand their oversight of oil companies and energy markets in ways that Congress once thought unnecessary.”

“Regulators Target Oil Industry,” Wall Street Journal, May 6, 2008¹⁴

Many large energy companies today are more in the business of managing information and less in the business of producing energy (in the oil and gas industry, for example, many of the upstream functions such as exploration and downstream functions such as refining and shipping are performed by service companies). Chevron Corporation recently stated that it has created a “digital tidal wave” of information that includes 1250 terabytes of unstructured data.¹⁶

This proliferation of digital information, combined with a highly regulated and litigated environment, means that energy companies face significant e-discovery challenges.

2.2 Lessons from the Real World

“For nearly six months, the parties and the Court have been grappling with an electronic discovery monstrosity with the hope that it could be corralled and definitively resolved, thereby obviating the need for motion practice. Alas, attempts to resolve the issue in lieu of briefs fell woefully beyond the parties’ grasp and, as the last straw, they have set the matter at our feet for appropriate resolution.”

PSEG Power New York, Inc. v. Alberici Constructors, Inc.¹⁷

Like companies in virtually every industry, the energy industry has faced its share of problems when it comes to managing, preserving, and producing data found on backup tapes. In fact, the destruction of backup tapes was a central issue in a case that long pre-dates the revised FRCP.

In the weeks following the 1989 Exxon Valdez oil spill, a computer operator “inadvertently destroyed computer copies of thousands of documents” by “reus[ing] the tapes, copying new information over them and obliterating what was there before.”¹⁸ A similar problem occurred in *U.S. v. Koch Industries*, where “several files which should have been preserved were destroyed” due to the destruction of backup tapes.¹⁹ The proper management of backup tapes as part of the Legal Hold process is crucial for companies in all industries, including the energy industry.

In a more recent case, an energy company plaintiff failed, due to a technical problem, to include 750 gigabytes of email attachments as required when producing email evidence in a case. In the ensuing arguments, the plaintiff argued that they should not be required to reproduce the email with the attachments, as the cost was too great (over \$200,000) and they also questioned the responsiveness of the email. The court ultimately ruled that the plaintiff should bear the cost of

reproducing the email messages “married” to the attachments. This case illustrates the importance of documenting and consistently following e-discovery collection and production procedures.²⁰

Finally, the case of Lyondell-Citgo Ref., LP v. Petroleos de Venezuela, S.A.²¹ illustrates the challenges that global energy companies face as they produce and market their products around the world. In this case, the defendant failed to produce a database containing “all Board minutes and related Board documents.” The defendant claimed that Venezuelan law prohibited it from providing such documents, but the New-York-based court did not accept the defendant’s explanation, and sanctioned them.

2.3 Taking Action

Organizations in the energy industry can learn from the cases discussed here by taking the following steps to improve and extend their e-discovery capabilities:

- 1) Ensure that contracts with suppliers and contractors outside of the US address their responsibilities for the preservation and production of information in connection with legal and regulatory matters.
- 2) Ensure that backup systems are not routinely used for the retention and archiving of business information. Their purpose is to provide business continuity. However, existing backup tapes containing information responsive to current and pending matters may need to be preserved and/or produced. Ensure that the legal department clearly communicates these requirements to the IT department.
- 3) Given the massive amounts of electronic information created in the energy industry (from seismic data to plant drawings and everything in between), investigate tools that can automate and facilitate the document review and analysis phase of e-discovery, as this can help to reduce the cost and burden of e-discovery.

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3. Endnotes

¹The Federal Rules of Civil Procedure (FRCP) are court rules for civil lawsuits (i.e., non-criminal cases) conducted in US federal courts. After several years of discussion and drafting, the FRCP were significantly amended to address issues specific to the treatment of electronic information (referred to as “Electronically Stored Information,” or ESI, by the Rules). After subsequent approval by the US Supreme Court, the amendments went into effect on December 1, 2006.

²FRCP Rule 26(f) Committee Commentary.

³FRCP Rule 26(f) Committee Commentary.

⁴Socha, George and Gelbmann, Thomas, “EDD Showcase: EDD Hits \$2 Billion. Updated Public Report,” Law Tech News, August, 2007.

⁵Murphy, Barry; Brown, Matthew; Barnett, Jamie, “Believe It — eDiscovery Technology Spending To Top \$4.8 Billion By 2011,” Forrester, December 11, 2006.

⁶51% of those surveyed in the US and 71% of those surveyed in the UK, as reported in, Fulbright & Jaworski LLP, “Fourth Annual Litigation Trends Survey Findings,” 2007.

⁷Greenwood Marketing, Inc., “Fullbright and Jaworski LLP 2007 Litigation Trends Survey,” July 2007.

⁸23% of US respondents said that e-discovery was the subject of a motion, hearing, or ruling from a tribunal in 2006, in, Greenwood Marketing, Inc., “Fullbright and Jaworski LLP 2007 Litigation Trends Survey,” July 2007.

⁹Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 Extra LEXIS 94 (Fla. Cir. Ct. Mar. 23, 2005). Case is currently in appeals.

¹⁰Zubulake v. UBS Warburg, 229 F.R.D. 422 (S.D.N.Y. 2004).

¹¹Qualcomm, Inc. v. Broadcom Corp., 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan. 7, 2008).

¹²Fulbright & Jaworski LLP, “Fourth Annual Litigation Trends Survey Findings,” 2007. Page 24.

¹³The District of Delaware Default Standard for Discovery of Electronic Documents (“E-Discovery”) identifies “e-discovery liaison” as a defined role for the purpose of e-discovery in that jurisdiction.

¹⁴Hughes, Siobhan, “Regulators Target Oil Industry: FTC Oversight Might Be Extended To Trading Markets,” Wall Street Journal, May 6, 2008.

¹⁵Greenwood Marketing, Inc., “Fullbright and Jaworski LLP 2007 Litigation Trends Survey,” July 2007.

¹⁶Tam, Pui-Wing, “Cutting Files Down to Size: New Approaches Tackle Surplus of Data,” Wall Street Journal, May 8, 2007.

¹⁷PSEG Power New York, Inc. v. Alberici Constructors, Inc., 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007).

¹⁸Surco, Roberto, “Exxon to Respond to Tape Erasures,” New York Times, July 8, 1989

¹⁹U.S. v. Koch Industries, 197 F.R.D 488 (N.D.Okla., 1999).

²⁰PSEG Power New York, Inc. v. Alberici Constructors, Inc., 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007).

²¹Lyondell-Citgo Ref., LP v. Petroleos de Venezuela, S.A., 2005 WL 1026461 (S.D.N.Y. May 2, 2005).

²²Browning, Lynnley, “Government Intensifies Mortgage Investigation,” New York Times, May 5, 2008.

²³Gantz, John F, “The Diverse and Exploding Digital Universe,” IDC Information and Data, March 2008.

²⁴Zamansky, Jacob, “Subprime Meltdown Leads to Wave of Litigation,” FINalternatives, February 13, 2008.

²⁵Guy Carpenter and Co., “Credit Market Aftershocks Threaten Professional Liability Profits,” Specialty Practice Briefing, November 2007.

²⁶SEC v. Morgan Stanley & Co. Incorporated, Civil Action No. 06 CV 0882 (RCL) (D.D.C.).

²⁷Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc., 2005 Extra LEXIS 94 (Fla. Cir. Ct. Mar. 23, 2005).

²⁸Calyon v. Mizuho Securities USA, Inc., 2007 WL 1468889 (S.D.N.Y. May 19, 2007).

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²⁹Zubulake v. UBS Warburg, 229 F.R.D. 422 (S.D.N.Y. 2004).

³⁰Wachtel v. Health Net, Inc., 2006 U.S. Dist. LEXIS 88563 (D. N.J. Dec. 6, 2006)

³¹In re Vioxx Products Liability Litigation, 2007 U.S. Dist. LEXIS 60299 (E.D. La. Aug. 14, 2007).

³²In re Vioxx Products Liability Litigation, 2007 U.S. Dist. LEXIS 60299 (E.D. La. Aug. 14, 2007).

³³Treppel v. Biovail Corp., 2008 WL 866594 (S.D.N.Y. Apr. 2, 2008).

³⁴In re Vioxx Products Liability Litigation, 2007 U.S. Dist. LEXIS 60299 (E.D. La. Aug. 14, 2007).

³⁵Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

³⁶Lau, Kathleen, "Microsoft spends around US\$20M on e-discovery - per lawsuit." ComputerWorld Canada, April 25, 2007,

³⁷Clark, Don and Brickley, Peg, "Intel to Probe Lost Emails in AMD Suit," Wall Street Journal, March 8, 2007.

³⁸Clark, Don and Brickley, Peg, "Intel's Email Recovery Effort is Set to Cost 'Many Millions'," Wall Street Journal, April 25, 2007.

³⁹Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

⁴⁰Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

⁴¹Autotech Technologies L.P. v. Automationdirect.com, Inc., 2008 U.S. Dist. LEXIS 27962 (N.D. Ill. Apr. 2, 2008).

⁴²Greenwood Marketing, Inc., "Fullbright and Jaworski LLP 2007 Litigation Trends Survey," July 2007.

⁴³Williams v. Sprint/United Management Co., 230 F.R.D. 640 (D. Kan. 2005).

⁴⁴Williams v. Sprint/United Management Co., 230 F.R.D. 640 (D. Kan. 2005).

⁴⁵Williams v. Sprint/United Mgmt. Co., 2007 WL 214320 (D. Kan. Jan. 23, 2007).

⁴⁶ClearOne Communications, Inc. v. Chiang, 2008 WL 920336 (D. Utah Apr. 1, 2008).

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4. About Kahn Consulting

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