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 litigation[3] (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 they 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 Stanley[9] ($1.45 billion sanction related to e-discovery failures), Zubulake v. UBS Warburg[10] ($29.3 billion award following e-discovery sanctions) and Qualcomm v. Broadcom[11] ($8.5 million in attorneys fees) clearly demonstrate the price of e-discovery failure.

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

Sponsored by Attenex
June 2008

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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 organizations[12]—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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3. E-Discovery Challenges in the Financial Services Industry

3.1 Overview

> *"Federal agencies are intensifying a criminal investigation of the mortgage industry and focusing on whether some lenders turned a blind eye to inflated income figures provided by borrowers."*
>
> ***"Government Intensifies Mortgage Investigation," New York Times, May 5, 2008[22]***

For many decades now, the financial services industry has relied upon computing technology and digital information. It is an industry that represents 6% of the world's gross output of information, and it purchases 20% of the worlds computers.[23] At the same time, the financial services industry is one of the most heavily regulated verticals, and it engages in an activity that impacts every participant in the world economy—from the largest corporation to the smallest personal bank account. The regulated nature of financial services requires firms in this industry to have better control of their information environment than companies in many other industries.

In addition to individual regulatory and legal matters, financial services sometimes become involved in so-called "street sweeps," where regulators seek to evaluate companies in an entire sector, even if the individual companies are not accused of wrongdoing. This decade has already seen such "sweeps" of the securities, investment banking, and mutual fund sectors, with the subprime lending sector the current focus of regulatory activities and litigation. By the end of 2007, "32 class-action lawsuits [had] been filed by investors against the subprime mortgage lenders, Wall Street firms that underwrote MBS and CDOs, and investors who purchased shares of hedge funds, bond funds and other securities containing subprime mortgage exposure."[24]

While the financial services industry's general IT sophistication is a benefit when it comes to e-discovery, its operating environment—especially in the current economy—will provide litigation and regulatory challenges that firms should prepare for today.

3.2 Lessons from the Real World

In the course of a Securities and Exchange Commission (SEC) investigation, the SEC alleged that Morgan Stanley failed to produce "tens of thousands of emails," due, in part, to its failure to "diligently search for backup tapes containing responsive emails." Morgan Stanley settled the matter and agreed to pay a $15 million civil penalty. It also agreed to "adopt and implement policies, procedures and training focused on the preservation and production of e-mail communications."[26] This matter is not to be confused with an earlier lawsuit involving Morgan Stanley where a judgment of nearly $1.5B was entered into against the firm in part because of discovery-related issues, then later overturned on appeal.[27]

> *"There was never any doubt that the subprime mortgage market collapse would have an insurance impact. The question was one of extent. While estimates vary from $1bn to $3bn, it looks like the reality may settle at the upper end of the scale. The final answer will not come until 2008 or maybe even 2009, but history, litigation tendencies and capital markets point toward the worst case scenario."*
>
> ***Credit Market Aftershock Threatens Professional Liability Profits[25]***

In a case where it was alleged that former employees of a securities firm had "used e-mail and small, hand-held computer storage devices to remove . . . 'vast quantities of . . . business data and documents," prior to decamping to a new securities firm, the plaintiffs were required to create and

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search copies of the hard drives in their personal computers.[28] Many companies in the financial services industry allow employees to work from home and use personal computers to conduct business. Such firms, and their employees, should be aware that production of information from such personal computers may be compelled in e-discovery.

In an employment-related case involving an investment bank, the jury awarded the plaintiff $29.3 million after the judge granted sanctions allowing the jury to assume that missing company emails were unfavorable to the investment bank. Sanctions were granted after the judge found that the defendant had destroyed e-mails after being specifically instructed not to.[29]

3.3 Taking Action

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

1) Get your information house in order before a regulator does it for you. Regulators have the authority to not only fine and otherwise sanction firms, but also to require firms to implement sweeping changes in the way information is managed. Most firms will find it less painful and expensive to put good programs in place without the pressure of regulatory scrutiny and external deadlines.

2) Make a plan to deal with the large volumes of data. Finding and organizing gigabytes of digital information is a daunting task, even when a regulator or court is not looking over your shoulder. Identifying and producing responsive information during a matter is even more challenging, so firms should look at tools that can help cull nonresponsive information and aid attorneys in evaluating what should be produced.

3) Manage personal use. Although allowing employees to use personal computers to conduct business may provide for a flexible work environment, it may also result in unexpected e-discovery requirements and costs. Manage the use of such technologies through policies and training.

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4. Endnotes

[1]The 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.

[2]FRCP Rule 26(f) Committee Commentary.

[3]FRCP Rule 26(f) Committee Commentary.

[4]Socha, George and Gelbmann, Thomas, "EDD Showcase: EDD Hits $2 Billion. Updated Public Report," Law Tech News, August, 2007.

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

[6]51% 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.

[7]Greenwood Marketing, Inc., "Fullbright and Jaworski LLP 2007 Litigation Trends Survey," July 2007.

[8]23% 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.

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

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

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

[12]Fulbright & Jaworski LLP, "Fourth Annual Litigation Trends Survey Findings," 2007. Page 24.

[13]The 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.

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

[15]Greenwood Marketing, Inc., "Fullbright and Jaworski LLP 2007 Litigation Trends Survey," July 2007.

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

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

[18]Surco, Roberto, "Exxon to Respond to Tape Erasures," New York Times, July 8, 1989

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

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

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

[22]Browning, Lynnley, "Government Intensifies Mortgage Investigation," New York Times, May 5, 2008.

[23]Gantz, John F., "The Diverse and Exploding Digital Universe," IDC Information and Data, March 2008.

[24]Zamansky, Jacob, "Subprime Meltdown Leads to Wave of Litigation," FINalternatives, February 13, 2008.

[25]Guy Carpenter and Co., "Credit Market Aftershocks Threaten Professional Liability Profits," Specialty Practice Briefing, November 2007.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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