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?

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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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2. E-Discovery Challenges in the High-Tech Industry

2.1 Overview

When high-tech companies with the resources and computing power of Microsoft spend an average of $20 million on e-discovery per lawsuit,[36] it is a clear indication that the e-discovery stakes are high for high technology companies. When a company like Intel produces 17 million pages of documents in a case[37] yet still ends up spending "many millions of dollars" to recover email messages from backup tapes during a lawsuit, it is a strong indicator that even the most technology-savvy company can pay a big price in the litigation context.[38]

> *"Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search. Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client's or attorney's discovery obligations."*
>
> ***Qualcomm Inc. v. Broadcom Corp.***[35]

High-tech companies are not immune from the technological pitfalls that other companies face in the e-discovery context. In fact, given the intangible nature of much of what high-tech companies produce (i.e., intellectual property such as software), e-discovery can be especially troublesome to manage.

2.2 Learning from the Real World

In the recent patent infringement case between Qualcomm and Broadcom,[39] the two high-tech companies fought a long intellectual property battle. Throughout the case, e-discovery issues came to the forefront and in particular the comprehensiveness of the plaintiff's production of digital information became an issue.

At one point in the case, Qualcomm's general counsel wrote to the judge admitting that "the company had thousands of unproduced documents." Following this the company located over 300,000 pages of documents "which had been requested but not produced in discovery."

The court came to the conclusion that the company "intentionally withheld tens of thousands of decisive documents from its opponent in an effort to win" the case. Further, the court found that the "massive volume and direct relevance of the hidden documents" negated the possibility that the lack of production was inadvertent.

The court thus decided that the company and its attorneys should be sanctioned for this "monumental discovery violation," and ordered Qualcomm to pay $8.5 million in attorneys' fees to the defendants as a result of its "organized program of litigation misconduct and concealment . . . throughout discovery, trial, and post-trial." The court also referred several sanctioned attorneys to the State Bar of California for investigation into possible ethics violations.[40]

Sometimes, simply turning over the data may not be enough. In another case involving a dispute between two technology companies, a critical document maintained by the plaintiffs in Microsoft Word® format was produced to the defendant in PDF and hard copy format. The defendant asked the court to compel production in the native Word format, stating that the Word document would contain metadata regarding "when the document was created, when it was modified, and when it was designated 'confidential.'"[41] Although the request was not successful in this case, the case illustrates the battles that litigations can expect to fight over discovery of digital information.

2.3 Taking Action

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

1) Determining the responsiveness of documents can be a complex and time-consuming task, especially in cases involving high volumes of electronic information and complex information types often seen in IP-related disputes in the high-tech industry. Hi-tech companies should prepare for e-discovery by investigating tools and techniques for the automated classification and facilitated review of information, which can reduce the cost and organizational burden of e-discovery.

2) Ensure that requests for information from the other side in litigation are clear, and as much as feasible, specify the desired format for production. Conversely, prior to producing information to the other side, ensure that the planned production format will be satisfactory to them while appropriately reflecting any technical limitations and requirements of your IT systems.

3) When negotiating agreements with partners, ensure that intellectual property and information management rights and responsibilities are clearly specified and that programs are in place to manage, label, and segregate information containing IP as needed.

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3. 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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