

# 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”).<sup>1</sup> The revised FRCP, with its requirements that legal departments “become familiar with” their organization’s IT systems so they can “meet and confer”<sup>2</sup> to discuss those systems with the opposing side in litigation<sup>3</sup> (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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

#### 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.<sup>8</sup> 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*<sup>9</sup> (\$1.45 billion sanction related to e-discovery failures), *Zubulake v. UBS Warburg*<sup>10</sup> (\$29.3 billion award following e-discovery sanctions) and *Qualcomm v. Broadcom*<sup>11</sup> (\$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<sup>12</sup>—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.<sup>13</sup>

## 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 Pharmaceutical Industry

### 2.1 Overview

In the pharmaceutical industry, the way information is managed (or mismanaged) can literally be a matter of life and death. Driven by extensive regulations regarding the management and retention of digital information (such as 21 CFR Part 11), the pharmaceutical industry generates and retains vast quantities of electronic information pertaining to every aspect of the business. This information often comes into play in litigation and regulatory matters.

*“Every litigant is entitled to the time of the court, but no litigant has ever before so wasted judicial resources in two chambers by failing to conduct discovery in good faith according to the rules, and willfully and repeatedly evading court orders to produce discovery.”*

**Wachtel v. Health Net, Inc.**<sup>30</sup>

In addition, as an industry that serves consumers, pharmaceutical companies may face the threat of complex class action or multi-district litigation. The e-discovery challenges of such litigation can be great and require special planning and execution in order to meet legal obligations and control e-discovery costs.

### 2.2 Lessons from the Real World

*“This discovery dispute has dragged on for over a year and at times has seemed hopelessly endless . . . The administrative and organizational travails that this Court has experienced are sure to recur with increasing regularity in similar cases, particularly at this time, at the dawn of the age of electronic discovery. . .”*

**In re Vioxx Products Liability Litigation**<sup>31</sup>

In a complex, multi-district case that followed, a discovery dispute dragged out over many months as the litigants argued over how many of the over two million documents produced by Merck should be protected by attorney-client privilege. Merck asserted privilege on 30,000 documents (amounting to 500,000 pages) and thus argued that they should not be provided to the other side. The court went on to establish a process for the review of the documents, one that cost over \$400,000 and took three months to complete.

Through this process, the court pointed out that the emergence of email and other forms of digital information presents unique challenges for attorneys charged with reviewing information as part of the e-discovery process:

With the ever-expanding use of, if not dependence on, e-mail technology, courts will increasingly be called upon to review electronic communications to determine whether they are protected by the attorney-client privilege. A primary challenge for the courts in this area is one of organization and administration. For example, it is essential that all e-mail threads be grouped together, rather than dispersed throughout several boxes of documents when produced for in camera inspection by the courts. Another challenge is created by the sheer volume of documents that must be reviewed in complex cases. The number of potentially relevant documents often reaches into the millions. It takes a legion of attorneys and paralegals to cull through the documents and recommend or decide whether document is responsive to a request and should be produced, or whether it is instead non-responsive or privileged. In such a milieu, there is a strong bias in favor of non-production. Such circumstances also create opportunities for the attorney who concludes that delay is strategically desirable.<sup>32</sup>

Pharmaceutical companies need to ensure that they have the capability to deal with the volume of documents and the complexity of the document review that can occur in multi-district and class action lawsuits.

Public pharmaceutical companies, like companies in other industries, can also become entangled in litigation involving the financial markets and the players within it. In the case of *Treppel v. Biovail Corp.*, a pharmaceutical company was sued by a securities analyst who alleged that senior officers of the company had damaged his reputation.<sup>33</sup>

In the course of the lawsuit, it was discovered that email sent and received by the pharmaceutical company's CEO was treated differently than the email of other employees. In fact, his email was downloaded to his personal laptop and then removed from the company's servers. As a result, his email was not available on backups of those servers that were provided during e-discovery. As a result, the court allowed the plaintiff to conduct a forensic search of the CEO's laptop.

## 2.3 Taking Action

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

- 1) The complex lawsuits that occur in the pharmaceutical industry place unique demands upon organizations and the attorneys that support them (e.g., "[e-discovery] challenges are exacerbated in . . . complex cases where, because of their vastness, no one counsel can be expected to keep up with everything that transpires").<sup>34</sup> Such suits may require complex queries and sophisticated collection and review protocols in order to meet e-discovery requirements. As a result, firms should investigate tools that can facilitate the automated review and classification of potentially responsive information.
- 2) Organizations should be careful about inconsistent information management procedures across the company. While it may be appropriate to apply a unique policy to company directors, the legal department needs to be made aware of such procedures so that Legal Hold and e-discovery procedures can be appropriately designed. Information management policies that seek to hide or make it more difficult to find and produce responsive information will not be looked upon favorably by the court.
- 3) Understanding the regulatory framework for the management of electronic records in the pharmaceutical industry can help attorneys understand where responsive information exists in the organization, how it is stored, and how it can be accessed. As such, attorneys in pharmaceutical companies should familiarize themselves with such regulations and with how they have been applied at the company.

### 3. Endnotes

<sup>1</sup>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.

<sup>2</sup>FRCP Rule 26(f) Committee Commentary.

<sup>3</sup>FRCP Rule 26(f) Committee Commentary.

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

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

<sup>6</sup>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.

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

<sup>8</sup>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.

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

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

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

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

<sup>13</sup>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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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## 4. About Kahn Consulting

Kahn Consulting, Inc. (KCI) is a consulting firm specializing in the legal, compliance, and policy issues of information technology and information lifecycle management. Through a range of services including information and records management program development; electronic records and email policy development; Information Management Compliance audits; product assessments; legal and compliance research; and education and training, KCI helps its clients address today's critical issues in an ever-changing regulatory and technological environment. Based in Chicago, KCI provides its services to Fortune 500 companies and government agencies in North America and around the world. Kahn has advised a wide range of clients, including Time Warner Cable, Ameritech/SBC Communications, the Federal Reserve Banks, International Paper, Dole Foods, Sun Life Financial, Kodak, McDonalds Corp., Hewlett-Packard, United Health Group, Prudential Financial, Motorola, Altria Group, Starbucks, Mutual of Omaha, Merck and Co., Cerner Corporation, Sony Corporation, and the Environmental Protection Agency. More information about KCI, its services and its clients can be found online at: [www.KahnConsultingInc.com](http://www.KahnConsultingInc.com).

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