

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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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 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 Telecommunications Industry

2.1 Overview

“The three most common types of litigation in the telecommunications/technology industry are: contracts, labor/employment, and patents/intellectual property.”

Litigation Trends Survey⁴²

The telecommunications industry, with its global scale, and highly-regulated and fast-changing technological environment, can be a challenging area when it comes to e-discovery. Telecommunications companies typically generate massive volumes of data as part of providing services to their clients (whether through telephony, Internet Protocol, or recent combinations) that can be difficult and expensive

to manage. Mergers and acquisitions are also a fact of life in this industry, as product innovations, market consolidation, and other factors drive litigation and e-discovery activity in this vertical.

2.2 Learning from the Real World

In a 2005 employment discrimination case,⁴⁴ the litigants began a discovery dispute because the telecommunications company produced spreadsheet data in .TIF (i.e., an image) format rather than in the native Microsoft Excel[®] format in which the spreadsheet was ordinarily maintained. Further, when the company did produce the spreadsheets in Excel format, they had removed certain metadata from the spreadsheet, locked some cells, and had otherwise altered the documents.

“When the Court orders a party to produce an electronic document in the form in which it is regularly maintained, i.e., in its native format or as an active file, that production must include all metadata unless that party timely objects to production of the metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.”

Williams v. Sprint/United Management Co.⁴³

The plaintiff moved for sanctions, which the judge denied because the production of metadata was a new and developing area of the law. The court’s growing understanding of metadata issues and the sophistication of litigants when it comes to digital information would likely result in a different result today. This case illustrates the importance of clarity in both making and responding to discovery requests. The completeness of electronic data and the necessity of producing metadata are both issues that have caused issues for telecommunications companies.⁴⁵

In a series of orders related to litigation involving two telecommunications companies, the defendant company was required to immediately backup and create images of certain computers in order to ensure that that evidence was preserved. Thereafter, the parties began to develop a search protocol to search the data on the imaged hard drives. The plaintiff suggested 170 search terms, to which the defendant “vigorously” objected. The search protocol became the basis of a lengthy dispute between the parties.⁴⁶

The negotiation of search protocols is increasingly common in e-discovery, and telecommunications companies and their attorneys should be conversant in search technology and techniques in order to be prepared.

2.3 Taking Action

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

- 1) When requesting documents in litigation, ensure that you understand the native format of the document you are requesting and whether or not the metadata inherent to the native format is necessary. In addition, when producing documents, ensure that you understand the expectations of the other side and of the court prior to removing data, converting data, or otherwise changing documents from their native format.
- 2) Build and improve Legal Hold and RIM capabilities, as they are the foundation of e-discovery capabilities. Additionally, look at legal review software that can help attorneys to gather, understand, and process documents during e-discovery events. Even without a mature RIM and Legal Hold foundation such software can reduce e-discovery costs and increase e-discovery capabilities.
- 3) Ensure that attorneys understand the capabilities and limitations of search technology so that they can appropriately propose and negotiate e-discovery search protocols.

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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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