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.

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, 2008[14]**

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.

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

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.

4. E-Discovery Challanges in the Pharmaceutical Industry

4.1 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.***[30]

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.

4.2 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***[31]

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.[32]

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. [33]

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.

4.3 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").[34] 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.

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

5.1 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.

5.2 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.

5.3 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.

6. E-Discovery Challenges in the Telecommunications Industry

6.1 Overview

> *"The three most common types of litigation in the telecommunications/ technology industry are: contracts, labor/employment, and patents/ intellectual property."*
>
> ***Litigation Trends Survey***[42]

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.

6.2 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.

6.3 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 form 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.

7. 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).

[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).

8. 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.

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