

# E-Discovery and Information Management: Making the Connection

## 1. Introduction: The Emergence of E-Discovery

Electronic discovery (the process of finding, preserving and producing digital information responsive to a legal matter) has today captured the attention of lawyers, executives, IT professionals, and others like never before. One analyst firm posits that new federal rules for e-discovery

are a key factor in the growing demand for information management software.<sup>2</sup> Another firm predicts that spending on e-discovery-related tools will amount to \$4.8 billion by 2011, as companies “wrap e-discovery into broader retention management strategies.”<sup>3</sup> Not only has this previously arcane (or at least highly-specialized) concept entered the vernacular of today’s business executive - entirely new categories of information technology and consulting services have been created to address it.

*“For billion-dollar companies, the number of [active] lawsuits soared to 556 cases, with almost half facing 50 new suits annually.”*

*Litigations Trends Survey<sup>1</sup>*

What is the “big deal” with e-discovery? Although some have been slow to realize it, e-discovery is a “big deal” because it requires fundamental changes to the way that organizations manage their information. E-discovery matters because it is not a problem that can be “fixed” simply by writing a new policy, hiring a new lawyer, or buying technology. Although each of these might help, none of them alone are enough. In fact, success in e-discovery requires coordinated efforts within the realms of technology, governance, and policy - at minimum. For example, the Electronic Discovery Reference Model, an industry-driven e-discovery framework, illustrates this connection by emphasizing the tight bond between process and technology in the e-discovery process.<sup>4</sup>

As it relates to technology, e-discovery not only requires new tools, but also new ways of thinking about existing tools and the way they should be used. On the governance front, preparing for - and executing on - e-discovery requirements depends on an unprecedented level of alignment between an organization’s legal and information technology (IT) groups. E-discovery also requires new policies that provide a framework for e-discovery to occur within records and information management programs.

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## 2. The Integrated Approach

*“[C]ounsel must become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm’s recycling policy.”*

*Zubulake v. UBS Warburg*<sup>5</sup>

### 2.1 Overview

The increased profile of e-discovery can be largely tracked back to amendments to the Federal Rules of Civil Procedure (FRCP) that went into effect on December 1, 2006, and several high-profile cases involving e-discovery, such as *Zubulake v. UBS Warburg*<sup>6</sup>, *Coleman v. Morgan Stanley*<sup>7</sup>, and *Lorraine v. Markel*.<sup>8</sup> The FRCP, which provide rules for e-discovery in federal courts, have in particular driven a great deal of short-term activity within organizations seeking to respond to their new requirements.

However, success with e-discovery requires a long-term vision that seeks to leverage existing approaches to information management. The integration of e-discovery and information management can improve an organization’s ability to respond to e-discovery demands and also lower the costs and risks associated with e-discovery. E-discovery and information management are highly complementary activities - although they have traditionally not been viewed in this way. This must change.

### 2.2 Benefits of an Integrated Approach

An integrated approach to e-discovery and information management has several benefits. For example, some organizations are starting to examine ways in which they can use the auto-classification capabilities of forensic and litigation support software in the information management context – prior to e-discovery. The intent is to leverage the software to increase the efficiency of information classification while reducing the burden on the employee.

In addition, some organizations are starting to leverage their investments in electronic content management (ECM) and electronic document and records management for e-discovery. Such technologies can be adapted to provide environments for attorneys and their staff to coordinate and manage the collection and production of digital information. Since many of these environments have the capability to ingest and manage many formats, including email, they can be successfully leveraged in this way. In addition, because many tools in this area were developed with records management in mind, they have features that are useful in the e-discovery context, such as activity logging, auditing, security provisioning, version control, and backup/disaster recovery capabilities.

Beyond the synergies that might be found in the IT environment, the integrated approach to e-discovery and information management provides additional benefits, including:

- Making it easier to find responsive information
- Facilitating the Legal Hold process, including the notification of custodians of responsive information.
- Reducing the volume of information that should be searched or reviewed for responsiveness

- Facilitating the identification of “readily accessible” information sources

Table 1 explores these concepts in more detail.

**Table 1: E-Discovery and Information Management**

<b>E-Discovery Requirement</b>	<b>How Information Management Supports Requirement</b>
Notify custodians of the need to preserve information in the context of a Legal Hold.	Information coordinators or similar roles that are part of a typical records and information management program can help to identify who should receive such notices and where responsive repositories exist.
Identify the types of electronically stored information (ESI) available in the organization.	A functional retention schedule can provide a foundation for addressing this need, as it captures a picture of key information across the company by function (however, it should not be considered comprehensive for preservation purposes as it typically does not identify non-records).
Identify the custodians of ESI in the organization.	Records retention schedules often provide this information. In addition, “source mapping” of an organizations structured and unstructured systems can help.
Analyze whether responsive information from a specific time period exists.	Information management policies should define how, where, and for how long information is retained. Well designed and implemented policies can help to create a clearer picture.
Manage the Legal Hold process, collect responsive information.	ECM and other information management technologies can be extended and leveraged for these purposes.
Efficiently find and collect responsive information.	Formal information management programs provide a context for organizations to dispose of information that is no longer needed for business or legal purposes. Keeping extraneous information is an unnecessary burden that makes finding, using, and managing information of value more difficult.

### 3. Building the Integrated Approach

The benefits of an integrated approach are clear, but how should an organization operationalize such an approach in their enterprise? As introduced in Section 2, there are three critical dimensions to building an integrated approach to e-discovery and information management: technology, governance, and policy. Each of these dimensions is explored in more detail in the following sections.

### 4. Technology Issues

#### 4.1 Overview

*“The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.”*

*Federal Rules of Civil Procedure Commentary<sup>9</sup>*

Information technology and the way it is used and managed provide fertile ground for e-discovery disputes. In many cases, attorneys are forced to reactively grapple with issues caused by the misuse or mismanagement of technology. Attorneys also often must address novel - and constantly evolving - issues raised by technology.

For example, in a recent case,<sup>10</sup> the court found that a company erred by failing to preserve responsive information stored in the RAM (Random Access Memory) of a web server,” even though there was no “preservation request which specifically address[ed] data temporarily stored only in RAM.” In making its decision, the court stated that, “the data . . . temporarily stored in defendants’ website’s random access memory (“RAM”) constituted ‘electronically stored information’ and was within the possession, custody, and control of defendants.” Although the court states that “its ruling should not be read to require litigants in all cases to preserve and produce electronically stored information that is temporarily stored only in RAM,” this case emphasizes the importance of organizations understanding how and where all potentially responsive information is stored.

A clear benefit of the integrated approach to e-discovery and information management is that it provides a framework for proactive work that can help to prepare the organization’s information environment for litigation. Some examples of the integrated approach in the technology environment are explored below.

#### 4.2 Backup Tapes

Unmanaged backup tapes have undoubtedly provided one of the greatest sources of pain for organizations in the e-discovery context. Although the new FRCP potentially provide some relief in this area,<sup>11</sup> organizations should nonetheless seek to improve the way that backup systems are used and managed. Exploring each issue associated with backup tapes is beyond the scope of this paper, but any approach should incorporate e-discovery, records management, and business continuity requirements, at a minimum.

- Establish and document the purpose of the back tape system to ensure that it is only used for its intended purpose: to backup data for business continuity purposes, and not for retention or archiving purposes
- Identify and document the physical locations used to store backup tapes
- Identify any documented procedures regarding the use of backup tape systems and analyze areas where they could be improved
- Inventory backup tapes
- Identify tapes that may be eligible for destruction, working along a scale from least eligible to most eligible. Work with the legal department to determine and document an appropriate process. A scale for determining destruction eligibility (from least to most eligible) might include these considerations:
  - 1) Tapes contain information subject to a current or anticipated Legal Hold
  - 2) Tapes contain records that are still required for business or legal purposes that exist nowhere else in the organization
  - 3) Tapes contain information that is needed for disaster recovery purposes (i.e., to restore company systems to the current time)
  - 4) Tape contents are unknown without further investigation
  - 5) Tapes do not contain information in categories 1-3, but contain one-of-a-kind information that has defined value to the organization
  - 6) Tapes contain information from systems that are no longer in operation
  - 7) Tapes contain information that is duplicated elsewhere
  - 8) Tapes contain information older than the time period that would apply to Legal Holds or records retention periods

### 4.3 Source Mapping

The FRCP require organizations to understand and identify the sources of responsive information. As stated by the FRCP, parties must provide “a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party.”<sup>13</sup> In addition, the rules require organizations to identify which sources they intend to produce from, which they do not intend to produce from, and explain why.<sup>14</sup>

*“[P]arties are under a duty to complete a reasonable investigation . . . Discovery requests served on a company solicit information known to the company, not solely information known by the president, CEO, or other person directed to respond to the discovery requests.”*

**3M Innovative Props. Co. v. Tomar Elecs<sup>12</sup>**

Taken together, these requirements mandate a high degree of familiarity with an organization’s information systems. In fact, many organizations likely lack a centralized, up-to-date inventory of systems, or an inventory of the type of information that each system contains.

This is where the concept of “source mapping” comes in. The purpose of source mapping is to build a list of systems, and the information those system contain, which can be used to facilitate e-discovery. Source mapping requires a collaborative effort among legal, IT, business owners,

and other stakeholders to identify and “map” information systems. This “map” should allow an attorney to navigate from a discovery request received in litigation to systems that contains that information. Examples of the types of information that should be collected in a source mapping project include:

- The system owner
- The software and hardware comprising the system
- The format of the data in the system, and any unique challenges or issues its preservation or production would involve
- The location of the system
- Date ranges for data stored in the system
- Backup and business continuity procedures related to the system

#### 4.4 Legal Hold Management Systems

It is time for organizations that face any significant number of e-discovery events to investigate technologies that will assist them to automate the Legal Hold process. Such technologies help organizations create formal and repeatable processes. As mentioned above, existing ECM software may provide a useful environment for this purpose.

Some of the requirements that organizations should consider for Legal Hold management systems are listed below.

- 1) Track matters that may trigger the need for a Legal Hold
- 2) Identify parties that should receive a notice for a particular matter
- 3) Create, customize, and issue Legal Hold notices
- 4) Track receipt and/or reading of Legal Hold notices by recipients
- 5) Track compliance with Legal Hold notices (such as providing follow up notices for compliance certification)
- 6) Trigger follow up notices as required to expand or contract the scope of the original notice
- 7) Send Legal Hold notice terminations
- 8) Integrate with tools used to collect/preserve responsive information

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## 5. Governance Issues

### 5.1 Overview

The new challenges represented by e-discovery and information management may require organizations to develop new governance and management structures. Perhaps like no other development to date, e-discovery requires an unprecedented alignment between the legal and IT functions (at a minimum). At the same time, e-discovery requires executives and middle management to understand legal issues at a depth that may be unfamiliar, at least for management in lightly regulated industries.

An integrated approach to e-discovery and information management will only be successful if it is supported by appropriate governance and management structures. This section explores activities that organizations can undertake to support these efforts.

### 5.2 Managing the Integrated Approach

- 1) **Project Steering Committees.** Investing in e-discovery and information management may require a series of projects that move the organization forward in a logical and risk-adjusted manner. This is particularly challenging because e-discovery and information management projects require cross-functional participation and oversight. Seek to establish project steering committees that include representatives from Legal, IT, Compliance, and key business units, at a minimum. Ensure that committee members understand the vision of an integrated approach and can help to socialize the concept in their respective departments and business units.
- 2) **Review Boards.** Review boards, like steering committees, should be multidisciplinary. Unlike project steering committees, however, review boards play a permanent role in evaluating e-discovery and information management progress and activity in the organization, and addressing issues that may arise.
- 3) **Operational Structures.** Revisit existing management and reporting structures for e-discovery and information management. An integrated approach may require an integrated reporting structure. There is no “one size fits all” approach here, but many companies are taking the approach of placing the information management function inside the legal department. Some create new groups with unified responsibilities for e-discovery and information management, and others maintain separate reporting structures, but create “bridging” roles such as the e-discovery liaison.

### 5.3 The E-Discovery Liaison

The new FRCP require organizations to “meet and confer” with the other side in litigation, and during this meeting, to discuss and come to terms on a variety of issues impacting e-discovery. At the same time, the new rules require organizations to provide detailed information about its systems and the information contained within them.

Clearly, the type of information and expertise required by the federal (and many state) rules in this regard is beyond that possessed by a typical attorney. However, requiring IT staff, who otherwise are engaged in managing and operating the organization’s IT environment, to routinely participate in litigation conferences, depositions, and so on, may represent a significant and unwanted burden.

The concept of an “e-discovery liaison” is an individual who is familiar with the organization’s systems and can assist attorneys in conducting e-discovery and can speak knowledgeably about the organization’s IT environment in the context of depositions, conferences, trials, and so on.<sup>15</sup>

Organizations that face a significant number of e-discovery events should consider creating such a role. Some of the responsibilities of this role might include:

- 1) Providing the legal department with the information it needs to specify the systems containing responsive ESI that are “reasonably accessible” versus those that are not “reasonably accessible,” and thus may not be subject to the production requirements, because of “the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found,” as required by FRCP Rule 26(b)(2).
- 2) As contemplated by FRCP Rule 26(b)(2), providing the legal department with the information it needs to, “identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing.”
- 3) Helping to prepare the legal department to “meet and confer” with the opposing side in litigation as regarding discovery as required by FRCP Rule 26(f).
- 4) Helping counsel to “become familiar with [relevant] systems,” to prepare them to “discuss those systems,” as contemplated by FRCP Rule 26(f).
- 5) Helping the organization improve its ability to “produce” ESI, and to enable the opposing party to “inspect, copy, test, or sample . . . electronically stored information,” and to translate, “if necessary, [that information] into reasonably usable form . . .” as required by FRCP Rule 34(a).
- 6) Helping the legal department prepare to “develop a discovery plan that takes into account the capabilities of their computer systems,” as contemplated by FRCP Rule 26(f).

## 6. Policy Issues

Information management policies play a key role in both e-discovery and information management as they tell employees what is expected of them and provide evidence of the organization’s intent. An integrated approach requires policies that adequately address:

- 1) What is required of the organization during “normal” business operations, when information is being managed according to business need and any specific legal or regulatory requirements.
- 2) What is required of the organization when information must be managed in the context of audits, litigation, investigations, or other formal proceedings requiring the preservation of information.

It is critical that policies are clear about employee obligations in each of these scenarios.

## 6.1 Policies as Evidence

*“Although an email ‘tracking log’ indicating the time and date that the employee opened the email, the employer could not prove that the employee had actually read the email or clicked on the links. The court determined that the mass email did not constitute sufficient notification and further admonished the employer for not taking ‘the incredibly simple and inexpensive step of configuring their system to log when and if employees clicked on the links.’”*

***Campbell v. General Dynamics Gov’t Sys. Corp***<sup>16</sup>

Information mismanagement has itself become a topic in litigation, and can lead to disputes that overshadow the original focus of the matter itself. In this environment, organizations should be prepared to provide a full and detailed accounting of their information management policies and procedures relative to the time period of the e-discovery activity. This information might include:

- Evidence showing which information management policies were in place during the time period of the matter
- Evidence showing who received the policies
- Evidence regarding training on the policies
- Evidence of auditing or other activities to measure compliance with policies

To prepare for the use of information management policies in future matters, organizations should consider the following activities:

- Provide a formal, controlled environment and method for the publishing, retraction, and retention of information management policies and procedures
- Use technologies to track the dissemination, receipt, reading, and acknowledgement of information management policies, and retain and manage this tracking information

## 6.2 Retention Schedules

The retention schedule has long been the cornerstone of the records retention program - some would say, too long. While the intent of the retention schedule - identifying categories of records, the period of time they must be retained, and the reason for retention - is essential, some organizations today view it as outdated, inflexible and insufficient to address the realities of the digital world. In any case, the information a retention schedule contains plays a critical role in ensuring that organizations meet their legal and business retention obligations.

However, a retention schedule might also play a key role in an integrated approach to e-discovery and information management. Successful e-discovery depends on knowing what information pertaining to a particular timeframe still exists. Successful information management depends on ensuring that information of value is kept for as long as needed. Clearly, the two functions are complimentary.

Organizations should investigate how their retention schedule can be adapted, expanded, reformulated, and leveraged in their technology environment to support the e-discovery process. This might include, for example:

- Collecting information about the systems that each category of record is stored within as part of retention schedule development/maintenance, and using that information to map sources of responsive information for e-discovery (as discussed in Section 5).
- Using the record retention categories as a guide to determine the categories of information that might be responsive to a preservation order, Legal Hold, or e-discovery request.
- Using retention periods to determine what types of information may have been retained during the time period of the matter requiring e-discovery, and whether or not that information is likely to still be available.

## **7. Conclusion**

Many organizations needed to take a short-term approach to building e-discovery capabilities in the wake of the amendments to the Federal Rules of Civil Procedure. This approach was undoubtedly necessary and resulted in significant improvements in the e-discovery capabilities of many organizations. However, beyond the initial impact of the FRCP, it is time for organizations to take a mature approach to e-discovery, one that embraces the long-term value that can be realized by integrating e-discovery and information management.

Integrating e-discovery and information management needs to occur at the technology, governance, and policy levels, at a minimum. On the technology front, addressing backup tapes, mapping sources of responsive information, and leveraging ECM and other technologies to manage the Legal Hold and e-discovery process are examples of activities that can provide both short and long-term benefit. The integrated approach needs to be implemented in governance and management structures, where organizations take a cross-functional approach. In addition, organizations should consider the creation of an e-discovery liaison role to help the organization respond to the requirements of the FRCP and state rules. As it relates to policy, organizations should evaluate their approach to policy, and consider the impact of the past and future use of their information management policies as evidence. Finally, organization should revisit their retention schedule to evaluate its use as a key e-discovery tool.

A proactive and well-managed records and information management program can provide the foundation for the reactive activities required by e-discovery. Investments in the retention tools and technologies of information management today can dramatically reduce the burden and pain of conducting e-discovery tomorrow.

## 8. Endnotes

- <sup>1</sup> Fulbright and Jaworski, LLP, Third Annual Litigation Trends Survey Findings, 2006.
- <sup>2</sup> Skjekkelen, Atle, "eDiscovery Market Size," AIIM Knowledge Center Blog, March 30, 2007. Available online, at: <http://infogovernance.blogspot.com/2007/03/ediscovery-market-size-aiim-knowledge.html>
- <sup>3</sup> Murphy, Barry; Brown, Matthew; Barnett, Jamie, "Believe It — eDiscovery Technology Spending To Top \$4.8 Billion By 2011," Forrester, December 11, 2006.<sup>4</sup> International Standard ISO 15489, Information and Documentation – Records Management (Geneva, 2001)
- <sup>4</sup> Available at, <http://edrm.net/>
- <sup>5</sup> Zubulake v. UBS Warburg, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).
- <sup>6</sup> The Zubulake decisions are reported at 217 F.R.D. 309 (S.D.N.Y. 2003), 230 F.R.D. 290 (S.D.N.Y. 2003), 216 F.R.D. 280 (S.D.N.Y. 2003), 220 F.R.D. 212 (S.D.N.Y. 2003), and 229 F.R.D. 422 (S.D.N.Y. 2004).
- <sup>7</sup> Coleman Parent Holdings, Inc. v. Morgan Stanley & Co., Inc., No. CA 03-5045 AI (Fla Cir. Ct. March 23, 2005).
- <sup>8</sup> Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D. Md. 2007).
- <sup>9</sup> Federal Rules of Civil Procedure Rule 26(f) Committee Commentary.
- <sup>10</sup> Columbia Pictures Industries v. Bunnell, 2007 U.S. Dist LEXIS 46364.
- <sup>11</sup> For example, by stating that, "A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost." \*Rule 45(d)(1)(D).
- <sup>12</sup> 3M Innovative Prods. Co. v. Tomar Elecs., 2006 U.S. Dist. LEXIS 80571.
- <sup>13</sup> Federal Rules of Civil Procedure, Rule 26(a)(1)(B).
- <sup>14</sup> As provided by, for example, Rule 26(b)(2)(B), which states, "On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost."
- <sup>15</sup> The District of Delaware Default Standard for Discovery of Electronic Documents identifies "e-discovery liaison" as a defined role for the purpose of e-discovery in that jurisdiction.
- <sup>16</sup> Campbell v. General Dynamics Government Systems Corp. , 321 F. Supp. 2d 142 (D. Mass. 2004).

## 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](http://www.KahnConsultingInc.com).

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