

Cost of E-Discovery Threatens to Skew Justice System

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A blue-ribbon group of legal scholars, including a U.S. Supreme Court justice, law professors, and attorneys in both corporate and private practice met recently to discuss growing concerns around electronic discovery (e-discovery). Exorbitant costs and massive amounts of data are having a negative impact on the society and the practice of law.

Key Findings

- The use of technology, especially e-mail and the Internet, has changed the legal discovery environment. Most organizations do not have the systems and policies in place to deal effectively with e-discovery.
- The volumes and costs associated with meeting e-discovery requests are rising precipitously. Jurists warn the situation will force all but the rich out of the legal system to venues such as arbitration or simple pleadings.
- Enterprises must recognize that there is a business value in organizing their information and data. Organizations that fail to respond run the risk of seeing more of their cases decided on questions of process rather than merit.

Recommendations

- Develop a reasonable document retention policy that supports the needs of the business and has the ability to destroy information when it is no longer needed.
- Communicate, educate and enforce document retention policies to ensure that they provide value and reduce risk for the organization.
- Use technology to automate whenever and wherever possible regarding document retention and management.
- Strive for a collaborative environment when it comes to e-discovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.

WHAT YOU NEED TO KNOW

The new Federal Rules of Civil Procedure (FRCP) that went into effect at the end of 2006 are an attempt to deal with the most-basic problems associated with the discovery of electronically stored information. These include what is considered accessible information, production formats, and what to do if privilege is breached during discovery. While these new rules provide clear guidance on process, many suggest that it will take years for substantive law to clearly lay out a consistent and reasoned approach to many e-discovery issues, such as what is truly accessible and what are considered routine "good faith" operations. During that interim, most parties will use e-discovery as just another tool in offensive or defensive civil litigation, resulting in more court decisions that focus on the legal process rather than merits of the case.

EVENT FACTS

On 20 March 2007, Georgetown University Law Center and H5, an automated document review and risk management provider, sponsored a panel discussion on the impact of e-discovery. Harvard Law School Professor Arthur Miller was the moderator, and panelists included U.S. Supreme Court Justice Stephen Breyer (see Note 1 for a complete list of panelists).

ANALYSIS

There have been many conference sessions, panels, and audioconferences on e-discovery sponsored by bar associations, law schools, and for-profit continuing legal education providers during the past three years leading up to the revised FRCP. However, nearly all have always featured content or speakers that favored either the plaintiff's bar (how to do it) or the defense counsel (how to fight it).

This session sponsored by Georgetown Law and H5 brought together the people from the organizations that were on both the giving and receiving ends of the milestone multimillion-dollar terabyte e-discovery cases, in both commercial and public-sector environments. They were both on the panel as well as in the limited audience of 100 attendees. The session also featured the first public comments from a member of the nation's highest court on the issues that have put e-discovery and the revised FRCP in the news.

Three key messages emerged from the two-hour discussion:

- Lawyers — and senior management — do not understand or comprehend the complexity of the technology or the volumes of information produced in the modern-day organization.
- The problems that have manifested itself in e-discovery are a complication of the adversarial nature of litigation, bad or nonexistent document retention policies, and undisciplined deployment of technology.
- Technology — which can be an unbiased tool — can help improve accuracy as well as increase efficiency. However, there still may be a need for a neutral third party in litigation that helps determine what needs to be discovered.

Breyer confessed at the start of the panel that he was a "babe in the woods" on issues regarding e-discovery. However, after hearing horror stories from both corporate attorneys and lawyers in private practice about massive costly (\$4 million to \$8 million) e-discovery searches that involved wading through terabytes of data, he suggested that this is a dilemma that could limit use of the

courts to only those who have the tools and the money. "If it really costs millions to do that, then you're going to drive out of the litigation system a lot of people who ought to be there. They'll go arbitration ... They will go somewhere where they will write their own discovery rules, and I think that is unfortunate in many ways."

Richard Braman, the executive director of The Sedona Conference, suggested that law schools should teach the need to collaborate during the discovery process to help overcome these problems. "In law school, students need to be told that there's a time for adversarialness. That's [in] the courtroom. And there's a time when you need to cooperate and collaborate with your adversary to get the facts on the table about which you're going to litigate," Braman said. Several on the panel and in the audience disagreed with the suggestion, calling it "utopian" in nature.

Nicolas Economou, the CEO of H5, put forward the suggestion that technology can help handle the massive amounts of data and reduce errors in finding relevant information. However, he found that from his experience, the adversarial process was counterproductive in discovery and said "honest brokers" will be required to determine what needs to be found. U.S. Federal Magistrate John Facciola agreed, saying that he was spending a great deal of time on e-discovery matters even before the new federal rules went into effect.

The long-term trend that emerges from this panel is the fact that the legal community is under an obligation to learn about the IT infrastructure, topology and architecture of the organizations they represent. As a result, they, too, will weigh in with an opinion on the adoption and implementation of new technologies. The short-term implications point to the fact that until there is a body of case law supporting the revised FRCP, a number of cases will be decided on process issues rather than merits. Finally, with the escalating costs, there will be a movement toward alternative methods of dispute resolution, especially by small and midsize organizations.

Gartner clients tell us that they are concerned about e-discovery. It is unlikely that the courts will say that electronic information does not matter. Justice is at stake in the sense that if the full body of evidence is not available, then the truth will be obscured, and facts will remain unknown. Information technology has created the problem of massive amounts of data that the court system must deal with. Only technology can solve the problem if it includes well-designed business processes and policies. Throwing technology at the e-discovery problem is in itself ineffective. In a perfect world, the solution to the e-discovery problem would combine the expertise of lawyers, line-of-business owners, IT professionals, and host of other disciplines.

Gartner maintains that advances in search technology and information sampling techniques, along with better processes for managing documents and data, hold at least partial solutions to the problems that attorneys, courts and organizations face in culling masses of electronic evidence, looking for relevant data. At the very least, we recommend that clients conduct an inventory of all information assets and begin to deduplicate and delete redundant and old data in a legally sanctioned and policy-driven way.

E-mail management and retention policies, document management systems, and data archiving and retrieval systems will help clients deal with the problem. Storage vendors offer deduplication technologies as well. The problem of uncontrolled information growth will not go away unless organizations take active steps toward making it go away. Paying attention to information governance makes sense for business as well as legal justifications.

The information contained in this research is intended to place the IT issues involved in e-discovery in the context of an evolving legal landscape. It does not constitute legal advice and should not be taken as such. Consult with and obtain the advice of legal counsel before taking significant action in any pending or anticipated litigation.

RECOMMENDED READING

"Key Issues for Electronic Discovery"

"Organizations and In-House Counsel Must Prepare to Comply With New E-Discovery Rules"

"Toolkit Decision Framework: The Role of Information Access Technology in E-Discovery"

"Toolkit Tutorial: Understand E-Discovery's Impact on Information Management"

Note 1

List of Panelists

The panelists were (in alphabetical order):

- Jason Baron, director of Litigation, National Archives and Records Administration
- Ron Brachman, vice president of Worldwide Research Operations, Yahoo Research
- Richard Braman, executive director, The Sedona Conference
- The Hon. Stephen Breyer, associate justice, U.S. Supreme Court
- Julia Brickell, associate general counsel, Altria Corporate Services
- Nicolas Economou, CEO, H5
- The Hon. John Facciola, magistrate judge, U.S. District Court for the District of Columbia
- Anne Kershaw, founder, A. Kershaw, PC // Attorneys & Consultants
- Patrick Oot, director of Electronic Discovery, Verizon Communications
- Marc Rotenberg, executive director, Electronic Privacy Information Center
- Hugo Teufel III, chief privacy officer, U.S. Department of Homeland Security
- David Vladeck, associate professor of law, Georgetown University Law Center

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