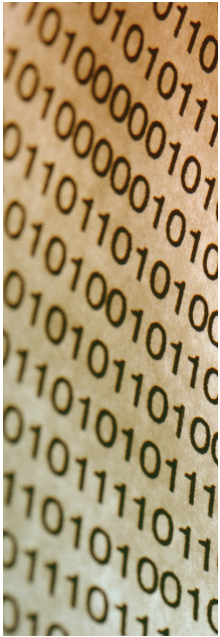


# eDiscovery and Information Management: Making the Connection



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Despite the hopeful thinking that electronic discovery (eDiscovery) would “go away” with the changes in the Federal Rules of Civil Procedure (FRCP) five years ago, the facts remain that eDiscovery is still a headache and major expense during the litigation process.

Organizations continue to invest in information management applications and processes designed to achieve compliance and improve efficiency. This paper explores the benefits that organizations can realize by taking an integrated approach that address both eDiscovery and information management requirements at the technology, governance, and policy levels.

### eDiscovery Today

“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>

The topic of electronic discovery (the process of finding, preserving, and producing digital information responsive to a legal matter) has today captured the attention of lawyers, executives, information technology (IT) professionals, and others like never before. Today, eDiscovery is a multi-billion-dollar business, and it continues to grow.

*Companies must proactively manage their information to ensure they are prepared when a discovery request hits.*

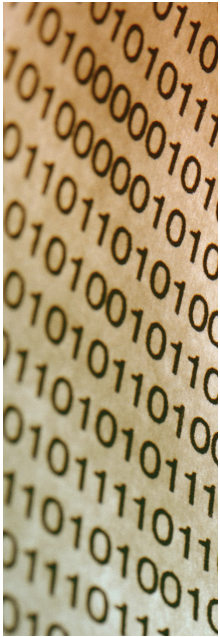
What is the “big deal” with eDiscovery? Although some have been slow to realize it, e-discovery is a big deal because it requires fundamental changes to the way that organizations manage their information. eDiscovery matters because it is not a problem that can be “fixed” simply by writing a new policy, hiring a new lawyer, or buying technology. Although each of these might help, none of them alone are enough. In fact, success in eDiscovery requires coordinated efforts within the realms of technology, governance, and policy – at minimum.

As it relates to *technology*, eDiscovery 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 – eDiscovery requirements depends on an unprecedented level of alignment between an organization’s legal and IT groups. eDiscovery also requires new *policies* that provide a framework for eDiscovery to occur within records and information management programs.

### Why an Integrated Approach Promotes Compliance and Good Business

“[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. Warburg<sup>2</sup>



## eDiscovery and Information Management: Making the Connection

Success with eDiscovery requires a long-term vision that seeks to leverage existing approaches to information management. The integration of eDiscovery and information management (including Records Management) can improve an organization's ability to respond to eDiscovery demands, and also lower the costs and risks associated with eDiscovery. eDiscovery and information management are highly complementary activities – although they have traditionally not been viewed in this way. This must change.

An integrated approach to eDiscovery 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. The intent is to leverage the software to increase the efficiency of information classification while reducing the burden on the employee.

Beyond the synergies that might be found in the IT environment, the integrated approach to eDiscovery 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

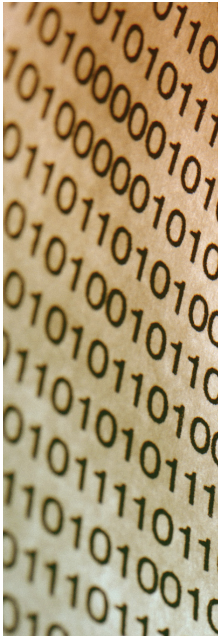
### Building the Integrated Approach

The benefits of an integrated approach are clear, but how should an organization operationalize such an approach within its enterprise? There are three critical dimensions to building an integrated approach to eDiscovery and information management: technology, governance, and policy.

IT and the way it is used and managed provide fertile ground for eDiscovery 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>3</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 the 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 eDiscovery and information management is that it provides a framework for proactive work that can help to prepare the organization’s information environment for litigation.



## eDiscovery and Information Management: Making the Connection

The new challenges represented by eDiscovery and information management may require organizations to develop new governance and management structures. Perhaps like no other development to date, eDiscovery requires an unprecedented alignment between the legal and IT functions (at a minimum). At the same time, eDiscovery 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 eDiscovery and information management will only be successful if it is supported by appropriate governance and management structures.

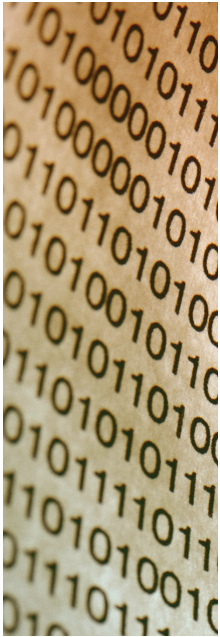
Information management policies play a key role in both eDiscovery and information management as they tell employees what is expected of them and provide evidence of the organization's intent. An integrated approach requires policies that adequately address:

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. "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>4</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 eDiscovery activity.



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### Conclusion

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

Integrating eDiscovery 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 Enterprise Content Management (ECM) and other technologies to manage the Legal Hold and eDiscovery process are examples of activities that can provide both short- and long-term benefits. 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 eDiscovery 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.

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

### End Notes

- <sup>1</sup> Fulbright and Jaworski, LLP, Third Annual Litigation Trends Survey Findings, 2006.
- <sup>2</sup> Zubulake V, 2004 U.S. Dist LEXIS 13574 (S.D.N.Y, 2004).
- <sup>3</sup> Columbia Pictures Industries v. Bunnell, CV 06-1093 FMC (JCx), U.S. District Court for the Central District of California.
- <sup>4</sup> Campbell v. General Dynamics Government Systems Corp. (PDF, 88K), 321 F. Supp. 2d 142 (D. Mass. 2004).

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