

Getting Started with Electronic Discovery: The Role of Information Technology

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1. Executive Summary

E-discovery is a critical challenge for all organizations, and one that can only be successfully addressed through a combination of people, processes, and technology. This paper is the first in a series of three that are designed to help organizations quickly understand how to get started with understanding and addressing their e-discovery challenges. This paper focuses on the role that technology plays in preparing for, and responding to, e-discovery requests.

2. Overview

Almost half of the billion dollar companies surveyed face 50 new lawsuits each year. Two thirds of them have at least one lawsuit with \$20 million or more at stake.

Litigation Trends Survey¹

By 2011, organizations in North America will spend nearly \$5 billion on e-discovery technologies.

Forrester Research²

When the new Federal Rules of Civil Procedure (FRCP) addressing electronic discovery went into effect at the end of 2006, the committee responsible for the rules noted that “the discovery of electronically stored information is becoming more time-consuming, burdensome, and costly.”³ Although the new rules were designed in large part to alleviate such challenges, only time will tell whether the goals of lower costs, increased efficiency, and “uniformity of practice” will be met.⁴

What is clear, however, is that e-discovery has emerged as a defining legal, business, and technological challenge for organizations today - one that requires them to fundamentally re-examine the way that they use and manage their digital information. Moreover, e-discovery is a problem that can only be solved by applying well-designed technology within the context of a strong information management program and e-discovery strategy. Simply put, e-discovery is not just a problem for the lawyers. Successfully preparing for - and responding to - e-discovery demands a multidisciplinary approach that leverages business, records management, and IT expertise as well.

This White Paper provides a high-level overview of some of the issues around e-discovery and is not exhaustive. The paper is not a Legal Opinion and should not be acted upon without first consulting a lawyer. KCI shall have no liability for errors, omissions or inadequacies in the information contained herein or for interpretations thereof. The reader assumes sole responsibility for the selection of these materials to achieve its intended results. The opinions expressed herein are subject to change without notice.

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This paper has a simple goal: to provide practical guidance to help organizations get started with addressing their e-discovery challenges. It addresses three major topics:

- 1) Integrating Information Management and E-Discovery
- 2) Leveraging Technology to Address the New FRCP
- 3) Assessing Your Organization's E-Discovery IT Readiness

3. Integrating Information Management and E-Discovery

“Records management and e-discovery are two sides of the same coin . . . because the success of a company’s e-discovery strategy relies on the strength of its records management foundation.”

Computerworld⁵

The recently amended Federal Rules of Civil Procedure (FRCP), and high-profile case cases like *Coleman v. Morgan Stanley*⁶ and *Zubulake v. UBS Warburg*⁷ clearly illustrate the need for organizations to take a new approach to e-discovery. Too often, analysis of the e-discovery challenge focuses on the period of time when it may be too late to make a significant impact on

the outcome. Organizations need to take a broader view of e-discovery, one that recognizes the critical, proactive role that information management plays in the process. In this view, information management and e-discovery are integrated, complimentary activities that are holistically managed.

At its core, information management is about understanding the value of the information, and then making good decisions about its management based on business and legal goals and requirements. The key activities of information management – capturing, classifying, retaining, and disposing of information according to a documented plan - provide a foundation for the preservation and production of information during discovery.

Traditional approaches to discovery tend to be reactive, federated, and matter-specific. In other words, the lessons learned from one e-discovery event are not necessarily applied in another, with responsible parties “doing whatever it takes” to make the e-discovery problem go away. Such approaches are not sustainable, and may result in gross inefficiencies and strategic inconsistencies that negatively impact a future legal position. One major technology company recently stated that it spends an average of \$20 million on e-discovery for each lawsuit it faces.⁸

This is especially true when e-discovery occurs in a vacuum. This can result in situations where, for example, responsive backup tapes are inadvertently recycled by an IT department (as in *Applied Telematics v. Sprint*,⁹), or responsive email is deleted due to routine system operations (as in *AAB Joint Venture v. United States*¹⁰). Even if the destruction of responsive information is not intentional, and is the result of innocent actions on the part of an IT administrator, for example, organizations may still find themselves subject to sanctions. As one court stated, “[g]uided by logic and considerable and growing precedent, the court concludes that an injured party need not demonstrate bad faith in order for the court to impose, under its inherent authority, spoliation sanctions.”¹¹

The successful integration of e-discovery and information management can play a large role in helping organizations avoid these types of problems. Investing in information management can have significant benefits for e-discovery, as explored further, below.

3.1 Disposing of Unnecessary Information

“ . . . we see no evidence of fraud or bad faith in a corporation destroying records if it is no longer required by law to keep and which are destroyed in accord with its regular practices . . . destruction of records no longer required is not in and of itself evidence of spoliation.”

Moore v. General Motors¹²

thereby reduce the cost of e-discovery. In other words, good information management practices allow organizations to reduce the e-discovery burden by providing a legally-defensible method for disposing of information that no longer has business or legal value.

The burden of finding, processing, reviewing, and managing large volumes of (potentially) responsive information in e-discovery can grow exponentially - simply because an organization has kept high volumes of unneeded information. Even though such information may have long since satisfied legal retention requirements and fulfilled its business purposes, it may still be responsive to the matter driving e-discovery, and as such, may be subject to preservation and/or production.

For example, in one case, an organization estimated that document review would take thirty staff months to complete, including a review of “3300 - 3400 electronic files” at 30 minutes per file.¹³ An information management program that ensures that information of value is retained only as long as it is needed - in accordance with legal retention requirements - can proactively help to prepare the information environment for e-discovery, thereby reducing costs.

3.2 Finding Responsive Information

The cost of finding responsive information and separating it from non-responsive and privileged information can vary enormously based on how much an organization “knows” about information at the beginning of the process. For example, in one case where an organization faced a mountain of unorganized information, an outside expert estimated that the cost of searching for email and other information would be between \$1.5 and \$1.9 million.¹⁵

“The survey results suggest that the more forward-thinking organizations . . . are taking the necessary steps to put their records and information management houses in order.”

**International Data Corporation /
Kahn Consulting, Inc. Survey¹⁴**

The classification of information at or near the time of its creation is a fundamental tenet of information management, and one that can have substantial benefits in the e-discovery context. After all, the more an organization knows about a body of responsive information, such as its business classification, retention period, security sensitivity, and so on, the more efficient the process of determining responsiveness, and collecting and reviewing that information can be.

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Information management taxonomies, file plans, retention schedules, and other organizational frameworks provide a foundation for e-discovery.

4. The FRCP: How Technology Can Help

“Rather than simply copying the electronic media to permit . . . search and review . . . on a computer screen, the plaintiffs spewed the digital production onto paper and, then, copied the paper for review . . . Thus, the court must disagree with the plaintiffs’ counsel’s assertion that ‘this case was a paradigm of efficient litigation . . .’”

In re Instinet Group, Inc.¹⁶

Too often, the e-discovery discussion focuses on the problems introduced into the legal process by information technology, and not on the ways in which information technology can help. The Committee responsible for the new Rules spent considerable time discussing the challenges of electronic information, noting that “discovery of electronically stored information raises markedly different issues from conventional discovery of paper records,” including greater volume, a more dynamic nature, and the difficulty of understanding information stored in electronic form without the aid of technology.¹⁷

The reality, of course, is that e-discovery simply could not be done without the use of technology. Furthermore, technology such as content analytics, if employed correctly, can significantly reduce the time and expense of e-discovery.¹⁸ Given the massive volumes of electronic information in contemporary litigation, the role of content analytics and other technologies has never been more important.

In fact, in large cases, the volume of information requiring review, and the complexity of responsive subjects can be an overwhelming hurdle if such technology is not employed. For example, a landmark study found that, in one case involving a subway crash, the use of manually-constructed search strings and keywords only resulted in 20% of the responsive documents being found.¹⁹

However, not all parties apparently understand the efficiencies that intelligent use of information technology can provide throughout the e-discovery process. For example, in another case, the court found that one side converted hundreds of thousands pages of information provided to them in digital form to paper, copied that paper, then conducted their review manually in paper form.²⁰ In another case, the court rejected an argument from a large corporation that e-discovery was going slowly because it had only one “IT support staff employee . . . experienced in conducting electronic searches,” and directed the company to improve its search capabilities.²¹

As explored further in this section, technologies such as content analytics also play a key role in helping organizations comply with the new FRCP.

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4.1 Analyzing Content Accessibility

“If the requesting party moves for the production of [difficult to access] information, the responding party has the burden to show that the information is not reasonably accessible.”

Federal Civil Rules Advisory Committee Report²²

When determining what information should be produced in the context of e-discovery, the amended FRCP allow responding parties to evaluate the relative expense and difficulty of producing information from one system (or “source”) versus another. In some cases, “these burdens and costs may make the information on [some] sources not reasonably accessible.” If this is the case, the responding party must “identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing”²³ because it has deemed such information to be not reasonably accessible. This identifying information must contain “enough detail to enable the requesting party” to conduct their own evaluation regarding the relative inaccessibility of the information.²⁴

Unsurprisingly, the process of determining what is - and what is not - “reasonably accessible,” has already provided fertile ground for disputes. For example, in Ameriwood Indus., Inc. v. Liberman,²⁵ the court rejected a discovery request for over 50,000 potentially responsive email messages because the information was “not reasonably accessible.” In another case (Semsroth v. City of Wichita), the responding party was required to restore backup tapes and search their contents, despite contending that the tapes were not reasonably accessible and that the purpose of the tapes was “. . . for disaster recovery purposes only, and not to retrieve information.”²⁶

In cases where there is a difference of opinion between parties regarding relative accessibility of responsive information, the Rules provide a process for adjudicating the dispute, which may include (among other things), directing a responding party “to conduct a sampling of information” in order to “test the assertion” of inaccessibility. This is what recently happened in the case of Hill v. Bauer,²⁷ where the court ordered sampling rather than a search of the requested pool of data, due in part to the fact that some of the data resided in databases that did not interoperate.

In any case, it is clear that organizations need to be prepared to understand and evaluate the content stored across their enterprise so that they can comply with the new requirements of the FRCP. Technologies like content analytics can play a key role in helping organizations, by providing capabilities such as:

- Efficiently analyzing the contents of multiple, disparate sources of potentially responsive information across the enterprise.
- Gathering and processing detailed information about electronic information and the systems that house and manage the information.
- Performing intelligent sampling to understand the contents of various repositories and systems to support decisions regarding relative accessibility.
- Intelligently “crawling” through enterprise data stores to discover information that may be responsive, or that otherwise needs to be managed in a specific manner due to the value of its content.
- Reducing the volume of responsive material to review by determining that information in certain repositories or systems is not responsive.

4.2 Meeting with the Other Side

The FRCP not only require organizations to understand their own electronic information and systems in detail; the Rules also require organizations to provide such information to the other side in the dispute. Organizations must be prepared to discuss the information they possess and the way that it is stored and managed. Technologies like content analytics can provide critical capabilities to help organizations to “meet and confer” with the other side in litigation.²⁹

“ . . . this discovery has all the earmarks of a game of blind man’s bluff . . . ”

3M Innovative Props. Co. v. Tomar Elecs.²⁸

The FRCP require parties in litigation to “develop a discovery plan that takes into account the capabilities of their computer systems.”³⁰ In addition, organizations must “become familiar with [relevant] systems,” so they can “discuss those systems” with the opposing side during the course of discovery.³¹

These requirements place a burden on organizations to clearly understand (and perhaps, to defend) their IT and information management environment. In addition, complying with these requirements may require intimate knowledge of the specific contents and unique features of various data types. This may especially be an issue in the context of discussing issues regarding the Attorney-Client Privilege and how parties might mutually agree to address them. As noted by the Committee, hidden metadata and other unique features of electronic information “may pose particular difficulties” that should be discussed when meeting with the other side.³²

In this regard, it is important that technologies designed to help organizations comply with these requirements of FRCP provide their output in a form that lawyers, not just IT professionals, can use.

5. Conclusion: Conducting an E-Discovery IT Readiness Assessment

91 per cent of organizations with over 20,000 employees have experienced an e-discovery event involving email in the past twelve months.

Enterprise Strategy Group Study³³

E-discovery is complex. Case law is a moving target. In US federal courts, the amended FRCP provide some direction – one that many state courts are following (i.e., many state courts are working on changing their discovery rules). At the same time, the volume of potentially responsive digital information in most organizations continues to climb. In fact,

a recent study found that the amount of digital information created, captured, and replicated was “about 3 million times the information in all the books ever written,” and that this number will grow at 57% each year through 2010.³⁴ These are almost unfathomable numbers, and they illustrate the need for organizations to take control of their information now.

As explored in the first section of this paper, information management and e-discovery today are “two sides of the same coin.” Information management programs provide a foundation that can dramatically improve the efficiency of e-discovery and significantly reduce the pain. In the second section, the paper examined the crucial role that technologies like content analytics can play in the e-discovery process and in helping organizations address the new requirements of the FRCP.

The final section of this paper provides a brief set of suggested questions for an organization to use to self-assess e-discovery capabilities. The goal of these questions is to help an organization

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focus on its e-discovery strengths and weakness so that it can begin to understand where it needs to make any changes or improvements. In the final analysis, e-discovery readiness is not a one-time project, but rather a process that must be responsive to new legal requirements, operating environments, and technological capabilities. This readiness assessment is designed to help your organization take another important step in this process.

- 1) **Does your strategy address the past?** An organization needs to understand the information that it already has in its possession; and to know whether it exists in the organized confines of an enterprise database or on backup tapes stacked in a dusty cardboard box, in a closet, in another state. An inventory of backup media is a good place to start.
- 2) **Does your strategy address the present?** At a minimum, an organization should understand the information that it is creating today on operational information systems; where the information resides; how long it is kept, who controls it; and how it can be accessed. This may sound simple, but in large institutions this knowledge is not centralized and it has many moving and ever-changing parts. Enterprise architecture models, if they exist, may be useful, as will any work that your organization has done around IT governance frameworks such as ITIL.³⁵
- 3) **Does your strategy address the future?** An organization needs to understand how its information will be managed in the future. In other words, is the organization planning on making major changes to the IT environment that will impact the ability to find, preserve, and produce information in the future? For example, a change in network topology, storage architecture, or even major software revisions can have a significant impact on future capabilities. Moreover, are there decisions that can be made today to make the future environment more suitable for e-discovery?
- 4) **Have you evaluated your e-discovery technology capabilities?** As explored throughout this paper, e-discovery technologies such as content analytics can play a critical role in an organization's e-discovery capabilities. Given the volume and complexity of the electronic information inside most organizations today, e-discovery is difficult, if not impossible, to conduct successfully without the right tools, such as:
 - Content analytics
 - Search tools
 - Storage systems with space and capability to restore backup media and other forms of archived data that may be responsive
 - Forensic tools
 - Cataloging and inventory tools for storage media and information systems
 - Retention schedule databases and querying tools
- 5) **Have you conducted a business analysis?** It is important to understand the true cost of e-discovery. This will help your organization to quantify the benefits of investing in technologies and techniques to improve e-discovery. There are many publicly-available cases and articles that provide useful information if it is difficult to find or extrapolate information specific to your organization.

- 6) **Are IT and Legal on the same page?** Organizations simply will not be successful with e-discovery unless the IT and Legal departments are working together. Further, this relationship should mature beyond one where IT is simply doing collections for Legal, to one where the two groups are working together to develop, maintain, and execute on contemporary e-discovery strategies.

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6. Endnotes

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- ³ Federal Civil Rules Advisory Committee Report, Page 25.
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- ⁵ Lau, Kathleen, “Microsoft spends around US\$20M on e-discovery - per lawsuit.” ComputerWorld Canada. April 25, 2007.
- ⁶ Coleman Parent Holdings, Inc. v. Morgan Stanley & Co., Inc., No. CA 03-5045 AI. March 23, 2005.
- ⁷ There were several important decision in this case, including, Zubulake v. UBS Warburg, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). illustrate
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- ¹⁰ AAB Joint Venture v. United States, 75 Fed. Cl. 432 (Fed. Cl. 2007).
- ¹¹ United Med. Supply Co., Inc. v. United States, 2007 WL 1952680 (Fed. Cl. June 27, 2007)
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- ¹³ Farmers Ins. Co. v. Peterson, 2003 OK 99 (Okla. 2003).
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- ¹⁵ Toshiba America Electronic Components, Inc. v. The Superior Court of Santa Clara County, 2004 Cal. App. LEXIS 2055 (Cal. Ct. App. Dec. 3, 2004).
- ¹⁶ In re Instinet Group, Inc., 2005 Del. Ch. LEXIS 195 (Del. Ch. 2005).
- ¹⁷ Federal Civil Rules Advisory Committee Report, Page 23.
- ¹⁸ For more information on how content analytics can reduce the cost and difficulty of E-Discovery, please see, Kahn Consulting, Inc., “Leveraging Content Analytics to Reduce E-Discovery Risks and Costs,” June, 2006.
- ¹⁹ David Blair, Language And Representation In Information Retrieval 101 (1990).
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- ²² Federal Civil Rules Advisory Committee Report, Page 31.
- ²³ FRCP Rule 26(b)(2)(B) Committee Commentary.
- ²⁴ FRCP Rule 26(b)(2)(B) and Committee Commentary.
- ²⁵ Ameriwood Indus., Inc. v. Liberman, 2007 WL 496716 (E.D. Mo. Feb. 13, 2007).
- ²⁶ Semsroth v. City of Wichita, 239 F.R.D. 630 (D. Kan. 2006). Note that even though this decision was rendered before the ammendments to the FRCP went into force, the court extensively relied upon the then-pending Rules in making its decision.

- ²⁷ Hill v. Bauer, No. CV06-5224AHM(RCX), 2007 WL 1309536 (C.D. Cal. Mar. 29, 2007).
- ²⁸ Innovative Props. Co. v. Tomar Elecs., 2006 WL 2670038 (D. Minn. Sept. 18, 2006).
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- ³¹ FRCP Rule 26(f) Committee Commentary.
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- ³⁵ Information Technology Infrastructure Library. More information available online, at: <http://www.itil.co.uk/>

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7. 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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