Gartner Research

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E-Discovery Market Trends and Project Overview

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For those doing e-discovery projects, there are five areas of concern: the impact of case law on their projects; building a business case based on how much e-discovery is costing their company now; vendor selection or replacement; program staffing; and the issues that arise when dealing with legal matters outside U.S. jurisdictions.

Key Findings

- There are several recent cases of which your general counsel should be aware, and IT will, in all likelihood, have to help the legal department understand the ramifications of these cases, as they specifically require an understanding of technology.
- As corporate procurement departments become more involved in buying legal services of all kinds, pricing models and pricing practices within the vendor community are beginning to change.
- All companies, even if they have only one internal investigation or potential litigation per year, need a proven process, based on best practices, that involves the legal and IT departments in identifying, preserving and collecting electronically stored information (ESI).
- Cross-jurisdictional issues are becoming more common, as courts and legislatures outside the U.S. are confronted with cross-border business and social evolution.

Recommendations

- Obtain baseline figures for the number of matters in which your company is engaged and the amount and type of data that has been collected in previous actions to form the basis of your business case.
- Make general counsel aware of recent court decisions affecting e-discovery and explain the technological ramifications of these decisions.
- Create, refine and document your e-discovery processes, as the courts and regulators are becoming less tolerant of shoddy, undocumented and lackadaisical e-discovery procedures.
- Create a role that serves as a liaison between the legal and IT departments and that can speak the language of both.

- Explore how you can extend e-discovery technology and processes to address information governance and data loss prevention issues.

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E-Discovery and Litigation Preparedness Through 2012

The opinions and recommendations in this report should not be construed as legal advice. Gartner recommends that entities subject to legislation seek legal counsel from qualified sources.

The case law concerning e-discovery continues to develop, as courts become more aware of the legal and technical issues connected with electronic information as the main way in which business is transacted.

It has always been the case that if a regulatory or legal request is made, companies must react by finding out who has the relevant data and ensuring it is preserved. This is reactive e-discovery. When companies receive a request or a subpoena, they must respond. There is no choice. Minimal steps include identifying the data, contacting the custodians of the data and ensuring the data is preserved in case it must be collected and produced for a requesting party.

In 2010, the e-discovery process was addressed in four important court decisions:

- The Pension Committee of the University of Montreal Pension Plan and others.
- Rimkus Consulting Group Inc. v. Nickie G. Cammarata and others.
- Judge James Francis in Orbit One Communications Inc. v. Numerex Corp., 2010 WL 4615547 (SDNY, 26 October 2010).
- Victor Stanley Inc. v. Creative Pipe Inc. and others.

The Pension Committee of the University of Montreal Pension Plan and others (see Note 1) has turned out to be less disruptive than many at first thought. It did hammer home the point that preservation over long periods was necessary in the eyes of the court, while the technical means for doing so were not necessarily straightforward. Judge Shira Scheindlin reiterated the need to issue written litigation hold notices and to remind custodians of their obligations on a regular basis. It is worth quoting Judge Scheindlin on this matter:

> Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated and that such records are collected, reviewed and produced to the opposing party.

Judge Scheindlin went on to find that 13 of the plaintiffs in the suit were negligent or grossly negligent in meeting their discovery obligations and proceeded to impose sanctions against them. This is an opinion your legal department will — or should — care about. Companies must have a documented litigation hold process, a method for notifying custodians and a method to enforce litigation holds over time. Simply asking users "not to delete email" is not good enough.

The Pension Committee decision was significant not only in itself, but also for the reaction it prompted from other courts. The first of these was Rimkus (Rimkus Consulting Group Inc. v. Nickie G. Cammarata and others, 07-cv-00405 [SDTX, 19 February 2010]), which dealt with the issue of proportionality in discovery. Judge Lee Rosenthal worried that concerns about e-discovery would overshadow the legal issues at stake. Although there are parallels with the Pension Committee case, in the Rimkus case the electronic information in question was available from other sources. Other cases citing Pension Committee followed, in which the opinion was reiterated in various ways.

Later in 2010, Judge James Francis disagreed with Scheindlin on the point of issuing *written* hold notices; he said it may not always be necessary to issue a written notice and that, in any case, sanctions would not apply if no relevant information had been lost. However, this opinion was qualified by the number of custodians and even the size of the business. Judge Francis appeared to be talking about smaller businesses and cases with one or very few custodians. In any midsize to large corporation, and certainly for cases involving multiple custodians over extended periods, a written hold notification is necessary. We would recommend that IT professionals, when it is their job to preserve data that may later be called for as evidence, specifically ask for a written hold notice, as this entails protection for them.

Judge Francis also questioned the leveling of sanctions against a party for spoliation of material when it cannot be proved that the material was relevant, even minimally, to the case, whether or not it was done intentionally. A subtle interpretation of this decision, which has some views contrary to the Scheindlin decision, is that it underscores the fact that "routine good faith operations" can continue to be carried out. For IT, this means that tapes can continue to be rotated, data can be deleted or archived, and other routine operations can be carried out on material that attorneys don't think is relevant. Gartner has seen overbroad preservation requests that have virtually crippled IT departments and done nothing at all to help interested parties determine the truth of the matter.

Another important 2010 case was Victor Stanley II (Victor Stanley Inc. v. Creative Pipe Inc. and others [D.MD, 9 September 2010]), in which Judge Paul Grimm raised the issue of inconsistency in discovery standards across jurisdictions. He speaks about four specific issues:

- To know when the duty to preserve attaches.
- The level of culpability required to justify sanctions.
- The nature and severity of sanctions.
- The scope of the duty to preserve and whether it is tempered by proportionality.

He says that these issues are of particular concern to corporations and governments, which may find themselves in court in various jurisdictions. Judge Grimm says that in not carrying out their duties to preserve, parties are putting a huge burden on the courts, which must have the facts to make a decision, and on the process itself, which by focusing on mechanics — e-discovery — hurts the substantive issues involved in civil justice. In other words, the intention of the 2006 changes to the Federal Rules of Civil Procedure was to make discovery less burdensome, but this has not been realized. This is directly relevant to IT and IT operations, as preserving masses of irrelevant material is a problem for them and does nothing to make justice speedier and fairer — in fact, it does the opposite.

Besides court cases in 2010, there were two other important events in the U.S. The first of these was the 2010 Conference on Civil Litigation (The Duke Conference), which took place in May 2010. During that conference, a paper called "Reshaping the Rules of Civil Procedure for the 21st Century" was submitted by the Lawyers for Civil Justice and others (available at http://civilconference.uscourts.gov). In this paper, the authors call for another rewrite of the Federal Rules of Civil Procedure. The main reasons they cite for wanting this to happen are the "runaway costs of legal discovery." Although these are only recommendations, if these reforms were carried out they would have major consequences for the e-discovery software and services industry.

The second major event was launched in 2009 and concluded in 2010. It was a project by the Seventh Circuit Court of Appeals, based in Chicago, Illinois, and was a pilot program to test a set

of principles to minimize the growing cost and burden associated with e-discovery (Seventh Circuit Electronic Discovery Pilot Program).

The guidelines being tested were to "incentivize early and informal information exchange on commonly encountered issues" relating to ESI to encourage parties to discuss and resolve issues concerning discovery without court involvement. Unless IT knows and can locate data and custodians, as well as give this to its attorneys for the pretrial conferences, its attorneys will not be able to cooperate. Ultimately, if implemented, the initiative would lead to better information governance.

In June 2010, Phase 1 of the pilot was completed, and a survey was distributed to nearly 300 lawyers and more than a dozen judges who participated. The results were rather mixed:

- The majority of judges could not say definitively, one way or the other, whether they think the program saved them time or money, or just the opposite.
- Lawyers complained that they did not feel that the program was appropriate for every case.
- Lawyers and judges believed it should not apply to every case because it would impede smaller matters.
- The respondents gave positive feedback on several concepts in the pilot:
    - Both parties engage a technical "liaison" to be accountable for making all e-discovery processes run more smoothly. This person does not need to be a lawyer, but should be someone with the appropriate technical skills.
    - Attorneys must discuss, at the early meet-and-confer conference, all issues of discovery and how they plan to go about everything.
    - At the initial meeting with opposing counsel, consider discussing splitting the cost of more expensive e-discovery processes.

In 1H11, there was a series of cases and decisions relating to spoliation, legal hold and cost sharing.

The first of these was the companion cases Micron Technology Inc. v. Rambus Inc., 2011 WL 1815975 (Fed. Cir., 13 May 2011) and Hynix Semiconductor Inc. v. Rambus Inc., 2011 WL 1815978 (Fed. Cir., 13 May 2011). Through a series of decisions in state court and then Federal Circuit court, the Rambus issue boils down to when Rambus reasonably foresaw litigation, and therefore when its duty to preserve potential evidence became operational. Although the cases, begun in 2000, are now on remand, there are still lessons to be learned for IT and legal personnel who work on e-discovery issues. The importance of a good document retention policy, a written legal hold policy, and documentation regarding any and all legal holds and how they are carried out and enforced cannot be stated too strongly. Although the legal question of "reasonable anticipation of litigation" is one on which only your legal department and its advisors can make the call, the subsequent actions that IT and other custodians take are all-important. Put bluntly, well-documented retention and destruction policies that are enforced as a matter of routine, but suspended when a "reasonable anticipation of litigation" arises, will help your company to avoid potential spoliation sanctions.

In Steuben II, Steuben Foods Inc. v. Country Gourmet Foods LLC, 2011 U.S. Dist. LEXIS 43195 (WDNY, 21 April 2011) the issue was also litigation hold. Although one of the defendants did not produce email and its litigation hold was deemed to be inadequate, the litigation hold failure did not prejudice the case, as the missing email was provided by another defendant.

The final case, Clean Harbors Environmental Services Inc. v. Esis Inc. (ND Ill., 17 May 2011), had cost sharing as its issue and is interesting to IT professionals and corporate legal departments because of the role that backup tapes played in the case. The defendants sought information backup tapes from the plaintiff, which paid to have the material restored. Although it is usually the producing party that pays, the data was deemed to be inaccessible and, therefore, expensive to restore. Thus, the judge ordered the parties to share the cost 50/50.

Another set of cases dealt with the issue of material posted on social networking sites. Rather than comment in detail, as Gartner believes this is still playing itself out, suffice it to say that courts have, in a number of cases, compelled production of, or at least review of, an individual's Facebook account. This issue has less relevance for corporations, at least so far, but it is not unreasonable to expect a situation in which an individual has posted work-related information on a social networking site and that information becomes relevant in the course of a legal action. Here, our recommendation is to try to protect your enterprise with a policy stating clearly what the consequences are for posting work-related material on a site that is allegedly a part of an employee's private life.

Beyond the narrow issue of e-discovery, Gartner also sees a growing interest in information governance. E-discovery issues have demonstrated to companies how badly overrun they are with redundant, out-of-date and trivial information, which becomes a liability when and if legal matters require any kind of accounting for that information. Information governance is the specification of decision rights and an accountability framework to encourage desirable behavior in the valuation, creation, storage, use, archival and deletion of information. It includes the processes, roles, standards and metrics that ensure the effective and efficient use of information in enabling an organization to achieve its goals. The ultimate solution to e-discovery issues is good information governance but, given the scale of the problem, we do not expect to see organizations maturing in information management disciplines until at least 2015. (See "Toolkit: How to Prioritize Information Management Initiatives.")

Good information governance ensures that only business-critical information is retained, and that data retention and destruction policies are adhered to as a matter of course. Less information retained means less information to discover — in fact, sorting through the masses of irrelevant information to get to what matters in any given litigation is what constitutes the bulk of the costs in an e-discovery exercise. Simply put, the less there is, the less there is to go through to make a determination of its relevance in any given instance.

Against this background, Gartner's research agenda for e-discovery for the next 18 months is described in this report.

Audience

The audience for e-discovery project key issues includes the following IT roles:

- CIOs.
- Application managers.
- Security and compliance officers.
- Data center managers.
- Email system managers.
- Litigation support personnel.

Outside IT, there is also a strong interest in these technology issues from:

- House counsel.
- HR managers.
- Compliance (non-IT) personnel.
- Records managers.

What Has Changed in the E-Discovery Landscape Since the Beginning of 2010 and What Changes Should Be Anticipated in the Next 18 Months?

There are four focal points for e-discovery in the next 18 months.

First is consistency of process, facilitated by software.

Second is proportionality of response, which requires both legal and IT involvement, so that everyone understands what is possible but also what is reasonable.

Third, clients need to expect an increase in the volume, velocity and variety of data sources that they may be asked to search and take the appropriate steps to prepare.

Fourth, enterprises need to understand and adhere to the spirit of the changes to the Federal Rules of Civil Procedure and be prepared to respond and cooperate in any requests for information in legal matters. This has been reinforced by the Sedona Conference Cooperation Proclamation, which has been signed by over 100 U.S. judges.

Those unfamiliar with the Rules and/or the Sedona Conference Cooperation Proclamation should become familiar with these documents and understand what they are trying to accomplish.

As the review of the cases in the first section of this document makes clear, a defensible preservation process is a necessary condition for carrying out effective litigation hold. And, as the work by the American College of Trial Lawyers makes clear, it is also possible to do too much and thus to spend unnecessary amounts of time, energy and money on litigation hold practices.

Organizations must have a process for identifying, preserving and collecting ESI. That process must be documented and responsible parties named. As Judge Scheindlin says in the Pensions case, "it should be abundantly clear that the duty to preserve means what it says and that failure to preserve records — paper or electronic — and to search in the right places for those records, will inevitably result in the spoliation of evidence."

In terms of the variety of data that your enterprise is already creating or collecting and may be asked to produce in the future, you can expect that there will be more (volume), it will be different (variety) and that it will accumulate at an ever faster rate (velocity). Expect, too, that its volatility will increase, meaning that things such as Web pages, externally hosted data and data you don't even own or control may become material in a legal or regulatory action in which your company is involved.

Without an inventory of what you have and without a process for finding what you need in any given case, your company will be at risk. Changes in retention management practices, work practices and the collection of ESI when necessary are inevitable.

Planned Research: Gartner research in 2011 and 2012 will include a specific focus on conducting an ESI inventory, specifying a preservation and collection process, and putting together policies and rules that result in "defensible deletion" — the proper management of business records before legal matters begin. This research will help CIOs, house counsel and

litigation support personnel to respond quickly and efficiently to e-discovery requests. Additional research will address the issues of archiving and backup, along with the convergence of these areas and the introduction of new data types such as SharePoint and social software. In 2H11, we will also publish a report on e-discovery and mobile devices. Finally, we will publish a case study on successful e-discovery processes and the application of e-discovery technology, in addition to a case study on a law firm that is radically changing its business model by using technology.

Which Service Providers and Product Vendors in Today's Marketplace Can Help With E-Discovery Projects?

Many companies reviewed their legal spending across the board between 2008 and 2010 — and they did not like what they found. Many were using too many service providers, having terms dictated to them by their outside counsel, not doing procedures in-house that they could do, performing manual processes that needed to be automated and generally spending a lot of money. Many companies decided to bring all or part of their e-discovery in-house.

Organizations that face constant litigation, and multiple matters with overlapping custodians, are moving from using third-party providers to insourcing the e-discovery infrastructure in-house. However, they are not doing the whole of the process in-house. From the processing of data that has been collected, to attorney review and analysis, many companies still rely on service providers to process and host data, and to provide Web access to review tools. The difference is that instead of letting outside counsel control this process, they are selecting providers and tools, and expecting outside counsel to comply with their decisions. This is being done to predict and control costs, and to reduce risk.

To summarize, in terms of the Electronic Discovery Reference Model, the steps of identification, preservation, collection and processing can increasingly be performed in-house with various kinds of software. IT typically makes the decision with the input of the legal department. The processing review and analysis phases of the process are still the province of cloud (hosted) providers. In-house counsel makes this sourcing decision, although it relies heavily on IT for its input and judgment.

Market conditions remain highly volatile. Potential purchasers of e-discovery software and services should ensure requirements are clearly articulated:

- Be clear about your overall needs. Knowing the numbers and types of cases in which your company gets involved, plus other legal and regulatory investigations, will give you an idea of what type(s) of tools you may need.
- Identify the data sources from which you now collect material — how much material is collected is one of the key requirements for picking a tool.

Hosted or cloud-based review and analysis platforms remain at the heart of the e-discovery service provider business. As multiple parties must look at data and because of data volumes, we expect that the processing, review and analysis phases of e-discovery will still take place outside the firewall with litigation support providers.

Planned Research: There are two critical pieces of research scheduled for 2011 and 2012: the second e-discovery Magic Quadrant, to be published in April 2012, along with the RFP document for e-discovery, which will be updated in 4Q11. The 2011 Magic Quadrant for enterprise information archiving, which will include e-discovery functionality, is another report that enterprises can access to help in making e-discovery purchasing decisions.

What Is the ROI for E-Discovery?

Before you can calculate ROI, you must work with your legal team to find out how much it is spending on outside service providers. Often this will be a "pass through" cost from outside counsel. Given the cost of processing data for e-discovery and the cost of outside lawyers, it is easy to save money by taking some of this work in-house. The principle is simple: by culling the document set in a defensible way before it leaves your enterprise, you reduce service provider cost and legal fees. The less data the outside lawyers deal with, the less you will be charged.

As more clients move into acquiring and implementing e-discovery software, Gartner will assess point solutions and best-of-breed versus platform solutions and the relative merits of each.

Planned Research: We will publish research on assessing and documenting current costs, and on assessing vendor pricing and delivery models. We are also planning an e-discovery Case Study to document best practices for reducing e-discovery costs.

What E-Discovery Processes, Roles and Organizational Structures Will Constitute "Best in Class" in the Next 18 Months?

Our advice from the beginning has been that legal and IT departments must work together to meet e-discovery challenges. Other stakeholders should include records managers and even outside counsel, who may need direct access to internal IT personnel. Each party must understand the needs of the other in practical terms. Many of Gartner's clients that have advanced e-discovery practices have entire teams of people in place to manage the e-discovery process. Even if your enterprise doesn't need an e-discovery full-time equivalent, you can still be informed by best practices from the mature and highly developed e-discovery teams of the most litigious companies.

Planned Research: In 2011 and 2012, we will update existing research on roles and organizational structures, along with processes for working with records management and outside counsel. We will also publish Case Studies on e-discovery roles and responsibilities.

What Is the Relationship Between E-Discovery, Information Governance, Enterprise Content Management and Records Management?

Reacting to e-discovery requests will never be anything more than a tactical response to a nonnegotiable business issue. It is a problem that cannot be "solved" in the conventional sense, so it is best to think of it as an ongoing business process and treat it accordingly. However, to get ahead of the game, the enterprise must think strategically about information management and information governance. E-discovery issues, while unavoidable, can be made better or worse by the way an enterprise deals with information governance in general. For example, policies on the use (and misuse) of various kinds of systems (from IM though email, SharePoint, file shares and document management systems), life cycle management practices, and retention and deletion policy enforcement can all have an impact on overall discovery burdens. Information management is not something that companies should undertake only because of e-discovery, but e-discovery often shows how much is being spent (and wasted) on information management practices, both good and bad. Don't miss the opportunity to take advantage of the situation.

Planned Research: In 2011, we have published research on ESI inventories, information infrastructure and other general information management topics that can be tied back to e-discovery. We will continue to publish work on information infrastructure capabilities (see "The

Information Capabilities Framework: An Aligned Vision for Information Infrastructure"). During 2012, we plan to publish further research on information governance, a topic of growing importance to our clients.

RECOMMENDED READING

Some documents may not be available as part of your current Gartner subscription.

"Magic Quadrant for E-Discovery Software"

"E-Discovery Market, 2011: Drivers, Inhibitors and Influencers"

"Five Ways to Manage Storage Assets and Defuse Explosive Growth"

"Creating an Effective Data Management Strategy for Aging Data"

Note 1
The Pension Committee of the University of Montreal Pension Plan

The full text of the Montreal Pensions Committee (The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al., No. 05 Civ. 9016 (SAS), 2010 WL 184312 (SDNY, 15 January 2010), decision is available in numerous public sources. Simply type "The Pension Committee of the University of Montreal Pension Plan, and others" into an Internet search engine.

All other cases are also taken from publicly available sources. See "Electronic Discovery Law," published by K&L Gates, for synopses of all the cases mentioned in this report, along with links to the full text of the cases.

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