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# Commentary

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## E-Discovery Challenges Are Communications Opportunities: Goals For Corporations And Counsel In 2008

By

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In e-Discovery, disasters currently dominate the news headlines. Rapid, almost astonishing, advances in technology have led to an e-Discovery panic as companies scramble to conform their mushrooming data stores and retention programs with last year's expansive amendments to the Federal Rules of Civil Procedure (FRCP).

With most disasters, litigation and communications strategies tend to proceed along parallel, but separate paths. Following a calamity — such as product recall, plant explosion or train wreck — the legal and communications teams pursue and protect client interests in both courts of law and the court of public opinion.

Today, however, *the courtroom itself* is often the scene of the train wreck when companies fail to preserve and produce relevant electronically stored information (ESI).

Companies must therefore tackle e-Discovery challenges, not just because of the potential legal ramifications, but to preserve their corporate brands as well. Some firms have even taken a crucial next step to enhance their brands by showcasing their facility with advanced technologies and methods in order to meet, and beat, the new e-Discovery challenges.

### E-Discovery In The Spotlight

Many companies have made headlines in recent years because of their struggles over how to manage large volumes of electronic data in legal matters. Morgan Stanley garnered front-page coverage in 2005 when it lost a \$1.45 billion verdict after a Florida state court judge instructed the jury it could presume that a large volume of missing email, if produced in the proceedings, would have supported the plaintiff's claims against the company. To reach its finding, the court looked beyond the immediate proceedings and also relied on an earlier SEC order that imposed monetary sanctions on Morgan Stanley and several other broker-dealers for failing to preserve business records. So, while other financial services companies also were forced to confront the harsh new digital reality, Morgan Stanley found itself in the unenviable position of having its past travails revisited in this large, private suit.

Although the appeals court reversed the state court verdict in 2007, the public relations damage had been done. The state court decision also forced Morgan Stanley to fend off a rash of other legal and communications challenges, including additional regulatory fines and private plaintiff law suits, all a result of its mishandling electronic data.

Recently, Qualcomm made headlines because it, too, failed to turn over relevant electronic evidence in a high-stakes patent lawsuit against rival Broadcom. Unlike Morgan Stanley, which had been grappling with e-Discovery challenges for a couple of years, Qualcomm's troubles began on the last day of trial when *its own witness* surprisingly testified that several emails on a key issue had never been turned over.

Hearing that, the jury entered a verdict for Broadcom, and the judge ordered Qualcomm to conduct additional document searches, which led to the discovery and production of more than *200,000 additional pages* of ESI. The judge then found that Qualcomm and its lawyers had engaged in "aggravated litigation abuse" and ordered Qualcomm to pay nearly \$10 million in Broadcom's legal fees. The company general counsel at first stated to the press that the verdict was "all upside, no downside" for Qualcomm, yet, shortly after that public pronouncement, he resigned, citing "personal reasons."

The court also initiated proceedings against Qualcomm outside counsel. The reviewing magistrate found six outside attorneys "assisted Qualcomm in committing this incredible discovery violation" and referred them to the State Bar of California for further investigation into potential ethical violations.

The Morgan Stanley and Qualcomm cases are wake-up calls to the business world about new risks posed in the electronic age, not just to the potential outcome of a single case, but to hard-earned, valuable corporate reputations. But, in 2007, those two companies were hardly alone:

- In an antitrust battle against AMD, Intel admitted in court that it had "lost track" of hundreds of employees and forgotten to send them mandatory ESI preservation notices. Since that startling admission, Intel has spent millions of dollars to

remedy the errors and is still not out of the woods — which likely means continued poor publicity.

- The antitrust investigation of Whole Food's deal to buy rival Wild Oats revealed communications by the Whole Foods CEO to board members describing how the deal would eliminate competition in key markets. Documents later produced also showed the CEO had for years anonymously posted messages on the Yahoo stock forum for Whole Foods about both his company's and his own performance.
- While many of the investigations and lawsuits in the 2007 options backdating scandal are ongoing, some embarrassing communications already have surfaced. In one criminal matter, the head of human resources at Brocade Communications Systems pleaded guilty to obstructing justice after she responded to a subordinate's email, which questioned the propriety of backdating new hire dates, by instructing her to "pls. delete this message."

Corporations that have been fortunate enough to avoid the e-Discovery spotlight are in a prime position to establish a leadership brand in the space. They have a golden opportunity, on the investor relations and public relations fronts, to stand out for heeding the new legal discovery rules both in word and deed.

For law firms, there is also a potential marketing bonanza. If professional services marketing is about identifying what keeps clients awake at night, there can be no better litigation marketing opportunity than to communicate a superior understanding of potential e-Discovery pitfalls and how to avoid them. Countless lawyers are writing articles and pursuing a variety of promotional initiatives in this area. Establishing real credibility in the e-Discovery arena, however, requires hard work and a clear institutional commitment. A few major law firms have made that top down commitment and are building strong brands on the position that they can handle these complex problems. The firms that lag behind, however, may fast find themselves left behind, permanently.

### Challenges Equal Opportunities

To be sure, the fact that today's discovery environment is anxiety-riddled means whoever steps up to

the plate soon enough, and persuasively enough, will secure a permanent communications and marketing advantage — and cast themselves in an enviable hero's role.

Consider the dynamics roiling the discovery environment. The original FRCP were not designed with e-Discovery in mind when first written decades ago. As technology evolved, judges were forced to deal with e-Discovery in *ad hoc* and often inconsistent ways. While the Dec. 1, 2006, e-Discovery amendments solved many issues, it is hardly surprising that critical challenges remain, presenting opportunities for corporations and counselors to differentiate themselves as key problem-solvers in 2008.

Here are four of the biggest e-Discovery mountains to climb in 2008 and beyond . . .

### 1. What To Save?

New Rule 26(b) requires litigants to turn over only “accessible” ESI. The rules, however, neither define “accessible” nor provide meaningful examples of accessible data types. Predictions that everything from automobile “black boxes” to copy-machine hard drives would become discoverable have largely proved errant. But in one high-profile case, Columbia Pictures v. Bunnell (No. 06-1093, C.D. Calif.; 2007 U.S. Dist. LEXIS 46364 [May 29, 2007]), a court required the production of ESI kept on a computer's random access memory (RAM), raising the specter that the much-feared “weapons of mass discovery” were now upon us.

While RAM is typically considered a temporary medium, the judge in Bunnell ordered it preserved because it was the only way to obtain key evidence of alleged copyright infringement on a website that promoted searches for pirated movie copies. For that reason, Bunnell has been an outlier with little legal effect. On the other hand, the case has had great public influence and caused companies to worry how they can predict or plan for when the next court will require the preservation of such fleeting ESI.

Of course, general counsel cannot possibly know how a court will rule, or even what issues it will be asked to rule upon, months or years in advance. So, should corporations then save everything? The answer is a resounding “no.” Just as they did before the advent of

e-Discovery, companies must preserve only what they reasonably know, or should know, is relevant or potentially relevant in litigation and the duty to preserve arises only when litigation is “reasonably anticipated.” But, recognizing that critical moment in time is difficult. While notice of a legal complaint, subpoena or government investigation are clear trigger events, the receipt of a customer claim, employee complaint, or business demand letter are murky.

Companies can show leadership by carefully crafting a comprehensive document management (a/k/a retention or destruction) policy. Absent reasonable anticipation of litigation or some other legal duty (such as an IRS regulation, SEC rule, or the like) companies are free to keep or destroy whatever information they want. But, because many companies are never wholly free of litigation, and out from under the reach of the duty to preserve, they should isolate anyone involved in a simmering legal dispute from the decision-making process and, if necessary, set the “go live” date for the plan several months out to negate any inference it was intended to get rid of potentially harmful information in the dispute. At bottom, the objective is to avoid appearing to “game the system.” The plan also should set forth its business rationale so, if necessary, it can be justified in court. And, the plan should anticipate what is to happen to company information if the duty to preserve triggers, identify who will distribute and follow up on the “litigation hold” notice, and make certain that IT knows that routine document destruction procedures and systems must be immediately suspended.

### 2. Controlling Costs

Most lawyers' visceral response to rising ESI volumes is to rely on manual or keyword search to reduce the data universe and hunt for key documents. Review rates using these first generation review systems, however, are very slow, at as low as 30 documents reviewed per attorney per hour. To review 100 gigabytes of data using these stale approaches would cost approximately \$10 million, assuming an average attorney billing rate of \$200 per hour. Perhaps even more painful, traditional search-based systems present substantial risks; while attorneys may want to believe that the combination of manual review and search can achieve a near perfect “gold standard” of accuracy, research has shown they are only between 20 percent to 50 percent effective at finding all relevant information.

Fortunately, new advanced “concept organization” systems address many of the limitations of traditional review. Instead of conjuring up an endless list of search terms — and all of their synonyms, acronyms, and misspellings — to identify potentially relevant documents, concept organization technology accepts ESI as it exists within each corporation and automatically organizes it into discrete subject matter folders based on its similarity to other information. As a result, reviewers can achieve review rates many times faster than possible using limited search-based systems and, in so doing, shave millions of dollars off the price tag of a 100-gigabyte matter.

Advanced systems also promote greater accuracy by grouping identical and near-identical documents together. Reviewers forced to shift between documents on different subjects and different types will, according to recent studies, miss as many relevant documents as they find. Thus, a law firm’s choice about *which* technology to use is every bit as important as the decision to use technology at all. Several recent high-profile decisions, such as PSEG Power New York Inc. v. Alberici Constructors Inc. (No. 05-657, N.D. N.Y.; 2007 U.S. Dist. LEXIS 66767 [Sept. 7, 2007]), Amersham Biosciences Corp. v. PerkinElmer Inc. (No. 03-4901, D. N.J.; 2007 U.S. Dist. LEXIS 6841 [Jan. 31, 2007]) and Newby v. Enron (No. 01-3624, S.D. Texas) reveal what happens when law firms rely on old technologies to handle today’s modern technology challenges. For law firms, e-Discovery leadership therefore begins with technology and a demonstrated willingness to make the right investments.

### 3. The Privilege Problem

E-Discovery also places tremendous strain on the attorney-client privilege. More data means more risk of inadvertent disclosure and, therefore, more time and money spent to review ESI to preserve the privilege. Over half the general counsel surveyed in the 2007 Fulbright & Jaworski Fourth Annual Litigation Trends Survey reported that privilege review consumed at least 5 percent of their total litigation budgets. Nearly one in five general counsel stated it was as high as *30 percent to 50 percent!*

While the new Rule 26(b)(5) contains a procedural “claw back” provision for the return of inadvertently produced privileged documents, it does not alter the substantive law itself. Thus, whether the privilege has

been waived will turn on the unique facts and circumstances in each case and the particular substantive privilege standards that govern in each jurisdiction. To compound matters and risk, some jurisdictions will extend waiver to all documents that are related to the same *subject* of the inadvertently produced files, even if they themselves were properly withheld.

Fortunately, some relief may soon be had. The Senate is considering a bill, S 2450, that would enact amendments to Federal Rule of Evidence (FRE) 502 that change much of the substantive law of privilege. Proposed FRE 502 would eliminate subject-matter waiver for any inadvertent waiver of privilege in federal actions. It also would allow a judge to incorporate litigants’ privilege protection agreements into a court order, and enforce that order against all parties in the case, whether they signed the original agreement or not. Finally, the proposed amendments would establish a uniform substantive waiver standard in all federal litigation.

Unfortunately, it is hard to know if or when Congress will pass the amendments to FRE 502. In the meantime, companies and law firms can show leadership in this space by lobbying for their enactment and, at the same time, by assessing the relative costs of poring through all potentially privileged documents in a matter against the often extraordinary costs of doing so and the likelihood that waiver would be found if some privileged documents were produced.

Another fundamental leadership strategy on the privilege front is to use advanced technology not only to lower the costs of review, but also to increase accuracy and dramatically reduce the chance of inadvertent disclosures that can lead to waiver. The drafters of the FRE 502 amendments themselves encouraged this tack in the Advisory Committee Notes that will guide judges:

“Depending on the circumstances, a party that uses advanced analytical software application and linguistic tools in screening for privilege and work product may be found to have taken ‘reasonable steps’ to prevent inadvertent disclosure.”

Considering that older, search-based systems have been proven to be as high as 80 percent *inaccurate*,

companies that rely upon such obsolete technology to identify privileged documents could find themselves pleading upon deaf ears when they claim they took “reasonable steps.” Thus, a company’s ability to preserve privilege after an inadvertent disclosure may well depend on whether they heeded the Advisory Committee and used the kinds of advanced technologies that the Committee recommends.

#### 4. Global Reach

Litigation increasingly involves data spread throughout many countries. The U.S. legal system treats most information on corporate computers as the exclusive property of the company, but much of the world thinks otherwise — and the laws reflect the difference.

For example, human resource files are given special protection under the European Union data privacy provisions so that even transfers *within* the company to the U.S. could violate EU laws. Companies may be concerned about transferring foreign-based data into the U.S. in a private matter if it could be subject to a U.S. government subpoena in other matters.

Moreover, companies must increasingly contend with the technical challenges of foreign language data that takes special expertise to collect and process without losing content and metadata. There may be cultural differences as well, since lawsuits are rare in many countries and culturally discouraged — with minimal or even no discovery allowed. As a result, foreign employees may not have the same experience with data preservation and collection as those living in the “litigation culture” of the U.S.

Companies with international ties become international leaders when they work to develop the in-house expertise needed to resolve these technical and cultural issues. There is also an opportunity here for law firms to create a strong brand, not just as premier e-Discovery advisors, but as counselors attuned to the global nuances involved.

#### Demonstrable Leadership

Despite the litany of well-publicized corporate horror stories — of how deficiencies in e-Discovery practice have haunted major global businesses in and out of court — there is still good news; some companies already are taking the kind of steps that present real

leadership opportunities and enrich their global brands. For example:

- Pfizer has developed an in-house team of expert attorneys and IT personnel to handle e-Discovery projects internally. Pfizer also has been a highly visible thought leader with team members speaking at e-Discovery educational events across the country.
- DuPont is well-known, not only for internalizing legal work, but also for sending work offshore as well. As a corporate model for cost savings, the well-known “DuPont model” can pay further dividends in ensuring better e-Discovery resources and more specific e-Discovery expertise.
- Cisco has been highly vocal about the need for outside counsel to develop a new relationship with their company clients and for law firms to use technology to drive down costs. Cisco’s general counsel has delivered highly-publicized keynote speeches on the need for law firms to develop greater and continual efficiencies that, among other benefits, should encourage better e-Discovery at lower costs.

As companies develop better e-Discovery tools, they confirm their leadership positions by also using the tools of the communications trade to spread the good news. For example:

- Technology itself can be used to communicate the successes that define e-Discovery leadership. Litigants who have mastered the challenges of ESI management can even launch, promote, and optimize their own “high-authority” blogs on the subject.
- Advance guard companies and law firms can continue to work within the professional groups that address ongoing e-Discovery problems and solutions, such as the Sedona Conference and EDRM — or even establish their own think tanks staffed with diverse experts, including corporate counsel, e-Discovery providers, law professors and judges, as well as their own lawyers.
- “Branded resources” like surveys, trend-identifying indices, etc. underscore thought leadership.

For instance, Fulbright & Jaworski's survey is an example of how a law firm can identify itself as part of the solution to a problem simply by taking the initiative to publicly study it.

- Maintaining close relationships with trade press journalists and beat reporters covering all sides of the issue is important for corporate positioning. You do not need to have an immediate news story in mind as an excuse to have lunch with the legal tech reporter at American Lawyer magazine or other key industry publication. The goal is to develop a relationship and become his or her go-to source so you are referenced in key articles on bigger trends and also get the chance to tell your side of the story if the article is about your company.

At the same time, companies that suffer unwanted attention as a result of document-related litigation disasters can implement reputation recovery plans. Setbacks do not preclude future leadership opportunities. To the contrary, the public expects companies to learn from their mistakes. The more companies learn, and the more openly and aggressively they

itemize the steps being taken to prevent future mistakes, the more they transform a crisis situation into a marketing opportunity.

To that end, a corporate e-Discovery team should be modeled along the lines of what Pfizer and DuPont have done and should include corporate communications as well as legal, IR and IT experts. The team itself can be an active participant in the profession-wide discussion — again, branding itself as part of the solution, not part of the problem, regardless of past mishaps in highly-publicized cases.

Observing some of the e-Discovery debacles in the last couple of years, it is natural to assume e-Discovery is all about avoiding disaster, and only that. Yet, we already have seen corporations and law firms distinguish themselves by deploying technology to solve the problems that technology causes. Once the smoke clears, their brands and reputations are only stronger for the effort.

Some reputations are being damaged in this arena. Others are being made. ■

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