



Wednesday, May 21
3:30 pm–5:00 pm

2001 Records Retention

Linda Davis

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DuPont Legal

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Attorney
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Faculty Biographies

Linda Davis

Linda J. Davis is currently the manager of legal administrative services for the DuPont Legal Organization. In this role she is responsible for strategic design and implementation of administrative services workflow, resource allocation, and associated systems requirements. In addition, she also serves as records champion for DuPont Legal. Ms. Davis has experience in the day-to-day management of all legal documents in partnership with the DuPont corporate records & information management group in assuring compliance with the DuPont corporate records and information program.

Ms. Davis previously served as administrator to the DuPont ethics & compliance central organization. In this role she was responsible for the development and implementation of necessary processes to manage documentation as set forth by the new state and federal regulations; i.e., Sarbanes-Oxley, HIPPA, etc.

Ms. Davis has been an active member of the Wilmington-Diamond State chapter of ARMA (Association of Records Managers and Associates) and was recognized as “Chapter Member of the Year” in 1998, 1999, and 2001. Ms. Davis’ speaking engagements include presentations across ARMA organizations, Wilmington Corporate Executive Administrative Assistants, the International Association of Administrative Professionals, and various ethics and compliance forums as well as internal to DuPont.

Nanci Tucker

Nanci Tucker serves as corporate counsel and senior consultant for Simpson Neely Group, Inc. in Evergreen, CO. As a consultant, she assists corporate law departments with the selection and implementation of matter management, document management and other software solutions that support business needs.

Prior to joining Simpson Neely Group, Ms. Tucker served as associate general counsel and assistant secretary for Guaranty Bank, a subsidiary of Temple Inland, Inc. a Fortune 500 company. Ms. Tucker has advised on a wide variety of issues related to corporate governance and practices, business initiatives, contracts and regulatory compliance.

She is a member of ACC and the ABA.

Ms. Tucker holds degrees from the University of Houston Law Center and the University of Colorado, Boulder.

Today's Agenda

The Rising Stakes of Records Management

What an Enforceable Policy Looks Like

Paper Records

Electronic Records

Rising Stakes of Records Management - Regulatory Compliance

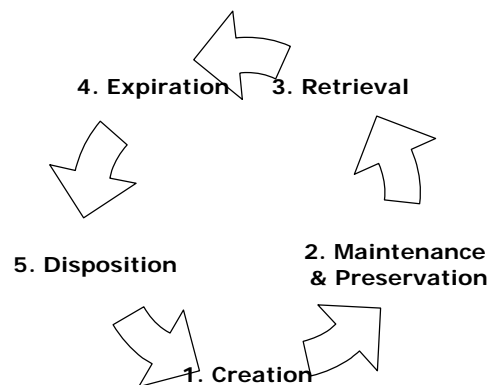
The Legal Landscape has changed. In the last 7 years, there have been dramatic changes to regulations that impose requirements on management of corporate records.

Sarbanes Oxley (SOX)
Gramm Leach Bliley (GLB)
Healthcare Insurance Portability and
Accountability Act (HIPAA)
Amended Federal Rules of Civil Procedure
(and others)

Rising Stakes - Financial Impact

- Storage and management expenses
- Lawsuits, judgments and settlements
- Sanctions (court, regulators)
- Harm to public image and stock value
- Personal liability for senior management

Life Cycle of a Record



HOW DOES THIS IMPACT THE LEGAL ORGANIZATION?

- Need to know record types
- Know who controls these records
- Where are records located
 - What about duplicates?
 - What about modifications?
- Know when to hold them

The Policy Should Include a Records Retention Schedule

- The purpose of the schedule is to list common types of documents, their retention period, and the retention period trigger.
- Retention Period: Records must be kept to meet:
 - regulatory requirements and
 - valid business requirements
- Don't want to keep records for too short or for too long a time
 - Keeping records too long leads to exposure because have to produce them if asked (even if could have destroyed per policy)
 - Keeping records too long is expensive (storage and production costs)
- Policy and retention schedule must be comprehensive but also clear enough for employees to follow. The objective is to minimize employee discretion



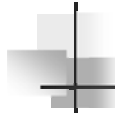
The Policy Should Address Litigation Holds

- Holds exist to satisfy the company's document preservation obligations during litigation, audits and investigations and should supersede the standard disposition requirements (ie, suspend the destruction of records)
- Litigation Plan: how the company will identify and collect records that may be relevant
- Litigation Hold: how the company will send communications suspending the normal operation of its destruction policies
- Zubulake v. UBS Warburg LLC
 - *"Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents"*
 - Duty to locate and preserve relevant information
 - Ongoing duty to ensure preservation



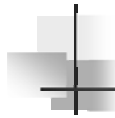
Hold It!

- Identify the Trigger – determine the point at which it is necessary to institute a hold
- Determine the Scope – nail down which employees and internal systems should be subject to the hold
- Draft the Notice
- Obtain confirmation that employees received the notice and agree to abide by it
- Update the hold
- Release the hold and put information back into record retention program



Challenges in Creating An Enforceable Policy

- Destruction must be consistent, non-selective and secure
- Policy must be communicated through robust training
 - "Records management is the only area of corporate governance where compliance is routinely left to the discretion of employees"*
- Policy must be enforced and audited



Records Retention and Paper Records

- Challenges
 - Millions of boxes in warehouses, corporate file rooms, departments and personal files
 - Box labels vague "NT Desk Files" or "Misc"
- Minimum storage requirements should include:
 - Originator's name and department
 - Valid record type code that correlates with retention schedule
 - "To" date – date range for files in box (not date box sent to storage)
 - Box number



Destruction of Paper Records

- Information should be indexed by records department
- Ideal: Retention and destruction policies applied automatically (except where hold in place)



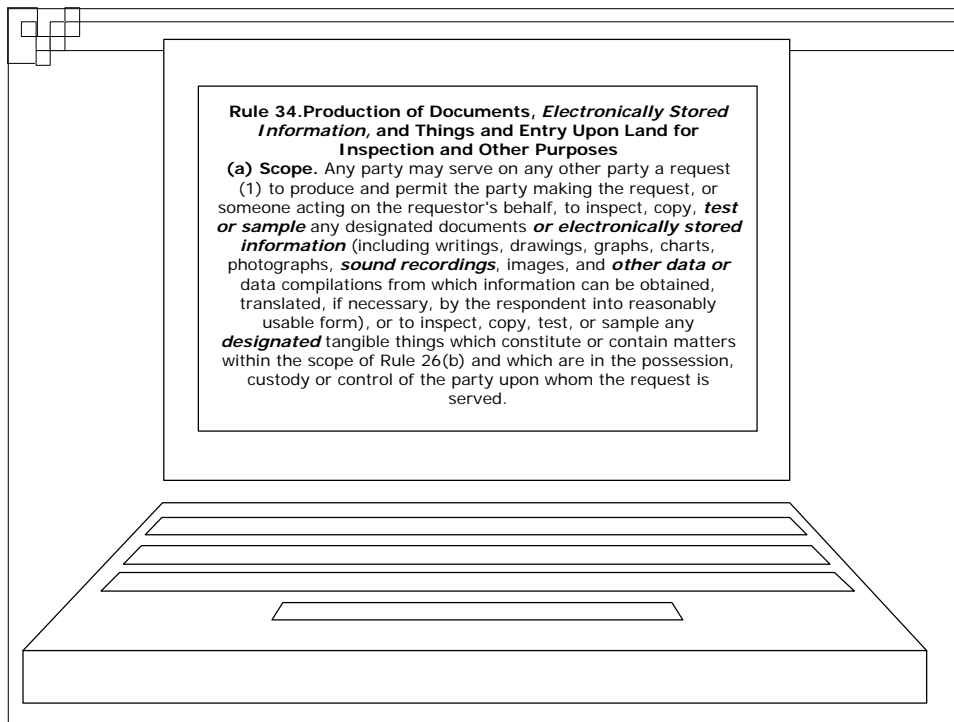
What Led to the Amendments Of the FRCP?

Mass introduction in late 90s of email as a corporate communication tool

Lawyers defining "rules" on case by case, data type by data type manner, many tried to produce paper documents instead of electronic information

Courts could not apply same discovery standards to electronic data as they had to paper records

Risk that companies would have to spend hundred thousands of dollars to produce a single email – overly broad discovery requests could be used to force settlements

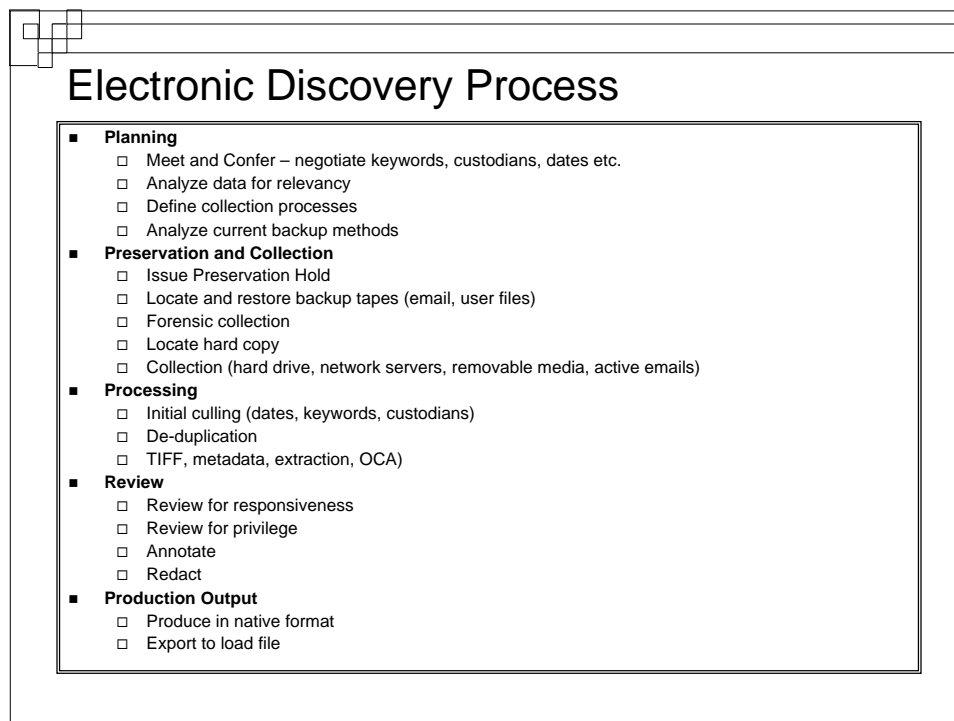
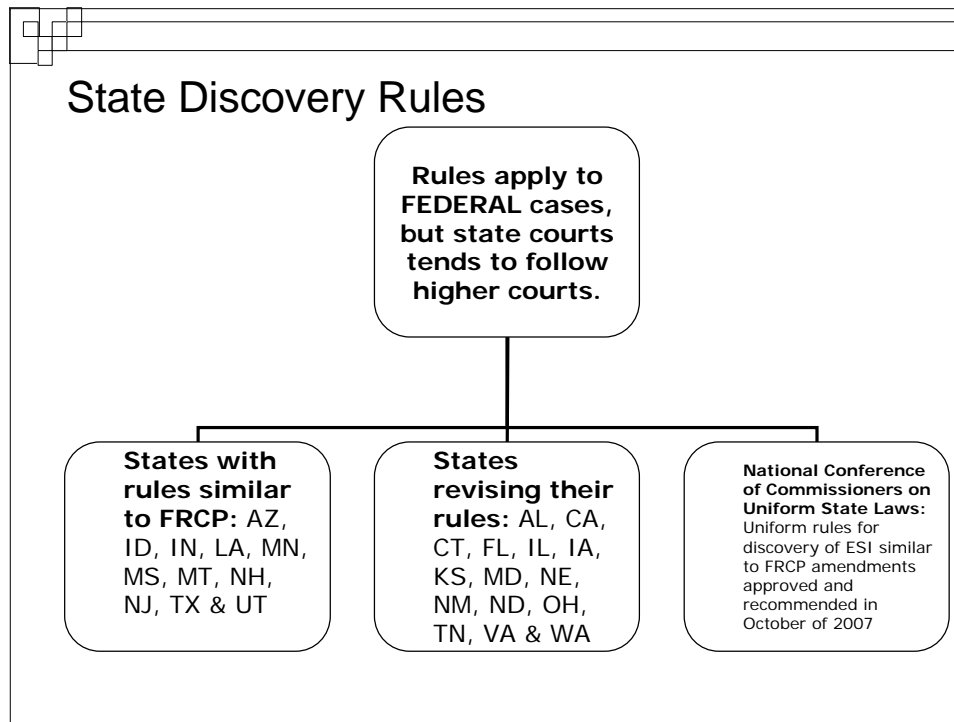



Rule 34. Production of Documents, *Electronically Stored Information*, and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, **test or sample** any designated documents **or electronically stored information** (including writings, drawings, graphs, charts, photographs, **sound recordings**, images, and **other data or data compilations** from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test, or sample any **designated** tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

Overview of the Federal Rules

FCRP Rule	Description	Comment
Rule 26(b)(2)(B) –Possible Limitations on Production	How a party can object to discovery when data is not "reasonably accessible due to undue burden or cost"	Must know what data you have, where it is, and cost to access (including all backup media). Inaccessible does not remove duty to preserve.
Rule 26 (f)-Mandatory Early Discovery Conference	"Meet and Confer"to discuss preservation of electronically stored information	Must be able to discuss corporate data availability and steps taken to preserve it. Opportunity to negotiate away expensive discovery obligations based on 26 (b)(2)(B)
Rule 26(b)(5)(B) –"Claw Back"	Process related to privilege waiver	Must know what data you have, where it is, and how expensive to access (this includes all backup media)
Rule 34(b) –Identifying Formats for Production of ESI	Information to be produced in a format in which it is "ordinarily maintained"or at least "reasonably usable"	May be required to produce data in "native format"and may be required to provide relevant metadata
Rule 37(f) –"Safe Harbor"Limit on Sanctions	"Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as the result of the routine, good-faith operation of the party's electronic information systems"	Must have sound policies, processes, and practices to delete data in a routine, auditable, and predictable fashion.






Practical Impacts on Discovery

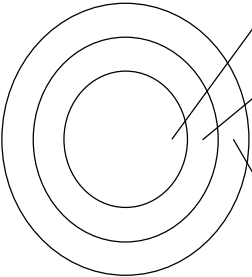
At the start of litigation, parties must familiarize themselves with:
 IT infrastructures and processes
 All potential sources of relevant data

Identify and sort data as accessible / not reasonably accessible
 Obligation to preserve "not reasonably accessible" data remains
 Identify potential problems (e.g. legacy or proprietary systems)
 Propose methods of preservation, harvest, review, production
 Understand associated costs

Opportunity to discuss cost-saving options
 Narrow scope of discovery
 Culling methods
 Claw back



Challenge: Most companies have little practical understanding of their data



Tapes stored off-site or in a closet?
 Who has what saved locally?
 Old servers, laptops and desktops?

Other data sources: email servers, network servers, local email archives, hard drive of each receiver, PDAs, home computers, printed paper, fax machines, printers, disaster recovery tapes, CD-ROMs, DVDs, flash drives, floppy disks, backup tapes, metadata

Different types of data
 Email
 Shared drives
 Application data

"Unwanted emails are like cockroaches. They're indestructible. You can never stop them and you can't get rid of them"

Determining what is burdensome can be difficult

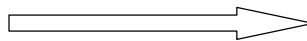
FRCP 26(b)(2)(B): “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”

Does it mean the data itself, the media, where it is stored, etc?

- How is the degree of burden measured?
- Is the information located somewhere else that is *not* burdensome?
- Is the data duplicative?



LESS ACCESSIBLE



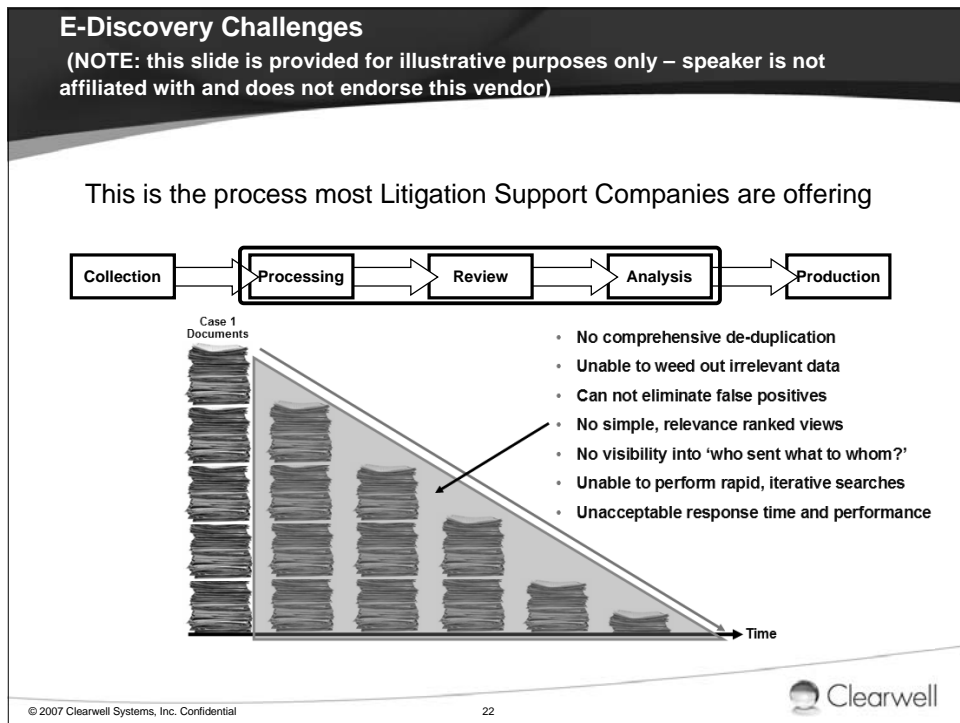
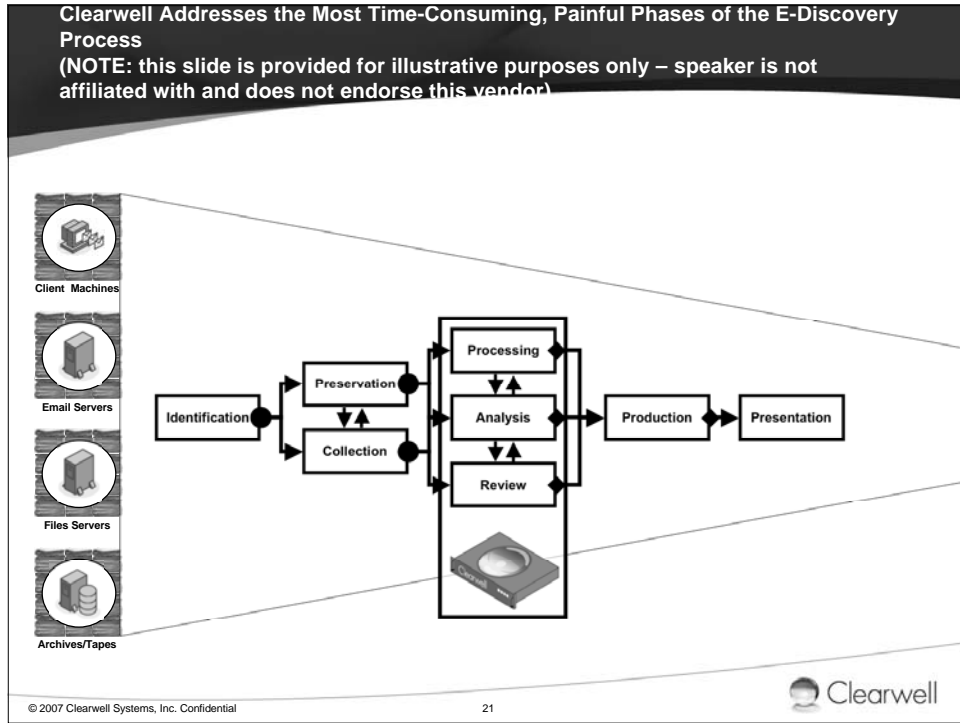
MORE ACCESSIBLE

Being on the lower end of the scale does **NOT** necessarily relieve a party of its duty to preserve, especially where the probative value of the information outweighs the burden of production.

Considering The Use of Technology

- Corporations
 - 220 million e-mails & attachments (38 TB+ of data) per year
 - 125 active legal matters
 - A corporation with \$1.5 billion in revenues will average more than \$8 million per year in corporate litigation costs.
- Electronic discovery is the number one new litigation-related issue for companies with revenues over \$100 million.
- Technology is just one part of the solution

Important: Technology must support (not replace) a consistent discovery response process



Our Partners Best-Practices for E-Discovery

(NOTE: this slide is provided for illustrative purposes only – speaker is not affiliated with and does not endorse this vendor)

turns it into this!

1. **Early Case Analysis:** Delivers immediate visibility into case facts
2. **Costs Savings:** Lowers processing and review costs by up to 90%
3. **Speed - No Waiting:** What used to take months, now takes a few hours
4. **No Guessing:** Eliminate delays and uncertainty
5. **Risk Reduction:** Settle cases faster based and with more accuracy
6. **Beyond Keyword:** Advanced analysis by threads, terms, domains and more
7. **Competitive Advantage:** Across all areas of litigation
8. **Increase Case Volume:** Over time based on time savings

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E-Discovery Process Flow

Legal Hold Manager

Matter Creation: New matter is created and Custodians and Business Units are assigned

LH Notice Issuance and Tracking: Legal Hold Notices are issued and acknowledgements monitored

Reuse: Existing document Collections in the Legal Hold Repository are copied into new matters as appropriate

Review Manager

Culling: Review Manager filters, culls and organizes document collections, creates workflows, and assigns Reviewers

Review: Reviewers evaluate documents and add their review calls

Loader

Preservation: Documents are collected and preserved into the Legal Hold Repository

Legal Hold Manager

Release: When matter is closed, Legal Hold is released and documents are removed from the Legal Hold Repository

Review Manager

Management: Review Manager monitors review progress and prepares documents for production

Production

Production: Documents are exported to outside counsel or opposing counsel

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E-DISCOVERY BEST PRACTICES

from Real-World Use Cases

A Clearwell White Paper

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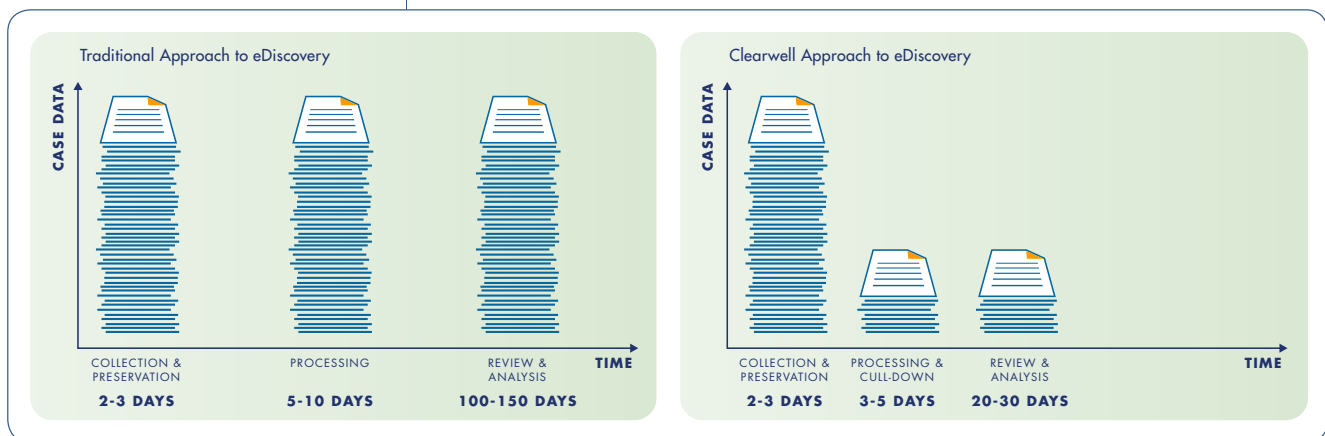
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Introduction

Lawsuits, corporate investigations, and regulatory audits are increasing in number—rapidly. In 2006, the average number of lawsuits at large enterprises reached 556, up 270% from the previous year.¹ The amount of electronically stored information is also increasing. More than 90% of new business records are created electronically, and 40% of them are never converted to paper.² The net result: companies are struggling to control skyrocketing e-discovery costs and to complete investigations with existing resources. The traditional approach of spending days processing all the data and weeks conducting review is slow, expensive, and risky. Companies need a new approach that allows them to address the e-discovery challenge by working smarter, not harder. Companies today require a new level of visibility and control earlier in the e-discovery process. This capability would enable companies to perform rapid and accurate early case analysis, and “cull-down” large amounts of data to a smaller, relevant dataset prior to processing for detailed review and production. This new approach would enable faster decision making and deliver significant cost reductions.



Clearwell Benefits

- Determine the right case strategy in hours
- Reduce e-discovery processing and review costs by eliminating irrelevant data
- Complete entire case analysis in days versus months

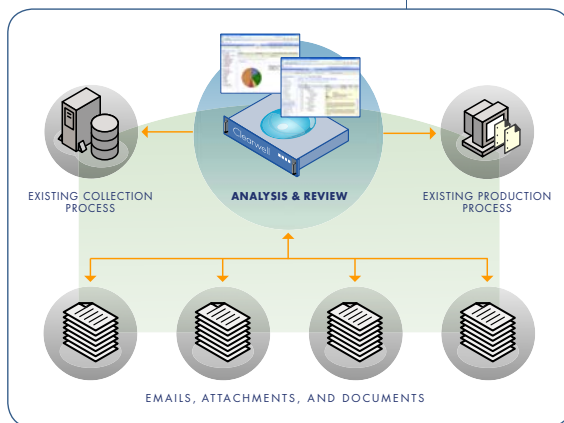
Numerous Fortune 500 companies, governmental agencies, and law firms have significantly reduced costs, accelerated early case assessments, and solved cases in a fraction of the time using the Clearwell Intelligence Platform® (Clearwell). This paper details several best practices derived from real-world cases and explains how Clearwell customers have met their e-discovery challenges and achieved a significant return on investment (ROI)—often within a single case.

E-Discovery Best Practices

PHASE 1: PREPARING FOR THE CASE

The first step in any case is to index the data to be analyzed. Traditional e-discovery solutions take 1-3 days to deploy and force users to wait until all indexing is complete before they can begin analyzing a case. This indexing process is often slow and takes hours to complete—even for a case that only involves a small number of custodial PST files and documents.

By contrast, Clearwell is up and running within 30 minutes and allows customers to begin their case analysis immediately. Clearwell starts indexing emails, attachments, and documents as soon as you collect and preserve them on dedicated NAS or file shares using existing methodologies. If required, Clearwell can also index and analyze data on live data sources (e.g. archives, Microsoft® Exchange servers, etc.). The following key features are utilized by Clearwell customers to prepare for a case:



Clearwell analyzes emails, attachments, and documents without requiring any changes to your current collection or litigation production processes.

Rapid analysis of emails, attachments, and documents: Unlike other solutions that require customers to wait until indexing is complete, Clearwell's multi-threaded architecture enables customers to begin their case analysis immediately.

Organizational Discovery: Clearwell discovers end-user email aliases and domain information, and automatically creates filters by domain, geography, department, and end-user. This enables customers to immediately weed out false positives, irrelevant files, and privileged information with the click of a mouse. Customers can also configure Clearwell to discover and analyze Microsoft Active Directory® information such as distribution lists, department, and location information.

De-duplication across Data Sources & Custodians: Clearwell's algorithms identify duplicate emails and documents, and treat them as a single entity, eliminating the subsequent review of the same content by multiple people.

De-duplication rates vary based on the type and number of data stores indexed. Clearwell's customers have typically experienced de-duplication rates between 30-60%.

Rapid Indexing: Clearwell's indexing process is fast and efficient. While actual indexing speeds vary based on the average message size, the Clearwell indexing process averages 3-5 GB per hour. Again, Clearwell's multi-threaded architecture enables customers to begin search and analysis on the data set immediately.

Incremental Indexing: Clearwell allows customers to add data to an existing index at any time without recreating the entire index. This saves significant time and resources since the discovery of new information or additional custodians occurs frequently during most cases. Clearwell can also be easily configured to index only new information from a data source on a scheduled and reoccurring basis to ensure the index is always current.

Real-World Use Cases

A technology company used Clearwell for e-discovery in response to a lawsuit filed by an employee who was allegedly discriminated against. The lawsuit sited proof within the corporate email system. In this case, the customer installed Clearwell, de-duplicated and indexed 2 large custodial PST files, and began their analysis in approximately 30 minutes. With key evidence discovered in a matter of minutes, the legal

team had more time to weigh legal options and choose the right case strategy, that is, to settle or fight the lawsuit in court.

A large insurance company used Clearwell for e-discovery in response to a regulatory inquiry. They needed to analyze email from live Microsoft Exchange servers (which contained the most recent 6 months of data) and email from their old server backup tapes. The first step in the process was to give Clearwell access to their Microsoft Active Directory server to collect organizational information. Within 10 minutes, Clearwell had a list of all Exchange servers around the world, all mailboxes within each server, and other information such as end-user aliases, department, location, and distribution lists. Then, the customer simply started the Clearwell indexing process by selecting all servers and a specific date range. Next, the customer converted several backup tapes to PST files and placed them onto a network share. However, the date ranges of the PST files overlapped with that of the live Exchange servers. This redundant data was removed by giving Clearwell access to the network share to create a single, de-duplicated master index. Clearwell eliminated 60% of the data as part of its de-duplication process. With all of the case data in a single index, the customer used Clearwell's quick search interface to perform the required searching and tagged all the responsive data into an organized project to be viewed by the regulator. Their objective was to be "responsive without being overly inclusive". The customer then created a secure account for the regulator. This allowed the regulator to log into Clearwell (via the Clearwell web-based interface) and review only the responsive data. By using Clearwell to respond to this regulatory inquiry, the customer shortened the time needed to obtain, index, and analyze the data by several weeks.

PHASE 2: EARLY CASE ANALYSIS

Once the index has been created, the traditional approach to e-discovery has forced customers and their law firms to launch a massive "review effort" that entails hiring several contract attorneys who are allocated portions of the data for manual review. These reviewers spend many days sifting through false positives, irrelevant messages, and redundant data. As a result, it is often weeks before the true context of the case and case strategy are known.

With Clearwell, early case analysis is completed well before manual review. Inside and outside counsel teams use Clearwell's web-based interface to rapidly navigate through discussion threads, custodial documents, message attachments, and more to get a better sense of their position on each case. This new approach from Clearwell is about working smarter, not working harder. The Clearwell approach enables "early case analysis" and "data cull-down" (Phase 3,—discussed below) to be performed much earlier in the e-discovery process, which leads to significant productivity gains and superior case knowledge.

With Clearwell, companies and law firms get fast answers to questions such as:

- Can we quickly find a smoking gun?
- Can we determine who knew what and when?
- How do I know what to look for?
- How do we find all the email address and domain permutations for certain individuals?
- Can we quickly determine how many messages might be responsive and, thus, if we can meet the deadline?
- Are we sure that we have identified all the custodians and all the data relevant to the case?

Answers to these questions help companies determine the critically important early case assessment. By knowing early in the process whether they should settle a case or prepare for court, companies stand to realize significant cost savings. Clearwell helps customers answer these early case analysis questions quickly and accurately, well before the lengthy manual review process. Early case analysis features from Clearwell include:

Quick Search: Clearwell's quick search capability delivers Google-like search capabilities to the entire corpus for a case, allowing customers to achieve a "first look" at a case and perform rapid early case assessment. Clearwell's search results are typically displayed in less than 10 seconds, even when searching millions of emails and documents.

Relevance Rank: Clearwell's patent-pending algorithms consider the unique properties of email and documents to display the most relevant results first, helping customers to assess and analyze cases more quickly. Customers often relate Clearwell's Relevance Rank technology to Google's PageRank™ technology (which delivers relevance-ranked search results from millions of web pages).

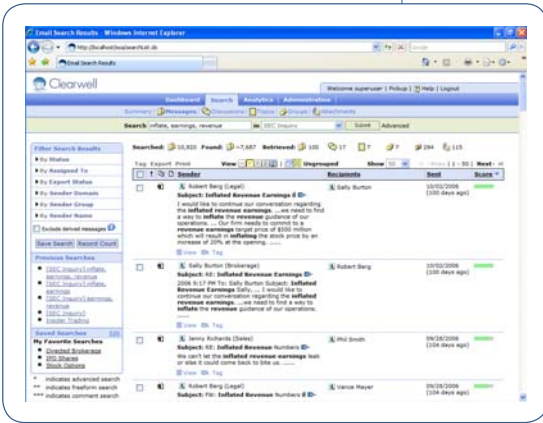
Discussion Threads: Clearwell's patent-pending algorithms dynamically link together all related messages into chronological threads that capture the entire discussion, including all replies, carbon copies, and forwards. By walking the thread, Clearwell guides customers to new evidence, quickly identifies all the participants, and determines exactly who knew what and when. This allows customers to determine who took part in a particular email conversation and discover if additional custodians should be added to the case.

Custodian Permutation Analysis: Clearwell discovers permutations for each target custodian. This capability automates the manual process that litigation and forensics teams must perform to determine all the combinations of a custodian's name, their various email addresses, and the various domains from which they are communicating.

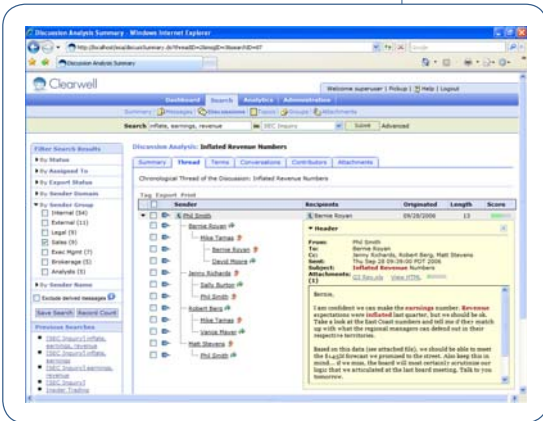
Topic Classification: Clearwell automatically organizes data into specific topics based on patent-pending linguistic algorithms, guiding customers to find important secret project names and code words.

Real-World Use Case

The forensics and litigation support teams at a Fortune 10 company use Clearwell to streamline how they handle internal investigations (e.g., employee harassment, inappropriate use of company resources, wrongful termination, and intellectual property theft). In one recent investigation, several key employees abruptly left the company at the same time. Combining this with the fact that the quality of their work was also suspect just prior to departure, management quickly collected their PST files and indexed them using Clearwell in order to determine if there was any violation of corporate policy. However, they did not know where to begin the investigation. By using Clearwell's ability to order email discussion threads by the number of messages, they began the investigation by reading the longest conversations first. From within these conversations, the client used Clearwell's Terms feature, where Clearwell's natural language algorithms suggested the most frequent terms (i.e., noun phrases) used in the conversation. Surprisingly, the most common term was "Project Escape." Within



Relevance Rank speeds analysis by displaying the most relevant emails and documents first.



Discussion Threads automatically link emails together to quickly identify all the custodians and determine exactly who knew what and when.

minutes, the investigation had taken a new course. Project Escape was the code word used by the employees to refer to the collection of proprietary information before their departure. The customer then searched for "Project Escape" and reviewed all the discussions that referenced this code word. Within seconds, Clearwell's Discussion Thread capability identified additional individuals who were part of the secret plan, but had not yet resigned. The customer was able to quickly remedy the situation before any material harm occurred. In the customer's own words, "we were able to accomplish in one hour with Clearwell, what would have taken us days with our former process."

PHASE 3: DATA CULL-DOWN

The cull-down process begins in parallel or right after early case analysis. In this phase, customers reduce a large dataset to a much smaller, relevant dataset. But the traditional e-discovery process doesn't include a cull-down step. Many organizations simply process and review all the potentially relevant information and therefore pay a tremendous price including steep fees paid to outside parties for processing and legal review. But with Clearwell, customers quickly and accurately cull-down large datasets and no longer need to send irrelevant data for processing and review, saving a considerable amount of time and money. Key Clearwell features that drive this time and cost savings include:

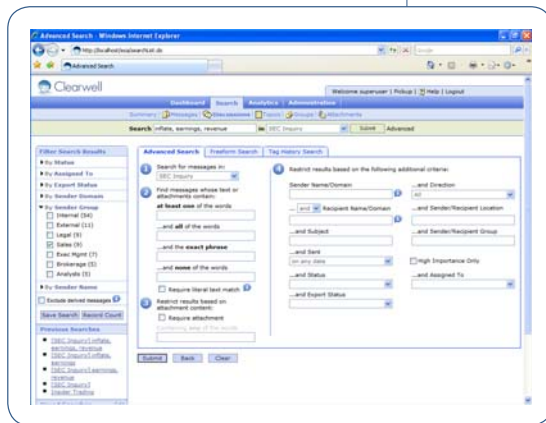
Auto-Filters: With the simple click of a checkbox, Clearwell immediately excludes certain domains, locations, groups, and end-users from search results. This makes it very easy to eliminate attorney-client privileged and irrelevant information such as lunch menus, spam, and newsgroup emails. Customers can also use filters to modify their search results to return email, documents, or both.

Communication Flow Tracking: Clearwell further enables customers to cull-down data by limiting search results based on email flow: individual-to-individual, individual-to-group, group-to-group including internal or external groups. With this powerful feature, Clearwell customers have reduced their case datasets by as much as 70% in some cases.

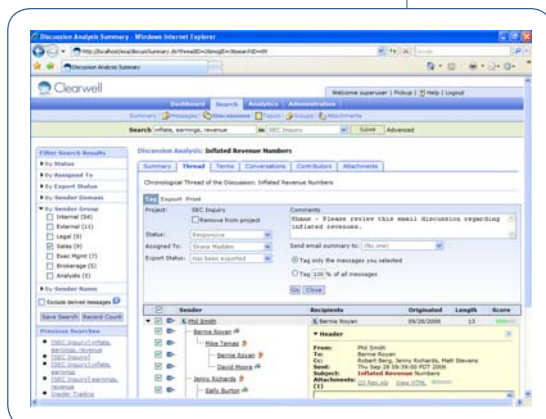
Advanced Search: Clearwell goes beyond basic keyword search and provides users with the ability to construct complex searches based on senders, recipients, communication flows, direction, subject, attachment, date range, tag values, and comments. Clearwell supports both stemmed (i.e., a search for the word "run" would return "ran", "running", "runner", etc.) and literal searches, and also provides power-user capabilities including Boolean, wildcard, fuzzy, and proximity searches.

Nested Search (or Search within Search): A noteworthy differentiator, Nested Search allows all of these searches to be executed multiple times on previous search results, thereby significantly culling-down large case datasets.

One-click Tagging: Clearwell's one-click tagging capability allows users to tag entire email discussions or complete result sets to rapidly separate the wheat from the chaff during the cull-down process.



Advanced Search delivers powerful and flexible capabilities to cull-down large datasets of messages, attachments, and documents.



One-Click Tagging instantly tags individual emails and documents, entire email discussions, or complete result sets.

Real-World Use Cases

A manufacturing customer wanted to investigate conversations between a set of employees and several outside entities. They collected PST files containing over 500,000 messages, but were running out of review time with only three days left to respond to opposing counsel. Faced with an impossible situation, Clearwell was brought in to help. As promised, Clearwell was installed and completed the indexing process in less than 4 hours. Clearwell's automatic de-duplication process immediately reduced the messages by 20%, to 400,000. Next, the customer quickly excluded attorney-client privileged email by selecting all messages sent to and from their outside counsel's domain, which reduced the dataset to 360,000 messages. Then, the customer performed a multi-phrase keyword search and tagged the result of 250,000 messages into a responsive dataset. From here, the customer further filtered the responsive dataset to emails between five employees and two external client domains, significantly reducing the number of messages to 15,000. Using Clearwell's web-based interface, the customer evenly allocated the 15,000 messages to separate remote reviewers for review. Using role-based security, the customer easily ensured that the reviewers only had visibility to their respective datasets (described in more detail in Phase 4 below). The end result: The customer reduced the data that needed to be reviewed by 97% (from 500,000 messages to 15,000 responsive messages) in less than eight hours and met their deadline with time to spare.

A large financial services company sent case data to an outside e-discovery service provider to process and load into a litigation support tool at \$2,000 per GB (for the purpose of Bates stamping, TIFF conversion, and redaction). With the growing number of cases, their costs were spiraling out of control. In an effort to control costs, they purchased Clearwell to cull-down the dataset to the most relevant documents prior to sending it to the service provider for processing. In their first case, they were able to cull-down the dataset from 100GB to approximately 20GB in three days—an 80% reduction. Clearwell saved the company from producing 80GB of data and spending \$160,000 (80GB x \$2,000 = \$160,000), delivering a 200% ROI from this single case.

PHASE 4: DATA REVIEW AND EXPORT

The next phase in the e-discovery process is detailed review and production. The traditional approaches consist of: (1) printing each document and manually reviewing them with highlighters; or (2) converting them into TIFF and reviewing in a litigation support tool. Both approaches are fraught with high-costs, limitations, and errors. Further, they do not provide the much-needed context to perform an accurate examination of the document, and fail to uncover important metadata such as formulas and hidden columns.

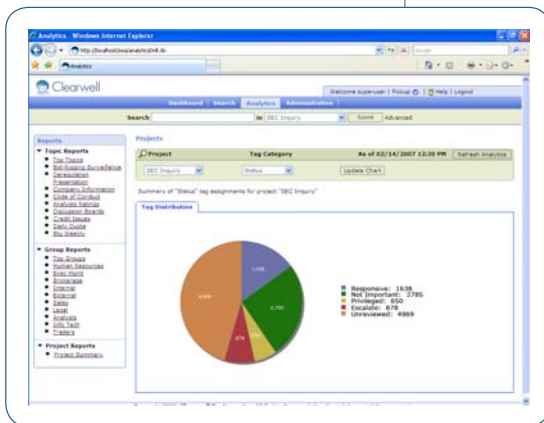
Clearwell delivers several new capabilities that increase the efficiency and accuracy of the review process. Clearwell presents each email and document in complete context, enabling reviewers to make the most accurate decisions. Customers can eliminate the unnecessary conversion to TIFF, quickly view all the data in HTML or native format, ensure consistency across reviewers, and deliver only relevant data to external parties. For cases that require document production, Clearwell provides easy integration with litigation production tools and services. For data review and export, Clearwell customers typically:

- 1) Review the responsive data within Clearwell or
- 2) Export the responsive data and send it to the requesting party which is typically a regulator or opposing counsel, or
- 3) Export the responsive data for production by a litigation support company in order to prepare for court

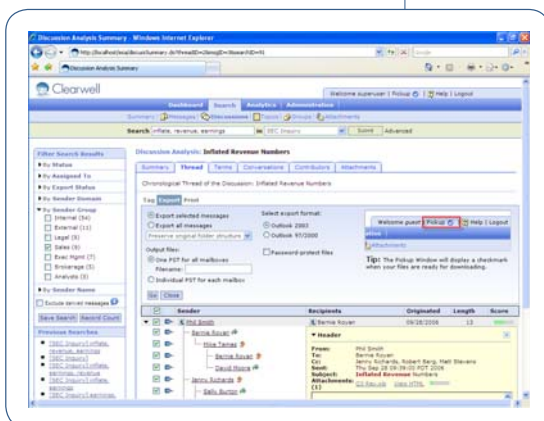
Key features for the efficient review of responsive email and documents using Clearwell include:

100% Web-based Review: Business professionals in Legal, Compliance, and Human Resources, for example, can now have secure access to review emails and documents assigned to their projects using a standard web browser. Clearwell's role-based security enables case administrators to grant access to just a single case or set of cases, enabling secure access for any number of internal constituents as well as external counsels. Web-based access and review eliminates the need to physically transport evidence, and significantly reduces the costly "back-and-forth" between teams when additional analysis needs to be done.

Review Modes: Clearwell provides multiple review modes giving users the custom ability to view search results in different ways. Among other options, users can view email and document headers only, short content snippets, or entire messages, attachments, and documents.



Case Analytics track the status of all cases to ensure that resources are properly allocated and deadlines are met.



Clearwell exports results in native formats, including PST, Adobe PDF, and approximately 400 other file types.

One-click Tagging: One-click tagging capabilities allow users to tag individual or bulk email and documents into projects, update the status as they relate to a project, and assign them to an individual for review. Users can easily configure Smart-Tags that automatically apply tags to future email and documents that meet the pre-defined criteria.

Discussion Thread Tagging: Clearwell also allows customers to review and tag the entire email conversation with a single click, speeding the review process. Further, by taking action on the entire thread, customers can ensure consistency and accuracy during the review process.

Hit-highlighting: Clearwell previews search results in HTML and highlights search terms in email messages, attachments, and documents—allowing you to quickly find what you are looking for without having to read every single word. Clearwell supports approximately 400 different document and attachment types, including multiple word processing formats, spreadsheet formats, presentation formats, emails as attachments, and compressed formats such as .zip.

Case Analytics: Clearwell delivers summary metrics on the status of all cases. Charts display the total number of messages reviewed, un-reviewed, and tagged into specific categories. Pre-built reports automatically monitor progress to ensure that resources are properly allocated and deadlines are met.

Key features for exporting the responsive data include:

Native Export: Clearwell allows results to be exported in native formats. The solution supports approximately 400 file types and multiple PST file versions, including Microsoft Outlook® 2007, 2003, 2000, and 97. Users can export results with password protection, preserve original folder hierarchy, and control the number of files created (one file for all custodians or an individual file for each custodian).

PDF Conversion: Clearwell allows users to quickly and easily convert email messages, discussion threads, or entire result sets to Adobe® PDF format.

Real-World Use Case

A law firm used Clearwell for e-discovery on a large manufacturing client's financial fraud investigation. In this case, the client employed the law firm to perform the review of 50 PST files containing over 190,000 messages. The deadline imposed by the regulators to produce only the relevant, non-privileged information was extremely aggressive—less than two months. In addition, the law firm was advised by the client to complete this task within a tight budget. Once the data was indexed by Clearwell, the case administrator used Clearwell's bulk-tagging capabilities to divide the messages between eight lawyers (that were physically located throughout the U.S.), and gave each secure, web-based access to Clearwell. The case administrator used role-based security to ensure that each lawyer only had access to their assigned dataset. Immediately, Clearwell saved enormous amounts of time and money since the law firm could easily leverage a larger pool of resources without costly travel or physically sending large amounts of data. The lawyers proceeded to efficiently review and tag emails by discussion threads, and then by individual messages. The case administrator used Clearwell's case analytics capability to provide daily reports to law firm partners and the client, keeping them updated on the progress throughout each step of the review process. Once complete, the case administrator exported only the responsive email messages in native format and delivered them to opposing counsel. The firm delivered accurate results on time and on budget for their client—a feat that wasn't possible prior to Clearwell.

Summary

Today's business environment has fueled a significant increase in the number of lawsuits, corporate investigations, and regulatory inquiries. As a result of this rapid growth, it is no surprise that e-discovery costs are spiraling out of control. Companies are under immense pressure to contain costs, more efficiently use internal resources, and mitigate business risk. Companies are reducing this pressure by adopting a new approach to e-discovery. By using Clearwell to perform early case analysis, and cull-down large datasets to much smaller, relevant datasets, companies are transforming their e-discovery processes. The end result: companies determine better case strategies, increase operational efficiencies, and dramatically reduce e-discovery processing and review costs.

FOR MORE INFORMATION

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1. 2005/2006 Fulbright and Jaworski Survey available at <http://www.fulbright.com/>
2. Brian Ingram, "Locate Smoking Guns Electronically," COM.



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eDiscovery

A THOMSON WEST REPORT



COMMENTARY

Reprinted From E-Discovery: A Thomson West Report

Managing Electronic Discovery: Scrapping Paper Procedures

By Riki Fujitani and Eric Kunisaki

Corporate defendants have learned the hard way that electronic documents such as ill-advised e-mails can prove very costly in court, but many have yet to recognize the dangers posed by the failure to effectively manage their digital documents even before a case is filed.

More than \$1 billion in judgments have been levied already against corporate defendants who found themselves on the receiving end of stiff court sanctions after failing to produce requested electronic documents. While disputes over electronic discovery previously were settled on a case-by-case basis, new federal rules that went into effect Dec. 1, 2006, have codified the obligations of both sides.

The procedures that have been used to preserve, collect, review and produce paper documents simply don't meet the requirements of the amended Federal Rules of Civil Procedure for discovery of electronically stored information.

In short, it's not enough to simply save electronic documents; a company has to be able to produce them in a timely fashion. To do so, a company must be able to track and manage crucial documents through their whole lifecycle or risk court sanctions and adverse judgments. To effectively manage "e-discovery," attorneys will have to understand their clients' document management and retention policies and be aware of the potential pitfalls.

Overview

The new federal rules will have enormous impact on corporations across all industries. Just as the Sarbanes-Oxley Act's corporate reforms have forced companies to spend billions of dollars on technology to safeguard their financial data, the amended rules make it imperative for corporations to ensure that their IT systems can comply with legal hold requirements as well as preserve and produce electronic documents during discovery.

Spending on e-discovery technology is expected to more than triple to \$4.8 billion in 2011 from \$1.4 billion in 2006, according to Forrester Research.

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The amended federal rules specifically address electronically stored information for the first time, recognize the impact it has on discovery and detail the obligations of both sides. Any failure to meet those requirements will likely be vigorously exploited by opposing counsel and may lead to court sanctions for spoliation and potentially hefty adverse judgments.

To meet the new e-discovery standards, corporations will need to review their entire document management and retention procedures as well as embrace new technology to manage the process from the initiation of litigation holds to document production.

Attorneys can help their clients to lower their e-discovery risks by advising them to take a forward-thinking approach that will not only make the e-discovery process much smoother, less prone to error and less disruptive, but also allow them to gain the “safe harbor” protections included in the amended rules.

This commentary will examine the impact of the new rules, how they affect case management and how technology can help address these challenges.

The Danger of Digital Documents

While there is still plenty of paper in the workplace, most information is now electronic, whether it be the tens of billions of e-mails sent daily, electronic documents, spreadsheets, slide presentations or even corporate databases. About 92 percent of new information is stored electronically, according to a study by the University of California at Berkeley.

For corporations, e-mail has replaced paper correspondence and often telephone calls. Instant messaging via computer or text messaging from mobile devices plays an important role inside and outside the corporation. All of that information is discoverable, and the often informal nature of electronic correspondence can cause significant problems in court.

E-mail figured prominently in the antitrust trial of Microsoft Corp. as well as in the obstruction-of-justice trial of Silicon Valley investment banker Frank Quattrone, who had urged his associates to clean out old e-mails as a government probe of his company was getting underway.

While an incriminating e-mail can prove damaging and costly, the failure to produce electronic documents can be just as bad. Morgan Stanley & Co. was ordered to pay \$1.45 billion in punitive and compensatory damages after the investment bank failed to produce executive e-mails in a timely manner in a lawsuit brought by financier Ronald Perelman.

In that case a Florida state court shifted the burden of proof to Morgan Stanley after the bank repeatedly uncovered more backup storage tapes. *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.*, 2005 WL 679071 (Fla. Cir. Ct., Palm Beach County Mar. 1, 2005).

Document Management and Retention Policies

Beyond the potential legal liabilities involved in e-mail, corporations face a daunting challenge in simply managing the sheer volume of correspondence and the many formats and often outdated media on which digital documents are stored. While electronic documents take up far less physical space than paper, there is only one format for paper.

Electronic documents may be created in a variety of text formats, for example the well known .txt, .doc and .pdf formats, not to mention the varying formats for spreadsheets and databases. A format that is readable on one system may

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not be readable on another. Documents may exist in a format that is no longer readable or can only be recovered at great cost.

Digital documents may be stored on a variety of media, from tape to floppy disks, compact disks, flash drives and hard drives. Duplicates of the same document may be stored in numerous locations, for instance on dozens of personal computers.

The media may be stored physically in a closet, in a drawer or at a remote storage site. Just as with paper files, employees may have lost track of where the electronic media is stored or be unaware that it exists. To manage IT costs, corporations routinely write over old or unneeded digital data, but that deleted data may still be recoverable through computer forensics.

Acknowledging the cost and storage constraints of corporate IT systems, the new federal rules, Rule 37(f) in particular, provide a safe-harbor provision that says courts may not impose sanctions for digital information lost “as a result of the routine, good-faith operation of an electronic information system.”

That provision recognizes the U.S. Supreme Court’s May 2005 decision to overturn the conviction of accounting firm Arthur Andersen in a case that hinged on whether the destruction of documents was part of an established program or an attempt to obstruct justice. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

“‘Document retention policies,’ which are created in part to keep certain information from getting into the hands of others, including the government, are common in business,” the high court said in its opinion. “It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.”

As a first step, corporations need to have established document management and retention policies that lay out a schedule for regular deletion of unneeded data, such as e-mail. Attorneys will need to be familiar with their clients’ document retention program and whether documents have been destroyed in accordance with those procedures.

Opposing counsel will seek not only to learn whether employees have followed the retention policy, but also will try to exploit instances where a dormant retention policy is brought to life in the early stages of a case or investigation.

Legal Hold Requirements

The e-discovery rules make it imperative for companies to be able to preserve relevant documents from the beginning of a case. The failure to initiate a legal hold early enough can prove costly.

For instance, an employee who sued UBS Warburg in a sex discrimination case won \$29.2 million in compensatory and punitive damages after the investment bank said it was unable to find relevant e-mails stored on backup tapes.

The U.S. District Court for the Southern District of New York found that UBS was not diligent in instituting a litigation hold, and the judge allowed the jury to assume that the missing e-mails would have been damaging to the bank. The duty to preserve documents begins not when a suit is filed, but when litigation is reasonably anticipated, the court said. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).

Under the new federal rules, opposing counsel will want to know when the legal holds were put in place, when the company’s document retention program was suspended and what processes were in place to satisfy the e-discovery

About 92 percent of new information is stored electronically, according to the University of California at Berkeley.

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obligations. Any deficiencies will be exploited to expand discovery, to win sanctions or to justify a larger settlement. The process of managing legal holds, however, can quickly become unwieldy and disrupt day-to-day business when many employees are involved or the company is involved in multiple matters.

To protect themselves and reduce costs, companies should consider legal hold solutions that allow them to effectively manage holds for multiple employees and multiple cases; to identify compliance, to track which document custodians have collected for which cases, and to track cross-matters for an individual employee.

The ability to track multiple holds is simply a necessity today. In its annual survey of litigation trends, the Fulbright & Jaworski law firm found that U.S. companies face an average of 305 pending lawsuits worldwide, with most of those cases in the United States. For companies with \$1 billion or more in revenues, the number rises to 556 cases.

The ability to track holds in multiple cases can be achieved by creating a single, in-house repository for electronic documents involved in e-discovery. Besides managing legal holds, such a solution allows a company to leverage custodian collections across cases and to make a much earlier assessment of case risk by collecting the relevant documents within hours, instead of weeks. This allows companies to decide on a litigation strategy quickly and to avoid litigation when a case should be settled.

Developing a Discovery Plan

Being able to effectively track legal holds and collect documents is crucial under the new rules, which require both sides to agree to terms for electronic discovery as soon as practicable. The amended Rule 26(a)(1)(B) requires the parties to provide copies or descriptions by category and location of electronically stored information that may be used to support or defend a claim.

The parties also must develop a proposed discovery plan that addresses “any issues relating to disclosure of electronically stored information, including the form or forms in which it should be produced,” according to Rule 26(f)(3).

Attorneys will have to be prepared very early in a case to negotiate with opposing counsel about the parameters of what digital information will be produced and the form in which it will be produced as well as to prevent expensive electronic fishing expeditions. To do that effectively, attorneys will need to know in which format documents have been stored and how they can be produced. They must be prepared to argue whether producing such documents would place an undue burden upon their clients.

The request for discovery may specify the form in which electronically stored information is to be produced, but if not specified, the material must be produced in the form in which it is ordinarily maintained or in a reasonably usable form. The material, however, does not need to be produced in more than one form under Rules 34(b), 34(b)(ii) and 34(b)(iii).

Attorneys also need to be aware that unlike paper files, electronic files often come with hidden “metadata” that track when a document was created, stored, possibly deleted and by whom. Such metadata may include spreadsheet formulas and information on how spreadsheets have been manipulated.

The duty to preserve documents begins not when a suit is filed, but when litigation is reasonably anticipated.

When deploying an e-discovery system

Counsel should:

- Detail the requirements of the new rules for the IT department.
- Review corporate document management and retention programs.
- Jointly identify legal, financial and technological issues.
- Develop an e-discovery compliance strategy for senior management.
- Consider the scalability of technology solutions.

The IT department should:

- Consider the cost and effort to integrate new software.
- Leverage an existing platform if possible.

The corporation should:

- Institute a company-wide process for e-discovery that takes advantage of safe-harbor protections.
- Educate the staff to ensure that executives and employees are aware of their responsibility to comply.

Metadata can be an important factor in a case. In an age discrimination case, a federal magistrate judge in Kansas ordered the corporate defendants to produce spreadsheets with the original metadata after they had submitted documents that were scrubbed of the data. While allowing the removal of information such as Social Security numbers, the judge ordered that the documents be produced in the manner in which they were maintained. *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005).

The rules, however, make an exemption for electronically stored information that cannot be discovered without undue burden or cost; but that will need to be demonstrated convincingly, and a court may still compel discovery of a showing of good cause under Rule 26(b)(2)(B). Such undue burdens might include backup storage tapes stored at remote sites for disaster recovery purposes to recreate a company's computer system, but this rule is sure to be the focus of much dispute.

Document Collection and Review

Although the bulk of corporate information is now digital, many companies still rely on the same procedures developed for collection and review of paper documents during discovery. That is because until now electronic discovery has not been a pressing issue for corporate general counsel. Seventy percent of those surveyed by Fulbright & Jaworski said e-discovery issues had rarely or never been the subject of a motion, hearing or ruling. Only 15 percent of U.S. counsel said their companies were well prepared to handle a difficult e-discovery challenge in a civil or regulatory matter.

The new rules, however, make such preparation imperative. Companies that rely on a one-off approach to electronic discovery subject their operations to needless and costly disruption, particularly when information is repeatedly collected from the same employees. Outdated procedures also drive up costs by forcing

Outdated procedures drive up costs by forcing the repeated review of the same document in separate actions or of duplicate documents in the same action.

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the repeated review of the same document in separate actions or of duplicate documents in the same action.

To manage cases and legal costs more efficiently, companies should consider an integrated legal hold and review tool that allows them to collect relevant documents and ensure that they are not altered or deleted. Such a solution will allow companies to track which documents have or have not been collected and to make sure that holds are not inadvertently released.

This type of technology allows companies to weed out duplicate documents, review documents in their native format for relevancy, identify privileged documents, get rid of irrelevant program files and “fantasy football” documents, and sharply reduce the number of documents that outside counsel must review.

By reviewing files in their native format, companies avoid having to convert them to image formats. Documents are typically converted to an image format known as TIFF, or tagged image file format, for review, a process that can cost as much as 10 cents a page. That bill adds up quickly in a large corporate case involving several million documents.

For litigation involving 25 people within the organization from whom documents need to be collected, a company could save more than \$1 million in costs for document collection, processing, attorney review and storage by using an integrated technology solution instead of traditional methods. Companies can also limit risks to intellectual property with an in-house e-discovery tool by having sensitive documents reviewed by outside counsel within the corporate firewalls.

By effectively managing corporate content from the initiation of legal holds through collection and in-house review of documents, companies reduce the risk that they will be unable to produce a relevant document, thereby jeopardizing their case.

Release of Holds

Effective e-discovery tools also help to mitigate another critical risk: keeping documents on legal hold longer than necessary and often with third-party vendors.

Corporations may have documents on hold for years without realizing it, opening up the possibility that those documents could become discoverable in future actions.

Documents forwarded to third-party vendors for processing are also subject to hold, and those vendors may not destroy documents when a hold is lifted, leaving them open to discovery in future actions.

By having the process in-house, corporations take control over the legal hold process. They can release documents more quickly and lower the risk of potential liability.

Managing holds in-house also allows companies to reduce the strain on their IT systems by allowing unneeded data to expire on schedule, or after a hold is released, in accordance with their established document retention plan.

Deploying an E-Discovery System

When it comes to deploying an e-discovery system, there are some key steps to follow.

Counsel should detail the requirements of the new rules for the IT department, review corporate document management and retention programs, and jointly identify legal, financial and technological issues in the discovery procedures.

The company should educate the staff to make them aware of their responsibilities to comply with corporate e-discovery procedures.

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The next step is to develop an e-discovery compliance strategy for senior management that leverages the firm's existing technology to maximize efficiency and reduce duplication. Counsel will want to consider the scalability of any technology solution to ensure that it will be able to handle a robust number of cases, and that gives them the ability to review documents within hours, not weeks.

The IT department will want to consider the cost and effort to integrate new software and will want to leverage an existing platform to save on the resources and smooth the installation and integration process.

The corporation should then institute a company-wide process for e-discovery that takes advantage of the safe-harbor protections for companies that make a good-faith effort to comply with the new federal rules.

Finally, the company should educate the staff to ensure that executives and employees are aware of their responsibilities to comply with the new rules and corporate e-discovery procedures.

Proactive companies are seeking ways to lower legal costs, manage cases more effectively and ensure compliance by deploying integrated legal hold and document review technologies that are managed in-house. The right technology allows companies to move from a costly "preserve everything" approach, which wastes IT resources and may pose a danger in future actions, to one where only needed documents are saved.

Managing electronic discovery effectively is an obligation that many companies have so far chosen to ignore, but under the new federal rules it is now an obligation that will be at the forefront of every case.

The days of turning over boxes of paper are gone.

Riki Fujitani is president and Eric Kunisaki is general manager of DiscoveryBox, a company that provides electronic discovery management software to businesses. For more information, visit www.discoverybox.net.