

E-Discovery: Your Next Nightmare?

as of this writing, it's impossible to escape daily news about the British Petroleum oil spill in the Gulf of Mexico. BP will owe \$20 billion or more for cleanup costs, and litigants on the federal and state levels are lining up for compensation, preparing to ask, "What did BP know and when did they know it?" Amid all this news, there is one term we haven't yet heard that will have a large role in this saga as it plays out: e-discovery, which refers to the pretrial action in a lawsuit where parties can request or compel digital documents as evidence.

As the term suggests, e-discovery applies to electronic documents, also called "electronically stored information" (ESI) of any format or kind. It was not until December 2006 that the U.S. Federal Rules of Civil Procedure formally extended legal discovery to ESI. In the ensuing 4 years, organizations have become increasingly aware of e-discovery requirements and challenges. Companies and agencies have many issues competing for their attention and scarce resources, and it takes time and money to develop new business and information management processes to prepare a solid foundation for e-discovery. Then there is the sheer immensity of the content that could be discoverable: terabytes or more of ESI, everything from Office files to blog posts, email, instant messages, and rich media. Lastly, e-discovery preparations and software work best if your business has well-established digital content and records management procedures in place. Of the three hurdles to good e-discovery practices, I believe the last is most daunting.

Still, an ostrich approach won't work. Almost every enterprise, public and private, is sued, often repeatedly. Since 2006, lawsuits likely include pretrial meetings between the parties to review potential electronic evidence, and the costs of that process are mind-numbing. Dr. Johannes Scholtes, chief strategy officer for ZyLAB, says that "Storing 250GB of electronic information costs you only \$250. Hiring an external firm to process and review it can cost you upwards of \$1 million." And that's just the beginning of the litigation costs.


As you begin developing an e-discovery strategy, you will wonder which issues to consider first as you ready your firm for this inevitable nightmare. Although it is not an easy read, the

Electronic Discovery Reference Model provides a high-level overview of the e-discovery lifecycle. Founded in 2007, the EDRM group who created the model provides details at <http://edrm.net>. The model starts with information management—the ocean of digital information—and provides an e-discovery process road map to winnow it down. I contacted four vendors with leading edge e-discovery solutions for their views on the biggest issues in e-discovery planning, and each of these vendors participates in the EDRM group.

Ursula Talley, VP of marketing at StoredIQ, asserts that "e-discovery can only become a predictable, repeatable, and cost-effective business process if data is truly managed." Talley also notes that cost predictability is the main driver in selecting an e-discovery solution, and "e-discovery is not a legal problem; it is an IT problem." Andrew Cohen, EMC's VP and general manager of e-discovery and compliance, stresses a need to consider the sheer size of ESI repositories. Cohen pointed out that an e-discovery "product must be able to scale" across swaths of tens, or even hundreds, of terabytes of information.

Craig Carpenter, VP and general counsel of Reccomind, says that law firms are slowly starting to take a "proactive approach to e-discovery to reduce the time and cost associated with large e-discovery projects." He says that the Toyota pedal recall shows the disadvantage of not being proactive. "Toyota's issues could have been avoided had they been able to gain insight into their information quickly and accurately." However, traditional e-discovery products—if they simply emphasize traditional search techniques—become overwhelmed with the volumes of information to be analyzed. Products with predictive text analytics can "automatically identify key documents, people, and phrases" to provide important insights into document collections before legal review begins. Another key aspect of e-discovery costs is whether or not the licensed software is based on the amount of data to analyze. ZyLAB's Scholtes says that "very few vendors provide software under a perpetual non-volume bound license."

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Like the BP spill, e-discovery can be extremely damaging and costly. Proactive cost avoidance, better information management, and related goals can drive an e-discovery initiative. Who foresaw and was ready with remediation plans for the BP oil spill? Apparently, nobody. So before you have a crisis on your hands, take the time to develop your e-discovery readiness plan. 

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