



## E-Discovery: A Common Term That Is Little Understood

BY GREG McPOLIN

**E**-discovery, an obscure concept a few years ago, has become widely known in legal circles. With companies such as Enron, WorldCom and the country's largest investment banks making front-page headlines because of the content of documents recovered from their computers, electronic discovery is now a commonly used term among attorneys, their clients and the courts.

Yet, as awareness of electronic discovery has grown, so has the confusion about what exactly it is.

In the simplest terms, e-discovery refers to the retrieval of materials originating from a computer. In practice, though, true electronic discovery extends beyond the origin of the computer files to encompass the analysis, gathering, processing, review and production of discovery materials in electronic format from start to finish.

### A New Practice

In the late 1990s, attorneys were still learning about general electronic discovery concepts: How computer documents are created and stored; the form and types of electronic documents that are discoverable; and how technology such as e-mail has changed the way clients do business.

As attorneys grew more knowledgeable, they realized that a fuller understanding of the e-discovery process could help avert a crisis. Too often, as lawyers sought advice on how to handle electronic documents in discovery, they received confusing and conflicting information.

Today, electronic discovery is frequently advertised as a specialty area of practice. Some of the nation's largest law firms have created

e-discovery practice groups, and they invest significant time and resources in marketing these skills to current and potential clients.

Some e-discovery service providers suggest the field is so complex that expensive "expert witnesses" must be retained in every case involving electronic documents. But nothing could be further from the truth.

Any attorney — regardless of his or her prior knowledge and experience — can make e-discovery an effective part of most cases.

### A Surprising Discovery

Many attorneys are surprised to learn that e-discovery processes are no different from those of traditional discovery — only the document storage medium has changed.

Attorneys should approach an e-discovery project just as they would a paper discovery project, using the following five steps:

- **Analyze:** The discovery request must be analyzed; document custodians and locations of key documents need to be identified; and a plan should be developed for handling the project. Identifying documents created and stored on computers is no different than identifying paper documents.

- **Gather:** In the paper world, gathering involves retrieving and copying documents from file cabinets and storage rooms. In the e-world, it simply means retrieving and copying documents from computer files. The electronic version of this step is much easier and less labor-intensive than paper-based processes. While some people consider computer forensics — complex evaluations of items such as deleted files, archived tapes and other information that is more difficult to access — crucial in the e-discovery process, only a fraction of all cases actually require such measures.

- **Process:** In paper discovery, documents must be processed by making working copies, stamping Bates numbers, storing boxes of documents in a central repository and, in some cases, scanning and coding documents so images of the paper can be stored in a

database. Electronic discovery enables documents to be quickly processed with automated technology that displays all documents in a common file format, seamlessly assigns unique identification numbers and stores the full text of all documents in a convenient, Web-based repository.

- **Review:** Manual discovery processes are time-consuming, labor-intensive and particularly error-prone in the review stage. Large teams of document reviewers rely on paper copies or fuzzy on-screen images to locate key documents. When searching manually, critical information can easily be missed. With electronic discovery, the review team has easy access to the entire document collection from any computer with an Internet connection. Full-text searching allows the review team to find critical documents in a matter of days instead of weeks or months. The ability to redact privileged information or apply annotations, all from one shared repository, also makes the review team more productive.

- **Produce:** As with paper discovery, the ultimate goal of any electronic discovery project is to identify and produce only those documents that are relevant to the matter at hand, while protecting a client's privileged or confidential information from disclosure. E-discovery streamlines this process by ensuring that only those documents designated as responsive are produced from the total collection, with redactions intact. Thus, the possibility of human error is removed from the process at this critical step. E-discovery also allows attorneys to produce a responsive collection of documents in either paper or electronic format.

### Implementing the Technology

Equipped with a greater understanding of the meaning of electronic discovery, the next step is to create an action plan for putting the technology to work.

Start by determining the volume of data the team needs to review; then, assess the relative

cost of using electronic discovery compared with the benefits received.

One of the most common complaints about e-discovery is the perceived expense. In the days of paper discovery, the "trickle effect" of costs lessened the blow of discovery expenses: Paper flowed through the process for many months, with perhaps \$10,000 for copying charges one month and \$30,000 for scanning and coding charges another month. In contrast, an e-discovery bid typically includes all the anticipated costs for the project up front.

What can seem like a large expenditure at first glance is actually much less expensive than traditional discovery processes on a per-page basis. Accurately assessing the size and needs of the case will put the team in the best position to effectively manage project costs.

Next, consider the options for electronic document review with an eye on the following:

- Look for a technology service provider that offers a full array of e-discovery services, from data collection and media restoration through online review to document production.

- The ideal format for electronic document display is PDF. This is the most widely used format for reviewing electronic information and the only format accepted by the federal courts.

- The online review interface must be Web-based, intuitive, and based on familiar discovery practices. If the system requires more than an hour of training, it is not worth using.

- Security must include 128-bit SSL encryption, managed firewalls, and advanced intrusion-detection systems.

- A single, client-dedicated project manager should support the legal team. Do not accept a "call center" model. Ask for references related to client service standards.

Once the team has assessed its technology options, implementing that technology early in the review process will improve the odds of success for any electronic discovery project.

Support must come from the most senior attorney involved in the case and, ideally, from the client as well. When the entire team has a vested interest in the success of the e-discovery project, all are more likely to enjoy the full benefits of the technology.

Finally, the team should form an ongoing relationship with one service provider. This will ensure consistency in communications and protocols for the legal team and its clients. It also will speed the learning curve for lawyers

using the technology. Since switching from one interface to another for different projects can be confusing, all parties will get the most for their money when the skills learned in one project can be easily transferred to another.

## Putting E-Discovery to Work

Electronic discovery in its true form is fast, cost-effective and capable of providing a strategic advantage only imagined in the paper world. The technology allows attorneys to:

- **Save time.** Millions of pages of information can be ready for review in a matter of days instead of months. Rapid turnaround times allow attorneys to meet court deadlines and prepare case strategy, especially in the early stages, with the benefit of knowing what is contained in the documents.

- **Save money.** With manual review processes averaging \$2.20 per page,<sup>1</sup> and scanning and coding costs coming in at roughly \$1.34 per page, the cost savings achieved with e-discovery technology are impressive. While per-page or per-gigabyte<sup>2</sup> charges vary among service providers, the cost is almost uniformly less than 25 cents per page. These cost savings are compounded by the infrastructure savings: no specialized hardware, no user seat licenses and no increase in IT staffing to support desktop litigation support systems. With a document set of 500,000 pages — a relatively small set by today's standards — the cost of e-discovery is about 19 percent of the cost of scanning and coding processes and 11 percent of the cost of manual review.<sup>3</sup>

- **Gain a strategic advantage.** By searching on the full text and meta data of the documents, attorneys can pinpoint critical issues early on in a case, thus allowing an earlier framing of the party's claims and defenses. E-discovery technology also enables users to locate documents immediately when new issues arise. With manual review, an emerging issue could mean that the review team will have to re-search entire boxes of documents to locate key information. Even with coded databases, search functionality is limited by the keywords chosen at the outset of the case and the accuracy of the optical character recognition technology used. The ability to search full text and meta data with true e-discovery technology allows attorneys to instantly access documents with new search terms at any point in the case.

- **Respond to changes in case law.** The legal team's strategy also is well served by the

ability to comply with court rulings requiring production of documents in electronic format. As courts around the country have considered the issue of whether data from computers can be produced in paper form, parties have frequently been required to produce electronically. Attorneys who capitalize on the electronic format of these discovery documents throughout the process are better prepared for these changes as case law develops. No attorney wants to endure the lengthy process of manually reviewing documents only to be forced by a court to retrieve and produce all the same documents in electronic format for the opposing party.<sup>4</sup>

## The Verdict

For attorneys who have been waiting to put e-discovery to work, the time to do so is now. The latest technologies are more user-friendly and cost-effective than ever before.

Combining sophisticated functionality with speed and accuracy, e-discovery technology can replace old, cumbersome processes with simpler, more efficient methods.



(1) Costs estimated here for manual review and scanning and coding processes are based on a November 2000 report prepared by a litigation support company specializing in scanning and coding. Costs for each of the three processes compared include out-of-pocket expenditures for creating a database of document information that can be utilized in discovery.

(2) One gigabyte of data is roughly equivalent to 100,000 pages, although page numbers may vary depending on file types. For example, a document created in PowerPoint consumes a relatively large amount of storage space but may translate to a small number of pages; likewise, a letter or other word-processed document may not require much storage space but may translate to a comparatively large number of pages.

(3) This example assumes a cost of 25 cents per page for electronic discovery. In most cases, the per-page cost will be lower.

(4) See, e.g., *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 (S.D.N.Y.) (production of information in "hard copy" documentary form does not preclude a party from receiving that same information in computerized/electronic form); *Storch v. IPCO Safety Products, Inc.*, 1997 U.S. Dist. LEXIS 10118 (E.D. Pa.) (production of relevant information in computerized form is a reasonable request).

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