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Tech Trends

Discovery Becomes Electric

By [Ashby Jones](#)
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For litigators, nothing is as tedious as the beginning of discovery in a big case. First there is document collection. Then there's document review, Bates stamping, photocopying and delivery to the other side. It's a process that makes a lot of associates wonder what they were thinking when they signed up to take the LSAT.

But a handful of vendors are promising a new, painless approach to big-ticket discovery called e-discovery. Companies like Seattle's Applied Discovery Inc., Portland, Ore.'s Fios Inc., Seattle's Electronic Evidence Discovery Inc. (EED) and Eden Prairie, Minn.'s Ontrack Data International Inc. move all of a party's electronic documents into a vast, electronic database. Attorneys can then search the database by keyword or concept. This eliminates boxes of paper-and a bunch of associate hours.

The Enron escapades have thrown the issue of access to electronic files into stark relief. But most of what these companies do is a little different from what the Enron investigators are trying to do. These vendors primarily organize electronic files that have not been destroyed.

"So far, e-discovery has worked incredibly well for us," says Marjorie Cohen, a senior litigation associate at New York's Chadbourne & Parke. "It makes associates' lives a lot easier, and is definitely saving our clients money."

Companies like Fios first ask a company's employees to "uplift" batches of e-mails and documents electronically into a centralized spot on a network server. The vendors collect the documents from the server and turn them into either PDF, TIFF or HTML files, depending on the vendor. The e-discovery services then run the database through a search engine. In a case featuring hundreds of thousands of relevant documents, attorneys can quickly put their hands on the hundred or so most vital to the case.

For years, law firms created electronic databases by scanning paper copies of documents into programs. But scanners misread words all the time. So searches of these databases are often inaccurate.

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Bypassing paper also allows these vendors to capture a file's "metadata." Metadata is invisible information that programs like Microsoft Word and Outlook attach to each document or e-mail. For instance, Outlook metadata might include who was "bcc'd" on an e-mail, when an e-mail was forwarded (and to whom); and when the e-mail was created. "Obviously, this can be very important in setting up a 'who knew what and when' type of scenario," said Mark Kroese, the vice president of marketing at Applied Discovery.

Take Willkie, Farr & Gallagher. The firm recently handled a discovery request on behalf of a client who used four separate e-mail systems. "We thought there had to be a better way than printing and rescanning," says Dexter Chestnut, the firm's litigation support coordinator. So the firm hired Fios to blend the electronic files into one searchable repository. "Our attorneys really liked it, it saved our client money, and we captured all the metadata," says Chestnut. "It really convinced me that [e-discovery] is the wave of the future."

Wondie Russell, a partner at San Francisco's Heller Ehrman White & McAuliffe, has used both Fios and Applied Discovery to handle parts of big litigations. She estimates that e-discovery saved her clients "roughly somewhere between 25 and 30 percent." It is also convenient for the lawyers. The vendors enable attorneys to hook into the databases from outside the office.

All three vendors offer a range of pricing options. Applied Discovery, for instance, says it charges "roughly" 15 to 40 cents per page. Fios charges "roughly" between \$3 and \$5 per megabyte of data converted. EED declined even to offer a pricing range. "It depends on the size of the job and whether the client needs services like forensic work," said Deanna Schuler, EED's vice president of sales and marketing.

So firms look elsewhere for other selling points. Mark Reichenbach, the manager of litigation support at Pillsbury Winthrop's New York office, knows that if questions about his client's discovery process come up at trial, EED's president, John Jessen, will testify. "He speaks as well and as authoritatively on the topic of electronic discovery as anyone," says Reichenbach. "It's a big part of why we use EED." The other vendors also routinely appear in courtrooms all over the country to describe their processes.

E-discovery has some kinks. There's the issue of privileged documents. The big e-discovery vendors all have sophisticated methods for making sure that privileged documents don't end up in enemy hands. For instance, Applied Discovery lets lawyers mark privileged material in each PDF file. The unprivileged information is then sent to the other side.

But lawyers are approaching this with caution. "Rationally, we all know these systems can handle the privilege issue," said Geoffrey Howard, a litigation partner at San Francisco's McCutchen, Doyle, Brown & Enersen, "but it's still sort of clunky. And that gives lawyers reason to pause."

Lawyers are also creatures of habit. Browning Marean, a partner in the San Diego office of Palo Alto, Calif.'s Gray Cary Ware & Freidenrich, insists that looking through a box of documents is quicker than clicking through the same documents on a computer screen. So he reviews the documents in paper form before he runs searches of the database. "Until [computer-based review] gets faster, paper is going to be a part