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Briefing

E-DISCOVERY

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Where e-discovery went next

Interview:
E-discovery guru Jonathan Maas

Feature:
Empowering litigation support

Plus:
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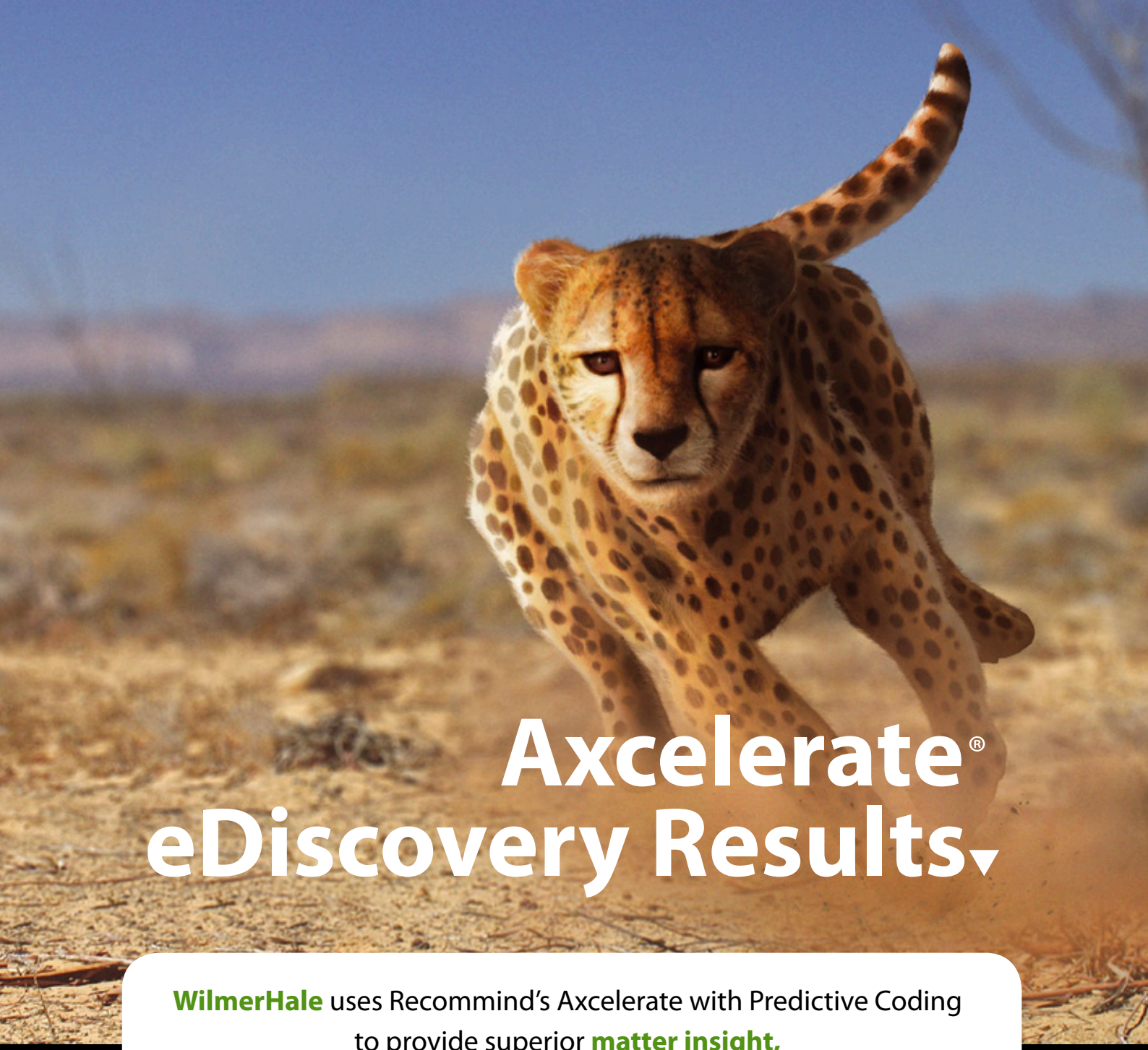

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It's e-discovery Jim, but not as we know it

How did e-discovery get so interesting?

It used to be one of the most routine things – now it's the only way we'll drag the cost of litigation down (if we care to). But it's got another trick up its sleeve: it can help law firms and clients be much better information managers, which is more important than many people realise.

If you're thinking this issue should be called 'E-disclosure', you have a point – but no, we don't agree. Even our keynote interviewee, Jonathan Maas, has given up calling it e-disclosure. I think calling the technology and process of automated/electronic sifting and assessment of electronically stored information 'e-discovery' helps separate it from 'disclosure'. By all means email me if you disagree...

This issue, sponsored by our friends at **ZyLAB** and **Recommind**, goes to lengths to uncover the new world of e-discovery and information management: what it means now, where it's going, what else it can do for your firm and your clients, and what the hot new technologies are.

I hope you find it useful and enlightening.

Rupert White, head of content and community at LSN and editor of Briefing

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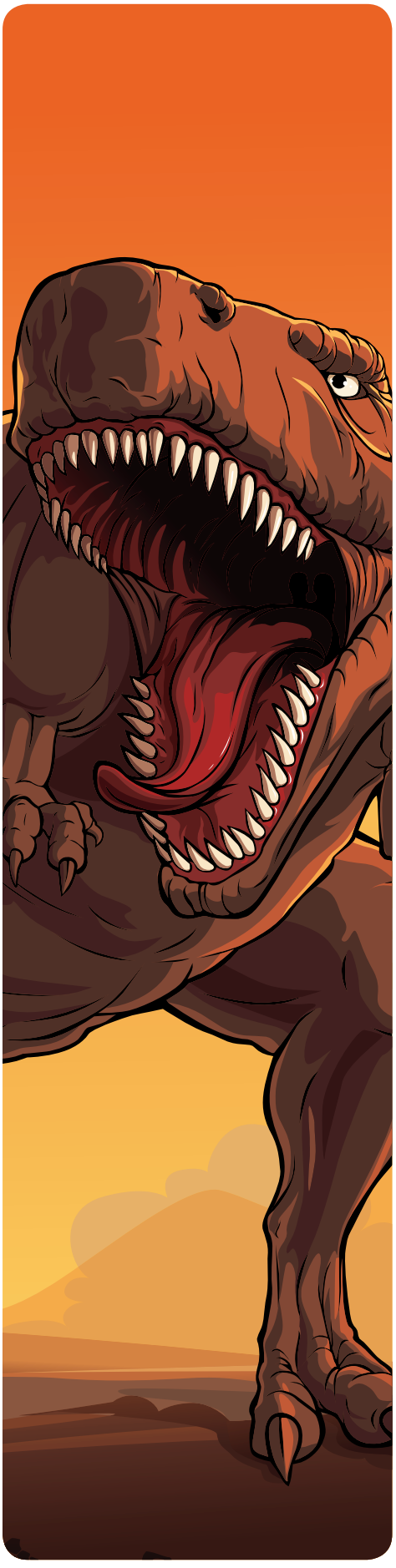
INTERVIEW

Taming the data monster



Rupert White talks to Jonathan Maas, assistant director at Ernst & Young about why the role of the law firm in disclosure is changing – and how e-discovery tools are helping firms inside their own walls

Jonathan Maas is a bit of a legend, which is an oddity, frankly, in a world as niche as litigation support. Maybe that's just legal journalist small-mindedness – we tend to like generalists, like ourselves. Why shouldn't lit support have its legends?

There are others who are equally well-known, but not so many who are still at the coalface – though I doubt Maas spends any of his days poring over hot PDFs, trying to match them to lawyers' case guidelines. He is assistant director in Ernst & Young's forensic technology and discovery services unit. Before that, he spent nearly 30 years in top-quality law firms – Hogans, Simmons and DLA, in that order. He rose all the way through the ranks (he went to Hogans from school) and knows, say many in the business, lit support and e-discovery backwards.

His assessment of the hot topics in the business right now doesn't throw up any big surprises – this is an area that follows the law, after all – but his view of the information overload that law firms, clients and outsourced e-discovery people like him face is stark.

"The big thing is the cost of the lawyers looking at the electronic documentation and electronic evidence [electronically stored information, or ESI]. The thing the electronic era has brought about is volume.

"Technology is clearly the problem... but technology is clearly also part of the solution," he says. "It's absolutely imperative that law firms understand the vital importance of [e-discovery and information management technologies] like predictive coding, de-duplication, statistical analysis, statistical sampling and all that stuff in order to reduce the volume [of documents businesses hold]. They don't need to know how to do it, just that it needs to be done."

This isn't just about becoming better advisers on technology to fight litigation – though that's central to law firms' future in lit support, says Maas. It's also vital to get a grip on how to slash data volumes in litigation, because otherwise serious reputational damage could ensue.

"Law firms need to know these things can be done, to know the benefits and

INTERVIEW **JONATHAN MAAS**

be able to stand tall with their decisions – the element of professionalism or professional trust is being lost, I think, without a battle having been fought."

In other words, there's a danger that the proportionality that English courts are trying to enforce isn't stopping law firms and clients producing far too much data.

Maas says he thinks what may have to happen is a change in the rules governing the regulation of solicitors, to stop them doing everything because it's the safest route – they need to be able to say 'Let's be realistic', he says.

Here's an example of how crazy it's getting: Maas says he's run cases at Ernst & Young where they've been "very restrictive in what we have collected in terms of electronic evidence" – yet he's still left with tens of millions of potentially relevant documents. "By any stretch of the imagination, that's too much."

Something has to give – and Maas says he hopes it'll be the lack of collaboration in adversarial litigation.

"At the moment, the kneejerk reaction is: a, it all looks like it might have to be disclosed; b, therefore it's all got to be read; and, c, it's also all got to be raked over to deal with privilege. And that's not an inexpensive exercise for the client. It's also far from what most lawyers trained for years to do. I've done many document reviews, and they are phenomenally boring.

"I'm not saying you shouldn't review client documents, but you have to use technology to reduce volume and you have to trust professionals, whether it's people like us in tandem with the lawyers or the lawyers alone, to do it sensibly. That's a big leap we have not yet made – but we should make it."

This may be forced upon businesses by the courts, says Maas. "I think we'll see courts penalising parties for not collaborating. It encourages parties to share, and somewhat ameliorate, the burden."

It's not just because the data's digital, he says – "it's the exponential rise in evidence that is never removed".

This sounds like a job for something called information lifecycle management (ILM).

> "Law firms are not under anything like the regulatory scrutiny many corporates face, and so do not have to address the information management challenge. Maybe that will change."
>
> Jonathan Maas, assistant director, Ernst & Young

Firms and clients need better info management

ILM is practising of information management, retention and destruction as much as it's about technology, and information management is something e-discovery suppliers are increasingly keen to say they work in.

This, usefully, happens to be largely true – the technology behind much e-discovery can be very useful for other things.

Clients really need to think about dealing more effectively with the vast amounts of data they transact, says Maas. "Organisations need to look at document retention policies right now and implement something sensible, because many organisations, for example, don't physically delete emails off servers – they just go into a deletion queue that is never executed."

This is just one of many flaws in some clients' behaviour, he says, and it has significant negative end results when they're in litigation.

"Records managers have, because of ESI, suddenly become the rabbits in the headlights, because it all boils down to records management. How long do you keep the stuff for and how accessible is it when you've kept it?" Perhaps as important is: how can you make sure you're destroying it properly – and defensibly?

It's not just clients that have these problems, though law firms aren't quick to realise it. ILM is, says Maas, "utterly key" in the future of law firm information management.

"[Law firms] are becoming more aware [of this informational issue] but they are not as aware as corporates.

"Corporates are [generally] subject to pretty strict regulation and are swamped in compliance requirements and the like. Law firms are not under anything like the regulatory scrutiny many corporates face, and so do not have to address the ILM challenge. Maybe that will change."

And, now that outcomes-

INTERVIEW **JONATHAN MAAS**

focused regulation (OFR) is here, the need for better information management in law firms might now be imperative – Maas says OFR definitively increases the need for more in-house e-discovery and information management systems in law firms.

Perhaps coincidentally, larger law firms are increasingly bringing e-discovery technologies in-house, and some are even using them internally to deliver the kinds of outcomes they get for clients.

Generally, law firms have resisted this move, preferring instead to outsource the capability.

Which kinds of law firms are taking on e-discovery technology, and which cannot? "It's changing," says Maas. It's appropriate in the largest firms, he says (those frequently handling hundreds of thousands of documents), while "the medium to smaller firms are the ones who start to feel the pinch and need outsourcing to the likes of Ernst & Young or anybody else".

"They just concentrate on the law, which is what they're meant to be doing."

> "Litigation support managers, in the traditional style, are seeing their roles become more like relationship and contract managers."
>
> Jonathan Maas, assistant director, Ernst & Young

Changing the litigation support role

E-discovery and its backdrop is making big changes to the role of the litigation support manager and professional – because it's changing their roles in a fundamental way.

"Litigation support managers, in the traditional style, are seeing their roles become more like relationship and contract managers as they begin to, or are encouraged to, use outsourced organisations," says Maas.

This shouldn't be a surprise – the legal industry is increasingly looking at outsourcing all sorts of things it used to keep firmly in-house, and e-discovery has for a long time been an outsourced 'buy'. But it's more than that: clients are buying e-discovery solutions and even tying up with companies like E&Y directly – so what's a big law firm to do?

"I think a law firm in 2013 or 2014 would struggle to match the prices of those whose business is the cost-effective collection and processing of data, whether it's in this country or somewhere else," Maas says. There are exceptions of course – sensitive litigation, IP cases and scandals are all drivers to keep the work confined to a very limited number of people.

But, overall, he says, the value-add that law firms and their IP departments and litigation support departments could add in litigation is to "work to reduce the volume of material that their lawyers need to look at, because that's the crunch point. There's no escaping the fact that it costs a lot to litigate in any common law jurisdiction. What is key is for everyone on the same side to work closely together to use their respective expertise to keep the cost of that litigation as low as possible".

That must also mean "collaborating with the 'enemy' on disclosure", he says, as disclosure is perhaps the least adversarial but most expensive part of litigation.

A law firm's new role in e-discovery and litigation support is as a trusted intermediary – something it's perfectly placed to do. Corporates are working out that it's sometimes easier and cheaper for them to move most of the e-discovery process in-house, leaving just the hard stuff to law firms. But, if they need to outsource the work, Maas says the contractual relationship should be between the client and the e-discovery business – the law firm shouldn't be in it.

The client's law firm should, however, be in nominal charge of the process, he says – acting as agent, giving instructions to the outsourcer and verifying that what has been done and been invoiced is good and true – "in effect rubber-stamping invoices so the corporate can then pay them without delay. That for me is a good model".

Law firms' future as project managers

Some might say 'well, that would be a good model for Ernst & Young', as it requires the outsourcer – but it also places law firms in a very important position: that of project manager.

This is indicative of a shift in legal business that hasn't really struck home yet – law firms should find ways to move away from doing the non-legal work, and towards overseeing it – leveraging their unique knowledge, not their billing muscles.

"Project management in law firms is a growing business, certainly in the US, and it's happening more here," says Maas. But, he adds, people in

INTERVIEW **JONATHAN MAAS**

UK firms could do with more formal training in this art. He points out that Eversheds boasts it's invested more than £10 million on learning and implementing project management and the technology to back it.

Quite a few firms, he says, are very interested in implementing project management, but they're so institutionally averse to the field that they are calling it matter management, because project management has with it inherent distrust from the legal community – but it's just what many lawyers already do.

"For me, the law firm is the hand on the tiller; it's the captain of the ship. We [at E&Y] are the navigator. We say 'we can go there and it will take us that long to get there' but the captain decides where we go. The corporate is the boat owner, and has ultimate veto.

"Everybody has an interest, everybody has to have a voice. What it boils down to is that at every step of the way, in terms of ESI, money spent with me, for instance, will reduce the money spent with the lawyer."

Law firms will still get paid, though, even if they're outsourcing the work – in the digital world, there will always be more relevant documents to review in the end.

So law firm management needs better training in project management, even over in litigation support, to help them turn the law firm tanker around and create a new, more consultant-style business. If they do, says Maas, they can deliver a lot of value.

The road ahead

But what clever e-discovery solutions can't do is give clients the cost certainty they're demanding for lots of other kinds of work. Right now, they can't even deliver big cost savings, though developments such as predictive coding look set to change that. For now, e-discovery is one of the last bastions of uncertainty in legal work.

What's needed in litigation support now, says Maas, is real collaboration – collaboration between the different people working a case for a client and a real collaboration (within bounds) between parties, to kill the information monster that's growing exponentially.

"I've found increasingly over the past five to 10 years that it's very difficult to divorce the specialities of the technologist from the law firm – you have to work together. You very rarely find a blend of the legal knowledge and obligations, the understanding of what a solicitor must do, with what you can do with technology.

"My career has developed by standing between the lawyers and the technologists and making the thing happen in ways they can each understand. I think this triad – the corporate, the lawyer and the IT consultant – should be working together."

But sadly none of this means clients will be able to magically know beforehand how much e-discovery will cost once it's done. "That remains the biggest issue," Maas admits. "We are inherently unable to estimate how much it will actually cost." Debate rages in e-discovery in the US, he says, over whether e-discovery work should be charged by the gigabyte, for example, for collection and processing – but this route holds a terrible threat.

"The truth of the matter is this: take an email box – how big is that mailbox? It might say it's 20MB and you think, 'Great, I'm going to charge x per megabyte to the client'. But that mailbox is a Tardis – it could be a gigabyte hidden in just 20MB worth of mailbox."

Not being able to predict e-discovery cost is a harsh reality that Maas says he loathes. "I absolutely hate it. I hated it as a user in a law firm. But you really can't know until you've done it".

The only way to make e-discovery work cost-effectively and profitably in future, therefore, is for law firms to become much better at project management, to learn to deal in revisable estimates, to collaborate better internally over litigation projects, to teach staff the dark arts of project management and external relationship handling, to become more advisory in their role in e-discovery and to get lawyers to really talk things through when it comes to disclosure.

Better get cracking then. ●

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>
> Jonathan Maas, assistant director, Ernst & Young

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FEATURE

Empowering litigation support

E-discovery is now about much more than just document review – the tools can be used in fee-earning and information management, and the people are having to learn a new basket of skills, Joanna Goodman reports

E-discovery isn't just about bundles, forensics and review any more.

Other legal technology has become smarter, but often still offers essentially the same functionality; e-discovery solutions, however, have morphed from being straightforward document review tools into sophisticated, multi-role solutions, offering predictive coding, intelligent contextual search, flexible categorisation and intuitive Outlook-style interfaces.

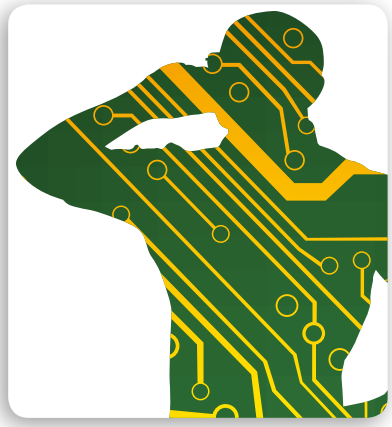
E-discovery has also begun to have a big effect on firms and the people in it, such as KM, IT and litigation support management – turning them into project managers and relationship people as much as work deliverers.

But can a firm's litigation support function help it win and retain clients and business, even if it's not fee-earning? And can a process driven by compliance genuinely represent a differentiating factor in the legal marketplace?

Today's e-discovery solutions are designed to save law firms and their clients time, pain and cost, and bring more general benefits in terms of efficiency, flexibility and business development.

Software to automate parts of e-discovery was initially created as electronically stored information (ESI) started to dominate the document world. More recent drivers to adoption include the spiralling cost of litigation, which some say contributed to the noted absence of an anticipated litigation boom in the recession. Instead, ever more commercial cases are being settled before they reach court, or are resolved by arbitration or other forms of alternative dispute resolution. Businesses are deliberately avoiding litigation, conscious of the need to reduce risk and their legal spend. So, when litigation is unavoidable, or important enough, firms are under pressure to find ways to minimise litigation costs.

The seemingly infinite variety of media and devices in play is a big issue, as is the relatively new challenge of information in social media. Social media is transient and challenging to preserve – if you don't capture a posting within a certain time, you're going to have to go cap in hand to Facebook or Twitter to retrieve it from their archive.



Compliance is another powerful driver, with the tightening of rules: notably the new Bribery Act, regulators' sharp focus on data protection and privacy, and practice directions supported by recent judgments that imposed penalties on parties for handling the e-disclosure process in a way that is ineffective or unduly time-consuming or expensive [*see the Earles case in our* Interview With Clearwell *on page 19*].

But there are some rays of techno-hope – context-based software featuring intelligent search technology and predictive coding seems to be the way forward in dealing with the huge volume of ESI.

As litigation partner turned international e-discovery specialist Chris Dale of the e-Disclosure Information Project says: "Technology got us into this mess, so technology will get us out of it."

Technology, meet people

But though e-discovery has necessarily become technology-heavy, the purpose and nature of the exercise means that it requires a combination of technology, processes and people. Whereas e-discovery has often fallen under the remit of the litigation department or litigation support team (depending on a firm's size and strategy and the extent to which e-discovery is handled in-house), it also involves the KM, IT and litigation functions working together – and requires a strong element of project management.

The most sophisticated review and analysis products now use predictive coding to scan data for clusters of words and phrases that indicate potential relevance to the case. The main providers of solutions are Recommind and Autonomy (recently acquired by HP). But even the most sophisticated software requires a lawyer to identify the relevant terms, seed the initial review with appropriate documents and review samples of the material selected by the software, validate its choices and/or adjust the criteria it uses.

Andrew Haslam, litigation support consultant and project co-ordinator at Hogan Lovells, says the use of this type of tool ties into the UK approach to proportionality in e-discovery – documents that are not selected by the software tend not to be considered relevant to the case. But the extent of the e-discovery process is a critical factor. "The real dilemma for lawyers and clients is deciding at what point to stop and talk to the other side," he says, adding that the co-operation encouraged by Practice Direction 31B does not necessarily mean collaborating with the opposing party.

Who runs the e-discovery show?

Dale's view is that the e-discovery function encompasses legal, security, audit and HR. He says it's about accessing information, so it involves KM and IT, but it now involves strategic technology choices as well as data security, risk management and project management, so this area is gradually being turned over to people in those areas.

Many larger firms handling e-discovery in-house have a dedicated litigation support group, but mid-size and smaller firms often outsource all or parts of the process, and so need few, if any, in-house litigation support staff. The function is often managed by IT, or KM if it exists.

Birketts' IT director Chris Simmons outsources some e-discovery functions. Smaller matters are handled in-house, while those involving larger volumes of data are outsourced. Some clients provide information on paper, which has to be reviewed manually, but most projects involve ESI supplied by the client. Difficulties arise in formats, for example, such as when opposing parties supply information for review in an obscure format, or in com-

> "The cost of a consultant is negligible compared to the cost of getting things wrong on behalf of a client."
>
> Chris Simmons, IT director, Birtketts

munication – litigation support is positioned differently in the hierarchy in different firms, which means "you cannot be certain who you are dealing with on the other side", Simmons says.

Birketts handles a high volume of litigation, and uses local external suppliers for outsourced work when volumes demand it. The choice depends on the preferences of the firm's litigators and practice areas – some clients extract their own data, while others require Birketts to help them instruct an external supplier.

To deal with these varying demands, Simmons is now looking to instruct an external consultant to project manage the e-discovery process by liaising between clients and opposing parties and ensuring that clients provide data in a manageable way. "The cost of a consultant is negligible compared to the cost of getting things wrong on behalf of a client," he says.

Lit support: project manager, interpreter, client-pleasing?

A law firm's e-discovery capabilities can genuinely benefit its bottom line, but in client retention and repeat business rather than new business. Apart from client perceptions around security, some law firms are bringing e-discovery work in-house because it allows them to get closer to their clients by understanding their data.

Denise Backhouse is an associate responsible for the New York office of Morgan Lewis's 80-strong global eData practice. This is a standalone business function led by a partner, and includes lawyers and eData associates, supported by a team of technologists. "We consider e-discovery as part of the practice of law, rather than as part of IT," she says.

"The idea was to reduce costs and improve efficiency by controlling the technology we use to analyse the data. The factor that drives up costs is attorney time looking through documents. We wanted technology that would give us a window into the data, enabling us to pinpoint relevant information at the earliest possible stage."

But, while the e-data group's chief function is e-discovery for litigation and regulatory investigations, its role also includes advising clients on all ESI-related issues, with the object of maximising efficiency and minimising costs – so the group is earning its keep in other ways.

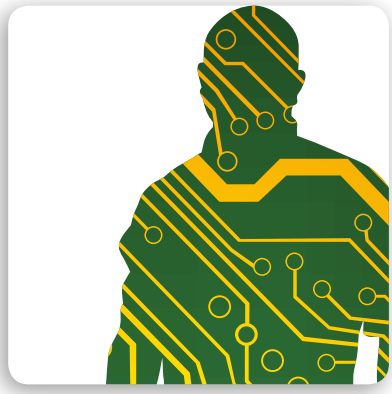
At Hogan Lovells, litigation support manager Bill Onwusah shares the running of the global litigation support group with full-time litigation support lawyer Matthew Davis. Litigators meet Onwusah and Davis to discuss the litigation strategy for each case. Davis has been able to develop synergy with the firm's litigators who vary considerably in skill and experience in dealing with ESI.

"While some teams need a lot of assistance, others are well-versed, and my role becomes more consultative." Davis considers himself something of an interpreter and project manager, ensuring there are no misunderstandings between the various groups involved in the e-discovery process.

Hogan Lovells' litigation support group handles all issues involving ESI, but it also represents an internal and external resource, regularly assisting clients with the e-discovery process including the identification and procurement of external providers. It's another example of a support function that's delivering client value beyond the obvious.

This opportunity is not

> "What drives up costs is looking through documents. We wanted technology that would give us a window into the data, enabling us to pinpoint relevant information at the earliest stage."
>
> Denise Backhouse, eData associate, Morgan Lewis



limited to e-discovery in the event of a dispute or regulatory investigation. Litigation support and e-data departments are increasingly taking on a consultancy role, advising clients on data retention and litigation readiness.

Backhouse and her team at Morgan Lewis, for example, work with clients on information governance, to make sure they are not over-preserving data. As the volume of stored information increases, so does the potential burden – and cost – of e-discovery.

So, by advising clients on their data retention policies, firms are helping to reduce the volume of data that could be discoverable in the event of litigation or regulatory investigation.

Finding the right tools for the e-discovery job

The tools can do more than their origins suggest, too. Jonathan Maas, assistant director, forensic technology and discovery services at Ernst & Young, says litigation support needs to be a standalone function, because it touches multiple elements of the business, and can deliver a lot to the firm. "IT and KM are different beasts, but the systems they use can be used for other purposes," he says.

This is reflected in the popularity of cross-functional tools for litigation support. A popular example is kCura's Relativity, which has a flexible design that enables its functionality to be tailored to users' requirements.

According to Maas, flexibility is Relativity's biggest advantage and its biggest disadvantage. "Although it is agile, it requires litigation support staff to manage it," he says. "It needs a database administrator, whereas other products, such as Clearwell, offer a plug-in-and-play solution. They are still sophisticated tools, but they are less adaptable. Relativity could be applied to any set of data – it could work as a deal room – a list of all the parties and the workflow. You can record who has viewed particular information."

Morgan Lewis, on the other hand, uses Recommind – and Backhouse and her team see predictive coding as providing a completely different way of thinking about data.

"Although it requires intelligent input, which means billing time up front, predictive coding enables us to reduce data volume effectively. There is a lot of pressure to do this – not just from clients, but also from the courts. It is becoming indefensible to review millions of documents."

The choice of e-discovery provider can make a very real difference to a case. There is no single dominant piece of software, although Recom-

iPads, the cloud and e-discovery

Cloud services are great – and a potential danger, partly because it's vital to know where company data resides. Other issues include whether mass retrieval of data is included in the service level agreement, and the form of the data when it is retrieved.

"Clients store data in the cloud, but they don't always think about en masse retrieval for the purposes of litigation," says Hogan Lovells litigation support lawyer Matthew Davis.

"It is incredibly important to consider at the outset whether the service level agreement (SLA) covers mass retrieval of data."

An email service SLA, for example, may cover retrieving yesterday's deleted emails, but it may not include mass retrieval of emails for the last four years.

"If an organisation is contemplating moving to the cloud, it shouldn't just think about IT and procurement. It's also important to include the legal function.

"No one wants to be dealing with those issues when the clock is ticking".

Too many smartphones

Fulbright & Jaworski's recent litigation trends report found that discoverable data in different media was a clear challenge for e-discovery.

Nearly a third of US respondent companies (30%) and 36% of UK respondents have had to preserve or collect data from mobile devices for litigation or regulatory investigation.

Almost half (45%) of all respondents don't have any restrictions on social media at their companies, and 18% have had to collect data from an employee's personal social media account in relation to litigation involving the company.

mind's predictive coding and kCura's Relativity are this year's top models. Clearwell, recently bought by Symantec, is another popular choice. But the choice of tool is driven by the type and volume of documents, and whether they involve different languages and concepts.

Davis says having a market awareness is vital – some tools offer limited or inferior functionality. It's also worth checking a provider's project management skills.

"If the software is excellent, but the provider is incompetent, it will still be a bad experience for the client," he says. "Our initial meeting with the client's legal team influences our choice of provider. If we're dealing with a multi-jurisdictional case with huge volumes, we might use Kroll. Further down the scale, we may require a provider with an international presence, such as Epiq. At the lower end of the market, if we are handling an HR matter in London we can get a quality service from a smaller provider at a significantly better price."

The most popular technology reflects the fact that e-discovery involves information management across departments. Recommind and Autonomy's predictive coding products were designed to facilitate intelligent, context-based search. kCura's Relativity, can also be used to categorise data for purposes other than e-discovery.

Databases are used in litigation to find a way of culling the volume of information to make it more manageable, but these resources can also be used for transactional due diligence. Rather than using an electronic deal room for transactional work, for example, the documents could be loaded onto Recommind or Relativity databases and tagged and used to produce reports and transaction bibles. "These tools are commonly applied to litigation as that is where the pressure point is, but innovative firms could certainly deploy them elsewhere in the business to derive similar benefits in terms of time and cost savings," says Davis.

This year's e-discovery tools of choice are not e-discovery-specific tools.

To outsource – or not?

A lot of e-discovery is really about outsourcing, and this can apply to different stages in the process. Haslam differentiates between products that are applied to the various elements of the Electronic Discovery Reference Model (EDRM), which divides the process into clearly defined stages. For example, some early case assessment tools can be applied to client data on-site, so although the process is conducted by a third party, it remains within the organisation's firewall and therefore does not present risks in terms of data security.

At Birketts, Simmons is looking to outsource more e-discovery functionality. "Most document review is done off-site, because it requires big servers with a lot of processing power. If you put e-discovery functionality on the firm's network it will slow everybody down."

Even firms that have invested in in-house and managed solutions employ third-party suppliers. Backhouse at Morgan Lewis explains that some clients have their own in-house solutions or preferred suppliers for extracting and reviewing data. "Although we offer a comprehensive in-house service, part of our role is to help clients assess the options and find the best fit and this can involve using a third party," she says.

At Reynolds Porter Chamberlain, e-discovery is part of the KM function. Apart from smaller or highly sensitive cases, which are handled in-house using locally applied tools, document review is wholly outsourced.

To ensure some commonality of service, RPC selected a panel of e-discovery providers, explains Andrew Woolfson, director of knowledge management and capability. "Our key criteria relate to sensitivity

"These tools are commonly applied to litigation, but innovative firms could deploy them elsewhere to derive similar benefits in terms of time and cost savings."

Matthew Davis, litigation support lawyer, Hogan Lovells

and scale. We project manage the exercise so that even when we appoint different providers to deal with each stage in the EDRM, the process is packaged as a project managed solution."

Woolfson either sources project management from within the firm, or uses an outsourced project management solution. Smaller projects are handled in-house, while medium- to large-scale litigation support is outsourced. He says successful litigation support is about getting the strategy right and educating lawyers in the processes and technologies. "If you get e-discovery/litigation support wrong, it can severely reduce client service. It doesn't really matter how you do it, so long as it is commercially sensible and operationally sound."

Next steps

On the technology front, predictive coding is the future of e-discovery, says Davis. "Currently, when lawyers are involved in a dispute that requires e-discovery, they find out whether it can be done in the traditional way – using paper. They use technology only when there's too much electronic information to get through. But it should be the other way round, with technology as the default position."

The trends in e-discovery demonstrate that it has moved into the mainstream, with some of the most advanced software developments in legal technology. Although there is no holy grail in terms of tools and technology, automated document review is becoming the default setting, especially in relation to early case assessment.

But litigation support is also viewed increasingly as a resource, and firms now regularly offer clients consultancy-style advice on litigation readiness. This type of advice links e-discovery to business development – once a firm has got to know how a client manages its data, it's more likely to be instructed.

So, while advice on litigation readiness keeps a firm on clients' radar during quiet periods, the litigation support department could become a rainmaker for a firm's dispute resolution group.

In practice, this tends to relate to client retention rather than marketing – but there's no reason an innovative lit support team couldn't do a lot more than that. ●

INDUSTRY ANALYSIS INDEX

Discover more

In this issue of Briefing we get the views of the companies at the coalface of e-discovery. What's on the horizon? How can law firms use their e-discovery knowledge to competitive advantage? And how can it help law firms as businesses in their own right?

Let's get discovering...

INDUSTRY ANALYSIS **E-DISCOVERY TECHNOLOGY**

Advantage, technology

Johannes Scholtes, ZyLAB's chairman and chief strategy officer, reveals the big challenges in e-discovery – and some solutions

A law firm, or in fact anyone tackling e-discovery, is facing a constantly evolving landscape. The biggest challenge is constant, however: the massive growth of electronically stored information, or ESI.

But beyond the sheer amount of data, law firms also now have to cope with more complex informational issues such as handling emails, the legal issues around disclosing recorded information, and in particular the risks associated with social media usage in the business world.

IT analyst firm Gartner predicts that, by the end of 2013, half of all companies will have been asked to produce material from social media websites for discovery.

ZyLAB's white paper 'Compliance in the Cloud: How to Deal with Social Media in the Workplace' gives law firms some practical advice on this challenge.

Back in 2009, James Moeskops of Millnet outlined the four key factors driving the trend in e-discovery: cost pressure from clients; increasing maturity of e-discovery technology; a judiciary that's become increasingly aware of e-discovery's preparedness to address costs; and competitive pressures, as more innovative law firms leverage the technology for a competitive advantage.

Almost three years on, all these drivers still ring true. E-discovery as a market is growing rapidly, and no one can afford to ignore it – but many law firms still haven't embraced the tools.

What are they waiting for? Forceful direction, possibly; even in the wake of practice directions and other legal changes, the courts, though much concerned with proportionality of costs, will never mandate which technology to use.

So, law firms need to be responsible for educating themselves.

How can a law firm benefit from adopting e-discovery technology?

There are some basic but important reasons to consider bringing some e-discovery technology capability in-house at a law firm, which cover everything from cost saving to increased capability:

- Avoid information asymmetry with opposing parties and regulators;
- Find more relevant information, faster;
- In compliance audits, use it to find more potential problems to solve and keep clients out of trouble;
- Avoid expensive third-party investigations and focus on your business instead;
- Help your clients to become litigation-ready;
- Negotiate better settlements for clients;
- Show yours is the more competitive firm, which delivers higher quality – and gets more business;
- Avoid risk and reputation damage due to errors and lack of unawareness around the available technology.

Technology is not replacing the lawyer

E-discovery does not have to be a cost-prohibitive exercise. Technology suppliers (like ZyLAB) now offer on-demand services on a project basis or for use in-house.

Technology in e-discovery is a way to deliver competitive advantage while keeping the costs proportional. The advent of machine-assisted review means lawyers no longer need to spend their time 'keeping the lights on', while firms can find more relevant information and hidden patterns in less time (gaining greater efficiencies), as well as being able to, effectively, work 24/7.

But lawyers' skills are still used for precision – and in the interpretation of ambiguous information, quality control, sampling and iterative improvements. So, they can rest assured – they're not going anywhere.

INDUSTRY ANALYSIS **PREDICTIVE CODING**

Future perfect?

Bob Tennant, CEO of Recommind, on why the new technology of predictive coding heralds a far more effective and cost-efficient future for those involved in e-discovery

Linear document review has become economically unfeasible in many legal and regulatory disputes.

The linear review process used to be manageable, when we lived in a paper-based world, but in the digital age it simply cannot handle the volume of electronically stored information (ESI) — let alone the subtlety of language used in global business.

One way of dealing with information overload in the legal, regulatory and investigative worlds is predictive coding. Predictive coding has made a splash this year, but we are still only at the start of the journey for this sophisticated technology. Designed to cope with reviewing huge numbers of documents, and already actively used in numerous cases and investigations across Europe and the US, the returns for those using predictive coding have given early adopters a significant competitive advantage.

What is a young technology now is fast becoming an integral part of the e-discovery process for law firms and corporations, drastically helping to minimise the complexity and longevity of document reviews – while also improving accuracy.

Leveraging lawyer input from the outset, predictive coding is the application of machine learning techniques to code documents in an automated or semi-automated manner. This combination of human and machine intelligence gives legal teams the power to review more relevant documents more quickly and accurately than other approaches.

With just a few examples to work from, a predictive coding system can be trained to code documents more accurately and consistently than manual review. It can be used either under supervision – where reviewers are still coding each document, but at a much faster rate – or not, in which case the computer codes most documents, but quality checks are iteratively performed by review leaders.

The key is that, in both cases, the process is significantly faster and more accurate, which translates directly into cost savings for both the law firms and clients involved.

It is widely acknowledged that around 70% of the cost of a dispute is lawyer review time – but having a process like predictive coding in place cuts that time dramatically, as well as ensuring a much higher degree of accuracy.

Also, by engaging senior lawyers earlier, better case decisions can be made up front. By using predictive coding to assist the review team, the reviewers get better review organisation and guidance, both of which help speed up the review dramatically (even when reviewers look at every document) as well as enhancing quality checking.

Putting people and intelligent computer applications together works better than using either alone, because they each have different error patterns.

When people concentrate and put something in a bucket, they're usually right – but they get tired. Computers don't tire. By getting lawyers to guide the computer, you get the best of both worlds. In some ways, predictive coding is similar to the traditional review process – but senior lawyers tell the computer what to look for.

The predictive coding process Recommind has patented is an iterative one. This means the system can be retrained to recognise documents that become responsive or likely privileged due to knowledge gained or changes in issues as the case progresses. Such an iterative process greatly helps reviewers and provides higher certainty that you're not missing anything. The system can also give a statistical confidence estimate of how accurate you are – great for defensibility, especially if reviewers are not looking at every document.

Engaging early in good information management practices is the best way to protect any business when it faces litigation or other disclosure requirements.

The end result not only means considerable cost savings for the organisations involved – it also awards them a greater level of confidence to make decisions.

BRIEFING SPEAKS TO **CLEARWELL SYSTEMS**

Beyond e-discovery

Briefing speaks to Philip Favro, one-time whistleblower lawyer in the US and now discovery legal specialist for Symantec – the new owners of e-discovery specialists Clearwell Systems

To delve deeper into what lawyers in law firms and behind corporate doors want out of e-discovery and information management systems – and their law firms – Briefing spoke to litigation specialist Philip Favro of Symantec.

Once a lawyer litigating huge federal whistleblower cases in the US, Favro now works with law firms and clients on e-discovery and archiving. His view is that e-discovery is just part of a larger picture – law firms need to get serious about their informational risk and management, and become indispensable advisers to clients about their litigation technology.

"The courts and regulatory bodies in the UK have much higher expectations now around how clients should address and respond to data requests, whether it's regulatory or in disclosure during litigation. They've raised their expectations and courts are punishing clients that fail to disclose in compliance with the rules," Favro says.

He's not wrong – a recent example was Earles v Barclays Bank in 2009, in which the bank, though it won the day, lost a small fortune in legal fees.

Barclays was severely upbraided by Judge Brown in the case because "the 'conduct' of electronic disclosure by the bank and its lawyers fell far below the standards to be expected of those practicing in the civil courts" – and he slashed its claimed costs from more than £200,000 to only £38,500 because of its poor e-discovery procedure and disproportionate fees.

"The Earles case is the quintessential example showing that courts and regulatory bodies have raised their expectations for how clients address disclosure in litigation and regulatory actions," Favro says. "To be prepared, clients and law firms alike must have the right tools in place for their information retention and disclosure needs."

"It's not just about having litigation management software, it's about having the right tools in addition to litigation management software to manage information."

Adding value through e-discovery capability

Being prepared for litigation and investigation isn't only a concern for corporate clients – it's one for law firms too; now that the new regulatory world of outcomes-focused regulation (OFR) is upon us, there's more need to have an idea of informational risk in the legal business prior to complaints.

"Having the documentation in place and the tools of support for that, both for disclosure and to respond to regulatory requests, is what's driving law firms and clients towards e-discovery technology," Favro says.

Of course, e-discovery is of more concern to clients than lawyers 99% of the time. But law firms can do a lot more for clients than simply act as the agent who orders the work, examines hard copy documents and signs off the job.

BRIEFING SPEAKS TO **CLEARWELL SYSTEMS**

"Do law firms need to advise clients about their information management? Absolutely, yes," Favro says. "Lawyers need to counsel the client to have an efficient and effective information management system and litigation readiness, to have a disclosure readiness plan in place. That means helping the client establish policies and procedures to ensure effective and efficient retention of data.

"It's not just about having litigation management software, it's about having the right tools in addition to litigation management software to manage information."

This isn't just because a client has to change the way it deals with data once a potential case arises; it's also because, if a client is thinking about data risk and litigation technology well in advance, it can readily defend a lack of data – one of the issues that killed Barclays' costs in the Earles case.

Reducing costs

Firms will learn best, perhaps, by using the technology themselves. The larger law firms are pulling e-discovery IT in-house, Favro says, and there are several very good reasons for this.

"If the client uses a litigation tool like Clearwell, it's nice for the law firm to have that tool as well," he says. "But it's not essential [to have the same solution], as long as there's some sort of compatibility."

E-discovery systems also allow firms to "really dive in and reduce the data set quickly and easily, which will allow a law firm to cut down costs to the client – and that's where the real value of Symantec's Clearwell Discovery Platform comes in".

"They can reduce costs across the board, which is hugely beneficial to the law firm because it makes their lawyers, paralegals and document reviewers more efficient – and it is great for the client because they get a cheaper bill – so they're going to be happier."

E-discovery technology may not necessarily be able to deliver more cost predictability to litigation – Favro, like many of those interviewed for this issue of Briefing admit that it's one of the last parts of law that's really unpredictable – but, he says, it can save money and help with the proportionality challenge.

Information management

But e-discovery these days is about much more than just litigation prep – it's a part of the world of information lifecycle management. This is evident in the recent acquisition of Clearwell by information security giant Symantec earlier this year. Favro says the deal gives firms an edge when it comes to thinking beyond plain e-discovery.

"Long before Symantec acquired Clearwell, Symantec's archiving solutions that are used throughout the world were compatible with Clearwell and with almost any other litigation tool," he explains. "Clearwell has an open API, so it will be compatible with other archiving and alternative solutions out there.

"Archiving software like Symantec Enterprise Vault is a key area where law firms don't have the same type of data requests through the disclosure process that clients have, but law firms still need to organise their data efficiently and effectively. They need to discover it effectively and they need to be able to store their data efficiently, to keep their own bottom line down.

"And they need to be able to manage data in such a way that they are prepared for a litigation event. Enterprise Vault allows a law firm to efficiently store and manage its email, for example, and that's really one of the big challenges. Lawyers are notorious for keeping enormous PST files, and Enterprise Vault allows law firms to be able to eliminate PSTs completely."

It also allows the firm to search quickly through emails, for example, to determine if it has a real problem in internal cases, from partner departures to fraud and sexual harassment. "You've got your data in one place and you've got your tool to analyse it, and you can make a quick decision within a matter of really minutes as to what's been going on, because you'll have the data at your fingertips."

In other words, the law firm gets exactly the benefits it normally extols to clients. You can't say fairer than that.

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to learn more about
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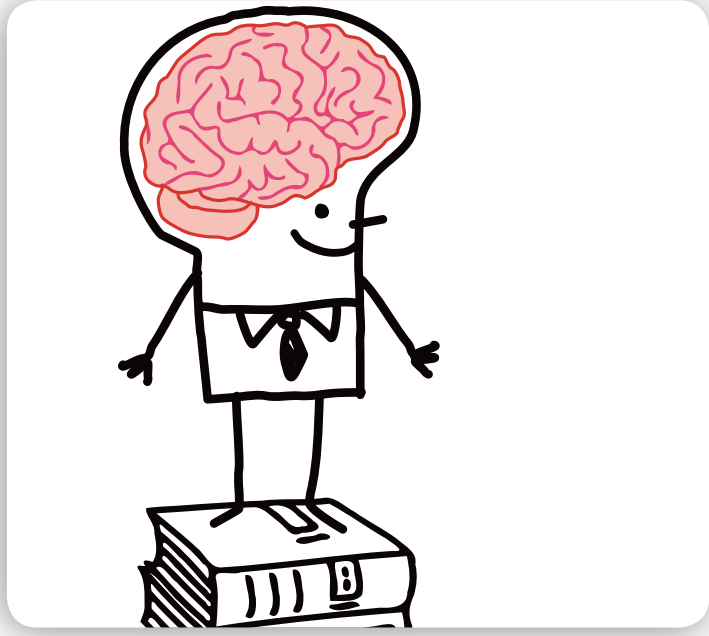
INDUSTRY ANALYSIS **MANAGING INFORMATION**

Informationally intelligent

Frank Coggrave of Guidance Software explains how firms and clients can cut the cost and disruption of digital investigations



Digital investigations come in many shapes and forms. But in every case, the key to minimising disruption, cost and reputational damage is to quickly assess the basis for the case.

This means reviewing all relevant electronic documents, wherever they're stored. This isn't just emails – it also includes instant messages, documents, even unstructured data such as content on social networking sites or forums.

USB sticks, iPads and smartphones, including personal devices, can now be added to desktops, laptops and servers as areas to search – and there will be a lot of information in the cloud in the very near future. The need to have visibility of all information across the entire organisation is a huge challenge.

One solution is to build processes; but, because compliance and regulation is a changeable environment, the task of establishing appropriate processes when dealing with compliance or regulatory investigations needs to factor in this changeability. New legislation, such as the Bribery Act, may require refreshed or revised processes.

But software that's flexible and easy to use can significantly lighten the burden of compliance on a business, and it can do more than that – there is a direct correlation between how quickly you can ringfence all data pertinent to any investigation and the speed with which strategy can be decided. Making an early decision, based on having access to all relevant electronic evidence, can empower those involved in investigations to make better decisions from positions of strength.

E-disclosure software can dramatically cut the amount of data for review by automatically searching against a sophisticated set of relevant terms. It can also help to implement the legal hold process of informing and questioning custodians, as well as monitoring and collating their responses with minimal interruption to work.

Having both these clearly defined e-disclosure processes in place, as well as using cutting-edge technology, can only help minimise any impact on productivity. It can also put the client back in control of the process. The converse is of course also true: a company that relies on manual processes or ill-suited technology can find itself embroiled in lengthy investigations that suck time and resources.

All pertinent documentation must be reviewed by legal counsel, but an efficient process supported by the right technology, can minimise the work and time required in preparation; giving more time to focus on analysing documentation and determining courses of action.

In the first instance, however, it's still crucial to get your house in order from a data standpoint, and not wait for the spectre of an investigation before putting appropriate measures in place.

The first rule of e-disclosure is to 'know where your data is located'. This is as important for law firms as it is for their clients. Conducting a thorough data audit and purging any sensitive or critical information found in inappropriate places can prevent heartache later. This is also why law firms might do well to advise clients to have a well-designed data retention policy that's published and communicated to all employees – and to operate one themselves.

Establishing what data needs to be retained and for how long limits the amount of information to be searched, as well as cutting enterprise storage costs. And, having defined and published the policy, it should be enforced across the organisation. This can be automated with the appropriate software, which can also monitor and report back on non-compliant data.

Intelligence can forearm and forewarn of litigious or regulatory issues, but technology and process can help snuff out any fire before it has the chance to seriously disrupt the business.

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INDUSTRY ANALYSIS **E-DISCOVERY AND CLIENTS**

Expanding horizons

Greg Wildisen, intl MD for Epiq Systems, on how law firms can deliver more to clients by helping them make better choices

It's crucial for those involved in the review of electronic documents – whether in a regulatory investigation, due diligence or a disclosure during the course of litigation – to make informed choices regarding the strategies, tools and techniques available to assist in sifting through this information.

Electronically stored information (ESI) plays a critical role in today's legal environment, because the amount of it continues to grow – exponentially.

Every legal project is different, and project variations will arise because of numerous, often competing, criteria. Projects will involve varying sets and volumes of data, numbers of custodians, budgets, timelines, jurisdictions, and technical and legal considerations.

Clients may also need to fulfil any, or all, of the following criteria within those projects:

- manage overwhelming volumes of data in preparation for large-scale litigation;
- meet challenging timescales when responding to a regulatory investigation;
- filter search results on small data sets as part of an ongoing compliance exercise;
- gauge the merits of a case quickly and inexpensively before investing in a full review.

These goals need to be balanced when choosing the most appropriate course of action, and intelligent choices when dealing with ESI will mean the difference between a smooth path to project resolution and a litany of administrative, cost and time woes. Therefore, it's very important for decision makers to familiarise themselves with the available technologies and the firms that provide expertise in dealing with electronic documents to be able to make the right choices.

Law firms (and in-house counsel) can add significant value to the relationship by helping clients establish efficient, repeatable, cost-effective and flexible processes. This will give the client both comfort and confidence when dealing with a current issue, as well as better enabling that client to confront future e-disclosure challenges.

Dealing with electronic documents is not always straightforward. Throughout the preservation, collection, processing, hosting and review stages, and with the increasingly complex, global nature of business, it is important for legal teams to have a broad spectrum of solutions from which to draw.

In these circumstances, a well-organised and responsive legal team will be one that has access to the following two elements:

Pick the right tools

There are plenty of tools that, properly implemented, increase efficiency in each stage of ESI preservation, collection, analysis and review. However, the key to achieving the best outcome for the client will be to work out which tool best fits the circumstances of a project and best integrates with other available tools across the project spectrum.

Many factors will influence the decisions on tools. What is most important is that those people tasked with dealing with electronic documents must embrace a flexible approach, applying the right tools and the right techniques to the circumstances of each unique case.

Get good advice

Flexibility and a choice of tools and techniques, though attractive, can also be confusing. The advantage of choice is more easily realised if decisions are reached with the benefit of expert advice from professionals who are both experienced in and adept at tailoring the right tools and techniques to a particular set of circumstances.

This solutions-based approach will ensure firms and clients implement defensible, repeatable processes aimed at resolving often complex issues relating to electronic documents – efficiently and cost-effectively.

At base, this should all mean lower costs. Today's e-disclosure firms provide clients and law firms with the tools and expertise to make smart choices, allowing early insight into information contained in the data and reducing the cost of the review.

And, if clients can apply the best professional resources at the most appropriate stages of a project, combined with the right tools for the circumstances, time and cost savings are an inevitable result.

Legal IT landscapes

A GLOBAL SURVEY OF LEGAL IT PEOPLE ON THE TECHNOLOGY ISSUES AFFECTING LAW FIRMS IN 2011

Covering some of the key technology issues facing law firms, and containing expert opinion from some of the leaders in legal IT from the UK and the US, Legal IT landscapes is a must-read for anyone interested in how IT will shape the law firms of tomorrow.

- Social media use in law firms for knowledge sharing and collaboration
- Tablet computers in law firms: Fad, or finally here to stay?
- What's stopping law firms from moving into the cloud?
- Business intelligence: Now the norm, or still just for the 'clever' firms?
- Document management: Is SharePoint finally ready to take on the world?
- Changing up to Windows 7 and Office 2010: Challenges and opportunities
- Legal IT people: How do they feel about their role, and is it valued?

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