

Adapting to the E-world

By Amy E. Wong

Need to find evidence?

If you are an attorney, you will not likely be scouring through file cabinets to get the information you need.

Today, 93 percent of business documents exist only in electronic databases. As a result, in-house attorneys are scrambling to adapt to this shift towards electronic evidence.

With increasing frequency, law firms and in-house legal departments rely on e-discovery businesses to discover evidence through email, attachments, chat rooms, word processing files, spreadsheets, and presentations. Because of corporations' reliance on electronic data storage, laws that require corporate archiving, and the flood of corporate lawsuits, the electronic discovery business has been booming.

E-discovery businesses scour corporate computers and databases, sift through superfluous material, hone in on incriminating evidence, and are banking big on their services. Michael Clark, e-discovery analyst at EDDix (Electronic Data Discovery Information Exchange), told the Associated Press that e-discovery's lucrative market is worth close to \$2 billion and expects to grow about 35% a year.

Kroll Ontrack, a Minneapolis-based e-discovery company, has quadrupled in size within the past 18 months; their storage has gone from half a petabyte to two petabytes. Two petabytes is equal to two million gigabytes. To put this in context, the Internet Archive stores almost every single public web page-ever to exist-in one petabyte.

Fios Inc., an Oregon-based e-discovery vendor, also forecasts significant changes in the coming year. It expects to employ 120 employees—72 more employees than they had in 2004. Also, Fios anticipates their 2006 revenues to reach \$30 million—a figure that doubles their 2004 total.

Although electronic evidence has been around since the 1970s, the reliance on e-evidence has not been as prominent as it is now. This boom is a result of the proliferation of tech-

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savvy employees who network via laptops, digital assistants, mobile phones, and pagers—all sources of e-discovery. According to a recent *Business Crimes Bulletin* article, “Blackberry is so addictive that it’s been dubbed ‘CrackBerry.’”

What is particularly dangerous about this e-communication addiction is that people often make reckless remarks about sensitive company issues. This thoughtlessness also characterizes email communications between attorneys and their clients, in which clients tend to be more frank, candid, and revelatory. Severe repercussions ensue.

According to a *Business Crimes Bulletin* report, recent case law establishes that the disclosure of client-attorney emails is, in many cases, legitimate. This means that attorney-client emails may inadvertently end up in courtrooms, much to the client’s and attorney’s dismay. Prosecutors, employers, and regulators frequently exploit sensitive client-attorney email in search of incriminating evidence.

Each disclosure case is, of course, different. However, according to a Law.com article, disclosure is usually fair game when: (1) the email was typed on company computer and sent over the company’s email system, (2) the company has a policy that employee emails are not private, and (3) the employee knew the company policy.

When it comes to electronic communication, it has become increasingly clear that there is little or no confidentiality. The safest alternative is to communicate vis-à-vis or via phone.

An Associated Press article says that 90 percent of U.S. corporations are embroiled in lawsuits. Furthermore, Fulbright & Jaworski research reveals that companies worth more than \$1 billion contend with, on average, 147 lawsuits per year.

When faced with litigation, in-house attorneys must locate, review, and produce all electronic files for each pending lawsuit. There are positive and negative aspects for in-house counsel.

E-files hold a wealth of information. According to a *New Jersey Law Journal* article, emails, chat room, and instant messages have candid and personal information that often prove valuable in the courtroom. On this flip side, however, frankness becomes a liability when the evidence is incriminating.

The negative aspect of e-communication is that in-house attorneys have to meticulously sift through countless files and take active measures to prevent the deletion of all potentially relevant data. Considering that the *New Jersey Law Journal* estimated that 60 billion emails are sent out daily, this is an overwhelming barrage of information and work.

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Ideally, the in-house counsel would have an efficient document retention policy. If not, e-discovery becomes an attorney's worst nightmare.

Gary L. Hayden, Counsel of Ford Motor Company, wrote in a *LexisNexis* article that, "Few corporate law offices have the expertise or resources to perform all aspects of electronic discovery themselves. Therefore, it is likely that in-house counsel will have to seek the assistance of outside counsel and others to perform various functions pertaining to electronic discovery."

Hayden advises that in-house attorneys need to familiarize themselves with their desktop technology, namely, word processing applications, spreadsheet applications, desktop databases, email applications, and metadata information.

He also noted that in-house counsel should spend time with the techies. When it comes to e-discovery, lawyers will inevitably need IT professionals to find, retrieve, preserve, and convert data into a usable and presentable form.

Last, sources agree that, when in need, in-house attorneys should turn to e-discovery companies for help. This often reduces the overall cost and time spent on a case. Also, it allows in-house attorneys to focus their time and resources on more pertinent issues.