

# E-DATA EXPLOSION

Growth in electronic information drives new costs and approaches to litigation

By PAIGE KOHN

Over the past decade, the enormous growth of electronically stored information has significantly changed how businesses approach litigation. New costs are incurred for data management and some cases are being settled faster. Both businesses and law firms have created legal e-discovery departments, and hired individuals with strong information technology abilities. Adverse parties are cooperating more during the early

stages of litigation, but at the same time, the courts are imposing severe sanctions for those who fail to preserve or produce information.

Molly Crabtree, a partner with the Columbus litigation group at Porter Wright Morris and Arthur LLP, witnessed document collection transform from “going to the warehouse looking at paper” to “gathering e-mail and figuring out how to produce [it].” Businesses and law firms need individuals with “a special set of skills to deal with ESI,” Crabtree observes.

Now that the “cost of e-discovery is what is driving the costs of litigation” there has been an increase in a “client’s willingness to settle” reflects Crabtree. She cautions that if a client bungles e-discovery, regardless of the merits, the case can be lost. Courts are “increasingly willing to grant some pretty severe relief.” Sanctions can be harsh, such as case dismissal, default judgment, and monetary penalties ranging from thousands to millions of dollars, or more lenient, such as adverse jury instructions and evidence preclusion.

Because the “volume of information just exploded,” lawyers had to develop new ways to manage the influx of documents, states Doug Matthews, partner with the Columbus litigation group at Vorys, Sater, Seymour and

Pease LLP. He remarks e-discovery “has become a specialty” and lawyers must have “an interest and ability to understand technology,” which is different than being a traditional litigator.

This transformation was largely affected by new federal legal rules adopted in 2006, says Gary Saalman, also a partner with the Columbus litigation group at Vorys. There now exists greater cooperation among parties, transparency and desire for proportionality; the latter meaning “efforts to preserve, collect, and produce have to be proportional to the merits of the case,” Saalman comments.

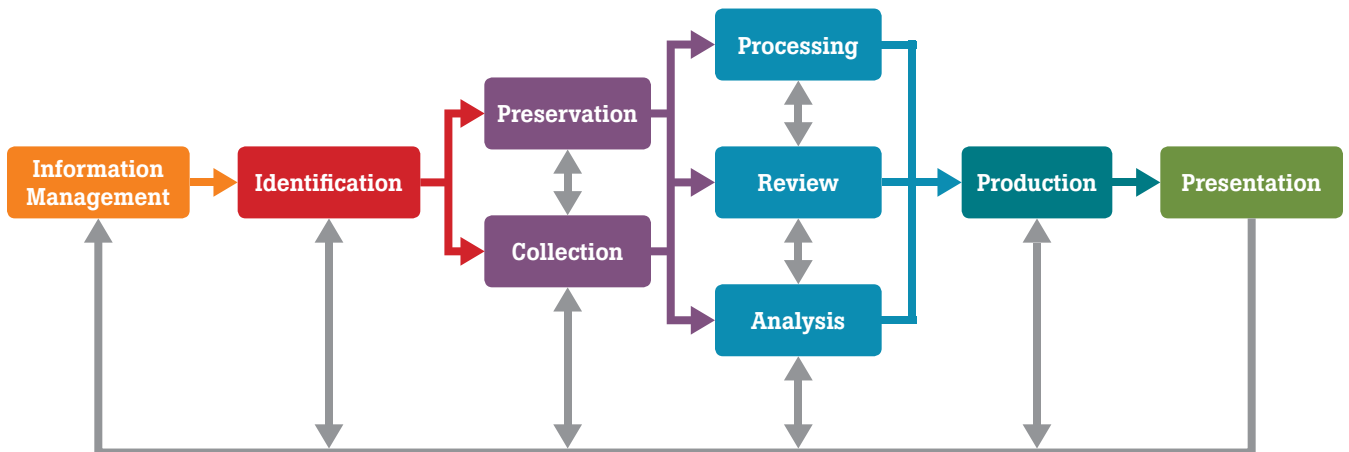
Prior to 2006, “there was no best practice, there was no process [and] we didn’t have good tools to deal with this,” reflects Julie Brown, the litigation technology executive manager at Vorys. Businesses “can’t keep everything [because] storage costs go out of control,” says Brown.



**“Cost of e-discovery is what is driving the costs of litigation.”**

**MOLLY CRABTREE**, a partner with the Columbus litigation group at Porter Wright Morris and Arthur LLP.

## ELECTRONIC DISCOVERY REFERENCE MODEL



Source: EDRM (edrm.net)

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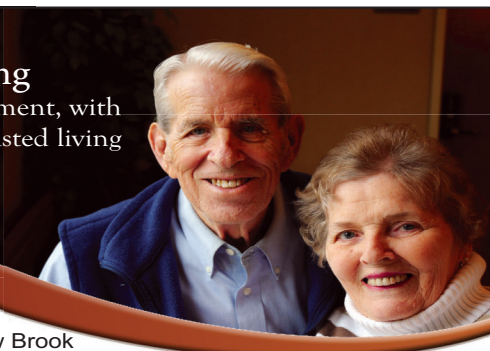
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Given the risks involved, ESI's growth has led to the creation of new departments and positions to manage the intersection of law, business, and IT. In 2002, Nationwide Insurance created a subset in its litigation department, comprised of seventeen people, including lawyers, paralegals, and litigation technology specialists. Peter Oesterling, associate general counsel at Nationwide Insurance, says smaller companies will have to rely on outside counsel experience and build relationships with vendors.

American Electric Power's legal department hired an information technology manager, Julie Richer, who manages data preservation, collection, review and production. "If the e-discovery process does not have one person overseeing all the parties involved, timelines will be missed and costs will soar," warns David Laing, assistant general counsel for litigation at AEP.

## THE PROCESS OF E-DISCOVERY

Due to the complexity of e-discovery, Oesterling visualizes the ESI process through the Electronic Discovery Reference Model, an online diagram showing the phases common to most cases. Depending on the size of the business, some phases will be outsourced to vendors while others will be retained.

Each phase of e-discovery requires corresponding technological tools. Numerous platforms exist, such as Relativity and Clearwell. No matter what platform is used, however, the key is formulating a strategy and using data analytics and technology to reduce collection and cost, says Matthews. Algorithms, statistics, key words, e-mail threading, data sampling, and predictive coding help businesses and law firms achieve these goals.

## BEST PRACTICES

The most cost-efficient e-discovery cases are those that implement a cohesive strategy from start to finish.

**Institute and enforce a strong information management program.** Before litigation even occurs, every company should have a robust information management program, says Oesterling. This includes having an effective and enforceable

data retention policy, which formalizes a process for preserving and destroying electronic information.

One area where companies are struggling is enforcing retention policies, reflects Crabtree. This can be solved when lawyers and business leaders coordinate with IT to monitor the policy, which is another general best practice.

It is essential that legal, business, and IT professionals are “speaking the same language,” Brown emphasizes.

Businesses should also centralize their information. Data should be saved on the company’s server, not employee hard drives, adds Saalman. Business information should not be conveyed via instant messenger or through home e-mail accounts.

Matthews warns further, “the more dispersed the control over the information, the higher costs are going to be.”

In the age of personal smartphones and tablets, companies should institute a Bring Your Own Device (BYOD) policy, he suggests. An effective policy ensures sensitive data like customer information is protected and eliminates the commingling of personal and business data, which reduces the discoverable electronic universe.

#### **Leverage vendors and lawyers for cost savings:**

While e-discovery often requires assistance from outside vendors for processing and producing data, Oesterling advises, “don’t put all your eggs in one basket.” By having master service agreements with several providers, they can be leveraged for cost savings. Similarly, institute a request for proposal process requiring vendors to compete for the best bid. For companies hiring outside counsel, Oesterling recommends considering a value-based billing agreement instead of typical billable hours.

For companies having frequent litigation involving the same information, Crabtree suggests negotiating long-term relationships with vendors.

Another essential consideration is data security. “Companies that are considering signing a contract with a vendor that will be hosting data externally should make sure protective measures are included in the agreement” to ensure the business has full control over the data, Laing cautions.

#### **Institute and monitor effective litigation**

**holds:** When a company anticipates or

The graphic features a dark blue background with various white and light blue icons representing technology and business concepts, such as a laptop, smartphone, email, social media, and network symbols. The text "Ice Miller" is prominently displayed in white, with "LEGAL COUNSEL" in smaller white letters below it. The word "build" is written in large, bold, orange letters, and "opportunities" is written in a smaller, elegant, cursive script below it.

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receives notice of litigation, the imposition of a litigation hold is vital to avoid spoliation of evidence. Crabtree suggests targeting the litigation hold by interviewing custodians of relevant information and communicating with the company’s IT department to locate the data.

Lawyers have to understand the client’s IT system so “relevant information isn’t being deleted automatically,” advises Matthews.

Once a hold is instituted, just like a data retention policy, it requires oversight to ensure it is followed. Saalman says trouble arises where a hands-off approach is pursued.

Similarly, AEP implements a legal hold tool, which sends automated reminders. Employees should also be educated. “All company employees should understand what a legal hold is and what to do if they are subject to a hold,” recommends Laing.

**Cooperate with the other side and promote staged discovery.**

After litigation commences, work with the other side to limit scope of discovery. “Meeting and conferring in good faith with the other side can really cut down on the amount [of information needed] to gather and look at,” Crabtree recommends. While the “knee jerk reaction is to collect it all,” having a targeted strategy and fostering cooperation can reduce costs and the amount of data collection.

She notes another effective tool for both parties is to agree to staged discovery. This means, “I will give you XYZ and you will give me ABC, we will both look and see if we need more, as opposed to give me the alphabet and I’ll see what I want.”

## THE FUTURE OF E-DISCOVERY

Further federal rule amendments on ESI are coming, says Oesterling. Issues such as early case management, proportionality, and sanctions are being considered, and amendments could go into effect as early as the end of 2014. Because law, technology and information are constantly shifting, businesses should remain vigilant in keeping up with the newest trends and regulations.

*Paige Kohn is a freelance writer.*