

E-Discovery's Perfect Storm

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catalyst for the development of the DigIT product suite. Since the launch of DigIT Enterprise™ in January, 2006, DigIT Technologies has enjoyed consistent growth in annual revenue. Prior to joining DigIT Technologies, McNew spent the last 17 years focused on information management, digital content management and technology.

The phrase *perfect storm* refers to the simultaneous occurrence of events which, taken individually, would be far less powerful than the result of their chance combination. Such occurrences are rare by their very nature, so that even a slight change in any one event contributing to the perfect storm would lessen its overall impact.

How, you may ask, does this relate to electronic discovery? Right now—today—if you are a C-level executive within a large organization, most likely you are experiencing first-hand the impact of a perfect storm. The rare convergence of the exponential increase in electronically stored information within an enterprise, plus the technology demands put upon an enterprise to manage this information, combined with changes in the Federal Rules of Civil Procedure are the three simultaneous occurrences that have created a powerful perfect storm within corporate America. As a result, litigation and electronic discovery is not just for “the lawyers” anymore.

Navigating the waters of electronic discovery now requires an entire crew: legal, IT, records management, compliance and security to work in a collaborative manner in order to mitigate risk and avoid costly exposure. A prevalent challenge among corporations working toward the goal of creating a sustainable, repeatable and efficient process for managing digital information during discovery is gaining consensus among all business units regarding the investment in technological assets necessary to comply with the changes in the law.

A recent survey conducted by IDG Research Services found that 21% of senior managers who responded to the survey reported that their organizations have multiple enterprisewide applications that support specific initiatives. This fact poses not only the obvious issue of the expense involved in the acquisition and deployment of multiple systems, but in addition, when a company's legal department embarks on an e-discovery voyage, the time and resource cost associated with collecting evidentiary data from disparate systems can reach well into seven figures.

Many C-level executives are looking for ways to improve efficiencies by deploying a

single solution across the enterprise that will address their primary areas of risk—legal, IT, compliance and records management. Since statistics show that the second largest uncontrolled cost in business outside of healthcare is the collection, preservation, review and production of data in litigation, the possibility of recouping the investment in an enterprise search application at the outset of one lawsuit is very real. However, enterprise search is not enough. Applications must be tailored specifically to address the challenges presented by stakeholders from legal, IT, security, forensics, outside counsel and current in-house e-discovery methodologies.

The benefits of using an enterprisewide search application that offers specific functionality designed for electronic discovery versus an “e-discovery” platform are many. Some offer the ability to search all data stores, including desktops, laptops, VOIP. Most search languages outside of English as well as both structured and unstructured data. However, first and foremost, enterprise search provides legal teams the speed and accuracy necessary to comply with the changes in the FRCP.

Common E-Discovery Challenges

Research to date shows the most common topics recurring in judicial opinions issued in 2007 were:

- ◆ **The importance of early case conferences (“meet and confer”).** Under Rule 16(b), parties must “meet and confer” at least 21 days before the scheduling conference. What this means is that within the first 99 days of a lawsuit, legal teams must be able to report to the opposing party who owns data relevant to the discovery request, where that data resides and the amount of data contained in the corpus. Being unprepared is not an option.
- ◆ **The accessibility of electronically stored information.** Rule 26(b)(2)B distinguishes between production from sources of electronic information that are reasonably accessible and those that are not, limiting production from the latter absent a showing of good cause in light of the burdens and costs involved. Some search

applications have built-in reporting features that provide reports that show which data stores were searched and those that were found inaccessible. Documented results of search efforts may help make your case for not producing data from certain media.

- ◆ **What to do when parties fail to abide by the new rules.** The courts continue to impose severe sanctions for spoliation of electronic evidence. In two landmark decisions, the courts issued adverse inference instructions for spoliation of evidence. As a result, the jury in the Morgan Stanley case returned with a \$1.4 billion verdict, and in Zubulake, the jury returned with a \$29 million verdict. A search technology designed to access all electronically stored information, create a forensically sound copy of relevant data and allows the user to export a copy of the selected data to a secure repository for further review and possible production is a low-cost insurance policy to protect corporations from catastrophic consequences.

Second to an enterprisewide search application which offers built-in features to create a repeatable process, mitigate risk and reduce costs related to e-discovery would be a software application capable of predicting the occurrence of a perfect storm several years in advance. ■

DigIT Technologies develops advanced software applications to address current and future trends in digital information management. Enterprise search applications are customized for different business silos within a corporation, eliminating the need for redundancy in functionality and duplicative expense. DigIT's product suite includes built-in legal features designed to reduce costs caused by “over-collection” and mitigate risk in e-discovery. Additional products offer forensically sound data collection and data filtering technology designed to eliminate “junk” from data collections for corporations and law firms.