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CHECKLIST
REPORT



Overcoming the Top E-Discovery Challenges

Overcoming E-discovery Challenges

By Marydee Ojala, Conference Program Director, Information Today, Inc.

I am not a lawyer and I've never played one on TV. But I do know of actors who played lawyers on TV and I watched some of the shows. One of the earliest was Raymond Burr, who played criminal defense attorney Perry Mason from 1957 to 1966. He was ably assisted by the extraordinarily efficient Della Street, played by Barbara Hale, and private eye Paul Drake, played by William Hopper. The series was based on books by Erle Stanley Gardner, and the series can still be viewed on CBS All Access and a few other outlets. There's a remake of the *Perry Mason* franchise at HBO, with the character more of a private eye than a lawyer. That's probably a good decision and in line with the earlier books.

More recently, there are the *Law & Order* programs with executive assistant district attorney Jack McCoy, played by Sam Waterston for the entire length of the series, from 1994 to 2010. He is dedicated to prosecuting criminals in the Manhattan court and has a sometimes unconventional approach to the job. He knows the law but isn't above bending or actually breaking trial rules. That trait makes him an effective fictional character but not one to be emulated by actual attorneys.

There are other TV lawyers, some good, some bad. There was the highly moralistic Lawrence Preston (E. G. Marshall) in *The Defenders* and the unethical Alan Shore (James Spader) in *Boston Legal*. Not all fictional attorneys are male or white. There's Ally McBeal (Calista Flockhart) in the eponymously named *Ally McBeal* show and Annalise Keating (Viola Davis) in *How to Get Away with Murder*. It's worth noting that most TV shows concentrate on criminal rather than civil matters, probably because they're more attention-grabbing for the viewing audience. Legal issues in the business world are much more likely to be civil cases.

MISSING PIECES

People who form their impression of lawyers from these television shows are missing a lot—and not only the distinction between criminal and civil matters. For one thing, the entire process of bringing a lawsuit to court doesn't really fit into an hour program time (actually, less than an hour, given the time taken up by commercials). It's a much more time-consuming process. Related to that is the avoidance of the entire concept of discovery and e-discovery. It's this process that frequently contributes to the length of time a real lawsuit takes. What discovery is not is dramatic. And with so many TV shows—not to mention movies and books—having plots that hinge on courtroom scenes with major revelations that bring last-minute surprises resulting in either convictions or acquittals, the matter of discovery isn't important to the writers. In the real world, however, discovery is integral to court cases, if not important for courtroom dramas.

If you're reading this and you are in the legal field, feel free to skip the next bit. But if you're in IT and/or involved in working with your legal department, here's a brief description of what's involved with e-discovery. At its core, discovery is a formal process in which defense and prosecution trade information and data that is related to litigation. It's the complete opposite from what courtroom dramas would have you believe. It makes facts and

documents known to both sides. This all happens prior to walking into a courtroom. Discovery is pretty open-ended; only information that is privileged or legally protected is excluded from the discovery process.

MASSIVE AMOUNTS OF DISCOVERABLE DIGITAL DATA

The term e-discovery advances the discovery process into today's reality of electronic information. Think of how much information previously stored as paper documents or never really stored at all, such as unrecorded phone calls, is now in a digital format. Word documents, spreadsheets, emails, text messages, social media posts, smartphone captures, and photographs are now commonplace and, thus, discoverable. The practice of law requires an understanding of e-discovery and the realization that it's complex. With all the formats in which electronic information can be stored, part of e-discovery is preserving gathered information on a single technology platform.

The volume of digital information is enormous. Back in Perry Mason's day, an attorney could have taken a couple of depositions and called it a day. That's not true anymore. The quest for information stored electronically is vastly more time-consuming and encompasses massive amounts of discoverable material. It is estimated that 90% of discoverable information today falls under the aegis of e-discovery.

When I asked Michael Hamilton, Senior Managing Director, Marketing, Exterro, Inc., about the components of discoverable information, he listed off all the types of formats in which data could appear. Then he brought up the role of metadata. Although not a format, metadata assigned to information can be of great importance in the e-discovery process. This makes the assignment of accurate and usable metadata crucial beyond simply allowing employees to find information they need to do their jobs.

THE RULES OF E-DISCOVERY

There are rules about e-discovery. The Federal Rules of Civil Procedure (FRCP) was amended in 2005 to recognize the growing importance of e-discovery and again in 2015 to clarify aspects of the implementation of e-discovery and curtail abuses. FRCP is not the only legislation that affects e-discovery activities. Privacy protection further complicates the issue. The EU's General Data Protection Regulation (GDPR), enacted in May 2018, caused businesses to focus on their data management practices. Following on from GDPR was California. Its California Consumer Privacy Act (CCPA) added to the complexity of e-discovery, among other ramifications.

Exterro's Hamilton explains, "This meant that businesses would now have to square their legal and regulatory obligations with another obligation to delete data should a consumer request it...." The privacy implications of data storage as it applies to e-discovery were already worrying corporate legal departments when the pandemic hit. Just as they were considering requests for budget increases, given the volume of electronic information coupled with the challenges posed by the regulatory environment, working from home became the norm. The number of unemployed

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people soared; businesses closed; and the booming economy headed drastically downward.

Suddenly, budgets were cut rather than increased. As Hamilton writes, a survey done by Exterro and *Today’s General Counsel* in the midst of the pandemic revealed the legal department heads were “preparing to cut staff, pay, or both.” Even the continued existence of some companies was, and is, in question. Litigation expenses are rising and, with the possibility (some would say probability) of future lawsuits stemming from the effects of the pandemic, it seems to be bad timing to cut budgets. However, it’s also clear that companies don’t have a lot of good choices to make about their budgeting options.

On the plus side, technology training, observes Hamilton, is actually improving and he has the survey data to prove it. He also notes that the trend is to bring the e-discovery process in-house rather than hire an outside firm. Adopting new technologies is a challenge in many parts of an organization, not just legal, partly because it requires learning new skills to perform tasks and envisioning procedures in a different light. For the legal staff, the challenge is partly about saving money but it is also about recreating procedures. The basics of e-discovery—collecting, preserving, reviewing, and processing—can be made more efficient with intelligent adoption of technology.

Survey research cited by Hamilton identifies the three most effective techniques for reducing e-discovery spend. They are using e-discovery technology, bringing more of the work in-house, and using a single or preferred provider. Still, as budgets remain flat or actually decrease, legal departments are being asked to do more with less and multitasking becomes essential.

COMMUNICATING IS KEY

Money isn’t the only stumbling block for e-discovery acceptance. It’s getting buy-in from non-legal executives and the IT department. Hamilton told me that he thinks communication is key to convincing decision makers that e-discovery technology is a critical factor in business success. Every profession has its own way of describing outcomes and the steps required. What seems self-evident to the legal staff may need to be explained to IT in the language of technology rather than that of legal. Coming to a common understanding of the benefits of e-discovery technology depends on the language used. Couching the legal needs so that IT is on the same page becomes even more critical in our current pandemic-induced, working-from-home situations, particularly when it comes to data privacy and potential litigation. Hamilton thinks that it’s imperative for legal to have a seat at the IT table and sees a new skill for the e-discovery professional, that of interpreter between legal and IT.

Top management speaks yet a third language. Without support from top management, e-discovery initiatives will fail to be granted

the resources necessary to be successful. Here Hamilton recommends giving executives an overview of potential ramifications of not protecting data. What are the worst case and best case scenarios for the business as a whole regarding safeguarding data, responding to litigation, and creating information management policies? When management grasps the implications, posed to them in management-speak, they are more likely to loosen the purse strings.

MOVING FORWARD

These are uncertain times. With a business slowdown in some sectors, legal departments are taking stock of what they need to be doing going forward. They are re-assessing their processes and re-evaluating how to operate in a more effective fashion. Uncertainty, unfortunately, also leads to more, not less, litigation. This is a good time to think through how to handle the increased workload. That includes e-discovery.

Ideally, enterprises will be able to automate mundane tasks, those that don’t really need much human intervention. Obtaining necessary facts about a legal matter quickly and defensibly will be required. Compliance with privacy regulations when it comes to personal data will remain necessary but will also be affected by regulatory changes as more jurisdictions add privacy legislation. Strategic evaluation and selection of e-discovery technology can mitigate business risks as we move forward to calmer, less stressful times.

Perry Mason didn’t have to contend with either a pandemic or e-discovery—the TV show predated the arrival of electronic data. He didn’t have a smartphone and never sent an email. The remake is set in the 1930s, so he still doesn’t. But today’s companies and their legal staff do need to consider the importance of e-discovery. They need to ensure that legal responses are timely and efficient and that legal teams are able to understand the culture shift regarding data storage, privacy, and discoverability.

There’s a wonderful meme I’ve seen that sums up why you should care about e-discovery: Dance like no one is watching, but text and email like it will be read in court someday as part of e-discovery. Exterro wants to help you “achiever pre-pandemic greatness in e-discovery activities with post-pandemic budgetary constraints.” A noble goal. ■



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Overcoming COVID-19, Litigation, and Regulatory Challenges

Examining how corporate legal teams can achieve pre-pandemic greatness in e-discovery activities with post-pandemic budgetary constraints

By Michael Hamilton, Sr. Managing Director, Exterro, Inc.



In January 2020, the U.S. economy boosted tremendous growth, which fed business investment. Among these investments was the adoption of legal technology to help departments overcome challenges related to information governance, electronically stored information (ESI), and data retention—all of which ultimately affect e-discovery during litigation.

Along with this, the changing regulatory landscape has made e-discovery more complex than ever. It has also placed a greater emphasis on the General Counsel or Chief Legal Officer as not only the steward of the legal department, but also a guardian of the business; by nearly a two-to-one margin, most GCs/CLOs see business risk as a more important focus than financial or legal risks, according to [Exterro's State of E-Discovery 2020 Survey](#). Further, the same survey found that heading into 2020, more than half of CLOs had planned to implement a new legal technology (or were in the process of doing so) in their department to help increase efficiency and decrease risk across the organization.

All of this accelerated as the EU's General Data Protection Regulation (GDPR), which granted consumers unprecedented rights over their data, started its implementation in May of 2018. This meant that businesses would now have to square their legal and regulatory obligations with another obligation to delete data should a consumer request it, which was an eye-opener for not just corporate legal departments, but business stakeholders across organizations.

As a result, enterprises would have to start taking their data management practices more seriously, starting with their retention obligations regarding data with no business use. For many businesses governed by the GDPR (or its closest U.S. counterpart, the California Consumer Privacy Act [CCPA]) another it's been a long and arduous process to comply with the law—and nearly half still haven't, according to recent surveys.

Then in March 2020, as the first regulatory fines from the CCPA began to post, the COVID-19 pandemic struck and businesses

began to shut down. Stocks plummeted—so often and so far, in fact, that the New York Stock Exchange on several occasions had to suspend trading to give investors a chance to “cool down” amid the panic sell-offs. Stocks have been volatile since, and nearly 40 million people are now unemployed.

'I ABSOLUTELY THINK BUDGETS CHANGE NOW'

Suffice it to say, few GCs and CLOs could have seen this coming. The [4th Annual Study of Effective Legal Spend Management](#) put out by Exterro, Blickstein Group, and *Corporate Counsel Business Journal* used survey data collected just prior to the start of widespread COVID-19 preventative measures. That survey found that, largely, corporate legal departments were expecting budgets to remain flat or perhaps increase slightly.

A month later, things changed. Exterro and *Today's General Counsel* surveyed GCs and CLOs regarding the converging priorities among Legal, IT, Privacy, Security, and Compliance departments, and found that many legal department heads were now expecting to have to do more with less. Many were preparing to cut staff, pay, or both; some soberly assessed the dire situations of their own companies.

“I absolutely think budgets change now,” says Linda Luperchio, Director of Information Lifecycle Governance & E-Discovery at The Hanover Insurance.

Luperchio said during an Exterro webcast in April 2020 that she expects litigation and e-discovery expenses to increase globally, due to COVID-19 and the disruptions it's causing with employee movement—not to mention potential class-action suits.

“We have a small [litigation] lull right now, but I think it's going to hit with a vengeance,” says Luperchio. “There's going to be worker's comp [suits], there's going to be all sorts of different claims that no one has ever experienced before, and there's just no way around it that it's going to hit e-discovery, because e-discovery fits with just about every lawsuit now.”

The [4th Annual Study of Effective Legal Spend Management](#) found that litigation ranked as the highest risk for increased costs (51%) over compliance (22%) or any other highest risk, so the increased risk of litigation may not necessarily be a surprise for some.

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But it is a concern that could lead to significant strain for many corporate legal departments that have had to make cuts due to fewer staff to handle increasing e-discovery/litigation workloads.

“I don’t think it’s avoidable,” adds Luperchio. “I think we’re going to see an uptick that we couldn’t have planned for when we did the budgets because nobody knew COVID-19 was coming our way.”

THE SILVER LINING: MANY IN-HOUSE TEAMS HAD THEIR EYE ON CUTTING E-DISCOVERY COSTS HEADING INTO 2020

For years, technology adoption in legal departments has been a challenge—in part because there’s a learning curve. But recently, with GCs and CLOs having given the green light to their e-discovery teams to adopt technology, more work has been moving in-house. With many departments opting to find ways to increase efficiency internally rather than spend lavishly on outside firms that charge top dollar for services like document review, technology can help effect positive change during difficult times. And often, the savings will be there if you have people, processes, and technology in place that create effective outcomes—but the investment in training has to be there.

“You need to have top-notch people on your team,” says Connie Brenton, Sr. Director of Legal Operations for NetApp during an Exterro webinar in April, about the importance of ensuring legal associates are well-trained for their positions. “Then process [is next]—you have to redesign your process—and then you can generally throw any technology over the process. If you have a lousy process, and you throw a technology over the top, you will just have a very fast lousy process.”

Data from [Exterro’s 2020 E-Discovery Maturity Analysis](#), which surveyed more than 600 businesses of all sizes across more than 20 different industries, found that in-house e-discovery training is improving. In-house legal professionals involved in the e-discovery preservation, collection, and review steps are not only doing their part to adopt better, more efficient processes, they’re learning the skills they need to operate technology in a cost-saving way. Overall organizational e-discovery training maturity scores increased from 2019 to 2020 from a 2.55 (out of 5) to a score of 2.73, according to the E-Discovery Maturity Analysis. It’s a somewhat marginal improvement, but continually building on process maturity over the years means more effective operations and technology use.

According to the Study of Effective Legal Spend Management, overwhelmingly, respondents said that the biggest opportunity to reduce e-discovery spend was within collection and processing. But so far, the most effective ways to reduce e-discovery spend lie in leveraging technology that can empower in-house teams to conduct document review, collection, and processing in-house.

According to this survey, the three most effective techniques to reducing e-discovery spend are:

- ✓ Using e-discovery technology

- ✓ Bringing more work in-house
- ✓ Utilizing a single or preferred provider

LEVERAGING E-DISCOVERY TECHNOLOGY TO LEAD LEGAL DEPARTMENTS OUT OF A POST-COVID-19 WORLD

The motivation for investing in e-discovery technology is to execute legal tasks faster, more accurately, and more efficiently—and legal leaders have begun adopting advanced e-discovery search, collection, processing and review technology more and more each year. E-discovery software that features AI and predictive capabilities have empowered legal teams to cut down the time and costs for identifying responsive data and making try or settle decisions earlier.

Legal departments, especially those involved in e-discovery activities, should embrace e-discovery technology like AI, not only due to concerns over losing staff but also because they answer current *and forward-looking* legal and regulatory hurdles. Obtaining e-discovery technology that integrates and works with other software used throughout the enterprise can help answer the challenges that we spoke of earlier—the converging priorities among IT, privacy, compliance, security, and legal—as well as create cost and time savings so that teams can focus on major priorities.

When considering how to have a greater impact with a smaller budget during these difficult times, the GC/CLO must ask three questions about their technology:

- ✓ How do we automate mundane tasks?
- ✓ How do we get to the facts of a matter as quickly and defensibly as possible?
- ✓ How do we deal with personal data to ensure regulatory compliance?

In conjunction with a comprehensive legal spending strategy that spans organizational units reporting to the GC/CLO (and includes any outside vendors), identifying e-discovery technology that can be utilized across teams—therefore further stretching organizational dollars—is perhaps the best way to ensure both regulatory compliance and litigation defensibility across the organization. Given the COVID-related disadvantages that some enterprises have, legal teams may not be fully intact for another year—perhaps longer—but there are ways to work around tighter budgets to create better collaboration and teamwork.

“The need to reduce spend is acute right now,” says Brad Blickstein, principal of Blickstein Group. “A strategic approach will be much more effective in the long term, and it also may be easier than it seems to implement.”

As long as business risk remains the top priority for GCs and CLOs, [e-discovery technology](#) remains one of the mostly likely ways to defensibly mitigate those risks. ■