



E-Discovery Roundtable

Buyers' Perspectives on the Impact of Technology Innovation

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Introduction

Today's fast evolving technology landscape is challenging the ability of e-discovery professionals to keep up. Where electronic discovery once focused on the preservation and production of email and other documents from internal systems, relevant data can now reside in the cloud and on social media sites which are outside of an organization's centralized information technology ("IT") infrastructure. This complicates the issue of control over data, requiring that organizations implement increasingly sophisticated approaches for information governance and discovery planning.

Equally challenging are rapidly advancing technology solutions that require the development of new best practices for ensuring the defensibility of discovery processes. One example is technology-assisted review (a.k.a. "predictive coding"), which has been touted by some as a groundbreaking solution in the struggle to contain escalating discovery costs.

Technology innovations are dramatically re-shaping e-discovery and many organizations are now looking for ways to adapt. This was the topic of a recent roundtable discussion hosted by Integreon in which participants focused on three key trends:

- Cloud computing
- Social media
- Technology-assisted review

The participants of the roundtable were assembled from top corporations and law firms as a cross-section of industry roles, including lawyers and litigation support professionals, IT managers, and compliance and records management experts. This report summarizes their perspectives on the impact that technology innovation is having on the discovery process and what organizations are doing to address the issues.

Impact of Cloud Computing

Discussion amongst roundtable participants confirmed that most corporations are actively investigating the business benefits and implications of cloud adoption. Participants identified the need for control over data as the primary e-discovery concern posed by the cloud. This relates to information governance, particularly for enforcing data management policies, protecting confidential information, and ensuring timely access for the collection of data.

Enforcing data management policies: Organizations that enforce their data management policies in the cloud can substantially minimize the risk of spoliation during discovery.

Specifically is the need to manage data retention and destruction practices. Roundtable participants were unanimous in citing the importance of establishing contractual provisions to ensure cloud providers adhere to the organization's data management policies. Also noted was the need to consider provisions to address possible bankruptcy of the cloud provider and other unexpected major events that could have severe implications for discovery. Contracts that effectively support an organization's data management policies can serve as the cornerstone for a defensible discovery process able to withstand close scrutiny by the courts and regulatory bodies.

Protecting confidential information: Organizations that store data in the cloud must not only be concerned about their own discovery obligations but also the discovery obligations of their chosen cloud providers. Despite the presence of confidentiality agreements, cloud providers may be compelled by law to produce data that belongs to their clients. While organizations may not be able to prevent this, roundtable participants believed there are steps that can be taken to ensure prompt notification from cloud providers, which may enable an affected organization to take prudent legal action. Participants recommended that contracts with cloud providers should include both standard confidentiality terms and provisions to address situations in which cloud providers may be unable to ensure confidentiality.

Ensuring timely access to data stored in the cloud: When matters do arise, organizations that are able to quickly collect their data will be in the best position to assess risk, determine case strategy, and meet production deadlines. The challenge may be in collecting the data. It might not be possible for an organization to send its own discovery team to collect data on site, since there can be conflicts with a cloud provider's obligations to protect the confidentiality of its other clients. Entrusting cloud providers to collect data on behalf of the organization can also raise the risk of the provider becoming involved in the matter as a third party. Remote access to data can be another challenge, due to bandwidth issues that can make it impractical to transfer large volumes of data (think terabytes) from the cloud. Roundtable participants recommended that contractual provisions should be established up front with cloud providers that will ensure a timely and adequate level of access for data collection.

Negotiating contracts with cloud providers:

Because the cloud represents a relatively new and untested legal territory for contractual issues, roundtable participants reported that there is little real guidance available for how to structure cloud agreements to meet discovery obligations. As a first step, participants pointed out that knowing exactly where data will be stored is essential to understanding which legal or regulatory jurisdictions might apply. Unfortunately, provisions for data collection are not well established and there is little precedence for what will stand up during litigation. This means the negotiating process with a cloud provider can be lengthy. One law firm participant gave the

example of a company that had recently adopted a hosted email system in which it took more than 90 days to negotiate terms that sufficiently addressed its discovery requirements. Participants recommended that when moving to the cloud, organizations should come to the negotiating table with a clear understanding of all the discovery requirements that a contract will need to address.

Impact of Social Media

Roundtable participants also discussed the implications of social media. Adoption of social media has increased dramatically over the past few years. Many of the participants believed organizations are not adequately addressing social media in their discovery readiness plans. Key gaps that participants highlighted were the lack of clear social media policies and enforcement practices as well as insufficient plans for preserving social media data in the event that a matter does arise.

Preserving data from social media sites:

Participants felt that important questions about how data can be preserved from the growing variety of social media sites remain unanswered. Different social media sites may require different techniques for capturing data. In addition, the technology for preserving data from social media sites is still in its infancy. Some participants recommended that organizations should seek the advice of digital forensic experts to determine the best approach for specific sites. In this manner, an organization can show a reasonable effort at avoiding data spoliation in accordance with its discovery obligations.

Establishing social media policies:

Participants strongly suggested that organizations put social media policies in place to minimize their risk, noting that relatively few organizations today have actually done so. Without such policies, employees may unknowingly put their employers at risk. Employers may also find themselves unable to address inappropriate behavior by its employees that use social media. Participants recommended a variety of provisions for social media policies, including:

- Allowable uses of social media by employees, noting important legal issues related to copyright, fair use, confidentiality, and proprietary information
- Specific behaviors that may result in the termination of employment
- Security and privacy considerations, such as recommendations for appropriate password protection
- Obligations for the retention, preservation and production of data, including clear explanation of employee responsibilities in the event of litigation hold notifications

The general view was that social media policies with these provisions can reduce the risk of litigation and regulatory investigations occurring and can expedite the discovery process by ensuring everyone knows what to do when matters arise.

Establishing social media policies, however, doesn't go far enough. Organizations must also ensure reasonable enforcement. There is some uncertainty about how to accomplish this, in part because monitoring technologies are generally inadequate. Participants recommend that an organization needs to at least distribute their social media policy to all employees and document acceptance of the policy by each employee. Some participants suggested that reasonable efforts at enforcement do not necessarily have to be perfect so long as good faith and enforcement consistency can be demonstrated.

Impact of Technology-Assisted Review

The final topic discussed at the roundtable was technology-assisted review, which is a recent innovation that holds promise for significant cost reductions through the automated coding of documents for review. Roundtable participants were in consensus that this technology has seen limited adoption to date due to a lack of critical acceptance and guidance for how it can best be used within a defensible process.

Moving to acceptance:

Most participants believed that technology-assisted review would become more widely accepted once it is proven accurate and complete in the eyes of the courts and attorneys for whom defensibility of the discovery process is of essential importance. One participant noted the example of conceptual review, which has been around even longer and was slow to gain general acceptance because of similar concerns about defensibility. Another participant suggested that the heightened attention on legal innovation and cost-saving approaches could help to accelerate acceptance of technology-assisted review.

Understanding how the technology will be used:

Roundtable participants also addressed recent claims that technology-assisted review would replace large numbers of lawyers. Participants felt this notion has been exaggerated and that the technology has great potential to complement lawyers with improvements in workflow automation and quality control, efficiency gains in first-pass review, and tighter integration and streamlining of the discovery process. Some participants even suggested an opportunity for the technology to be used by an opposing counsel to quickly sift through productions to find the most important documents, particularly those that the producing party might consider "hot docs." Citing similar technology hype and misinformation about early case assessment, some participants stressed that care must be taken when considering the adoption of technology-

assisted review. The technology clearly has the potential to improve process efficiency, but it should not be viewed as a “miracle cure” for e-discovery.

Developing protocols and best practices for use:

Roundtable participants recommended that organizations considering technology-assisted review should first focus on developing protocols and best practices that would ensure process defensibility. One corporate participant noted that the outcomes do not have to be perfect, but that courts do expect reasonable efforts at managing potential errors. Multiple participants gave the example of false negatives, in which responsive documents might erroneously be identified as non-responsive. The same error can be made regardless of whether technology or humans are “reviewing” documents. The critical element for defensibility is the presence of a documented process that reasonably assures results are produced in a consistent and accurate manner.

Final Thoughts

As many organizations consider adoption of the latest technology innovations, they should also consider the inherent risks in using such technologies without also developing the necessary governing policies and contractual arrangements needed from a legal discovery perspective. Technology can help to improve the discovery process, but an over reliance on technology can actually weaken an organization’s position even before litigation starts. Roundtable participants all agreed that the key to ensuring a defensible process is the careful selection of technologies that will complement and enhance an organization’s ability to meet its discovery obligations.

About Integreon

Integreon is the largest and highest-impact provider of integrated legal, research and business support solutions to corporations and law firms. It is a trusted partner to 9 of the top 10 global law firms, the top 10 investment banks, and 17 of the top 50 global brands, enabling these organizations to improve profitability and freeing their leaders to focus on business growth. With 2,000 associates operating from 17 offices across North America, Europe, Asia and Africa, Integreon works collaboratively with its clients to address their specific support needs, including legal process outsourcing and e-discovery/disclosure, market and competitive intelligence, due diligence and other business services. For more information about Integreon’s full range of solutions, please visit www.integreon.com.

For more information contact:

- **Jeff Fehrman**
jeff.fehrman@integreon.com
- **Eric Feistel**
eric.feistel@integreon.com

www.integreon.com



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