

Meeting the eDiscovery Challenge

The Top Five Most Significant Types of Discovery Cases of 2007 ^[1]

- *Court Orders Email Search and Production at Producing Party's Own Cost*
- *Court Considers Sanctioning Attorneys for Discovery Abuses*
- *Court Orders Defendant to Preserve and Produce Server Log Data Stored in RAM*
- *Court Denies Motion to Compel Deleted Email Stored on Backup Tapes*
- *Magistrate Finds Email Exhibits Inadmissible and Outlines Standards for Electronic Evidence Admissibility*



For many organizations, the growing impact of litigation is rapidly becoming one of the most critical issues facing business, reverberating from the legal team through the CEO's office. As expanded compliance and regulatory requirements increase the pressure, organizations find themselves facing substantial costs in responding effectively to litigation related discovery requests. At the same time as electronic information and communication are exploding in usage, compliance and discovery requirements are demanding increased discipline in retaining, tracking, discovering and managing all electronic information – challenging even for the most advanced corporate information infrastructures. Worse, organizations are confronted with significant risk, fines and negative public exposure should they lose or mishandle electronic evidence for a case. To be prepared to handle your current and future litigation demands, your organization is being compelled to take a hard look at its eDiscovery readiness, and to address several key questions:

- Are you prepared to respond effectively to eDiscovery requests?
- Can your organization identify and deliver all the emails and documents requested if a lawsuit or regulatory investigation becomes a possibility – even if those emails and documents go back three, five, or more years?
- Can your organization discover and produce this information quickly enough to meet the compressed timelines demanded by recent changes in key regulations?
- And finally, will your organization be successful in navigating the eDiscovery minefield, avoiding the fines, sanctions and damage to your corporate reputation that have plagued some of the most respected companies over the past few years?



How would your organization respond to these questions? Most organizations today cannot answer all these questions with an unqualified “yes.” They are forced to manage risk by handling incoming litigation related discovery demands in a reactive manner, engaging high-end legal service providers or deploying short-term point solutions to manage eDiscovery on a case-by-case basis. For these organizations, this reactive approach results in huge bills and redundant work as the same information might be repeatedly discovered across different cases.

But it doesn’t have to be this way. Leading organizations have recognized that by proactively addressing eDiscovery and making it part of a standard, consistent business process, they can drive down costs, improve agility and responsiveness, and get ahead of challenges by quickly assessing cases internally and preemptively deploying the best legal strategy. For these organizations, the key to proactive eDiscovery is a powerful and proven infrastructure to manage and collect electronic information coupled with tools to automate the phases of the eDiscovery processes in the context of a consistent, well-managed business process. This approach enables you to get ahead of the curve, dealing with litigation today while preparing your organization to be more proactive in time. This document will provide the information and describe tools that will enable you to begin implementing an eDiscovery strategy, taking control of cost and risk and turning electronic discovery from a terrifying prospect into an operationalized, routine business process. And at the same time, these tools offer the value-add proposition of “knowledge management,” creating the foundation of an information agenda for corporate legal and compliance teams that helps ensure that only the most current and correct information is maintained and used for future decision-making.

The Consequences of Inadequate Preparation for eDiscovery

Electronic discovery can be a costly and potentially damaging proposition made even worse if an organization fails to take appropriate actions ensure it is able to provide adequate and timely responses to discovery demands. One needs to look no further than the current headlines to see the high-profile impact of incomplete eDiscovery responses. Consider the cautionary tale of a highly regarded financial institution that failed to include 7,000 email messages as part of its discovery order. It was hit with \$1.58 billion judgment (reversed several years later) along with a multi-million dollar fine from a regulatory agency. Despite the reversal of the judgment, the damage to its corporate reputation remained.^[2] Another company was fined \$50,000 a day for each late response to a discovery request.^[3] The costs and fines can add up quickly and the resulting public embarrassment can haunt organizations for years.

“The average cost of defending a lawsuit exceeds \$1.5 million per case, with 20% to 30% of that being internal and mostly IT-related... By selecting the right technology for e-discovery and by tying that to an information life cycle management strategy, you can save your company a ton of money and your IT department a ton of time.”^[4]

Source: Debra Logan, Research VP, Gartner, Inc

Fast-Growing Electronic Information Becomes Key to Litigation

Recent changes in laws and regulations have increased the importance of electronic information in litigation and regulatory proceedings – across all industries and geographies, well beyond the boundaries of the U.S. As a result, many global organizations are realizing that they are not fully prepared in their ability to respond in a legally defensible manner to these discovery requests and the other requirements involved.

Compounding the problem is the sheer volume of electronically-stored information (ESI). Consider that the typical corporate hard drive can hold up to 40 gigabytes of information and if these electronic documents were printed out, each gigabyte of data would fill a pickup truck.^[6] When added to the information saved on servers, sent via email, and captured in content repositories, these “truckloads” add up quickly – particularly when it’s necessary to rapidly find the information necessary to satisfy an eDiscovery request on a compressed timeline.

Consistent Enforcement of Retention Rules and Litigation Hold is Critical

The lack of, or the inconsistent administration of, a formal and approved retention schedule compounds the problem of ESI volume and adds to the pressure many organizations face in effectively responding to discovery requests. Without routinely applying a consistent retention schedule based on regulations, corporate policies and business requirements to your electronic information, your organization could be required to turn over all relevant non-privileged information requested no matter how old, even though it could and should have legitimately eliminated and destroyed the information potentially years earlier.

When litigation is pending or appears imminent, your organization must identify content or records requiring preservation and apply subsequent litigation holds to preserve the information. Throughout the process, you must prove its chain of custody with internal system audit trails to show evidence of who did what and when for any and all material processes. Having formal, well-documented, and consistently applied records retention policies and procedures is a key step toward being able to meet these requirements, and is a foundation of a proactive approach to eDiscovery.

Several recent lawsuits have involved emails that were not provided as part of the eDiscovery process, only to be uncovered at a later date resulting in substantial penalties and fines. Your organization should include all types of information in the eDiscovery equation – including email – to determine relevancy to the litigation at hand. To deal with the discovery conundrum, your organization requires an enterprise-wide platform approach along with email archiving, retention and retrieval that addresses all electronic information, across business applications, multiple repositories and locations.



Ready for Today's Challenges and Preparing for Tomorrow's: IBM eDiscovery Solutions based on Enterprise Content Management Offerings

To prepare for today's as well as tomorrow's eDiscovery challenges, one of the best steps your organization can take is to get your electronically stored information under control by implementing a robust, scalable in-house infrastructure for proactively and consistently managing content and information enterprise-wide. Coupled with integrated tools and best practice processes for helping respond to eDiscovery requests, such an infrastructure can help drive down cost, increase agility of discovery response, improve consistency and defensibility of processes, and ultimately lower risk to the organization.

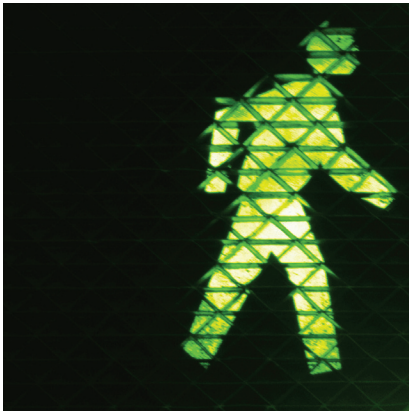
The best way to achieve such an outcome is to implement a comprehensive enterprise content management (ECM) approach, which combines scalable, proactive information and records management capability with the infrastructure needed to streamline the key business processes of eDiscovery. An ECM approach also delivers repeatable, consistent and secure records management processes to support all types of records.

IBM's eDiscovery solutions provide a simple way to get started with an ECM-based approach to eDiscovery. They build upon the proven capabilities of the IBM Enterprise Content Management platform and enable you to tackle key phases of electronic discovery, as outlined in the Electronic Discovery Reference Model (www.edrm.net). By taking proactive control of your information with IBM ECM, you can also reap benefits beyond eDiscovery by leveraging the strength of the platform to better manage corporate governance and risk, substantially increase operational efficiency, gain insight into your business via content insight, and improve access to key business information.

Security-Rich, Audit-Tracked Repository of Records for Litigation Matters:

The foundation of IBM eDiscovery solutions is IBM's industry-leading ECM repository platform. The ECM platform is built around a core repository providing a highly-scalable, security-rich vault for all key business records and information. In contrast to creating another information silo, the same ECM repository platform used to manage critical business records content is leveraged for eDiscovery – ensuring information integrity and accelerating the processes of eDiscovery by proactively managing critical information in one place. The repository includes several key capabilities – including security & access tracking, records management to ensure information is retained appropriately, and business process management that helps automate eDiscovery processes and make them more repeatable. These pieces are key to developing defensible, consistent eDiscovery processes.

Automated Identification, Collection, Processing, Analysis and Export of ESI: IBM's eDiscovery solution extends the repository platform with proven tools to effectively locate, access and automate the collection and processing of ESI from across the enterprise in a consistent, unified manner. Depending on the source repository, ESI can be collected into the repository vault or managed in place with federated access. Electronic content sources include, but are not limited to, email



servers by IBM CommonStore and IBM FileNet Email Manager, documents on file shares or desktops by IBM FileNet Records Crawler, Microsoft SharePoint® files by IBM SharePoint Archive, images by IBM FileNet Image Capture and faxes by IBM Fax Capture. Non-electronic content, including paper, can be managed and collected via rich capabilities for ingestion, capture and processing of imaged source content, helping accelerate discovery response when paper-based information is requested.

The IBM Classification Module helps you to selectively decide what to collect and archive and what not to based on the automatic evaluation and mapping of the content to the rest of your enterprise information. Federated access enables you to search a variety of structured and unstructured ESI sources.

Coordinating the process of collecting and processing ESI in the repository platform is the new IBM eDiscovery Manager tool, which provides eDiscovery-specific capabilities for authorized IT and legal users. eDiscovery Manager provides a secured interface to create case files, identify relevant collected information and assign it to a case, and lock down information from accidental deletion with litigation holds. It also provides tools for searching and culling through the information to identify the key set of relevant items. It can then export the case to other partner-provided tools or hosted platforms for downstream litigation support review and production.

Extending eDiscovery Manager is the new IBM eDiscovery Analyzer tool, which provides conceptual search and content analysis capabilities that enable legal professionals and litigation support specialists to conduct early case assessments, prepare for Meet and Confer discussions, and refine the collection of case-related e-mails to help dramatically reduce eDiscovery review costs.

Records Management for Legal Holds, Consistent ESI Life Cycle

Management: IBM's market-leading Records Manager product, with preintegrated offerings leveraging Business Process Management and other ECM services, can automate the entire records management life cycle process and help you implement a compliant legal discovery process with effective legal holds, preservation, tracking and timely destruction management.

Process Management to Automate the Process: IBM's market-leading Business Process Management solution, tightly integrated with records management and the ECM platform, provides the ability to automate and audit legal discovery processes and helps your organization to manage its litigation response as a documented, measurable, repeatable business process – helping improve defensibility and proactively reduce cost.

To solve problems and improve records management practices, a Forrester Research study concludes that firms must tackle organizational challenges first, use technology solutions such as message archiving to ease e-discovery and progressively evolve records management strategies across the entire organization.

Source: Forrester Research ^[11]

Email: Convenient, Easy and Major Liability for eDiscovery

- 29.1 percent of enterprises with 20,000 employees or more reported that employee email was subpoenaed in the last twelve months.
- Nearly 20 percent of respondents estimated that outbound email poses a legal, regulatory or financial risk.^[13]

Source: 2007 Proofpoint Survey

Managing Retention Equals Prevention: Learning from Experience

Situation: A company reviewed materials identified for discovery during a four-year period. Fifty percent of the materials were past retention and should have been disposed of according to the retention schedule.

Impact: The company spent \$12 million to review materials that should have been eliminated according to its own retention schedule.

Learning: Records management is an ongoing process and will help reduce the amount of discoverable information.

Source: Managing Electronic Records Conference^[10]

Where to start?

Ready for today, IBM eDiscovery solutions built on the combination of IBM Discovery Manager and the IBM ECM platform help your organization deal with current eDiscovery litigation matters while each step you take automatically brings you closer to being prepared for any future litigation and corresponding eDiscovery requests. Litigation response requires that eDiscovery is managed as part of the business process to achieve, sustain and prove compliance. The spectrum of information managed within these business processes should encompass unstructured as well as structured information. The IBM ECM offerings for eDiscovery are proven solutions that provide for the management of all information, structured as well as unstructured, across the entire enterprise.

Email: The Electronic Equivalent of DNA Evidence

One of the most critical areas for eDiscovery is email, as noted by Gartner Group.^[12] Email is a prime candidate for proactive management via an IBM eDiscovery solution, as it often contains vital evidence for either the plaintiff or the defendant and also necessitates automated collection to manage its volume. An ECM approach can be easily and quickly deployed: Customers have implemented IBM email archiving solutions in as quickly as two days. IBM email collection and archiving solutions can immediately go to work addressing eDiscovery and email archiving needs, while laying the foundation for enhanced capabilities down the road. As one of the initial steps, this approach helps you respond to today's litigation requirements involving email, while your investment in an Enterprise Content Management platform builds the foundation for a long-term integrated eDiscovery approach.



The costs for outside legal services to identify, collect, review, analyze, prepare and produce ESI can add up quickly. One organization learned this the hard way by spending \$7.2 million on ESI in 2006. Of the total volume of ESI submitted for review and analysis, almost 90 percent was email and of these emails submitted, 57 percent were determined to be not relevant to the case. By implementing an email management technology solution tightly coupled with eDiscovery technology, this organization can save 50 to 70 percent of its outside legal services costs for preparation, review and analysis. The customer will be deploying an integrated compliance solution (IBM ECM offerings for eDiscovery) with the goal of achieving a “one version” management for email, electronic documents and corporate business records. As a result, the organization can reduce its back-up and storage costs by 40 percent and its outside document preparation and conversion costs by 10 percent.

“Enterprises that choose one-off solutions for each regulatory challenge that they face will spend 10 times more on compliance projects than their counterparts that take a proactive approach.”

Source: Debra Logan, Research VP, Gartner, Inc

Preparing for Tomorrow’s eDiscovery Challenges

Building upon the same infrastructure, organizations can bring control to content on their file shares, desktops, and other storage devices, all at their own implementation pace. For example, one organization plans to deploy several products in the ECM offering portfolio:

- IBM eDiscovery Manager
- IBM Classification Module
- IBM FileNet Records Crawler
- IBM eDiscovery Analyzer

For this organization to put the right content and records control in place, it will implement upon IBM FileNet Content Manager and IBM FileNet Records Manager.

Managing Content and Business Processes

The IBM eDiscovery solution, built on IBM ECM, provides a solid foundation for the complete range of eDiscovery, including records management, collection, processing, classification, analysis and review. It enables organizations to implement eDiscovery as a documented, measurable and repeatable business process and to demonstrate adherence to a consistent records management approach. By managing both content and processes, organizations can achieve compliance with the proper operational policies, processes and controls.



About IBM eDiscovery

IBM is a proven provider in the eDiscovery market, capable of delivering a comprehensive, integrated ECM platform for eDiscovery – with solid retention and records management, ESI collection and processing, classification, analysis and review. IBM ECM offerings for eDiscovery help manage litigation preparedness and response as a business process using a unified, flexible platform. Customers implementing IBM eDiscovery solutions are able to respond to eDiscovery requirements using internal resources to locate both unstructured and structured information, and at the same time can become more proactive because the solution is based on a strategic compliance platform. Whether it is for managing corporate governance and risk mitigation, increasing operational efficiency, or for achieving compliance with regulations, the same platform allows you to manage your current and future eDiscovery needs.

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- [1] *Business Wire*, "One Year Later" Kroll Ontrack Reveals the Most Significant Electronic Discovery Cases under the New Federal Rules of Civil Procedure," 28 November 2007.
- [2] *Patrick Mueller*, "Lawyer, Data, Money – Start now examining the products, partners, and processes you need to accommodate the feds' new rules of evidence," *InformationWeek*, 9 July 2007.
- [3] *Stacy Collett*, "Storage on Trial If your company is faced with a lawsuit, you could bear the burden of retrieving documents quickly. Here's how to be the hero," *Computerworld*, 8 October 2007.
- [4] *Debra Logan*, "Content, Compliance and E-Discovery: ROI in the First Fifteen Minutes," *Gartner Symposium/ITxpo, Orlando*, 10 October 2007.
- [5] *Michael Osterman*, "You really should pay attention to the FRCP; Federal Rules of Civil Procedure (FRCP)," *Network World Fusion*, 15 November 2007.
- [6] *Debra Logan, Whit Andrews, John Bace*, "Key Issues for Electronic Discovery," *Gartner Group Inc.*, 12 March 2007, p. 4.
- [7] *Same*.
- [8] *Jacquie McNish*, "Electronic paper trail tells that tale," *The Globe and Mail*, 23 May 2007.
- [9] *Craig Rhinehart*, "Simple steps to get on the road to compliance," *ZDNet.com News*, 2 October 2007, <http://news.zdnet.com/2424-9595_22-167781.html>.
- [10] *James L. Michalowicz*, "New Perspectives on Cost-Justifying 'Best Practices' ERM Programs: A Pioneering Case Study in Risk Reduction & Cost Reduction," *Managing Electronic Records Conference 2002*.
- [11] *Nikki Swartz*, "Putting Retention Management on the Right Track," *Information Management Journal*, 1 November 2007.
- [12] *Debra Logan*, "Content, Compliance and E-discovery: ROI in the First Fifteen Minutes," *Gartner Symposium/ITxpo*, 7-12 October 2007, p. 7.
- [13] *PR Newswire*, "2007 Proofpoint Survey Finds That 32% of Large U.S. Companies Employ Personnel to Read Employee Email; Nearly 28% have terminated employees for email policy violations; 20% have disciplined employees for improper use of blogs/message boards; 14% for social network violations; 11% for improper use of media sharing sites," 23 July 2007.
- [14] *Dow Jones News Service*, "Employee Email Increasingly Monitored, Used in Court," 31 July 2007.