White Paper

Taking Control of the Corporate Litigation Discovery Process:
Corporate America’s imperative to reduce risk, cut costs, and improve ROI in the digital age.

Gil Legault
Managing Principal
Corporate Litigation Management

Kimberly Grippe
Principal
Corporate Litigation Management

Glen M. Fowler
Principal
Corporate Litigation Management

Joel Wuesthoff, Esq.
Certified Information Systems Security Professional

Rev. January 2006
Introduction
Over the last 10 years, the corporate Office of General Counsel (OGC) has steadily lost control of the litigation process as the world increasingly operates in a digital economy. The definition of documents has been expanded to include electronically stored information, which means such things as metadata and deleted data. Additionally, a number of factors—including the complexity of digital documents, unprecedented regulation, and unrestricted outsourcing—have contributed to this trend.

The symptoms of losing control are pervasive and expensive. U.S. corporations lose millions of dollars annually due to the spiraling costs of managing multiple litigation vendors and the sheer volume of handling digital documents. The more immeasurable—but very real—dangers of ineffective document management processes include:

- The increased risk of Court sanctions for missing deadlines
- The personal exposure to corporate officers and inside/outside counsel for criminal and civil penalties
- The missed economies of scale opportunity made possible by repurposing data in multiple matters and jurisdictions

Although the costs, both hard and soft, continue to escalate, few corporations have taken steps to reverse the trend. This paper outlines specific factors affecting the discovery process and litigation readiness, as well as a framework that helps the OGC position themselves from a litigation readiness perspective.

The Challenges of Working with Electronic Information

The discovery process, which seeks to uncover the truth for all parties, is the cornerstone of civil litigation. From the time a complaint or a regulatory inquiry is filed until discovery closes, attorneys and clients work through a methodical process that encompasses:
- Document preservation
- Identifying the nature of the case and location of potentially relevant documents
- Document acquisition (paper and digital)
- Processing of electronic information to identify pertinent documents
- Paper and attorney review of all relevant and privileged materials
- Witness preparation and deposition

Fully 93 percent of all information generated in today’s business environment is electronic. Compiling, analyzing, and managing this flow of information forms the foundation of not only the case in question, but the counsel-client relationship. As corporations have exponentially increased their ability to exchange and store vast volumes of information and data through enterprise content management systems, attorneys struggle to keep pace with their clients’ data retention and retrieval architecture.

Meanwhile, litigation continues to become an all-encompassing element of business. Companies that actively prepare by having policies and procedures in place prior to imminent litigation are much more likely to avoid Court sanctions and manage Court-imposed deadlines. Equally important, proactive information management allows a company to focus on its core business, mitigate risk, and invariably drive down the costs of their overall legal services.

The reality, though, is that the OGC and attorneys have a non-delegable duty to monitor every aspect of the discovery effort. For instance, the marquee case supporting this argument is *Zubulake v. Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004), where Judge Shira Sheindlin enunciated a series of affirmative steps required of counsel relating to the preservation and production of electronic data.

Lawsuits these days require companies to comb through vast electronic archives as well as active data. The consequences of ineffective or incomplete discovery are wide-ranging and can include:

- Monetary fines/sanctions \(^1\)
- Exclusion of evidence/testimony
- Adverse inference
- Contempt
- Expanded discovery
- Partial default judgment
- Default judgment

The corporate ramifications for failure to control and process electronic information are severe. Recent examples include:

- $604.3 million in compensatory damages, plus $850 million in punitive damages—totaling 1.4 billion on a major diversified financial services and global securities business institution because it failed to turn over evidence in the case.
- $2.75 million fine on Big Tobacco for spoliation
- $8.25 million fine on five financial firms for violations of securities laws
- $10 million fine imposed on a multi-national financial institution
- $25 million fine on a worldwide telecom company

All of these Court decisions resulted from poor or deficient discovery processes that failed to unearth, account for, or preserve critical digital documents. While the fiscal effects are apparent, the personal liability to corporate officers and its counsel is equally alarming given the renewed emphasis on corporate accountability and ethics.

\(^1\) N.Y. Court Issues Spoliation Sanctions for Negligent Destruction of Email
Managing the Enterprise-Litigation Linkage

The linkage between records management and litigation is comprised of four elements:

- Enterprise risk management
- Records management
- Document management/imaging
- Litigation support and discovery

These elements evolve from pervasive financial and workplace regulatory standards that are regularly imposed by governmental agencies (e.g. SEC, DOJ, FTC, etc.). Over the past several years, data retention and retrieval requirements have been further highlighted by increased corporate compliance legislation, such as:

- The Sarbanes Oxley Act 2002
- Gramm-Leach Bliley Act (1999)
- Amendments to the SEC Act of 1934

As a company’s records management complexities increase, the systems and technology infrastructure that maintain these processes become even more convoluted.

In an effort to gain control and exact efficiencies when dealing with myriad information streams and storage/retrieval systems, companies are turning to outside vendors to manage the mountains of materials.

Outsourcing labor-intensive tasks to lower-cost economies has become a corporate fact of life. But managing records management and litigation is not a hands-off activity. The OGC routinely sources certain aspects of the discovery process to outside vendors.

Re-thinking the Document Management Workflow

The traditional document management workflow between the OGC and its various providers is disconnected from the other (Fig. 1). In a non-digital environment, where documents existed in paper form and were laboriously shared among the vendors, there was an inherent acceptance of workflow gaps during the discovery process.

In today’s digital workplace, where information is regularly created, stored, and destroyed without human intervention, the OGC and its vendors must better synchronize document workflow processes. While the nature and volume of information has changed dramatically over the years, the rules of discovery have not. Documents are considered documents whether they’re housed in a dusty bin or a remote server. And even if the information’s half-life is measured in seconds, a case’s outcome can hinge on the OGC’s ability to retain, retrieve, and analyze that data.
The Five Components of Discovery Workflow

The discovery process has grown in complexity and scope as paper documents have been superseded by electronic data to become the primary source of evidence in civil litigation. The OGC should employ new strategies and tactics appropriate to this landscape.

The five components of the discovery management process are:

1. Data identification and preservation
2. Data acquisition
3. Culling, filtering, & processing
4. Document review
5. Production and delivery

A well-crafted document retention program combined with a robust records management system will enable the rapid identification of information needed for any given matter. Knowing “what you have” makes it possible to selectively preserve what is required, while lessening the burden of a “litigation hold” for all documents “not reasonably anticipated to be responsive.”

Alternatively, a failure to be organized, (the current state for many corporations) can make the entire discovery process more complicated, particularly in the areas of identification and acquisition.

In many cases data may be missing or altered through neglect, oversight, or purposeful deceit (spoliation). Utilizing Forensic methodologies throughout the acquisition process makes it possible to find and resurrect missing or damaged data, while certifying and defending the comprehensiveness and validity of the collected information.

Data resides in both electronic and paper form. Data can be further delineated by what is “structured” (e.g. databases, email) and “unstructured” (e.g. paper, memos, letters, or loose files). Systematically collecting electronic and paper documents, while adding structure to otherwise unstructured data, is the fundamental starting point for establishing relevance. Processing these collected bits of data allows for a logical translation of seemingly unrelated information into a cohesive whole.

Attorney document review is the most time consuming and expensive component of discovery. For example, an average case can involve roomfuls of documents and terabytes of electronic data. Investing in the infrastructure to support essential review activities displaces critical capital from an organization. A well-designed web-based repository enables litigation teams, (i.e. Joint Defense Groups (“JDGs”) and Multi District Litigation (“MDL”) to collaborate online and exchange pertinent information about the document universe. This empowers the OGC and its outside case teams to efficiently analyze information, while leveraging the most cost effective resources for each part of the process.

Production of the Responsive document subset is often the least contemplated aspect of the discovery process. Planning should include a cost/benefit analysis for delivery formats including Native Files, Imaged Files (Tiff’s or PDF’s), and Paper. Different matters require different solutions: based on the amount of information, the review format and the desired level of cooperation between the parties. For example, when working with the SEC or DOJ there is often cause for a more collaborative environment.

These five “must-have” elements can be viewed as pieces to a puzzle—each distinct, but inter-related. The activities can jumble and overlap into an inefficient (and costly) mess of missed deadlines, meaningless metrics, and lack of accountability. Conversely, they can mesh together into a seamless process under the direction of a single source.
Conclusion: Aligning Best Practices and Technology to the Discovery Process

By establishing consistent management processes for organizing discovery across matters and various outside counsels, the OGC can benefit from more consistent and predictable results. This would include reduced costs, more favorable outcomes, and improved ROI.

Technology enables efficiency, but the e-discovery solutions available to the OGC must be considered as a collective whole for the most productive process redesign.

For example, imaging capabilities allow for the capture of and digitization of paper documents. Likewise, electronic information in the form of emails, memos, and databases can be moved easily from one storage system to another.

In and of itself, capturing and collecting data in digital form greatly eases the storage of information. But capacity constraints can quickly lead an organization to trade one type of storage (file cabinets in storage) with another (gigabytes on hard drives). Virtual repositories, on the other hand, allow for practically unlimited storage potential.

But capacity is only part of the equation. Virtual repositories must be efficiently accessible so that the proper information is readily available. To accomplish this, documents themselves can be made intelligent through technologies that recognize the content within the document. This type of artificial intelligence, known as Smarter Document Management (SDM), builds an automatic awareness into the document and bypasses the need for human intervention to categorize, store, analyze, and retrieve the information.

Documents can be made “smart” either at inception or during the imaging/digitization process. This applies to both structured (e.g. databases) and unstructured (e.g. memos, letters) information. Applying SDM solutions to the collective body of knowledge greatly reduces the need for human intervention and analysis during the storage and retrieval process. The productivity gains, in turn, are enormous.

When digitized input processes are aligned with intelligent retrieval systems, the summary effect unlocks tremendous productivity gains and maximizes the OGC’s discovery capabilities.

Next Steps:

1. Know what you have—be proactive
   - records management & records retention
2. Establish Policies, procedures, and compliance
3. Identity mapping across the enterprise
   - Identify key individuals
   - Identify key processes
4. Create/Assign a Litigation Response team
   - Secure internal experts
   - Secure external partners
5. Establish an Acquisition and Preservation strategy
6. Identify Trained IT departmental personnel
7. Procure outside resources as appropriate
8. Maintain protocols for Defensible Chain of Custody
9. Establish secure archive or repository and ensure the technology is scalable
10. Standardize Your Method of Review
    - Combining electronic and paper
    - Advanced conceptual search technologies

For Additional Information on Best Practices and Managing Electronic Discovery, please refer to the following resources:
- The Sedona Principles
- Electronic Discovery: Law & Practice, by Adam Cohen, Co-Author & David J. Lender
- IDC, Worldwide Information Management for Compliance 2005-09 Forecast and Analysis, by Julie Rahal Marobella
- The Socha-Gelbmann 2005 Electronic Discovery Survey
**About the Authors**

Gil Legault  
Managing Principal  
Corporate Litigation Management

As Managing Principal of Corporate Litigation Management services for Xerox Global Services, Gil Legault works exclusively with offices of General Counsel for large corporations. He consults with major clients to reengineer document-intensive business processes that are critical to the legal community, using his knowledge of computer science and Lean Six Sigma processes. In this role, he helps his clients streamline their discovery process and manage a wide range of paper and electronic documents.

Legault and his team have extensive experience improving document-driven business processes designed around delivering measurable results for clients. His unique background and understanding of the discovery process allow Legault to find cost savings and leverage state-of-the-art solutions and services for legal departments and their outside counsel. This results in improved velocity, consistency, and increased capacity during the litigation discovery process.

Kimberly Grippe  
Principal  
Corporate Litigation Management

Kimberly Grippe serves as a Principal for the Corporate Litigation Management services group of Xerox Global Services. With more than 15 years of experience in the litigation support technology field, Ms. Grippe has experience in all aspects of litigation support, primarily on large scale—complex litigation, production and operations, sales support, war room and Court room support, digital imaging, litigation and discovery management, database administration and process automation, and data conversion.

Prior to joining Xerox Global Services, Ms. Grippe founded the Multimedia Practice at TrialGraphix, managed the Litigation Support Practice for 11 offices of Holland & Knight, and more recently served as the Practice Support Services Manager for a major New York law firm. Ms. Grippe also served as a consultant for a National Trial Support firm: FTI Consulting.

Glen Fowler  
Principal  
Corporate Litigation Management

Glen Fowler serves as a Principal for the Corporate Litigation Management services group of Xerox Global Services. With more than 17 years of experience in the litigation support technology field, Mr. Fowler has experience in all aspects of production and operations, digital imaging, litigation discovery management, data conversion, and forensic analysis. Additionally, he has set up and managed over 40 on-site service centers within law firms and corporations, providing document management services.

Prior to joining Xerox Global Services, Mr. Fowler worked in varying capacities providing imaging, coding, printing, forensics, and e-discovery and facilities management services. Fowler has been on the founding team of several companies including his role as CEO for Applied Solutions, Inc. He has worked in leadership and consulting positions for national companies that include Merrill Communications, Pandick Technologies, and Pitney Bowes Management Services.

Joel Wuesthoff, Esq.  
Certified Information Systems Security Professional

Mr. Wuesthoff is an attorney and a Certified Information Systems Security Professional (CISSP), and serves as Senior Consultant for Ibis Consulting, Inc., an electronic discovery provider. Mr. Wuesthoff has twice appeared as an expert panelist on electronic discovery issues in front of New York’s Supreme Court Commercial Division Justices.