

Litigation Support Managers face up to *more challenges in the post 12-1-06 FRCP world*

By Rick Wolf and
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There was a great deal of heated discussion leading up to the adoption of new Federal Rules of Civil Procedure (FRCP) on December 1, 2006, and for good reason.

These new rules will have an immediate and lasting effect on corporate law departments and forever change the way companies manage litigation. In many organizations, the onus of navigating through the uncharted waters of so-called e-discovery falls on litigation support managers.

The new rules require parties in every civil case filed in federal court to discuss and disclose all relevant electronically stored information (ESI), broadly defined to include email, web content, voice messages, presentations and spreadsheets, and any other type of information stored in electronic form. At the outset of every case, parties must exchange a copy, or description by category and location, of all relevant ESI, as well as a description of "inaccessible" ESI a party declares it will not search or produce. After making these initial disclosures, but before the hearing at which the court enters a scheduling order for the case, the parties must meet and confer about the preservation, disclosure and ultimate production of ESI, including the form(s) of production, and negotiate an agreed discovery plan for court approval.

While these changes to the FRCP raise a variety of complex and interesting legal

issues, the rules are having a dramatic effect on the way companies manage litigation. Although organizations always have had duties to preserve information needed for legal proceedings, the old way of managing litigation did not focus on "hold management" so early in the litigation process because most discovery involved paper documents. With the new prominence of ESI and the ease with which employees and IT administrators can inadvertently delete or write over ESI so it is not discoverable, hold management procedures must be seamless, efficient and take place well before involving outside counsel. Establishing new hold management processes also bring to light deficiencies in records management policy compliance, and most organizations lack effective policies and procedures in this area. Because organizations need new business processes and better

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policies to deal with e-discovery, the role of the litigation support manager is more critical than ever and in-house counsel is increasingly leaning on him or her for answers.



Companies do not quickly respond to change. While we knew the amendments were coming for many months, the vast majority of organizations did not prepare and are already behind the eight ball. The problem, however, is that there are no Mulligans or second chances in federal district court, and litigation support managers and analysts need to be ready now to respond to e-discovery challenges. The stakes just got higher. If you are not sure where to start or how to prioritize what appears to be an endless flow of critical tasks, consider these four areas:

Understanding the matter and the risk profile

Effective e-discovery and litigation support management requires the litigation support professional to have an in-depth understanding of the client's risk profile on any particular legal matter and know how e-discovery might affect the client's investigation, trial or settlement strategy, in the near term and over the long term.

Know Your Organization -- Understanding IT Assets

Outside counsel and frontline e-discovery managers and analysts need to probe and understand the organization's IT ecosystem and nuance. Learning seemingly basic facts, such as knowing the number of email servers, how they are backed up for disaster recovery purposes, and who has access to which systems, can be very complex in large organizations and getting IT personnel to share system information with law professionals is new. You must have a firm grasp on your organization's IT systems, and must befriend your IT colleagues. Outside counsel needs a map to your organization's IT infrastructure and you will need to keep that critical information up to date.

If you are not conversant with the basic IT infrastructure of your company you can expect bad consequences in litigation. Mistakes around insufficient data collection/preservation methodologies invariably result from an attrition of meaningful communication; that is, nobody asked the right questions. Assume nothing and ask probative questions of both counsel and client. Most of all make IT your friend!

Understanding your e-discovery bench strength

Litigation support personnel need to develop and have available a preferred network of e-discovery service providers ready to quickly and efficiently respond to their demands. Do not underestimate the importance of having qualified outside specialists who know your company and systems, but also do not underestimate the complexity of assembling such a team. The e-discovery vendor market is highly frag-

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mented and slowly maturing. Having such a pre-screened team of proven outside service providers in place will yield many benefits. Your organization will have the ability to identify and swiftly match instant needs with the right service providers who have consistently demonstrated core relevant competencies. In an accelerated selection and procurement process, litigation support professionals must be able to recognize and point out deficiencies in qualifications or pricing that may not be readily apparent to counsel and client. Further, you need to be able to translate pertinent technical information in a way that is both understandable and actionable for counsel.

Understand the Cost Matrix

In the early stages of litigation, clients need an accurate budget of litigation costs. Until now, organizations have not tracked these costs very well, principally because outside counsel embedded these expenses in legal bills or because finance

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teams did not insist that you break out and track the information separately from other costs. Considering the high expenses involved with e-discovery and anticipated frequency of these costs, you will need to devise a process to separate these costs, providing adequate analysis. Work with your finance or procurement department to establish a process for comparing proposals submitted by invited e-discovery service providers and tracking the costs of those retained for budgeting and forecasting purposes. Include line items covering collection,

culling, production and attorney review.

Conclusion

The recent changes to the FRCP addressing management and handling of ESI have now significantly elevated the role and responsibility of frontline e-discovery managers. Given the dynamic usage and



reach of ESI coupled with the ever-growing portfolio of risks that ESI presents to the corporate client, today's thought-leading litigation support manager is a:

- More proactive fact-finder with initial case and risk assessment
- More versatile communicator across a multitude of fundamentally different corporate functions and business cultures
- Better prepared operations manager who can handle a network of specialized service providers in a complex emerging field
- More informed project manager who monitors complex matters in coordination with inside and outside counsel, corporate functional groups and a maturing e-discovery industry
- Critical to the success of any legal team. LSJ

About the authors

Rick Wolf is the founder of Lexakos (www.lexakos.com), a business advisory group that specializes in litigation holds management, compliance, records management and e-discovery controls. Matt McCarrick is CEO of Litigation IT Solutions (www.litigationit.com), a legal technology-based business advisory group specializing in services benchmarking and procurement, as well as service provider consolidation programs.