

Living Dangerously

Several months after the amended Federal Rules of Civil Procedure took effect, many companies remain woefully unprepared for electronic document discovery requests.

Nikki Swartz

Any organization – large or small, public or private, for-profit or not-for-profit – can be smacked with an electronic discovery order at any time. According to research from the Enterprise Strategy Group, 47 percent of U.S. businesses with 20,000 or more employees, and 56 percent of those with between 1,000 and 4,999 employees, received requests to produce electronic documents related to a lawsuit in 2006.

The amendments to the Federal Rules of Civil Procedure (FRCP), which went into effect December 1, 2006, require U.S. businesses to implement policies and procedures for producing their electronically stored information in the event of a federal lawsuit. Under the amended federal court rules, companies are responsible for preserving electronic documents, making disclosures regarding their electronic systems, and producing

those documents within 30 days of a request related to an investigation or lawsuit.

Recent studies have revealed that far too many businesses are woefully unprepared to comply with the FRCP requirements today – more than six months after the new rules took effect.

Surveys: Firms Unsure, Unprepared

Recent research reveals that many organizations – especially smaller ones – seem to be burying their heads in the sand when it comes to preparing their business for possible e-discovery requests. Few are taking the

Estimated E-Discovery Market

As most companies – 95 percent, according to recent studies – create and retain the majority of their critical organizational information digitally, the electronic discovery market continues to increase.

Year	Market Growth (in billions)
2005	\$1.295
2006	\$1.768
2007	\$2.423 (estimated)
2008	\$3.134 (estimated)

Source: 2006 Socha-Gelbmann Electronic Discovery Survey

steps necessary – and required by the FRCP – to manage their electronically stored information properly enough that they could quickly produce it in the event of an investigation or litigation.

For example, in a survey of 166 U.S. professionals involved in the information and storage management fields conducted in March and April 2007 by Xiotech Corp., a file management technology provider, only 39 percent said they had a system in place for implementing legal holds to prevent the accidental deletion of critical records. Fewer than 25 percent said they had taken steps to comply with the new FRCP amendments. In fact, of the respondents who said the average size of their company's typical lawsuit exceeded \$100,000, only 40 percent said they had taken such steps.

Another survey from e-discovery management software vendor Discovery-Box and Strategic Discovery Inc., which helps businesses respond to e-discovery challenges, revealed that 83 percent of IT decision-makers are unprepared for litigation under the FRCP because their organizations lack a comprehensive document preservation system. The survey of 336 senior technology executives – 58 percent of companies represented have more than 5,000 employees and 8 percent have fewer than 500 employees – conducted during a technology conference in May showed just how unprepared most firms are for e-discovery issues. According to the survey, only 17 percent of respondents said their companies have a comprehensive system in place to prevent employees from deleting data that is required for litigation or investigations. Even more startling, 67 percent said they were either not aware of or were unfamiliar with the process used by their firm to collect electronic data for lawsuits.

Considering that all U.S. organizations are subject to the FRCP guide-

Schools Not Exempt from FRCP

According to a recent survey of IT administrators in kindergarten through 12th-grade schools, 90 percent said they have no plan in place for electronic discovery.

The findings, released in May by storage provider CommVault, revealed that only two-thirds of respondents were even aware of the amended Federal Rules of Civil Procedure (FRCP), which took effect in December 2006 and require organizations to provide, within 30 days, electronic records pertinent to a federal court investigation or lawsuit.

In addition, 80 percent of respondents said they were unclear about their governing school district's e-discovery policies, according to the survey. Overall, a CommVault official said in a release, the survey results indicate a disconnection between schools' awareness of the issues related to FRCP rules and their legal discovery preparedness.

For example, while the survey revealed that most school districts are fully aware of legal amendments, many of them have yet to establish policies to address electronic discovery for schools. By not appropriately managing and retaining their electronically stored data according to federal rules, district administrators are exposing their schools to potential litigation risk and costly legal action, the CommVault official said.

When asked to define their top priorities for FRCP compliance, 90 percent of schools cited overcoming cost and resource barriers, and 60 percent mentioned reducing the administrative burden of managing e-mail and archives. Sixty percent also named mitigating risk and learning what FRCP means for a given school district as priorities.

lines, the survey had few positives. For example:

- 67 percent of respondents said it would be extremely or somewhat difficult to find e-mails and documents if a legal issue arose.
- 43 percent of those who were ordered to hold records for litigation admitted they were not able to collect all the documents requested.
- 23 percent were unaware that the FRCP were amended in December 2006 to include new document preservation and electronic system disclosure requirements for litigation.
- 58 percent said they were given no or unclear instructions on legal

holds, or their execution of the legal hold was flawed.

The Discovery Obligation

Unless individuals and organizations suddenly stop filing lawsuits, e-discovery is not a problem or issue that will go away. Recent surveys have shown that an average U.S. company faces 305 lawsuits at any one time, and large firms with \$1 billion or more in revenue deal with 556 at once.

Of course, each and every lawsuit means that there is a good chance that a firm will be required to produce electronic records in a short amount of time. There may be firms out there that still produce and retain information – such as contracts, receipts, and bills – totally in paper form and file

cabinets, but they would be in the minority. According to a *Network World* report, 95 percent of all business communications today are created and stored electronically. That means most organizations are subject to e-discovery laws and are responsible for evolving their information practices and processes so they are in compliance with the amended federal rules.

Companies that are still unprepared for e-discovery risks – and have yet to begin a comprehensive program for complying with the new FRCP – are living dangerously. Not complying and not managing electronically stored information properly can cost an organization millions in fines and adverse legal decisions. Most businesses probably realize this but may still think, “It won’t happen to us.” But in today’s business environment, that kind of thinking can put an entire organization at risk. ■

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