

## New Federal Rules Put Premium on E-discovery Systems

*By Carol E. Curtis*

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Changes to the U.S. Federal Rules of Civil Procedure, effective Dec. 1, are spurring a new generation of electronic discovery solutions as companies face a mandate to have systems in place to manage all digital information throughout the enterprise. The changes formally codify the principle that information in digital form is no different from other documentation that is subject to discovery in legal proceedings. As frequent targets of lawsuits requiring production of e-communications, financial services firms are likely to be particularly affected.

"This means that now, when you have e-discovery requests, you must address electronically stored information simultaneously" with other document requests, said Nicholas C. Croce, president of Lynbrook, N.Y.-based Doar Litigation Consulting. This requires defendants to manage and control all their electronically stored information and, in effect, to "to treat their data uniformly," he said.

Among other things, the changes address what is reasonably accessible for discovery, including electronically stored information, production formats and accidental loss of electronically stored information. As a practical matter, experts say, companies involved in legal discovery will need to be prepared to field technology experts as witnesses, maintain an inventory of information assets classified by system, enable and encourage central storage of electronic information, make their policies available and accessible and have an established procedure for suspending destruction of documents.

Securities firms face a unique set of problems, Croce explained: "As a result of utilizing technology and becoming efficient, [the securities industry] has created a much larger challenge to include all of that as discoverable information."

### Proliferating Solutions

Software vendors are responding with a plethora of new programs for managing e-communications. At an Oct. 24 briefing in New York sponsored by software provider Autonomy, Debra Logan, research VP at consulting firm Gartner, said she has seen "a lot of opportunism" in the way the software industry is reacting to the changes. Gartner has identified no fewer than 475 vendors in the space, she said, 60 of them "legitimately in the e-discovery business."

The vendors clearly see a giant opportunity. Logan estimates that in 2007, at least 75 percent of all global companies will be involved in legal or regulatory actions that require a systematic approach to e-discovery. Right now, she contended, "There is not a single corporation that has an effective e-records policy that has been implemented across

the board." As a result, Gartner projects that by 2008, 60 percent of the largest 2,000 companies in the world will implement enterprisewide records management solutions, up from 20 percent in 2004.

At the briefing last week, the Aungate division of Autonomy, which has offices in San Francisco and Cambridge, England, unveiled its "electronic document discovery and real-time monitoring solution," based on the Autonomy Idol platform. The software allows firms to index more than 1 billion documents, Autonomy said, while providing automated filters to reduce the data set and cull nonrelevant information across terabytes of data.

Autonomy said the solution helps companies and other entities, such as investment advisers, achieve real-time governance by "automatically understanding the content and interrelationships of all enterprise communication, including e-mail, voice and instant messaging."

Aungate's real-time policy management module also enables firms to monitor e-communications, including e-mail, instant messaging (IM) and voice content, and automatically issue alerts regarding relevant content. The system can be deployed using key words, conceptual descriptions or existing samples.

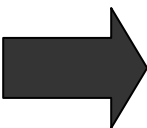
Logan noted that judges are increasingly disinclined to be lenient about failure to fully and promptly comply with requests for e-communications. "If you can use technology to cut e-discovery costs, you will have a very fast payback period," she said. "The legal defense that the computer ate my homework' no longer prevails."

Logan also maintained that the impact of the rule changes will be top of mind in the information technology field next year. "Until now, the legal implications [of e-discovery] have not been clear," she said. "IT needs to be involved. Policy needs to be automated. This will make a big difference in the way firms run their IT departments. This is the IT story of 2007."

### **Avoidance Is Costly**

For companies that choose to outsource e-communications management, she estimated that from collection to production, the process costs between \$2,500 and \$4,000 per megabyte. "The problem is that everyone has looked at this as an expense," Croce said. "Now, the cost of not doing it could be greater."

Croce, whose clients include many financial services organizations, noted, "The securities industry has been hammered by the speed with which electronic discovery has become a factor in litigation." For example, when traders routinely record phone conversations to ensure that their trades are accurate, the recordings are now discoverable under the rules. "The message is that electronically stored information covers everything," Croce said. "That includes security surveillance tapes, e-mail, voice, IM, BlackBerrys, online storage, blogs and Web sites."



Steve Chan, VP of business development at San Jose, Calif.-based ZipLip, noted that the new rules also address procedures for handling inadvertent disclosure of privileged communications. Accordingly, ZipLip, which provides an end-to-end system for e-mail archiving and compliance that is in place in at least one top Wall Street bank, has created "automatic attorney-client privilege flagging," a solution that presorts and identifies potentially privileged information.

By Dec. 1, "companies will have to have some type of retention policy in place" for all electronic communications, Chan said. "They will have to store it and make it retrievable."

Ian Black, managing director of Aungate, said that its technology already powers some of the largest enterprise real-time monitoring and retention implementations. "This latest release leverages Autonomy's Idol platform to provide ... a complete range of real-time governance and electronic document discovery solutions," he said. Autonomy clients include the Securities and Exchange Commission, New York Stock Exchange, National Association of Securities Dealers, Standard and Poor's Corp., Merrill Lynch & Co., Credit Suisse and intelligence and defense agencies worldwide.

<http://www.securitiesindustry.com/article.cfm?articleid=18750&searchTerm=ziplip&page=1>