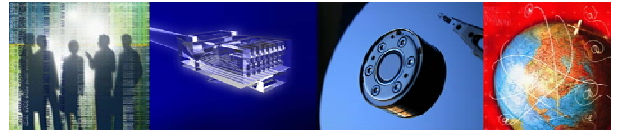




IT Knowledge • Business Results



# White Paper

## Leveraging IT and Electronic Discovery Technology to Meet the Expected Challenges Posed by Recent Changes to the Federal Rules of Civil Procedure

By Brian Babineau  
Analyst  
Enterprise Strategy Group  
Intelligent Information Management

October, 2006



**The following white paper is sponsored by  
Index Engines:**

*Leveraging IT and Electronic Discovery Technology to Meet the  
Expected Challenges Posed by Recent Changes to the Federal  
Rules of Civil Procedure*

**October 2006**

Index Engines  
960 Holmdel Road  
Holmdel, NJ 07733

☎ (732) 817-1060  
① [info@indexengines.com](mailto:info@indexengines.com)  
🌐 [www.indexengines.com](http://www.indexengines.com)

# Table of Contents

---

Table of Contents .....	1
Executive Summary .....	2
Introduction.....	2
Electronically Stored Information Changes Traditional Discovery Processes .....	3
Ignorance is Not an Excuse for Lack of Preparedness.....	4
The First Step: Understanding Your Enterprise Information.....	5
Conclusion .....	6

## Executive Summary

---

When it comes to electronic discovery, the process of producing digital information as part of a legal matter, ignorance is no longer bliss. The massive volume of enterprise data located in file systems, applications, preprimary storage and archives can be, at any time, discoverable. Recent amendments to the Federal Rules of Civil Procedure (FRCP) underscore the increasing amount of legal matters that involve electronically stored information. Organizations will need to alter discovery processes to rely more on IT as information needs to be located and, in some cases, restored before it is reviewed. An overarching theme in the FRCP changes is the need for organizations, especially general counsel, to comprehend what information it has and where it is. This insight can prove invaluable as parties negotiate conditions of discovery and prepare strategies in support of litigation.

## Introduction

---

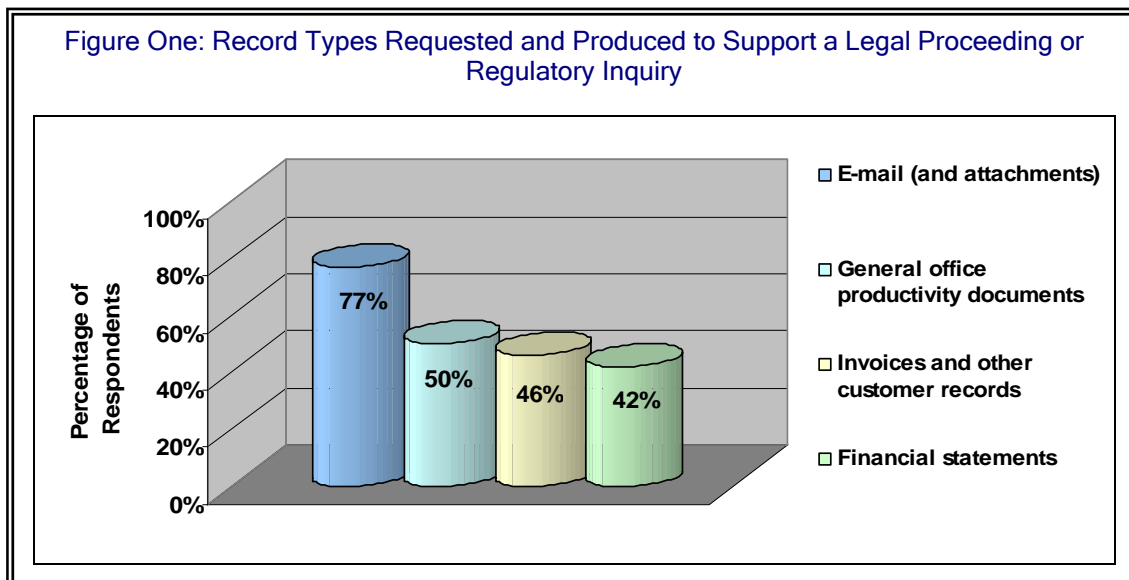
ESG research estimates that 91% of organizations with a workforce over 20,000 employees have been through an electronic discovery event involving e-mail in the past twelve months. You may say to yourself that is to be expected because large enterprises conduct international operations, manage more people and are subject to more regulations – all of which increases legal exposure. However, our research also reveals that out of all of the organizations we surveyed, regardless of their revenue or number of employees, 46% had been through an electronic discovery event. One out of two businesses have been forced to look through servers, offline archives, applications and other IT systems to satisfy discovery requests made by courts or to comply with internal corporate governance policies designed to mitigate internal risk.

Traditional discovery processes involve corporate counsel and external attorneys deposing ‘interested parties’ and photocopying paper documents deemed relevant to a specific matter. Nowadays, this process has become much more complicated, as attorneys need to rely on IT departments to search desktops, servers, backup tapes, e-mail applications and other data center systems. Issues including Congressman Mark Foley’s messages to an employee and Hewlett Packard’s memos to board members highlight the legal risk of e-mail. Of those organizations that have been through an electronic discovery during the last year, ESG estimates that 77% have had to produce an e-mail. Organizations must be aware that all electronic information - work productivity files, database records, x-rays and other content - could be discoverable at any given time.

While high profile events such as the Martha Stewart e-mail requesting the sale of ImClone stock based on insider information remind attorneys that it only takes one implicating message to turn the tide of any legal matter, amendments to the Federal Rules of Civil Procedure (FRCP) will keep electronic discovery at the forefront of general counsel and IT department’s minds and budgets for the foreseeable future. The FRCP defines the rules of civil law and governs how courts function. These rules also determine the process of motions, pleadings, remedies and judgments for civil cases. On December 1, 2006, new amendments that provide guidelines for the request, production and good faith destruction of electronic evidence will be added to the FRCP. As a result, organizations will be required to understand and locate all electronic information. Further, organizations must be able to measure the cost to access electronic information if it is requested as part of a discovery process. Because many IT departments do not fully understand the extent of the data it creates and stores across all applications, the changes to FRCP could handicap in-house attorneys and occupy IT staff when preparing for or responding to a discovery request. In fact, the amendments should serve as a catalyst for many executives, including general counsel, to sponsor IT initiatives that can facilitate the identification and location of all enterprise data.

## Electronically Stored Information Changes Traditional Discovery Processes

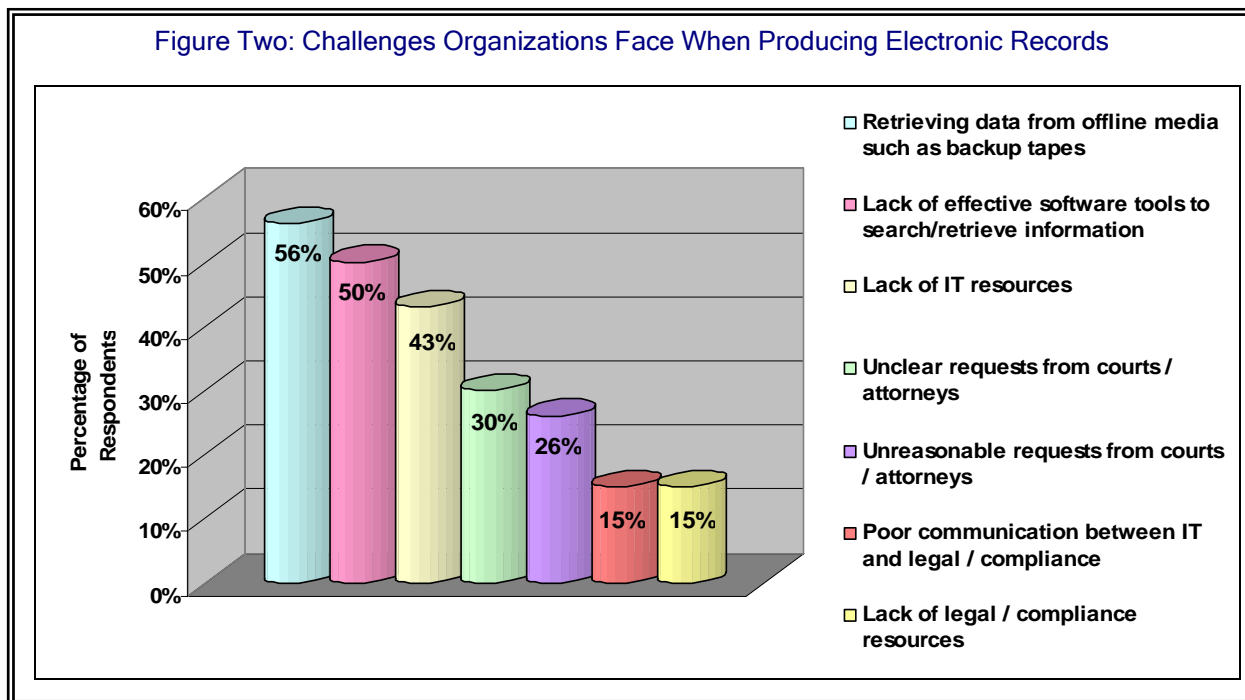
Although ESG is comprised of technology analysts, not legal experts, our quantitative research as well as discussions with enterprises indicate that IT departments are now an integral part of the legal discovery process. The predominant reason for the addition of this group to the process is the profile of the evidence being used to negotiate and argue legal matters ranging from executive malfeasance to employee rights. Employees, inclusive of senior executives, communicate almost anything over e-mail and regulators and litigators continue to prey on these messages - past and present - as primary sources of evidence. In addition, contracts, human resource application data, financial and other electronic documents all can become evidence. These sources of electronic evidence are depicted in Figure One. Historically, attorneys deposed key individuals involved in a case, photocopied and reviewed the contents of the file cabinets and desks of these individuals and may have searched phone records to string together the whereabouts or communications trail of an 'interested party.' These activities, traditionally performed by a combination of in-house and external counsel, are still relevant, but more frequently, the search, retrieval and review of electronically stored information is part of the discovery process.



Electronic discovery provides unique challenges to organizations as the location, restoration and review of information can be extremely resource-intensive. Many general counsel need to rely on IT to assist with the first two steps: determining the data that exists and where it is located, as well as making it accessible and reviewable by attorneys. Information may reside on desktops, storage systems, application servers, databases and backup tapes. For example, e-mail messages could be saved on an employee's desktop (as a .pst file), on the e-mail application server and on a backup tape that copied the data from the message server. Depending on the data's location, restoration can become an expensive obstacle. With costs hitting an estimated \$2,000 to \$3,000 per backup tape, many customers spend millions of dollars paying service providers to restore data from offline storage media as this is where large capacities of historical information is often retained. In fact, 56% of organizations cite retrieving data from these sources as the largest challenge related to electronic discovery.

Figure Two notes that organizations struggle with searching and retrieving information, an issue that occurs after data is restored. In many cases, organizations cannot easily identify specific files or messages that are relevant to a particular case. As a result, general counsel have entire applications,

file systems and mailboxes restored while attorneys read through all of this information in an attempt to filter pertinent information. Attorneys bill out at relatively high rates, making the manual search process costly, with risks including turning over more information than originally requested to opposing counsel and overlooking or missing data that could be critical evidence. The goal for organizations in the midst of a legal matter is to reduce costs during the discovery process. An easy way for in-house counsel to minimize expenses is to leverage IT resources to index, search and cull through the massive volumes of data. Once relevant data is located, external counsel can assist in the review process. This process will focus the billable resources on the process of building their case rather than manually searching through computer files in hard copy format.



IT can assist in restoring information to a format that can be indexed and searched. The next logical step to reduce the time it takes to search and review data is to invest in the appropriate technology. Many organizations fail to extend IT's role in helping to identify and implement these solutions, instead relegating the department to identifying where data is and managing the restoration process (either internally or with a service provider partner). In contrast, other customers may not have the IT resources to support the increasing focus on electronic evidence, inevitably leading to the outsourcing of the entire process - a potentially expensive proposition given the increasing frequency of electronic discovery requests.

## Ignorance is Not an Excuse for Lack of Preparedness

A common mistake that many organizations make is coupling electronic discovery with the financial services industry, especially the large Wall Street broker/dealers and investment banks. While many of these financial service institutions have found themselves in the media as a result of inappropriate e-mails, electronic discovery events, according to ESG Research, can be correlated to the size of an organization rather than its industry. As previously mentioned, 91% of companies with more than 20,000 employees have been through an electronic discovery event where an e-mail had to be produced in the past year. Over 50% of organizations with greater than 1,000 employees have had

similar experiences. Figure Three further confirms that electronic discoveries can happen to any organizations regardless of the industry.

The major reason that all organizations must, at the very least, reevaluate their electronic discovery processes and the technology that supports them is the addition of the recent amendments to the Federal Rules of Civil Procedure (FRCP). These rules, which govern all aspects of civil law, have been recently updated to include more specific guidance on the treatment of electronically stored information. In ESG's opinion, the most significant change is outlined in Rule 26(a)(1)(B) that states that organizations must to be able to identify, by category and location, electronically stored information that it may use to 'support or defend claims.' The amendment states that this capability should exist before a discovery request for specific information is made. Many organizations may not be aware of the electronic information it currently has or where it is. Think about it - how many general counsel know that specific data that exists on backup tapes and where those tapes sit?

There are several other amendments to the FRCP that organizations should become familiar with. The changes magnify the increasing focus on the process to produce electronically stored information requested in discovery events. It is the responsibility of the general counsel's office to stay abreast of changes to the FRCP. However, general counsel should quickly engage with IT, especially when attempting to grasp all of the electronic information that exists in the organization. More importantly, when this conversation occurs, both groups should quickly identify any issues that could arise as the result of not being fully aware of the scope of data that is created and stored by the organization, and more importantly, discuss ways to solve these issues, as the new FRCP rules go into effect December 1, 2006.

## The First Step: Understanding Your Enterprise Information

Since its inception in 1938, the FRCP has undergone ten major revisions, including those related to electronic discovery in 2006. The changes will clarify some of the confusion about the cost burdens associated with producing inaccessible information and, will, more than likely lead to the request of information in electronic format, facilitating quicker searches. The modifications should also increase an organization's awareness that electronic discovery events will continue to increase, requiring a change to existing processes. With Rule 26(f) requiring opposing parties to immediately meet and discuss issues related to electronically stored information, it is imperative that respective counsel actually comprehend the digital data stored by their organizations.

The encouragement for immediate discussions regarding electronically stored information increases the need for organizations to contextually understand the information that it creates and stores.

### Figure 3 - E-Discovery, It Can Happen to You

*Non-financial industries are also subject to electronic data discovery (EDD) events*

Percentage of firms that have experienced an EDD request

- ✓ Telecom, 63%
- ✓ Government, 62%
- ✓ Energy, 50%
- ✓ Health Care / Life Sciences, 42%
- ✓ Manufacturing, 40%
- ✓ Education, 38%

Percentage of firms that have experienced multiple EDD requests per month

- ✓ Telecom, 70%
- ✓ Information Technology, 30%
- ✓ Government, 28%
- ✓ Health Care / Life Sciences, 18%
- ✓ Manufacturing, 15%

Source:  
ESG Research Report: *Digital Archiving: End-User Survey & Market Forecast 2006-2010, March, 2006.*

Organizations looking for a starting point when it comes to streamlining electronic discovery processes can start by attempting to locate all of their enterprise data. This exercise can be accomplished by building an information index which analyzes and catalogues full text and meta-data attributes (creator, date of last access, etc.) of files and e-mail. The index can be used to quickly search for specific content and help locate where it is stored, eliminating the manual efforts currently employed. Because attorneys will be required to understand their data and engage in discussions around it, the index can be leveraged relatively early in the electronic discovery process. By understanding the details of their organization's electronic information, attorneys can better prepare for negotiations around the discovery and production of data and even assess the risk associated with electronic files in order to proactively protect the company from future litigation.

An enterprise information index can also help reduce costs during other electronic discovery operations. Attorneys can easily search through data and identify relevant content. This can limit any data restoration expenses as counsel can hone in on specific files or messages to restore. With less data to restore, fewer resources are needed, creating the opportunity for the process to be handled internally (as opposed to outsourcing). Further, a more comprehensive index can facilitate more sophisticated filtering and search parameters which can produce the most appropriate and relevant subset of data. For example, an attorney may need to find all messages sent by 'Joe Smith' that contain the keywords "Company Confidential" because Mr. Smith just quit and now works for a competitor. In-house counsel can build a case for 'stealing intellectual property' against Mr. Smith. Attorneys can spend more time reviewing the right information as opposed to looking for it.

## Conclusion

---

It is hard to imagine any aspect of daily business that doesn't include computers or electronic information. However, the legal discovery process, up until recently, rarely focused on digital data. Presumably, regulators and litigators assumed that computer systems and associated data were inaccessible and that traditional depositions and photocopying exercises would suffice. The inherent value of this information began to outweigh the discovery costs while smoking guns for several high profile cases, including Enron, were uncovered in e-mail and other files. Now, the Federal Rules of Civil Procedure are being altered to emphasize the transition to electronically stored information, creating a compelling need for organizations to improve their information management.

Specifically, organizations must find ways to reduce the costs associated with downstream electronic discovery processes, including the location, restoration and review of digital data. General counsel must collaborate with IT to build a comprehensive understanding of the information that is retained, as well as where and how accessible it is. Failure to do so will continue to increase the discovery costs of the restoration of offline media and the unnecessary time spent by attorneys reviewing many more documents than are required. Organizations should also weigh the risks of producing too much information or failing to locate pertinent information because they were not aware the data existed. These costs and risks can be measured along with the benefits achieved by knowing the full scope of information that an organization stores and how to use that in negotiating discovery parameters or developing case strategies. The cost savings and potential benefits coupled with the changes that will result from the new FRCP rules should be enough to warrant an investment in time and technology for organizations to improve their understanding of electronically stored information.

All trademark names are property of their respective companies. Information contained in this publication has been obtained by sources The Enterprise Strategy Group (ESG) considers to be reliable but is not warranted by ESG. This publication may contain opinions of ESG, which are subject to change from time to time. This publication is copyrighted by The Enterprise Strategy Group, Inc. and is intended only for use by Subscribers or by persons who have purchased it directly from ESG. Any reproduction or redistribution of this publication, in whole or in part, whether in hard-copy format, electronically, or otherwise to persons not authorized to receive it, without the express consent of the Enterprise Strategy Group, Inc., is in violation of U.S. copyright law and will be subject to an action for civil damages and, if applicable, criminal prosecution. Should you have any questions, please contact ESG Client Relations at (508) 482-0188.



Index Engines delivers powerful indexing products that streamline the discovery, classification and management of data across the enterprise. The Index Engines platform is the only solution that understands storage protocols enabling wire speed and efficient collection of data from primary storage to tape archives. Our indexing engines are architected to affordably scale to any enterprise environment, providing full content and metadata queries across billions of documents.

The following models are currently available. Each model is delivered as a plug and play appliance that differ in how they collect data.

**SAN Engine** – In-band connection to the SAN for data ingestion. The SAN Engine understands backup software formats and performs wire speed indexing of data as it is backed up. Connects to tape libraries, VTL's and more.

**LAN Engine** – Out of band connection to network attached storage and archive devices for data ingestion. Data is streamed from network storage devices to the LAN Engine and immediately indexed. Connects to NAS, CAS, and D2D backup environments.

**Tape Engine** – Offline content is indexed directly from tape, eliminating the need to restore the contents. Search and find files and email without ever having to move the data online.

Once data is indexed it is immediately searchable using the browser based interface. Users can find any data across the enterprise, based on their security permissions, quickly and easily.

Contact us today to learn more.

Index Engines  
960 Holmdel Road  
Holmdel, NJ 07733

☎ (732) 817-1060  
📧 [info@indexengines.com](mailto:info@indexengines.com)  
🌐 [www.indexengines.com](http://www.indexengines.com)