

REPORT EXCERPT

the **451** group
*Analyzing the Business
of Enterprise IT Innovation*

E-DISCOVERY AND E-DISCLOSURE 2011

Crossing Clouds and Continents

The e-discovery market continues to grow, driven in part by new laws and regulations – and sanctions for e-discovery failures – forcing more corporations to implement e-discovery programs. As with any growing industry, challenges arise.

IM | INFORMATION
MANAGEMENT

the **451** group

AUGUST 2011

the **451** group

 Tier1Research

© 2011 THE 451 GROUP, LLC, TIER1 RESEARCH, LLC, AND/OR ITS AFFILIATES. ALL RIGHTS RESERVED.

THE 451 GROUP: INFORMATION MANAGEMENT

The following is an excerpt from an independently published report, 'e-Discovery and e-Disclosure 2011', published in August 2011 and reproduced by kCura with permission of The 451 Group.

SECTION 1

Executive Summary

1.1 INTRODUCTION

Our annual look at the market for electronic discovery (e-discovery, or e-disclosure as it is known in the UK) is an opportunity to step back from the day-to-day focus on overall trends in the market. Here, we examine not only how this growing industry is adjusting to new technologies, but also to new legal decisions and regulations.

Cloud computing has had – and will continue to have – profound implications for e-discovery. It enables organizations to store massive amounts of data without having to maintain an infrastructure while still offering quick, easy access. However, it involves storing sensitive, confidential documents on someone else's server, and as more e-discovery vendors offer hosted SaaS applications, the question of whether law firms and corporations should let their most important documents go beyond the firewall is critical. We do expect this anxiety to diminish, but current concerns are somewhat different to those people had a decade or so ago about whether to put their customer data online. Then, the concerns were mainly about security and reliability – is it safe, and can I get at it when I want it? With e-discovery, the concerns are all that and more because there are also jurisdictional issues to consider.

Of course, cloud computing is not the only technology affecting e-discovery. Social media has opened a Pandora's box of legal and technical issues for e-discovery. Who owns the data? Who is entitled to access, and how do you get the data? We will examine how courts have dealt with these issues.

Technology usually outpaces the law, and 2011 has been no exception. Judge Shira Scheindlin's Pension Committee decision caused some alarm among lawyers, some of whom saw the decision as a Draconian e-discovery mandate. However, other courts have refused to follow parts of the decision, most notably its mandates that legal holds must be in writing and its holding that some interpreted as a requirement to produce evidence whether it was relevant or not. Just as the 2006 amendments to the US Federal Rules of Civil Procedure created more e-discovery business, decisions such as Pension Committee are doing the same thing. Just look at how many vendors are now offering legal-hold products.

Conflict of laws continues to be an issue in e-discovery. What are lawyers and their clients to do when discovery mandates in the US are in direct conflict with privacy laws and blocking statutes in Europe? Technology sometimes offers answers, and cloud computing could be one. Just as new e-discovery requirements in court decisions drive e-discovery business, conflict of laws can do the same thing, as organizations use technology as a tool for compliance.

The past 12 months has seen a resurgence in M&A activity in this market, particularly in the first half of 2011. This report will review these transactions and look ahead at what might be coming next. As e-discovery crosses clouds and continents, we will analyze how these factors and others impact corporations, their lawyers, their software and service providers as they deal with new technology, new laws and new regulations.

1.2 KEY FINDINGS

- Growth in e-discovery overseas outsourcing continues, but the backlash has started in the form of US state legislation and a lawsuit in India to ban the practice.
- Cloud computing impacts e-discovery in terms of archiving and at the attorney review stages, even while information stored in cloud-based email and applications grows rapidly and with it, organizations' angst about where their data resides.
- Despite supposed security concerns about the cloud, the main applications that are implemented as cloud-based services are the ones that house the type of information most likely to show up as evidence in litigation. In other words, what's in the cloud is the very stuff that is likely to get you into trouble.
- Social media is a growing issue in e-discovery, with questions including ownership of and access to social media data. In 2011, US courts have ordered litigants to turn over their social media login credentials and comply with broad-based discovery requests.
- While no regulations are on the books yet regarding the archival of social media and Web-based email, compliance managers in financial services companies believe it is inevitable.
- The US Foreign Corrupt Practices Act and the UK Bribery Act will be key drivers of e-discovery in the next few years.
- European privacy laws and blocking statutes continue to present e-discovery challenges for litigants where these European laws are in conflict with US e-discovery law.
- We expect forensic-level collection functionality to be increasingly relevant in the European and Asian markets for use in internal investigations.

- Document retention and disposition remain challenging for organizations, especially because many have no written formal policies. However, with the number of spoliation sanctions having doubled in the first half of 2011 compared to the same period in 2010, we predict more organizations will be developing formal policies.
- The 2010 Pension Committee decision has been controversial, and other US courts have rejected its conclusion that legal holds must be in writing and have questioned its holding on the production of non-relevant evidence.
- M&A has picked up recently, with four deals in April and May 2011, three of which had a combined value of \$890m.
- We expect there is more to come in terms of M&A from the major IT vendors, notably EMC, IBM and, possibly, Microsoft. Oracle appears indifferent to this market.
- Geographic expansion is a key driver for M&A among service providers, especially involving US service providers entering the UK market. Expect similar activity from US companies into Canada, Australia, New Zealand, Singapore and South Africa.
- We expect consolidation among mid-sized UK law firms as liberalization of the market begins in October 2011 when non-law firms are allowed to provide some legal services.

SECTION 3

The Customers' Perspective

3.2 THE LAW FIRM: ZELLE HOFMANN VOEBEL & MASON LLP

Zelle Hofmann is a mid-sized law firm with five offices in the US, with its headquarters in Minneapolis. When a new national e-discovery counsel – Eric Mandel – joined the company in early 2009, he was charged with looking at all the software being used internally for what worked and what didn't. He quickly ascertained that Autonomy Corp's Introspect review tool, while being widely used, was not looked upon that favorably by users. The main problem with it was its performance, particularly for those using it outside the firewall, which, as a hosted review tool, is often the case in multi-matter cases. Another major issue was the level of customer support, which Zelle Hofmann didn't deem to be adequate.

So with the help of a third party, a business case and requirements list was drawn up, including interviewing people at different levels within the firm, as well as those outside the firm using Introspect. The firm looked at all the major licensed products, as well as the potential to outsource everything. After that process was complete, Zelle Hofmann chose kCura's Relativity hosted review platform. It is now used across all the offices, as well as by those outside the firm. The critical factor in choosing Relativity was the user experience, even though it is also cheaper to buy than its nearest rival. By the time the procurement process had got down to the final two options, it was about 25% cheaper than Thomson Reuters' CaseLogistix, the other tool being considered. But there's more to the cost of e-discovery software than the price of the license and maintenance; the cost of the users' time is often a bigger consideration. Specifically, the number of mouse clicks needed for reviewers to annotate documents was lower in Relativity than in any of the other tools, and when teams of lawyers are going through thousands of documents in a case, each click or movement of a mouse is money.

Relativity is used mainly as an on-premises tool at Zelle Hofmann because it is more cost effective to do so, but it is used occasionally on a SaaS basis for external users. The company has found no latency issues with it, even when working with translators in Japan on a case. It's fair to say that Zelle Hofmann isn't pushing the boundaries in terms of document volume, but it hasn't noticed any scalability issues, either.

One of Relativity's main claims to fame – and what makes it a platform rather than a tool – is the ability to develop applications on top of it and do so fairly easily. Zelle Hofmann has one full-time person who manages the application, and the firm has built a few small applications on top to manage custodians in a certain way, connect to a relational database and alter the way Relativity does evidence tracking.

Mandel believes Relativity is the best review platform on the market, in addition to being one of the cheapest. However, it should be noted that he does not consider the far less expensive LexisNexis' Concordance or AccessData Group's Summation review tools to be in the same market – although we do. Zelle Hofmann also uses Nuix for processing, which is becoming an increasingly common combination because the two companies have a go-to-market partnership.

One minor downside Zelle Hofmann found was the frequency of software updates from kCura. Updates had been occurring monthly and now come about every six weeks. The company would like this to move to a quarterly model. Another very minor issue was the minimum seat license. At the time of purchase, Zelle Hofmann was forced to buy a 100-seat license. However, kCura has subsequently resolved this concern by reducing that requirement to 25 seats.

SECTION 6

Profiles of e-discovery software and service providers

6.21 KCURA

kCura looks to pull away from rivals in e-discovery market

Originally published: 17 Feb 2011

kCura, often better known by the name of its hosted legal review platform – Relativity – appears to be firing on all cylinders. It says that all of the Am Law 50 and 95 of the Am Law 100 are customers, and in January alone, 158 of the Am Law 200 had used Relativity at some point. So, as far as law firms are concerned – especially US law firms – it has the market pretty well covered. Still, it aims to increase the number of seats there while also branching out into other types of businesses as they gradually seek to bring what has been the more costly part of the e-discovery process – review – in-house.

The 451 take

Service providers and law firms seem to love Relativity – even some of kCura’s competitors concede that to us privately. Once customers have built their own applications atop Relativity, they are far less likely to migrate away from it to another review platform. The development-platform approach also helps keep the company from being pigeon-holed as just another hosted legal review company, of which there are many. However, penetration beyond law firms is quite small right now, and it’s still early days for kCura’s move beyond its stronghold in review to other stages of the e-discovery process.

kCura’s Relativity has not only become one of the most widely used SaaS-based review platforms at law firms, it has also become a favorite of the service providers that have helped get it to that point. This is because kCura has made Relativity a development platform rather than just a review tool. Also, kCura tends to sign three-year deals with service providers, so the commitment on both sides is pretty deep.

The company has increased its customer base of enterprises running Relativity in-house – mostly law firms, as opposed to service providers – which now sits at 34. It secured 37 new channel partners in 2010 to take the total to slightly more than 100 (the majority in the US) and had 5,950 active hosted cases. It has a shade more than 100 employees.

Because Relativity is on a three-month release cycle, each release’s enhancements can seem somewhat trivial, but it is regular release cycle that customers seem to like and which is only really feasible for a natively SaaS product like this. In version 6.9, kCura included an optical character recognition (OCR) engine, made hit-persistence highlighting faster, added workflow improvement and introduced what it calls the application deployment system. The last of those is a way for users to package together custom-built applications and deploy them into specific work spaces. This could be used for cases that might require different applications as they move through the various stages of the ediscovery process.

The OCR function means the text can be extracted directly from images within Relativity, rather than having to export images to an engine and then reimport them. The viewer workflow improvement synchs multiple open versions of the same document so that users with multiple monitors (as is often the case for lawyers when reviewing documents) can keep documents synched as they move through the evidence.

Major service providers that are customers include Fios and Huron Consulting, both won in 2010. They are among those that have had their own proprietary review platforms and either switched to or added Relativity because it gives them the review tool they want while also enabling them to customize it. There are two levels of customization available to customers. There are documented APIs for those that want deep integration, such as the company's software partners, including Digital Reef, Nuix and Wave Software. Then there are the applications built using what the company calls dynamic object frameworks.

The first major application that kCura itself built on top of Relativity was the Method legal hold application, which debuted last year. It is priced aggressively because kCura believes (rightly, in our view) that the market won't pay seven figures for legal hold. It has four clients for Method, including the US Department of Justice's Environmental and Natural Resources Division, which has also bought Relativity and kCura's analytics (concept search based in part on an OEM from Content Analyst). Analytics is another source of potential growth for kCura because only about 10% of customers have opted for it since it was introduced in 2010. KCura plans to keep that product aggressively priced, too, with the overall idea of expanding the platform. Once customers have built their own applications atop Relativity, they are far less likely to migrate away from it to another review platform.

Customers can – and do – build much simpler applications than Method. One example we've seen is a chain of custody app that tracks what evidence has come into the law firm, on what media (documents, hard drives, CDs, etc.) and which cases it relates to.

In 2010, kCura introduced a change to its licensing model to attract a larger number of smaller law firms, shifting licensing deals from strictly enterprises of 100 seats or more down to a 25-pack to accommodate general counsel's need for a lighter-weight offering. The company reports that it has been successful while emphasizing that it has not stopped winning deals with the larger firms.

Competition

There are a lot of review platforms out there – some are SaaS-based, others on-premises, and some are available as either. But the nearest to kCura in terms of being on shortlists alongside it is iCONNECT Development's nXT. The company has recently added the Incept culling and early-case-assessment product, which can export to nXT or other review tools.

Other review tools include AccessData Group's Summation CaseVantage and iBlaze, Autonomy ZANTAZ' Introspect, CaseCentral, Daegis' DocHunter, FTI Consulting's Ringtail and Attenex, Iron Mountain's Legal Discovery, LexisNexis Concordance, Merrill Corp's Lextranet, Recommind's Axcelerate and Westlaw CaseLogistix. There are many others, of course, but those are the main ones kCura is likely to come up against.

Its Method legal hold product shouldn't, perhaps, be looked at as a stand-alone offering because there are very few viable stand-alone legal hold offerings. But among the legal hold tools that are not part of something larger, we would cite CaseGuard Technologies and Zapproved, while Exterro, which added legal hold functionality soon after launching with its Fusion Discovery Workflow Management layer, has since added more informationgovernance- focused tools to its arsenal. IBM purchased Exterro competitor PSS Systems in October 2010, which also has legal hold plus a bunch of other features.