

Strategic discovery:  
Taking steps to avoid litigation's  
black hole

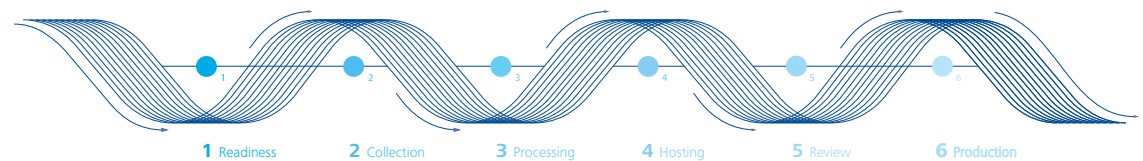




Our participants explored the discovery continuum, from readiness through production. They looked at emerging problems, issues, and trends in pretrial discovery, particularly as affected by the explosion of electronic files. Finally, they discussed some specific trends currently employed to manage the document review process. Acknowledging these trends

could help you avoid being sucked into litigation's black hole. The following is a summary of a Deloitte Dbrief webcast featuring eDiscovery and document review leaders from Deloitte Financial Advisory Services and Kelly Stewart, partner, Jones Day.

### The discovery continuum



This discovery continuum is designed to help prepare data relevant to litigation or an investigation for production. The continuum begins with proactive measures that can be taken to provide a more efficient and effective discovery process. This is followed by the “nuts and bolts” of discovery — collection, processing, and hosting of the data. The continuum then moves to document review and, finally, production. The continuum differs from the Electronic Discovery Reference Model (EDRM) in that it addresses not only electronic media but also paper records. Discovery of paper documents is still relevant for most companies.

The components of the continuum are integrated and interdependent. Reducing the effort to complete discovery requests requires connecting these components and being aware of their dependencies on one another.

Clients seem to be challenged by readiness since proactive planning to handle discovery requests effectively and efficiently during a future government investigation or litigation can be a significant distraction from ordinary business. Readiness includes document and data preservation planning. Preservation is the safety net that helps prevent inadvertent destruction of documents and data once the duty to preserve arises. Processes to properly preserve newly created files after the preservation of existing files takes place may be required and are better to have in place on the front end. Litigation reaction requires advance planning; without it, significant corporate and legal resources are needed to build a plan once it takes off the ground.

The collection of documents and data is another big challenge for companies. The process involves significant people resources — not only attorneys, but technical specialists and records management employees — and a comprehensive understanding of where documents and data reside.

### Discovery — The problem

Handling data properly is an organizational issue, not just a litigation issue. Volume is tremendous, and media types keep proliferating. Every 18–24 months, companies face a doubling of data they produce. Technology systems and applications can pose a web of problems. It is not out of the ordinary for a client to have more than 8,000 applications and systems, each with a specific owner and universe of data.

**The regulatory environment:** Regulators are very concerned about data preservation, collection, and production. Standardization early can relieve regulatory pressure later. Changes to the Federal Rules of Civil Procedure also pose new constraints on electronically stored information (ESI).

**Role of Information Technology (IT):** Electronic discovery can have a significant impact on records management and information technology departments. Records management is no longer just a tertiary function. IT is now tasked with managing e-mail, storage, and systems support. Sometimes this function lacks the “bandwidth,” including physical and human resources, to handle the extra burden of litigation support.

**Substantial and increasing costs and risks:** It is important to implement both a prospective discovery program and a legacy data remediation program. Legacy data remediation deals with the identification and analysis of outdated systems, servers, backup tapes stores, and outdated PDAs, mobile devices, and other media that are not actively used. Not knowing what types of information is contained in these various legacy data stores adds additional risk during the discovery process. These legacy data remediation programs can be performed by internal personnel or with a combination of internal resources and external vendors.

### **Heightened scrutiny of in-house and outside counsel:**

Corporate clients often expect their legal counsel to actively manage preservation and collection efforts and to know a client's IT systems and data management intimately.

**Courts react to preparedness:** Courts tend to be more lenient with companies that have reasonable standardized programs in place that are routinely followed — not merely followed after litigation arises. Proper handling of documentation can help dramatically in discovery. If you can demonstrate to a court that you have a well-thought-out and -documented discovery program, you may be able to avoid penalties and sanctions if a document discovery management issue comes up in your case. Conversely, courts have held business people, not just counsel, responsible when bad faith in producing or destroying discoverable documents is shown.

**The real world — discovery issues:** Recent federal court e-discovery opinions highlight the importance of preparing carefully for the rigors of electronic discovery:

- **Columbia Pictures v. Justin Bunnell, et al.**  
(C. Dist. Ca., 2007): Court ordered defendant to preserve and produce server log data stored in RAM
- **Williams v. Taser International, Inc.**  
(U.S. Dist. Ct. Ariz., 2007): Parties deadlocked on scope of e-mail search; court ordered defendant Taser to run 21 specific searches to identify a collection of “presumptively responsive documents.” Taser then had 30 days from entry of the order to produce all such documents and 45 days to complete any associated privilege review of these documents and produce a comprehensive privilege log to the requesting party. Taser was barred from excluding presumptively responsive documents from the production on any grounds other than privilege.
- **Muro v. Target Corp.**  
(N. Dist. Ill., 2007): Court granted plaintiff's motion to compel production of Target's e-mail correspondence, some of which contained legal opinions, based upon the insufficiency of Target's privilege log.
- **United Med. Supply Co., Inc. v. United States**  
(U.S. Ct. of Appeals, Federal Circuit, 2007): Court imposed sanctions for inadequate preservation of electronically stored information based on faulty e-mail to and from contractors.

Other federal cases illustrate just how badly things can go wrong for litigants who do not produce everything they should have:

- **Zubulake v. UBS Warburg (V)**  
(S. Dist. NY, 2003): Determining that the defendant had willfully deleted relevant e-mails despite contrary court orders, the court granted the motion for sanctions and costs, to the tune of \$29 million.

- **Coleman Holdings, Inc. v. Morgan Stanley & Co., Inc.**  
(Dist. Ct. of Appeals, Fla., 2006): Morgan Stanley was fined \$1.5 billion for failing to timely produce records (both electronic and paper) after counsel had certified that everything available had already been produced. For example, an entire Long Island warehouse full of relevant documents was discovered after the fact.
- **Phoenix Four, Inc. v. Strategic Res. Corp.**  
(S. Dist. NY, 2006): Court imposed sanctions for spoliation and other discovery misconduct even though it did not grant the plaintiff's requested relief. Counsel never asked about electronic records.
- **Qualcomm Inc. v. Broadcom Corp.**  
(S. Dist. Cal., 2007): Sanctions levied against both Qualcomm and its outside counsel for “monumental” failure to disclose 200,000 e-mails before trial — a lesson to learn about the proactive discovery process.

### **Trends in proactive discovery**

The first third of the discovery continuum addresses discovery readiness and record collection practices.

Having clearly articulated records management policies and procedures that your company actually follows is the first building block in a proactive management process. Evaluate whether policies are up-to-date for your industry, especially related to electronic records.

Your program should explicitly address e-discovery — how you intend to collect, sort, manage, and store all your company's data (internally or with help of a vendor). Vendors can help with data system mapping and generating a data source catalog (the Federal Rules of Civil Procedure require preparation of a source catalog to map the universe of data available), and this catalog may need to be refreshed for every new matter. Just because a company has a policy and roadmap in place, it does not mean the policy is part of routine practice or that new streets on the roadmap have not been created since the last time you looked at that map. You should make no assumptions.

Do not underestimate the importance of managing and remediating legacy data. If the only copy of data that you know about is on a 5-1/4” floppy disk, do you have a machine in-house that can read that data?

### **Trends in discovery processing**

The next portion of the discovery continuum addresses the processing and hosting of electronic data once your company is in the discovery process.

It is difficult to exaggerate the velocity at which information is growing. Cases that generate a terabyte of data (56 million pages) are now common, and higher orders of magnitude are on the horizon.

Increasing amounts of data require better ways to search and cull data collections. Companies, or the vendors they outsource to, require increasingly sophisticated tools and technology to index and search and de-duplicate data. Of course, the proliferation of data means that companies, even if not engaged in complex litigation, need more and more data storage and processing capacity.

The global nature of many investigations adds to the complexity. Data may be in multiple languages, which can double or triple the amount of data to manage. In addition, jurisdictions outside the United States, especially the European Union, have strict privacy rules and constraints on what data can be transported or transmitted across borders.

Meanwhile, technology advances keep creating new media types. Litigants and their attorneys now deal with voice, video, and hybrid media. Many systems, such as voice mail systems, were not designed to store the amount of data that may need to be frozen and preserved for years while litigation works its way through the courts. While there is new technology to address both voice and video file types, it is a time-consuming process to convert voice mail and video content to written data. If voice mail or video files have a role in your litigation, this could prove time-consuming and expensive.

### **Trends in document review**

The final third of the discovery continuum addresses the review and production of documents and data.

Litigants are experiencing substantial costs from increasing collection volumes, both of which may be unpreventable. Fortunately, technologies are surfacing that will help to reduce irrelevant documents after collection and before review. Concept analytics, keyword searches, and folder analysis (e-mail relegated to project folders by categories or dates) are becoming increasingly valuable.

Interestingly, technicians who need to process and review vast volumes of information are paying more attention to artificial intelligence (AI) — “smart” systems that can learn what the user seeks and screen out the rest. AI is still in its infancy, but it is definitely promising.

Corporations are also turning to specialized organizations to assist trial teams with the burden of document review (i.e. costs, volumes, and tight deadlines). This sort of litigation process outsourcing works best when there is an

emphasis on an experienced process to confirm the review can be appropriately supervised and the procedures can be reproducible and scalable (as discovery scope often grows rapidly without much warning). Much of this outsourcing is happening domestically in the United States; however, off-shoring to countries like India, which have thousands of well-trained lawyers available to work at a fraction of the rate that American law firms charge for associates and paralegals, is growing at double-digit rates.

Complex arguments could arise during the review and production process. Special masters may be appointed to manage questions of privilege and attorney work product in addition to more serious charges of “spoliation” (intentional destruction of data known to be relevant to the other side’s document requests). “Over-privileging,” technical problems that should have been caught in review, and failure to comply with production parameters could all lead to further inspection, delay, and cost.

Meanwhile, parties face increased scrutiny and criticism from their adversaries. With such massive volumes of data in play, it is often easy for one party to poke holes in another party’s discovery implementation. Even if you have done everything cleanly and by the book, you may face cost and delay explaining away questions from your adversary.

### **Document review concepts**

It is possible to use available innovations to reduce the amount of costly page-by-page reviews. The discovery continuum diagram above illustrates various opportunities for managing costs and volumes of documents between the collection and production of those documents to opposing parties. In addition, the common sense of selecting a review platform after production specifications are determined is crucial to making sure the specifications can be met, but this sensible approach is not always obvious to most producing parties.

The “bottom line” is that there are many factors that play into managing costs and minimizing exposure to criticism. When possible, by employing the sensibilities of (1) specification negotiation (to manage adversary expectation), (2) process transparency (to limit scepticism by your adversary), and (3) an experienced team (to provide a solid understanding of the implications of process decisions), document review and production exposure can be managed.

### Managing e-discovery

The ever-increasing volume of data allows opportunities for error and criticism by other parties throughout the discovery continuum. In the long run, it is advisable to try to make decisions on how to handle discovery by understanding the implications of all components along the way.

Who is responsible for designing and maintaining the discovery program? To an extent, that depends on how a company is organized. In many respects, ultimate responsibility goes to the CEO and board. The program development should involve a committee including in-house counsel (especially the General Counsel), IT, key business heads, the records management department, and in some cases, outside counsel.

Policies for readiness and reaction should be developed across various functional groups to avoid gaps in the process (legal, finance, IT, and records management). Establishing and maintaining the proper tone at the top is also critical in getting the program implemented — just having a program in place is not enough.

### Contact information

#### Bruce Hartley

Director  
Deloitte Financial Advisory Services LLP  
+1 202 378 5175  
brhartley@deloitte.com

#### Tony Reid

Principal  
Deloitte Financial Advisory Services LLP  
+1 904 665 1405  
tonyreid@deloitte.com

#### Kelly Stewart

Partner  
Jones Day  
+1 214 969 5134  
kellystewart@jonesday.com

This presentation contains only general information and is based on the experiences and research of Deloitte and Jones Day practitioners. Deloitte and Jones Day are not, by means of this presentation, rendering legal, business, financial, investment, or other professional advice or services. This presentation is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. Deloitte, its affiliates, related entities and Jones Day shall not be responsible for any loss sustained by any person who relies on this presentation.

#### About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu, a Swiss Verein, and its network of member firms, each of which is a legally separate and independent entity. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a detailed description of the legal structure of Deloitte Touche Tohmatsu and its member firms. Please see [www.deloitte.com/us/about](http://www.deloitte.com/us/about) for a detailed description of the legal structure of Deloitte LLP and its subsidiaries.