

# Understanding The World Of E-mail: How It Can Significantly Increase Or Decrease The Costs Of Electronic Discovery – Part I

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The greatest cost factor for companies involved in large-scale litigation or governmental matters is the increasing cost of electronic discovery. Electronic discovery costs have been rising at double-digit rates, with no end in sight<sup>1</sup>. The most significant factor that contributes to electronic discovery costs relates to the enormity of e-mails that have to be collected, processed, hosted, reviewed and produced. With the amount of e-mails created by a company growing at a rate of 30% annually<sup>2</sup>, it is critically important for companies to master an understanding of this technology as the potential costs of electronic discovery could prove to be devastating.

In order for a company's general counsel and outside counsel to contain the costs of electronic discovery it is crucial for them to gain a solid understanding of the most significant cost factor – e-mail. Corporate e-mail space is dominated by two major mail platforms: Microsoft's Exchange Server and IBM's Lotus Notes. A number of other large technology companies also have the means to enter this corporate arena, including Google.

When a company has identified which custodians' (employees) data sets are relevant to the case at hand, there are several key areas to consider. The first is to properly execute a well-designed litigation hold notice that will protect the interests of the company from extremely damaging allegations such as destruction of data claims. With the preservation notice in place, the company can develop and implement a strategy to forensically collect relevant data from the various data sources that are contained within its infrastructure.

One of the most common locations to find a custodian's e-mail data is on the company's e-mail server. There are also a number of other locations where e-mail data can be contained, such as the custodian's hard drive, network shares and backup tapes.

From a strategic standpoint it is important to ensure early in the process that all of the parties involved have a full understanding of the company's e-mail policies and procedures. Counsel needs to understand the parameters that control a user's mailbox, such as size limitations, auto archive policies and/or self-initiated archives. This allows the collection team to properly carry out

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their responsibilities. In addition, counsel is better able to determine the date range of a given user's mailbox. As a result, counsel has greater insight as to whether a backup tape is necessary as a source of data.

In the past, the collection and review of backup tapes created significant and excessive costs for most companies. With improved technologies and a thorough understanding of a company's e-mail infrastructure it is now possible to avoid the unnecessary review of large quantities of backup tapes.

When a case involves Microsoft Exchange Server, it is also important to consider the collection and processing of off-line storage files (OST files). An OST file is the synchronized e-mails that are contained on the e-mail server that enables the user to view their e-mail when they are disconnected from the company's network. One such example is when an individual is on an airplane and creates e-mails that will be sent once he/she is reconnected to the company's network.

To retrieve data from OST files, the files must be converted to another format prior to being processed by an electronic discovery tool. If the conversion is not complete, the data cannot be extracted from the mail archive format. Although Microsoft has very powerful and robust technologies, processing this type of data requires a highly technical skill set. Counsel should seriously consider whether it is warranted to process OST files due to the fact that they are an off-line synchronization of e-mail, currently contained on the e-mail server, given the potential costs associated with the procedure, as well as the duplicative nature of this data set.

With the increased usage of BlackBerry and other PDA devices, counsel should consider the potentially relevant data these devices may contain. PDAs can store e-mails as well as files such as work-related documents that may or may not be on the company's e-mail servers. Additionally, these devices are capable of sending SMS (short message service, which can be sent to a telephone number or a PIN number) text messages to devices outside of the company's network.

In cases involving IBM's Lotus Notes, counsel needs to account for the fact that e-mail is stored in a completely different file structure as compared to Microsoft's Exchange Server. The mail archive format used by Lotus Notes is an NSF file (Notes Storage Facility). The challenge with NSF files lies in the actual electronic discovery processing of the data. There are several processing tools that are not capable of processing an NSF file in a native file format. Therefore, the NSF file must first be converted to a Microsoft PST (Personal Storage Table) file format for processing. Counsel also needs to be aware that the conversion may not be an identical representation of the native data in its NSF format.

A separate consideration for a com-

pany is the usage of non-corporate web-based e-mails by employees. Many employees regularly use services such as Hotmail, Gmail, Yahoo, AOL and others for personal communication while in the workplace. Companies are dealing with this type of usage through corporate policies, such as those that expressly prohibit the services' use by monitoring web traffic, which can block access to these types of sites. When such a policy is not in place these services could potentially allow an employee to send confidential or sensitive data outside of the company's e-mail servers.

Today's litigation and regulatory

## Partners Notes

### Norris McLaughlin Partner Included In Who's Who Of Environmental Lawyers

Edward A. Hogan, a member of Norris McLaughlin & Marcus, P.A., has been selected for inclusion in the International *Who's Who of Environmental Lawyers 2007* (3rd Edition).

Mr. Hogan was nominated for this award by his peers as one of the USA's leading practitioners in the environmental field. Nominees were selected based upon comprehensive, independent survey work with both general counsel and environmental lawyers in private practice worldwide. Only specialists who met independent international research criteria were chosen. Mr. Hogan is one of 370 lawyers to be selected for this honor.

As co-chair of the Norris McLaughlin Environmental Law Group, Mr. Hogan devotes his practice to counseling clients on all aspects of environmental law and litigation.

### Robert C. Ballou Appointed Chief Executive Officer Of ONSITE3

ONSITE3 has announced the appointment of Robert C. Ballou as its chief executive officer. Mr. Ballou replaces Mark Hawn, who will continue serving the company as its chairman of the board of directors. Mr. Ballou will also serve on the corporate board of directors.

Mr. Ballou joins ONSITE3 from software leader Intuit where he led that company's Real Estate Solutions business. During his three years at Intuit, Mr. Ballou and his team successfully transitioned an enterprise software and consulting solutions business into a global market leader while also delivering substantial growth in revenue, earnings and shareholder value.

ONSITE3 also announced that Bill Truchan has accepted the position of chief operating officer. Mr. Truchan previously held the position of chief financial officer.

Replacing Mr. Truchan as chief financial officer for ONSITE3 will be Mike Empey, previously ONSITE3's vice president of finance. Prior to joining ONSITE3, Mr. Empey spent seven

environment offers tremendous challenges for corporate counsel when defending their companies. By better understanding e-mail and the company infrastructure, counsel can develop stronger policies to help mitigate their risks and cut the costs associated with electronic discovery.

<sup>1</sup> Gartner, Inc., Dataquest Insight: Emerging E-Discovery Market Spurs New Content and Records Management Investments by Tom Eid and Debra Logan, October 12, 2006.

<sup>2</sup> Frank Chambers, "EDD Tips for Email from the Front Line," Law Technology Today, March 2007, referenced in Cynthia L. Jackson, Business Guide to Compliance: Plan Now for Managing Electronic Data & Avoid Tomorrow's Legal Risks, Baker & McKenzie, 2007, 31.

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Fernando M. Pinguelo, a member of Norris McLaughlin, has been selected by *NJBIZ*, a New Jersey business publication, to receive its coveted 2007 Forty Under 40 Award.

Mr. Pinguelo, chair of the Norris McLaughlin & Marcus Entertainment Law Group, practices in the area of entertainment law, specializing in complex litigation and employment matters in federal and state courts.

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Norris McLaughlin has announced that members David E. Cassidy, Scott M. Baach and Jerry S. D'Aniello have been selected for inclusion in New Jersey Super Lawyers Rising Stars 2007. Mr. Cassidy is in the Labor & Employment section; Mr. Baach is in the Business/Corporate section, and Mr. D'Aniello is in the Family Law section.

years in public accounting, including five years at Ernst & Young.

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ONSITE3 announced that it has been added to the U.S. Department of Commerce's Safe Harbor List, demonstrating to ONSITE3's clients that its practices conform with the Safe Harbor framework developed by the U.S. Department of Commerce and the European Commission regarding "adequate protection" for personal data from Europe as required by the European Union's Directive on Data Protection.

Developed as a solution to the unique approaches to data privacy between the United States and European Union, conformance with the Safe Harbor framework enables U.S. companies to lawfully transfer personal data outside of the European Economic Area (EEA) such as might be needed to address time-sensitive e-discovery requests under the recently amended Federal Rules of Civil Procedure.

The ONSITE3 Safe Harbor Data Privacy Policy is available online at [www.onsite3.com/safeharbor](http://www.onsite3.com/safeharbor).