



## LITIGATION

# E-DISCOVERY EVOLUTION

*Tools to analyze digital data have become more sophisticated and cheaper, allowing even small firms to reap the benefits*

*By Elizabeth Raymer*

**D**igital tools to use in discovery have been evolving over the past decade or so, from glorified Excel databases to very technically sophisticated software.

“The tools now are incredible,” says Sarah Millar, discovery counsel at Lenczner Slaght Royce Smith Griffin LLP, a litigation boutique firm in Toronto, whose practice focuses exclusively on discovery. E-discovery technology has grown by leaps and bounds recently, she says, and the legal profession in Canada has embraced it. “The sophisticates in the U.S. were using the technology before us, but here, the uptake has been incredible in the last two or three years.”

Grant Thornton’s survey for its 2018 National Litigation Report showed that, while many respondents didn’t believe the costs of e-discovery were deterring clients and organizations from moving forward with cases, most

respondents (57 per cent) felt the true costs of e-discovery were still being revealed and are already affecting the legal process or could in the future. And two-thirds of respondents believed forces such as artificial intelligence are disrupting — or may disrupt — the legal process.

But lawyers who practise in e-discovery extoll its benefits, including the cost efficiencies in having machines do the work of humans — and more quickly. So, whether you’re a sole practitioner or a litigator at a major law firm, there is an e-discovery solution for you; you just need to find it if you haven’t already.

## Data then and now

Back in 2006, when e-discovery tools were starting to be explored, there was less data; the Library of Congress in Washington, D.C. held the most, says Glenn Smith, a founding partner at Lenczner Slaght in Toronto, but by today’s standards, that amount was negligible. It now holds at least 10 terabytes of data; even as far back as 2011 there were 1.8 trillion gigabytes of data being generated in the U.S., he says.

Today's discovery involves vast amounts of data to be sifted through, including copious volumes of email and data from social media accounts. "You cannot go forward without controlling electronic data," says Smith. "It's impossible."

Every lawyer will have to be trained in it, he says, and their clients as well, including companies that often "don't have a clue how much electronic data they have" and may face expensive lawsuits if security is breached. "Privacy legislation is coming in, which is scary for most corporations."

Toronto lawyer Susan Wortzman recalls one client who, in preparation for discovery, had printed off email messages, then scanned them and sent them to her offices. Wortzman is a partner at McCarthy Tétrault LLP and the founder of MT>3, a division of McCarthy Tétrault that specializes in e-discovery, information governance and the management of digital information; she is also the author of the third edition of *E-Discovery in Canada*.

Aside from the cost and bother of printing off the email messages and then scanning those messages when they started as digital, "you also lose the metadata," says Wortzman. "You're losing valuable e-discovery information by doing that."

Yet, despite the ongoing challenge of training clients, as well as lawyers, in handling electronic data, "I think we've hit . . . the point now where we can say that most lawyers are understanding the e-discovery process and saying, 'we have to get on board with this,'" she says.

## Discovery technology today

Dera Nevin, an e-discovery lawyer and associate in Baker & McKenzie LLP's information technology practice in Toronto, describes the technology for e-discovery as having evolved in three main ways.

"First, the technology can handle more kinds of data than before," she says. "Think emails and social media and data from mobile phones. It can help understand the facts of the case by having everything in one place.

"Second, the technology now incorporates machine learning [a form of artificial intelligence], natural language processing and analytics." These tools can visualize how people communicate by email, group documents together by concepts and discover quickly whether there are communications missing. "Using some of all these components in every case helps bring the evidence alive earlier in the discovery process." This works not only on "outbound" discovery, meaning what a lawyer is giving to the other side, but also on "inbound" discovery, which is what the other side is giving you.

Third, Nevin says, there are e-discovery offerings in the "cloud" and more service providers. "That means more options for law firms in renting versus buying and makes the technology available in other contexts." That makes it easier to put a small matter through this technology and reap the benefits, she says.

Finally, a lot of the technology today is "just better designed," she says, making it more intuitive to work with and easier to look at. "Some is even connected to your mobile, so you can get alerts and other notifications."

Wortzman describes different ways of training a machine (i.e., machine learning) to do e-discovery. The first is with a collection of relevant records that may be used as a seed set to train the computer. Another way is to use a team of subject matter experts to start the review, who will code records and train the computer in that manner. Having a seed set of important documents is a good start, and "we usually have those from the client."

One new trend in e-discovery technology is email threading, says Lara Mason of Norton Rose Fulbright LLP in Calgary, who co-leads the firm's global e-discovery group with Lynne O'Brien in the Toronto office.

"We use email threading to suppress unnecessary email and review," says Mason, adding that it's a tool that can also be used to tell a story in a concise way. "It's one of the developments that helps deal with voluminous email."

O'Brien says there is also an increasing interest in the use of text messaging in discovery and in social media. "It's still an evolving area, and the e-vendors are evolving, but there's an increased prevalence in those sources of data."

E-discovery technology can also be used to identify gaps or inefficiencies in opponents' production or to find "hot" documents there, says Mason. Although historically e-discovery review may have been used only on one's own documents, "now I find it's being used on both the defensive and offensive" sides, she says. "You're able to be creative when reviewing your opponent's production . . . and can use whatever technologies and processes might be helpful in the particular instance."

## Choosing tools and vendors

So many tools, so many choices. Anne Glover, a partner at Blake Cassels & Graydon LLP's Litigation and Dispute Resolution group in Toronto and practice group leader of the Blakes inSource team, notes that there isn't just one program that a lawyer or firm must buy and that the annual LegalTech conference in New York contains "floors of programs. They're all expensive, at different price points" and some firms may choose to outsource e-discovery to a vendor, she says.

"It's a challenging time for some firms to discern what to do."

Glover identifies security risks as one concern in choosing tools. "We [at Blakes] run our tools by our IT security group to make sure . . . they're up to the standard required of us as a law firm," she says. "There are a lot of great programs, but some are new" and perhaps not "at the level you would need for client data."

Larger firms will have the capability to do most everything regarding e-discovery in-house, says Norton Rose's Mason. "There can be situations where a certain firm has an expertise in e-discovery and can be hired to do that, but we find it beneficial to do both e-discovery and the litigation process" in-house.

Smaller firms may choose to piggy-back on a larger firm for e-discovery tools. McCarthy Tétrault is one major firm that supports and hosts data for smaller firms, says Wortzman.

Indeed, outsourcing e-discovery, in whole or in part, is

becoming much more prevalent, says Baker McKenzie's Nevin, either because lawyers wish access to specialized advice or service or to gain an edge over an adversary within a matter. "Others find outsourcing achieves efficiencies and cost savings for clients. In some cases, clients require it."

### **Eyeing the future (and bottom line)**

Over time, the costs of e-discovery will go down, Glover predicts, as technology takes us to the next level, to be smarter and more efficient. But practitioners agree that the savings on human cost cannot be overestimated. The use of technology saves the labour of associates and articling students, as well as reducing the services of contract lawyers to do review. That said, "we still need lawyers to review and apply legal judgment," says Wortzman.

Lenczner Slaght's Millar sees the future in platforms that

will analyze documents considering its merits, provide an analysis of case law and put evidence in a broader context. "It's the inevitable next step." Technology is coming down in price, she agrees, and will be instrumental in levelling the playing field. "Small practitioners can use the technology without an army of associates or outsourced lawyers."

Lenczner Slaght founding partner Glenn Smith recalls how he and four other lawyers left a major Bay Street law firm in 1992 to open their litigation boutique. "We started doing cases, we researched on a computer," he says today. "By 1992, our research was as good" as that of the firm they'd left — which employed a director of research commanding a half-million-dollar salary — "and we were able to compete because of technology.

"Technology always levels the playing field," he says. "It just takes time." ☺