

eDiscovery Trends:

2011 Year In Review & Forecasting 2012

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eDiscovery In 2011 – The Year In Review

The eDiscovery year tends to begin with a bang at the LegalTech Conference in New York (LTNY). LTNY 2011 promoted some pragmatic ideas such as managing eDiscovery as a process and taking control of Information Governance (IG), while also hinting at forthcoming heat around “the Cloud” and predictive coding.

The “manage eDiscovery as a business process” notion had real traction, with corporations admitting the need to take control of eDiscovery and to imbue it with the business intelligence necessary to make process management smooth and effective. Vendors came out with centralized dashboards that could show progress on tasks within the eDiscovery lifecycle – litigation hold notices, collections, analysis, review, and production. eDJ published “[Managing eDiscovery As A Repeatable Business Process](#)” – a report that examines the components of the eDiscovery process and the roles of various constituents (e.g. Corporate legal, law firm, service provider) within that process. It also explores how technology and service solutions can support managing eDiscovery and the trends that affect decision-making.

While Information Governance was a term bandied about often in early 2011, it became clear that the market is not yet mature. Many of the IG messages from solution providers lacked real meat, instead vaguely referencing ways to integrate information across multiple repositories, apply retention policies and conduct discovery. For the vendors, it is about selling a vision – vendors need to be at least a year ahead of an emerging market. eDJ conducted an IG survey in conjunction with ViaLumina, Ltd. in the spring / summer of 2011. As the fall rolled around, eDJ had a chance to analyze the results and publish the report, “[Defining Information Governance: Theory Or Action.](#)” The results confirmed the hypothesis that IG is an evolving market. Proof of traction comes from the growing acceptance that IG is a defined model for managing information that companies are currently executing on and the fact that respondents overwhelmingly agree that IG encompasses both structured data and unstructured content. However, while there is some agreement on what IG is and the component practices within it (records management, eDiscovery, archiving & storage, security, compliance, privacy, etc.), there are seemingly not a ton of proactive IG initiatives underway. This is not uncommon in emerging markets where unique challenges exist, e.g. getting huge volumes of diverse types of electronic information under control.

Predictive coding was also a trending topic in 2011. Recommind made a splash when it filed to patent the company's version of predictive coding and thereby put the spotlight on the fact that predictive coding means something different to everyone. To gauge the level of doubt of predictive coding's defensibility, eDJ ran an informal poll on the topic throughout the year. For the most part, respondents felt that it was too soon to tell. Early on, more respondents felt that predictive coding was not defensible than was defensible, but as the year went on, that sentiment changed, albeit only slightly. As of December 8, 2011, 33.9% of respondents (215 respondents in total) believe predictive coding is defensible, 27.9% believe it is not defensible, and 38.1% believe it is too soon to tell. Clearly, predictive coding is evolving rapidly.

Thankfully, not long after LTNY-2011, the "[scale and performance wars](#)" news cycle ended. Many vendors had made aggressive claims about the amount of data processing applications could process in a day (upwards of 1TB / day, per the claims). There is an issue of differentiation between enterprise scale and case scale on enterprise platforms that confused potential customer bases. There is a conflict between enterprise scalability and case scalability. The scale argument ultimately was not a priority to enterprises; corporate IT typically can manage scale with hardware purchases or virtualization. For customers worried about particular cases, the scale and performance claims of vendors weren't significant because few customers need to process more than 1TB of data in a day. While scale and performance of software is important, it proved not to be the ultimate purchasing criteria.

2011 also saw the rise of the "eDiscovery platform," with vendors advertising solutions that could manage the full eDiscovery lifecycle. A common example of this was products making the jump from processing engine to eDiscovery platform via the bolting on of a legal hold notice module or wizard. Hold notices are the official kick off of the eDiscovery tailgate party. This is related to the notion of managing eDiscovery as a business process, and evidence of the move toward an eDiscovery platform that can manage as much of the eDiscovery activities behind the firewall as is possible for corporations. In reality, there are few vendors capable of doing that in 2011, though that will change as the market continues to evolve.

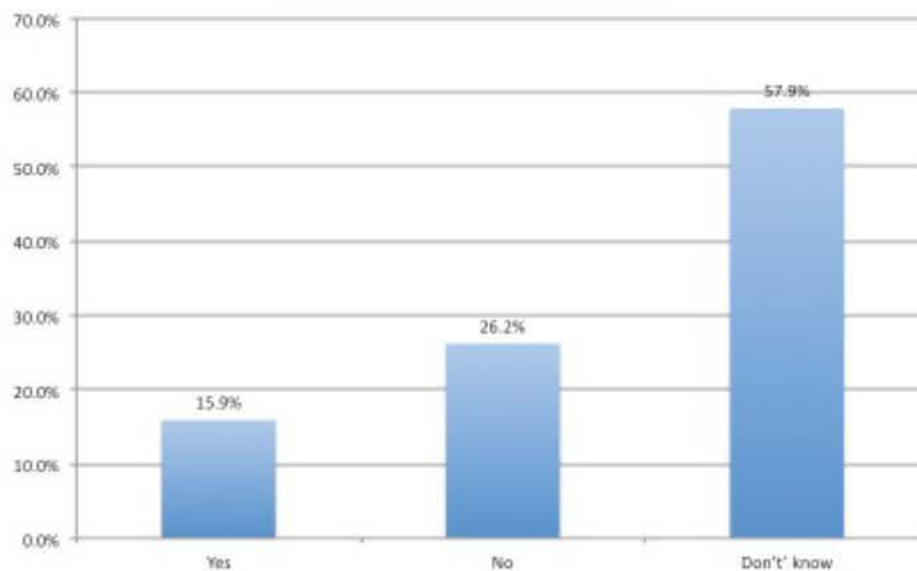
The summer of 2011 brought the first annual Carmel Valley eDiscovery Retreat. This show gave the market a chance to discuss the real issues of defensible preservation, validation testing to defend eDiscovery processes, protecting sensitive corporate ESI in discovery, and handling emerging ESI sources. The Carmel Valley Retreat marked an important evolutionary step in the eDiscovery industry – real practitioners

sharing pragmatic best practices about how to manage both tactical and strategic eDiscovery issues. The relaxed setting was the antithesis to the frenetic pace of LTNY, and the substantive dialog was evidence the market is finally showing real progress up the maturity curve.

The evidence of progress continued at the ILTA 2011 show. Overall, the mood was upbeat and most vendors reported that 2011 was shaping up as a record year. Litigation and discovery readiness spending seemed to have recovered from the 2008-2009 lull. Many service providers were finally offering fixed fee or managed service alternatives to volume based pricing. This is new enough that they are still wrestling with how to price their offerings, but it is encouraging to see some major players recognize that corporations need cost predictability in order to make a commitment to preferred providers. It was also at ILTA that it became clear that “ECA” applications are simply repurposed processing applications with native file viewers. In order to offer real value to customers, vendors will be required to go beyond processing with a simple review user interface (UI) – they will need to offer ways to further streamline eDiscovery and speed up review. This fits nicely with the topics of managing eDiscovery as a business process and predictive coding. Look for more convergence of these topics to come.

An overview of 2011 would not be complete without mentioning “the Cloud.” The Cloud hype intensified throughout 2011. For the eDiscovery market, this was a good news / bad news scenario. The good news is that many corporations and law firms understand the value the Cloud can offer (e.g. lower costs, high scalability, and minimal management effort). According to the results of eDJ’s [SaaS survey](#), almost 70% of respondents are leaning toward using the Cloud or a hybrid cloud/on-premise solution for eDiscovery. Only a quarter of respondents indicated not leaning towards utilizing the Cloud. The bad news is that most organizations are at risk of being unprepared for conducting eDiscovery on information stored in the Cloud. What is clear is that eDiscovery is an afterthought, if a thought at all, when it comes to cloud-based information solutions. A large majority of respondents are using cloud-based solutions ranging from hosted email archiving (e.g. Microsoft LiveOffice, Google’s Gmail, etc.) to Salesforce.com to Quickbooks Online. Companies are knowingly or unknowingly storing discoverable information assets in the Cloud. But do they have a plan in place for eDiscovery, should the need arise? Overwhelmingly, the answer is no. Only 16% of respondents indicated that an eDiscovery plan is in place for cloud-based information management solutions while 26% responded that they do not have an eDiscovery plan in place. What is truly scary is that 58% don’t know if a plan exists. This creates an opportunity for solution providers to help companies access information stored in the cloud while bringing functionality to preserve, collect, analyze, and review that information.

If using cloud-based services, was an eDiscovery plan put in place before moving data to the cloud?



Source: eDJ Group "eDiscovery and The Cloud Survey, November 2011 N = 309

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Throughout the year, there was continued merger and acquisition (M & A) activity in the Discovery marketplace, with two acquisitions in the “bombshell” category given the premiums paid by acquirers. Symantec bought Clearwell in June, 2011 for close to \$400 million (a premium of approximately 8x Clearwell’s revenues), while HP bought Autonomy for about \$11 billion (a premium of more than 10x). Both acquisitions were logical ones that eDJ believes will bring value to the acquirers while also opening up more opportunities for competitors in the market.

Symantec has been an archiving market leader with its Enterprise Vault (EV) product line for over 15 years. The company added the Discovery Accelerator product to give customers the ability to conduct eDiscovery searches and quick reviews of information stored in EV. That was sufficient when most discovery centered on email, but the world has moved beyond just email and eDiscovery solutions must address all content sources. Solutions must also address more of the eDiscovery process than collection and preservation; there must be functionality for processing,

review, and analysis and applications for early case assessment (ECA). This is where Clearwell will fit with Symantec.

The HP acquisition of Autonomy attracted much attention because of the sheer size of the deal and the drama that unfolded around it (e.g. HP CEO Leo Apotheker being fired). eDJ conducted a deep analysis of the potential for the merged entity and published the report [“Analyzing HP’s Acquisition of Autonomy.”](#) In general, eDJ is bullish on the acquisition, even with the high premium paid. HP is betting the future of the company on the Autonomy business. With Autonomy in the fold HP is positioned to compete fiercely in the information management space, which HP estimates to be a \$20 billion market. Given that 90% of all information today is unstructured content, having Autonomy’s content analytics capabilities will give HP an edge in making sense of organizations’ content landfills. The business intelligence (BI) market will expand to include intelligence hidden in unstructured content and kick off new competition amongst the information management vendors to offer added elements of analytics. Going further, HP now has the opportunity to integrate IDOL (unstructured and semi structured data management) with Vertica (structured data management) and ArcSight (security) for holistic information management and protection. Autonomy points out that many BI vendors are already OEM customers, integrating Autonomy’s IDOL into their products in order to process unstructured data.

The eDiscovery market kept eDJ Group team busy in 2011 with some substantive movement up the learning and maturity curves, some red herrings, and the beginnings of more mass consolidation. eDJ expects the market to remain interesting and dynamic in 2012.

Forecasting eDiscovery Trends For 2012

eDJ believes that, in 2012, the eDiscovery market will continue to see the evolution of some of the trends that began in 2011, such as the replacement of processing applications with more full-service ECA applications and eDiscovery platforms. Issues about managing eDiscovery in the cloud and for social media will gain increasing attention; solutions to address these challenges will gain mindshare in 2012. We also believe that Predictive Coding will gain steam and increased acceptance. We expect to see an abundance of case studies and real world examples that ease any concerns about the defensibility of Predictive Coding.

In general, eDJ sees the following eDiscovery trends in 2012:

- ***Continued growth of The Cloud for Information Governance and eDiscovery, but at a slow burn.*** There is no stopping the freight train that is the Cloud, but legal, privacy, security, and control issues will force some to apply the breaks a bit. While many applications like a CRM can move quickly to the Cloud without impediment, legal and discovery concerns are enough to force companies to think twice before completely moving information management to the Cloud. In eDJ's eDiscovery and The Cloud survey earlier this Fall, half of all respondents were either somewhat or very concerned about eDiscovery of information stored in the cloud. eDJ will expose some of the issues with proactive information storage in the Cloud and SaaS-based eDiscovery in the Cloud. We will offer best practices and pragmatic ways to avoid some of the pitfalls that could await. The Cloud will continue to change cost dynamics of the industry. eDJ will be there to cover changing pricing models and market dynamics that can affect decision making.
- ***Continued evolution from processing applications to ECA to eDiscovery platform.*** It is likely that LTNy 2012 will feature the vast majority of software vendors touting an eDiscovery platform that can handle all or most of the eDiscovery lifecycle. In 2012, however, more vendors than ever will be able to offer compelling, integrated platforms. Gone are the days that any organization will buy just a simple processing engine. Rather, processing applications must evolve to add collection & preservation, analysis, review, and even some level of production in order to provide compelling ECA.
- ***The emergence of Information Management platforms.*** Large enterprises face huge challenges dealing with Big Data. Big Data covers both structured data (e.g. that in ERP systems) and unstructured content (e.g. files stored in SharePoint). Companies need to leverage all information for strategic advantage while ensuring they know what they have, where it is, how to get it, and how to quickly discern what it means for eDiscovery purposes. How can the information management platform impact eDiscovery? Well, in the minds of corporate practitioners, preservation "in-place" would be the panacea for many of their preservation headaches. An information management platform could potentially deliver such preservation benefits. We already see many large software vendors positioning to be the huge information management platform (e.g. HP/Autonomy, IBM, Microsoft, Oracle, and HP). IG and eDiscovery capabilities will be critical components of the information management platform. Currently, there is no vendor capable of delivering a full platform, nor are any companies ready to deploy such a platform across the enterprise. Rather, 2012 will be the year we begin seeing the vendors jockey for position.
- ***More action on industry certifications.*** In 2011, eDiscovery certification and education was supposed to be big. That was something of a

letdown. While many professionals take classes and gain certifications, no “industry standard” certification has arisen and there are several options for eDiscovery education. Professionals are not quite sure where to turn. There are a lot of interesting opportunities here – in an emerging industry like eDiscovery, it is very helpful to one’s career to have certifications to put on a resume. eDJ will research the available options for certifications and education, including the business models of the organizations offering education. We will talk with those that currently have certification and learn how it has helped careers. eDJ will also investigate any plans that accredited organizations like the ABA have in terms of offering eDiscovery education and/or certification.

- ***Social media collection and preservation heats up.*** The usage of social media tools such as Twitter, FaceBook, and LinkedIn create collection and preservation challenges that are brand new. Just as companies kind of figured out how to handle email for eDiscovery, these new collaboration mechanisms come into play with diverse native formats and new types of metadata. This creates an opportunity for solution providers to bring innovative collection and preservation tools to the market. Watch for most vendors to message social media collection and preservation capabilities, but for best-of-breed vendors like Actiance, NextPage, SocialWare, and X1 Discovery to have the most advanced, defensible, and cost-effective solutions. Point solutions are often the most innovative ones because the vendors can concentrate all development efforts on specific types of content.
- ***Predictive Coding goes mainstream.*** Many organizations experimented with predictive coding in 2011. Look for some interesting case studies to emerge that allow the legal community to feel more comfortable with the defensibility and accuracy of predictive coding. Also, look for some vendors to use other terminology – like Technology Assisted Review (TAR) – so as not to invite legal pressure from Recommind (who patented their own predictive coding technology/process and tried unsuccessfully to trademark the term). Predictive coding will have its biggest impact in the ECA realm, as corporations and law firms use it for first-pass review. eDJ does not see predictive coding gaining widespread adoption as a replacement for linear review in 2012, though we are beginning to hear stories of this occurring.
- ***More Consolidation in the eDiscovery market.*** HP made its big move to bring IG into the fold with its 2011 acquisition of Autonomy. There are other large vendors like EMC and IBM that have eDiscovery products in the portfolio, but others like Microsoft, Oracle, SAP, and even Symantec will need to make further acquisitions to become or stay competitive in the eDiscovery software market. eDJ does not see an acquisition of the scale of HP/Autonomy occurring in 2012, but does believe there will be several roll-ups of regional service providers to become more competitive with the likes of Kroll Ontrack. The way for a service provider to achieve scale is through a more national network. The venture capital community will be heavily involved in these roll-ups.

- ***Corporations continue to get smarter about eDiscovery.*** True eDiscovery best practices have been few and far between because of the pace of change and information volume challenges that companies face. eDJ believes that 2012 will see corporations – if not creating innovative best practices – getting better at managing eDiscovery as a process. One way companies will do this is by being able to quantify eDiscovery spending. Metrics will emerge, such as average spend per document; these metrics will feed ECA and intelligent legal decision-making.

About the eDJ Group:

eDJ Group offers unbiased information and pragmatic advice, based on years of experience and proven industry best practices. Whether researching a technology or service solution, conducting an eDiscovery Bootcamp or finding the right expertise to answer your specific questions, eDJ Group is the source for all eDiscovery professionals.

We are committed to helping eDiscovery professionals get the information necessary to excel in their professions, rather than offering legal advice or counsel. We operate with the utmost integrity and commitment to our clients on these guiding principles:

- Independence – All research, reports, advice and services are agnostic and conducted independently without influence by sponsors.
- Highest Ethical standards – All content is honest perspective based on real experience and interactions with thousands of practitioners; detailing both successes and failures without favoritism.
- Pragmatic, Experienced Expertise – All services are conducted by industry experts with decades of experience in eDiscovery and strictly vetted by the eDJ Group founders.

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