THE e-DISCOVERY TIGHTROPE

STEPHEN LUDLOW, Program Manager, e-discovery Solutions, **Open Text Corporation,** talks to *BTQ* about how companies are toeing the line between risk mitigation and the volume of content

Business Trends Quarterly e-discovery is a buzzword that seems to be at the forefront of many corporations, even at the C-level and the board. **What is causing executives to take notice?**

STEPHEN LUDLOW Reputational loss is something that has C-level executives and board members paying attention to e-discovery. e-discovery related issues have continued to make good press, particularly since the first big e-discovery ruling, Zubulake vs. UBS Warburg. Ever since then, a number of high-profile cases have made the press and have brought companies the kind of coverage they're not really looking for. Organizations are not going to be happy about the damage that can result from such cases and from the press, and they're also worried about the potential costs of e-discovery issues in court. They often result in fines, sanctions and adverse inference rulings.

CFOs are looking at the annual spend in legal as an area where they might be able to find cost savings. Legal spend typically tends to be one of the largest unpredicted operational expenses in the organization. Additionally, due to the nature of litigation and not actually knowing when it might happen, litigation costs also tend to be unpredictable. CFOs are looking for a way for legal to reduce their outside spend and increase ways for e-discovery to move from being an expensive fire drill to a managed process.

BTQ **What are the issues associated with e-discovery?**

SL Fundamentally, the core issue associated with e-discovery is the tightrope that companies are walking. They're walking between two chasms: One is risk mitigation and the other is the volume of content. Volume is an easy one to understand because most of the costs associated to e-discovery are volume-based. Review, the single greatest cost associated to litigation, is charged out on a per page, per document or per gigabyte (GB) basis. Processing, the second largest e-discovery cost, is charged on a per GB basis — and it keeps going from there to collection costs, and so on. So, obviously, minimizing the volume of content that must be sorted and organized, searched, collected and eventually reviewed has a significant impact on cost every step of the way.

Risk mitigation is not as straightforward, because different approaches are being taken. Initially, many organizations assessed that the risk of spoliation — the accidental or willful destruction of evidence — merited a "keep-everything" approach to content. What these organizations are now facing are massive e-discovery costs due to the volume of content that flows through the e-discovery process.

Additionally, in retrospect, organizations have learned that the "keep-everything" strategy has also increased their risk of keeping possibly damaging evidence, and have determined that those messages could have been deleted during the normal course of business, had they not had a "keep-everything" strategy.

Unfortunately, some organizations have swung the pendulum the other way. A lot of them have been implementing draconian disposition policies to essentially get rid of everything in the shortest term period as possible. Without the capability to go out and institute a litigation hold on content that might be related to a case when there's an expectation of litigation, a lot of organizations are now running into trouble with the courts when evidence has been destroyed. This "delete everything" policy has also had an unexpected adverse impact on end-users, who typically like to keep content they deem valuable for longer than the default short retention period. What often happens with organizations that do not provide the capability for end-users to designate content as valuable, is users circumvent policy and create personal stores. From a legal perspective, the only thing worse than not having any policies for retention and disposition of content is having policies that users are willfully not following.

The balance that more companies are trying to achieve is sensible retention and disposition of content based on compliance requirements coming from legal and productivity requirements from business users. I think that strategy has to be complemented by the capability of being able to apply litigation holds on content anywhere in your organization as soon as litigation is reasonably expected.

BTQ **e-discovery also seems to have a lot of visibility in the IT organizations that we talk with; why is that?**

SL The first reason is that many IT organizations may have made some inadvertent decisions that have had a significant implication on legal and e-discovery. E-mail archiving is a good example. The retention and disposition of content can have a big impact on cost and risk associated with e-discovery. Many IT organizations have actually set these policies based on cost savings and performance for their email environment. Without input from legal, archiving might actually be compounding e-discovery issues rather than mitigating them.

IT organizations have created large content stores where information is piling up, and there is no real way of being able to get rid of that content defensibly.

Additionally, what we're beginning to see more of, particularly with the downturn of the economy, is that companies are looking to reduce costs, and they're turning away from outside vendors who are specialists in the collection of content and they're turning to their own IT organization. The problem for IT is that this isn't really their job. Companies can't ignore discovery requests; however, from IT's perspective, the collection activities are a drain on their resources. IT is meant to manage infrastructure and implement systems, and so on. We're finding that more IT departments are beginning to look around for e-discovery applications as well.

BTQ What approach are organizations taking to address some of the challenges associated to e-discovery?

SL Companies are taking a two-pronged approach. On one hand, they're taking an approach that is long-term and strategic. They're looking at reducing the risks and costs of e-discovery by looking at their records and retention management systems and policies to be able to apply them broadly across all content in the organization to leverage the benefits of disposition, while relying on the capability to suspend disposition through in-place legal hold when required for discovery purposes. On the other hand, organizations are looking to get a win in the short term as well. In those cases, what we're finding is that organizations are adopting e-discovery applications that allow them to in-source a number of the activities associated with e-discovery, where in the past they relied upon outside vendors to perform activities.

Where companies are travelling down the records management retention path for the classification of content, I think it's important that they have the capability to classify content transparently without significantly impacting the end-user. One of the strengths that Open Text can bring to their customers is the capability to classify content anywhere in the organization, so that both legal and IT can understand the information and ensure that it is being retained as per policy. For companies that are looking to get an immediate impact on e-discovery costs, they can begin to look at e-discovery applications that allow them to in-source a number of critical path activities that are a part of e-discovery.

BTQ What activities are organizations in-sourcing?

SL One of the really big risks that companies face is the inability to place a litigation hold on content when there is the likelihood of litigation. What we find is, companies are looking for the capability to be able to place a litigation hold on content anywhere in the organization, in the enterprise content management (ECM) system, and outside that system as well.

IT tends to be very involved in collection. There are some cases where organizations still rely on end-users to actually do collection, and that doesn't tend to stand up very well in court, so organizations are looking to automate collection as well.

Finally, processing is another area organizations in-source, which is the extraction of metadata and the embedded files within files to make the content ready to be loaded into a review application. What we find is that organizations are looking at high costs, which can range from $500 to $1,000 per GB. They're looking at those costs and deciding to do an internal job for a cost savings that will eventually pay for an entire e-discovery program. The good news is, if all of those things are in a single application, we can also benefit from early case assessment. Early case assessment is the capability to assess the risk and the costs associated to a case to make a decision about how to proceed. Most of the time organizations have relied upon getting their information into a review application to begin to do that assessment. With a tool that can reach out and search content from anywhere within the organization, it allows legal to have a look at the content much earlier.

BTQ What challenges do organizations face when they decide that they need to apply retention and disposition policies on content?

SL The single biggest barrier that we find has nothing to do with systems. Typically, the first thing organizations need to do is decide the policies that they are going to implement within their organization. The reason that this tends to be an issue is that organizations need to understand the impact of some of those policies from an IT, end-user and legal perspective. Getting those teams together to allow them to talk and be able to understand the issues that each one of them is facing is one of the barriers to successful implementation of retention and disposition policies in the organization. Users want to be able to make sure that they can retain the information they feel is valuable over a period of time that makes sense to them, so it is important for organizations to engage with and work with end-users.

The last thing organizations are having difficulties with is — even if they have the capability to set the policies and work with end-users — there still tends to be a lot of legacy content that acts like an anchor and drags them down from being able to move forward. The capability of being able to go in and classify legacy content and determine what needs to be kept, what needs to be placed in litigation hold and what can be deleted is an important factor when considering moving to enterprise-wide retention and disposition.

BTQ Do you have any advice for companies that are going to be heading to two paths of record and retention management and in-sourcing?

SL We already discussed the importance of bringing together the three communities of business users, IT and legal. I think it is very important from a policy perspective, but it is also important that we bring together those groups when we begin to consider what is actually going to fund our projects. A lot of the time, particularly in today's economy, we're finding that IT projects, and projects in general, are being "moth-balled" for a period of time unless they can really show a demonstrable ROI. Bringing these three groups together to look at not only the benefits of the program and what the policies are going to be, but also what the ROI is going to be, is a good way to move forward with these programs. BTQ

STEPHEN LUDLOW, Senior Product Marketing Manager, leads Open Text's eDiscovery practice and is responsible for leveraging the capabilities of the Open Text Suite of compliance applications like Email Management, Records Management, and Content Life Cycle Management to create solutions that reduce eDiscovery costs and risks. He is also responsible for bringing eDiscovery applications to market that specifically address enterprise requirements to in-source collection, litigation hold, and early case assessment.