

# Practice Innovations

Managing in a changing legal environment.



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## X and Y and Social Media

*Baby boomers may be sharing the workplace with members of Generations X and Y for a longer time than previously thought, given the current financial situation. Here are some observations on the character traits of those generations, with accompanying commentary by two Gen Xers.*

By **Linda Will**, Consultant, Minneapolis, MN

They are the alphabet generations, in many cases our children, but they are also members of our workplace. Baby boomers know them as Generations X and Y. And due to the financial disruption that has affected many of our retirement plans, we will be working and sharing the workplace with these generations for a much longer time than was first thought. Two members of Generation X, Julie Bozzell and Christine Sellers, offer comments on my observations.

### X vs. Y

Actually, they could be siblings, as there is only a mere year or two that separates these two groupings. Gen Xers are usually considered to have been born between 1965 and 1976, whereas the Gen Yers were born between 1977 and about 1998. Both are the offspring of the baby boomers or the “love generation,” but their births occurred at different cycles in that generation’s life span.

Gen X, also known as the “baby bust generation,” due to the drastic drop in the birthrate following that of the boomer generation, is considered self-reliant and individualistic. They were conceived to younger parents, just starting and probably struggling with careers. Many are the result of divorce and often tagged “latchkey children.” In many cases, they saw their parents suffer through job insecurities and job layoffs. Pragmatic and practical, they tend to mistrust institutions and want expedited career growth with immediate fast track remuneration. Although this generation tends to take employment seriously, it rejects rules. It tends to be casual and value flexibility and freedom.

Gen Y, on the other hand is a product of the later cycle of the boomers, during the prosperity years. They are often referred to as the “echo boomers,” relating to the size of their population. This generation is three times the size of their predecessor generation and was raised by more mature, established parents, growing up with nurturing and amenities. They are seen as optimistic, yet realistic, indifferent to institutions and inclined to rewrite the rules. They are accustomed to multitasking as they grew up, juggling sports, school, and social interests. They are the “trophy kids,” where participation in sporting competitions meant that everyone was entitled to a “thanks for participating trophy.”

Due to the times and manner in which they were raised (one growing up with the end of the Cold War, grunge music, and the emergence of AIDS, and the other with Britney Spears, Harry Potter, and the Jonas Brothers), these two generations seem to be opposites of the spectrum and yet the two share a workplace not just with boomers, but with one another.

**Julie:** *I am of the Gen X generation and I think that in many ways I fit that profile. I am a strongly self-reliant multitasker who became acquainted and comfortable with technology at a young age. My family was one of the first to have an Apple computer at home. I was also the first of my friends to get on the Internet.*

**Christine:** *I was born later in 1976 (1977 is considered the beginning of Gen Y), and so I fall at the tail end of Gen X, but I learned technology like a Gen Yer, if that makes any sense.*

And they share more than just a workplace. They share a view on communicating.

### **Social Media**

Social media include online technologies such as wikis, Twitter, instant messaging, podcasts and more. Social media have become the focus of corporate America as a new means to stay in touch with clients and markets, on an immediate “now” basis. They allow companies to engage and influence clients with added value. Social media are about insight, about sharing the experience. They are also about relationships, internally and externally—those known and those that begin as a faceless connection. They are about communication.

To both Gen Xers and Gen Yers, social media are a given, both in their social environment and more and more in their work environment. Gen Xers, riding the coattails of the information revolution, saw the inception of MTV, home computers, video games, and the Internet. Gen Yers came of age during the digital revolution and are sometimes known as the “net generation” or “first digitals.” Whereas Gen Xers learned to use technology (Julie Bozzell was one of the early library researchers to become Microsoft® certified), Gen Yers just assume technology (when Christine Sellers’ research position at her law firm was cut, she started a blog called Law Librarians of Leisure.)

Both generations have seen how social media have impacted the workplace and worry about control.

**Julie:** *Social media are going to have a real impact on how we manage tomorrow’s law firm, but we may not be there yet. Yes, some of these Web 2.0 resources can be good for getting your name out there, but time spent interacting with these mediums is not billable, which is not popular in the billable world we live in. Image control, however, is a concern worth some time investment by firms. LinkedIn, for example, does make the participants more accessible, and supposedly in control of their image. Recommendations by others on this site are seen as immediate approvals, which seem ideal, but they can also represent advertising, which is not OK in the case of lawyers. How many lawyers understand this? Firms should develop educational programming and policies regarding lawyer use and understanding of social media. When you use Twitter, you*

*are sharing with strangers and not controlling your image. In short, you can lose control of your presence. There is no authority patrolling these social media sites for us and enforcing accuracy. It is up to us to stay informed and protect ourselves.*

**Christine:** *Law firm tweets give up to-the-minute coverage of timely client-centered matters. There is a difference between the business of law and the practice of law and social media fall into the mind-set of the business aspect. However with more people accessing sites, it is so important to represent yourself or the firm the best you can. If you do not take control of your presence, it will be created for you. The firm must take control of its involvement with social media or information will be missing or misunderstood.*

As law firms initiate more and more social media formats, they are taking control of this technology, understanding that an online imprint can last for eternity. However, there are other concerns being discussed, most notably the scholarship and work product of young associates.

### **Born Book vs. Born Blog**

That online media are more expedient and geographically convenient than print, and afford a more productive and efficient system for sharing and creating information, is understood. However, what is not so well recognized is that, although all online information can be converted to print, the opposite is not the case. Not all print information can be converted to alternative media, and so, for now, books and blogs remain side by side.

Both older and younger generations of researchers have their own style of obtaining information. One flips pages and the other clicks links. They share the end goal of obtaining the correct information or correct scholarship that will enable them to provide the best service to their client. However, they do not understand each other's tactics. Methodical, more print-oriented researchers are concerned about the younger generation's seemingly random research practices. And they are becoming vocal concerning the erosion of scholarship and its impact on the end work product.

**Julie:** *I believe that social media are having an impact on the scholarship of the practice of law. Young associates used to go to their librarians for advice on which resources or research tools they should consult to explain or give precedent to the point of law that they were pursuing. As experts, we could direct them down the proper path, be it print or the use of a database. But now they go to colleagues for answers regarding research, or worse, seek out guidance from complete strangers on the Web. They do not always seem to understand the need for a qualitative source or the importance of precedent. Some attorneys consider Wikipedia a source, even though the authority is not apparent.*

**Christine:** *There is an erosion of scholarship, but there are other factors involved besides social media that are causing that erosion, like the cost of journals and treatises. Many law libraries are forced to cancel traditional resources due to subscription costs. Social media do have their purpose when impacting client development and updating or alerting attorneys. Firms should try to understand social media and what they can do for them. Complaining about them is not a positive.*

### **In Conclusion**

The constant of technology is change, and during the time it takes this article to be published, there most likely will be social media .2 and .3 in play. Further, the next generation, the Gen Zers or “digital natives,” are growing up and making their way toward the workplace.

I did not reference character traits of the boomers but, as stated in the discussion of baby boomers in the free online encyclopedia Wikipedia ([http://en.wikipedia.org/wiki/Baby\\_Boomer](http://en.wikipedia.org/wiki/Baby_Boomer)), “One of the unique features of Boomers was that they tended to think of themselves as a special generation, very different from those that had come before.” Boomers, in effect, elevated generational demarcation to the status of an interpretative key to the human condition at work and in the larger society.

Does generational diversity, however, truly make that much of an impact in the 21st-century workforce? Boomers tend to think of the workplace as defined by their generation, but is it? Should it be?



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## Disaster Recovery at Warp Speed with Virtualization Technologies

*A viable disaster recovery plan is essential to surviving catastrophe—whether hardware failure, data corruption, or a Category 5 hurricane. Virtualization technologies are changing the disaster recovery model and can provide the tools to help create a current and well-documented recovery plan.*

By **Lynn R. Watson**, Deputy Chief Knowledge Officer, Hogan & Hartson L.L.P., Washington, DC

Does your firm have a disaster recovery plan? I would venture to say yes. It may be a little dusty, but inevitably a news headline will soon appear spreading panic about a hurricane brewing or a pandemic lurking and all eyes will once again be focused on your plan. Surprisingly, statistics show that very few “disasters” result from natural disasters or large-scale catastrophic events. It is much more likely that your firm is going to need to recover from a hardware failure, data corruption, or air conditioning or power failure than from the swine flu or a Category 5 hurricane. In reality, it doesn’t really matter; when any event results in the disruption of information technology services or an outage in your data center, your disaster recovery plan had better be ready and viable.

### What Are the Expectations?

#### The plan is current

If there is one thing that disaster recovery plans are not, it is static. It requires a lot of diligence on the part of IT to keep these plans current. Every time a change is made in the firm’s IT operating environment, it needs to be evaluated against the existing plan to identify potential changes. Application upgrades, new hardware, changes in infrastructure, new backup technologies and procedures, and new storage components all need to be accounted for and addressed.

#### Time to recovery and your recovery point

One basic underlying concept in any disaster recovery plan is the acceptable recovery time. This is the time that the organization has agreed is acceptable for being “down.” Just after Sept. 11, my organization engaged a third-party consulting firm to devise a recovery plan. In that era of disaster recovery, we had some systems that were deemed mission critical and were allotted a recovery time within the first 24 hours of an incident, but many services weren’t expected to resume for days or in some cases, up to a week, after an event. However, according to a recent survey from Symantec,<sup>1</sup> these expectations have changed significantly. Up to 60 percent of an organization’s systems are now deemed mission critical and most organizations expect their mission-

critical applications to be restored within four hours of an event. The acceptable recovery window continues to tighten; in the same survey in 2008, only 3 percent of organizations indicated that they could recover skeleton operations within a 12-hour window, and 31 percent of respondents indicated that they could recover baseline operations within a 24-hour window.

Another area of focus in your plan is your recovery point, which basically defines how much data you feel that you are comfortable losing. For example, if you have real-time replication, you basically have an immediate recovery point, but if you take a snapshot of your data or server every four hours, then you could potentially lose up to four hours worth of work if something were to happen. Your recovery point varies from system to system and is highly dependent on your backup strategies and the success of those strategies. A lot of organizations still use nightly tape backups as their sole backup strategy. Under this scenario, you could potentially lose up to 24 hours worth of work product and, in reality, you could lose more. According to industry statistics, 20 percent of nightly tape backups fail to capture all data. In addition, 40 percent of IT managers have indicated an inability to recover data from a tape when they needed it.<sup>2</sup> As a result, many organizations have moved away from tape. However you back up your data, just remember when considering your disaster recovery plan that your point of recovery is very important, and you're only as good as your last successful backup.

## **What Are the Major Challenges?**

### **Cost and investment**

To implement a solid disaster recovery strategy is not cheap, but most organizations seem to accept this fact. According to the same Symantec survey, IT budgets for disaster recovery were up in 2009 compared with 2008 and, even with the economic downturn when many areas are being cut, it is expected that expenditures for disaster recovery will remain at this level.

Traditionally, disaster recovery has meant the identification of key systems and the investment in requisite hardware to rebuild those systems at some off-site location. Typically, the hardware needed to be a very close, if not an identical, match to facilitate a successful restoration. Unfortunately, for this large outlay of capital, the investment results in little more than hardware that sits idle "just in case."

### **Put to the test**

Another area where disaster recovery plans commonly fall short is testing. It is not uncommon for plans to go untested, and when they are put to the test, the results are not that surprising—one in four tests results in failure. However, given the wide array of variables that must be accounted for, it is surprising that our disaster recovery plans are as good as they are.



## Enter Virtualization

Virtualization technologies have been in existence for several years, but it is just in the past two years that they've gained a strong foothold within the legal environment. Initially, virtualization was brought in as an answer to firms' green initiatives and to address environmental constraints such as power and air conditioning, but many firms have found that there are several secondary benefits to virtualizing their environment.

### What is virtualization?

Generally speaking, traditionally, one application equals one server. Over time, this has led to hundreds of servers, and all of these servers take up space, electrical power, and cooling, but many of these servers are underutilized. With virtualization, several logical servers can be consolidated onto a single physical machine where they are able to share the available resources (e.g., RAM, CPUs). In this scenario, an organization can significantly reduce the number of servers that it supports, which also reduces the physical footprint of the IT infrastructure, the required cooling, and the draw on power.

### How does virtualization affect disaster recovery?

Virtualization affects disaster recovery in the following ways:

- Immediately, the disaster recovery strategy becomes slightly less complex because you're dealing with fewer servers as part of your recovery strategy and, ultimately, this means a reduction in expenses and less idle equipment.
- Virtual servers are software based and hardware independent. Basically, a virtual machine comprises several files. These files contain the entire server—data, applications, operating system, hot fixes, updates, etc. These files can be restored to any compatible host, regardless of the make and model of the physical box, and your server, application, and data can be up and running immediately. Similarly, system restorations become much more uniform and you are less dependent on system-specific expertise and documentation.
- With the right tools and configuration in place, your virtual servers can automatically failover to alternate physical machines when they detect a failure or particularly high resource utilization.

Virtualization is not a panacea. There are pitfalls. In a virtual machine environment, a hardware failure has the potential to affect multiple systems instead of a single resource. In addition, it is important to know your applications and how they are used and the resources that they require. With these caveats stated, it is safe to say that virtualization is changing the disaster recovery model and is providing IT departments with the

necessary tools and capabilities to meet the ever-increasing demands surrounding firm disaster recovery strategies. However, it is still important to emphasize the necessity of a well-documented plan and the need for regular testing, and it is still imperative to set expectations and define acceptable recovery parameters.

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## “Start It Up”

*Does your law firm take advantage of the challenges and opportunities that change presents? By laying a proper foundation, recognizing client-driven opportunities, and investing in resources that optimize growth, your firm can survive—and thrive—in a changing environment.*

By **Al Podboy**, Director of Library Services, Baker & Hostetler L.L.P., Cleveland OH

There is a phrase that, according to the Internet, has long been misattributed to the Chinese. It is “May you live in interesting times.” The phrase can be interpreted as either a blessing or a curse. The interpretation depends on your perspective. Regardless of who first used the phrase, it has definitely been an interesting year. It has been an interesting year for society at large. From a law firm perspective, whether the year has been blessed or cursed depends largely on the firm’s ability to react to change.

Change brings both challenges and opportunities. The challenges can be met with fear and inertia, or with preparation and optimism. In the current climate, opportunities exist because of government action or inaction and client-driven responses. The client drives the law firm’s reaction. That reaction depends on three basic factors: (1) a solid foundation, (2) a view toward client-driven opportunities, and (3) ready access to the tools and resources available to optimize growth. We will briefly look at all three factors.

Client-driven law firm growth requires a firm foundation. That foundation requires a four-prong approach, an approach that includes a client focus, internal communication, solid expert practice areas, and control of expenses.

First, client focus is a law firm’s reason for being. Successful clients create successful law firms. A client-driven focus requires constant communication—communication that explores the client’s needs, views, expectations, and priorities. Knowing the client is the key to a law firm’s own business development.

Second, in order to meet the client’s needs, the law firm must have excellent internal “team” communication. Team communication involves the partners, associates, and staff. Open communication and a team approach reduce anxiety during a period of change, and tap into new client service ideas and possibilities within the law firm and its practice areas.

Third, exploring the client’s ideas and possibilities for growth requires a review of the firm’s practice areas. Through a review, the law firm develops new or “remodeled” practice areas. Such review may also require attorney reassignment and training.

Last, serving the client requires a detailed audit of expenses. To stay competitive all nonessential expenses must be cut. However, the law firm must also retain and enhance the tools needed for continued success.

Where possible, contracts should be renegotiated. Excess capacity must be examined, both lawyers and staff. Again, team communication is key. Team discussions should include the impact on salary, bonuses, sabbaticals, deferrals, hiring, and possible layoffs. Again, all of these approaches to expenses, whether material or personnel, should be constrained by the client's requirements for new opportunities and growth.

Looking for client opportunities while in a recession requires an optimistic mind-set. History teaches that such opportunities do occur. In the depths of the Great Depression during the 1930s, President Roosevelt's New Deal created new federal agencies and regulations. These proved to be a boon for law firms. The New Deal created new business opportunities and obligations. Those opportunities and obligations required law firms to respond by creating new practice areas. Will President Obama's "newer" deal do the same? The past year has brought bailout bills and stimulus packages. All of this legislation, whether federal or state, is again creating new client opportunities and obligations—client opportunities and obligations that create windows for law firm growth.

Law firms with diverse and balanced practices have already responded to many of these client opportunities and obligations. Although the earliest response was in the area of bankruptcy and employment practice, the latest area of growth is in the impact of new regulations on the law firm's client base. New regulations are affecting clients in many areas—antitrust, taxation, environment, green initiatives, communication, government contracts, white-collar criminal defense, congressional investigations, governmental affairs, lobbying, food safety, and banking, to name a few. Client-driven law firm opportunities are also reappearing in the securities and venture capital areas. These client representation opportunities are not limited to domestic clients. The current client opportunities have a global reach. With modern technology, law firm representation is no longer limited by geography. Law firms can represent foreign and domestic clients wherever they are located.

Opportunities for law firm growth are not limited to practice area development. With the substantial attorney layoffs and deferrals that have occurred come client-driven law firm hiring and training opportunities. Properly positioned and grounded law firms now have new leverage in acquiring exceptional lateral hires and in recruiting new talent. The above-mentioned new and remodeled practice areas have increased the need for continuing legal education, designed to enhance and develop expertise and business development. With a solid client-driven foundation and the recognition of new client opportunities and obligations come the need for new research and continuing education resources.

In the area of research, both governmental and commercial vendors are providing the tools that will drive client research needs in developing and expanding law firm practice areas. Two such government sites are [www.recovery.gov](http://www.recovery.gov) and [www.grants.gov](http://www.grants.gov). Both of these sites help track the progress of federal agencies and agency rules on the allocation of monies that individual states will receive from the stimulus and bailout acts. The sites discuss who will administer the funds and how they will be enacted, creating client opportunities.

Commercial vendors also responded with new research tools and databases almost immediately. West, for example, rapidly developed a Financial Crisis tabbed page on Westlaw®. The content includes topic-focused traditional materials such as cases, statutes and regulations, administrative materials, public records, and individual company information, but in one easy-to-use location. The page includes topics such as Recent Developments with links to articles such as “Thinking About Starting a Foreclosure,” “The Commercial Real Estate Market Between a Rock and a Hard Place,” and “Depreciation in Real Estate Values,” from various Andrews litigation reporters. Under the topic Current Legal Analysis, West provides access to articles about the subprime mortgage lending controversy and the financial crisis from publications such as *Aspatore Special Reports* and Andrews litigation reporters. The News, Journals and Law Reviews topic also provides access to resources that discuss the financial crisis and the subprime mortgage market. Under the topic Analytical Materials, West provides links to the texts *Shareholder Derivative Litigation: Besieging the Board* and *Bank Directors’, Officers’, and Lawyers’ Civil Liability*. Trial filings and appellate briefs are also provided. Other vendors have created similar tools that discuss and track the economic stimulus bills and the billions of dollars in funding client opportunities that such bills have provided—opportunities dealing with infrastructure, energy and environment, health care, communications, education, taxes, labor and employment, and more. These opportunities impact clients both large and small.

The Library of Congress has also entered the research market. One example is its summaries of the financial stimulus plans in 16 countries and the European Union and Russian Federation, available at [http://www.loc.gov/law/help/financial\\_stimulus\\_plan.php](http://www.loc.gov/law/help/financial_stimulus_plan.php). The Library gives law firms access to global stimulus opportunities.

The vendor response did not stop with research. In the area of continuing legal education, West responded with financial crisis CLE programs. Getting lawyers up to speed, West’s LegalEdcenter® provided access to programs such as “The Basics of Bank Failure,” “Rescuing the Economy: An Examination of the Emergency Economic Stabilization Act of 2008,” “The Derivatives Market: What Comes Next,” and “Derivatives and Bankruptcy: Where Do the Safe Harbors Begin and End.” These are just a few of the online resources available. West also supports law firm clients by providing cost-effective in-house attorney CLE programs. West’s program offerings involve both new practice areas as well as changes to traditional practice areas. These commercial vendor examples have complemented the CLE programs of national, state, and local bar associations.

Our interesting times have created opportunities for our clients. To respond, the clients need professional representation from law firms that have laid the proper foundation, recognized new opportunities for their clients, and invested in the resources to serve their clients. By doing all three, law firms should be ready to crank the ignition, hit the accelerator, and “start it up!”

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## Docs Without Borders: Is a Web-Based Office Suite in Your Future?

*Web-based office productivity software is gaining traction. The ability to access work product regardless of location from almost any Web-enabled device, coupled with ease of sharing information and low IT maintenance, makes Web-based applications powerful and cost-effective tools.*

By **Conrad J. Jacoby**, Founder, efficientEDD

Few recent technological achievements have changed society as much as the development of the World Wide Web. Today, we think nothing of using the Web to send and receive e-mail messages, go shopping, make travel reservations, play games, and research just about any topic that can be imagined. Old computers are finding new lives, not as recycled scrap metal, but as Internet access points that continue to provide significant functionality to users.

Businesses have also been tapping the power of the World Wide Web, as they find that it can be easier, cheaper, and better to use Web-based services for some tasks that have traditionally been managed with local software. Salesforce.com has become a compelling demonstration of how a Web-based application can provide a powerful (and more cost-effective) solution for many business development professionals across many industries—even in companies that traditionally have had strong internal sales channel resources. Within the legal community, litigation support professionals increasingly recommend Web-based discovery document repositories that offer rapid scalability, extensive analytical functionality, and 24/7 technical support—while also outperforming most traditional litigation support software installed inside law firms. Outsourced discovery document hosting isn't just more convenient than managing the project on internal information technology infrastructure; it often provides greater functionality and gives legal teams a substantive edge over opponents who are using less powerful analytical solutions.

One final frontier for Web-based applications, however, has been the core word-processing and office productivity software that is loaded on practically every personal computer in the world. These are applications that must be available to users night and day, regardless of location. Data files created by these mission-critical applications must also be readily accessible and secure against both intentional and accidental intruders. Faced with these and other requirements, it's small wonder that Microsoft® Office remains one of the most popular software programs in the world.

Over the past few years, however, Web-based word-processing, spreadsheet, and PowerPoint-style presentation software has attracted increasing attention and an increasingly large and vocal user community. Though Google Docs dominates news coverage of Web-based office suites at the moment, at least a dozen



different Web-based word-processing programs are available, as are an equal number of online spreadsheet programs, many of them with surprisingly rich feature sets.

Why is Web-based office productivity software gaining traction now? Users are initially attracted to Web-based productivity suites for one basic reason: they're free. Google Docs and other competing online suites require nothing more than user registration, and they don't require elaborate and error-prone software installation. However, users quickly discover that these are fully featured applications that read and save documents in several popular formats, including Microsoft Office (.DOC and .XLS), OpenOffice, PDF, and HTML. For many, these programs prove more than powerful enough to serve all their document creation needs, especially those (like Google Docs) that also have an offline access mode for when an Internet connection isn't available.

Perhaps a bit counterintuitively, Web-based applications have also become increasingly attractive because they may meet mission-critical criteria better than traditional locally loaded software. Web-based solutions permit a user to access work product regardless of location and computer, so it's no longer necessary to load proprietary documents and information on a laptop computer that could easily get lost or stolen. Equally important, online document storage associated with Web-based applications also makes it easy to share documents with colleagues and clients. Unlike internally hosted document management systems—and even corporate and law firm extranets—users can easily share documents with others, all of whom can then access the files online from any location. No elaborate network configuration or security dance is required.

IT departments are also finding that Web-based applications offer some distinct advantages. First, other than standard Web browser plug-ins like Java and Flash, these programs require no installation on a computer—minimizing IT maintenance requirements. Second, far fewer security patches and updates—the bane of so many users and IT professionals—are required when only the computer operating system and browser must be kept current.

It's also increasingly difficult to find locations that lack Internet access. The growing popularity of affordable cellular modems for laptop computers and growing availability of Internet connectivity even when cruising at 35,000 feet inside a commercial airliner have eroded already weakening fears that materials stored online will be unavailable at critical times. Further, in addition to offline access, most Web-based office suites permit users to access their files from any Web-enabled device, including not only other computers, but also nontraditional devices such as mobile Internet devices and cell phones.

Of course, online applications aren't perfect. Organizations with sensitive information continue to be concerned about third party data storage that they do not control and for which a physical location is unknown. Large collections of information are the most attractive targets for hackers and corporate espionage, and even the best-managed data centers run some risk of intrusion and compromise. Corporate records managers also have some legitimate concerns that storing work product outside corporate servers may make it more difficult

to enforce an organization's document retention plans, since no single life-cycle management tool can presently be applied to internal and external data repositories.

### **Conclusion**

At least two of the strongest proponents of Web-based applications are certain that this market will continue to grow strongly. In July, only days after Google announced the release of an enterprise-oriented version of its Google Docs suite, Microsoft announced that the next major release of its benchmark productivity suite, Office 10, will include both locally installed software and a free, stripped-down, online version of its software. Web-based Office 10 will be a direct competitor to Google Docs, and this rivalry will increase the pressure on both Google and other providers of competing Web-based software to further increase the functionality and ease of use of their programs. Equally important, the publicity generated by this rivalry is likely to further increase awareness and adoption of Web-based applications.



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## Help Your Clients Help You: Be Proactive About E-Discovery

*Electronic discovery can be a high-cost, high-risk activity. Developing a proactive e-discovery strategy can generate revenue, build goodwill with clients, and ensure that you achieve the best possible litigation outcome.*

By **Daniel Estrada**, President, D.C. Estrada, Grand Rapids, MI

Until recently, law firms have primarily approached electronic discovery reactively. Most e-discovery dollars have been spent cleaning up a mess instead of preventing one. But it's painfully obvious to anyone who has conducted discovery of electronic evidence that a proactive approach is cheaper and easier for everyone involved. It also makes you much more likely to win your case.

In 2008, we began to hear more talk about corporate policies, e-discovery planning, and other proactive measures. This paradigm shift—coupled with today's economy—has created an interesting litigation landscape, and corporate clients aren't letting outside counsel run the show. But e-discovery has also created an opportunity for law firms to provide new and innovative services to their clients.

Despite some attorneys' aversion to technology, electronic evidence is a fact of life. Companies generate an immense amount of electronically stored information (ESI), and much of it is relevant to litigation. Even as early as 2002, only 0.01 percent of new information originated on paper. Increasingly, most of the relevant information available about any legal matter is stored electronically.

Yet, in a recent study conducted by Osterman Research, nearly 70 percent of large and medium-sized companies surveyed indicated that they are not ready to address e-discovery issues.

And it's no surprise: collecting electronic evidence from large, disparate information technology systems can't be accomplished with the push of a button. Electronic data can be stored in many different formats, on a variety of different systems. Most ESI is never printed, and files can be saved, modified, or deleted with the click of a mouse.

E-discovery can be a high-cost, high-risk activity, especially if your clients are not prepared to handle the barrage of discovery requests that inevitably land on their lawyer's desk. In addition to making litigation much more expensive, e-discovery also introduces other risks:

**Winning is about proving good faith, *not* about the evidence presented.** In many cases, data retention policies and preservation efforts are more important than the evidence itself. If an organization doesn't have adequate controls in place, there's no way to meet its preservation obligations. Famous e-discovery cases like *Zubulake v. UBS Warburg LLC* clearly set this precedent.<sup>1</sup>

**Giving up can be the best business decision.** Sometimes, settling a case (regardless of fault or responsibility) is cheaper and easier than dealing with e-discovery. The exorbitant cost of a poorly planned e-discovery effort often makes settlement the only viable option.

**E-discovery sanctions are increasingly prevalent.** Because of the complexity associated with electronic data, it's easy to make costly mistakes. As recent case law illustrates, courts have become increasingly demanding when it comes to e-discovery, even going as far as referring attorneys to the state bar for disciplinary action.<sup>2</sup>

Instead of reacting to e-discovery when litigation occurs, you should be proactive in addressing these risks with your clients.

For starters, developing an e-discovery strategy allows you to generate revenue on the front-end instead of waiting for clients to get sued. Being proactive about litigation also builds tremendous goodwill with clients. E-discovery planning has a tangible return on investment, so a strong litigation strategy will directly increase your clients' profitability. And, you'll win more cases when your clients are prepared for discovery. Planning ahead will help demonstrate good faith, a critical requirement of the Federal Rules of Civil Procedure (FRCP) and many state court rules governing e-discovery.

Most significantly, corporate clients expect their outside counsel to have a skilled e-discovery practice group. Attacking e-discovery proactively gives litigators a deeper in-house perspective, helping to build a stronger understanding of the unique challenges that e-discovery presents to their clients. And, helping to implement a discovery strategy will make your firm an easy choice for future litigation work.

### **Guidance from the Federal Rules of Civil Procedure**

So how do you help clients develop a proactive e-discovery strategy? Most organizations don't extract the substantive compliance requirements implied by the FRCP. If we look closely, the FRCP and supporting case law give us clear guidelines for e-discovery preparedness:

**Prepare an adequate legal hold process.** Ensure that proper hold triggers are identified and that swift, appropriate action is taken in response. Provide training to employees so they know how to react when a hold is issued. Draft hold message templates that address a variety of common scenarios, based on the client's litigation history.

**Know where and how data is stored.** Work with IT to generate a “data map” or similar documentation that shows how the IT system is organized. Quickly identifying sources of potentially responsive ESI will put you one step ahead during discovery.

**Plan for collection and analysis.** Make sure your clients have an e-discovery plan that covers the collection, processing, and review of potentially responsive ESI. There are several elements:

- Address the storage and retrieval of e-mail, file shares (“network drives”), databases, and any other electronic information (e.g., voice mail, text messages).
- Evaluate technical systems that are used to archive and retain data, such as e-mail archiving appliances and document management systems. Make sure these systems are equipped to handle automated legal holds.
- Select software tools and vendors to collect and process electronic evidence stored on the company’s system. Depending on the size and complexity of the organization, it may be more cost-effective to outsource or to purchase in-house tools.
- Develop a comprehensive review strategy. This may include hiring contract attorneys or other legal support staff to keep costs down.

**Build a good faith showing.** In addition to a strong legal hold policy, it is critical to demonstrate that the company has control over its electronic records. The only way to establish good faith is to craft excellent policies that are well-implemented, properly enforced, and consistently followed. Effective policies are clear and concise, and they avoid legalese as much as possible. But every organization is different; IT policies should be tailored to fit your client’s culture and business practices. Policies may also address acceptable use, employee privacy, intellectual property issues, internal and external communication, and data security practices.

**Keep only what you need.** Retaining unnecessary records significantly increases the cost of litigation, because there is more data to search, collect, and process in response to an e-discovery request. Retaining less data also decreases the organization’s storage costs and increases efficiency.

**Tip:** There are only three reasons to retain an electronic record:

1. There is an ongoing business need to keep it;
2. A regulatory compliance obligation exists; or
3. There is a legal hold on the record.

**Test and learn—then test again.** Be sure to test the company's processes regularly to ensure that all technical and procedural controls work as expected. Tweak policies and plans based on changing business needs, changes in the law, and the organization's own litigation experience. Most importantly: communicate with stakeholders *very early* in the planning process and solicit feedback. This will create management buy-in throughout the organization.

Corporate policies should also be reviewed annually or semiannually to ensure that they adequately address current risks. Effective policies are communicated to employees, reviewed and discussed regularly, and updated as a matter of habit. New employee orientation should always include a discussion about corporate IT policies.

### **Ensure the Best Outcome**

In the electronic age, we cannot ignore the risks and challenges introduced by new technologies. The right litigation preparedness strategy will make e-discovery cheaper, easier, and less painful for everyone involved. But it's vital that you work with skilled technologists who have experience addressing e-discovery proactively. With the right team, taking a proactive approach ensures the best possible outcome for your clients.

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### **Sources**

1. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004)
2. *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008)



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## **Book Review: *Mass Career Customization: Aligning the Workplace with Today's Nontraditional Workforce***

By **Cathleen Benko** and **Anne Weisberg**, Boston, MA: Harvard Business School Press, 2007

*Employee demands for flexibility often conflict with the traditional rigid organization of most workplaces. This book proposes “mass career customization” as a means of systematizing needed flexibility in workplace structure that will benefit both employee and employer.*

Reviewed by **John E. Duvall**, Administrative Analyst, Hogan & Hartson, L.L.P., Washington, DC

Cathleen Benko and Anne Weisberg foresee a collision between the traditional rigid corporate ladder that characterizes the organization of most workplaces and an emerging nontraditional workforce. The new workforce is characterized by several converging trends. The approaching retirement of the baby boomers, combined with lower birthrates, stagnant college graduation rates, and declining competence in basic writing and math skills, results in a shrinking pool of skilled labor. The marriage rate is declining, and more of those who are married are in dual-career households. There are more single-parent families who have, in common with dual-career parents, less of a support structure for responsibilities outside of work.

Women now make up half the workforce and more than half of college graduates. Women are also making better grades and winning more honors in college than men. Women's childbearing years often coincide with the key middle years of their careers, and women who leave the workforce temporarily find it difficult to reenter later. Women who do reach management levels are more likely than men to be in dual-career households and to feel the strain more.

Men now also expect to spend more time with their families. Formerly, men's latent demand for flexibility was suppressed by traditional expectations of what a man's role in business and family should be. Both male and female members of Generations X and Y, however, now place a higher priority on a meaningful family life and are less willing to sacrifice it for their career. At the same time, technology is making possible new virtual workplaces that offer more flexibility as to where and how work is done.

These trends are driving new employee demands for flexibility in the workplace while technology is creating new ways to accommodate them. Employers will have to meet these demands to attract the workers they will need, and that will mean moving away from the rigid corporate ladder to a more flexible lattice model that allows for multiple career paths.

The flexible work arrangements many employers now offer are not the answer. Too often, they are static, one-off solutions to an employee's particular, temporary needs. They are seen as exceptions to the norm of full-time work that do not address the conflict between rigid career paths and varying employee needs. Employees who take advantage of flexible arrangements are stigmatized as less committed. Managers and leaders find it difficult to create flexible arrangements for themselves. Granting flexible arrangements to some employees may raise equity issues and lead to resentment among others who are asked to take up the slack. Trade-offs, particularly in compensation and advancement, are often not discussed.

Benko and Weisberg propose "mass career customization (MCC)" as a means of systematizing and embedding the needed flexibility in the structure of the workplace and extending it to most employees. "MCC assumes a definite, not infinite, set of options along four career dimensions and provides a structure to articulate and manage these options as commonplace events—rather than one-off accommodations. Employees customize their careers by selecting the option within each of these four dimensions that most closely matches their career objectives while considering their life circumstances and the needs of the business at any point in time. Decisions on each option are made in counsel with managers and revisited periodically. These choices are registered on an MCC profile. ..." (pp. 82–83) Every employee, apart from, perhaps, part-timers and new hires, will have a profile. At any given time, most profiles in an organization will reflect a full-time, unrestricted work schedule, but each employee's profile will vary over time, reflecting a reduced commitment to cope with childbearing, child rearing, or other life events and then a return to fully engaged work.

The four dimensions of MCC, each of which varies along a scale, are, with their endpoints: Pace (accelerated or decelerated), Workload (full or reduced), Location/Schedule (unrestricted or restricted), and Role (leader or individual contributor). Pace refers to how quickly the employee advances to higher levels of authority; Workload, to the quantity of work performed, expressed as number of hours worked per day or week. An unrestricted Location/Schedule corresponds to full-time work and unlimited availability for travel. Role refers to the category of the employee's position or job responsibilities. The dimensions are interrelated, making trade-offs explicit. For example, a restricted Location/Schedule requires a reduced Workload and probably also a decelerated Pace. A management Role may require an unrestricted Location/Schedule, while an individual contributor Role may be compatible with a restricted Location/Schedule. These variations would also impact compensation, although not evaluations, which should relate to each employee's goals as specified in his or her MCC profile.

The benefits of MCC include promoting an ongoing conversation between the employer and the employee and providing a framework for discussing career options. For employers, benefits include an improved ability to forecast talent needs, a tool to attract and retain high-performing employees and to “entice aging talent to extend their tenure ...” (p. 152) by offering them a reduced commitment. MCC promotes leadership diversity by providing multiple and flexible career paths. In particular, MCC allows talented women to stay connected to the organization through their child-rearing years and rise to top positions.

Reconfiguring the workspace for MCC may involve separating jobs into modules. Employees would take on more or fewer modules as their MCC profiles changed. Virtual networks offer more flexibility in when and where work is done.

Building the business case for MCC involves estimating how scarce critical talent is now and how scarce it will be in the future, and asking who is leaving your organization and why. (p. 152) Are they leaving for other jobs or to cope with life events? How much does it cost to replace them, and when does the cost affect the bottom line? How many one-off flexible arrangements are your managers handling now? These are not isolated incidents but a trend that requires a comprehensive response.

This book was published in 2007, before the current financial crisis became evident. It may seem that the crisis has, at least temporarily, put an end to the talent shortage and therefore to the need to offer incentives such as MCC to attract employees. This may indeed be a long-term change. On the other hand, as the workforce trends cited by Benko and Weisberg are mostly long-term demographic trends that will not be reversed (e.g., the retirement of the baby boomers and lower birthrates have already guaranteed that succeeding generations will be smaller), it may very well be that, as the economy recovers, the talent shortage will return, and with it the need to adapt to the changing workforce.



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