

Kroll Ontrack Sees Data, Guidance, Pricing Among 2011 EDD Struggles

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E-discovery court cases and technology trends in 2011 represented a field showing signs of maturing, Kroll Ontrack Director of Discovery Michele Lange said this week, in connection to the company's annual look at cases. Of the 92 cases evaluated, 67 percent involved preservation and spoliation, 42 percent addressed sanctions, and 15 percent involved production disputes.

"This is the fourth year running that we have reviewed the prominent cases and orders that have been issued by judges across the country related to e-discovery," Lange explained. "At a high level, if you take a look at where we are this year versus last year or five years ago, the themes were fairly unsophisticated or brute-force," she said.

For example, 2011 saw consensus across the legal field that software metadata -- descriptive information about a file -- should be included with traditional forms of electronically stored information, as could user activity from social networking. Such information is now commonly sought by criminal investigators and civil attorneys, but, "It's almost comical to think that this was even a big deal a few years back," Lange noted.

Other legal technology matters that were widely addressed in 2011, such as whether attorneys and judges have enough guidance, remain unsettled. Federal committees and even Congress are still evaluating that question, however, Lange cited the Western district of New York case *United States v. Briggs* in which Magistrate Judge Hugh Scott applied civil rules for e-discovery because criminal rules were insufficient. In general, "The theme there, across 2011, is courts are begging for, or taking issues into their own hands," Lange said, in Minneapolis.

Some help is starting to become available. Lange noted that for patent cases, the Advisory Council for the U.S. Court of Appeals for the Federal Circuit issued a model order limiting e-discovery. The New York State Bar Association offered help to confused counselors by publishing its own e-discovery guidelines. The subject also arose in the National Research Council's Reference Manual on Scientific Evidence, although the manual conspicuously lacks a chapter on computer technology.

For vendors like Kroll and others, the biggest challenge is to satisfy customers who simultaneously want more control, more visibility, and reduced costs. "They say they want all the control in the world, but they don't want the headache," Lange said, acknowledging the conflicting demands. "They're always going to say they want it both ways. That's just the nature. Everybody wants it cheap and fast," she observed.

Kroll's approach to "fast and cheap" is a self-service offering called Verve, which aims to be easy to use compared to high-end discovery products.

Another never-ending e-discovery debate of 2011 is the question of who pays. Lange noted, "The parties are talking about and arguing for and against ... and then, on top of that, does precedent support taxing e-discovery costs?" That will certainly continue in 2012.