

Compliance Readiness – Legal Service Providers

Stratify Legal Discovery:™ A More Effective And Efficient System For Document Review

The Editor interviews Michael S. Simon, Legal Associate of Client Development and Strategy, Stratify, Inc.

Editor: What is unique about Stratify's approach to electronic discovery?

Simon: Stratify combines five factors that you will not find in other companies. Our in-depth legal knowledge, extensive experience in electronic discovery, highly reliable service and scalable solutions, and technology innovation combine to deliver highly productive eDiscovery applications. These factors are the foundation for the Stratify Legal Discovery™ service which provides automatic concept organization and native file review to create a fast and cost-effective review system.

As an ASP hosted solution we provide an excellent alternative to in-house applications because we receive and host the documents in our secure data-center. As a result no additional infrastructure or personnel costs are incurred by the firm. I have colleagues at AmLaw 100 firms who tell me that they are running out of storage space because of the data demands of projects. This makes a hosted storage and document review system very attractive. The service also allows law firms to work collaboratively with clients and co-counsel using an online system that offers a high degree of security where people can control the level of access each user will have.

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Editor: Who are the typical clients that Stratify works with?

Simon: Because electronic discovery needs to be managed by all legal professionals, we work with the AmLaw 100 as well as smaller firms. We also work with Fortune 500 companies who appreciate the more efficient and effective review results they are able to achieve with the Stratify Legal Discovery service. Studies with our clients show that attorneys who use the Stratify Legal Discovery application review an average of 500 documents per hour. That is an incredible improvement over previous systems. In some projects we have seen sustained review rates of 1,000 documents per hour and there are instances where attorneys reviewed 10,000 to 15,000 documents per day. That is an incredible productivity leap from traditional e-discovery systems.

Editor: What types of matters do clients use the Stratify Legal Discovery service for?

Simon: There are a variety of matters that clients use the Stratify Legal Discovery service for. Stratify has been involved in a number of major cases related to the options backdating investigations. We handle extensive litigation in disciplines including intellectual property, securities, antitrust, HSR second requests, and regulatory issues where the SEC or other agencies conduct investigations.

What is very interesting is that we are seeing an increasing use by major companies on internal investigations that have not been prompted by formal litigation or existing regulatory investigations. These companies have decided to proactively conduct their own internal investigations to understand the information they have on hand before any trouble ensues. For example, after determining that regulators were focusing heavily on options backdating, many companies triggered their own internal investigations before anyone came in and investigated from the outside.

Editor: You have written about the importance of having “technical teams” at the forefront of the company's discovery efforts. Would you tell our readers why “technical teams” are important?

Simon: It is very important for attorneys and companies to make sure that their technical teams are involved. The new amendments to the Federal Rules of Civil Procedure have changed the way that discovery and trial practice must be conducted. One of the key changes in the FRCP amendments is that electronic discovery must be handled early on in a case. Therefore, the senior attorneys handling the matter need to deal with electronic discovery issues as early as possible. In order to do this, the attorneys and those involved in the process need to have a fundamental understanding of technology.

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The new Rule 26(f) Advisory Committee Notes state that the attorneys need to be fully familiar with their client's IT systems before the “meet and confer” that will happen at most 99 days



Michael S. Simon

after the start of litigation. Attorneys need to discuss these systems with internal and external professionals so that they are prepared for that meeting and can discuss document preservation, production, document format and privilege in the face of what may be hundreds of thousands or even millions of documents. All of this needs to be done with the understanding of how the client's IT systems work, where the documents are stored, the likely sources of those documents, the format, what information is easy to access and what is inaccessible. Also, attorneys need to be ready to prepare for an early 30(b)(6) deposition of their client's records manager or network personnel who will testify as to how the documents are kept and what the systems look like.

Editor: Does Stratify have team members on staff who can work as part of a “technical team?”

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Simon: We do. This relates to the legal experience that Stratify's professionals have. Our project managers all have legal industry backgrounds – whether as attorneys, paralegals or litigation support personnel. Customers need to have someone they can depend on as an advisor in this context.

Editor: What are the consequences for a company that inadvertently discloses privileged or proprietary information during the course of discovery?

Simon: The potential for a disastrous situation is high. The new Rule 26(b)(5) creates a framework for getting documents back but it does absolutely nothing to change the substantive and ethical laws of waiver. Some courts have taken a harsh stance on this issue stating that an inadvertent waiver cannot be restored. The majority of courts have a reasonableness test but there is still a possibility that you will not be able to get the information back. Moreover, there is also the possibility that a judge may grant a subject matter waiver where you have to produce everything on the same subject as the waived document. Even when you do win, you loose; clients do not like it when faced with this situation and you may spend hours – probably non-billable – trying to prevent a disaster.

Editor: Does the Stratify Legal Discovery service include features that

ensure that these types of waivers do not occur?

Simon: Yes. The fundamental concept of the Stratify Legal Discovery service is that it automatically organizes documents for you. It creates an environment that improves the speed and reliability of your review. Studies show that when lawyers have to rely on basic search functions to review different documents they are likely to make mistakes. Stratify's application groups similar documents together which makes the process more accurate and efficient. Users are also able to combine the automated concept organization with strong search capabilities to make search results more useful and to conduct powerful presumptive privilege sweeps.

Other features such as Stratify Visual Email Analytics™ allow you to track email messages which may have been missed by a general privilege sweep. So if there are emails that discuss privileged information that were sent by people outside the legal department, visual email analytics can be used to track down those messages and their attachments. The application also includes a final quality check which automatically flags inconsistent tagging. If a document is tagged as privileged and marked for production, it will be flagged for review further.

Editor: How can companies become more proactive in the face of increasing regulatory compliance and litigation?

Simon: Companies need to be prepared and have systems in place for document retention that take into account the new rules and requirements. Key people need to be directly involved, including IT, business, records management, and legal, sitting together at the table so that they can work out their internal rules and procedures. They will then need to make sure that those procedures are disseminated, tested and confirmed. There are many companies that have procedures that are not followed. You need to work these out and have triggers in place for when the reasonable anticipation of litigation arises and you need to initiate the litigation hold. You also need to have the procedures for litigation holds built into those rules and ready to go. When something happens, you have to follow the rules. If a company does not adhere to the procedures potential trouble will likely follow.

The procedures need to be monitored, tested and followed in everyday situations. Procedures that are not complied with are in many ways worse than not having any rules at all. If you have times when the procedures are not followed because of either IT failures or people not complying, it is going to give ammunition to the other side to claim spoliation. This is why constant testing and monitoring is critical.

Please email the interviewee at msimon@stratify.com with questions about this interview.