

The MARYLAND LITIGATOR



MSBA Litigation Section

February 2012

The Maryland Litigator

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THE LITIGATION SECTION OF THE MARYLAND STATE BAR ASS'N AND ITS
APPELLATE PRACTICE COMMITTEE



PRESENT

Recent Impact Decisions of the Maryland Appellate Courts

**Thursday, April 26, 2012
5:00 – 8:00 p.m.**

Robert C. Murphy Courts of Appeal Building
Fourth Floor
361 Rowe Boulevard
Annapolis, MD 21401

**5:00 - 6:00 p.m. Social Hour Reception – Foyer to the Courtroom
Cash Bar (Beer & Wine) & Hors D'oeuvres
6:00 p.m. - 8:00 p.m. – Courtroom
Speaker Presentations and Audience Questions**

**\$10.00 for MSBA Litigation Section Members
\$25.00 for others**

SPEAKERS:

GLENN T. HARRELL JR., *Judge, Court of Appeals of Maryland*

ROBERT N. McDONALD, *Judge, Court of Appeals of Maryland*

JAMES R. EYLER, *Judge, Court of Special Appeals of Maryland*

CHARLES E. MOYLAN JR., *Judge, Court of Special Appeals of Maryland (retired)*

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Clouding E-discovery

By Marc Hirschfeld, Esq.

Cloud computing concepts can be traced back to the 1960's and were built upon the premise that computer processing power and equipment was too expensive and too large for an end user to purchase, install and maintain. A consumer would pay for the computing power of a "mainframe" but access the information through a cheap terminal that didn't have a processor, memory chip or disk space. However, as the costs and sizes of PCs plummeted and their processing power skyrocketed, end users lost the need for classic cloud computing solutions. The current batch of cloud computing solutions are much more robust and complicated than the mainframe/terminal framework of yesteryear and pose substantial e-discovery challenges for attorneys and their clients involved in litigation.

Current cloud computing services can be broken down into three basic categories: 1) SAAS or software as a service, 2) PAAS or platform as a service, and 3) IAAS or infrastructure as a service. SAAS is the most common form of cloud

computing services and is also the most likely to involve E-discovery issues. Traditionally, when an individual would purchase a computer, they would be required to purchase and install additional software to perform the most basic tasks like word processing and email. The software would have to be compatible with the hardware and installed and configured prior to opening, editing or emailing a document. A dialup connection would have to be established prior to an email being sent and delivered. With the advent of broadband internet and the increasing sophistication of internet browsers, technology companies are now able to deliver software directly to end users without the end user having to install additional software or purchase powerful hardware. Storage can be moved to the internet and that same information can be accessed on multiple devices; through Ipads and smartphones as well as traditional computer platforms like desktops and laptops.

Google's email and word processing tools are great examples of SAAS products. Instead of purchasing Outlook software to manage calendars and email, a user can access his/her email and calendars online through a browser or on their android/iphone/ipad devices with an app. If a user already has outlook installed on their computers, they can connect Outlook directly to Google's email server similar to the way they would connect to an Outlook Exchange server. There is also no need to setup and maintain a companywide Outlook Exchange server and be subjected to system wide email outages in the event of a power or internet failure affecting the server. Google docs allow a user to create and edit Word, Excel and PowerPoint documents online within a browser window or through a dedicated app without having to install Microsoft Office. It even has built in version control and allows multiple users to edit documents at the same time.

Moving information and applications such as Word/Excel documents, email and calendars into the cloud does have its drawbacks especially where E-discovery is concerned. What a company gains in accessibility, function and cost, it loses in control, and security. As an E-discovery consultant, I am routinely ordered by Courts to forensically image computers and servers for the purpose of locating and producing responsive data in litigation. When crucial information is moved to the cloud, it is virtually impossible to gain control of the hard drives and servers hosting the data to perform the Court ordered imaging in a defensible manner. Even something as simple as running Court approved search terms within the cloud is difficult. Google's search tools are excellent for retrieving the most relevant documents from a court approved search term list, but will not retrieve all relevant documents. Litigation holds and retention policies are also difficult to implement when users are capable of deleting information stored in the cloud irretrievably with a push of a button from their phones. In the event that data is deleted, the data cannot be retrieved without access to the cloud provider's servers that host the data. These types of deletions could lead to adverse inferences and sanctions for spoliation of evidence if opposing counsel discovers missing data. Another important E-discovery aspect of the cloud is the difficulty in exporting data in bulk for a production to opposing counsel. For example, Yahoo's mail does not allow a user to export sent email to a local computer without a complicated or creative workaround.

There are a number of SAAS solutions designed specifically for attorneys that are involved in E-discovery. Concordance and Summation are two litigation database software packages which allow attorneys to manage and review large amounts of discovery material in an efficient manner. Attorneys

with limited needs for such software can have the software and case data hosted in the cloud on a case by case basis. Attorneys pay for access on a monthly basis and do not have to purchase software nor do they need to have experienced staff on hand to load and maintain databases. Some of the largest E-discovery providers are now offering solutions for attorneys to perform the full E-discovery process online. Attorneys can obtain raw data from their clients and upload it online into a full E-discovery processing suite. Once the data is online, attorneys can perform the full gamut of E-discovery services such as early case assessment, deNISTING (removing system files), deduplication (removing duplicate items from productions), culling via search terms, dates and custodians, review, production and even court room presentation. These solutions are still in their infancy, but will likely bring the cost and ease of E-discovery down significantly.

This latter type of E-discovery tool could also be classified as a PAAS cloud computing service or platform as a service. PAAS provides more than just a software application to an end user, it is a platform for a user to install or host their own software applications. An example of PAAS is a Wordpress website which is often used by attorneys for blogging purposes. A Wordpress website requires a web server and a sql server running in the backend to run correctly. The cloud service provider hosts the sql server and web server as a platform and the owner of the site adds blog posts through a web browser. The consumer has control over the deployment of the website as well as the hosting environment configurations. Once the website is configured properly, a visitor is able to view blog posts and provide comments when visiting the website. Discoverable information for a lawsuit may be stored on the cloud provider's web and sql servers and create additional E-discovery issues if it cannot be exported in a reviewable format or if it is not searched properly. Backups of PAAS system components can also contain relevant information that are not accessible nor within the control of a litigant for the purpose of E-discovery.

The third cloud computing service, infrastructure as a service or IAAS, allows a company to move their entire computer server infrastructure to the cloud. A consumer can create a virtual copy of their servers and move the copies to an online host. Moving servers to an online host allows a company to free up space and provides access to unlimited hardware configurations at a moment's notice. The cloud provider is responsible for maintaining the physical components involved in hosting the servers but the end user has complete autonomy with regard to everything else. IAAS gives companies the most control over

E-Discovery...

data, however, the physical servers that host the virtualized servers can change from day to day. Cloud providers can move or copy virtualized servers and information at any time and information may reside in places not contemplated by attorneys and non-IT employees of a company.

While cloud computing is revolutionizing the computer industry, it is also creating additional E-discovery challenges that are difficult to articulate to a Court or negotiate with opposing counsel. The key to tackling these challenges is to be proactive: 1) Understand what types of data may be stored online with a cloud provider and its relevancy; 2) Create a data map to share with opposing counsel; 3) Determine how the information can be retrieved and test your results, and 4) Attempt to forge an agreement with opposing counsel prior to production. In the event you are unable to reach consensus with opposing counsel regarding the sources, methods of culling, and production this information should be laid out clearly to the Court at the earliest stages of litigation.

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