

the Judicial Conference of the United States, and the U.S. Supreme Court, according to Richard Marcus, the associate reporter to the Advisory Committee on Rules of Civil Procedure. Even on a fast track, the earliest that new rules could go into effect would be December 2013, Marcus says.

Littler's Weiner defends the existing rules as sufficient: "If you

choose to use them, there are incredible tools in your arsenal." Both Weiner and Mack point to the proportionality rule that was in the FRCP even before the 2006 amendments, requiring a court to limit discovery that's unreasonably cumulative, duplicative, expensive, or burdensome. If a case is worth \$200,000 and the other side is requesting discovery that costs

\$300,000 to produce, a party can go into court and challenge the request as not proportional to the issues at stake. That rule has historically been underutilized but is starting to garner more attention.

"It's a diamond in the rough, this proportionality rule," says Mack. "It can be used immediately; there's no waiting for any changes."

—Terry Baynes

The Recovery in E-Discovery

THE INDUSTRY BOUNCES BACK AFTER A 2008 CONTRACTION.

IT'S A \$2.8 BILLION INDUSTRY, poised for another year of renewed growth as the private sector ups its litigation spending.

The e-discovery business played catch-up in 2009, says Tom Gelbmann, a Minnesota-based information technology consultant and coauthor of the 2010 Socha-Gelbmann Electronic Discovery Survey, published in sibling publication *Law Technology News* in early August. After the industry contracted, for the first time ever—by 9 percent in 2008—resurgent corporate earnings have helped lift e-discovery spending amid a tepid economic recovery. Gelbmann's survey saw a 10 percent recovery for the industry in 2009, boosting it back to its estimated 2007 market value, and he projects further double-digit expansion over the next few years.

Individual e-discovery vendors report similar recent increases. Kansas City, Kansas-based legal technology provider Epiq Systems, Inc., for example, posted a slight decline in operating revenue for the first half of 2010, but sales for its e-discovery unit reached an all-time high of \$19.8 million in the

second quarter. The economic collapse punched an industrywide pause button, says Epiq's senior vice president of document review services, Laura Kibbe. Now, she says, "I see discovery returning." Utah-based e-discovery provider Orange Legal Technologies announced its eighth consecutive quarter of double-digit growth in August; Florida-based Wave Software said that it had a record 400 percent revenue growth in the first half of 2010; and California's Guidance Software, Inc., posted second-quarter sales of nearly \$23 million, a 38 percent increase from the 2009 period.

Ironically, some of that growth also stems from new government investigations and lawsuits aimed at untangling the financial alchemy that precipitated the downturn. "Because of the economic collapse, and some of the shenanigans that happened around that, I think we're seeing some uptick in some of the large litigation," Gelbmann says. For its \$50 million postmortem on the carcass of now-defunct Leh-

man Brothers Holdings Inc., for example, Jenner & Block worked with an Epiq bankruptcy unit. John Cogan, vice president of marketing for e-discovery consulting firm Fios, Inc., says he's seen the company's sales jump in part because of the government's renewed vigor in pursuing investigations. "Some of the business that we have is directly due to our clients being involved in responding to government inquiries," Cogan says.

But while those inquiries grab headlines, Gelbmann says, future e-discovery spoils will come from smaller ponds. "The real growth is in the small and medium-size cases," he says. Cogan agrees: "It's very much trickling down. Now you're seeing divorce cases where some-

one's e-mail has been asked for."

The question, says Gelbmann, is whether industry providers can fully capitalize on this market by

lowering costs for the smaller—and more cost-sensitive—clients who can no longer ignore the demands of e-discovery.

—Charlie Mead

Government investigations are good for business.