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## Practical Tips to Help Control Costs and Mitigate Risks in Ediscovery

By Andy Ruckman

As information continues to explode, e-Discovery vendor technologies and methodologies are evolving and adapting to manage the ever-increasing volume of electronically stored information (ESI) used in legal proceedings. Corporate legal departments, law firms and consulting firms are evolving as well to protect their interests, gain competitive advantage, and better serve their clients by controlling the high costs and risks associated with the increased volume. As important as innovation is to these efforts, it is just as important to contemplate and learn from past experiences so history is not repeated. This article focuses on four observations of an e-Discovery consultant with years of experience assisting corporate counsel to manage the e-Discovery process through various legal proceedings. Hopefully, it will provide some insight into ways to control the costs and mitigate the risks of e-Discovery in your organization.

### Perform Early Case Analysis

This hot topic has been exhaustively discussed among attorneys, discovery consultants and vendors for the past several years to the point that it needs no introduction. Or does it? The benefits cannot be ignored. It can provide attorneys with an early view into key documents, custodians, timeframes, and other information, which helps facilitate “settle vs. litigate” analyses and expedite defense strategy development. In addition, it informs preservation and collection activities. However, it is apparent that many attorneys still do not perform this critical process either because of time or resource constraints or lack of information about the process.

Early case analysis is essentially a preliminary fact finding process designed to develop deeper substantive insight into facts and issues and to help validate and refine time, cost, quality, and risk factors. Let’s examine an example: An expansive document request is received requesting production of documents for 30 employees (aka custodians) and associated with several issues, a lengthy time period and accompanied by search terms. The first step (after initiating preservation procedures) frequently is to consider the question, “how can I narrow the scope of this request to reduce the costs of discovery?” Traditional approaches have been to interview key personnel, identify additional custodians and topics, and collect hard-copy / electronic documents as identified by the custodian.

Many forward-thinking companies are using technology to inexpensively collect, process, and analyze readily accessible ESI from key custodians to expedite their understanding of the case and strengthen their negotiating position. Using conceptual and categorization technologies, attorneys are able to quickly “zero-in” on key concepts and, more importantly, identify concepts (and associated search terms) that have no relevance to the issues. In addition, using email analytic, social networking, and timeline analysis technologies, attorneys can help identify who spoke to whom when, when certain events occurred, who was involved / had knowledge of the issues, etc. When combined, all of this information is very powerful in supporting negotiations with the other side to narrow the scope and therefore the costs of e-Discovery.

### Employ Project Management Concepts

It is often hard to set a budget, especially when a document request is received naming 50 custodians, 3 pages of search terms and a 10-year time period. However, it is often helpful to make an attempt, simply because one needs a baseline to perform scenario planning and inform negotiations. For example, let’s assume an attorney has some limited estimating capabilities, either metrics captured from prior matters or early case assessment tools, and she estimates that she will have 10,000 documents to review in 4 weeks. Using the traditionally accepted review rate of 250 documents per attorney per day, she estimates that she will need 2 attorneys to complete the review (10,000 docs / 4 weeks / 5 days = 500 docs per day / 250 per attorney = 2 attorneys). Further, she estimates a budget of \$64,000 (2 attorneys x 40 hours x 4 weeks x \$200 per hour = \$64,000) and a per doc review cost of \$6.40 per document (\$64,000 / 10,000 docs = \$6.40).

Now that the attorney has established a baseline, she can apply basic project management concepts (i.e. triple constraints—scope, time, cost) to inform her discovery strategy and potential burden arguments. Continuing with the example above, suppose she estimates a budget of \$64,000, but is imposed a budget of \$50,000 (cost), she knows that, in order to keep within this budget, she either needs to narrow the “scope” by negotiating time frames / search terms OR increase the hours (time) to perform the review (e.g. lower priced attorneys). The key question is by how much? Using the model, she can estimate

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that given the budget of \$50,000, she can only review 7,812 documents ( $\$50,000 / \$6.4 = 7,812$ ) and therefore needs to negotiate a narrowed scope less than or equal to this amount. Alternatively, she could review the 10,000 documents, but will need to either use technology to increase the review rate to 320 documents per attorney per day or find attorneys at less than or equal to \$156.25 per hour.

### **Closely Manage And Help Optimize Attorney Review**

It is no secret that document review costs represent the majority of e-Discovery costs in litigation. However, for various reasons (e.g. independence) many companies are reluctant to get involved in the design and execution of their outside law firms' document reviews. The problem as it relates to cost has to do with the risk vs. cost tradeoff. Law firms tend to be more risk adverse than the clients they represent, which can cause law firms to be more cautious in their approach to document review. More caution often translates into more levels of review (e.g. 1st Level, 2nd Level, Privilege, Pre-Production, etc.) and by higher-priced attorneys (e.g. associates vs. contract attorneys vs. off-shoring). Ignoring this tradeoff causes the cost of discovery to be much higher than it should had the risk profile of the law firm been aligned with the risk tolerance of its client.

Understanding this tradeoff, some companies have begun to optimize this relationship by putting an informed project manager on site to manage the document review. Others have implemented "smart reviews," which allocate review work to appropriate resources based on risk, quality, speed, and cost objectives. For example, using technology and knowledge of the facts of the case, attorneys can organize documents by concept, person, thread, or timeframe and rank them in tiers based on degree of potential relevance / responsiveness. Tier 1 documents are typically key custodian documents or key search term hits, tier 2 documents are typically secondary custodian documents and other search term hits of interest, and tier 3 documents are typically custodians, search terms, concepts or time periods unlikely to contain relevant information. In this example, tier 1 documents would be reviewed by law firm associates, tier 2 by contract attorneys and tier 3 by off-shore attorneys.

The benefits of this approach can be three-fold because the company is mitigating risk by having outside counsel review the most significant materials, improving timeliness by giving outside counsel access to tier 1 materials sooner, and reducing costs by assigning lower cost resources to the tier 2 and 3 reviews.

### **Demand Detailed Audit Reports And Chain-of-Custody Forms**

Almost all attorneys will agree that it is critical that ESI be collected in a forensically sound and defensible manner regardless of whether a traditional forensic tool is used to perform the collection. Most attorneys, if not all, will agree that a proper chain-of-custody form is required for any piece of digital evidence in a legal proceeding. The chain-of-custody form will often contain information such as serial number, custodian name, make / model of the computer, hash values, etc. Chain-of-custody procedures are typically well-established and closely followed by vendors, law firms, consulting firms and corporate legal departments.

A potentially greater issue and larger risk to an engagement is what happens to the ESI after it is extracted from the piece of digital evidence, processed, loaded into a platform, reviewed and later produced, often in a different format. This is an area where the performance of different e-Discovery vendors continues to vary significantly. Corporate counsel should generally demand granular and detailed audit reports from their e-Discovery vendors, consulting firms, law firms, and in-house IT resources who collect, process and host data. Audit reports should at a minimum include the volume of ESI on original media, extracted, excluded (system files), excluded (file extension), excluded (exception), culled (search term), culled (timeframe), processed, loaded, reviewed and produced. In addition, the reasons for each document not making to the next phase of the process should be implicit or clearly detailed. The failure to produce relevant documents in any litigation or regulatory proceeding carries the inherent risk of sanctions, adverse inference instructions, etc. (recent court decisions confirm) having thorough and accurate audit reports and chain-of-custody forms can be critical to mitigating this risk.

### **Other Potential Cost Savers**

**Narrow File Extensions**—if the majority of the documents likely containing relevant information are DOCs, XLSs, PPTs, PDFs, and email, attempt to negotiate processing only these file types

**Reduce Email Family Complexity**—use a review tool that treats (i.e. enforces) an email plus its attachments as one document

**Capture Metrics For Future Estimates**—gather information specific to company's employees (e.g. ESI per employee, de-duplication rate of email, files and restores, pages per GB, etc.)

### **Other Potential Risk Mitigators**

**Employ Statistical Modeling Techniques**—to help test and improve the accuracy of search terms, privilege document identification and reviewer performance

**Develop QA Protocols**—to help validate quality at all stages of the e-Discovery process (e.g. Productions—do the site production folder counts match the production database counts? Has the underlying text of redacted documents been removed?)

**Standardize Review Team**—use the same attorneys to conduct reviews to realize efficiencies through document / business familiarity and standardized processes

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