

Managing Electronic Discovery from Start to Finish – Maximizing Efficiency and Utility while Minimizing Risk

By Michael B. Hayes and Stephen A. Grossman

It goes without saying that managing electronic discovery can be a very time-consuming and cost-intensive proposition. There are many ways, however, to maximize efficiencies and thereby minimize the costs of electronic discovery. The challenge lies in driving efficiencies and maximizing the utility of electronically-stored information (“ESI”) in litigation while minimizing the risk of discovery sanctions and/or the production of privileged or otherwise confidential information (“litigation risk”).

In the arena of electronic discovery, risk comes in many forms, including failing to: (1) timely place a defensible legal hold on potentially relevant ESI, (2) coordinate with opposing counsel and, if necessary, the court concerning the parameters of ESI collection, review and production; (3) properly identify and secure the relevant ESI sources and repositories; (4) collect, restore, and process the ESI; (5) review and accurately code the ESI for responsiveness and privilege; (6) produce the responsive, non-privileged ESI with appropriate metadata and OCR; and (7) log those documents withheld and/or redacted for privilege.

This memorandum discusses, in summary fashion, some of the methods that we have identified as having significant potential to maximize efficiencies and drive utility in electronic discovery without increasing the litigation risks. At the same time, this memorandum provides a brief overview of the proper management of electronic discovery on a day-to-day and litigation-to-litigation basis.

Information Management

Comprehensive, consistent, entity-wide information management policies and procedures are absolutely crucial to controlling the costs and risks of electronic discovery. Developing and maintaining proper information management, in turn, requires close collaboration between and strong commitment from in-house counsel, company information technology specialists, information managers/consultants, and business unit liaisons. Outside counsel can also prove useful in the effort, providing a sounding-board for proposed policies and procedures and determining their relative defensibility in the event of future litigation.

Determining how, where, and by whom the corporation’s ESI is stored is just a first step in the process; developing a strong document retention policy which includes an enforceable ESI destruction schedule and procedures is likewise critical to proper information management.

The Litigation Response Plan

In today's corporate world, information management is an absolute necessity independent of litigation events. When litigation involving the corporation is initiated, however, or even when it becomes a reasonable possibility, the corporation cannot afford not to establish an e-discovery strategy or "Litigation Response Plan" to manage the undertaking. EDRM.net describes the Litigation Response Plan (or "LRP") as follows:

Creating a strategic plan for litigation response is one of the most important parts of the e-discovery process. The process should include corporate counsel, corporate information technology personnel, records management personnel, outside counsel, inside counsel and possibly an electronic evidence consultant. In many cases, this process is driven by the generation of an LRP. The purpose of the LRP is to:

- Collect, assimilate, and document existing legal strategies, corporate infrastructure and topographies, and electronic evidence production methodologies;
- Work with the inside counsel, outside counsel team, the corporate information technology team and records management department to provide legal and technical strategy, including data gathering strategies, pleadings, and best practices consultation;
- Establish a written policy to follow upon receipt of a discovery request, preservation order or other similar item;
- Ensure that the company meets its legal obligations while minimizing the electronic discovery expense and burden; and
- Ensure that the third-party consultant can provide expert witness testimony in the event the implementations of the electronic discovery strategies come into question.

<http://edrm.net/resources/guidelines/edrm-framework-guides/identification-guide>

When properly developed, the LRP drives efficiencies at every stage of the electronic discovery process, from case assessment to collection, review, production and utilization of ESI in litigation. In our view, the LRP should involve and thereby engage not only the corporate departments/units responsible for managing the company's litigation and its information technology, but also those groups involved in the conduct at issue in the litigation.

Here, litigation strategy and electronic discovery strategy necessarily walk hand-in-hand, and depending on the level of involvement of business unit liaisons, the LRP can prove to be an invaluable early case assessment tool for in-house counsel. In addition, especially for larger corporations with numerous business units and/or subsidiaries or other related entities, understanding who the key custodians are and where the relevant ESI may be found will likely require input from the business units that are generating the corporation's ESI on a daily basis.

The LRP is at once a map of the corporation's sources and stores of potentially relevant ESI, a predictive discovery event time-table, a discovery task management tool, and an iterative

statement of the corporation's litigation discovery strategy. Although time-consuming, if the LRP is to be of real utility to the corporation it must undergo regular re-assessment and, where and when necessary, revision.

ESI Preservation, Collection and Processing

In corporations large and small, the proper preservation of ESI depends on the entity's commitment to the endeavor. Absent strong leadership driving the development of and training on company ESI preservation policy, employees can and will create, disseminate, save, store, and download ESI in every way and everywhere you can imagine, and probably in many ways you never dreamed of.

ESI preservation is primarily about minimizing litigation risk, but if done well, it can also help reduce electronic discovery costs in several ways. First, assuming the corporation has a strong ESI destruction schedule, the sheer volume of data that needs to be collected, processed, reviewed and produced can be significantly reduced. Second, preservation policies can help simplify the process of identifying relevant custodians and locating the key data repositories for a particular litigation. Finally, the orderly, measured maintenance of ESI pursuant to a strong preservation policy can help enable the corporation to move the tasks of data processing, de-duplication and preparing for review in-house, creating significant potential savings.

Legal hold notices are a beast unto themselves, and every litigation (or potential litigation) requires the development of a unique litigation hold notice. In many cases, the legal hold notice is prepared in rapid fashion, without much consideration of what might lie ahead in the litigation or the probability that some employees will disregard the notice in whole or in part.

Knee-jerk legal hold notices are almost always a mistake, and can be a prime cause of unnecessary litigation risk. In our view, legal hold notices should be developed as part of the LRP, with input from in-house counsel, outside litigation counsel, information technology managers and leaders from all of the business units where potentially responsive ESI may have been generated and/or reside.

The collection and processing of ESI for review and production obviously requires substantial technical knowledge and proficiency. Whether an outside vendor is retained to assist in the process or not, this step of the electronic discovery process offers the potential for significant cost savings without raising litigation risk to any significant degree. The obvious sources of potential savings here are in de-duplication and the elimination of standard system and other "junk" files from the data collected before processing for review; however, early case assessment ("ECA") software applications are proliferating in the marketplace and if utilized properly can provide significant additional pre-review ESI volume reductions and important data relating to the relative strengths and potential weaknesses of the company's litigation strategy.

In our experience, applying ECA tools to an electronic discovery project requires some patience and a decidedly hands-on approach. To maximize the effectiveness of an ECA tool, counsel responsible for the handling of the litigation and technical support staff proficient with the tool's capabilities have to work together to develop searches to run against the data set to

isolate and, where possible, bulk code irrelevant email traffic and other loose documents. The time and effort spent can result in significant cost savings, but intelligent ESI volume reduction using ECA tools requires the participation of litigation counsel well-versed in all of the issues and the current and anticipated discovery requests in the case. Their participation is also critical to the “assessment” function of the tools – namely identifying the key events, documents and email that will drive the litigation.

Key term searches present another cost-savings opportunity, but are dependent upon counsel's ability to develop and negotiate key term searches with opposing counsel -- which can be a time-intensive, costly proposition in and of itself. We also see potential for the development of methods and means to perform negative key-term searches and data mining to eliminate large volumes of clearly non-responsive data. Simply put, running the data against a strong set of relevant terms to generate volumes of ESI which are likely not relevant or responsive, coupled with near-duplicate searching, review and coding can quickly reduce the volume of data to be subjected to in-depth review for responsiveness and privilege.

Collection and processing have become highly commoditized services and as a result, there is opportunity for driving cost savings through aggressive vendor contracting. Some corporations are moving the collection and processing functions entirely in-house; that obviously requires actuarial analysis and the consideration of business factors well beyond the scope of this memorandum. Suffice it to say that we see the cost of collection and processing steadily decreasing as time goes on, making the utilization of outside vendors more and more attractive.

ESI Review and Production

ESI review and production have proven to be the cost center in electronic discovery and as a result, have the highest potential for driving cost savings. Not surprisingly, however, this is also where litigation risk is most prevalent – because it is through these gates that privileged ESI can pass through to opposing counsel.

As sure as the sun rises and sets, information technology continues to advance, and document review platform software is no exception. There are any number of platform providers out there, some more advanced than others, some with better infrastructure and capability to perform on tight schedules and with large volumes of ESI. Some platforms emphasize ease of use, while others focus on speed of review, searchability, and/or the grouping of like documents.

Review Platform Selection

Review platform selection should be driven by the LRP; in other words, the team that knows what the litigation is about and knows the volume and the general sorts of ESI content that needs to be reviewed is in the best position to make judgment calls concerning the key strengths that the company is looking for in a review platform provider. Unfortunately, in our experience there is no platform out there that does everything exceptionally well. That day may come, but for now, review platform selection depends on compromise, and deciding which needs are most crucial to the success of the review and to containing review costs.

One more point on review platform selection: make them go through their paces. If a platform provider boasts that it has the best team of project managers and expert technical support on call 24/7/365, then the provider should have no problem providing supporting information to substantiate its claim, including the names, office locations, and CVs of its team members. Professional references should be insisted upon, and if reasonably possible, the provider's facilities should be toured to validate the vendor's capabilities. Finally, in today's economy it is more important than ever to establish the continuing financial viability of the platform provider before entrusting them with your ESI.

ESI Review

We have found that grouping ESI for review not only by custodian and date, but also by utilizing key term searches to segregate likely responsive data from likely non responsive or privileged data speeds review without sacrificing accuracy (which necessarily increases litigation risk). Other review efficiencies that we have employed include simultaneous near duplicate review and coding and the implementation of clear review protocols with easy-to-follow parent-attachment coding rules.

Keeping a close eye on individual reviewers likewise pays dividends in cost-reduction; daily analysis of reviewer speed (in documents per hour reviewed) is utilized to weed out poor or unmotivated reviewers. The speed metric, however, has to be consistently gauged against individual reviewer accuracy or else the potential for litigation risk can increase exponentially.

The quality control ("QC") model for electronic discovery review depends on the nature of the litigation, the volume and nature of the ESI to be reviewed, and to some extent the experience and talent of the review team. We have taken the tact that one hundred percent quality control review by members of the litigation team should take place for at least the first one to two weeks of any significant electronic review. Thereafter, we review a set percentage of the documents coded by each reviewer to ensure an acceptable level of accuracy throughout the course of the review.

If a reviewer's coding is unacceptable, we work to quickly determine whether the issue is one involving a certain type of data (which can be corrected and the reviewer trained on how to properly code the data), or whether the reviewer's competency is in question (in which case we will terminate the reviewer and perform a full quality control review of their work).

Privilege review can be a significant cost center in electronic discovery. We have employed contract reviewers to perform initial-sweep reviews of documents that have been determined to be potentially-privileged based on key privilege term searches. We strongly believe, however, that members of the litigation team who understand the nuances of the issues in play and the involvement of the attorneys whose communications appear in the ESI should conduct the final privilege review and perform privilege redactions where appropriate. To do otherwise, in our view, would increase the litigation risk to an unacceptable level.

One more point concerning review costs and potential cost savings: we see the review cost model rapidly moving toward fixed fee pricing on a relatively widespread basis. Making

review costs more predictable, for certain, is something that corporations want and need, and we anticipate that law firms will soon find themselves losing out on potential representations if they fail to embrace fixed fee arrangements in connection with ESI review projects. We are not, however, convinced that fixed fee pricing for ESI reviews will necessarily result in cost savings to the corporate clients. It is not unreasonable to expect that many firms may build significant cushion into their fixed fee cost offerings to hedge against unexpected complications or difficult data sets. To drive cost savings in a fixed fee cost model, corporations should press outside counsel concerning the assumptions underlying the proposed fixed fees.

ESI Production

Finally, there is electronic discovery production. Most document review platform providers will tiff, stamp, and otherwise process responsive data for production together with whatever metadata is required. Again, this is a highly commoditized service, and there is some potential for cost savings here if the corporation is willing to shop other production vendors for more attractive rates than those offered by the platform provider. Better yet, with a strong understanding of the market rates for data processing and production, the company will be in a better position to negotiate production costs with the platform provider at the outset, and thereby eliminate any need to shop production vendors on the back end.

ESI Utility Drivers in Discovery Practice, Motion Practice, and at Trial

Electronic discovery is a cost center – there is no getting around that reality. Given that fact, it is incumbent on all of the individuals responsible for the management of the company’s electronic discovery to maximize return on the costs. In the litigation realm, that means the dollars and time spent identifying, preserving, collecting, processing, reviewing and producing ESI should work to the benefit of the company and its litigation counsel as the litigation moves forward and the data is used to further the company’s legal arguments and strategy.

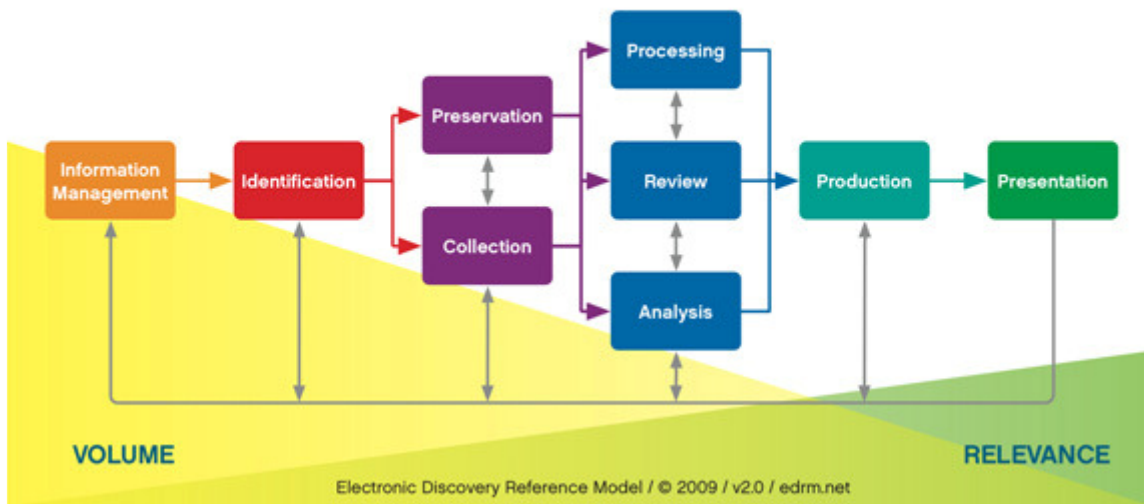
If reviewed ESI is to be useful to litigation counsel, it has to be easily searchable, and it has to be stored in a format that is easy to review and easy to quickly print out. Those requirements seem simple, but when large amounts of data are involved even the simplest tasks can become complicated. If the reviewed ESI is to be maintained with the document review platform provider through the course of the litigation, then due diligence needs to be done, from the outset, to ensure that the provider has a strong infrastructure capable of securely storing the information in a stable environment no matter the number or scope of searches conducted against it. Searchability is likewise crucial, and this is something that, in our experience, many of the platform providers do not yet see as an important part of their product offerings. That is slowly changing, but it is a reality for at least the present time.

Another alternative is to export the reviewed ESI into an internal database for the duration of the litigation. If the volume of the ESI is enormous, this may be a practical impossibility, but on smaller to mid-sized electronic reviews this is an area of significant potential cost savings.

E-Discovery From 20,000 Feet – The Electronic Discovery Reference Model

Our above analysis of electronic discovery management and potential efficiency drivers is based on the Electronic Discovery Reference Model (or “EDRM”), which lays out in graphic form the flow of electronic discovery from information management through production of data and utilization of ESI at trial. The EDRM acknowledges that one step forward in the process can and often does necessitate one, two, or three steps back to validate the effort and ensure defensible identification, preservation, collection, processing, review, analysis and production of ESI. We include the EDRM here because we believe it is a useful reference and self-awareness tool for every member of the electronic discovery management team.

Electronic Discovery Reference Model



For questions or additional information, please contact:



Michael B. Hayes, Partner – 215.772.7211
Stephen A. Grossman, Partner – 856.488.7767