

■ FEATURE ARTICLE

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The E-Discovery Toolbox: What You Should Look for in a Unified E-Discovery Solution

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Faced with the high costs of outsourcing e-discovery to vendors, consultants and outside counsel, organizations have no doubt considered insourcing some of the work. The decision of which e-discovery processes to bring in-house is based on various considerations. Setting aside the document review phase of the process, organizations look first to the most costly line items when deciding which processes to bring in-house first. In recent years, organizations have targeted collection and processing as two big-ticket items to bring in-house. In fact, Real eDiscovery's Winter 2009 feature article ("Bringing eDiscovery Processing In-House") addressed how organizations are attempting to move e-discovery collection and processing in-house and away from service providers.¹

complicated e-discovery process. The issue remains as to which of the processes to bring in-house. With a unified technology, organizations have the ability to insource such capabilities as automated legal holds, pre-collection analytics, early case assessment and first-pass review.

Litigation Hold

A litigation hold notice is a memo that notifies an organization's employees of their preservation obligations as custodians of potentially relevant documents to a lawsuit. For decades, the issuance of a paper memo to custodians and a follow-up interview were sufficient to meet a litigant's initial discovery obligation. Technology has created the need for a higher standard of care and a more robust process that can improve the

However, a technology-based legal hold notification solution still requires human contribution. Organizations considering automating this aspect of the e-discovery process should consider the risk of error inherent in stand-alone solutions. Specifically, errors that may occur during the transition from the issuance of the legal hold to the point at which ESI collection begins. An integrated solution that uses a single platform for both the legal hold and collection phases provides organizations with the most complete process.

Specifically, legal should look for a solution that uses the custodians placed on legal hold as the starting point to manage, track and report on the collection, preservation and processing of ESI. This means that litigation hold is no longer an independent process isolated from the other parts of e-discovery. Thus organizations reduce costs and minimize potential errors during collection. (See, *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, 685 F. Supp 2d 456 (S.D.N.Y. Jan 15, 2010, amended May 28, 2010) "[t]he failure to issue a written legal hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."

Pre-collection Analytics

Many of a company's initial efforts to alert custodians and collect ESI are an attempt to establish a record of reasonableness. Given the prevalence of case law concerning sanctions for spoliation, organizations tend to err on the side of over-inclusiveness during this process. This means organizations may issue holds to potentially irrelevant custodians. The result is unnecessary expense.

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In the short time since the article's publication, collection and processing have expanded such that organizations are continuing to insource more of the e-discovery workflow. This trend is a result of a number of factors, including: the increased sophistication and capacity of in-house e-discovery teams, the pressure to adapt to shrinking legal budgets and minimize risk during continuing difficult economic times, and the development of technology that facilitates an integrated, comprehensive solution to the increasingly

accuracy of electronically stored information (ESI) collections, track and release the scores of litigation holds large organizations maintain, and standardize the process from the outset of a case.

In addition to the hold notice, organizations can combine technology solutions with standardized questionnaires and reporting functions to reduce costs further and minimize risk. The use of technology may also provide a defensible position, potentially protecting organizations from mistakes common in a manual process.

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¹ The article examined the intricacies of ESI processing and the role technology can play in reducing processing costs and risks for in-house e-discovery teams.

Technology that can perform pre-collection analysis of ESI from potential custodians can return relevant information early in the e-discovery process. This information can help guide the direction of the litigation. Specifically, counsel can use the results of this pre-collection analysis to—among other things—refine keyword lists, eliminate or expand custodian lists, estimate costs based on the volume of potential data to be collected, and assist in preparing a litigation-specific data map. Used in conjunction with an integrated legal hold notification process, organizations can recognize significant reductions in costs at the earliest stages of a lawsuit.

Early Case Assessment

The ability to analyze ESI traditionally required lengthy, expensive processing and document review. This typically moved any analysis of the documents' contents to the end of the discovery process. As the volume of ESI expands exponentially year-over-year, this workflow model is not only cost-prohibitive, but it also exposes an organization to unjustifiable risk. In-house legal departments should choose a solution that can analyze ESI at any point in the discovery process.

Often generically referred to as early case assessment (ECA) in-house counsel typically had to wait until after processing to be able to analyze ESI. Now in-house counsel should expect that their e-discovery technology should allow analysis almost simultaneously with the collection, and even prior to collection. With ECA technology, in-house legal departments can view documents as they collect them and make strategic decisions earlier about the company's legal exposure and defense strength. Furthermore, powerful indexing engines that allow faster keyword searching, term-hit highlighting and advanced search capabilities (e.g. Boolean) are enhancing ECA. ECA technology also can reduce the time it takes for counsel to uncover and manage "smoking gun" documents from months to only a few days.

First-Pass Review

What was once the exclusive domain of large-firm associates, the document review phase of e-discovery has undergone dramatic changes. With the latest technology, in-house



A Scalable Solution

Whether your case concerns a handful of custodians or spans across the enterprise, EnCase eDiscovery's integrated technology enables counsel to run pre-collection analytics, issue and track litigation holds, view documents during collection, and index only potentially relevant documents. With this robust solution, organizations are now empowered with the option to bring the e-discovery process in-house.

legal departments can review and analyze documents before sending them to outside counsel. Retaining the documents internally until an organization has conducted initial review and analysis provides significant cost savings and reduces risk.

Counsel achieves these cost savings by having internal personnel review documents using keyword searching and content analysis. Instead of dumping every document collected on outside counsel to review, legal departments produce only a targeted production, thereby reducing review costs without exposing the company to spoliation risks.

Until recently, in-house counsel simply could not scale an internal team capable of reviewing the vast volume of potentially relevant ESI. Advances in technology have changed that paradigm.

In-house counsel should choose a solution that can manage a number of simultaneously occurring processes. For example, from a Web interface, in-house counsel should be able to run keyword searches against individual

custodian collections to refine keyword lists for upcoming meet-and-confers with opposing counsel. The search results should not only provide metrics on the potential volumes of ESI, they should also allow counsel to view the actual documents. While eyeing the documents, attorneys should be able to apply user-definable issue tags and add attorney notes. If the keyword search returns an e-mail, the solution should make it possible to view the e-mail thread (i.e., parent-child relationship) and uncover previous or subsequent, related messages.

Looking Ahead

Technology solutions are evolving to assist organizations with meeting litigation's growing technical demands. The trend of insourcing more of the process will continue as organizations look to lower costs and reduce risk wherever possible. A mature, integrated technology with the core functionality of collection and preservation, ECA, legal hold and first-pass review should be a priority for organizations considering this approach. ■



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