

E-DISCOVERY

Early Case Assessment is Defensible, Strategic and Smart

By Christopher Wall and Lisa A. Spinelli

Discovery, which now largely involves the exchange of electronically stored information (ESI), often comprises the bulk of litigation costs. Electronic discovery can be expensive, often unpredictably so, and controlling the costs of electronic discovery (particularly data preservation and collection) has become a major focus of attention for litigators.

In the past decade, new technologies have increased the volume and types of discoverable data, challenging companies and their law firms to keep up with regulatory, investigatory and litigation requirements while still managing costs.

Parties can defensibly narrow the scope of potentially relevant data prior to electronic discovery processing and before incurring the costs of expensive attorney review of that data.

Data management has become a daunting and at times even a risky endeavor, with the number of reported court cases specifically addressing electronic discovery issues increasing exponentially between 2000 and 2010. Many of these cases involved sanctions.

In assessing a case and facing mountains of data, with deadlines to meet and with limited time and resources, counsel must determine what to preserve, how to preserve it, for how long, and how to effectively identify relevant or potentially relevant documents. The process of Early Case Assessment (ECA) provides counsel with an effective way to address these problems.

ECA has gained momentum since the 2006 amendments to the Federal Rules of Civil Procedure, which direct parties to discuss electronic discovery as part of their meet-and-confer discovery-planning conference under Rule 26(f).

Through ECA, counsel can systematically survey the ESI landscape and thereby mitigate costs, reduce the volume of data and mitigate the risk of errors even before discovery formally begins. Addressing discovery-related challenges as early as possible enables better results by targeting the specific problem areas of preservation, retention and determination of search parameters.

With ECA, parties can defensibly narrow the scope of potentially relevant data prior to electronic discovery processing and before incurring the substantial costs of attorney review of that data. Analyzing and evaluating the data through ECA allows counsel to get an early look at data and reduce its volume by eliminating (or substituting) custodians. This is accomplished by identifying relevant keywords, phrases, date ranges and data types. The process also allows counsel to determine strengths and weaknesses in the case, test proposed

search terms, increase the defensibility of ultimate productions, and even consider early case resolution based on the early data results.

There are three primary ways that ECA technology helps to lower costs: It reduces time, volume and mistakes.

It speeds the analytic process by organizing the data into a searchable, sortable and easily viewable format. That cuts down on the amount of time attorneys actually need to look at documents.

Second, it helps reduce the volume of data by eliminating obviously non-responsive documents. A big challenge is knowing at the earliest phase what to preserve and what not to preserve, since it is often difficult to know what will be relevant in the upcoming litigation. In the earliest stages, as the issues are still congealing, counsel should take a measured approach in conducting ECA, eliminating only data that is clearly irrelevant, since lifting the legal hold from non-responsive data allows it to be disposed of according to a data retention plan.

Taking steps to eliminate clearly irrelevant data can significantly reduce the volume of data that must be retained and preserved. It will also reduce the volume of data sent through the costly and time consuming process of attorney document review.

Third, ECA technology can increase defensibility by way of "data analytics," which can validate the quality of search terms and assess whether all relevant custodians have

been identified and accounted for. This provides transparency for the benefit of opposing counsel, making it easier for both parties to work together and collaborate on the selection of search terms.

ECA reports, such as keyword hit rates and data "dictionary lists," also help avoid wrong turns in legal strategy. In addition to getting an early glimpse into the relative quantity and nature of responsive documents, counsel can answer the "who, what and when" questions involved in early case assessment: Who authored the documents? What were they about? When were they created?

With this information, counsel can be far more cost-effective in directing the course of litigation.

Simply put, early case assessment provides valuable opportunities for savings, in terms of both time and money, while enabling defensible decisions regarding preservation, retention and search parameters.

ADOPTING THE PROCESS

Since ECA is such an effective tool, one would assume that it has been accepted as a standard part of almost any matter involving electronic discovery. However, that's not the case. According to Kroll Ontrack's Fourth Annual ESI Trends Report (which looked at the year 2010), almost three fourths of companies in the United States either have never conducted (37 percent) or are not aware of having conducted (34 percent) ECA on any litigation matter.

The report also found that in-house legal is far less likely than IT to know whether ECA technology has been deployed: According to the report, 43 percent of legal departments did not know whether their company had the technology in place, compared with 27 percent of IT departments. Not only is there an apparent lack of investment in ECA

technology among U.S. companies, but legal departments seem less involved in its acquisition, and they may not even know about it when it is there.

Currently only 29 percent of companies leverage ECA technology. One reason may be that some attorneys shy away from its implementation, classifying it as a job for IT. However, given the fact that ECA is not just a technology, but is also a strategic process, legal departments cede the responsibility for it to IT at their peril.

The legal department clearly should be involved in deciding which technology to use and how to use it. Legal has the necessary expertise, which IT may lack, to select and use reporting features, analytics features, and search functionality, all of which help inform case strategy.

In selecting ECA technology, cost efficiencies certainly should play an important role. Beyond that, various tools offer different features, some more important than others. Potential users should consider, first and foremost, that the tool be robust enough to handle large volumes of data, both for searching and reporting. If counsel has to defend a keyword selection, the tool should be able at a minimum to export those data analytics to a report that is easy to read and to share. Speed and ease of use are other important considerations.

No matter how good the technology is, however, the people conducting the analysis component of ECA are likely the most critical part of the process. Before implementation, it may be advantageous to consult with ECA experts who have both legal and IT background. Among other issues, counsel and IT should work together to determine whether to invest in a third-party hosted ECA solution – which may be simpler and less expensive in the long run – or to purchase and install ECA technology, which may require regular

updates and support from the company's own personnel.

Effective ECA can bring a high return on investment. It can reduce costs by maintaining oversight of an investigative or discovery process, whether outside counsel has been engaged or not.

Moreover, at the same time it gives companies greater control over their legal spend, effective ECA can create a more accurate and defensible end product, thus making less likely the costs associated with haphazard, less transparent, and even sanctionable discovery. It's a proven antidote for the mushrooming volume of data that companies today need to address. ■



CHRIS WALL is a manager at Kroll Ontrack's Legal Technologies consulting group, which consults with corporate attorneys and litigation support staff about information management, discovery and computer forensics issues in civil and criminal litigation, as well as regulatory matters. He has expertise in case law pertaining to electronic discovery and the use of electronic evidence in legal proceedings. cwall@krollontrack.com



LISA SPINELLI is client relationship manager for Kroll Ontrack in New York and New Jersey. She advises corporations on all facets of information management and legal technology, from litigation preparedness and electronic discovery to incident response and computer forensics investigations. lsinelli@krollontrack.com