

White Paper

It's All About the Deadline:

Overcoming the four key challenges of eDiscovery to help control attorney review costs.

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In today’s corporate litigation landscape, eDiscovery has become a complex challenge. The costs involved in finding, collecting, processing, reviewing and producing an ever-growing number of documents and electronic data are formidable in themselves. In addition, everything produced—or not produced—in the process of discovery must be defensible in court to avoid costly sanctions. But the most time-consuming and expensive element of eDiscovery remains attorney review. Getting the discovery materials into the hands of the attorney reviewers—on time—is the biggest challenge. Using today’s eDiscovery technology correctly can help corporations meet that all-important deadline. Choosing an experienced eDiscovery partner that can manage the entire process is of paramount importance, not only to the outcome of litigation, but also to the bottom line.

Introduction

eDiscovery. The mere mention of it strikes fear inside every Fortune 500 legal department. Certainly the breadth and depth of electronic information within an organization can represent major challenges in themselves. The mountains of paper and electronic documents created by today’s businesses make any attorney nervous when faced with court-defined and regulatory-ordered deadlines for the production of relevant documents in a litigation or investigation.

As of December 2006, the Federal Rules of Civil Procedure (FRCP) redefined the description of a record to include email and other electronic records, creating huge volume increases in discovery matters. So there’s an enormous push to use technology to manage, find and cull the information in a better, faster way—all to give attorney reviewers the time they need to put their cases together and meet court-defined dates. Not meeting those dates can mean court sanctions, which can add large amounts to the costs of litigation.

Advanced search technology is now a hot topic among vendors and litigators alike, because it holds significant promise to yield more valuable information, more quickly. But what most corporations most often need is the expertise to reduce the time, effort and extensive costs associated with this preparation phase of litigation—while increasing the quality and security of the data

produced. It's imperative that the people defending a corporation's interests have what they need to succeed...and that it be accurate and on time.

To meet deadlines, there are four hurdles to overcome in the process: shrinking the document population for review, getting this information into the hands of the reviewing attorneys as quickly as possible, making sure the attorneys can review the information quickly and easily, and finally, producing the relevant documents in time to meet court deadlines.

And that's why eDiscovery is all about the deadline.

The elements of eDiscovery

Discovery, whether traditional or electronic, is based upon the principle that a free exchange of information is more likely to help uncover the truth about the facts of an issue. The theory of broad rights of discovery means that all parties go to trial with as much knowledge as possible, and that neither party should be able to keep secrets from the other, except for Constitutional protection against self-incrimination. Court rules and state rules of evidence govern the discovery procedure, and the courts also establish the deadlines and guidelines for filing discovery requests and submitting results. Failure to deliver or properly answer a discovery request on time can also lead to fines and other sanctions.

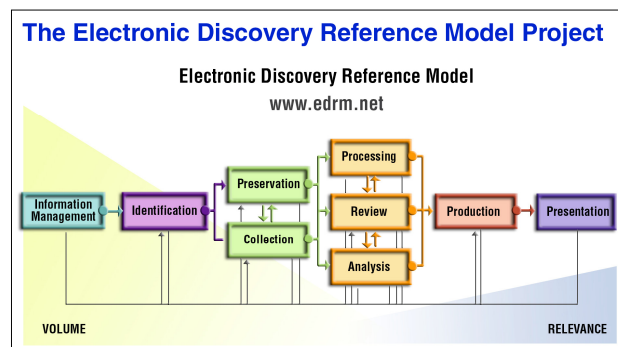
Discovery materials range from paper documents to all types of electronically stored information, including email, text documents, spreadsheets, images, database files, deleted email and file backups.

The costs of eDiscovery

In a wrongful-death class-action suit, experts estimated that it could cost as much as \$1.75 billion for a pharmaceutical company to restore e-mails from its backup tapes. Facing a hostile court, the defendant company settled for over \$3 billion dollars.

Establishing a flexible but consistent framework is critical for corporations and attorneys alike, because for any discovery project, documents and data from multiple systems and in multiple formats be collected, stored, reviewed and produced. In some cases, the amount of data can involve millions of pages and hundreds of attorneys in multiple locations. This potentially can become a very costly and complex project, requiring expert help to simplify the process without sacrificing scalability, accuracy and speed—and without risking the security of a corporation's data. In addition, all the data, as well as the processes involved, must include a careful audit chain and be defensible in court. This becomes even more complicated in the process of eDiscovery.

The Electronic Discovery Reference Model (EDRM) shown here was created in May 2005 to address the lack of standards and guidelines in the electronic discovery market. The completed reference model provides a common, flexible and extensible framework for the development, selection, evaluation and use of electronic discovery products and services. See www.edrm.net for more information.



When it comes to meeting deadlines, the four key challenges of eDiscovery lie in the processing, review, analysis and production steps of the process, as shown in the EDRM chart. Naturally, the eDiscovery process involves many details within each of those steps, not the least of which is determining just how many, and what types, of documents and data to collect.

Electronic discovery includes the following steps:

- Identifying likely sources.
- Gathering electronic evidence while avoiding spoliation and maintaining chain of custody.
- Making the collected data readable and usable for all parties involved in examining the products of discovery.
- Filtering the data to achieve a relevant, manageable collection of information.
- Making the information available in TIFF, PDF or native format and providing supportive information, such as objective coding, metadata and searchable text format, as part of a database accessible from a Web-based repository.

Challenge 1: Shrink the document population

The process of eDiscovery first requires identifying all the data to be processed electronically, per the discovery order. Determining which documents and data to collect involves a company's IT department, its OGC and its outside counsel, to varying degrees. But at the beginning of the discovery process, there's almost no way of knowing how many documents and computers full of data may need to be processed for review.

Once data collection has been determined, culling the documents and data, quickly and effectively, is the challenge. During discovery, an over-collection of files can occur, bringing in files not relevant to the case or discovery order. The legal team will apply parameters, such as date restrictions, key words and names of custodians, in order to cull down the discovery documentation for review. While carefully trimming the amount of information helps to limit the actual number of documents for review and contain costs, maintaining defensibility is a critical requirement at this stage. Therefore, it's essential to establish defensible culling processes.

A recent trend in eDiscovery has involved efforts to reduce the amount of electronic documents that enter into the attorney review—a gallant effort. However, the reality is that the overall volume will continue to grow. While the amount of data that can be culled from a collection of documentation will increase, the data companies create will also continue to increase as well.

Technology advances will therefore continue to grow in their sophistication to collect, organize and sift documents during their creation. Additional technology advances help in identifying documents relative to a particular discovery order or investigation. But as overall volume increases, so does the ratio of relevant documents. There's a new emphasis on developing technologies to identify documents during creation. For example, email systems are adding the capability to categorize documents as they enter the email server.

And as technologies used in business operations advance, so will the complexity of handling the records that result from these advancements. Different types of records create additional processing challenges. These days, records can include instant messaging, voice mail, video and other forms of electronic communication. Collection and processing systems need to adapt to these record types, too.

But even as new technologies help during the identification and collection processes, the ever-increasing volumes of documents and records will present a challenge during the processing phase of eDiscovery. Growing volumes will need to be processed faster and more completely. Text and metadata extraction, as well as file and Tiff conversions, must be done accurately and completely while meeting the expectations and deadlines for getting the information into the hands of the reviewers.

By choosing one full-service vendor for eDiscovery management, all vendors and outside counsel can focus on their core competencies while the corporation can rely on a standardized, defensible eDiscovery approach, along with faster results.

Challenge 2: Get the right documents to the reviewers

Once native documents, data and other files have been identified, culled and converted to an application for review, they must be loaded into a document-review system—ideally, a password-protected Web-based document repository that makes discovery documents available to the legal teams on a 24/7 basis.

The challenge here not only involves speed, but also accuracy. Of course accuracy is expected, but with the complexity and volumes of data, mistakes can happen. Quality control is essential to the process of loading the data into the review system. All documents pertaining to a case must also be catalogued and systematically coded for proper identification, without redundancies, so that the right parties have access to the correct documents.

Yet another hurdle at this stage is the volume of data entering the system, which can fluctuate wildly during the course of a matter. Initially, data may trickle in as data discovery and collection ramp up. At any stage, large amounts of data may need to be loaded onto the system. If the system can't scale accordingly, it will be at the expense of the document reviewers' access to those documents. Poor system response time means reviewers have little or nothing to review—wasted time that adds up in review costs.

Central to the review process is accurate and timely reporting. Detailed reports that include dates and times for when data is processed and loaded into the review system are essential. This allows the attorney review teams to better manage the workload and make adjustments to the size and expertise of their

teams. With the legal teams' ability to manage both the number and times reviewers are needed, corporations can expect to better control review costs.

Benefits to corporations that use a defensible, standardized eDiscovery process:

- Compliance with the FRCP
- Increased ability to meet right timelines
- Ability to reuse work product
- Less duplication of effort
- Consistency of data use and positioning
- Greater security and limited data risk

Challenge 3: Make attorney review faster and easier

Attorneys on both sides of the matter will use the document-review system to view and add their own systematic coding as they review these documents. This means that the review application must be highly organized, robust, stable and easy for all the attorney reviewers to use. By culling documentation during review and analysis, a corporation's legal team can focus its litigation strategy more quickly.

The FRCP rules now encourage automated analysis to cull non-relevant documents, but the exact methods aren't specified. Therefore, it's important to establish defensible culling practices. Current methodologies include deduplication, near-duplicate detection, concept and Boolean search, categorizing, email thread analysis and more. Ideally, the review application will support all full-text search operations, including keyword, proximity, phrase, stemming, Boolean and concept. Using two different concept-searching technologies delivers broader results than any single technology, and helps legal teams find potential "smoking gun" documentation. Concept search engines that use best-of-breed technologies also eliminate the "black box" nature of advanced searching.

Documents that are coded as relevant or responsive to a case will be produced to the opposing side. Attorneys may also decide that certain sections of a

document may contain confidential information or information that is not relevant to the case. In these situations, they can use the review system to “redact”—or black out—sections of documents so that the opposing side cannot read that information.

The time separation between discovery and production becomes the critical focus of the attorney review team for each side. As the team is staffed and trained, the documents must be available to review. Any slowdown in keeping documents moving causes reviewers to become idle and needlessly raises attorney costs. With attorney review the most expensive element of litigation, efficiencies gained or lost here dramatically affect the bottom line.

Hourly rates for outside counsel are rising fast—with fees for senior partners topping the \$1,100-\$1,200 mark.

Challenge 4: Produce relevant documents in time for court dates

Once documents have been identified as relevant and responsive, they must be produced to the other side in time for review. This usually means that documents are converted to TIFF format, all redactions are applied, and a stamp is added to each document. The stamp can include Bates numbering, which is a unique identifier applied to each page of a document as an evidence number. Statements indicating that information within documents is confidential can only be reviewed by the opposing side’s attorneys, for security and privacy purposes.

At this point, it’s a real race to the finish line. The pressure to produce relevant documents is intense. Deadlines are imposed by the courts, so quick turnarounds and accurate productions are essential. Here again, the system architecture must offer flexibility and scalability, in addition to reliability. Therefore, the system in place must be able to scale at any time during the case—whether this includes conversion/processing, loading, storage, number of concurrent users reviewing the documents, or daily amounts of document production. Whether the matter is large or small, the process and requirements are exactly the same. And that means corporations in litigation—along with their legal teams and eDiscovery vendors—must be prepared.

Equally important is maintaining defensibility throughout the discovery process with a fully documented chain of custody. The service provider is the key to both, since the actual documents are in their possession. The discovery management vendor must therefore be in compliance with the chain of custody, or audit trail, since attorney reviewers do not have control of the documents. They can only review, code, highlight and designate privileged documents.

Chain of custody must provide a detailed account of the location of each document from the beginning of a project until the end. Every step and action during the process—and the processes involved—must be noted, stored and easily retrievable so that discovery documents can stand up in court if challenged. And in today’s matters, attorneys can expect to be challenged on almost all discovery items.

Failure to produce on time equals costly judgments

These are just a few examples of cases where failure to produce discovery materials resulted in major losses—and expenses—for a variety of corporations:

- Giant Screen Sports LLC v. Sky High Entm’t, 2007 WL 627607 (N.D. Ill. Feb. 27, 2007)—default judgment and dismissal of counterclaims where, among other things, defendants **failed to produce emails subject to inspection request**
- Commissioner of Labor of N.C. v. Ward, 2003 N.C. App. LEXIS 1099 (N.C. Ct. App. June 3, 2003)—default judgment for **failure to comply with order to produce**
- Mariner Health Care Inc. v. PricewaterhouseCoopers, No.02—VS—037631—F (St. Ct. Fulton City. GA, filed Aug. 29, 2002)—dismissal with prejudice for **ongoing failure to produce requested documents in a timely fashion**
- American Bankers Ins. Co. v. Caruth, 786 S.W.2d 427 (Tex. App. Dallas 1990)—default judgment for **failure to comply with order to produce**

Conclusion

To make that all-important deadline in court, corporations need sound and proven eDiscovery practices that are built on easy-to-understand, accessible policies and procedures. Getting to court fully prepared also requires a reliable, flexible and scalable loading system and review application that allow for fast turnaround, absolute accuracy and complete defensibility.

The sheer volumes and risk involved in failing to process all relevant data by court-imposed deadlines present potentially huge costs. Whether the matter is large or small, the challenges involved in eDiscovery are the same and require a highly organized, step-by-step process. In addition, many corporations become involved in multiple matters, multi-district litigation and joint defense group litigation. In these larger matters, corporations must be able to depend on third-party expertise to help them manage the entire process of eDiscovery in order to contain the rising costs in attorney review time. The eDiscovery management vendor that can provide the services a corporation needs while streamlining the process, ensuring accuracy and controlling costs is the ideal choice. The vendor that also offers extensively trained and experienced personnel, full client services and 24/7 support is a safer bet in order to meet the crucial deadlines that are part of the complex and fast-paced arena of corporate litigation.

About the Author

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In his role as vice president of business development, Mr. Reiff leads the sales and marketing efforts of Xerox Litigation Services (XLS), which provides a full range of discovery management services for Xerox's AM Law 100 clients and Fortune 500 Office of General Counsel clients. He has more than 25 years of experience in building, supporting and marketing advanced enterprise-class software products and services.

Prior to joining Xerox, Mr. Reiff served as the client director of discovery management solutions at ZANTAZ Inc., where he led the successful implementation of several large-scale litigation projects in eDiscovery. He also led business development efforts in discovery management at Steelpoint Inc. prior to its acquisition by ZANTAZ in 2004. Mr. Reiff has held leadership positions in marketing and business development at several leading technology companies, including OpenSystems, Computer Associates and Cullinet Software.

About Xerox Litigation Services

Xerox Global Services offers Xerox Litigation Services to provide complete discovery-management services to support the most difficult, document-intensive cases. Combining leading technologies with industry expertise and outstanding service, Xerox Litigation Services (XLS) provides in-house counsel and their outside law firms with a comprehensive solution to litigation support and electronic discovery. These include on- and off-site discovery-management solutions, Web-enabled document review technology that is secure, scalable and defensible, and consistent, repeatable processes that help to maximize discovery efficiencies and contain costs. Former Amici CEO Craig Freeman is the vice president and general manager of XLS. He has been responsible for the design and implementation of eDiscovery systems for some of the most complex litigation matters in the country.

Xerox Global Services helps companies take a new look at the business challenges they face today. No other company has more experience making business processes more cost-efficient and secure—from managing your assets in the office—to records management—to services for large-scale print production. And only Xerox Global Services uses Smarter Document ManagementSM technologies to deliver the results that clients can see and measure.

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