

eDiscovery White Paper

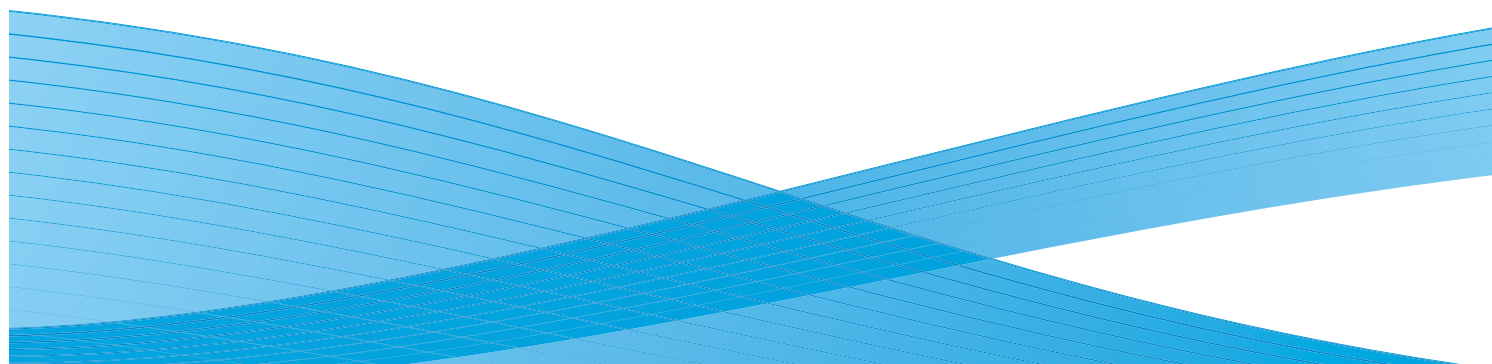
Building a Strong Defense:

Key considerations for Selecting an electronic discovery vendor

Contents

- 2 Being prepared for a discovery order has never been more important.
- 3 The eDiscovery marketplace is evolving rapidly.
- 4 What does eDiscovery entail?
- 4 A snapshot of the eDiscovery process.
- 5 Accuracy, reliability and scalability will determine your defensibility.
- 6 Be sure a vendor has the infrastructure you need.
- 7 When choosing an eDiscovery partner, experience is paramount.
- 7 About the author
- 7 Xerox Global Services

October 2008
Author:
Kenneth Reiff
Vice President, Business
Development
Xerox Litigation Services



Being prepared for a discovery order has never been more important.

In today's global business arena, companies not only face challenges and complexities in the ways they manage and store their documents and other records—they also face an increasing risk of corporate litigation. Following the amendments to the Federal Rules of Civil Procedures (FRCP) in 2006, a company's documents and data as they relate to a discovery order must be stored and accessible at any time during litigation, whether they're paper or electronic. Combined with the added risk and costs associated with eDiscovery processes, it's essential that companies be prepared if and when litigation occurs.

Organizations that have already added an enterprise records-management system have an advantage in terms of adding eDiscovery capabilities. But making sure that all documents are accessible is the key. Paper documents now compete with an increasing number of electronic records. With nearly five exabytes of business e-mail exchanged annually, e-mail is, and will continue to be, one of the most prevalent types of records that are essential to store and manage. In order to truly leverage most eDiscovery vendors' capabilities and contain costs, a comprehensive records-management system should be in place so that a company can execute an equally systematic and thorough eDiscovery process on an as-needed basis.

In addition, because discovery disputes are always a possibility, the data produced for the courts, along with the document processing and review steps, must all be documented and defensible when challenged. This includes any searching technologies that vendors use while culling, during the preprocessing as well as the grouping of documents for review. Otherwise, corporations can face mounting expenses in the form of court sanctions and fines—in addition to the possibility of losing the case entirely.

The price of not being prepared for litigation can be enormous. Senior management and corporate boards of directors, along with their Office of General Counsel personnel and outside counsel, risk court sanctions, civil and criminal penalties and even jail time for missed dates or spoliation (destruction or alteration) of evidence.

Taking the steps to put a comprehensive records management system in place is stage one of a complete discovery program. Once records, including e-mails, have been digitized and stored in an electronic content management (ECM) system, companies of all sizes have options in terms of adding eDiscovery capabilities.

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.

The eDiscovery marketplace is evolving rapidly.

Like the corporate litigation arena, the eDiscovery market is evolving at a rapid pace, with new mergers taking place and new, highly targeted niche products available.

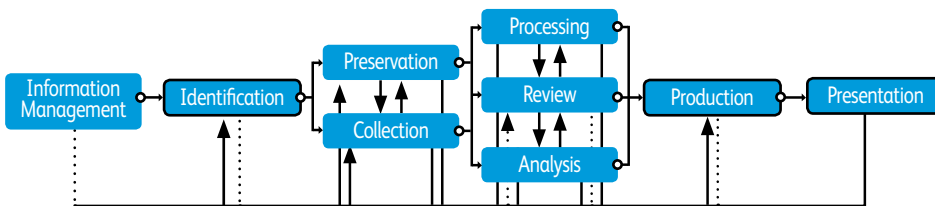
However, it makes sense for corporations to consider the range and depth of services they may need before choosing a vendor or a particular product. Larger organizations may prefer a seasoned vendor that offers a range of essential capabilities along with the ability to recommend ancillary vendors for specialized services. Ideally, an eDiscovery partner will also offer the capabilities of products and services with a proven track record.

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 must be collected, stored, reviewed and produced. The amount of data can, in some cases, 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 in the eDiscovery phase must include a careful audit chain and be defensible in court.

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 in an eDiscovery vendor 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.

“The production of electronic documents and data is now part of our litigation culture. Cost-effective managing of the harvesting, review and production of such information requires careful selection of your eDiscovery vendors. If you take the time to educate yourself about the vendors prior to actually needing them, you will give yourself the time to learn enough information to properly vet the eDiscovery vendor.”

Mark Yacano, partner, Wright, Robinson, Ostheimer & Tatum “Vetting Your eDiscovery Vendor: the Lawyer's Perspective”



The Electronic Discovery Reference Model Project (EDRM) was created to address the lack of standards and guidelines in the electronic discovery market.

What does eDiscovery entail?

Discovery 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 (ESI), including e-mail, text documents, spreadsheets, images, database files, deleted e-mail and file backups.

A snapshot of the eDiscovery process.

Before selecting an eDiscovery vendor, corporations and their outside counsel will want to consider the following components of a complete discovery program.

Stage 1

The corporation has a comprehensive records-management system in place that includes all corporate documents and data, including e-mail.

Stage 2

Now eDiscovery can begin, which 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. Within Stage 2, the following steps occur:

- **Assessing**—This initial step is also one of the most time-intensive, because it involves identifying all data relevant to the discovery order, electronic files and paper documents. Within each document, automated software can help to accurately extract the metadata and text that applies to the discovery order, based on search terms specified by the legal teams.
- **Harvesting and collection**—Digitized hard-copy documents and electronic data, including e-mail, are now ready for imaging and file formatting to be easily readable and accessible.
- **Culling**—During this step, the vast amounts of documentation can be reduced to those items specific to the discovery order. Carefully trimming the amount of information helps to limit the actual number of documents for review and can help to contain costs, but maintaining defensibility is still a critical requirement at this stage. Different systems and tools are available to help lawyers and their vendor partners search, find, catalog and manage the entire review cycle.

Stage 3

Discovery management, which is the review and production cycle, can now begin. This includes all documents identified as admissible in court during Stage 2, and includes:

- **Coding**—A vendor will apply a bibliographic document indexing system to each piece of data to provide a layer of consistency throughout all file formats.
- **Storing**—A vendor can create a web-based document-review system for each legal matter, which is hosted on a remote server and accessible for review 24/7, anywhere an internet connection is available. Once logged on, users from both sides of the matter can organize, search, cull, review, annotate and produce documents and transcripts online, with real-time updates. It's essential that this repository not only be flexible, but also offer the highest degree of security available to protect vital corporate data and privileged documents.
- **Reviewing**—Now attorneys and data experts on both sides of the matter will cull and filter through the TIFF (Tagged Image File Format) and native files to identify relevant and privileged documents. This review cycle can involve millions of pages and/or gigabytes, and typically involves tens, if not hundreds, of attorneys. Attorney review is still the most costly phase of discovery.
- **Production**—At this point a vendor can add a numbering and branding system to the data. Users can then output data in electronic or hard-copy form. Repository administrators track and report all access and production, to manage and protect the chain of custody for each matter.

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.

Accuracy, reliability and scalability will determine your defensibility.

To protect their interests and achieve the best possible outcomes during litigation, corporations will want to gauge an eDiscovery vendor's capabilities based on three crucial areas of performance: accuracy, reliability and scalability. Each of these capabilities is essential to maintaining defensibility at each phase of litigation.

Inside these three areas are specific capabilities that may not only determine how successfully a company defends itself during a matter, but could also make a difference whether the company makes itself vulnerable to additional expenses imposed by the courts. The eDiscovery capabilities important to every corporation as it prepares for litigation include the following:

Volume management for instant scalability

Legal teams and their clients determine which documents and data will be reviewed for production, based on specific discovery orders. 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. Establishing consistent collection protocols and an affirmative discovery plan with a vendor is essential.

However, the amount of electronically stored information (ESI) generated by today's businesses can complicate and significantly enlarge the scope of the discovery process. It's important to remember that for any case, there is a chance that data volumes could explode beyond original estimates. Therefore, the vendor's system must be able to scale at any time during the case—whether this includes conversion/processing, loading, storage, number of concurrent users reviewing documents or daily amounts of document production. The bottom line: whether the matter is large or small, the process and requirements of discovery are exactly the same. And that means corporations in litigation must be prepared.

Reliable turnaround times to meet court dates and quality standards

Processing large volumes of data can be a real challenge when timelines are short. Deadlines are imposed by the courts, so quick turnarounds and accurate productions are essential. Here again, vendors must offer flexibility and scalability, in addition to reliability. As an example, if the contents of one or more computers must be processed and examined right before a deposition, the right eDiscovery partner will accommodate the rush workload—without negatively affecting the rest of the casework.

Equally important is the accuracy of the documents in question. All documents pertaining to a case must also be cataloged and systematically coded for proper identification, without redundancies, so that the right parties have access to the correct documents.

Equally important, confidential documents must be securely stored, segregated from production, and made available only to legal team members with the proper authority to view them.

Culling to increase accuracy, reduce review time and provide defensibility

Once the data load has been identified (e.g., per custodian, date range and other determinates), corporations and their outside counsels must be sure their discovery partner can help them identify all documents that meet the discovery order. Culling discovery documentation allows a corporation's legal team to focus its litigation strategy more quickly. And accuracy reduces the time involved for attorney review, which is still the most expensive part of any litigation.

The FRCP rules now encourage automated analysis of documents to cull non-relevant documents, but the exact methods are not specified. Therefore, it's also important to establish defensible culling processes. Current methodologies of processing and culling include deduplication, near-duplicate detection, concept and Boolean search, categorizing, e-mail thread analysis and more. Ideally, the vendor provides a system that supports 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 alone, and helps legal teams to find potential smoking-gun documentation. Concept search engines that use best-of-breed technologies also eliminate the black-box nature of advanced searching.

Establishing defensibility to win challenges

Documents must not only be identified correctly, they must also be reviewed properly. The service provider is the key to the chain of custody, and to document defensibility, 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 should 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 to produce them—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.

Controlling costs at each step of the process

To ensure eDiscovery compliance and mitigate risks, corporations need sound and proven processes that are built on easy-to-understand, accessible policies and procedures. The sheer volumes and risk involved in failing to process all relevant data by court-imposed deadlines present potentially huge costs. In addition, many corporations become involved in multiple matters, multi-district litigation and joint defense group litigation. In these larger matters, a vendor must offer the scalability, reliability and accuracy to accommodate what can amount to millions of pages of documentation to be cataloged, reviewed and audited.

Be sure a vendor has the infrastructure you need.

As part of a careful review of an eDiscovery vendor, corporations will also want to make sure that a vendor offers all the up-to-date systems that can produce a successful solution. While the technical components and support a vendor offers are somewhat behind the scenes, they are nonetheless fundamental to an eDiscovery solution that can make or break a case. Specifically, corporations and their outside counsel will want to ask potential vendors about past experience handling very large cases. Elements to consider include:

- **Platform**—Larger eDiscovery vendors that offer processing, review, analysis and production services typically offer a web-based, hosted repository for each matter. Other solutions include eDiscovery appliances that plug into corporate networks and out-of-the-box software solutions that load on in-house servers. These plug-in solutions are limited in their ability to access data from outside corporate firewalls, such as for distributed legal and review teams. In addition, it can be difficult for IT to maintain software/hardware solutions in these rapidly evolving and specialized areas.
- **Network architecture**—The extensibility of the vendor's network architecture is key. It's also important that a vendor offer the latest hardware to deliver a fast, secure, scalable product to end-users. In addition, upgrading systems and using leading-edge technology to improve performance are important considerations. A vendor that invests in best-of-breed hardware is more likely to offer the extensive capabilities that larger cases demand. But these enhancements cannot present any downtime for the review team or affect the processing, loading and production of documents. Therefore, a corporation will want a system to be built and managed so that the simple addition of hardware improves the system's extensibility.
- **Technology**—Like network architecture, corporations will want to work with vendors that also offer customizable best-of-breed technologies for fast, easy-to-use, but highly secure searching and review functions. Corporations should consider the levels of backup and disaster-recovery services available in the event of a complete failure of the primary data center. At least three levels of data redundancy are best, and a dual power supply is a basic requirement. With three levels of redundancy, if the primary data store fails, there's no fear in operating from the secondary data store, since a third is also available. A systematic and documented schedule of backups, along with documented disaster recovery and business continuity plans, is an important feature to review prior to any program implementation.
- **Client services**—Litigation is a 24/7 industry, so an eDiscovery vendor should also provide dedicated support personnel and services around the clock, from the start of the process until the close of the matter. Professional services are a key differentiator in eDiscovery vendor offerings. Corporations will want to assess a vendor's experience and education levels in the legal field, project management and computer science, in addition to other support areas. Also, scaling services are equally as important as scaling technology—especially when there are sudden demands for more processing, loading of data and document production.

When choosing an eDiscovery partner, experience is paramount.

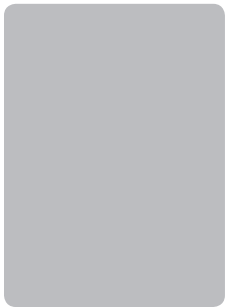
Without question, increasing litigation and the multibillion-dollar costs associated with eDiscovery require corporations to be prepared if and when litigation occurs. In fact, most experts would say that it's not a matter of if, but when. Today's business climate demands that organizations of all sizes must place eDiscovery in the same ranks as other business functions, such as IT, operations, security, ethics and finance.

With corporate investment in the electronic data discovery market expected to exceed \$4 billion by 2009, the companies that will achieve the greatest return on their investments will be those that successfully link document management with eDiscovery. Note that this \$4 billion only represents approximately 15 percent of the total spent on corporate litigation. Many billions more will be spent on costs for outside counsel.

When adding an eDiscovery system, a holistic approach is a sound strategy for success. Companies should identify a solution that takes into consideration their internal processes and technologies currently available, and select a vendor that can develop a customizable solution to meet their needs for the best return on investment. This includes an enterprise-wide policy that complies with all legal requirements, fits within an organization's records-management business needs, and provides overall accountability. The eDiscovery vendor that can provide the services a corporation needs while streamlining the discovery process, ensuring accuracy, meeting deadlines and controlling costs is the ideal choice.

Implementing an eDiscovery program requires sound processes built on easy-to-understand, accessible policies and procedures to ensure compliance and mitigate risk. While up-to-date technology is essential, it's only one component of a complete eDiscovery management solution. The vendor that also offers full client services and 24/7 support is a safer bet in the complex and fast-paced arena of corporate litigation.

About the Author Kenneth Reiff



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.

Xerox Global Services

Xerox Global Services (XGS) delivers measurable results for companies in industries from aerospace and the financial services to healthcare, government and retail by looking at business challenges in a whole new way.

Our more than 15,000 consultants and service delivery experts specialize in managing office assets and output, reengineering document-driven processes and optimizing print production environments.

We employ Smarter Document ManagementSM technologies to add intelligence and structure to both paper and digital documents and activate the content they contain. And we combine our extensive industry expertise with tools like Lean Six Sigma to create a powerful portfolio of services that adds real value to enterprises worldwide.

www.xerox.com/globalservices

