

Early Data Assessment - A Critical Component of Proactive Discovery Management

Early Case Assessment

Early Case Assessment techniques (ECA) have been used by sophisticated litigants for years to achieve better and more predictable litigation results. Now, with productions being measured in GB instead of boxes, there is more reason than ever to incorporate an early assessment of the data involved in the matter.

Gaining an in-depth understanding early in the life of a new case provides optimal litigation options and can drive the overall litigation strategy from the get-go. Disciplined ECA can also be a strategic advantage that gives one litigant a jump-start on the critical issues in the case. ECA provides a much clearer picture of the case, ultimately reducing cost, increasing efficiency and mitigating risk.

However, without understanding the critical facts of the case, ECA loses much of its value. The isolated decision to “settle or litigate” with an incomplete or inaccurate understanding of factual basis and merits of the claims and defenses is not nearly as valuable as it could be. Because most (if not all) of the information needed to form an assessment of the case is today in electronic form, the ability to quickly analyze and evaluate that data is important.

Moreover, technology advances have made the information more useable – allowing attorneys and experts to analyze data faster and in more detail. More and more, arguments made in court are based upon analysis of large amounts of data (tending to prove patterns, trends, and the like). Today, lawsuits are won (and lost) by the side that is able to process data quickly and use it to support its version of the facts.

After all, raw data is just that; it only becomes valuable and useful information after it is processed, evaluated and interpreted to make it so.

What is Early Data Assessment?

The sooner the process of evaluating and interpreting the relevant information begins the better. Organizations are finding that evaluating the data relevant to their cases earlier in the life of the case is a valuable endeavor. Early Data Assessment (EDA) is simply the analysis and evaluation of the most critical information early in the case. Examples of EDA include:

- In a class action wage and hour dispute, evaluating payroll and timesheet data of a small sample of the putative class to assess overall exposure;

- Evaluating the likelihood of success on a claim that an organization’s “pattern or practice” systematically results in discrimination by evaluating raise and promotion data in an HR system; and
- Evaluating the costs of conducting discovery by sampling data from a variety of the systems containing relevant information

EDA as Part of Discovery Management

Discovery is often the most lengthy, burdensome and costly aspect of litigation, and therefore is often glossed-over by counsel. Perhaps this is a result of the legal industry’s lack of focus on the importance of how discovery material gives an edge over the opponent, perhaps it is indifference, or perhaps it has more to do with not understanding the collection and realizing how involved it will be once it is too late. With that said, it remains true that the discovery process is also the foundation for strong advocacy. In-house and outside counsel handling today’s complex litigation are seeking a scalable and cost-effective solution for managing the entire discovery process, paper and electronic, while minimizing the inherent risks in litigation in order to achieve the desired outcome.

The best way to meet these needs is through the adoption of standardized Discovery Management protocols. Discovery Management is the use of standardized processes and technologies for conducting discovery - including the collection, processing, review,, and production of hardcopy and electronic data.

When implemented successfully, Discovery Management streamlines the collection and organization of discoverable material to enable counsel to review and produce documents and data responsive to discovery demands in the most cost-effective and timely manner.

To implement such a holistic approach, the organization must have support from a variety of stakeholders within the organization. One way to gain this support is through the creation of a Discovery Management team. A Discovery Management team combines the skills of the most proficient project management, legal and technical individuals in order to achieve the business and legal objectives of the client. The Discovery Management team will perform an EDA in order to paint a better picture of the entire case: from what to expect of the supporting documentation for their legal arguments, to projecting the volumes of data they can produce to the other side within a reasonable time frame.

By doing an EDA, the team can determine the various relationships between the departments, and ultimately who is the source of the data versus where the data currently resides. The team’s data knowledge proves fruitful to both the IT and legal departments because it prevents multiple data-requests due to under-inclusive or misunderstood data needs, and enables these departments to focus on their role within the organization. The team also understands the breadth of the requests and can narrow the focus in terms of what data is needed, and how that data can be manipulated to respond to discovery demands. More often than not, that same data is needed for various litigation, and instead of multiple data requests and explanations from the IT department, the team has the data at its fingertips with

resources available for further analysis.

Benefits of EDA

A solid EDA reduces surprises and exposes the strengths and weaknesses of the case while there is still ample opportunity to position the issues in one side's favor. It identifies the gaps between what is needed and what can be provided. This process emboldens the trial team— as they know with confidence they can support the positions they are taking. Furthermore, understanding where the data is stored, the various formats and file types, and how the data might be relevant to on-going or future cases can be extremely beneficial in managing long-term litigation efforts.

1. Understanding Relevant Information

A well-executed EDA allows the trial team to understand the content and format of the most relevant data sets. It provides an opportunity to see individual documents and, more importantly, understand the relationships between the data and data sets at a higher level. By gaining knowledge, the team can be further guided in their subsequent collections and reviews. The work product of an EDA provides a comprehensive picture of the data to the attorneys and allows them to clearly see all issues involved in one well-organized view. Because organizations accumulate large volumes of data in diverse formats and databases, including operational (day-to-day; transactional), anecdotal (macro-level; non-transactional), and meta-data (data about the data; definitions), understanding the format of the relevant data and how to process it can be as valuable as the content of the data itself. The EDA provides knowledge about client-IT infrastructures, various data sources and definitions, pattern recognition, and how databases interact with each other.

2. Cost Effectiveness

An EDA helps determine, early on, what types of data the client has and can focus for the team's efforts to ensure no efforts are wasted. This results in a more cost-effective trial preparation process. A critical component of the EDA to evaluate the likely probative value of the data sources in light of the costs to harvest and process the data to decide whether to harvest entire collections, certain subsets, or samples.

3. Fewer Surprises Associated with Collection

EDA reduces the chance for surprise at the eleventh hour. Those organizations that wait until discovery begins in earnest to review the relevant data and its sources are inevitably surprised: either data that should have been deleted has not been; or data that should have been preserved has been deleted. These organizations lose credibility with their opponents and the court and incur more costs to deal with these issues.

The organization that evaluates the contents and format of its data collections early in the case is less likely to be surprised by what it finds when it dives in deep during discovery. Often, the data collected is inconsistent. It is neither well organized nor complete. When this is discovered late in the discovery phase, the risk of making inaccurate representations to the opponent and the court increases. An EDA

identifies gaps and inconsistencies in the data.

4. Improving Communication between Different Internal Departments

Though IT departments maintain the data infrastructures, they do not understand the contents of the data or how it should be used to support or refute litigation claims. Furthermore, in-house legal departments are not responsible for the inner-workings of these other departments and do not have that breadth of knowledge needed for complex analysis. Therefore, there is an inevitable gap, for discovery purposes, between: 1) IT departments who manage the data, 2) other departments who are the source of the data, and 3) the legal departments who use the data in response to discovery demands.

An EDA improves the communication between the various stakeholders in an organization by creating meaningful communication about critical issues before the deadlines become urgent. This fosters better, more meaningful relationships between IT, legal, records management, and other interested departments. It is this understanding of the information provided that enables the discovery management and legal teams to develop a comprehensive case strategy.

What will an EDA Provide?

Specifically, the types of questions that an EDA should answer include:

1. Is there a specific time-frame for the data (beginning and ending period)?
2. General description of the data (what is the data-type including applications, and for what purpose)?
3. What are the key data points that support the litigation and are they attainable?
4. How is the data accessed (per data custodian on local hard-drive, on a shared-drive, in a general data warehouse and through the system administrator only)?
5. Is there a data access policy, and what is it (i.e.: only the IT department can access the databases)?
6. Are there any regulations or that apply to the data (i.e.: for health insurance or member-specific data, HIPPA applies)?
7. Who are the data custodians and what is their contact info?
8. What are the origins of the data (any particular department)?
9. Is the data now in another location (i.e.: data warehouse receives data from multiple departments)?
10. What is the process of the data transfer if not in the original custodians' care (i.e.: data flow and who manages it)?
11. How is the data to be used for litigation purposes?
12. Will there be need for complex data analysis (i.e.: will the data need to be parsed or summarized

to prove specific discovery demands)?

13. How will the data be stored for litigation purposes (i.e.: in database, spreadsheet, in a repository)?

Conclusion

As there is shift from paper to electronic information, organizations commonly involved in litigation are looking for comprehensive approaches to handling complex data. The EDA is a valuable tool that is often overlooked in the initial phases of the litigation. The early understanding of the data assists the legal team in painting a larger picture of the litigation, where cost-savings can occur, allow them to find smoking guns, or determine if they are over-reaching in their claims. The discovery management teams' involvement with e-discovery, especially at the onset of the relationship with its clients, is an immeasurable value in litigation support.

SIDEBAR: How Early Data Assessments Improve Results:

Example: Government Agency - Accounting / Payroll Systems

An agency of the federal government uses proprietary systems (housed in data centers in various regions throughout the country) to maintain its human resources, accounting and payroll data of its employees. The in-house group that supports these systems is often under-staffed and understands very little about the various legal claims made by employees.

At the onset, the EDA uncovers how the documents are organized; where they currently physically reside; who the appropriate contact is to gather the data; how that data can be organized for litigation purposes; and how to collect and assimilate the disparate data into a useable format and in a cost-effective way. The government organization's discovery management consultant, working in conjunction with government counsel, determines what data center to request data from in response to litigation, thereby collects the CDs, and harvests the data off the media to put into its own database for analysis. In order to make this data readable, analysis is performed on the data and the discovery management consultant takes on the role of the source as it now houses a complete set of the payroll data, to be used in current and future litigation, or for analysis by in-house or outside lawyers, or experts.