

# Digital Discovery & e-Evidence

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## Discovery Management: Making Discovery More Cost-effective

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Litigation is a major concern for any organization. A significant amount of money is budgeted to legal departments and a high percentage of their litigation funds are specifically earmarked for discovery. Advances in technology and streamlined processes within the organization can affect litigation budgets in a positive way by creating more efficient discovery management ultimately resulting in cost savings. One method of achieving a high return on investment is through the adoption of formal, standardized methods for conducting discovery.

Discovery Management is a formal, centralized approach to a process that often consumes many legal department dollars. When effective Discovery Management plans are used, methods, technologies, and processes are more refined, results are more consistent from case to case, and team members are more productive because there are fewer redundancies.

### The Benefits: Costs, Planning/ Budgeting, and Effectiveness

A well-executed Discovery Management plan saves money. Applying the same approach across cases reduces redundant efforts, resulting in

significant cost savings. In information-intensive litigation matters where some attorneys are assigned to a matter only for the duration of the discovery phase, a detailed Discovery Management plan allows them to ramp up faster. A Discovery Management plan defines procedures and allows attorneys to find relevant information quickly, cutting down the inefficient, 11th-hour efforts that too often precede discovery cut-off dates and large production deadlines. It eliminates duplicative technology costs, including training time and counsel's effort.

In addition to these overall cost savings, a comprehensive Discovery Management plan enables counsel to gear the discovery process more specifically to particular matters. This improves counsel's ability to predict costs associated with collecting the documents and data and converting them into systematized formats for quick and effective searching, retrieving, analyzing, and reporting.

A well-planned and executed Discovery Management plan ultimately results in more effective representation, as trial counsel can concentrate on advocacy rather than data organization.

### The Plan's Content

A Discovery Management plan should utilize proven technology to significantly increase the efficiency of counsel. It should detail uniform approaches for:

- planning the discovery process in light of the unique facts of each case/matter;
- collecting the information, both hard copy and electronic;
- processing hard copy documents and electronic files into standard formats that make them accessible to the entire litigation team;
- reviewing the information for relevancy, responsiveness, and privilege; and
- delivering the information in accordance with the production request.

### Proven Principles that Lead to Success

While there is no one-size-fits-all approach to Discovery Management, certain key issues should be addressed in all comprehensive Discovery Management plans. Every organization has a unique caseload, strategy, organizational structure, and degree of technological sophistication. For this reason, each organization should examine its needs and customize its approach.

However, the following principles have been proven to yield a significant return in almost all organizations.

**1. Utilize cross-functional expertise when creating the Discovery Management team.**

The Discovery Management team creates the plan and monitors its implementation, ensuring that it continually represents the most effective way for the specific organization to manage discovery. It is crucial that appropriate associates from different parts of the organization serve on this team together.

The process of creating a comprehensive Discovery Management plan is actually one of its primary benefits. Expanding the team beyond the legal department engages employees who rarely work together in a mutual effort to understand the requirements and implications of one another's roles. This creates an understanding of and greater appreciation for the legal department's requirements. A Discovery Management team composed of members from different departments consistently bridges the gap between technology professionals' "technobabble" and the "legalese" used in the law department.

The Discovery Management team members and their suggested functional roles should be as follows:

**In-house litigation counsel:**

Articulates needs of legal department clearly across multiple practice areas. Often, this attorney is more technology-savvy than a typical attorney. May be more than one attorney.

**Senior level in-house litigation support staff member:**

Provides practical, hands-on description of how litigation support tasks are currently handled.

**Document/Records Manager/Corporate Librarian:**

Provides insight into current information retention policies of organization and assists in determining how the Discovery Management plan will integrate into the corporate records retention guidelines.

**Outside counsel litigation support staff member:**

Provides input as the ultimate user of the Discovery Management solution.

**Discovery Management service provider:**

Contributes legal and/or technology services and consulting, based on strong experience with implementations at other organizations.

It is also advisable to include a senior level member of the legal team—either the General Counsel or the Assistant GC for litigation. The Discovery Management plan is most

enthusiastically adopted when it has explicit endorsement from the highest levels of a legal department. Therefore, the General Counsel and/or Assistant GC responsible for litigation must actively encourage the program to ensure its effectiveness and success. Other possible team members include a representative from the finance department, who can assist in the calculation of return on investment (ROI).

**2. Consider all types and sources of information relevant to discovery.**

The plan should address all types of information, in any format, to be collected during discovery, especially those commonly produced in the organization's prior experience with litigation. This ensures the comprehensiveness of the discovery effort, within reason. Specifically, the plan should identify and address information management systems that may house potentially relevant electronic information. This can be especially challenging in organizations that have undergone significant M&A activity, and have accordingly been faced with the challenge of integrating disparate information systems.

**3. Coordinate the plan with the organization's document retention policy.**

The Discovery Management plan should include policies and procedures for immediately suspending the destruction of documents and electronic information when directed. This is particularly challenging given the vast amounts of electronic data that are routinely backed up by complex and sophisticated systems. For most organizations, retrieval of backup data is a more difficult task than the majority of the bench or the bar appreciates. Every organization regularly engaged in litigation should be prepared to interrupt its electronic data backup cycle and to retain selective information indefinitely. Without advanced planning and preparation, it is virtually impossible for most medium and large corporate organizations to comply with an immediate order to suspend deletion of backup data. This is an area of great weakness for most corporate litigants' discovery processes.

**4. Develop procedures for identifying and collecting case-specific information within the organization.**

Establishing guidelines in advance of any specific litigation for identifying and collecting information in response to discovery will speed the process and enhance the organization's ability to withstand challenges to the collection efforts. Organizations employ several processes to facilitate collection. First, the identification of types of information required for collection begins with the legal department. The request is, after all, a legal one—lawyers must prepare responses, and lawyers often verify their accuracy and completeness. This may involve building a litigation matrix that details legal claims and defenses, the elements of each, the factual allegations relating to each element, and

the documents and information relevant to each such allegation. That matrix, in turn, will evolve into a map that can quickly reveal the strengths and weaknesses of a case. It can also be used as a starting point to begin a search for documents relevant to the litigation.

Once the types of information have been identified, the next step is to contact the business units that maintain this information. Detailed instructions should be issued mandating collection procedures and tracking requirements, particularly the date, time, and name of the person who collected and retained custody of the documents until they were released to the legal department's representative. Instructions for collecting electronic data should include procedures for maintaining the integrity of the metadata.

#### **5. Compile a Coding Manual**

A Coding Manual is a set of directions for processing disparate information into a single Discovery Management system that includes document and record unitization (or determination, the process of defining where a document begins and ends), imaging, and coding. Such a manual can yield significant value by ensuring that the minimum processing necessary is performed routinely, consistently, and correctly, in accordance with expectations.

Many organizations classify litigation matters, and in traditional tail-wags-the-dog fashion, allow the classification scheme to dictate the amount of processing. The better practice establishes guidelines for such issues as how paper documents will be processed and whether imaging or OCR (Optical Character Recognition) is required. (For example, if you expect that any document will be copied and produced to more than one party, imaging those documents at the start of the discovery process is the most cost-effective protocol.)

Discovery Management systems also provide varying degrees of search capabilities on document data contained within the system. Many attorneys find it useful to capture information about a document's date and the identities of people who authored and received the document. In electronic data collections some of this information may be extractable from the electronic file's metadata. But be somewhat wary of metadata. Different software versions and operating systems means metadata from one file type is not necessarily comparable, and the fields may be inconsistent enough to make their contents suspect. With e-mail, however, the author, recipient, title, and date sent/received metadata are generally reliable and useful for a variety of common litigation preparation tasks.

#### **6. Standardize review processes for relevancy, responsiveness, and privilege.**

Document review absorbs the vast majority of time and effort expended to respond to a document production re-

quest. Legal professionals spend countless hours reviewing documents. The ability to re-use work product of reviews across multiple cases is an additional good reason to implement a comprehensive Discovery Management plan. While most review procedures must accommodate case-specific considerations, well-documented review processes with decision trees will yield work product that is more reliable and useful in future matters. The types of standard decisions that can be implemented include decisions regarding attachments and nested e-mails.

#### **7. Outline procedures for production.**

The Discovery Management plan should outline production procedures, including rules for reviewing productions, identification of production review resources, analysis of the feasibility of automated versus manual review, and detailed identification of production history logging and tracking mechanisms. Approval by in-house counsel should precede production of information.

#### **8. Identify a single electronic Discovery Management solution.**

Standardizing a single Discovery Management system is prudent for two reasons: it reduces cost and allows attorneys to become expert users. The costs associated with installing and maintaining hardware, software, and technical staff amount to but a fraction of the expense of using multiple systems. Hidden costs include ramp-up time and the effort required to train new users. Implementing one standard system enables attorneys to understand fully how to use available tools without relying on third parties or unfamiliar software applications.

The Internet has made an online Discovery Management system a standard tool for managing complex litigation in most organizations. Web-based solutions house information in one place and grant access to all necessary parties.

#### **9. Communicate the Discovery Management plan to all involved parties.**

The Discovery Management plan must be well documented and create clear and unambiguous instructions to all parties contributing to the discovery process, especially outside counsel. These are the people who will be the likely beneficiaries of the improved efficiencies and faster access to information. Discovery Management performance expectations for outside counsel should be included explicitly in outside counsel's engagement agreement.

### **The Rewards**

Discovery Management creates an efficient system for any organization's approach to litigation. It maximizes technology and streamlines discovery processes, reducing redundancies of effort to create significant cost savings.

Discovery Management tames a struggle that often consumes large portions of the legal department's budget. Detailing specific approaches to the entire process of discovery and formalizing the organization's process allows the legal department's focus to shift more quickly from research-

ing, sifting, sorting, and coding to advocacy.

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## ABOUT IE DISCOVERY

### Who is IE Discovery?

IE Discovery is the first legal services provider offering comprehensive Discovery Management and other litigation support services to corporate law departments, outside counsel, and government agencies. Comprised of legal professionals, technologists, and document specialists, the IE Discovery staff creates solutions for a wide range of complex, information-intensive litigation.

### What is Discovery Management?

Discovery Management is a sophisticated methodology for collecting and transforming disparate documents and data - both in electronic and paper forms - into a unified system that enables attorneys to quickly analyze relevant information for more effective advocacy. Encompassing the complete discovery cycle, from collection to production, IE Discovery's robust services rely on the InfoDox(tm) platform-a secure, Web-based system for searching, organizing, and producing discovery documents.

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IE Discovery offers solutions for all areas of Discovery Management:

- Planning - Legal and technical consultants assist clients to devise a Discovery Management strategy, for ongoing litigation and future cases.
- Collection - Identification and acquisition of discovery data and documents, both electronic and paper, from multiple sources.
- Processing - Staffed with experienced document professionals, the Data Processing Center follows rigorous quality assurance guidelines.
- Review - Legal professionals, using platform tools, perform reviews for relevancy, privilege, and issue coding, as required.
- Production - The identification, organization, and output of production documents to opposing counsel.

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