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BEST PRACTICES

Slashing E-Discovery Costs in a Digital Universe

Over the past ten years, the amount of data created by a typical organization has exploded, and that growth isn't projected to slow any time soon. In fact, it has been estimated that data requirements are growing at an annual rate of 60% and that the digital universe will balloon to 1,800 exabytes by 2011. Today, many medium-sized organizations measure their data in terabytes, and many large organizations have moved into the realm of petabytes.

While the increase in electronic data is not inherently bad, it does have a downside—it can be expensive to collect, process, and review for litigation. Even the simplest strategies for managing and storing electronic data aren't cheap, and adding the processing and review required for legal discovery raises costs even further. In today's tough economic climate, many organizations

are seeking ways to trim budgetary fat—not add to it—and cutting discovery costs is a challenge. However, despite the glut of electronic data, reducing e-discovery fees is not only possible but relatively straightforward with a little planning and technology.

How much should E-discovery cost?

The first question many trial teams ask when they first begin examining discovery costs is, "So, how much should a typical e-discovery project cost?"

Unfortunately, there is no simple answer. The cost of discovery is unique to each project, depending on the number of custodians, the total volume of data, and the types of data included in the collection. Pricing models for e-discovery providers also run the gamut—pricing can be per page, per gigabyte, per hour, or per custodian. Thus, the cost differs depending on the circumstances of the case and the pricing model(s) chosen. The only way to determine whether discovery costs are reasonable is to weigh them against the potential liability exposure of an individual case.

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Below are several ways you can control the costs of e-discovery.

1. Take control early, before you lose control.

Waiting until you receive a discovery request to begin considering cost controls will place your organization in defensive mode. Instead, begin planning and collection when you anticipate a potential lawsuit. Early planning will give your organization time to analyze the potential scope of the collection and enable you to budget accordingly. It will also allow your organization to begin strategizing early so that your attorneys can drive the discovery process, instead of reacting to what your opponent throws at you.

The meet and confer offers a prime opportunity to take control of discovery costs early in the process. Prior to the meet and confer encourage the attorneys you support to consider the following points. A well-prepared litigant can encourage decisions that are in his or her favor. Legal teams should:

- **Consider the Scope of**

- Collection.** There is a fine line to walk when collecting data. Since the more data you're required to collect, the more discovery costs will

increase, it's often a good idea to reduce the size of your collection by using technology to cull irrelevant data. Conversely, if you don't collect enough data, you run the risk of having to perform a second (or third) round of collection, which may be costly and time consuming.

Therefore, for run-of-the-mill cases, attempt to limit the scope of discovery as much as possible, while still including all timelines and data sources that you know are relevant to the case. For large, complex, high-stakes cases, consider over-collecting data so that data is available as the winds of litigation shift.

In short, there is a balance to strike between under and over collection. Collect too much, and you'll spend time and money processing and reviewing it all. Collect too little, and you'll spend time and money performing a re-collection.

- **Use Non-Traditional Filtering Methods.** If possible, advise the trial team to obtain an agreement from opposing counsel to use non-traditional filtering methods, like automated review, to reduce the size of your collection. Automated filtering is typically far less expensive—and many believe just as accurate—as human reviewers to cull irrelevant documents.

- **Produce File in Native Format.** Producing files in the native format (i.e., keeping documents in the format in which they were created

rather than converting them into image formats like TIFF or PDF) is usually the least expensive production method. Remember, however, that this approach does have weaknesses, including an inability to effectively redact content and eliminate metadata.

- **Negotiate a “Quick Peek”**

- Agreement.** Another way to control discovery costs at the meet and confer is to negotiate a “quick peek” agreement. A quick peek agreement allows the requesting party to perform a quick, preliminary review of the opposing data before the producing party undertakes the time and expense of reviewing the entire collection to eliminate non-responsive and protected information. Rather than the usual “everything but the kitchen sink” approach, the quick peek gives the requesting party a chance to sample data and make tailored discovery requests. It also allows both parties to estimate volumes for cost purposes and proactively address any cost-shifting issues. Don't forget, however, that a privilege review should occur after the quick peek and prior to production.

2. Understand your objectives and budget.

To paraphrase an old saying: If you don't know where you're going, you won't know when you get there. Without a defined budget, discovery teams often end up spending money right up until the discovery deadline, rather than making decisions that are designed to keep costs down.

A better approach is to first determine your discovery budget, and then work backward from that budget when making strategic decisions. Ultimately, one person should be responsible for making the final call on all discovery-related decisions and expenses. Ideally, this person should have an in-depth understanding of the entire discovery lifecycle, the technical tools, the lingo used in discovery, and recent case law.

Once you have established a defined budget, you should use metrics to keep your budget on track (see “How Metrics Keep Your Budget on Track”) below for more details).

3. Standardize discovery processes

Standardizing the discovery processes always drives costs down, since it allows you to reap the rewards of both repeatability and scalability. In other words, the lessons you learn during each iteration of discovery will fine-tune your processes for the next discovery, allowing you to leverage more of your previous work with each subsequent project.

4. Reduce or eliminate non-substantive legal review.

Often, organizations think the easiest approach to discovery is to collect every document that is available from a custodian. While that tactic may simplify the collection phase, it’s expensive and time consuming where it counts the most—during legal review.

Think of it this way: while discovery is generally the most expensive aspect of litigation, legal review is the most expensive aspect of discovery. Therefore, a cost-conscious organization should save expensive human reviewers for important documents and eliminate irrelevant files as early in the process as possible. For instance, at the point of collection you can always cull:

- Application files like DLLs (Dynamic Link Library files) and executables.
- Documents obviously unrelated to the case at hand.
- Duplicate documents that are exact copies of data already included in the collection.

An alternate approach is to err on the side of over-inclusion by collecting all potentially relevant data, and then use technology to cull irrelevant documents. A benefit of this strategy is that

if the issues or scope of the case change, you won’t have to go back and re-collect because the data is already available and ready for you to use.

5. Use non-traditional methods for document review.

The days when an attorney had to touch every document in a collection are gone. The volume of data in a typical case is simply too vast for such an outdated approach. Instead, forward-thinking organizations perform non-substantive reviews - those conducted for purely defensive purposes such as privilege, relevance, and responsiveness determinations—using automated technologies.

Automated filtering is well-accepted by courts as long as it is transparent, comprehensive, and easily explained. In other words, using “black box” technologies that hide internal processes may not withstand judicial scrutiny, but using reasonable and documented processes that clearly illustrate the key terms and conceptual categorizations used to filter documents usually will. Take note, however, that automated processes should include a human review for quality control purposes. This important step helps to ensure later defensibility.

A similar idea is to use automated search technologies to group near-duplicate documents (documents that are similar, but not a 100% match). It’s usually not a good idea to eliminate near duplicates without some level of human review, but automatically identifying and grouping them makes review much simpler, faster, and cheaper.

A final, non-traditional way to cut review costs is to use contract attorneys. The least expensive approach is to hire offshore reviewers, who generally charge from \$10 to \$30 per hour. Legal service providers who are unaffiliated with a law firm are also relatively inexpensive, charging around \$90 - \$100 per hour. Hiring reviewers on a contract basis is also cost-effective, but you must have existing infrastructure, processes, and

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technologies in place to accommodate these temporary workers.

Hidden costs of discovery

Following the tips outlined above will help reduce your e-discovery spending. However, take care that you don't offset those gains by forgetting about the hidden costs associated with discovery, including:

Unpacked Data. Compressed data, like that in a zip file, will become exponentially larger as you extract the individual files.

Tight Deadlines. A time crunch will quickly eat away at your discovery budget. If your project is under a tight deadline, expect to spend far more on discovery than you would with a leisurely timeframe.

Collection Approach. For routine cases, you should take a surgical approach, rather than hacking at your electronic data with a metaphorical axe. If you collect, cull, and load native files using a "wide net" approach that includes more than it excludes, you'll spend much more than you would using a refined approach. The "scalpel" method may cost more upfront, but it will be cheaper in the end as you need to manipulate, analyze, and customize your collection.

As previously mentioned, in high-stakes cases with ambiguous underlying issues or a complex collection process, you may need to initially over-collect and then use technology to weed out irrelevant material prior to review. That way, if the issues or the geographic scope change, the information is immediately available and ready to be searched.

Lack of Planning. Failing to cull data and run sample analyses during collection usually leads to a lot of rework, and rework always means greater expense. Planning ahead takes more time up front, but is definitely worth the effort.

Lack of a Project Plan. If



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you try to predict expenses without a project plan, your budget will be inaccurate from day one. So, forecast a reasonable budget during the planning stages, and stick to it as closely as you can during the remainder of the project.

How metrics help keep your budget on track

Defining a budget at the beginning of your project is a great start, but you won't know whether you're on track unless you continually compare your estimated metrics to your actual numbers. Metrics you should closely track include:

- The number of custodians and data sources.
- The amount of data filtered at every stage, from collection through production.
- The amount of time spent on document review.

If you find that your estimated metrics are far different than your actual numbers, you should quickly determine why. For example, if your filtering processes eliminate more data than you expected, you may need to adjust your processes or technology. Similarly, if document review takes much longer than you anticipated, you should determine the number of documents your reviewers are averaging per hour and ask questions if that number seems unreasonably low.

Finally, remember that when it comes to metrics you can't compare apples to oranges. If your processing is calculated on a per-gig basis and your review is cal-

culated on a per-hour basis, you need to convert those numbers into a common format before you can conduct an accurate data analysis. Likewise, you should track your metrics based on the units of measurement your vendors use to bill you. For example, if your vendors bill by the hour and you need to track efficiency, you should analyze your metrics to determine whether it's taking one hour on average to review a document or one minute.

Controlling volumes will control costs

If you take just one message from the tips provided above, let it be this: The best way to slash your e-discovery budget is to limit the amount of data you collect, review, and produce. Develop a clearly defined discovery plan that eliminates as much data as possible during collection, and measure your progress against that plan by tracking your metrics every step of the way. This proactive approach will allow you to slash your planned discovery costs, while also preventing unexpected, last minute blows to your discovery budget.

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