

REDUCING eDISCOVERY COSTS: TWO SOLUTIONS THAT CAN HELP MEET THE CHALLENGE

Although it has produced a sea change in the practice of litigation, electronic discovery has also contributed to rising costs due to the massive amount of data that people and organizations generate every day — voluntarily or otherwise.

Hiring document review attorneys to pore over thousands (or millions) of emails or comb through reams of electronically stored information is often cost-prohibitive, even for large firms and corporations. Electronic discovery is one of the most costly aspects of litigation, with a typical medium-sized lawsuit costing parties between \$2.5 million and \$3.5 million.¹



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In the past few years, the sheer volume of written and digital communications has drastically increased. In a digital world where we are connected at home, on the job, and on the road, more and more data from a variety of sources can shed light on a defendant’s activities and serve as evidence in a trial. But the jump in volume and types of data also presents unprecedented challenges – and expense – for attorneys and the organizations that house such data.

There is business and regulatory pressure to mitigate these expenditures. In addition to internal budget considerations, law firms and in-house legal departments must follow government mandates, such as the 2015 Federal Rules of Civil Procedure, to reduce discovery time and costs while reaching just resolution of cases.² While mishandling and inefficiencies can lead to higher costs, penalties, and lost revenue, narrowing discovery requests to relevant data can reduce costs and time spent.

When organizations begin to proactively shift their record management systems to an information governance framework and leverage technology tools such as technology-assisted review (TAR), they will get closer to solving the cost problem.

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WHAT'S DRIVING HIGH COSTS

The main factor driving up costs in eDiscovery is the document review phase, which accounts for more than half of expenses. The RAND Institute for Civil Justice determined that the review phase accounts for about 73 percent of e-discovery costs.³ During this phase, electronic documents are evaluated to determine if they are responsive, privileged, or confidential.

“Part of what makes e-discovery so expensive is the volume of information,” says Maura Grossman, principal at Maura Grossman Law and computer science professor at the University of Waterloo in Ontario. Grossman has written extensively on e-discovery and the use of technology-assisted review processes to manage discovery costs.

The broad reach of digital content and big data sources has also created an enormous challenge when searching for responsive information. The list of potential discovery sources is endless: mobile devices, cellular and internet-based voice conversations, marketing databases, business applications, audio and video files, instant messaging, social networking, cloud computing platforms, financial transactions, computers and flash drives, multiple servers, and so on. Finding ways to review this kind of information can be costly and time-consuming for a discovery team.

Rising costs can further be attributed to weaknesses in the corporate IT structure. Many companies preparing for litigation find that their own technology systems cannot be easily searched. Pete Pepiton, eDiscovery director of Dinsmore & Shohl LLP, says outdated information systems pose a major hurdle in the e-discovery process.

“eDiscovery is so expensive because IT environments are complex,” Pepiton says. “Companies started gathering information decades ago, and they’ve incrementally added technology that they’ve needed. Very few companies start off with a brand-new set of infrastructure that’s all going to behave well together.”

Even companies that have a well-integrated information technology structure bought that infrastructure so that it could respond to their business needs. The infrastructure isn’t built with the notion of responding to discovery requests.”



SHIFTING CORPORATE AND INFORMATION GOVERNANCE

Managing eDiscovery costs doesn’t only lie in harnessing the volume of digital data that’s now a key consideration in litigation. It’s also an issue of assessing and refining corporate and legal governance — how law firms and corporations approach the process of managing that data; their strategies for organizing, processing, and storing information; and how they factor cost considerations into the equation.

eDiscovery costs can escalate with duplicate and unknown repositories; a lack of system integration, executive oversight, and legal hold process; and inconsistently named and structured data. In response, costs can be lowered by implementing sophisticated information governance systems, moving data to the cloud, and maintaining appropriate retention schedules and litigation holds.⁴

Organizations that implement information governance maintain an accountability framework that allows them to create, store, use, and dispose of information in accordance with regulatory, legal, risk mitigation, and business workflow requirements.⁵

On the other hand, organizations without strong information governance policies often do not have guidelines on where electronic matter content is to reside. At present, “there’s relatively little information governance at many corporations,” Grossman says.

“They don’t know what they have and where it’s located. Not everyone saves everything in a file that says ‘X Contract’ or ‘Y Deal.’ If there’s a dispute in which a company must look in many places for many different kinds of data, and there’s a tendency to over-preserve, then a huge amount of data is going to be processed, searched, and reviewed. Each step incurs costs.”



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As a result, more organizations today are evolving their systems of records management to an information management framework as a way to streamline business operations and protect customers and stakeholders. An enterprise-wide, integrated set of procedures allows organizations to better track where relevant information is housed. This knowledge can help reduce eDiscovery costs while also addressing operational, privacy, and security needs.

This can be done by expanding the traditional definition of records management to encompass more categories of information, and by integrating management of those data stores with regulatory and operational requirements, corporate culture, and privacy and security rules. To succeed, such a dramatic transition also requires executive buy-in and adequate budget.

TECH SOLUTIONS AND ACCOUNTABILITY

In response to cost considerations and the increasing volume of data under their purview, more corporations are demanding accountability from attorneys, vendors, and data management teams — analyzing cost, timelines, and outcomes. They are also managing e-discovery processes in-house to save costs. As a result, diverse vendor solutions continue to pop up and address this ongoing need and help legal departments predict and manage the costs of document review.

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To that end, systems such as technology-assisted review (TAR) have refined the process of eDiscovery and made it quicker and more cost-effective. TAR facilitates collaboration between human reviewers and computers to select appropriate documents.

Here’s how it works. Subject matter experts determine whether documents are responsive or privileged, then a computer system is trained to sort and review other documents in the same collection, and makes judgments based on patterns learned from the choices made by the human reviewers.

Computer searches through massive data sets take a fraction of the time needed by human reviewers, and with a considerably higher rate of accuracy. The result of this increased efficiency is a considerable increase in savings. A model based on typical litigation costs showed that a firm using TAR could save 30 percent on total review costs, compared to a firm conducting a traditional linear review using contract attorneys.⁶

Corporate counsel at larger companies are deploying integrated litigation repositories to standardize all their cases and counsel on a common platform, and then equipping those platforms with cost-saving tools such as TAR.⁷ Multi-matter repositories allow documents loaded into a core repository to be used in multiple matters and accessed by outside counsel.

“Even if a firm or client chooses not to rely solely on technology-assisted review, using it simply to prioritize reviews and productions into tiers can still streamline the process substantially,” says John Pierce, managing partner at Pierce Burns LLP in Los Angeles. “That is often how technology-assisted review is used in criminal investigations, where ‘reasonable diligence’ does not always provide sufficient protection to the defendant (criminal subpoenas simply require the production of the requested documents).”

While more data needs to be collected to demonstrate cost reduction over time, it’s clear such tools bring greater transparency and predictability in litigation costs, and save time. eDiscovery software and data processing services may also reduce workload and minimize costs for legal hold, collection, processing, and review of documents and data.

“Technology-assisted review, including the use of predictive coding and other artificial intelligence or machine-learning technology, can vastly decrease eDiscovery costs with respect to both time and expense. It also exponentially increases the accuracy of e-discovery review and production due to the elimination of human error,” Pierce says.

Some litigators have still been reluctant to embrace TAR and other technologies. Maura Grossman chalks up much of this reluctance to force of habit — and a tendency to underestimate how many errors human reviewers can make on their own.

"For many years, there were many firms that made substantial revenue from having junior associates review documents," Grossman says. "It's hard for them to give that up. But that's very different from looking at a screen for 14 hours, at document after document. People tend to be unaware of the level of human error in that task."

LOOKING AHEAD

As digital technologies continue to evolve and facilitate a greater number of daily tasks in our personal and professional lives, the amount of electronic data to be sorted in discovery will only increase. To get a handle on the mounting costs of eDiscovery and begin to reduce expenditures while remaining compliant, litigators and their support staff are advised to shift to an information governance framework and embrace technological solutions that automate the process, increase accuracy and speed, and reduce labor costs.

ABOUT CANON DISCOVERY SERVICES

Canon Discovery Services has a skilled, dedicated team of discovery professionals with a proven track record in solving complex discovery matters. Backed by over twenty years of experience, we help law firms and corporate legal departments develop practical, defensible eDiscovery response plans to support successful outcomes. Our services range from ESI processing, culling and analysis, document review, hosting and production to implementing information governance and readiness response programs. Canon Discovery Services is a part of Canon Business Process Services, a subsidiary of Canon U.S.A. Visit us at cbps.canon.com.

¹ Karel Mazanec, "Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse," 56 Wm. & Mary L. Rev. 642, 2014, <http://scholarship.law.wm.edu/wmlr/vol56/iss2/7>.

² Jesse E. Weisshaar and Mark W. Cowing, "Amendments to Discovery Rules: How Will You Be Affected?" Bloomberg Law Insights, November 25, 2015; and Michele C.S. Lange, "How This Year's Experience with the New Rules Will Shape Next Year's E-Discovery," Bloomberg Law, December 28, 2016, <https://www.bna.com/years-experience-new-n73014449147/>.

³ Nicholas M. Pace and Laura Zakaras, "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery," RAND Corporation, 2012, <https://www.rand.org/pubs/monographs/MG1208.html>.

⁴ Michael Greene, "Federal Judges Offer Take on How to Trim E-Discovery Burdens," Bloomberg Law Insights, November 23, 2017.

⁵ Bob Larrivee, "Minimize Business Risk: Top 5 Information Governance Obstacles You Must Tackle Now," AIIM and Canon Business Process Services, 2017, https://cbps.canon.com/assets/pdf/AIIM-eBook_InfoGov-2017_FINAL.pdf.

⁶ Christopher H. Paskach, F. Eli Nelson, and Matthew Schwab, "The Case for Technology-Assisted Review and Statistical Sampling in Discovery," Position Paper for DESI VI Workshop, June 8, 2015, ICAIL Conference, San Diego.

⁷ John Tredennick, "Taking Control: How Corporate Counsel Are Integrating E-Discovery Technologies to Help Manage Litigation Costs," Bloomberg Law Insights, November 5, 2014.