A Practical Approach to E-Discovery

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Electronic data may be similar to any other evidence once it reaches the courtroom, but finding it and bringing it into the courtroom is an entirely different process. Electronic evidence exists in quantities, in formats and in locations unfamiliar to purists accustomed to paper discovery.

To understand where the evidence lies and how it may be unintentionally altered or destroyed, lawyers must have a technical understanding that was not necessary to produce paper documents. Although the scope of discovery is no different, there are objection issues in electronic production that have no corollary to paper discovery. The concept of "possession, custody and control" is partially replaced by "inaccessible" or "not reasonably accessible." Computer discovery is different than paper discovery and ignoring those differences may cost money or result in the loss of valuable evidence.

Project Size
The benefits of E-discovery technology are scalable for different sized projects. Without a direct comparison of the services offered by electronic discovery service providers, it is difficult to prepare a cost comparison of the different electronic discovery options. Many attorneys want look for uncomplicated checklist or comparison chart. An understanding of up-front pricing differences and long-term project costs requires more consideration.

Get an upfront project bid
Cost is an important component of quality, but the up-front project bid should not be your only consideration when choosing an electronic discovery service provider. Low-ball bids have can come back to haunt you with unexpected add-on charges, missed deadlines, and unmet expectations. In some cases, low cost also means low value.

Value means the best technology, the most functionality, the highest levels of security, and standard-setting client service—all at a fair price.
According to **Miranda Glass** at www.applieddiscovery.com, you need to ask the following questions to assess the value of a potential E-discovery vendor:

Assessing Value: 10 Questions to Ask
The answers to these questions will help you evaluate electronic discovery service providers. Each "no" will likely result in additional back-end costs.
1. Is pre-project planning included?
2. Are files processed in standard PDF format?
3. Is unlimited training for authorized users included?
4. Is the use of the Online Review application unlimited?
5. Is the number of users unlimited?
6. Is unlimited support by a dedicated Account Manager included?
7. Is your data stored on a dedicated server (i.e. not shared with other clients)?
8. Does the service provider use a secure server environment with redundant, managed firewalls and 128-bit SSL encryption with digital certificates?
9. Are software maintenance and upgrades included?
10. Is project management included for life of the case?

Many vendors offer a low per-page or per-gigabyte fee for processing electronic files in discovery, but may not tell you about other charges in the proposal. Others neglect to conduct up-front project planning meetings to describe the wide array of possibilities for managing the data as the case progresses. (Some vendors provide proprietary document management software.) Without this upfront information, the review team frequently ends up paying more than originally estimated.

There are many ways to hold down the cost of Electronic Data Discovery (EDD).

1. **Eliminate all backup tapes** that you don't need or cannot read because you no longer have the hardware or software. Dispose of old computers, hard drives, floppies, CD-ROMs, Zip disks and e-mail accounts. Don't hold onto tapes that hold information you must retain. This will only bog down your discovery process if you have to produce that data.

2. **Institute an email clean up policy.** Much as you would organize paper correspondence for efficient searching later, email should be just as respected. Many confidential/ personal and spam related information is insecurely included in email. Establish an email policy with all personnel that may be subject to producing that correspondence or eliminate it. Make it easily searchable and pertinent.

3. **Have data classified and standardized for storage**. Paper discovery costs less, in part because we generated and retained less paper, and also because we managed paper better. Paper is in a file, folder, or cabinet. It had a specified place (or should have.)

Records management principles can also apply to ESI (Electronically stored information.). Establish a folder structure and naming protocols. The same protocols can apply to email. Designated identification and folder storage should be assigned within the information management system.

4. The most expensive part of EDD is attorney review, so money savings flow from **shrinking the amount of ESI reviewed,** shifting the review burden to the other side and using cheaper talent. Trim review volume by filtering and de-duplication to gather non-responsive material before attorney review, and work with the other side to identify irrelevant file types, target discovery to specific custodians and date ranges.

Discovery rules permit production of ESI as maintained in the usual course of business. Consider leaving review to the opposition, protecting privileged content through agreements. Use low cost lawyers or outsourced to lower-cost resources.

5. **Keep responsive ESI on the servers** with a policy and software or other technology that will be efficient and secure, searchable and backed-up. Don't get sloppy with secondary means of storage that is not integrated with your primary and secure servers.

6. Purchase new hardware with your EDD plan and budget in mind. **Consider the cost of preserving and harvesting contents of new technology.** Will it add to the cost of EDD? If so, is it worth buying?

7. **Consider training IT staff to preserve EDD.** This in-house professional can help you make sound decisions with EDD document harvesting (the second most expensive part of the process) in mind. To take it one step further, having forensic evidence properly stored can save you from real world spoliation sanctions

8. As indicated when I discussed the upfront project bid, **knowing the component cost of vendor services is important to saving money and controlling costs**. Some vendors are competent at particular tasks (e.g., tape restoration or scanning) and price these services competitively. Understanding the ESI process helps identify what each process costs and you can match the best vendor to that process for a value added price.

Tasks:
- Data collection=**"harvesting"**-Defendant may do or turn over to EDD vendor to do.
- Filtering/Processing= focusing on identified custodians (e.g., individual e-mail senders) and key words, as well as performing de-duplication and **metadata** (data that describe other data) extraction. Determine the number of gigabytes of information to be processed.
- Review=since most data reviewed is not responsive to discovery requests, it pays to review this data in **native file** (review of files on-screen, either in the programs in which they originally were created or using litigation support software or an online review tool.)

- Production=**Produce the information to the other side.** Opposing counsel usually want data in native file review in order to access metadata, producing counsel often prefers PDF or .tiff format to avoid production of metadata.

9. Work cooperatively with the opposing counsel. This can save you lots of time and money. **Be forth coming about your EDD processing and information.** This may enable your opponent to limit what has to be produced and you can avoid sanctions, which judges seem to distribute readily with EDD.

Understanding the EDD process can help you preserve data and prepare for discovery effectively and efficiently, leading to cost saving and successful litigation results. Careful planning and a good dialogue with your vendor service provider leads to no surprises and your legal team will benefit from the most desirable result of all: best products and services at a competitive price.

Useful Internet Resources
http://www.discoveryresources.org (many resources)

http://www.kenwithers.com (legal educator and case law)

http://www.krollontrack.com (includes helpful case law list)

http://www.lexisnexis.com/applieddiscovery.com (includes helpful case law list)

http://www.uscourts.gov/rules/newrules1.html (proposed amendments to FRCP)

http://www.craigball.com/ (forensic computer attorney)

http://www.fiosinc.com/ (many resources)