

White Paper

Minimizing eDiscovery Complexity Through Vendor Consolidation

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Introduction

Electronic discovery is an extremely complex process that only worsens as corporate data stores continue to grow and the number of matters involving electronically stored information (ESI) increases. Initially, organizations outsourced all aspects of the electronic discovery process because they did not have the skills or resources necessary to handle it in-house. As matters involving ESI and data volumes became more frequent, outsourcing every job became prohibitively expensive and companies responded by investing in a myriad of technology solutions enabling them to manage the initial steps of the electronic discovery process themselves.

These investments solved a number of problems by automating certain tasks such as identifying and collecting data, but also introduced new issues. First, despite deploying several solutions, companies still need to procure certain services from legal process outsourcers. Secondly, IT and legal have to manage data import and export operations between various products and services. This worsens with the more disparate products and services a company uses to support electronic discovery. Lastly, the more information has to be “touched” or “managed” during import and export operations, the greater the risk of accidental data loss or deletion. Altogether, deploying multiple technology solutions to automate electronic discovery can actually increase cost and risk—two things companies are trying to avoid.

There are ways that an increase in technology investment can lead to lower electronic discovery costs. At the beginning of 2010, 30% of enterprises surveyed by ESG stated that they were going to reduce the number of vendors they work with in order to bolster cost containment initiatives.¹ When applied to electronic discovery, this strategy can have a significant impact if the vendor a company chooses to work with integrates its own products and services and if these offerings are flexible enough to connect with third party solutions. This paper discusses why out of control electronic discovery processes are ideal for the application of vendor consolidation principles because doing so would simplify operations, cut costs, and minimize risk to legal and IT departments.

How Did We Get Here?

Leveraging External Resources

Well before ESI-related amendments were added to the Federal Rules of Civil Procedure in December 2006, organizations were forced to produce e-mails, files, and other digital records during discovery. Without the tools or the competency to manage electronic discovery, organizations turned to legal process outsourcers (a.k.a., legal service providers) specialized consultants, and external counsel. Corporate counsel also took advantage of external resources to shift some of the risk and potential liabilities associated with electronic discovery as there wasn't much guidance or penalties associated with how it was managed.

Consultants and external law firms assisted with the identification, collection, and preservation of data as well as project management. Legal service providers processed ESI to create a hosted, searchable index where in-house and external counsel as well as contractors could log on to and review the corpus for any responsive and privileged data. Together, the service provider and external counsel helped prepare the information for production to opposing counsel, courts, or regulators. For these services, attorneys and consultants charged an hourly rate while service providers often were compensated per gigabyte of data processed and hosted for review.

Technology Delivers Automation

After the December 2006 FRCP amendments went into effect, corporate counsels realized that electronic discovery was here to stay. They were going to have to figure out how to manage the process more efficiently, something most were unprepared for. In 2007, most corporate counsel interviewed by ESG didn't have an electronic discovery budget or the means to track electronic discovery-related spending.² However, most knew that the number of matters involving ESI was increasing. In 2008, a study by the American College of Trial Lawyers revealed that of

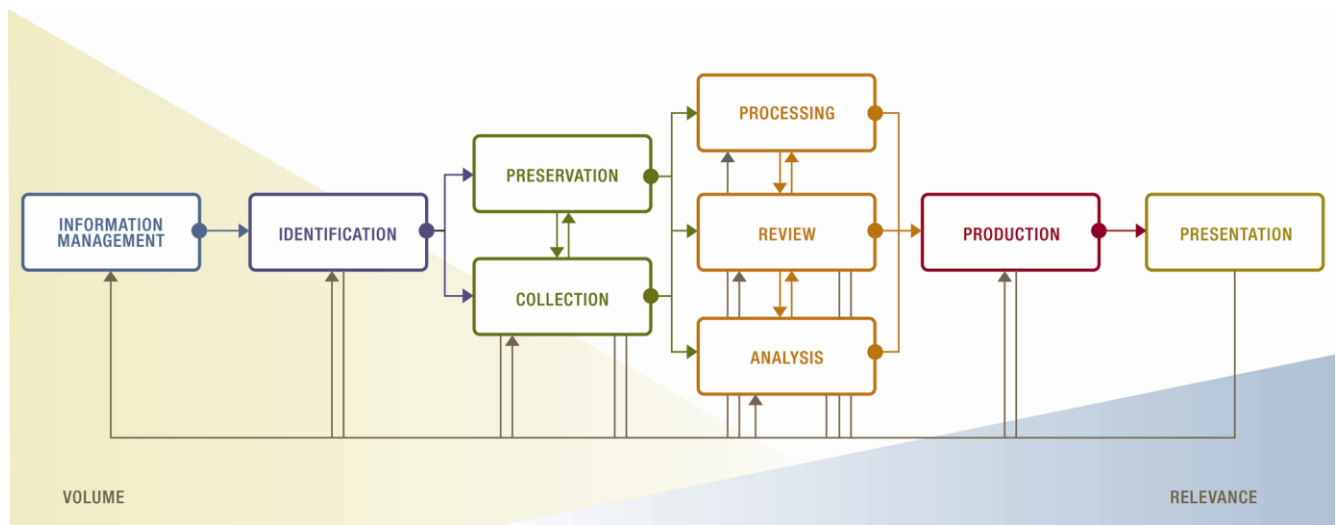
¹ Source: ESG Research Report, *2010 Data Center Spending Intentions Survey*, January 2010.

² Source: ESG Research Report, *Electronic Discovery Requirements Escalate*, November 2007.

those attorneys that dealt with matters involving electronic discovery issues, 86% had issued or received a discovery request for ESI since December 2006.³

Corporate counsel soon realized two things: they needed to reduce legal service provider costs and make in-house electronic discovery resources—especially Litigation Support Specialists and their IT counterparts—more productive because the frequency of matters involving ESI was unlikely to drop. Thus began the technology investment phase of electronic discovery; companies began purchasing solutions that helped with the identification, collection, preservation, and initial analysis of ESI—the first steps in the electronic discovery process (see Figure 1). Some tools help cull data sets and provide insight into matters early on in the discovery process. However, legal service providers were still needed to process the data—albeit a smaller amount of it—host it for review by outside counsel, and produce it to opposing counsel. With several deployment options including on-premises software (a solution is deployed behind a corporate firewall) and Software as a Service or “SaaS” (a solution is deployed at a third party provider with users leveraging a browser to complete tasks), companies could easily take advantage of emerging electronic discovery-specific technology. The good news for corporate counsel was that some of these technology investments lowered legal service provider bills and consultant fees, and they found themselves able to manage some risk by triaging cases. The bad news was that corporate counsel had to find additional budget for technology, which was something that legal departments rarely had to do in the past.

Figure 1. *The Electronic Discovery Process Defined*



Source: www.edrm.net.

The Current Reality

Realizing the positive impact that technology solutions had on certain steps of the electronic discovery process, investment continued. The problem was that at that time, no single technology vendor offered a wide enough range of solutions to address all electronic discovery requirements. For example, in a late 2008 interview with a litigation support specialist who worked for a \$10B (revenue) company, ESG discovered that this individual’s team used approximately nine different technology solutions to assist with various electronic discovery tasks, depending on the scope of the request.⁴

Today, organizations still work with legal service providers because a preponderance of the technologies in the marketplace focus only on the initial phases of electronic discovery. External consultants are also often needed when a request is so large that in-house resources cannot support it or when the scope of an inquiry is unique, such as when dealing with old data saved in outdated formats.

³ American College of Trial Lawyers, *Interim Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, August 1, 2008.

⁴ Source: ESG White Paper, *Getting Control of Electronic Discovery*, December 2008.

As a result of the aforementioned market dynamics, companies now find themselves managing multiple point electronic discovery solutions as well as legal service provider and consultant relationships. All this increases costs as in-house staff must learn how to use a variety of products, companies cannot optimize electronic discovery processes because it is difficult to create standard operating procedures when dealing with so many different solutions, and matters are often delayed because technology-related issues cannot be addressed immediately when it is unclear which product is the problem.

Worse, the costs extend beyond management complexity and potential delays in completing discovery. The more point products and services an organization uses, the more likely it is that legal and IT are forced to import and export data between the various solutions so the next phase of the process can be completed. The more data is “touched,” the higher the probability that it can be altered, even unintentionally, reducing the likelihood that its integrity can be defended.

Time to Move Forward

The Stakes are Higher

Aside from chain of custody risks and complexity, organizations must also examine electronic discovery processes yet again because the penalties for mismanaging ESI are becoming clearer through various court opinions and sanctions. Gibson, Dunn, & Crutcher, LLP, a well known global law firm, reported in July 2009 that more than 60 federal and state court opinions addressing electronic discovery were issued in the first half of the year, with over half of the opinions involving the consideration of sanctions. According to the firm’s estimates, these figures represented a two-fold increase in the proportion of e-discovery opinions courts consider and a similar increase in the proportion of e-discovery opinions that impose sanctions.⁵

While the opinions provide additional guidance and interpretation regarding various electronic discovery challenges, the sanctions serve as a reminder that mismanagement of the process can lead to financial penalties and adverse outcomes. Corporate counsel should expect more opinions and sanctions related to electronic discovery to be issues as the legal system examines more cases involving ESI. This trend makes it imperative for organizations to get their own electronic discovery “houses” in order.

On a more optimistic note, Gibson, Dunn, & Crutcher’s report also reveals that some organizations are using competencies in electronic discovery process management—especially preservation—against an opposing party:

Typically, a party establishes a data preservation protocol in order to defend or shield itself from accusations of discovery shortcomings and potential sanctions resulting from them. However, a party that is conversant in e-discovery can also use it to assail an opposing party if it fails to meet its obligations.⁶

Improvements in electronic discovery processes can actually help an organization achieve a more favorable outcome, especially if the opposing party does not have the same expertise, technology, or experience in managing matters involving ESI.

Solutions are Maturing and Expanding

As organizations increase their investments in electronic discovery solutions and services, they are starting to select products that solve more than just one step of the electronic discovery process. One of the motivations for doing so is to consolidate vendors and products in an effort to reduce expenses, representing an extension of a strategy first employed in 2010. In 2009, 32% of companies surveyed by ESG that planned to maintain or increase spending on electronic discovery also said they planned on reducing the number of vendors they worked with in an effort to control costs.⁷

⁵ Gibson, Dunn, & Crutcher, *2009 Mid-Year Update on E-Discovery Cases*, July 2008.

⁶ Ibid.

⁷ Source: ESG Research Report, *2009 Data Center Spending Intentions Survey*, February 2009.

In response, vendors are quickly expanding their portfolios to support and automate multiple electronic discoveries. For some, this means offering a suite of individual products that are then integrated—translated, each product can move data from one step in the process to the next without cumbersome import/export operations. Others may offer one product that supports multiple functions, allowing the data to be transitioned through the workflow without actually being “moved.” As a further benefit, many of these products can be deployed on-premises or via Software as a Service (SaaS). The former is ideal is when companies want to complete a task immediate such as first pass review and security of information (i.e., they want to prevent any external party access) is critical whereas SaaS facilitates a more collaborative process such as final review and production when external resources (i.e., outside counsel) need to interact with the information.

Vendor consolidation efforts do not need to end with purpose-built electronic discovery technology regardless of whether they are delivered on-premises or via SaaS. Legal service providers are still needed for certain steps and may need consultants to assist with project management or other activities. Some vendor services portfolios include forensic collection and analysis, outsourced document review, and expert testimony. Fortunately, some of these service providers and consultancies now have technology solutions to help their clients manage the initial steps of the electronic discovery process internally, representing a comprehensive solution portfolio that makes electronic discovery vendor consolidation possible.

Only a Matter of Time

Even if a company doesn't take the initiative to consolidate vendors, the market is likely to do it for them. In IT, history has a tendency to repeat itself and any time a series of applications solving a point part of a business process (or series of business processes) appears, the market eventually consolidates. As an example, the enterprise application market was once populated by vendors (J.D. Edwards, PeopleSoft, Siebel, Business Objects, Hyperion, Great Plains Software, etc.) that handled specific business processes such as accounting, supply chain management, and enterprise resource planning. These companies offered focused software solutions, but customers started combining business processes. In order to optimize these newly joined business processes, the underlying software had to be joined as well. Software investments shifted from point products to integrated suites. The point product vendors could not survive and were acquired; the enterprise application market is now dominated by a few suppliers (Oracle, SAP, Microsoft, etc.) that have integrated all of their acquired point solutions into application suites.

ESG expects that electronic discovery will follow a similar path. The process itself is intertwined and does not necessarily occur linearly. Some tasks need to be repeated if the scope of a request changes or if attorneys uncover more custodians from which data must be collected. The only way the process gets simplified is if all the solutions work together. As such, all signs indicate that the market will consolidate as smaller point-products are overlooked for more comprehensive solutions. Vendors that do not have comprehensive solutions will likely acquire point-product vendors. Vendors that do not have integrated solutions will need to increase research and development investments to address the challenge or likely be left off customers' evaluation lists.

The Benefits

Working with fewer vendors may seem like an easy decision for most organizations, but some may not realize all the benefits, which can vary depending on the degree of vendor actually achieved.

“One Throat to Choke”

As with any technology, there will be situations where users need assistance in resolving a bug or figuring out how a particular feature works. If a company is using solutions from multiple vendors to support an electronic discovery workflow, identifying the basis of a particular issue can be a nightmare—vendors often point fingers rather than collaborate. Corporate and external counsels often end up waiting for a resolution instead of pursuing initial analysis and investigation activities.

This issue often manifests when a customer sends data from a specific technology solution, such as an initial case analysis tool, to a legal service provider for final review. If the service provider and product vendor are the same, there is very little chance that processing will be delayed because of file support issues. If the vendors are not the same but have done integration work, transitioning an exported file for processing should be straightforward. Without integration, processing is delayed and countless hours may be spent trying to resolve the issue.

This challenge is mitigated by working with one vendor offering integrated products. In instances where a company works with a small group of vendors, negotiations and billing can be simplified and services-related issues can be expedited provided the vendors have integrated their solutions, have a joint services agreement in place, or both.

The bottom line is that fewer vendors means fewer places to call when something goes wrong. This leads to faster problem resolution, which reduces the risk that electronic discovery processes are disrupted or halted for an extended period of time.

Simplified, Repeatable Processes

When dealing with multiple electronic discovery vendors and products, legal and IT staffs may end up treating every request as a unique process where different solutions are used depending on the scope of the inquiry. While it is always good to maintain flexibility, it is very hard to scale electronic discovery processes when every inquiry is treated as a “one off.” In fact, managing electronic discovery this way can actually increase costs because companies are forced to hire more staff to operate different technologies and project manage different matters.

Minimizing the number of technology solutions litigation support specialists and IT staff have to manage as part of electronic discovery can improve productivity. There certainly is inherent value in familiarity. Knowing what certain technology solutions can and cannot do enables the creation of standard operating procedures. In turn, these procedures allow companies to establish repeatable processes, making it easier to deal with higher volumes of electronic discovery activity.

By making electronic discovery an automated business process that in-house resources are familiar with, legal and IT can easily identify when a certain request should be treated as an “exception” and turned over to a service provider and specialized consultants. Establishing repeatable processes with vendors that offer technology, processing and hosted review, and consultancy services drives more efficiency because customers do not have to explain or educate external resources on which products they use and how they use them.

The bottom line is that standardized technology leads to standardized electronic discovery processes which can scale. Companies also gain more control over when and how they leverage external resources.

Efficient Chain of Custody

No organization wants to go through the entire electronic discovery process only to have the data’s integrity questioned because corporate counsel cannot adequately prove chain of custody mandates were properly followed. The more often ESI is handled for whatever reason, the greater the chance that someone can unintentionally or maliciously alter metadata or delete the content altogether.

Working with fewer, more integrated products minimizes the need to frequently import and export data. Litigation support specialists and IT do not have to manipulate the data to create acceptable load files for a specific solution or service provider. Additionally, there is less chain of custody auditing and documentation to be done to prove that the information has not been altered in any way.

The bottom line is that ESI chain of custody requirements are complex enough given the amount of data that moves through an electronic discovery workflow. The fewer times ESI has to be exported from one solution and imported to another, the less likely something bad will happen. The easiest way to achieve this is by working with standalone products that assist with multiple steps of the eDiscovery process and making sure those products are integrated with other solutions, such as legal service provider offerings, to expedite data transfer operations. Alternatively, customers have to work with a single vendor that is accountable for the entire process (i.e., has a broad range of integrated products and services) and can defend it in court.

Purchasing Power

The basic rules of procurement dictate that “the more you buy, the bigger the discount.” This can be easily applied to electronic discovery technologies and services. Organizations that consolidate vendors will not eliminate spending; they will still have all of the technology and services they always used. This spend, however, will be directed at fewer vendors, giving customers more leverage in negotiating software licenses, service providers, and consulting rates.

The bottom line is that when customers exercise their purchasing power, cost savings quickly accumulate.

What to Keep in Mind

Organizations may be hesitant to “put all their [electronic discovery] eggs in one basket,” which can be a problem if a vendor doesn’t continuously innovate and bring new capabilities to market or struggles to remain financially viable. To minimize the downside of working with fewer vendors, companies must make sure that the technology and services offered by those few vendors address their requirements. Customers shouldn’t settle for average technology just to reduce the number of vendors they work with—the savings will just be offset by higher operating costs (manually completing tasks, external counsel fees, etc.). Conversely, companies should not keep technology “around” if it doesn’t solve an immediate issue.

To help figure out what solutions and providers to keep, ESG recommends creating a dynamic (i.e., flexible and updated) list of features that are “must haves” and “nice to haves,” enabling more informed decisions when consolidating offerings and vendors. One such capability that should be in the “must have” category for both on-premises and legal service provider solutions is auditing and tracking. Corporate counsels need this feature to easily prepare chain of custody documentation. This alleviates some of the manual work that in-house resources do to prepare to defend the overall integrity of their electronic discovery processes and the associated ESI managed within these processes.

Further, vendor consolidation strategies do not necessarily mean that an organization work with only one vendor, especially when it comes to technology supporting critical business processes like electronic discovery. ESG believes that customers would be smart to maintain a multi-vendor strategy. There is a big difference between buying “one of everything” to address electronic discovery challenges and a multi-vendor strategy. The latter entails establishing strong partnerships within a limited group of vendors offering a broad spectrum of integrated technology, legal services, and consulting capabilities.

The Bigger Truth

In its 6th Annual Litigation Trends Survey Report released in October 2009, Fulbright & Jaworski, a global law firm with a history in electronic discovery expertise, asked over 400 corporate counsels about their plans to reduce electronic discovery costs.⁸ Nearly half of respondents said they were going to “in-source some electronic discovery activities,” a process that many other companies have already started.

Regardless of how far along organizations are on the “in-sourcing” electronic discovery path, this is only the first step toward gaining control over the process and reducing expenses for the long term. Efficient electronic discovery operations require people, processes, and technology. Cost effective and risk adverse electronic discovery means an organization gets all of that from as few places as possible.

⁸ Source: Fulbright & Jaworski, *6th Annual Litigation Trends Survey Report*, October 2009.



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