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# eDiscovery: Everything You Need to Know About Review

By Bruce A. Olson

### INTRODUCTION: HAVE A PLAN ...

Once the process of identification, collection, and processing of relevant electronically stored information has been accomplished it is time to move to the review phase.

As with the other stages of the eDiscovery process, proper planning is a must. In fact, planning for the methodology of review should occur at the outset, as the way in which the review will be conducted and the volume of materials that will need to be reviewed will directly affect the strategy you employ to gather and process your client's electronically stored information (ESI). In many ways, the review process is the most critical since the review will determine what is ultimately produced to the other side in a case.

### Inadvertent Disclosure ...

With the elevated risk of inadvertent disclosure of privileged information or attorney work product due to inadequate review procedures while reviewing gigabytes of ESI, it is appropriate to consider claw back agreements or quick peek agreements at your initial meet and confer. While the recent eDiscovery amendments to the Federal Rules of Civil procedure contain a default standard relating to inadvertent disclosure, Rule 26(b)(5) should really be seen as just a starting point, and the better practice is to address the mechanisms of retrieval of inadvertently produced information in a written agreement or court order that applies from the outset of the case.

### Written Guidelines ...

The development of a plan should always result in written protocols that will guide the process. Whether it is a sophisticated coding manual, or just a written memo outlining guidelines and proce-

dures, you need to have a source document that everyone can refer to as they work with the ESI being reviewed.

Things to consider include identification of fields to be coded; use of lookup tables to ensure consistency of data entry; methods for reviewers doing objective review to tag items for further subjective review or resolution of questions or concerns; methods for the use of redaction; methods for identifying privilege, work product or other confidentiality issues; methods for inclusion of reviewer annotations; methods to maintain email and attachment links, and to deal with email threads; methods to tag information as irrelevant or non-responsive, as spam, or as junk email; and methods for tagging information that appears encrypted or password protected or otherwise corrupt or unreadable.

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### Methodologies ...

The basic review methodologies are the traditional paper review, internal review using an in-house review or litigation support system like Summation or Concordance, internal review using an external application provided by an eDiscovery vendor that typically works with a hosted online data collection accessed via the Internet, or external review using temporary attorneys or paralegals who are also

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typically provided by an eDiscovery vendor using the vendor's method of choice. In this day and age it rarely makes sense to use paper review unless you are dealing with a very small collection or you are dealing with technologically impaired attorneys. Some method of electronic review is preferred.

### **Segmented Review ...**

Since the level of skill needed to assess different review considerations varies in complexity and sensitivity, a good plan will involve dividing the collection into different segments for staged review. Some collections may be successfully reviewed using offshore talent. Others may be reviewed successfully by para-professional staff. Some collections, however, need to be reviewed by attorneys knowledgeable about the specific issues in the case. To me, this means that the attorneys who are going to try the case must be trained in the use of the available review tools. You cannot devise a plan for delegated review if you don't know yourself how the technology works. Unfortunately, too many lawyers think they are too busy to learn how to work with the tools, or they treat the process as a staff function that is beneath them.

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(My own belief is that a lot of this attitude is the result of an unexpressed fear of technology. Lawyers are always reluctant to admit they don't know everything, and more often than not they are afraid to admit in a public training session that they have only rudimentary computer skills. It's much easier to assert that the use of the technology is better left to "lesser players." This attitude often results in an inefficient method of case management, trial preparation, and presentation. Sophisticated clients know this and are beginning to demand that their trial attorneys not only own the technology, but actually know how to use it!)

### **STAFF ...**

Staffing is a big concern. In many cases you are presented with a huge volume of information that needs to be reviewed in short order, but once it's reviewed you don't have ongoing work for the reviewers. Consequently, in the appropriate case you should consider using temporary staff, whether under your own direction or outsourced to firms specializing in review. There now are temporary paralegals and even temporary attorneys who provide off-site review. They are adept at using the technology and can in many cases complete the review process in a faster and more economical way than your full time employees could ever hope to do. In the right case, offshore outsourcing may be appropriate, but due diligence is required in finding the right vendor.

As you work with your clients to address these issues in terms of cost, remind them that the cheapest bid is not always the bid that will result in the lowest final cost. Location, skill, experience, and level of sophistication must be considered. It is also true that your case may not need a top tier eDiscovery vendor with their typical high cost structure. On the other hand, it may be that the initial higher cost will actually result in lower overall costs.

Once again, consideration of these types of issues should be part of the early planning process.

### **TIME ...**

Because the amount of information needing electronic review is typically much greater than the amount reviewed in the old paper world, you need to develop realistic timelines for the completion of the review. This should be addressed or at least considered as part of the meet and confer process. It is important to prioritize the work being reviewed so you can deal with the important and more relevant information first. This will enable you to engage in a rolling production where the marginally relevant information or information you suspect is not relevant at all can be left for later review.

It is important to confer with your outside vendors or your in-house litigation support team so everyone knows the time table. Keep in mind this is not

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an arbitrary time-line that the attorney can simply dictate. You need people who understand what is actually involved in processing and reviewing the information, and vendor or experienced litigation support input is essential. This collaboration should be done as early as possible so you don't end up with a scheduling or discovery order that contains unrealistic deadlines. This is particularly true when you are dealing with data that wasn't live in the first place. If you need to restore backup, for example, it may take a great deal more time than you might expect to restore and identify the relevant data and then process it for review. In short, you must establish and track milestones.

Finally, consider whether you need to collect quality control and audit information. This can be used for early identification of problems with particular reviewers or problems with collections that need to be dealt with in a different way than originally contemplated.

#### **REVIEW TECHNIQUES ...**

There are a number of specific techniques you should consider when preparing the collection for the review process. If all of the documents are in native format with searchable text, you may be able to use keyword searches to quickly identify and eliminate categories of documents. If the collection contains many imaged records that are OCR'd, then a more rigorous online review of the potentially culled materials may be necessary due to possible OCR errors.

If the images contain mixed typed text and handwritten materials, then OCR alone will not be enough to determine whether to exclude a particular set of documents. In that case you need to segregate them as a smaller collection and do a page-by-page visual review. If you do this, consider whether your software enables you to create notes or other searchable text fields where you can type the handwritten information so it will then be searchable electronically.

Another way to cull the collection is to use bibliographic coding such as author, date created, recipient, etc. This is the typical approach of litigation support programs like Summation or Concordance,

and the ability to search, slice, and dice using the coded fields can help organize and speed the review process.

One final note: If your reviewer is in a position to assess whether a particular document is potentially responsive, have them use software to tag what is and is not responsive. If the collection is smaller and being scrutinized by a higher-level reviewer, consider adding a field where you can note up front the number of the document request or interrogatory to which the document is responsive. Be sure to use multi-entry fields for this purpose since we know one document can be responsive to a number of different discovery requests.

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Make sure any vendor you hire to do the collecting and processing can generate the appropriate load files for you.

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#### **REVIEW TECHNOLOGY ...**

A key concern at the outset is the selection of platform to use for the review process. If you are going to do the review in-house and you are going to use a particular litigation support program, make sure any vendor you hire to do the collecting and processing can generate the appropriate load files for you. Be sure they can extract specified metadata from email or other types of electronic documents. Make sure their extraction processes do not destroy any links between email and attachments or email threads. Spoliation sanctions can arise from processing that destroys the electronic relationships that enable the viewer to see the electronic documents in the way they are maintained in the normal course of business.

#### **Native File Format ...**

As technology has progressed we've gone from a time where it was a big deal to just be able to view and copy documents as Tiff or PDF images. In some cases this may still work for you. However,

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the current trend is to manage documents in their original or native format. There are a number of reasons for this.

First, you don't need to incur unnecessary processing charges to convert everything to Tiff or PDF. Second, they are searchable as is, and don't suffer from the degradation that can occur using an OCR process. Finally, native format preserves the metadata. Unless you know what you are doing, and have made a conscious decision and reached a written agreement to forgo discovery of metadata, you want to preserve its availability from the outset.

(Having said that, I acknowledge that many programs make it difficult to work with native files. They often don't have a single viewer available that enables you to jump from .doc to .jpg to .xls to .dvw seamlessly. In some cases you are required to have the native application installed on the reviewing computer and that can add additional expense in terms of buying software you ordinarily wouldn't use. Thus, while the trend is to go native, there are good reasons not to if you understand and have thought out the consequences of such a decision.)

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Learning half way through the case that you now need to do more than you originally thought, can be a very costly mistake.

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#### **Functionality ...**

You do want a system that will enable you to search easily. Keyword search is universal, but the availability of Boolean search capabilities, or some of the more advanced concept and context search capabilities should be considered when selecting your platform. Furthermore, products like Attenex give you the ability to do visual analysis of document relationships that can help you more quickly hone in on what is important. Some of us simply process information better if there is a visual component. While these types of products are typically more expensive, depending on your needs and the size

of the collection, the investment in extra functionality can be well worth it.

Other typical tools you will want include annotation, redaction and tagging capabilities; organizational tools such as the ability to add special folder structures or create subset collections; and reporting capabilities to see what was recently added or who processed it or whether information has been produced as part of a particular production set. Robust functionality that can process large amounts of data within the database quickly so search results are instantaneous is very important. The ability to easily create production sets is important.

#### **Mobility ...**

Finally, you need to know if the program has the ability to enable you to go mobile. Online tools are great, but if you can't create a set of materials to use on your laptop when you leave the office to take a deposition, you may be in trouble. High speed 24/7 Internet access at every possible location is not yet the norm.

#### **Misc. Considerations ...**

If you are using an online-hosted review using one of the available commercial software programs, or the proprietary programs that many eDiscovery vendors have developed, you should keep in mind the features that you want for review when picking the vendor. If they have a better price for processing than their competitors, but their review products lack features, are slow and cumbersome, or are difficult to use, you may end up spending more in terms of your own time or staff time to work in the collection. This is an issue that must be considered as part of your request for proposal.

You also need to consider what you are going to need to do in a given case. If you know you won't be dealing with metadata, forensic issues are absent, and less sophisticated review is called for, then you may be able to use a much less expensive solution. You need to plan for this from the outset. Learning half way through the case that you now need to do more than you originally thought, and your platform can't deliver what you currently need, can be a very costly mistake.

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There are other miscellaneous things you need to keep in mind. In terms of IT and in-house platforms, you must consider installation and maintenance issues, storage capacity, and security issues. What is the cost comparison between an in-house solution and a hosted solution when you factor in all of the hardware, software, and personnel costs that are involved? On the other hand, if you think a hosted solution is the answer, what are the hosting and access charges? What about security, redundancy, backup and disaster recovery, and access issues? Most important of all, will the company be there in six months to a year? If not, who owns the data and how do you get it back if the company goes dark?

Finally, the ability to generate metrics is important. You need it for internal management to ensure a cost effective process. Clients demand a variety of information to help keep you accountable. If your platform cannot produce the necessary metrics you run the risk of a very unhappy client who may not want to pay their bill.

### CONCLUSION

Developing an appropriate eDiscovery review process requires much consideration. It is part and parcel of a well-developed discovery plan. A team approach is needed; help and advice can come from a variety of sources. Early planning is key to

keeping costs under control, and lead counsel must understand this process and be able to deal effectively with its different components in order to provide competent legal advice in today's electronic world. If you don't know how yet, this article should at least provide you with a basic lesson plan, but make the effort to learn what you need to know.

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Bruce A. Olson, is a shareholder in the Milwaukee based law firm of [Davis & Kuelthau, S.C.](#) A trial attorney and nationally recognized legal technologist focusing primarily on the areas of electronic discovery and litigation technology, Olson is AV rated and Board Certified by the National Board of Trial Advocacy. He is co-author of *The Electronic Evidence and Discovery Handbook: Forms, Checklists and Guidelines*, published by the American Bar Association. He received the prestigious "TechnoLawyer of the Year 2002" @ Award from the TechnoLawyer Community, and was Chair of ABA TECHSHOW 2004, Vice Chair of ABA TECHSHOW 2003, and served on the TECHSHOW Board of Directors from 2000-2004.

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