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Five strategies for effective oversight and control of eDiscovery spend: How to turn eDiscovery into a repeatable business process

Gone are the days when corporate law departments could fly under the radar, operating outside of budgets (or without budgets) because litigation was deemed too capricious and unpredictable to manage as effectively as other business units within the company. Today's corporate law department is expected to run as any other high-performing business department: on budget, with measurable results. This white paper discusses new technology, strategies and tips that in-house counsel and eDiscovery teams, increasingly led by legal operations professionals, are taking to accommodate and work within shrinking budgets, controlling costs without sacrificing outcomes.

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Introduction

Gone are the days when corporate law departments could fly under the radar, operating outside of budgets (or without budgets) because litigation was deemed too capricious and unpredictable to manage as effectively as other business units within the company. Today's corporate law department is expected to run as any other high-performing business department: on budget, with measurable results.

This white paper presents and discusses five key steps that high-performing, efficient law departments take to control discovery costs and develop—and then stick to—workable budgets, making discovery a repeatable, predictable business process.

Thankfully, both technology and legal operations roles are evolving. Technological advancements come not a moment too soon: improving discovery processes, without increasing costs, is more urgent than ever. The past 20 years has seen an explosion of content and data sources. Cases that once involved a manageable 30,000 documents routinely encompass three million documents. How can anyone collect, manage or review that much data efficiently—and meet pressing deadlines? Yet the time demands of investigations and "rocket docket" discovery cases have not let up.

With a few best practices, well-chosen tools and experts to help improve productivity and make discovery a repeatable process, an organization can maximize the bang for its discovery buck.

Start with strong foundations

An organization should start by establishing the core foundations and themes that can be relied on to control costs and build successful discovery budgets: Focusing on legal operations as a business process and knowing their people better. Budgeting success depends on applying and supporting these themes. "Perfect" discovery is an unattainable myth, the pursuit of which can bleed a budget dry.

These next five practical steps can help keep a discovery budget on track. These strategies are arranged from left to right on the Electronic Discovery Reference Model (EDRM):

- Hold and collect wisely

- Manage discovery centrally

- Develop repeatable processes

- Use machine learning for efficient review

- Leverage business intelligence for better decision-making

Discover actionable, concrete ways to limit discovery spend while gaining greater insight into data, cases and processes.

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"Requests are becoming more burdensome— they're broader and encompass more sources of data. In-house counsel are in the position to untie the knot and see where there is overlap and what's really necessary. That translates into a reduction in scope."

Sharyn Procaccio
VP and Assistant General Counsel, Hunt Companies

(Opinion stated is Sharyn's and not that of her company)

Understand the role of legal operations

This was supposed to be the year of legal operations, but the next few will strenuously vie for the title. The Corporate Legal Operations Consortium (CLOC) launched its annual conference just a few years ago with modest participation. Attendance doubled in the CLOC Institute's second year, doubled again in 2018 and has shown no sign of hitting an inflection point.

CLOC's initiatives reflect the growing notion that business expertise needs to be brought to legal departments. Of course, legal operations are about more than spend, but the most pressing need, and thus the most attention, is for budget management.

Legal operations require a holistic approach, treating all legal functions—and all of a company's offices, wherever they may be in the world—as interrelated components of a whole. That means that instead of pigeonholing every iota into a different box or category with a distinct toolkit, it makes sense to work with fewer vendors that can each provide a broader range of technology and/or services.

In short, the focus on legal operations ties into the question of how to develop effective strategies for reducing legal spend on discovery. But operations involve people and it is important to know who they are.

Know people better

It is impossible to manage a budget without knowing the people working within (or who are affected by) that budget. What exactly do they do for the company? What types of data do they generate, manage, retain or archive? How well do they understand discovery and their roles and obligations? How well do they comply with those obligations and communicate their concerns?

Organizations must know all the different sectors of the business and understand how each department uses data. This knowledge helps reduce spend, adjust operations and create policies that will make a business stronger and more cost effective.

It is incumbent on legal operations leaders to understand, in depth and in detail, the business operations of the entire company. That means conferencing with all the different business unit leaders, interviewing custodians and figuring out what the business needs to collect for a potential litigation or investigation matter.

The better an organization knows its people, the better it can define and reduce scope— without losing valuable discoverable data—and the more efficient it can be. Of course, part of the reason an organization needs to know its people is so it can understand its data.

Know data better

It is no secret: Data management represents a pain point for most businesses. Data maps are terrific, but developing them and then keeping them up to date can be a huge undertaking. And data mapping is not everything. Knowing data better is a combination of smart data management (understanding and making the most of an organization's existing data) and metrics (capturing specific performance measurements about data that explain trends in discovery spending).

"Metrics are key in planning your litigation. Know where your data exists so you can make the argument against over collection using those metrics." –TracyAnn Eggen, E-Discovery Specialist, Dignity Health

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Data management demands not just knowing where data is but also what that data means. The way to build that knowledge is to do a post-mortem analysis on every case, every time. Within each subject area, whether labor grievances, patent or trademark issues or business issues, such as contractual compliance, revisit each matter at its conclusion. For example, organizations should maintain custodian profiles for each matter, so as not to reinvent the wheel with each new case, while simultaneously assessing metrics for each case to effectively hit targets.

Based on that knowledge, they should start a conversation with outside counsel about what custodian and non-custodian data needs to be collected. When an argument for limiting the scope of discovery is based on hard data from numerous prior matters, they can identify ways to reduce overall spend without losing important data.

Bear in mind that knowing data also means building a partnership with the IT department and vendors that are supporting the applications. Organizations should not wait until they urgently need data or information to open that discussion. They should start building the relationships and gaining the knowledge needed to be an effective liaison between IT and outside counsel as soon as possible.

Proportionality is the watchword

Key to limiting discovery spend and controlling budget is an understanding of what discovery encompasses under today's rules. Ever since the December 2015 amendments to the Federal Rules of Civil Procedure, the emphasis of discovery has shifted. Today, the biggest problem is not recognizing helpful or relevant or even dispositive information—it is finding that information within the morass of millions of unhelpful, irrelevant and meaningless documents. That is why discovery is now thought of with a modifier: Everything should be about proportional discovery.

Rule 26(b)(1) redefined the scope of discovery to include "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[1]

Proportionality is explained via six factors:

- The importance of the issues at stake in the action

- The amount in controversy

- The parties' relative access to relevant information

- The parties' resources

- The importance of the discovery in resolving the issues

- Whether the burden or expense of the proposed discovery outweighs its likely benefit

Balance is the key here. In a world of connected devices, there will always be too much data. The critical question, then, is how much data is proportional to the needs and demands of each case. Organizations must keep the limit of proportionality top of mind at all times. Every time an organization considers a request for access to data or access to personnel, they should evaluate whether what is being sought, or what an opponent is seeking, is proportional to the matter. The most effective and least painful way to limit discovery spend is to limit the amount spent on nonproportional information; conversely, the best way to blow a budget is to fruitlessly pursue "perfect" discovery.

With that caution, these next key strategies will help put these foundations in place and produce proportional discovery within any budget.

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Hold and collect wisely

Legal holds arise from the duty to preserve information from pending or reasonably anticipated litigation. In practice, many legal departments still issue holds via email and track them using spreadsheets—a time-consuming, risky and expensive "one off" way to manage holds.

Litigation typically begins with a hold notice and then continues with communications, collection and preservation for the anticipated litigation. As the number and complexity of holds increases, however, relying on email and memory becomes increasingly dangerous, particularly when those managing holds move on to other jobs or leave the company. Sanctions for failure to properly preserve evidence are increasing in severity and number.

Implementing holds manually—or in a one-off manner—can blow a budget even before the first stage of discovery. Many legal departments still use a traditional workflow in which outside counsel conducts in-person interviews of custodians to identify potentially relevant data sources. Then, a forensic collection vendor may collect data and a specialized eDiscovery vendor may process the data and load it for review. Under this model, legal holds and collection alone can reach upwards of $500,000 per matter (not to mention the disruption to employee productivity).

Automating legal hold and collection with mature technology

Automated legal hold and remote collection technology, such as OpenText™ Legal Hold, simplifies these processes within a single, cost-effective cloud-based system. Automating legal hold and collection into a process reduces errors, risk and time, and adheres to a defensible process. Furthermore, mature legal hold technology increases access to critical documents. Rather than waiting days or weeks, collected data can be made available almost immediately.

Here is how automated legal hold technology works:

1. Legal hold management

Start by sending and tracking notifications and setting automated reminders for custodians and data stewards. Hold notices should be written in clear language that is comprehensible to the layperson. Aim for plain language and clear directives in hold notices and provide an easy way for employees to ask questions or seek clarification when needed.

Automated legal hold software tracks custodians' responses to holds, ensuring timely acknowledgment of every hold and a statement of compliance with it, and automatically generates periodic reminders to ensure that custodians remember obligations even when other holds are released.

2. IT system integration

Automated legal hold software can be integrated with internal email and HR systems to select custodians from different departments or locations. Being able to see that an employee has departed via integration with HR systems is one way to see if that former employee's data, including his or her drives, need to be preserved and collected.

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3. Employee questionnaires

Notify and survey key employees to gather important information and identify relevant data sources and documents. Lock in critical stakeholders first, then phase the discovery effort from there as needed. Questionnaires help determine exactly how important custodians manage data. Do they have files on a hard drive? Have they strayed from the expected data map? Do they have issues with the accessibility of their data? Questionnaires are the quickest and most cost-effective way to glean these answers and can be customized with pre-drafted templates.

While it is important to quickly identify key custodians and data stewards, those employees must also have a working knowledge of the legal hold process to understand the duty to preserve potentially relevant documents.

4. Collect

An organization may be able to preserve in place once a hold has been issued, avoiding the need to collect. The data gathered from questionnaires can be used to understand the extent and volume of potentially relevant and proportional discovery before collection starts. This helps to better plan for and control the scope and cost of the effort.

When gathering data is necessary, the right tool can integrate directly with existing systems to collect data, depending on the specific situation. A remote collection tool, such as that integrated with OpenText Legal Hold, can preserve email and documents from enterprise mail, drives and corporate and storage networks from remote employees anywhere in the world, or simply down the hall. This is done behind the scenes with an agentless tool. Data can be preserved and gathered broadly or surgically, when only specific documents are needed (e.g., for mergers and acquisitions, EU data collections or special investigations).

On-premises collection tools, such as OpenText™ EnCase™ eDiscovery, sit on the actual endpoint or server within the organization and crawls that endpoint looking for responsive files, collecting that data into a file that can be processed into review. Industry standard tools, such as EnCase eDiscovery, should be able to collect from all major email sources and content repositories, including archives, Google® Drive, Microsoft® SharePoint®, Microsoft® Office 365®, Box.com, Dropbox® and more.

Bear in mind that preservation is the stage at which discovery failures can be expensive to fix. And those failures can be terminal to a case if they are egregious. Fortunately, there is no need to rely solely on custodians: Instantly suspend any deletion practices that are in effect, preventing many types of spoliation from the moment a notice of a potential matter has been issued.

5. Promote or preserve

Documents can be preserved in place or in a low-cost repository, promoted to review with direct integration with review platforms, including OpenText™ Insight or OpenText™ Axcelerate™, or used immediately for another purpose, such as an investigation. Legal teams can start reviewing documents while other data is still being collected.

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6. Defensibility

Use the data the automated legal hold system generates to create a comprehensive, defensible audit trail detailing every step in mere seconds.

Finally, an organization must remember its people: Ultimately, the hold and collection process can be disruptive to custodians. Take care to time efforts to fit the needs of employees and minimize business interruption. Many collection tools can operate in the background without disrupting employees while they work. It is helpful to have someone in the legal department with some IT mastery, or at least enough experience to speak both "languages." Ideally, legal and IT can work together to understand each group's pain points and respective roles and responsibilities.

Manage discovery centrally

As one of the foundations, this white paper discussed the holistic viewpoint of legal operations, which looks at the overall needs of the organization and uses integrated approaches, instead of specialized applications and disparate processes, to solve problems. This approach is equally valuable when it comes to managing discovery data.

Traditionally, corporate legal departments have managed portfolios in silos—sending data to multiple vendors and law firms, perhaps by area of expertise or to balance workloads across teams. Under this model, documents are collected, processed, loaded into a review platform and reviewed for a single matter. This occurs even when many of these documents, such as common technical documents related to one patent infringement suit, are likely to be relevant where that patent has been alleged in another matter. Once the case is complete, the documents, coding and work product—including the costly review of privileged documents by outside counsel—is dispositioned and human judgments are lost for the next "like" case.

Thus, working in silos misses the opportunity to review once and produce many times. Documents that frequently come up in litigation need to be collected and reprocessed, re-reviewed and reproduced each time. Instead of viewing each case or each data point individually, which is inefficient and costly, organizations can use a multi-matter management system with a core document repository and data warehouse (holding "data about that data") for reuse across future cases.

Relying on a multi-matter management system with a data repository, each new matter creates greater efficiency because data is collected and processed just once. When new matters arise, documents can be assigned from the data repository to a new matter without needing to collect or process the same data (additional costs), and prior coding can be pre-populated (greater efficiencies). That is, coding decisions or "tags," such as privileged, confidential and other designations, are retained for use across multiple cases. Documents can then be efficiently reproduced across matters, allowing for a "review once, produce many times" workflow for commonly produced records.

A central data warehouse provides a holding area for data about frequent flyer custodians and data sources, along with sensitive documents, such as privileged, trade secret, financial information, personally identifiable information and protected health information. The documents can then be applied to each new matter as needed, without incurring repeat costs.

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Cost-savings and process repeatability of a data warehouse

Imagine a large pharmaceutical company has 10,000 R&D documents related to a core compound used in multiple drugs. Over time, 50 lawsuits have hit relating to each drug.

Under a traditional siloed approach, assuming it costs $1 to review one document, it would cost $500,000 on that review alone. This does not include the additional costs of interviewing the same custodians again, collecting and processing the same documents or the immeasurable costs associated with the risk of inadvertent production of sensitive materials by one or more vendors and law firms hosting copies of that data.

In a centralized model based on multi-matter management and data re-use functionality, these same documents are reviewed and coded once—costing $10,000, one time only and saving $490,000.

Centralizing case data and documents offers the following primary advantages over the traditional data silo model.

1. Collect, process and load once

A centralized model collects, processes and loads documents to a core repository once from which they can be assigned to individual matters, avoiding unnecessary repeat fees with each new matter. More sophisticated systems integrate legal hold and collection functionality for efficient data flow, to understand custodian and non-custodian data from legal hold through production.

2. Propagate coding decisions within individual matters

Legal teams can reuse valuable attorney work product—coding decisions from prior matters—in support of matters that arise later. While relevance coding may vary from case to case, issues such as privilege, privacy and proprietary information generally are retained and reused across cases. Keeping that reviewed data in a repository with its tags intact shortcuts that portion of review in the next matter, saving on the most expensive stage of discovery.

3. Review once, produce as many times as needed

Legal teams can reuse entire documents produced in a prior matter without further review. This opportunity often arises with common business documents and in intellectual property disputes. The documents can often be reviewed and categorized once and assigned to as many matters as needed at no additional effort or cost, enabling rapid response and supporting a strategic advantage, especially when large sums are at stake.

4. Reduce risk

Centralization also means less risk. First, there are fewer coding mistakes across documents, driven by consistent process and work product from prior cases. Second, centralization reduces the risk of inadvertent production of sensitive material. Third, it helps keep data secure by allowing in-house teams to control access and limit the flow of sensitive information across disparate law firm and vendor databases.

5. Report across matters for better decision-making

Finally, data centralization is a key component of enhanced and cross-matter reporting across enterprise custodians, collections, deadlines, review metrics and related legal spend—all necessary for daily management and strategic planning. This will be explored further during a discussion on metrics in the next section.

Centralization is more than just a multi-matter management system. It is about taking control of the entire eDiscovery process, understanding the rules governing proportionality and streamlining systems and processes to cost-effectively manage legal data.

Develop repeatable processes

Whether managing data internally or working with a partner, standardizing workflows and leveraging technology around a central data repository can help gain control over data and ensure consistency across all cases. This eliminates redundant efforts and establishes efficiency-promoting best practices.

First, organizations should develop a standardized approach to discovery. They can start by evaluating the impact of current processes and tools and investigating best practices they can integrate into the approach. A corporate playbook can memorialize these standards to ensure consistent application and support process defensibility.

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A well-thought-out playbook should cover the entire discovery process, from data preservation and collection formats and labeling to processing, loading and reviewing data. The process should include determining what types of searches will be used, how data review workflows will be organized and the respective roles and pass-off points for internal reviewers, managed review teams and outside counsel and how data will be produced. Organizations should develop overarching best practices and build them into processes.

But they need to be careful not to mistake this thoroughness for complexity. Plain-language, simple policies that are clear, concise and usable by the entire team, including in-house counsel and eDiscovery professionals, vendors and outside counsel are preferable to complex and theoretically complete but unreadable tomes. If possible, incorporating a diagram describing the process and clarifying timeframes and expectations is helpful.

The playbook should answer key questions for the department, employees and discovery partners. As noted above, it should address every component of discovery, from the initiation of a potential matter to its eventual resolution in clear terms. What happens after a legal hold has been issued? What is the process for collecting data? What is the most efficient process for review workflow and who are the responsible parties for first-pass review, document prioritization, enhanced QC and privilege review? Organizations should establish clear expectations and consequences for failure to meet those expectations.

Second, to take full advantage of every opportunity to control discovery costs, they should regularly evaluate and optimize techniques as discovery technology evolves, avoiding the tendency in discovery to "set it and forget it."

As important as it is to create consistent, repeatable processes, the playbook should be fluid so it can grow and adapt to meet requirements. It will consistently improve discovery practices and find new ways to save money and keep the budget under control.

By continually evaluating protocols and partners, an approach to discovery can be both more accurate and more affordable. Over time, consistency and efficiency lead inexorably to cost savings as organizations learn from data, build a data repository and spot new areas for improvement.

Use machine learning for efficient review

Document review remains the most expensive stage of discovery—making it the most immediately impactful stage at which to control and limit spend. Today's TAR 2.0, based on a continuous active learning (CAL) protocol, is one of the lowest-hanging fruits to reduce discovery costs.

CAL is like Pandora for discoverable documents: An organization can tell it what it likes through coding choices, and it offers results that are closer and closer to its preferences. The richest information rises to the top of the pile.

Solutions using TAR 2.0, such as OpenText™ Insight Predict, can further reduce costs by decreasing the volume of documents necessitating human review. The utilization of TAR 2.0, a form of AI and machine learning, allows a company's legal teams to review far fewer documents than keyword search or earlier TAR 1.0 systems, reducing document collections by 80 percent or more and finding the most relevant documents first. When a team begins coding the documents, the TAR engine continuously surfaces the most likely relevant ones first based on the previous coding decisions. In other words, it is always continuously and actively learning. When the system mixes in contextually diverse documents, a process by which the algorithm is actively finding documents which may be related but are unlike other documents that have been reviewed, the reviewers find documents they might not otherwise see.

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"It baffles me that attorneys overwhelmingly still use keywords instead of TAR. I don't know why. Perhaps they don't understand the technology. We cannot be afraid of technology."[2]

Andrew Peck
U.S. Magistrate Judge
U.S. District Court Southern District of New York, 1995-2018
Senior Counsel, DLA Piper LLP (U.S.)

With recent advancements in TAR, it is now very effective for more than large outbound productions. It is equally effective for nearly any review task of any size and document collection richness (including low richness collections), and today is used for investigations, opposing party reviews, deposition preparation and issue analysis and privilege and privilege quality control (QC). The result is that an organization can continue to increase savings on review and save on outside counsel fees for nearly every case, including QC.

High efficiency review using TAR 2.0

According to the recent Legal Department Operations Survey, more than 80 percent of corporate legal departments are using less expensive review attorneys to save costs.[2] This includes regional law firms and/or managed document review vendors. However, many are still using keyword search to cull documents, looking at as many as nine non-responsive documents for each responsive one. That means these organizations are wasting time on approximately 90 percent of review efforts.

The TAR 2.0 ratio is much narrower, on average two to one, which means that the team looks at just two documents to find one relevant one. That team finishes faster and bills less—saving up to 80 percent or more on the total cost of review.

The importance of TAR 2.0 for many types of review cannot be overstated. Do not leave this powerful tool on the table.

Leverage business intelligence for better decision-making

Taking another page from the legal operations playbook, using data metrics and business intelligence (BI) strategies and tools can both improve matter management and drive informed strategic decision-making to reduce costs.

Only when data is aggregated and integrated into a central repository does meaningful reporting become necessary. Good reporting can better budget, properly manage day-to-day legal operations—including the daunting task of resource allocation across multiple matters—catch problems before they occur and easily keep other stakeholders informed.

Sophisticated tools, such as OpenText™ Insight BI, display up-to-the-minute metrics and analytics that support day-to-day discovery and budget management. For example, knowing at any moment how many custodians the organization is waiting to hear back from, the status of collections, how many documents have yet to be reviewed or if there are enough review resources to meet current timelines, helps estimate whether deadlines can be met and budgets adhered to.

A good BI strategy should help legal department professionals accomplish the following:

- Aggregate key eDiscovery metrics, such as custodians, collections, matters, deadlines, resources and allocations across matters, comparing them with historical review metrics. With historical trends and project reports, get to know who data holders are and marry business operations and document management protocols with investigation and litigation portfolios.

- Integrate information from the core repository with other relevant systems within the corporation, such as legal hold and collection technology, and accounting and human resource systems, for a more comprehensive understanding of costs and establish and adhere to a discovery budget.

- Understand key performance indicators to track the progress of cases, ensure proper resource allocations based on availability and deadlines, evaluate pricing models and assess legal spend across vendors and outside counsel.

- Make informed strategic decisions. For example, if 60 percent of a custodian's collections were identified as privileged across all prior matters, that insight can be used to collect differently from that custodian. At the very least, know there will be budgetary impact and plan accordingly, since it is costly to review a privileged document.

- Integrate TAR metrics into the dashboard to stay apprised of the progress and the cost of a review.

- Summarize counsel performance to help vet billing rates. This keeps outside counsel diligent about billing and logging hours and shows how to save money without sacrificing quality.

- Provide easy access to only the metrics that matter for a particular role, and external reporting to inform critical players who might not proactively engage the system.

By aggregating organizational data across matters, organizations can identify process improvement opportunities and work these into the evolving discovery playbook. After getting a realistic sense of how closely the organization sticks to budget estimates and how discovery spend varies month to month, they can quickly decide what actions to take—aiming for predictability, control and reduced costs. Any decision made will be based on sound data.

Conclusion

With the right technology and best practices, legal departments can improve daily operations, more effectively plan for and control discovery costs and continually evolve the organization with data-driven intelligence.

Organizations need to remember the key themes that both support and are supported by the strategies outlined. For example, the key theme of "know data better" makes it easier to implement legal holds and develop repeatable processes using a centralized data management system and dashboard metrics to assess moment-to-moment success. And applying technology to expedite and enhance review makes it quicker and easier than ever to review data and extract critical insights.

Keep an eye on those foundational themes—approach the legal department as a business operation and know people and data better—while implementing these strategies for successful oversight of discovery spend and budgeting. Automate and streamline legal holds and data collection, centralize data management, develop a playbook of repeatable processes, expedite review using machine learning and track metrics across matters via up-to-date dashboards to better predict and manage discovery spending.

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