

The case for eDiscovery technology

A firm's attitude and approach to electronic discovery can be the key to setting an early case strategy and increasing the likelihood of success, writes Nuix chief executive Eddie Sheehy.

FILES HIGH: Choosing an effective eDiscovery platform is integral for firms. Imagine this scenario: Company A and Company B each receive notice of litigation and are given 100 days to pull together all documents deemed relevant to the cases being brought against them. Both will undergo the process of discovery of the potential evidence.

Each faces the expense of mounting a defence, and is wondering - perhaps dreading - what the documentation, once gathered, will prove about its guilt, liability or innocence. That is where the similarity ends. One will be anxious about the unknown for longer and less strategic in its approach - spending significantly more money in the process. The other will be in control, with powerful early knowledge about the case data and maximum time to strategise.

Put bluntly, the difference will be their attitude and, indeed, their law firm's approach to electronic discovery (eDiscovery) of the potential evidence.

Company A takes one look at this suit, and thinks "too hard". Company A relies on the law firm to suggest where to look for the potentially relevant electronic information and then this is collected via the company's IT team. To further cull the data, Company A's in-house counsel works with its law firm to identify a series of key words which are used to bring relevant information to light.

The law firm takes the data and asks a litigation support vendor to process, search, host and print the data. Whether the culled dataset is reviewed electronically or on paper, each document is reviewed in a linear fashion - a costly process which can take weeks. Company A has limited or no ability to set an early case strategy and has a high likelihood that it will miss key points of potential evidence; the Text Retrieval Conference (TREC) 2008 found that key word and Boolean searching returned between only 22 and 57 per cent of all relevant documents.

Company B knows the value of understanding the content held within its electronic documentation at the earliest point so a case strategy can be established as soon as possible. Earlier this year Company B invested in bringing some of its eDiscovery activities in-house, including processing, search, analysis, Early Case Assessment (ECA) review and production. Company B also has a good network of supporting external eDiscovery experts to help, including its law firm.

An ECA is rapidly conducted once notice of litigation is received. In conjunction with its law firm, Company B gathers and indexes millions of documents, runs hundreds of targeted searches and yields a relevant subset of documents for review within mere days. Company B will quickly understand where it stands and can negotiate from a position of strength at the "meet and confer" stage.

Much of Australia's legal fraternity has more in common with Company A than Company B. Odds are that even though most case data is in electronic form and Practice Note CM6 strongly endorses electronic management of electronic documents, lawyers and barristers prefer to have everything printed and review it on paper.

However, the technology has come of age and legal professionals' longstanding aversion to technological change is coming to an end, especially in the area of eDiscovery. There is now an opportunity for law firms and their in-house corporate clients to use an eDiscovery platform to leverage their knowledge and gain a competitive edge for their clients, in terms of both case strategy and speed of response.

A Gartner research paper released this week on the adoption of eDiscovery technology offers three key recommendations to lawyers: The first is that law firms must change their fundamental business models to adapt to legislative, regulatory, technological and economic factors. The second is that enterprises should require their external legal counsel and external legal service providers to show them a road map for the use of technology to reduce the cost and increase the efficiency of legal discovery and legal review. And third, that enterprises whose law firms fail to respond to the demands for technology efficiency in discovery should engage different counsel.

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These strong recommendations come on the back of a tsunami in the eDiscovery market, led strongly by the United States, where lawyers in mid-to-large-sized companies and law firms are becoming increasingly familiar with electronic discovery.

Many companies in the US face multiple litigation matters each year - sometimes literally thousands - as well as numerous compliance and regulatory actions. With a GFC-inspired focus on costs - and often terabytes of unstructured information to wade through - lawyers in firms and companies are embracing technology to get the job done faster, smarter and cheaper.

There is a strong trend for large enterprises, particularly in regulated and litigation prone industries, to bring some or all of their eDiscovery in-house.

They are doing this to reduce costs, mitigate risk and regain control of the process. For these firms, in-house eDiscovery not only makes financial sense, it enables an early case assessment and a first-pass review to be completed within days instead of months.

Whether the process is conducted in-house, provided by a law firm, or achieved through a combination of these, the difference between dealing with evidence electronically and the paper-based approach is stark. In a recent case, leading UK litigation support firm Millnet Financial used a powerful eDiscovery platform to process more than 15 million electronic documents and deliver the final data in a few weeks - opposing counsel took more than six months to process only 400,000 documents on paper. Millnet estimates its client saved more than 40 per cent over what was paid by the opposition to its litigation support vendor.

The fact is that the most expensive part of eDiscovery is not the processing of electronic evidence. It is the act of having reviewers manually review irrelevant documents to rule them out during the discovery stage.

In Australia, most large corporates do not have the volume of litigation which would drive them to in-source. But when a litigation event occurs, it is the law firm that can quickly bring a superior technology engine and its legal skills inside the client's organisations, and that can facilitate an ECA inside the company's firewall, that should gain its client's respect.

The benefits of dealing with information electronically was reinforced in Australia by three judges who shared a panel at the IQPC 'eDiscovery Australia' conference held in Sydney in October.

The key message from The Hon. Justice Byrne (of the Supreme Court of Victoria), The Hon. Justice Gzell and Associate Justice MacReady (of the Supreme Court of NSW), was that cases which are dealt with electronically are cheaper, quicker and easier to manage.

That is why it is important to get the eDiscovery process right and choose an advanced technology platform. Early case assessment tools enable lawyers to interrogate incredibly large pools of potentially relevant electronic data and rapidly exclude a significantly larger part of the irrelevant data so that the smallest number of documents is actually reviewed.

Law firms should refuse to be daunted by the growing amount of electronic data mounting before them, should understand the eDiscovery technology at hand and help their clients undertake rapid and deliberate ECA - especially if they want to stand out from the crowd.

The real cost of storage	
<p><i>Storage device estimates:</i></p> <ul style="list-style-type: none"> • CD = 650 MB = 50,000 pages. • DVD = 4.7 GB = 350,000 pages. • DLT Tape = 40/80 GB = 3 to 6 million pages. • Super DLT Tape = 60/120 GB = 4 to 9 million pages. 	<p><i>Page estimates:</i></p> <ul style="list-style-type: none"> • 1 MB is about 75 pages; • 1 GB is about 75,000 pages (pick-up truck full of documents). • Average pages per email: 1.5 (100,099 pages per GB). • Average pages per word document: 8 (64,782 pages per GB). • Average pages per spreadsheet: 50 (165,791 pages per GB). • Average pages per power point: 14 (17,552 pages per GB).