Sleep with a Smile-**Avoid E-Discovery Nightmares**

The Computer & Internet Lawyer

September 2016

Section: FEATURESLitigationPg. 1; Vol. 33; No. 9

Length: 4877 words

Byline: Joel Henry and Michael Pasque

Dr. Joel Henry is a Professor of Computer Science and adjunct Professor of Law at the University of Montana, and President of Agile Data Solutions, an e-discovery technology company in Missoula, MT. He concentrates on the intersection of law and technology, utilizing his education and experience in both to teach, consult, and advance legal technology solutions. **Michael Pasque** is the Senior Vice President of Products and Services at Agile and is a graduate of the Blewett School of Law at the University of Montana. His focus is on e-discovery and how technology improves the practice of law. This article was published in the March 2016 edition of *Montana Lawyer;* reprinted with permission.

Body

"There are many who don't wish to sleep for fear of nightmares. Sadly, there are many who don't wish to wake for the same fear."-Richelle E. Goodrich, Dandelions: The Disappearance of Annabelle.

The subject of electronic discovery (e-discovery) seems to strike fear in lawyers from coast to coast, and border to border. Many legal professionals, from first-year law students to bar presidents, recoil in fear just hearing the phrase. No wonder the entire task of collecting and reviewing documents and emails spurs settlement talks and early retirement considerations. E-discovery should not be a nightmare, yet, quite frankly, the task is like a bad dream from the very beginning. Why?

First, the legal profession struggles with both technology and change. Put them together and it makes for a very large iceberg. Fear of this unknown and largely misunderstood block of ice makes sense. An e-discovery iceberg hides cost and schedule slippage in great quantities below the water's surface. But people with basic knowledge of icebergs know what's under the surface. An attorney need not know a dictionary of technology acronyms, software platforms, hard drive configurations, and complicated algorithms to effectively perform e-discovery. Just some basic knowledge and the right technical support can melt the iceberg. But therein lays the problem-the right support.

Second, this e-discovery support, often camouflaged as litigation support, can be self-serving. Convincing attorneys that data volumes are large, complexity high, and accuracy critical simply scares the legal field into paying by the gigabyte, by the hour, or both. With no fixed cost, the support vendor has no motivation to be efficient. In fact, the more data included and more hours required increases their bottom line. In practice, more than 90 percent of collected data has no bearing on a case. Effective software does the work of dozens of support vendor staff, and the field itself can, and does, offer flat-fee pricing. When paying a vendor by the hour, a law firm simply shifts billable

hours away to a third party or, worse yet, adds to the total hours billed to the client by combining vendor hours with legal team hours. A vendor who can't commoditize e-discovery shouldn't be your choice of vendors.

Third, effective collaboration with opposing counsel can reduce the data you both must produce. Technology exists to select the most likely relevant data instead of every document and email within a custodian's grasp who ever heard of the controversy at issue. Mutually decide on search terms, or better yet the concepts, you both hope to find, then only retrieve and review that data.

Fourth, understand exactly what e-discovery can produce. Human reviewers consistently miss 35-40 percent of the relevant documents looked at. Of course they do-who could possibly read documents or emails for days and days and be more accurate than that? Technology doesn't get tired, but it fails to be perfect. People fail to be perfect and easily tire. The idea that human review sets a high standard of accuracy simply doesn't prove true in practice. Therefore, a technology that consistently locates 80 percent of the relevant documents and emails in 10 percent of the time always will be a far superior choice to human review. Technology isn't a magic bullet, but it can make the humans involved more efficient, more accurate, and far more productive. Think of how your car with a GPS system makes you more efficient, more accurate, and more productive in getting from place to place. Of course, the GPS fails to be perfect but no one trades their GPS for a map and compass.

An e-discovery project need not be a nightmare. A number of simple steps and pieces of knowledge can make these projects ones that do not devour a case or wake you up at night in fear. Don't fear sleeping or waking up to an e-discovery nightmare. Instead, know enough about e-discovery to implement cost-effective solutions that allow you to practice law and gain the trust of your clients.

E-Discovery Technology and the Legal Profession

No one accuses the legal field of being cutting edge when it comes to technology. Attorneys spend much of their time managing client risk or resolving the result of that risk. Yet, lawyers tend to jump quickly on new law in their field of practice. The difference may be perception. Lawyers understand the significant problems they face if they miss a key point of law, so they diligently monitor the case law in their practice areas. Unfortunately, attorneys fail to see the problems they face by moving slowly forward on the technology front. Without technology, attorneys often draft the same contract clause in many different ways, or make arguments on the same point from different angles, or worst of all, miss key facts that could turn their case. The technologies impacting the practice of law-such as e-discovery-should be given the same level of attention as the law itself.

Every profession fears the unknown. Many, however, must embrace the unknown of new technology to stay relevant or even profitable. The refrigerator of today uses a fraction of the power needed by a refrigerator from 10 years ago. Consumers don't buy a new refrigerator every year, but you can be sure refrigerator manufacturers make new models every year for the crop of consumers who need them. Attorneys must view themselves as manufacturers of legal solutions for a new crop of clients every year. New technology proves to be almost as important as new judicial rulings.

E-discovery technology requires some investment of time to understand, just like a new TV, microwave, thermostat, or automobile. Good technology makes that initial investment small in comparison to the efficiency provided. To start with, focus on what you really need to know and where best to spend your time. Most attorneys don't need to know the complex technology under an e-discovery tool's hood, but they do need to know what goes into the tool, what comes out of the tool, and the cost of what's produced.

First, your team must preserve data. An e-discovery technology should be able to collect data from multiple custodians for a particular time period and store the data so it can't be changed. Your team probably doesn't need to know what operating system, programming language, and database must be used to effectively preserve the right data. Does the technology gather the data, store the data in a way that prevents alteration, and allow multiple

searches for likely relevant data? Solid answers to those questions provide a defensible and effective collection process.

Second, a legal team needs to find documents and emails with information about the case from the preserved data sets. You should understand that each data set includes an enormous number of data items that have no relevance to the case or controversy. With that fact in hand, don't accept an e-discovery technology that requires someone to review or tag all preserved data. An effective technology should collect the documents and emails most likely relevant to the case from the preserved data. If the technology requires review of all collected data by a person, you have the wrong technology. Remember, people fail to be perfect, therefore technology need not be perfect to be far superior to people, which is supported by the new proportionality standard in Federal Rule of Civil Procedure 26.

Third, the team must produce data to the other side. This falls into the strictest of black boxes because you know what you need to produce-for example, PDF files with Bates stamps that conform to a particular format. Can the technology produce the format needed? If not, will opposing counsel accept an alternative format that keeps the cost of discovery proportional to the case?

Lastly, remember that the learning curve on e-discovery technology must provide a significant return on investment. Part of that return requires looking back at how work was done before e-discovery technology was used. For example, many firms use an inefficient process such as this:

1. Hard copy correspondence comes in the door and is scanned into an image PDF file. This turns out to be a very effective way to prevent users from searching for any words in the document.

2. Client data continues to arrive in a wide variety of electronic formats on a thumb drive, or even in a single-image format.

3. Your firm pays for the data to be run through optical character recognition, or converted to a single format such as a PDF, or both, in order to perform basic keyword searches.

4. Your team loads the documents into a document management system. Worse yet, they create a spreadsheet and enter every document name and a tag for the document generated through manual reviews of each document, removing those protected by rule or law.

5. You convert the data to image PDFs or TIFFs (both are pictures rather than text searchable documents) and ship the data to opposing counsel.

6. Opposing counsel performs steps 2, 3, and 4 before getting your production and attempting to cross reference with the data you produced.

7. You and opposing counsel now realize the case has become about data processing and not law.

One law firm faced this exact situation recently, but to a far worse degree. The data produced to the legal team consisted of only 32 PDF files, but a staggering 234,000 pages total. Even more challenging, the pages were all images. The text of each page could be read by a person but could not be searched for a specific word by a computer. Without good technology and technology support, the firm paid to have the pages manually run through optical character recognition only to get back another small set of files with an enormous number of pages. The firm then had to pay to use yet another technology to search, sort, and extract the pages with key information. Fortunately, a vendor with new, easy-to-use technology saved the day. In a document with thousands of words, the legal team could find the one page containing the text critical to the case.

All these problems could have been avoided with some basic understanding of technology and the appropriate support. This starts with agreeing to a production that does not require data conversion, does not place thousands of

pages in a few files, and can be analyzed by software that locates the pages within documents containing key information. Such location shouldn't take days or require additional cost, and should be agile enough to find content on pages when new information about the case arises. The takeaway: Learn some basic technology, get the right support, and be a more effective lawyer.

E-Discovery Vendors

E-discovery vendors, like all businesses, strive for revenue and profit. Although document collection, review, and production can be complex, it need not be. If seen as too simple, vendors may not be able to put into place lucrative contracts that grow with the volume of data and, subsequently, personnel hours required. Let's face it: Many e-discovery vendors use technical complexity to cultivate fear of the project, or see themselves as capitalizing on law firm challenges rather than being a trusted support vendor providing solutions. Many times, a lawyer contacts a vendor with a deadline looming-that's a very poor time to negotiate a contract. In other cases, the legal team has no idea what a project entails, thus any estimate or proposal gets accepted. Vendors should provide cost-effective, accurate solutions that allow legal teams to succeed. After all, that's what lawyers do for their clients.

Vendor communication and professionalism should provide insight into the vendor's ability to help you understand the project, the costs, the results to expect, and a reasonable time-frame to complete the tasks. As soon as a vendor starts talking, begin listening for how they can make the project easier, faster, and more accurate. Don't let a vendor deluge you with jargon, acronyms, and techno-speak that lead to larger costs. A vendor should be able to talk to technology professionals one way and attorneys another. If the vendor confuses the audience, you have the wrong vendor. If you can't understand the vendor, find another you can understand. Misunderstandings mushroom into nightmares, resulting in fear of ever using technology again.

In the recent past, litigation support vendors feasted on time and materials contracts. Law firms that charge clients by the hour understand this type of billing-such costs simply get passed on to the law firm's client. The world has changed. The email software you use doesn't charge by the hour or by the email-it's commoditized. E-discovery has become commoditized as well, meaning that vendors with the right technology can charge flat fees in a tiered fashion. There may be some portion of the vendor contract requiring hourly compensation for vendor personnel, but a qualified vendor should be able to accurately estimate this and stand by the estimate unless a major project factor changes (*i.e.* more attorneys to train, significantly more hands on work, etc.).

Consider the technology used by a vendor. There are two extremes: (1) vendors with their own technology, and (2) vendors with a menu of off-the-shelf technology. Vendors on both ends can be good or bad. A vendor with in-house technology may be superior, or far less than acceptable. Suppose a vendor provides inhouse technology based on a Microsoft product that is out of date, not properly licensed, and no longer supported by Microsoft. Further, suppose this vendor used software developers without any formal education in computer science or software engineering. Perhaps Web site development can be done with such personnel, but few lawyers would trust their data to such an application developed by learn-as-you-go developers.

Conversely, suppose another vendor offers patent pending technology developed by experienced professionals, some with master's degrees in computer science. This company uses technology unique on a national stage and can offer both superior price points and accurate results. Without a software supplier, this vendor can adjust price points as needed to meet law firm needs. However, in-house technology should be subject to a price vs. capability analysis. Understanding what the software can't do and what process must be used to complete the project is key. A lawyer need not be a techie to ask the right questions: What can't the software do and what must my team do to complete the project?

Many e-discovery and litigation support vendors use third-party software solutions. These come with a baseline price from the software vendor and tend to significantly increase the starting point of a bid on any project. Many of these software solutions fall into the category of big software products requiring significant effort to set up,

maintain, train, and use. These solutions come with the accumulation of features requested by other law firms all across the world over a period of many years. Think of the biggest multi-player instrument in Dr. Seuss' *How the Grinch Stole Christmas*. That software might be just what your team needs, but it might also include far more features than you need, all of which you will pay for. Big, do-everything software packages have another downside: They have so many features that learning the few your team needs becomes much more difficult. How many of those buttons on your satellite TV remote control do you really use?

One litigation support vendor recently charged a client in excess of $18,000 to simply obtain preserved data the client extracted from an email system and place all of it in a third-party tool. No selection from the preserved set took place to reduce the amount of data requiring review. No review of data or production had been included in the bid, but the vendor was happy to continue to charge the law firm by the hour for both. That's a nightmare to be avoided. Your vendor should be able to preserve, collect, assist in review, and produce data for a flat fee.

E-discovery vendors should strive to solve problems and be seen as an asset to a law firm. The ability to use the right software for the project at price points proportional to the case leads to more engagements between legal teams and vendors. When the legal field sees both utility and cost-effectiveness of e-discovery on cases with values as low as $50,000, the legal field begins to leverage the technology advancements needed to make law affordable and more effective for all. E-discovery vendors must play a role through education that erodes the fear of the subject, improves selection of the correct tools for the project, and includes flat-rate, tiered pricing.

Working with Counsel

Most pairs of opposing counsel eye each other with respect and trust, until they have reason not to. E-discovery should not be that reason. Unfortunately, the opposite does occur: Two lawyers fear e-discovery so much they avoid it and thus fail to perform due diligence on all sources of facts about their case. This fear also can become the ugly truth behind movement to settle a case. The perceived cost of e-discovery also can motivate these settlement discussions. Neither approach-ignorance or avoidance-meets the level of representation the legal field requires.

When e-discovery must be performed by either party, cooperation and transparency as to the effort, cost, and schedule ensures trust between opposing counsel. Cooperation goes beyond a basic meet-and-confer conference. E-discovery requires each attorney to talk with their client and IT staff to understand the process used to create electronic data, as well as the storage and retrieval process. This forms the basis of the next discussion, namely how to ensure preservation and then how to collect data from the preserved set for review. Data types, locations, and formats should be identified and then a smart collection process used. Smart collection selects from the data set those documents and emails most likely to be relevant, instead of moving all preserved data straight to the review phase.

In another recent example, attorneys at two Montana firms struggled with e-discovery largely due to a vendor, charging by the hour, insisting that many more hours would be required to remove duplicates across the data set and review all data preserved. With an estimate that exceeded $30,000, the firms felt trapped by factors that neither fully understood. Fortunately, another vendor was able to step in and help finish the project-from collection to production-for less than $9,000. Because both attorneys trusted each other, they were able to take this important step of bringing in another vendor with more effective technology. This vendor focused on the attorneys' needs rather than the opportunity to run up an e-discovery bill.

E-discovery that falls disproportionally on one side of a case can present cooperation issues. Certainly a big national company with many employees generates more email and documents than a single plaintiff. No matter how the burden of e-discovery breaks down between counsel, cooperation must still occur. E-discovery requests that include multiple custodians over a reasonable time range might never be considered overly expansive, yet could be very costly and yield relevant data totaling only 5-10 percent of the total data collected. Counsel can cooperate by

discussing exactly what both sides want from the collection and then only select documents and email that meet those wishes. This requires some understanding about the difference between preservation and collection.

After data preservation has occurred, collection and review cooperation must take place. Preservation means ensuring that electronically stored information (ESI) is protected against inappropriate alteration or destruction, while collection means "gathering ESI for further use in the e-discovery process (processing, review, etc.)." [1]Both legal teams must preserve, but smart collection can save significant costs. Smart collection means selecting the most likely relevant data from the preserved data set. If counsel can agree on how to smartly collect data, the focus can remain on the practice of law rather than the process of e-discovery while still retrieving the data both parties need. Smart collection can be as simple as mutually agreeing on particularized search terms, or better yet, concepts that relate to the case. A simple keyword search such as "grievance" will return every document or email in the data set with the word "grievance," which might result in a huge, although overly broad, data set to review. However, a concept such as "Sally Smith grievance" used with the right technology (*i.e.* that finds documents with "grievance of Sally Smith" as well as "grievance filed by Mrs. Sally Smith") will return a much more focused data set to review. Smart collection technology can be used repeatedly when new concepts arise during the case or new data augments the collection. Think about the white pages from Chicago with tabbed pages separating the letters of the alphabet-you don't review the entire phone book for Sam Jeff coat, you go to the Js. To make this work, counsel on both sides must cooperate.

Smart collection produces a much smaller, more focused data set to review. Counsel then should use a cost-effective, accurate review technology. Human review might be cost effective if every review hour can be billed to the client *and* the client agrees to pay for those hours. However, savvy clients, especially corporate and insurance companies, will demand review software be used that reduces review time while maintaining accuracy. Keeping in mind that human reviewer accuracy rarely exceeds 65 percent, software that meets this low threshold and cuts review time in half becomes a must. Review should focus on identifying privileged documents and emails, as well as other data protected by the Health Insurance Portability and Accountability Act (HIPAA), Family Educational Rights and Privacy Act (FERPA), and other state and federal law. Identifying relevant data during review also is key, as counsel will be searching for facts that support the case on either side. Review should be focused, efficient, and the resulting data easily produced in a format that saves time and expense for both attorneys, and subsequently, their clients.

Production is the last step in the e-discovery process. A reasonably sized, focused set of data has been collected, reviewed, and stands ready to be produced. Counsel should agree on the data type and organization for the production. There is no reason for one attorney to convert text searchable files to image files, or, worse yet, print and then scan documents into image files only to have opposing counsel pay to have the documents converted back to a text searchable format through a costly optical character recognition process. Matching the data type produced to the data type needed for review by the receiving party makes production faster, cheaper, and far less likely to be a source of contention.

On the topic of production format, many firms still view production as a set of TIFF files, which in fact are images. It is much better to produce in the format of the original data or standard PDF files that can be text searched. Nearly all document management systems and review tools handle PDFs efficiently and nearly all production tools produce PDFs. Keeping production simple and matching the produced data type and organization to the receiving party's needs facilitates using electronic data to support legal work rather than clashing about e-discovery and using legal work to defend the e-discovery process.

Working Knowledge of E-Discovery

---

[1] EDRM, *EDRM Stages*, edrm.net, http://www.edrm.net/resources/edrm-stages-explained (last visited Feb. 16, 2016).

Although e-discovery does not require an attorney to become a techie, some working knowledge of the field leads to smoother, cheaper, and more effective processes. Every lawyer must sort through issues and facts to find those that support the case and e-discovery turns out to be much the same, focusing on what relates to the case by eliminating what doesn't early on.

Preservation means "don't delete or alter" electronic data. If you don't need extraneous items such as metadata, get the IT staff or client to make a copy of the data by custodian and time period. Put that data somewhere with protection so that no one can get to it without permission. On the other hand, collection means "select the most likely relevant" electronic data. That does not mean every single data item preserved. Review should be done on this smaller data set and be supported by software that makes review fast, accurate, and self-checking. For instance, if you mark one email privileged, then other email should be found with similar content. Production should be easy for the producing party and match the format needed by the receiving party. Focus on what comes out of each phase and make certain the transitions happen smoothly. Don't try to understand the technology in each phase; the proof lies in the output of each phase. You don't need to know how to make a soufflé to know when you taste a good one.

Accept that e-discovery will not be perfect, but will be far more effective than human review of thousands of pages over days or weeks. Human error rate, plus inordinate amounts of time, ensures inefficiency. If you are concerned the technology might miss something important, focus on what you are looking for rather than avoiding the technology. If a search for data based on the concept "Alice Smith prescription medicine" doesn't produce what you think might be hidden within 100,000 emails, redefine your search. Perhaps, "Mrs. Smith dosage" or "Smith drug order" might work better. This is where a smart vendor will offer helpful support. Let the technology do the work and don't let a vendor convince you that every search requires hours of vendor staff time.

Understand the best e-discovery software and vendor cannot make these processes fast and easy. However, don't let the vendor turn the project into a mystifying, cost-escalating nightmare that swallows the entire case. Expect to ask questions and make adjustments to the process. Demand that the vendor answer the questions in a language you can understand. If you come away from a conversation dazed, confused, and worried, you have the wrong vendor. Switching vendors midstream should not set the project back, and good vendors will help you down the road as you continue to use their processes in other cases.

One vendor recently took over a project with more than one million emails in the preservation phase from another vendor in Montana. Despite the terminated vendor's assertion that the new vendor would fail, the project moved to completion at one-third the cost projected by the terminated vendor. This resulted in a successful e-discovery process for the lawyers and instilled confidence in e-discovery as a system. More importantly, it proves that firms can change vendors midstream.

E-discovery on the majority of cases should not cost tens of thousands of dollars. The right technology, used correctly by cooperating counsel, can make e-discovery proportional to cases once thought to be too small for technology. Get bids from multiple vendors, but don't let the low bid automatically win. Ask what your client gets from each phase of e-discovery and what your firm must do within the process. This should shine light on how the process will or will not work, and make transparent the effort needed by your legal team. If one vendor can handle the entire process, preservation to production, ask for a specific price for each phase. This will expose whether the vendor has a well-designed process, if the vendor truly has one.

Basic knowledge of e-discovery can be easily gained without drowning in technical jargon. Attorneys can do this, just as we learned to use Fastcase, Westlaw, and Lexis. In the end, the time needed turns out to be reasonable. After all, just because many of us drive cars, few of us actually qualify as automotive engineers.

Conclusion

E-discovery should not be a nightmare to avoid but rather a cost-effective and accurate way to find key facts and information about a case. A working knowledge overcomes fear of technology. Understanding how to get the most from vendors, instead of them getting the most from you, will help immensely. With knowledge of the process and acceptance that human review simply does not set the gold standard, you can make e-discovery a process that supports the focus of your work-the law. Sure, one article and one e-discovery case cannot make you an expert, but you need not be an e-discovery expert to cooperate with opposing counsel and leverage a vendor to provide a solution that makes sense for your case.

Sleep well, and wake up with a smile. E-discovery and document review, in general, do not live under the bed until darkness falls, emerging as your worst nightmare. Understanding, cooperation, the right vendor, and the right expectations allow you to rest easily, only worrying about the legal aspects of your work. You are on your own there!

FOOTNOTES

Classification

Language: ENGLISH

Publication-Type: Magazine

Subject: ELECTRONIC DISCOVERY (90%); GLACIERS & ICEBERGS (90%); PROFESSIONAL WORKERS (90%); LAW PRACTICE (89%); LEGAL SERVICES (89%); LAWYERS (89%); LAW FIRM BILLABLE HOURS (89%); LITIGATION (71%); EARLY RETIREMENT (55%)

Industry: LAW PRACTICE (89%); LEGAL SERVICES (89%); LAWYERS (89%); LAW FIRM BILLABLE HOURS (89%); LITIGATION (71%); COMPUTER SOFTWARE (66%)

Load-Date: August 20, 2016