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# *Why Now Is the Time for Legal Teams to Invest in Self-Service eDiscovery for Smaller Matters*



In 2011, noted investor and entrepreneur Marc Andreessen famously said, “Software is eating the world.” He was referring to internet-based companies that continue to offer solutions to everyday problems—and how more services that we use are made up of software. In the intervening years since 2011, we’ve seen technology trends in consumerization, automation and artificial intelligence, among others, all give rise to the advancement of self-service software in a panoply of industries: for example, airline self-service ticketing, eCommerce chatbots, virtual agents, home rentals, ride-hailing services, food delivery and more.

Software has made a significant mark on the legal industry too. There has been an increasing trend of corporate legal departments and law firms reaching for ways to improve their efficiency and lower the variable cost of service delivery by adopting a variety of different software platforms, including eBilling, matter management, case and deposition preparation and legal hold.

eDiscovery is a particularly prominent category of legal software that has promised to help law firms and corporations gain control and predictability of eDiscovery costs, particularly for smaller matters such as subpoena responses, employment-related concerns (e.g. harassment claims, wrongful termination, policy violations), small internal investigations, small tort matters, and the like. More recently, smaller matters such as Data Subject Access Requests (DSARs) and California Consumer Protection Act responses (CCPAs) have added to that small matter workload. These smaller matters have often had disproportional costs relative to their impact on the overall business, and have over-burdened already stretched legal teams.

Back in the late 2000s through about 2010, implementing eDiscovery software to handle these small matters typically involved the deployment of on-premise, server-based software or individually licensed desktop software. In the past three to five years however, there has been a growing trend of organizations looking toward self-service eDiscovery for these small matters, which entails moving beyond those early solutions and adopting “next-generation” eDiscovery software—software that is hosted, modern and “simpler”—with the hopes of more efficiently tackling these smaller matters.

In 2020, with the emergence of the COVID-19 global pandemic,

there appears to be an accelerated shift toward self-service eDiscovery for these small matters. Given the circumstances, it’s easy to see why. Legal teams are now practicing law remotely, which places increased emphasis on self-service usability, access to technical support resource, hosted data security and secure remote access, self-instruction, and of course, cost savings to meet the demands of tighter operating budgets. A self-service approach to eDiscovery – particularly for small matters - has become vital for legal teams that continue operations through a pandemic that has rendered in-person collaboration impracticable.

Here’s what you need to know about self-service eDiscovery for small matters, including the problems it is designed to solve and the benefits it brings to the practice of law, particularly as we navigate a groundbreaking pandemic and its aftermath.

## *How Should We Think About Self-Service eDiscovery for small matters?*

Self-service eDiscovery generally refers to the ability of a legal team to execute all of the necessary steps of eDiscovery on their own, from uploading and processing collected data, running analytics, culling and prioritizing documents, reviewing documents and applying work product and performing productions and exports. The platforms that enable this workflow are generally of the “next-generation” variety that promise to improve usability over their predecessors, provide more automation to minimize human processes, host in a secure hosted environment, and be supported by a technical services organization that can assist with onboarding and occasional issue resolution.

These “next generation” solutions differ from the original class of eDiscovery software that were typically hosted within an organization’s own data center premises, wasn’t nearly as automated end to end (thus relying on human-powered processes to get data in and move it where it needed to be), didn’t run analytics automatically, and generally required a massive investment on behalf of the organization to self-administer, self-manage, and self-support the environment. Clearwell (now owned by Veritas), Summation by Access Data, Viewpoint by Xerox, Relativity and other platforms could well be considered to fall within this category.

<sup>1</sup>Marc Andreessen, “Why Software Is Eating the World,” Wall Street Journal, Aug. 20, 2011. Retrieved from <https://www.wsj.com/articles/SB10001424053111903480904576512250915629460>.

The legal industry has been steadily adopting self-service eDiscovery solutions for a few years now, particularly for organizations that have a high volume of smaller matters. Given the oftentimes manual, repetitive and labor-intensive workflows inherent in eDiscovery, these challenges were magnified for organizations that were over-burdened with higher volumes of these smaller matters, making a shift toward self-service eDiscovery a natural fit. And, with the ever-present—and now, pandemic-fueled—pressures to control costs and manage tight legal budgets, these self-service eDiscovery solutions have led with a new promise: to stem the growth of in-house eDiscovery resources and related expenses that have threatened legal budgets as ESI data stores have grown.

## How Does Self-Service eDiscovery Help with Small Legal Matters?

In-house legal departments and law firms often have a steady flow of small-scale matters, including, but not limited to, subpoenas, employment disputes (e.g., harassment claims, wrongful termination, arbitrations, and policy violations), internal investigations and compliance audits, data privacy inquiries (e.g., Data Subject Access Rights (DSAR) requests) and California Consumer Protection Act (CCPA) inquiries), arbitrations and small litigation (e.g., contract disputes and intellectual property disputes). While individually minor, these recurring legal matters en masse place a continued drain on the legal team's limited technical support resources that could better be deployed to support larger, more complex eDiscovery matters – such as large-scale litigation, cross-border fraud and investigations, class action suits and the like.

In the past, these smaller matters have been handled by the organization's legal team in a variety of inefficient ways.

- Paper Discovery:** Before the rise of electronic discovery, organizations relied exclusively on page-by-page-turning paper discovery. Still today, some organizations print any documents collected from smaller matters and page-turn to review, code, scan and produce those that meet relevance criteria. Yet the problems with paper have always been, and always will be, pronounced: the inability to search, filter and cull the document corpus; the lack of analytics or data visualizations to better understand the document corpus; the inability to readily collaborate on review; the lack of any review audit trail; the physical security and integrity of the printed paper itself; the difficulty of redacting and producing documents; and the time and expense of printing.
- Offline Microsoft Exchange/Outlook Review:** In this method, the organization collects PST email archives from select custodians and loads each onto a dedicated Exchange server, where the attorney then reviews them in Microsoft Outlook. Again, the challenges are numerous: the risk of modifying or spoiling evidence; the risk of read-receipts triggering warnings to persons under investigation; limitations on searching, sharing and handling various file types; difficulties in redacting and producing files; the lack of analytics, data visualizations or an audit trail; and a bottleneck caused by dependency on IT and legal operations.
- File Sorting:** In this method, the organization puts individual, standalone electronic files into a file share system, where they are then each opened individually, reviewed in a digital page-by-page turn manner, and then moved to a “relevant” or “not relevant” folder. The obstacles here are comparable to those with Outlook review: a limited ability to search or share the workload, the absence of analytics or data visualizations, the need for a secondary flow to redact and produce and the lack of an audit trail, which means the method doesn't scale as document sizes grow.
- Old Desktop eDiscovery Software:** This method employs in-house technical support (e.g., litigation support) resources who process data using data processing software like LAW and then load documents into an older eDiscovery software—like Lexis Nexis Concordance—that resides on a local machine within the legal department. The attorneys access the document corpus on that machine through a remote access software. Given this method's heavy reliance on litigation support's manual steps and involvement, legal teams often find the discovery process bogged down, absorbing cycles from technical support resources that are otherwise needed elsewhere on other projects. Also, the older technology employed includes no or limited data analytics and visualizations, difficulties with sharing and collaboration and an inability to scale as the matter expands, and it may even expose the organization to data security and control problems.
- Older Hosted eDiscovery Software:** This method is the same as the one immediately above but endeavors to use older eDiscovery software that is hosted somewhere within the enterprise. This method is littered with the same challenges

and limitations as other outdated software: reliance on unavailable technical resources, limited data analytics and visualizations, scale issues and data security and access control problems. Additionally, this method places a burden on the IT and legal technical resources teams to wear many hats, from managing and monitoring the environment and scaling resources when there are concurrent heavy loads to upgrading and protecting and securing the platform and its data. Also, the software may not be accessible to outside counsel if it is hosted within the corporate firewall.

- **Full-Service eDiscovery Process (eDiscovery Vendor or Law Firm):** Although it may be easier to outsource eDiscovery, full-service eDiscovery (as opposed to self-service eDiscovery) often escalates costs since a service provider (or law firm) is going to charge billable hours for time consumed. Those costs can spiral, perhaps unpredictably and disproportionately, to the value of the small matter. And, the discovery timeline may also expand based on the vendor or firm's workload. Finally, the full-service eDiscovery model may still be a burden to the organization's centralized litigation support and eDiscovery resources, as they may be involved in contracting, escalating issues and performance and consulting to manage costs.

Given the challenges of these traditional methods, legal departments are looking to "next-generation" self-service eDiscovery platforms to manage their small-matter workload more efficiently and cost-effectively.

Self-service eDiscovery for smaller matters promises to resolve several key challenges:

- **Simplifying Complex Tasks:** Generally speaking, self-service eDiscovery software is built to be easy and also to automate complex tasks (e.g., data intake, processing, duplicate removal, uploading and exception handling). This means the legal team can push these now simplified tasks away from busy and overworked technical litigation support personnel to attorneys and investigators directly. Some software also focuses on streamlining project creation and setup to further reduce the burden on these technical support resources.
- **Accelerating Workflows:** These next-generation software platforms generally speed up the time to begin review, shorten the time to create batches and expedite productions by automating the substeps involved in traditional eDiscovery. Plus, to the extent that the software provides a faster review and speed-coding capability, the software will accelerate the longest portion of discovery; document review.

- **Accommodating a Wide Range of Data Types:** This category of software builds on the learnings of older eDiscovery software by handling a wide range of data types, and some even allow users to load in smartphone and tablet data, threading chat conversations from messaging apps such as SMS, MMS, WhatsApp, iMessage, Facebook Messenger and Skype, so conversations appear as they would on the native applications.
- **Enhancing Data Security:** With self-service eDiscovery, organizations can keep data under their control, simplifying the chain of custody and reducing the touchpoints that could lead to a security breach. Additionally, all of the organization's data pertinent to legal matters resides in one hosted location, meaning fewer copies of the data are floating around in the ether, without knowledge of, or management by, the organization.
- **Reducing Overhead:** Easy-to-use eDiscovery software generally absorbs fewer labor cycles, helping organizations keep labor costs under control. That ease of use also frees up lawyers and technical resources to focus on higher-value work. Plus, hosted solutions generally relieve the burden on the organization's IT resources.
- **Improving Scalability:** Self-service platforms can scale to handle data sets of any size without requiring thorny conversations with the IT team about capacity planning and infrastructure investments.
- **Delivering Cost Savings:** For small and routine matters, organizations can eliminate the expenses associated with retaining the services of outside counsel and project managers, thus ensuring that costs remain proportionate to the value of the case.
- **Reducing the Review Population:** Core to maintaining proportionality in line with these smaller matters, next-generation eDiscovery software generally incorporates analytics and artificial intelligence (e.g., email threading, textual near-deduplication and conceptual analysis) as well as helpful data visualization that allows the case team to cull the population more aggressively, leverage artificial intelligence to avoid review and, generally, find and review the potentially relevant material faster.

## Why COVID-19 Has Made Self-Service eDiscovery for Small Matters Even More Urgent

While the trend by organizations to source a self-service eDiscovery solution has been steadily increasing, the COVID-19 pandemic appears to have accelerated this trend for three reasons: budgets, staffing and caseloads.

Budgetary pressure on legal teams, which has been a consistent theme in legal departments since the Great Recession of 2008, has clearly ratcheted up. On July 30th 2020, the U.S. Department of Commerce released an estimate that the U.S. gross domestic product shrank by nearly one-third compared to the second quarter of the previous year. Some industries—such as travel, energy, automotive and retail—have taken huge hits, meaning that corporations in those sectors are slashing budgets and sometimes headcount, including in the legal department. Those corporate legal departments are asking for discounts and renegotiating fee arrangements with their outside counsel, with many asking for extended payment terms. This has had a cascading effect on outside counsel, with many firms forcing furloughs, trimming staff and curtailing hiring plans. As the pandemic unfolds, legal departments “will be challenged to reimagine the art of the possible and to restructure how legal delivery can meet enterprise expectations” according to Mark Cohen, CEO of Legal Mosaic. Self-service eDiscovery for smaller matters makes it easier for these legal teams to operate in a lean mode, particularly when the organization selects a robust tool that automates many discovery workflows and decentralizes the workload away from overworked technical support resources.

Streamlined, efficient eDiscovery will be increasingly important as the number of new small matters increases. It is likely that organizations will be buffeted by waves of small employment matters, including discrimination claims, unemployment disputes, workers’ compensation claims, whistleblower claims and disability and accommodation lawsuits under the Americans with Disabilities Act and other disability laws, as well as with more virus exposure claims under the Occupational Safety and Health Act and state equivalents. An uptick in privacy litigation is also likely, with increasing requests from data subjects asking how organizations are using their data, particularly since the CCPA went into effect on January 1, 2020.

As cases continue to rise, law firms and corporate legal departments that are strapped for resources—in terms of both dollars and people—will increasingly need a self-service eDiscovery solution that expedites their workflows without adding to the strapped labor workload.

Self-service eDiscovery platforms address accelerating market trends and can help lawyers manage an onslaught of new small matters. In short, they’re an available, sensible pivot that can help legal teams realign their practice with client expectations, employee needs and the economic realities of the market during and post-COVID.

## Guidance for Choosing the Right Self-Service eDiscovery Solution for Smaller Matters

When you’re looking for a self-service eDiscovery solution for your organization to more efficiently handle smaller matters, remember that every platform will differ in its features, ease of use and support. Here are the key considerations and thinking exercises to perform before you make a decision.

- **Matter Volume and Type:** How many and what type of smaller matters do you foresee running in the self-service eDiscovery software? Should you focus on fast-moving, in-and-out subpoenas, DSAR requests or CCPA inquiries only to start and then go to longer-hosting investigations later? Depending on the answer to these questions, you’ll come to understand your expected hosted volumes better and be in a better position to negotiate pricing based on your anticipated volume.
- **User Needs:** What are the requirements for your users and support teams? Ask each set of users what features they must have and what they would like to have. Leaders from the teams involved should participate in the selection and implementation planning.
- **User Sophistication:** Does your staff have the skills and available capacity to independently manage a self-service eDiscovery solution for your organization, or will you need some help? And, if you need extra help, what form is that help expected to take: just a production here or there, or

<sup>2</sup>Caroline Spiezio, “IN BRIEF: Legal Depts Delaying Bills and Seeking Discounts Amid Pandemic,” Reuters, Apr. 21, 2020. Retrieved from <https://www.reuters.com/article/lawyer-coronavirus-in-house/in-brief-legal-depts-delaying-bills-and-seeking-discounts-amid-pandemic-idUSL2N2CA01K>.

<sup>3</sup>Mark A. Cohen, “COVID-19 Will Turbocharge Legal Industry Transformation,” Forbes, May 24, 2020. Retrieved from <http://www.forbes.com/sites/markcohen1/2020/03/24/covid-19-will-turbocharge-legal-industry-transformation/#6c26be821195>.

an all-day-every-day involvement to help keep the slate of projects running on time? Since the shift toward self-service eDiscovery conveys added responsibilities for the organization to handle its own project management, data processing, document productions, workflow design, corpus culling, review batching, oversight and the like, does your organization have the resources to take that on from Day 1? Day 45? Day 100? And are there multiple technical support team members who can be trained to back up and support a remote workforce?

- **Scalability:** If small matters balloon into large matters, can the chosen platform still handle them? How well will it perform with large volumes of data? It's important to ask about expected latency situations and make sure the vendor lives up to its promises of live environment monitoring. Also, confirm that your vendor can step in with an assistive hand in such circumstances and can perform full project management should it be warranted.
- **Test Drive:** Before you sign, test out the platform instead of relying solely on the vendor's demo. Remember that you're test-driving more than just the software; you're also test-driving the vendor and its customer service. Ask your vendor to let you use the software at no cost for 90 days so you can learn the software while test driving it. And keep in mind, that this may be a career-defining decision about which vendor to bring on board; so choose wisely.
- **Customizations and Enhancements:** How can your organization request changes and enhancements to the platform? Will your organization have any input into product development, and will you be able to test new features before they are released to production environments? Will you be allowed to participate in end-user focus groups? Consider that this is the selection of a partner, more than selection of a technology.
- **Technical Support:** How much and what kinds of support will your organization want? Will you need help with training end users, providing technical support, maintaining and upgrading the platform or anything else? Make sure the provider offers support tailored to your needs.

## Conclusion

Lawyers, both in-house and in law firms, have been trying to do more with less for some time. Now, with COVID-19, they must be more efficient than ever, particularly when anticipating the flood of small, repetitive matters that are likely to stem from the pandemic. Legal teams need to find ways to ease the sources of friction associated with eDiscovery, accelerate their response timelines and keep costs in check.

While COVID-19 has paralyzed much of business, litigation and internal employment disputes continue marching on, oblivious to recessionary pressures and staffing limitations. Investing in a self-service eDiscovery tool enables organizations to get more work done at a fraction of the cost of alternative approaches, with efficiency dividends that will last for years. Legal teams that adopt self-service are likely to find that its benefits far outlast the current crisis.

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