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Consilio Institute: Practice Guide

MEASURE TWICE, DISCOVER ONCE: EDISCOVERY PROJECT SCOPING AND PLANNING

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CLICHÉS, CHAOS, AND EDISCOVERY PROJECT PLANNING

We have a lot of maxims in English about the value of preparation, like "measure twice, cut once" or "a stitch in time saves nine." Perhaps the most well-known aphorism of this type is "an ounce of prevention is worth a pound of cure," which dates back to an anonymous letter on the importance of fire safety that Benjamin Franklin published[1] in the *Pennsylvania Gazette* in the early 18th century. Though Franklin was writing of fire safety and the consequences of laxity in that area, he might as well have been writing about eDiscovery project planning and its risks. As any experienced eDiscovery practitioner will confirm, being forced to risk your neck jumping out the window of a burning house, because of something tiny you missed while hurrying around, can be a pretty good analogy for the eDiscovery experience.

eDiscovery on Fire

eDiscovery is undeniably challenging. Data volumes continue to multiply, data types continue to diversify, and data custodians continue to modify their tools and practices. Couple this daunting set of variables with an ever-expanding set of eDiscovery tools and services available to be leveraged, add time pressure and an adversarial process, and you have a perfect recipe for chaos, uncertainty, and small (but important) things getting missed.

As Franklin's letter and the other maxims tell us, the reliable way to reduce the risk of such errors is to take the time for proper planning before rushing headlong to action. To be sure, planning an eDiscovery project is an iterative process that overlaps and intersects with other early project activities, but investing the time and effort required for effective planning, from the beginning (and throughout those early phases), will produce downstream benefits, including saved time, saved money, reduced risk, and increased defensibility. The clichés became clichés for a reason.

Evolving Expectations

State bars and industry organizations formally recognize the importance[2] of competent preparation and planning to meet the technical and logistical challenges of our current eDiscovery reality. For example, California's Formal Opinion on attorneys' duty of eDiscovery competence[3] specifically articulates that attorneys (or attorneys working with the assistance of qualified experts) need to be able to:

- "Initially Assess E-Discovery Needs and Issues, If Any"
- "Analyze and Understand a Client's ESI Systems and Storage"
- "Advise the Client on Available Options for Collection and Preservation of ESI"
- "Identify Custodians of Potentially Relevant ESI"
- "Engage in Competent and Meaningful Meet and Confer with Opposing Counsel Concerning an E-Discovery Plan"

[1] Benjamin Franklin, *On Protection of Towns from Fire,* The Pennsylvania Gazette (Feb. 4, 1735), available at https://founders.archives.gov/documents/Franklin/01-02-02-0002.

[2] Robert J. Ambrogi, *Tech Competence*, LAWSITES, https://www.lawnext.com/tech-competence (2021).

[3] The State Bar of California Standing Committee On Professional Responsibility and Conduct, *Formal Opinion No. 2015-193* (June 30, 2015), available at https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL 2015-193 %5B11-0004%5D (06-30-15) - FINAL.pdf.

Each of these requirements is part and parcel of effective eDiscovery project planning, making the ability to do such planning a formal requirement in California. The EDRM organization, too, in their EDRM Project Management Framework[4] ("EPMF") emphasizes the critical importance of the early planning phases to overall project success:

> **The Scoping Phase lays the foundation for project success by aligning all teams to a common vision and goals.** By defining the project scope and providing an overview of the context and constraints, this phase lays the foundation for project planning in the following phases. [emphasis added]

Their EPMF scoping phase is then followed by a preliminary planning phase and a detailed planning phase.

About this Practice Guide

In this practice guide, we will discuss various aspects of effective eDiscovery project planning to equip you with the knowledge you need to reduce your chaos, your costs, and your risks. We will review: initial scoping activities; investigation activities; volume and cost estimation; and roles and communication.

Checklists

Throughout this guide, we will also review checklists of key items for each phase in the process. Checklists may sound like simple things, but when properly implemented, their value is real. For example, doctors starting to follow checklists for key tasks in one program saved 1,500 lives and $175 million in just the first eighteen months.[5] If checklists are a match for modern medicine, they're more than a match for eDiscovery.

INITIAL SCOPING ACTIVITIES

We don't spend a lot of time talking about imagination in legal practice, but it's pretty essential to effective project scoping. Unless you're working in an eDiscovery operation with Level 5 maturity[6] (*i.e.*, with extensive aggregated data about past projects, matter types, etc.), each new project is going to be fairly opaque to you at the outset. You will know the general legal subject matter, the essential event(s) giving rise to the issue, and any individually named defendants within the organization. Beyond that, however, anything and everything (or nothing) might be relevant.

The first step, then, must be brainstorming to figure out what and who might be relevant. Doing this effectively requires collaborating with: individuals

[4] *Project Management Guide*, EDRM, http://www.edrm.net/frameworks-and-standards/edrm-model/projectmanagement/(2020).

[5] Atul Gawande, *The Checklist: If something so simple can transform intensive care, what else can it do?*, The New Yorker (Dec. 2, 2007), available at http://www.newyorker.com/magazine/2007/12/10/the-checklist.

[6] *Capability Maturity Model*, Wikipedia, https://en.wikipedia.org/wiki/Capability_Maturity_Model#Levels (Mar. 18, 2021).

with direct knowledge of the relevant legal issues; individuals with direct knowledge of the relevant factual issues; and, individuals with direct knowledge of the organization's individual and enterprise IT resources. Essentially, inhouse counsel, outside counsel, internal IT, any external collection resources, and any relevant senior employees all need to be looped into this exercise in imagining what might exist.

Starting with what you know about the type of matter, the underlying facts, and the key players (typically based on a complaint or preservation notice), you and your collaborators must extrapolate what types of relevant materials are likely to exist within the organization and where (or in whose custody) they are likely to be. This should include consideration of, both the information and materials you will want to see and use, and the information and materials you anticipate the opposing party will request. This is the general flow of inquiry:

- What events are in dispute or under investigation?
  - What questions do you have about those events?
    - What materials might help you answer them?
  - What questions are parties-opponent likely to have about those events?
    - What materials might they imagine exist and request?
- What are the elements of the legal claims and defenses in the matter?
  - What types of documentary evidence might help establish or refute them?
    - Where or in whose custody might such evidence be?

This process can be aided by checklists of potential sources, like those used for custodian surveys and interviews, but it is a fundamentally imaginative exercise. Imagine the events at issue in the context of normal organizational operations and think about what might have been generated:

- Might there be departmental records, like HR files?
- Could there be useful data about the events in your ERP systems?
- Would employees have discussed the events via the internal chat client?
- Maybe the relevant office used shared network folders?
- Perhaps copies of deleted records exist on back-up tapes?

Additionally, it is beneficial to imagine what distinctive characteristics relevant materials from these sources might bear, *i.e.* how you would try to find them if searching for them in a collected data set:

- Are you seeking evidence of intent in communications between certain employees?
- Are you looking for evidence of internal awareness in executive meeting minutes?
- Will relevant documents contain certain keywords, like a name or project code?
- Are you looking for contracts executed with a particular party or on certain dates?
- Are you looking for metadata evidence of an employee altering key documents?

Having some ideas about distinctive characteristics of this type will be helpful to you as you move on to the investigation activities we will discuss below.

Prioritization

Once you have finished your brainstorming exercise and have a list of potentially-extant relevant materials, likely places to look for them, and

distinctive characteristics you might use to identify them, your next step is to prioritize these potential materials, sources, and custodians to guide your subsequent activities and allocation of resources. Prioritization of the items on your list – whether they are IT systems, departmental systems, or individual custodians' devices – should be done based on three key criteria:

1. How likely it is that the source actually contains relevant materials
2. How important and useful those materials would be, if they do exist
3. And, how likely those materials are to be requested by parties-opponent

Obviously, the greater the likelihood it exists, the greater its potential utility, or the greater the likelihood it will be requested, then the greater its priority should be (with items that score high on all three metrics at the top of the list). This prioritized list of potential sources can then be broken into three tiers that can be used to guide prioritization of subsequent steps, determination of proportional levels of effort, or phases for a phased discovery plan:

- Tier 1 – Materials that must be sought (key sources/custodians)
- Tier 2 – Materials that may need to be sought (secondary sources/custodians)
- Tier 3 – Materials that may not need to be sought (tertiary sources/custodians)

Once you have completed this prioritization and grouping, you are ready to begin the investigation activities we will review next.

Initial Scoping Checklist

1. What are the events at issue, and what are the legal claims?
2. What internal and external individuals should be involved in brainstorming?
3. What questions do we have about the underlying events? What questions will they?
4. What materials might answer those questions for us and for them?
5. What are the elements of the relevant legal claims and defenses?
6. What materials might establish or refute each of them?
7. What individuals, devices, departments, or systems might contain them?
8. What distinctive characteristics might help you search or filter for them?
9. What is the relative priority of each potential source identified?
10. What grouping into tiers should be applied for planning subsequent steps?

INVESTIGATION ACTIVITIES

Once you have collaborated with knowledgeable individuals to brainstorm hypothetical materials and potential sources (and prioritize them), you are ready to begin investigating the facts on the ground to bridge the gap from your imagination to actual reality. A variety of investigative options are available for accomplishing this, including: targeted interviewing, data mapping, surveying, and sampling. Which one (or more than one) will be most useful to you will depend on your circumstances – in particular, your expected number and types of sources. For example:

- The larger your project, the more investigative steps you'll need to take
- The more systems and sources by count, the more useful a data map is
- The more custodians by count, the more useful surveys and samples are

Targeted Interviews

Targeted interviews are the easiest investigative step and a common first one. In this context, conducting targeted interviews is like conducting a limited number of custodian interviews with key personnel. This process is typically less formal (*i.e.*, no full script) and less complete (*i.e.*, most individual custodians aren't included) than the official custodian interview process, which will come later in the project. (As we noted above, planning an eDiscovery project is an iterative process that overlaps and intersects with other early project activities.)

Your goal in the targeted interviews is to review your list of prioritized, hypothetical materials with individuals that have knowledge of the potentially relevant enterprise, departmental, and third-party systems – as well as the computers and devices typically issued to individual custodians within the organization – to confirm or deny your assumptions and gather the information you will need to scope and plan further.

Targeted Interviews Checklist

1. Who is familiar with enterprise, departmental, and/or third-party systems?
2. Who can provide details about employee computers, devices, and usage?
3. Who else might be able to confirm or deny assumptions about what's there?
4. What details would you ideally like to know about the potentially relevant sources?
5. Has everything from your prioritized list been reviewed, detailed, and documented?

Surveys

As we noted above, the investigative options you need to undertake to test your project assumptions will depend on the specifics of your project, especially on its scale. Larger or more complex projects will require more – and more ambitious – investigative efforts. Surveys are particularly useful and important in projects that feature a large number of potential custodians.

Surveying in this context, like targeted interviews, is part and parcel of what would normally be your full, pre-collection custodian interview process. And, like targeted interviews, it is worth thinking about surveying as more than just collection planning. Beyond just documenting what7 technology devices or other materials a custodian has, surveying can help you test all of your assumptions about what exists, how/when/why it's generated, where and in what formats it is, what distinctive characteristics it bears, what priority it should have, who else might have it too, and more.

Surveying can be accomplished in a variety of mechanical ways, ranging from passing out and collecting paper forms to custom-building a secure web survey. In between those extremes, there are electronic forms built in spreadsheets or PDF documents. Leveraging PDF forms has some advantages, because the forms can be easily locked from editing outside the input fields, multiple field types can be used (e.g., checkboxes, radio buttons, free text entry), and responses can be easily extracted and aggregated using Adobe tools. Additional options include third-party web survey tools and the survey features included in some hold management software.

Getting a survey created and distributed takes a bit more lead time and costs a bit more money than just conducting a few targeted interviews, but the benefits for the right project make it well worth it, because once created, a survey scales freely across any number of custodians. Imagine needing to gather information from dozens (or hundreds) of custodians scattered across the country (or world) in different offices and departments. Targeted interviews alone would not provide you with sufficient information about what's potentially out there, and comprehensive interviews would take an enormous commitment of people, time, and money. In such situations, surveys – at least as an initial data gathering activity from which targeted follow-up interviews can be planned – strike an ideal balance.

Surveying Checklist

1. Do we need additional information from many potential custodians?
2. Would self-reported answers be sufficient for our current purposes?
3. Given the questions and recipients, what format makes the most sense?
4. How will answers be collected, aggregated, and made useful for planning?
5. How will completion tracking, reminder issuance, and follow-ups be done?

Data Mapping

Your next investigative option is data mapping. Data mapping is the process of "mapping" the various data stores and sources in an organization. Many organizations do some version of this already for non-legal purposes. For example, the IT or IS department may have "maps" of the organization's servers, computers, and enterprise systems, along with directories of installed software. A data map for the legal activities like eDiscovery, however, is a related but distinct thing. This kind of data map needs to combine system details, content details, and other key details (e.g., who owns it, any built-in export tools, etc.) to facilitate preservation and collection.

Ideally, data mapping for legal activities would be undertaken on a proactive, organization-wide basis rather than in response to a specific matter, but engaging in some targeted, reactive data mapping is better than none and well worth doing. (And, it can form the basis for proactively proceeding to organization-wide data mapping once the current matter is has concluded.)

In this context, you would be working your way down your potential materials/hypothetical sources list, reviewing them with relevant individuals (from IT/IS, Records Management, etc.) and reviewing relevant (information systems and records management) documentation, attempting to flesh out that list with concrete details. What you will be attempting to build is less a literal map than a spreadsheet or matrix. Your final product will be a searchable, sortable, filterable reference tool listing sources in rows and relevant details about them in columns.

Things you may need to know about each source include:

- Source type (e.g., enterprise, department, individual custodian)
- Owner/manager of source (e.g., specific IT contact, department manager, or custodian)
- Types, models, and years for source's hardware systems or custodian devices
- Versions, years, and other details for source's relevant software
- Available native search and export tools/features, if any, and relevant details
- Limitations of such tools, if any (e.g., one mailbox at a time, can't search nested content)
- Desired materials expected to be there (including expected formats, dates, etc.)
- Expected volume of materials from source (e.g., record count, file volume)
- Relative priority (and sensitivity, if applicable) of those desired materials

Gathering and organizing this information (or as much of it as time and circumstances permit) will enable you to scope and plan your needed preservation and collection activities with a high degree of precision. You will know which sources can be handled internally and which require specialists, which are likely to present technical challenges and which can be had quickly, and which are most likely to be really important and which are most likely to be duplicative.

Data Mapping Checklist

1. What kinds of hypothetical systems and devices are implicated by your list?
2. What details about those systems would it be most useful for you to know?
3. From where and whom within the organization could those details be gathered?
4. Have all relevant (and reasonably obtainable) source details been gathered?
5. Are those details consistently described in a manipulable spreadsheet or matrix?

Sampling

The final investigative option we'll review is sampling. In the land of eDiscovery, sampling is used to refer to both judgmental and statistical sampling. In this early project planning phase, both kinds of sampling can be useful.

Judgmental sampling is the informal process of looking at parts of something large to get an anecdotal sense of the whole. For example, attorneys are engaged in judgmental sampling when they run a variety of instinctively-selected search terms in a document collection to familiarize themselves with what's there. Judgmental sampling is also what you're doing when you select key individuals for targeted interviews, using them as proxies for the whole list of hypothetical custodians.

More importantly, though, judgmental sampling is a way to learn about what's on sources and systems that, unlike custodians, cannot self-report to you. This kind of judgmental sampling might take a variety of forms, such as:

- Testing/searching electronic mailboxes to test relevance before collection
- Indexing/evaluating some backup tapes to test for unique materials in backups
- Collecting representative custodians' laptops (or phones, etc.) to test relevance

Statistical sampling is the more formal process of taking simple random samples of sufficient size to reliably estimate properties of the whole set. For example, reviewing and coding 2,400 randomly selected documents from a million-document set to estimate, with a confidence level of 95% and a confidence interval of +/-2%, how much of the total is relevant (or privileged, confidential, etc.).

Depending on your project's scale and timeline, you may proceed from judgmental sampling to statistical sampling, by loading and coding formal samples from your initial, test collections. If you need to say with certainty whether a category of devices or sources is worth pursuing further, formal sampling of one or more devices' contents can provide that certainty, and if those contents are voluminous, formal sampling will do so far faster than broad review.

These sampling techniques are especially important in this era of increased focus on proportionality. Negotiations with opposing parties often happen in parallel with internal project planning and other early activities, and negotiations about the appropriate scope and scale of discovery are always more effective when assumptions can be backed up (or disproved) with actual facts and examples. This provides an additional use for, and benefit from, your investigative efforts. For years, judges have been emphasizing to parties the importance of using sampling to flesh out facts about what is and isn't actually there instead of fighting over theories about what might be.[7]

Sampling Checklist

1. Do we need additional information about what's on various sources or systems?
2. Do we need support for discovery negotiations as well as our own project planning?
3. Would judgmental sampling of one or more of the devices be sufficient?
4. Is formal statistical sampling needed to take more specific measurements?
5. How will the sampling process, including decisions and rationales, be documented?

[7] *See, e.g., Pippins vs. KPMG LLP*, 279 F.R.D. 245 (S.D.N.Y. Feb. 2, 2012), available at http://pdfserver.amlaw.com/legaltechnology/Pippins_v_KPMG_Order_20120203.pdf.

VOLUME AND COST ESTIMATION

Once you have completed your initial planning and completed your investigation activities to validate and flesh out your initial assumptions, you should be equipped with enough information to proceed to estimations of project volumes and potential costs. At a minimum, you need a reasonably accurate count of:

- Custodians requiring collection
- Devices per custodian requiring collection
- Mailboxes and network shares requiring collection
- Enterprise or departmental systems requiring collection
- Cloud-based sources requiring collection (e.g., Slack, Teams)
- Backup tapes or other loose media requiring collection

Volume Estimation

At this point, you should have some sense of how large each category of sources is (*i.e.*, laptop size, mailbox size, etc.) and how broadly you expect to have to collect (*i.e.*, full images vs. logical images vs. pre-filtered collections/exports). With this information, making an educated guess as to your initial collected volume becomes straightforward:

Custodians x (Sum of Issued Devices' Typical Sizes)

+ Mailboxes x Typical Size

+ Network Shares x Typical Size

+ Sum of Enterprise and Departmental Systems' Sizes

+ Estimate of cloud-based source volumes

+ Backup Tapes/Storage Media x Tape/Media Sizes

= Approximate Total ESI Volume to Collect

Once you have this number, you will need to make some additional assumptions and adjustments to project your likely downstream volumes.

First, you'll need to consider the expansion of the collected data volume that will occur at the beginning of processing. For example, your collected data volume will include some number of compressed container files (e.g., ZIP, RAR, etc.), each of which will expand into one or more files of larger size than when compressed. Other types of compressed and nested content also exist (e.g., local PST and OST email stores), and during processing all will be fully expanded so each element can be individually normalized, tracked, and reviewed. In particular, cloud-based collaboration tools are prone to significant post-collection expansion. The amount of expansion can vary widely – from as little 10%, to more than 40%, up to 1,000% in some cases – depending on just what was in the original collection. Collections from collaboration tools, in particular, tend to expand dramatically.

Second, you'll need to consider the immediate reductions that will occur from de-NISTing, deduplication, and the application of any objective filters:

- **De-NISTing:** It is standard practice to de-NIST each collection to eliminate system, software, and utility files that can have no bearing on the matter at hand. Just how much material will be eliminated depends on how narrowly or broadly the collection was done. Full disc images will be greatly reduced in volume; targeted collections of user files will not.
- **Deduplication:** It is also standard practice to globally deduplicate each collection so that only one copy of each record need be reviewed, managed, etc. Modern discovery software makes the tracking

of each place a duplicate was, as well as their later restoration and handling, simple matters. Email heavy collections will see the most volume reduction, as every party to an internal email communication may have duplicate copies of every message between them.

- **Objective Filtering:** It is also very common for a new collection to have some objective filtering applied during processing based on the scope of the case or the negotiated limits of discovery – for example, the application of date restrictions or file type restrictions. How much additional impact these filters will have on volume will depend on how narrowly targeted the initial collection process was.

As both parties and collection tools have grown more sophisticated in recent years, the trend has definitely been towards smaller, more-targeted initial collections that therefore reduce less during this phase. Additionally, it should be noted (when estimating volume for hosting costs) that the final, post-processing volume will expand slightly again when loaded into a review platform to accommodate the review platform's database file, extracted text files, etc.

A variety of tools and analyses are available to help you select your assumptions and do these sorts of estimations. The EDRM organization has collected several free calculators here,[8] and their own EDRM Data Calculator[9] is a good place to start. For moving on to cost estimations and other downstream planning, you may need to estimate not only total volumes, but also potential document or page counts (for review cost estimation). The number of documents or pages in a given gigabyte of collected ESI can vary dramatically depending on the source type and the collection method. Consult with your collection and processing service providers to determine a reasonable estimate for your specific circumstances.

Volume Estimation Checklist

1. How many of each kind of source do we have?
2. How large do we expect each individual source to be?
3. How broadly or narrowly do plan to collect for this matter?
4. How much volume expansion do we anticipate during processing?
5. How much reduction from de-NISTing, deduplication, and objective filters?

[8] *Budget Calculators*, EDRM, http://www.edrm.net/resources/budget-calculators/ (2020).

[9] *EDRM Data Calculator*, EDRM, http://www.edrm.net/resources/budget-calculators/edrm-data-calculator/ (2020).

Cost Estimation

At this point in your process, you have completed your initial planning, completed your investigation activities to validate and flesh out your initial assumptions, and you've completed your project volume estimations. You now have enough information to also do cost estimation:

- Source types and counts for estimating collection costs
- Projected collected volume for estimating processing costs
- Projected post-processing volume for estimating hosting costs
- Projected file/document counts for estimating review costs

As with volume estimation, cost estimation is now a straightforward process of multiplying your projected volumes and counts by your preferred service provider's price prices. Several of the calculators linked above for data volume estimation can be used to help you estimate pricing as well, and many service providers also offer their own calculator built to reflect their specific pricing model.

Estimation of the review costs portion does require some additional work. Simply dividing your projected document count by 50 documents per hour to get a total number of hours of review to be performed will not give you an accurate estimate. Instead, you must consider a number of additional variables:

- How much do you believe the collection can be further reduced during ECA?
  - *By using searching, sampling, filtering, clustering, etc.*
- Will you use near-duplicate identification and email threading to reduce further?
  - *They both reduce volume and increase review speed*
- Will review be traditional or technology-assisted (i.e., TAR or CAL)?
  - *The former takes more first-level hours, the latter more QC*
- How much training, oversight, and quality control time will be needed?
  - *Management, oversight, and QC increase exponentially with project size*
- How much privileged material do we anticipate needing to code and log?
  - *Assume a minimum of 5-10% privileged materials requiring logging*
- Do we expect many spreadsheets, technical drawings, or other difficult documents?
  - *If there are enough, establishing specialized workflows can save time*

All of these variables will affect how much must be reviewed, how fast it can be reviewed, and how many labor hours the total effort will take. An experienced eDiscovery project manager can help you think through these options and their effects.

Cost Estimation Checklist

1. What are our projected volumes before and after processing?
2. How much additional volume reduction do we expect after processing?
3. What review options and methods do we expect to employ in this matter?
4. How much privileged or technically-challenging material do we expect?
5. What price list, bundle, or model are we using for this matter?

ROLES AND COMMUNICATION

As you transition from your planning and estimation activities into the full eDiscovery project, taking time to predefine key roles and communication guidelines can save significant time and confusion later. Even a modestly-sized eDiscovery project is likely to involve individuals from:

- The client organization:
  - In-house counsel and support staff
  - IT and records management personnel
- One or more law firms:
  - Case team attorneys and support staff
  - Litigation support personnel
  - Internal or contracted review team personnel
- One or more eDiscovery services providers:
  - Forensic collection personnel
  - Data processing personnel
  - Document review personnel
  - Project management and support personnel

That is a lot of groups and individuals – each with distinct perspectives and priorities – to keep coordinated and moving towards the same goals. The clearer the roles and guidelines established at the beginning, the easier that will be to do.

Primary Points of Contact

eDiscovery projects generate phenomenal amounts of intra- and inter-organizational communications, especially during the first few phases of activity. To keep that communication flowing smoothly, it is useful to identify a single, primary point of contact for each organization. The majority of communication with that organization about the project should go through this individual, and they should be copied on any communications going directly to others on their team. This individual is typically a project manager for the service provider, a paralegal or litigation manager for the client organization, and a junior attorney or paralegal for the law firm. The identified individuals function as air-traffic controllers, ensuring that all traffic gets directed to the correct people within their respective organizations. They also serve as early warning systems that can keep an eye out for potential issues requiring priority or escalation.

Delegations of Key Authority

Another extremely common challenge of early discovery phases is getting key decisions made in a timely fashion. For example:

- Device acquisition decisions during on-site collection efforts
- Exception handling decisions during data processing
- Batch coding decisions during early case assessment
- Tagging palette change decisions during early review

Delays in any of these decisions – or many others – can cost money, as people and resources sit idle awaiting instructions. These delays can be mitigated or avoided by predetermining the scope of authority being delegated to key team members at each organization. Can the junior associate make these decisions without approval from the partner? Can the law firm without approval from the client organization? At a minimum, a designated decision-maker for on-the-fly collection scope changes should be identified before full-scale collection is begun.

Issue Escalation Paths

In any eDiscovery project, unexpected issues are inevitable: a custodian will fail to cooperate, a server will go down, a last-minute scope change will be made, etc. When those issues arise, it will be necessary to escalate the issues beyond the primary contact people for each organization and past the first-level decision-makers handling day-to-day activities. Senior management of a service provider may need to step in to ensure resolution, senior partners may need to make difficult decisions, or the AGC or GC may need to get involved to approve additional expenditures.

Knowing in advance how these sorts of issues should be escalated, and to whom, can save time, money, and frustration when those issues arise. You will want to know:

- Who are the after-hours points of contact at each organization and what are the preferred methods of contacting them?
- What is the escalation path at each organization, when primary points of contact or afterhours points of contact cannot be reached or cannot provide resolution?
- Who has final project authority and responsibility at each organization?

E-mail Communication Rules

Because of the large volume of email communication that will go on, and because of the legal significance of much of that communication, it is also important to establish some rules for that communication:

- First, how should the emails be labeled?
  - This includes, both any required privilege and confidentiality warnings that need to be applied to satisfy legal requirements, and any standardized subject line flag (e.g., matter name and number) to aid later identification, organization, and searching.
- Second, how should the emails be stored?
  - Since all of the emails are now relevant to the matter (even if all protected as privileged or work product), they must be preserved. Retention expectations and storage instructions (e.g., Outlook foldering and folder labelling instructions) should be communicated.
- Third, are there any restrictions on who can be included on project emails? Or on what can be discussed in them?
  - For example, some law firms or service providers may have a firewall between different internal project teams to avoid potential conflicts, or an organization may deem its proprietary business information too sensitive for any discussion in email.

Other Documentation Rules

Finally, you will want to establish some rules for any project documentation beyond email communications. These rules should specify how non-email materials should be labeled, stored, and screened, just as you have for email

communications. Beyond that, these rules should also cover any documentation that needs to be generated. For example:

- Are there recurring reports (e.g., weekly or monthly progress against budget) that need to be generated and distributed?
- Are confirmation emails to be sent documenting project decisions? Change logs?
- How should decision-making about culling and coding during ECA be recorded?

Establishing these rules from the outset will ensure that you have the materials and information you may need later to explain or defend the conduct of the project and its key decisions.

Role and Communication Checklist

1. Who will function as each organization's primary point of contact?
2. Who at each organization will have authority to make decisions?
3. How and from whom can after-hours assistance be obtained?
4. What is the escalation path for each organization?
5. Who is the ultimate decision-maker for each organization?
6. What protective language or identifiers should be used in email?
7. Are there any limits on the recipients or topics for email?
8. What are the storage and retention rules for email?
9. What are the labeling, storage, and retention rules for non-email documentation?
10. What recurring documentation, if any, needs to be generated?

A FINAL RECOMMENDATION

One final piece of advice for effective eDiscovery project scoping and planning: seek help from experienced practitioners early and often. It is quite common for organizations not to involve an eDiscovery service provider or independent expert in their eDiscovery project efforts until much of the initial scoping and planning has already been done – sometimes after the meet-and-confer has already occurred and an agreement has already been negotiated. Unfortunately, at that point it's already too late to avoid some of the pitfalls discussed above, and the negotiated agreement may not even be technically feasible.

So, it's worth remembering: you can always opt to involve a service provider or expert practitioner for a few hours of early consultation and planning assistance to help you check your blind spots and get off to a strong start, without committing yourself to outsourcing every phase of the project.

Key Takeaways

There are five key takeaways from this practice guide to remember:

1. **eDiscovery planning reduces risk and cost.** The most expensive mistakes are the ones made at the beginning, which can result in lost evidence or large-scale do-overs. Spending some time engaged in effective scoping and planning is an investment in avoiding those issues. Implementing some standard checklists to ensure the completeness and consistency of the scoping and planning process from matter to matter can be very effective.

2. **Imagine events in context, what might exist, and what's needed.** Thinking thoroughly through what is likely to exist, what you are likely to need/want, and what your opponent is likely to need/want is the best way to avoid key materials being missed or lost. Once you have a list, prioritize it by likelihood it exists, importance if it does, and chances of it being requested by the other side.

3. **Investigate as thoroughly as you need to test your assumptions.** Leverage one or more of targeted interviewing, surveying, data mapping, and sampling to confirm what exists and gather useful details. Data maps are most helpful for wrangling enterprise and departmental systems; surveys are most useful for wrangling large numbers of potential custodians; and sampling is a powerful way to replace hypotheticals with evidence and examples for planning and negotiation.

4. **Use your gathered data to estimate volumes and document counts.** Remember that volume will expand during processing – sometimes dramatically – and then reduce (some) due to objective filtering. Remember that loaded, hosted volume will increase again (slightly). Estimations of volumes and document counts can be used to estimate the costs for each project phase, but more variables must be considered when estimating review costs.

5. **Define roles and communication as clearly as possible.** eDiscovery projects typically involve numerous individuals from numerous organizations. Keeping everyone coordinated and moving towards a common goal is easiest when there are designated primary points of contact for each organization, pre-determined delegations of authority, clear escalation paths, and guidelines for communication and documentation in place.

ABOUT THE AUTHOR

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