

Consilio Institute: Practice Guide

CORPORATE COUNSEL GUIDE TO END-TO-END EDISCOVERY

By Consilio

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CORPORATE COUNSEL GUIDE TO END-TO-END EDISCOVERY

If you're in-house at a large corporation, chances are you spend most of your time – or would like to spend most of your time – delivering strategic legal advice to your business stakeholders and driving real business value for the organization. It can often feel as if anything outside of this is a distraction.

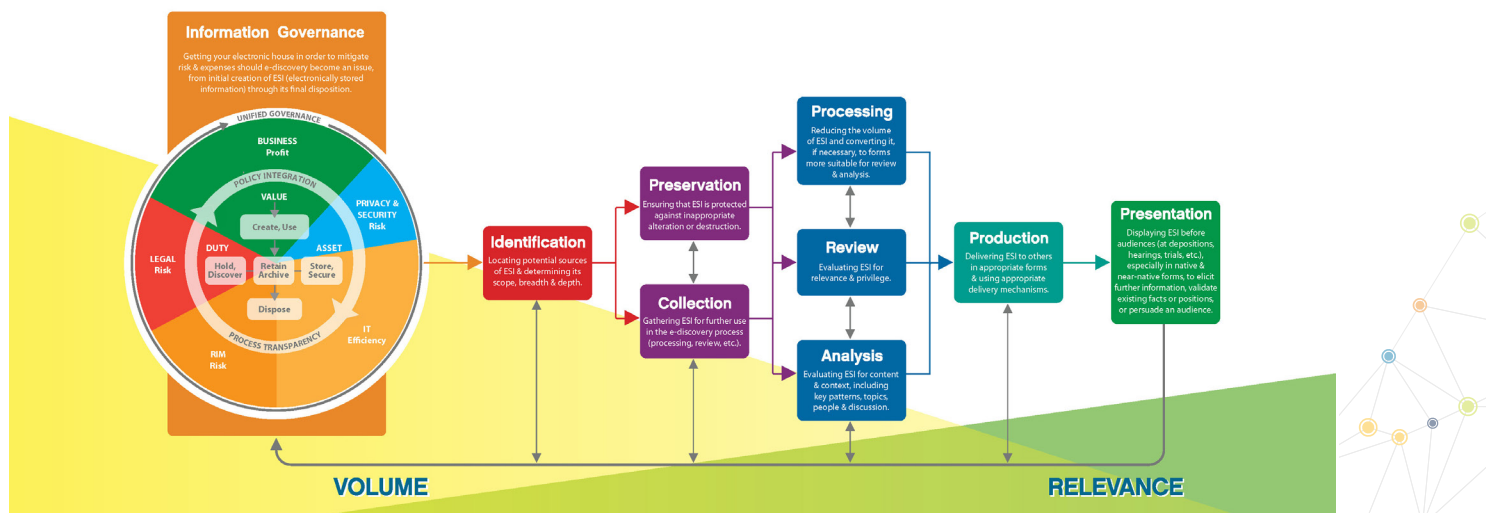
So when it comes to electronic discovery – the process of collecting, processing, reviewing, and producing documents and information for discovery during a litigation, investigation, or regulatory review – the nitty gritty details can feel like something that should simply be outsourced.

Terms like culling, de-duplication, forensic images, and metadata weren't taught in law schools until recently, and many in-house counsel don't use them regularly. However, the practical application of eDiscovery can be a boon to profit-making entities.

Read on for what you need to know to build an efficient, effective eDiscovery program inside your company's firewalls – and reduce costly distractions to your ultimate goals as an in-house lawyer.

THE ELECTRONIC DISCOVERY REFERENCE MODEL (EDRM)

The Electronic Discovery Reference Model details all the phases in the discovery lifecycle. Each of the phases presents a unique challenge to the in-house practitioner.



Source: edrm.net

Identification & Data Mapping: Information Governance

Knowing where your company's data is, who controls it, and when it ought to be destroyed is a massive undertaking at any organization. However, the identification phase of any eDiscovery project will be greatly aided by the existence of even a rudimentary data map, so the exercise is well worth it, with multiple downstream positive effects. A data map should include, at its most basic, a list of each department or line of business in your company, a list of the types and locations of information they control, and any retention/data disposition policies that are applied to that data.

To create an information governance program, begin with the end in mind – a complete, usable data map that can be used to streamline downstream eDiscovery processes:

1. **Begin at the beginning.** If one doesn't exist already, start by making a simple list of your organization's main service and/or product lines and departments. You'll also want to identify the areas, departments, or lines of business with the highest potential for litigation.
2. **For each area identified in Step One, put together an overview of the business.** Number of employees, what geographic locations they are in, and what systems they use as part of their day-to-day operations. Keep in mind that some departments may not have centralized operations, and you may need to help them identify systems they use by asking good questions or even job shadowing for a day or two.
3. **Work with your IT department.** Partner with your company's IT team to create a centralized company application database so, as litigation or investigations arise, you can easily get basic information about all company systems and who the IT and business owners of each system are.

The practical application of eDiscovery can be a boon to profit-making entities

4. **Make a list of your company's communication systems.** Consider the obvious, like email and voicemail, and the not-so-obvious, such as messaging platforms like Slack, Teams, Bloomberg, WeChat, WhatsApp, and so on. Interview each system's administrator about the type of system, the physical location of the servers housing the system, and the volume of information they store. Don't forget to ask about retention policies and any technical limitations that apply. For example, does your email system automatically archive email older than six months? Does voicemail older than 30 days stick around? Knowing all these answers can be valuable for downstream legal tasks.
5. **Document what you've learned.** Consolidating everything you've uncovered into one system or document is not only good business practice, it's also a legally sound practice. Memorializing your company's data map may allow you to prepare someone else to be a 30(b)6 witness, saving you a headache.
6. **Repeat steps 2 through 4 for every business unit, department, and region that is feasible.** Some business units may be very low-risk and may not be worth spending the legal capital, but document each decision anyway so you can revisit them down the road.

Consolidating everything you've uncovered into one system or document is not only **good business practice**, it's also a **legally sound practice**.

Preservation & Collection

Once you know what information you have within your organization, you are well prepared to meet discovery obligations once litigation is reasonably anticipated.

The next steps in the EDRM are preservation and collection – but which comes first? The answer to that is, as is often the case in the legal world, “it depends,” and it’s often both – depending on what you learned in the identification phase as well as on the features of the particular matter at hand.

A guiding principal to use when thinking about the preservation and collection steps of the EDRM is: the more risk there is that data may be lost if not collected, the more important it is to collect that data quickly instead of just preserving in place. For example, if data you need to preserve exists only on an individual’s smartphone, that data is at a high risk of loss if not collected. The device could easily be lost, damaged, or traded in for a newer one. The data might be deleted by the user, lost due to storage limitations of the app or device, or altered by an update to the app or the operating system. In contrast, if the data is stored on corporate enterprise systems (which often include

Legal Hold, Defined

“A communication issued as a result of current or reasonably anticipated litigation, audit, government investigation, or other such matter that suspends the normal disposition or processing of records. Legal holds may encompass procedures affecting data that is accessible as well as data that is not reasonably accessible. The specific communication to business or IT organizations may also be called a hold, preservation order, suspension order, freeze notice, hold order, litigation hold, or hold notice.”

Source: The Sedona Conference Glossary

Choosing the Right Legal Hold Technology

There are some great legal hold tools on the market to automate the tracking of the information you need about your legal holds.

- ▶ Be sure to understand your legal hold process before you purchase a tool – then look to tools and technology to enable your process.
- ▶ Ensure that you can always prove what you did, and when – and not have to spend an inordinate amount of time gathering and sorting to find out.
- ▶ This could be as simple as a database managed internally, or as complex as an enterprise-wide software deployment – do what’s best for your organization, its litigation profile, and the resources you have at hand.

reliable preservation, audit, and backup features), the risk of that data being lost is much lower, and it is likely safe to preserve it in place until you're sure about whether its collection is required for the matter.

Legal Holds

Legal holds are the first line of defense for preservation efforts.

A legal hold can be as straightforward as an email from someone within the company with authority, such as general counsel or associate general counsel and should contain at a minimum:

- ▶ A brief description of the matter
- ▶ What kinds of information should be preserved, or "held"
- ▶ Legal department contact information for questions — such as legal@ company.com
- ▶ Instruction on what to do meet their preservation obligations

Even at this most basic level, always make sure you document your process. Keep a record of:

- ▶ Who got the legal hold notice
- ▶ What the notice said
- ▶ When it was sent
- ▶ When the recipients received it
- ▶ When and how each recipient acknowledged receipt

Collection

Now that you've preserved potentially relevant data appropriately, collection should be much easier to accomplish.

Who. Take into consideration both the culture of your organization, as well as the culture of each individual

Choosing a Collection Tool and/or Consultant

There are many tools on the market you can use to collect data in a forensically sound manner. Questions to ask before choosing:

- ▶ Do you need an image of collected data, or just active data?
- ▶ Which tools will work best for what you need?
- ▶ Can your in-house team use the tool, or do you need help from a vendor or consultant?
- ▶ Do you have different needs at different offices or locations, depending on the team, data, and technological know-how available at each location?
- ▶ Are remote collection capabilities important to you?

business unit, department, and region when deciding "who" will send communication about collection efforts. Legal should draft the communication, but in some cases other executive leaders ought to "send" the communication and legal can benefit from the clout of that individual being the messenger.

How. How do you go about collecting all the data you'll need for your discovery efforts? Keep in mind throughout the process that you must be able to explain what you did at any given moment both during and sometimes even long after the process is over. If you should ever become involved in a spoliation hearing, how do you want to come across to the judge? Make sure you:

- ▶ Use technology and processes that can be explained to the judge and to your opponent, and
- ▶ The collection is logged and documented

eDiscovery Processing

After preservation and collection, you are ready to move on to the next step in electronic discovery: processing. At its simplest, processing simply means putting the data from collection into a format that can be searched, de-duplicated, and loaded into a system for review.

Once again, the key to eDiscovery data processing is documentation. Make sure you know what is happening to your data, how the process is quality checked, and that both of those things are memorialized in writing.

For example, if you give your eDiscovery vendor a terabyte of data, how can you prove the entire terabyte was processed appropriately? A good provider should be able to explain every step they take with your data in writing.

The key questions to ask yourself when choosing an eDiscovery vendor for the processing step are:

1. Does the vendor have proven experience, references, and a good reputation in the industry?
2. Are they willing to memorialize, in writing, what exactly they will do, in as much technical detail as necessary?
3. Does the process explain what data goes into the system, what happens to it while it's there, and what comes out?
4. What quality controls exist, and where, throughout the process?
5. How strong is the project management team that will be working with you? Will you have a dedicated project manager? What are the relevant individuals' qualifications?
6. Is the vendor working with you to create the right solution for your matter? Make sure the overall design of the vendor's process is in line with the goals of your case.

eDiscovery Processing, Defined

"The automated ingestion of electronically stored information into a program for the purpose of extracting metadata and text; and in some cases, the creation of a static image of the source ESI files according to a predetermined set of specifications, in anticipation of loading to a database. Specifications can include the de-duplication of ESI, or filtering based on metadata contents such as date or email domain and specific metadata fields to be included in the final product."

Source: The Sedona Conference Glossary

eDiscovery Review

Next up is the most expensive portion of the discovery process: review. This is known by many names, including lawyer review, attorney review, document review, managed review, and managed attorney review. Regardless of nomenclature, it just means that the information that has been collected and processed must now be reviewed for relevancy to the particular matter at hand. The "reviewers" may be a combination of human reviewers and software tools.

Understanding Review Timelines

First, know how long you have to complete the review. This can vary widely depending on the type of case, matter, or investigation you are tackling. Class actions and mass torts, for example, have longer lead times. Regulatory investigations, however, often have very compressed timelines. Second requests, for example,

require large volumes of information to be reviewed and produced very quickly.

You can perform some basic math to determine how long your review should take, and how you will need to staff your review project. To start, determine the number of documents (or pages) that must be reviewed and divide that total by an estimated number of documents (or pages) per hour of review. That review rate might be anywhere from 50-100 documents per hour, depending on the type and complexity of the materials to be reviewed. You can then divide up your total estimated hours of review work across different numbers of reviewers and weeks of work to find the right balance of size and speed to accommodate your budget and your timeline.

The numbers are easy, but establishing the right process can be complex. Your process must ensure that your review team makes consistent decisions, protects privileged and confidential materials, meets required deadlines, and stays within your budget.

A key part of establishing your review process is selecting the review platform you will use. There are

It's important you work with a provider that has expertise in a wide range of technologies & tools.

Review, Defined

"The process of reading or otherwise analyzing documents to determine the document's applicability to some objective or subjective standard. Often used to describe the examination of documents in a legal context for their responsiveness or relevance to specific issues in a matter."

Source: The Sedona Conference Glossary

many to choose from, each with different aptitudes and limitations. It's beneficial to work with a provider that has expertise with a range of platforms and can help you determine the best fit for your needs.

Past the review platform itself, there are a few types of technology on the market to be aware of that can help make any review project more efficient.

Tools & Technology to Speed Review

There is no substitute for legal know-how, but there are many types of tools on the market that can be deployed to defensibly reduce the ultimate amount of data for review by humans, reducing your overall eDiscovery spend and the amount of time your organization spends on a particular matter.

Technology-Assisted Review

Depending on the type and the provider, this may be referred to as technology-assisted review (TAR), continuous active learning (CAL), machine learning, or even AI. According to The Sedona Conference Glossary, TAR is:

A process for prioritizing or coding a collection of electronically stored information using a computerized system that harnesses

human judgments of subject-matter experts on a smaller set of documents and then extrapolates those judgments to the remaining documents in the collection. Some TAR methods use algorithms that determine how similar (or dissimilar) each of the remaining documents is to those coded as relevant (or nonrelevant) by the subject-matter experts, while other TAR methods derive systematic rules that emulate the experts' decision-making processes. TAR systems generally incorporate statistical models and/or sampling techniques to guide the process and to measure overall system effectiveness.



eDiscovery Business Intelligence Dashboards

Any eDiscovery project can benefit from a project management dashboard that can show you visibility into where you are in the process – especially during review, when you're managing to a timeline with both human and data factors that if not monitored, can veer off track. Look for a platform that:

- ▶ Is user-friendly and easy to understand
- ▶ Can be customized to show you the data YOU need to see for a particular matter
- ▶ Integrates and pulls data from leading review platforms
- ▶ Speeds budget preparation and can show ROI immediately

Agile Review Project Management

Whatever tool or platform you choose, you will still need some human beings to do the review. You have several options available:

- ▶ **Traditional law firm associate review:** A very expensive option, and less common nowadays.

- ▶ **Pass-through review:** Many law firms will hire contract lawyers and pass the cost through with no or slight markups. That can save a lot over law firm associate review; however, law firms are often not well-staffed to manage a large review project. Review project management is a specialized practice – from ensuring reviewers are working at adequate productivity and accuracy levels, to ensuring security protocols are in place to protect sensitive corporate data.
- ▶ **Third-party review companies:** These are organizations that specialize in review and work directly with law firms and in-house legal organizations to accomplish review in the most expedient and accurate fashion.

A good review vendor has:

- ▶ Deep expertise with the best document review platforms on the market
- ▶ Quality control practices to govern the reviewers, whether on-site in a review room, or in a remote capacity
- ▶ Deep expertise in agile project management methodologies

- ▶ The ability to report on productivity and error rates
- ▶ The ability to measure and quantify their progress and use these metrics to predict future costs

After review, it's time to produce the responsive materials you've identified and to use those materials to begin preparing for depositions, hearings, and trial.

Review Best Practices

Whatever combination of tools, technology, processes, and people you put together for any given review project, keep the following best practices in mind:

1. Establish a written review protocol for every matter. This can serve to prove later on that there was an organized approach to review, that your review team was well-trained, and that privilege review was addressed.
2. Take reviewer training seriously. Review teams are much more effective when they know how they fit in the case. Sharing case strategy with the teams looking at the information can provide downstream benefits – not least of which is, when you have another matter down the line, you can hire the same team who will have learned and improved from working with you, and be able to deliver better, faster, and more efficient service over time.
3. Regularly monitor review performance and metrics. When you are facing a motion to compel or production deadline, it's helpful to have the data behind your timeline. This will give you the ability to demonstrate reasonableness.

Conclusion

As an in-house attorney, eDiscovery can often feel like a distraction from the work you want to be doing: delivering strategic legal advice to your business stakeholders and driving real business value for the organization. All the nitty gritty details can feel like something that should simply be outsourced – and some of them can be. But outsourcing to the wrong partner can be as disruptive and distracting as any

internal effort. Successfully managing eDiscovery – including choosing the right partners, is essential to the outcomes of your matters and to the efficiency of your organization's legal spend. Familiarizing yourself with the range of options available to you and the best practices associated with them can result in finding better information, more quickly, and less expensively across all your matters.