



## Best Practices in Discovery Planning: Establishing Discovery as a Process

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# Executive Summary

For organizations in highly regulated or litigious industries, responding to legal and regulatory matters has become a normal course of business. The same activities must be carried out again and again, much in the same way as other acknowledged business processes such as planning, recruiting and invoicing. While each matter may be different, the process by which an organization responds can be standardized. Doing so results in a number of benefits, including:

## IMPROVED QUALITY AND REDUCED COST

- The process is repeatable and measurable, both of which are critical to optimizing effectiveness in an efficient and cost-effective manner, and to enabling improvement over time.

## BETTER DEFENSIBILITY

- A well-defined and documented discovery process demonstrates to the court a good faith effort and reduces the risk of sanctions in the event that the process is questioned.

## REDUCED DISRUPTION

- A systematic process that has been operationalized throughout the organization will help minimize the impact of litigation on other business activities.

However, establishing an effective discovery business process is a challenge. There are many considerations and no one solution will be applicable to all businesses. Organizations that have been most successful have followed a best-practices approach that includes: establishing ownership and accountability, enlisting help to navigate the process, performing an assessment, and selecting discovery services partners.

This paper – the first in a series that discusses best practices in discovery planning – details a best-practices approach for establishing discovery as a business process. In following papers, we will discuss approaches for building an effective discovery response team (DRT) and then for responding when a matter arises.

“Electronic discovery – and its supporting tasks and workflows – should be declared a business process. Doing so would allow organizations that are regularly responding to regulatory and civil inquiries to actually have metrics in place so they can see what this component of the overall legal/litigation process costs and how efficiently tasks and workflows are managed and completed. Then, companies can determine if and how they want to improve and automate electronic discovery, which should result in lower costs and risks. If these reasons do not compel organizations to at least consider making electronic discovery a business process, then the incentive of getting multiple departments to work together, better, should.”

– Enterprise Strategy Group

*Enterprise Strategy Group, “Declaring Electronic Discovery a Business Process,” December 2010.*

## Discovery needs to be a Business Process, not a Discrete Event

Litigation – and, as a result, e-discovery – is a routine part of doing business today for many companies in heavily regulated or highly litigious industries. According to Fulbright & Jaworski, “The vast majority of corporate counsel polled in the U.S. and the U.K. predict litigation will either rise or remain the same in the next 12 months: 92% of U.S. companies and 85% of U.K. companies.”<sup>1</sup> Historically, companies facing litigation responded to discovery matters as individual projects – or worse, as fire drills. This approach is not optimal because it:

- Lacks efficiency, costs more, and requires greater time and effort to manage
- Makes it hard to ensure a complete and defensible process
- Subjects the organization to greater scrutiny and possible sanctions
- Inhibits process improvements and development of best practices

Courts have raised their expectations for corporate discovery efforts and are increasingly intolerant of shortcomings resulting from a reactive approach. Gibson Dunn, in its semi-annual *Electronic Discovery and Information Law* report<sup>2</sup>, noted: “In general, courts awarded monetary

<sup>1</sup>Fulbright & Jaworski, “2011 Fulbright Litigation Trends Survey,” 2011.

<sup>2</sup>Gibson Dunn, “2011 Mid-Year E-Discovery Update,” July 2011.

sanctions to compensate aggrieved parties for the fees and costs incurred in bringing the motion for sanctions and any other injury caused by the discovery misconduct.” The report cites a number of examples including:

- *IOWI, LLC v. Monaco Coach Corp.*, No. 07-3453, 2011 WL 2038714, at \*5 (N.D. Ill. May 24, 2011)  
“The defendant failed to search its network drives and was required to pay half the costs of the forensic search that the plaintiff subsequently conducted. (The defendant was not required to pay the full amount because the search only turned up one responsive email.)”
- *Surowiec v. Capital Title Agency, Inc.*, No. CV-09-2153-PHX-DGC, 2011 WL 1671925, at \*7 (D. Ariz. May 4, 2011)  
“[Imposed] an adverse inference sanction for gross negligence for failure to preserve a computer after receiving notice of lawsuit.”
- *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010)  
“According to Judge Scheindlin, a party’s failure to issue a *written* legal hold notice constitutes gross negligence *per se*, supporting an inference that relevant evidence was destroyed, that the opposing party was prejudiced, and that sanctions are justified unless the party rebuts the presumptions.”
- *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, No. 08-CV-561S(F), 2011 WL 1549450, at \*1, \*4-5 (W.D.N.Y. Apr. 21, 2011)  
“...the plaintiff’s corporate counsel implemented a legal hold orally through conversations with the company’s President, Vice President of Business Development and six other managers and officers... The court rejected the defendant’s argument that relevant documents that were not produced should be presumed lost and sanctions imposed.”

A small number of leading organizations have come to terms with the fact that discovery is a necessary part of doing business today and are now treating it as a business process. This means they are developing a strategy, establishing accountability, and putting in place procedures and resources. As a result, they are successfully controlling costs and better managing risks. But according to a survey performed by The 451 Group, “Most companies still have no repeatable e-discovery process or dedicated staff in place, with the overwhelming majority continuing to ‘do it themselves’ using existing internal tools and staff.”<sup>3</sup>

Recognizing that discovery needs to be a business process is just the first step. To implement an effective discovery process, organizations need to:

- Establish ownership and accountability and, if necessary, enlist help to navigate the process
- Perform a discovery assessment to understand their current position
- Select the appropriate discovery services partners

## Establishing Ownership and Accountability and Enlisting Help

For any business process to successfully take hold, it requires ownership – backed by executive sponsorship – and accountability held by someone in a position of authority and influence within the organization. In most companies, ultimate ownership of and accountability for discovery lies with general counsel, and it often must also be a priority objective for IT, records management, compliance, and other related functions. In some organizations, the CFO is also starting to take an active interest and pushing procurement to get involved as it relates to outsourcing or acquiring technology.

Whether the first step is initiated by the GC or by the CFO or procurement, the next challenge is to overcome organizational politics and/or inertia. For many organizations, this is most effectively accomplished by hiring or appointing an attorney or an IT or other highly technical resource to spearhead the initiative under the guidance of the GC. Alternatively, organizations can hire a consultant or a service provider can be engaged to provide guidance, expertise, and best practices throughout the planning and process development phases. Bringing in outside help can add a depth of expertise to an organization that is not available internally. In any case, it’s important to bring help in as early in the planning cycle as possible.

## Perform a Discovery Assessment

Before you can build a discovery process, you need to understand your current and desired discovery profiles as well as the costs, risks, and benefits associated with the decisions that will need to be made in order to make the appropriate choices for your organization.

The first step is to understand your litigation profile, which will inform the decisions you need to make during the

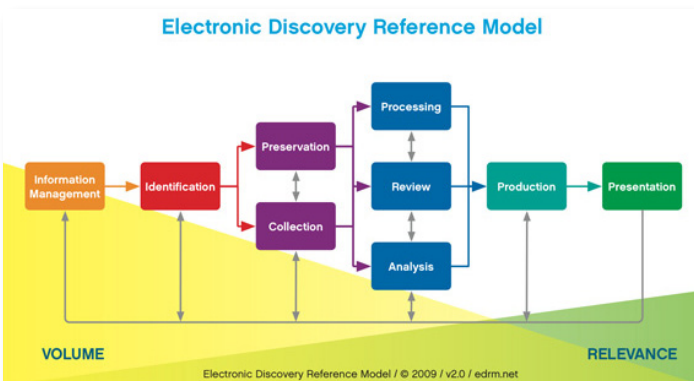
<sup>3</sup>The 451 Group, “E-Discovery and E-Disclosure: Bringing it all Back Home,” April 2010.

discovery assessment. A discovery process is not a one-size-fits-all proposition; the optimal process for a Fortune 50 pharmaceutical firm is likely to be very different from one for a \$100 million high-tech company. Determining the best policies and processes for your organization will depend on factors such as:

- Whether you are in a highly regulated industry
- The volume of litigation your organization is involved in
- Whether your organization is involved in a significant volume of M&A activity (for which HSR Second Requests can require aggressive discovery schedules)
- Your organization's appetite for risk

The next step is to identify everyone who currently gets involved in discovery when a matter arises. Make sure you include all service providers that are engaged to assist your organization's discovery efforts at any stage during a matter. These individuals and partners will provide critical information during the discovery assessment.

Finally, you need to perform a discovery assessment. The Electronic Discovery Reference Model (EDRM) provides a useful framework to help guide the assessment process. By stepping through each phase to understand the current approach and weigh it against alternatives, you can make an informed choice about the best approach for your organization moving forward.



Following are the common options for key phases of the EDRM, along with considerations to help you make the right decision for your organization based on cost, risk, reward, and effort required.

## KEY STEPS IN THE DISCOVERY ASSESSMENT

1. Document current processes as they relate to discovery.
2. Gather and review existing policies and procedures.
3. Interview employees and third parties who are involved in discovery-related activities, including legal, IT and others.
4. Identify the costs related to discovery so you understand current spend and can identify potential opportunities for savings.
5. Understand how your organization currently responds to matters and where ownership of the process resides.
6. Evaluate the technology and infrastructure currently in place.
7. Identify challenges in the current approach. Are costs too high? Are your resources constrained? Are you limited by technology? Are there other challenges impeding efficient and effective discovery?
8. Evaluate alternatives based on your litigation profile and your available budget/resources; consider whether you should bring in third-party vendors and/or technology.
9. Define and implement the desired approach.

## INFORMATION MANAGEMENT

Information management – which revolves around your organization's infrastructure – is usually handled in-house, although some corporations hire consultants to help assess the infrastructure. Stakeholders include but are not limited to IT, legal, risk, and regulatory departments.

You want to review your data retention and destruction policies and procedures to determine if the policies are consistent across the organization and whether they are being followed, including:

- Emailing archiving policies, procedures, and mailbox size limits.
- Where employees are allowed to save information, how long it stays there, and how it gets archived.
- Information lifecycle management policies. These storage and information policies generally tie into a framework of overall IT governance and management.

- SLAs with cloud providers. Ensure contracts with cloud providers include provisions for the discovery process.
- Social media policies. These policies help manage the volume and type of information that employees publish via social media vehicles.

This information will help you understand the amount of data that could potentially be part of a discovery event as well as the effectiveness of the policies and procedures currently in place. It is important to recognize that judges have been known to sanction organizations that have policies but don't follow them, for example:

- *Northington v. H & M International* (N.D.Ill. Jan. 12, 2011)  
 “The court issued an adverse inference jury instruction against that company because it spoliated significant emails and other data. The genesis of this spoliation was the company’s failure to establish a formal document retention policy.”<sup>4</sup>
- *Haraburda v. Arcelor Mittal U.S.A., Inc.* (D. Ind. June 28, 2011)  
 “...the court tied a litigant’s preservation duty to its document retention efforts. In order to discharge its duty to reactively preserve evidence, the court reasoned that enterprises must proactively create ‘a “comprehensive” document retention policy that will ensure that relevant documents are retained.’ Failing to implement a retention policy often results in a loss of key information and this, opined the court, may result in sanctions.”<sup>5</sup>
- *Micron Tech. v. Rambus*  
 “...the district court for Delaware held that the implementation of a document retention policy around the time that Rambus was already preparing its litigation strategy to enforce its patent portfolio, and Rambus started and was continuing to destroy documents until just prior to filing its suit, was evidence of spoliation. The court imposed the most severe discovery sanction, and declared that the patents in suit were unenforceable against Micron Tech.”<sup>6</sup>

You should also develop a data map and a schedule to keep it up to date. A data map documents how electronically stored information (ESI) moves through the organization from creation to storage and, ultimately, destruction. A

comprehensive data map includes information about employees, processes, technology, data types, physical and virtual data locations, retention policies, and enterprise content management programs. A data map can even help the legal department ensure that storage and backup are performed properly according to corporate retention policies.

Finally, if your organization has or is considering investing in a document or information management system, understand who is responsible for interacting with legal and IT from a discovery standpoint. If you have this technology in place, determine whether it is adequate to meet your desired-state needs or whether you should consider enhancing or replacing it. Assess how this and other technologies fit into your overall e-discovery workflow.

## PRESERVATION

Preservation of information as it relates to legal hold is typically managed in-house. Corporations are increasingly using technologies – such as legal hold software – to help automate the process. If you are considering acquiring legal hold technology, make sure your organization is willing to make the capital and resource investments to maintain the software. There are SaaS-based options which reduce the capital expense required to implement the technology, but you may want to weigh the lower total cost of ownership against the reduced control and security implications of having your data housed externally. You should also consider whether you need to engage an outside consultant or service provider to manage the system for you.

Consider adopting ARMA International’s *7 Steps for Legal Holds*<sup>7</sup> as a best-practices approach to preservation. The steps are:

1. Identify trigger events
2. Analyze preservation duty – is a legal hold required?
3. Define the scope of the legal hold
4. Implement the legal hold
5. Enforce and examine the effectiveness of the legal hold
6. Modify the legal hold, if necessary
7. Monitor and remove the legal hold

<sup>4</sup> Favro, Philip, *E-Discovery 2.0*, “Proactive Retention Means Effective Preservation in eDiscovery,” September 22, 2011.

<sup>5</sup> Ibid.

<sup>6</sup> Sherman, Michelle, *Social Media Law Blog*, “E-Discovery Rules Applied to Social Media: What This Means in Practical Terms for Businesses,” January 18, 2011.

<sup>7</sup> Isaza, John J. and Jablonski, John, *7 Steps for Legal Holds of ESI and Other Documents*, 2009.

Make sure you frequently update your legal hold policies and procedures.

And finally, develop appropriate training materials and educate employees on the importance of and process for legal holds.

## COLLECTION

As the cost of storage continues to plummet, the volume of corporate data stored in-house continues to explode. At the same time, social media and cloud-based systems are storing increasing volumes of potentially discoverable data outside your IT department's control. These trends are creating challenges that increase the difficulty and risk of the collection phase. A few tools – such as X1 Discovery and NextPoint – are available to help preserve or collect ESI from social media.

There are a number of ways you can approach collection: it can be performed in-house, outsourced to a service provider, or you can employ a hybrid approach.

In the pure outsourced model, organizations use a service provider to perform collection for every matter. On the other end of the spectrum, you could acquire the appropriate technology – such as Guidance Software, AccessData, or Clearwell's collection module – and perform all collection in-house. Some corporations opt to control collection internally in an attempt to reduce cost. This option does, however, include a level of risk:

- You assume full responsibility for managing the collection. If something goes awry, you could risk losing a lawsuit based on a process problem that has no bearing on the merits of the case.
- In addition to investing in the technology, it is your responsibility to ensure that employees performing the collection have been properly trained and that protocols are strictly followed.

A third option is to acquire the technology but outsource the collection process to a service provider. This hybrid approach offers the flexibility to manage small collections in-house but use the provider for larger or more complex collections.

When evaluating the options for your organization, you want to consider the following questions:

- Are you willing to make the capital and resource investments to acquire and maintain collection technology in-house?
- Do you have the expertise and resources to support consistent, defensible collections without causing undue strain on normal business operations?
- Are you willing to take on the additional risk associated with in-house collection? Is that risk

acceptable for smaller matters but not for larger cases?

- If you already have technology in place, is it adequate or do you need to consider replacing or enhancing it?
- Are you willing to have someone at your company testify to the efficacy of a collection or be deposed over the work they performed?

## PROCESSING

Processing is predominantly done externally by outside counsel or a service provider. There is, however, a trend of bringing some processing in-house via technology – such as Guidance Software, AccessData, Clearwell, Tunnel Vision, Autonomy, etc. – which can help reduce the costs and risk of e-discovery, if managed properly. If you are considering bringing such technology in-house, you want to answer the same questions that were considered when evaluating technology options for the collection phase.

If you've chosen to work with an outside provider, you want to streamline the process as much as possible in order to ensure efficiency as well as manage costs. Document processes and workflows across the e-discovery lifecycle and create process audits at various check points. This will enable you to minimize business disruption and plan accordingly as well as help you predict costs and lower the expense of complying with e-discovery requirements.

## HOSTING

Hosting is also predominantly handled externally as most law firms rely on service providers. And while some organizations that have invested in end-to-end solutions (e.g., Clearwell) will allow a small team of in-house and sometimes outside counsel access to conduct smaller-scale reviews, this is not often feasible, primarily due to security reasons. Outside counsel must be able to log in and review data but most corporations restrict external users – including outside counsel – from accessing materials related to litigation. If using in-house software for hosting is an available option for your organization, make sure you have the additional resources and expertise needed to support the process effectively. Reviews can often take place on a 24x7 basis and many organizations are not set up to support this function in the way that most third-party service providers do today.

## REVIEW

Review is often the most costly phase of the e-discovery process. Finding ways to improve the efficiency of the review process – while maintaining defensibility – can lead to significant cost savings. Outside counsel performs review by utilizing their own resources, typically associates, or by outsourcing the process. There are two industry

models for outsourcing document review – the staffing model and the managed review model. In the staffing model, a law firm or client specifies reviewer qualifications and a staffing agency locates and vets the reviewers to assemble the team. A managed review provider typically provides a review team as well as facilities, technical support, and project management, and shares with counsel responsibility for managing an efficient and defensible process.

You can allow outside counsel to determine which review provider is used, or you can establish relationships directly with one or two service providers. Working with the same provider across matters enables them to become familiar with the types of documents within your organization as well as your custodians. This leads to increased efficiency – e.g., reviewing more documents per hour – which can, in turn, deliver long-term savings.

When evaluating review providers, consider whether they offer onshore, offshore, or blended options. Flexibility in location helps organizations manage cost. For example, some companies keep patent and other IP-related matters onshore or nearshore and utilize offshore review for less sensitive matters to maximize cost savings. Organizations that want to “test the waters” of offshore review often take a phased approach. Look for a provider that offers onshore/nearshore and offshore options to ensure they can support your needs now and over time.

Technology-assisted review, also known as predictive coding, is another consideration. Review is people-intensive and finding ways to automate portions of the process can help reduce costs. The technology won't replace people, but can be used to streamline the review process to deliver time and cost efficiencies. The technology shows promise and, while it has not yet been broadly adopted, more and more corporations are using it to facilitate at least some portion of the review process. Even if you outsource the review process, you should understand the benefits and potential risks and have a say in the technologies and approaches used by your provider.

## Select the Appropriate Discovery Services Partners

Once you've completed the discovery assessment, you should have a good sense for which phases of the process you will handle in-house and which you want to outsource to a discovery services partner. When identifying potential partners, look for providers who can support all the work you wish to outsource. A provider who can support all of your e-discovery needs will be able to deliver efficiencies – and avoid common bottlenecks and hand-off issues that can arise when services are delivered by a group of point-solution service providers.

Since there may be matters in which a provider also works with the opposing side, most organizations establish strategic relationships with two or three providers. This offers the best balance between the efficiency gained from working with a consistent provider and the risk of a potential conflict if sole-sourced. If you plan to establish a long-term strategic partnership with your provider, build in agreements that can help prevent conflicting them out of supporting your needs. Your provider will be familiar with your company, data, and processes so ensure that they are contractually obligated to check with you before taking on new clients that have the potential for legal conflict with your organization.

## Conclusion

Proactively establishing discovery as a business process, rather than reacting to discovery matters on an ad hoc basis, enables you to ensure a complete and defensible process that also controls costs and reduces business disruption. The critical first steps are to perform a discovery assessment and to select the right providers that will deliver the most value to your organization. This will arm you with the information and resources you need to define and implement the discovery process that is best for your organization. At this point, you will be ready to build an effective DRT to manage the process and respond when a matter arises, which will be discussed in detail in the next papers in this series.

## About Integreon

Integreon is the largest and most trusted provider of integrated e-discovery, legal, research and business solutions to law firms and corporations. We integrate services and technologies to support you from the beginning of the discovery process to the end. We are the only provider that offers a full suite of integrated solutions with on-site, onshore, and offshore services. Our range of integrated services offers you flexible e-discovery options – we can help you choose just the services you need or you can take advantage of our end-to-end solution that can be delivered with a per-document, fixed-price to help you better predict and manage your legal costs. Our project management approach – which focuses on consultative planning, disciplined execution, and repeatable results – enables us to deliver a transparent, consistent, high-quality, end-to-end client experience.

Learn more at [www.integreon.com](http://www.integreon.com).

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