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eDiscovery Policies: Planned Protection Saves More than Money Anticipating and Mitigating the Costs of Litigation

Introduction: Rising costs of litigation

The chance of your organization being involved in litigation is rising each year. World media is bombarded by legal drama on television almost nightly. A glance at the daily newspaper quickly makes it clear that this is not simply fiction for viewing pleasure. We are operating in an increasingly litigious business environment. What steps are you actively taking to ensure you are not simply rolling the dice, hoping you are prepared? You can bet that the likelihood your organization will face litigation at some point is pretty strong. Putting policies in place now can reduce your risk along with your costs.

When it happens to you, that is the worst time to discover just how costly litigation is for organizations not prepared for eDiscovery. The latest revision of the Federal Rules of Civil Procedure has elevated electronically stored information (ESI)—the data stored on computers, like email and memos—to the same high level of importance as traditional paper-based documents. The importance of ESI dramatically raises the cost of litigation by making the vast quantities of electronic data most organizations routinely save now subject to the costly legal discovery process.

For example, Purdue Pharma L.P. spent more than \$400 million defending consumer claims against its drug product, OxyContin. As reported in the Wall Street Journal at that time, the company engaged 40 law firms in 32 states to fight the OxyContin actions. The effort engaged 322 partners, 849 associates and 1,023 paralegals who worked on the case and billed the company for more than 1.2 million hours of work. Much of the cost was attributed to their eDiscovery process. Could your organization foot those bills?

Certainly the pharmaceutical company represents an extreme case. The expense details only came to light when Purdue Pharma's insurance company balked at paying the bill and the two parties ended up in court. However, the case offers a clear warning about the need to anticipate legal costs and prepare ways to mitigate the high cost of costly Electronic Document Discovery (EDD) or traditional discovery requests. Putting simple retention policies in place is your first line of defense. "An ounce of prevention..." as the saying goes.

This white paper reviews the litigation data handling process, identifies primary factors impacting litigation costs, introduces strategies to reduce litigation costs, and provides a model to assess and predict litigation costs. Using this paper as a guide, puts you in a better position to estimate the time and expense you'll face when litigation invariably knocks on your door. By implementing the strategies outlined below as your "playbook" you will be able to manage those costs.

Data handling drives litigation costs

Before computers and information systems became so pervasive the important documents in litigation existed primarily on paper and were stored in file cabinets. These file cabinets took up considerable space, and companies set up file storage areas populated by rows of file cabinets and cardboard storage boxes. The companies also employed a small clerical team to maintain and continuously cull documents from these areas when they were no longer required.

Companies did not generally keep multiple versions of the same document due to space limitations. Nor did they save and file every scrap of paper for the same reason. During litigation a discovery request might be arduous, but it was manageable because there was a finite amount of data and the organization knew where and how to find it.

The advent of ESI and its importance in the litigation process changes everything from a discovery cost standpoint. Instead of continuously weeding electronic documents organizations store almost everything. They not only save multiple copies of the same document, but multiple copies of previous, slightly different versions. Similarly, instead of having all the documents concentrated in a single file room or warehouse, documents are stored by hundreds of applications on dozens of storage systems spread all over the enterprise. Many emails are also printed out as “hard copy backups” creating even more duplicates which increase your costs of scanning and coding. In the event of litigation, important documents might be on laptop computers out in the field, desktop systems, departmental servers, and backup tapes shipped to an offsite storage facility as well as on the organization’s primary, secondary, archival storage systems. All of this is potentially subject to discovery during litigation.

In this new digital era come different challenges in cataloging the vast amounts of data stored. Organizations have to undertake complex metadata coding to identify and index this electronic data. The legal industry has helped with some of this by providing templates for the standard objective coding of documents, but much subjective coding usually still remains to be done manually, which will add to the cost in both time and money. As shown in the earlier example, the subjective review and coding costs are a main contributing factor to eDiscovery costs.

Finally, the revised Federal rules have substantially accelerated the discovery process, stipulating that planning for discovery should begin almost as soon as the litigation is filed. This leaves very little time to find and organize data before court-imposed deadlines start hitting. This compressed time table invariably adds to the cost of litigation.

Primary litigation data cost drivers

With paper documents, it was easier to understand litigation costs. This is due to several factors:

- Less data in general
- Continuous culling of documents
- Better knowledge of the data content and location

In the ESI era, organizations have far more data and a lot less control. Most have not been aggressively enforcing enterprise-wide retention policies that would reduce the volume of data. Also, the organization does not know exactly what data it has stored. Many organizations don’t even know how much actual

data they have, what that data is, or even where it resides. This can cause delays and costly searches, especially when this data may reside in multiple places.

Using the following factors, you can begin the process of understanding and anticipating your litigation costs:

- Number of pages (1000; 10,000; 1 million)
- Volume of stored data (usually in GB or TB)
- Document types (email, text documents, rich media, structured data)
- Knowledge of data (what the data is)
- Organization of stored data (how the data is indexed, classified)
- Location/accessibility of stored data (where it is, how it is accessed)

Getting a handle on the magnitude of your potential litigation and discovery challenges is imperative as you begin to estimate the cost in terms of people, hours, and per-GB/per-document fees.

Strategies to reduce data handling costs

The key to lowering your cost of litigation is to implement strategies that will reduce the volume of data and reduce the amount of work required to find and access it. These strategies address ESI retention, document management, and automated tools.

ESI Retention Policy

The first strategy is the development, implementation, and enforcement of an enterprise-wide retention policy. This should be undertaken as a joint effort between top management, the general counsel, and the information systems staff. The best advice you will get: **DO IT NOW**, *before* you are involved in litigation. Establish the policy and then make sure your retention policy is widely communicated and consistently enforced.

The goal of a retention policy is to guide the organization in keeping the information it needs for only as long as it is required and not a moment longer. When information is no longer needed, whether for regulatory or business purposes, the retention policy should direct its immediate removal. Of course, when litigation hits, holds are put on certain data that preserve the data superseding any retention policy in place. Otherwise, companies need to regularly delete ESI based on the retention policy just as they do their paper documents. This retention policy must also cover hardcopy backups of the ESI or the exercise was futile.

eDocument Management

A second strategy is to follow good document management practices. These range from classifying your ESI and tagging it with appropriate metadata to consolidating the data so it can be effectively managed, protected, and accessed. Companies also need to define roles and responsibilities. Someone, for example, needs to ensure the right data is preserved in the face of a legal hold. Companies get into litigation trouble when data they should have preserved has been removed or data they told the court didn't exist suddenly turns up.

Between an established retention policy and good document management practices, the organization should know what ESI it has, where it is located, and how to find and access it. This represents good business and information systems practice in general. Even without litigation, this action will help to protect the company's stored data.

Automated Tools

For our third strategy, the organization should consider investing in automated tools to facilitate the ESI management process, particularly in the areas of near-duplication and email threading.

De-duplication tools search your ESI for duplicate copies, but the search for near-duplicate copies requires a far more robust search tool. Organizations routinely save multiple copies of electronic data because it is so easy to share copies. These copies are exactly the same. The nearly duplicate copies represents a larger percentage of the copies in a thread, thus representing a higher cost in their review if not flagged and removed by the tool. This duplicate data is costly from the standpoint of wasting storage resources. It also drives up the cost of litigation by forcing you to unnecessarily search through what amounts to redundant data. Near-duplication tools such as **Equivio™** will identify duplicate copies for removal and flag near-duplicate copies of data by highlighting the percentage of difference between copies. The reviewer then only needs to review and evaluate the changed data in order to determine its fate. Obviously, this will save countless hours of drudgery in reviewing near-dup documents.

Email has emerged as a critical source of evidence in much of today's litigation. In one example, the Financial Industry Regulatory Authority ordered the investment firm Morgan Stanley to pay \$12.5 million in fines to resolve charges of mishandling e-mail. Specifically, the company often failed to provide e-mails requested by claimants in arbitration proceedings and by regulators, according to the agency. The lesson: pay careful attention to how you handle email.

Email threading tools use a variety of techniques to organize and group related email messages. Basic tools will rely on simple email headers and to/from/subject fields. Other tools will do more sophisticated context grouping based on the content of the messages. These tools save considerable time and effort during ESI searches that look to produce every message related to a certain issue. Missing any message, even a tangentially related message, can have serious ramifications.

By implementing these three strategies—retention policy, edocument management practices, and near-duplication/threading tools—organizations can significantly reduce the amount of ESI they must contend with. Not only will this save money and improve efficiency every day, but it will put the organization in the best position to minimize the rising cost of litigation.

doeLegal litigation cost assessment model

The implementation of a clear, well documented and widely communicated retention policy combined with good document management practices enables the organization to reduce the cost of litigation and improve the efficiency and accuracy in responding to eDiscovery requests during litigation in two ways:

1. Significantly minimizes the initial number of documents to be collected, resulting in sizable cost savings for all subsequent eDiscovery phases

- Ensures the appropriate actions, roles, and responsibilities are in place in the event of a litigation hold, effectively increasing the efficiency and accuracy of the response while minimizing the risk of court imposed sanctions and penalties

Similarly, the use of automated software tools to identify and group duplicate and near-duplicate documents and email threads will reduce document review time, which is one of the most costly components of the eDiscovery process. It does so by organizing, grouping, and analyzing near-duplicate documents based only on the differences in the content. In the same way, it speeds the review of email by requiring the review of only the last email in a thread, which contains all the previous messages in the thread. The resulting savings can be significant, as the model below demonstrates.

The *doeLegal Litigation Cost Estimation Model* shows the baseline cost of litigation along with the savings that can be achieved by implementing our three cost reduction strategies. Fully implementing these strategies can cut the cost of eDiscovery in litigation almost in half.

The *doeLegal Litigation Cost Estimation Model* uses the following baseline data for a typical eDiscovery exercise.

Number of Pages	2,000,000
Number of GBs	200
Number of Documents	200,000
Percent of eMails	25% of documents (50,000)
Percent of Paper vs. ESI	10%
Average Attorney Hourly Rate	\$150
Sample baseline data	

doeLegal Litigation Cost Estimation Model

Activities	Baseline Costs	Costs With Retention Policies & Electronic Document Management Practices (Note A)	Costs with Equivio Near-duplicate Software (Note B)	Costs With Equivio eMail Thread Software (Note C)
EDD				
Scan (\$0.03/page)	\$6,000	\$5,100	\$5,100	\$5,100
OCR (\$0.03/page)	\$6,000	\$5,100	\$5,100	\$5,100
Extract, search, TIF conversion (\$0.03/page)	\$54,000	\$45,900	\$45,900	\$45,900
Objective Coding (\$1.00/document)	\$20,000	\$17,000	\$17,000	\$17,000
REVIEW				
Review & Subjective Coding \$150/hr, 10 documents per hour)	\$3,000,000	\$2,550,000	\$2,103,750	\$1,753,125
Near-duplicate @ \$0.12/document			\$20,400	\$20,400
Total Costs	\$3,086,000	\$2,623,100	\$2,197,250	\$1,846,625
Savings		\$462,900	\$888,750	\$1,239,375

Notes:

- A. Assumes a 15% reduction in number of pages in initial collection resulting from utilizing sound retention and document management policies & practices.
- B. Near-duplicate document review savings calculated at an average of 17.5%, assuming a percent of near-duplicates of approximately 26%.
- C. eMail Threads email document review savings calculated at an average of 70%, and eMail Thread software is included in the Equivio Near-duplicate software.

Equivio, www.equivio.com, provides recommended automated tools to assist with eDiscovery. You may use comparable tools from other vendors.

Notice that whenever you can reduce the amount of material to deal with, you reduce costs. Conversely, where you cannot reduce the amount of documents and email to be reviewed, you end up paying high hourly rates, for lawyers, associates, and paralegals to manually review and subjectively code the material.

Conclusion: Planning now can reduce litigation costs in the future

From the model above, it becomes clear that the more an organization can reduce the amount of ESI in its systems, the more it can reduce the potential cost of litigation. This results from cutting down the volume of documents to be searched and reviewed. The strategies described above are neither difficult nor costly to execute. Mostly, it just takes good management discipline to:

- Establish and enforce retention policies
- Regularly review and update retention policies
- Know what data you have and where it is
- Put appropriate tools and services in place
- Plan your litigation hold procedures

The key is to start planning your protection now before litigation hits. Once you are caught up in litigation, you won't have the time to pursue data reduction initiatives of any sort, but you will wish you had. With **doeDiscovery™** there is never any guesswork.

Thank you for viewing this exclusive whitepaper on the eDiscovery process. If you have any further questions, we have Litigation Support Experts ready to answer your questions about the most advanced suite of securely hosted Case & Content Management, eBilling, and Litigation Support tools available. We have the right tools, the expert knowledge, and the proven performance to prove to you how valuable having a "partner in performance" can be. Call 1-302-798-7500 to speak with your expert today