

A Review of Electronic Discovery Strategies

By

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Introduction

Developing an effective strategy continues to be a cornerstone for effective electronic discovery. This paper examines several common strategies and analyzes the pros and cons of each. Two key elements of any strategy are choosing the appropriate technology and developing an effective project management plan. All too often, increased power and complexity of electronic discovery technology has overshadowed the project management. Consequently, attorneys are often disappointed in the results returned and costs increase significantly when projects are not completed properly. Project management is the central element of successful electronic discovery.

The Evolution of Technology

As technology and industry experience continues to evolve, so do strategies for electronic discovery. A driving force in the evolution of electronic discovery is technology and service providers competing for a piece of this multi-billion dollar industry. However, advancements in technology and processing do not automatically result in industry acceptance.

In *Crossing the Chasm*, Geoffrey Moore explains that the evolution of new technology and processes does not mean that everyone is willing to get onboard. He categorizes how people adapt to new technology at different rates as follows:

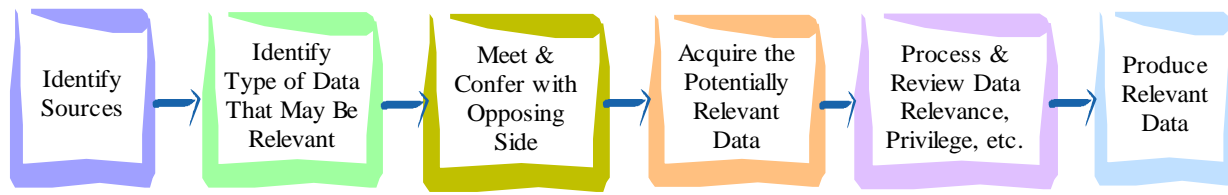
- **Innovators** are always looking for the next advancement simply for the love of technology. They want to, “be there when it happens!”
- **Early Adapters** look for advancements in technology because of the competitive advantage or higher ROI it creates.
- **Early Majority** is the mainstream market, a population that is generally risk adverse and wants a thoroughly proven solution before making a commitment.
- **Later Majority** is much the same as the early majority but tends to be resistant to or even afraid of technology.
- **Laggards** want nothing to do with new technology and generally must be dragged along kicking and screaming into the future.

Where you and your firm fall in this continuum of technology acceptance is important. As the size and complexity of electronic discovery projects continue to increase so does the development of new technologies and processes continue to adapt. If you fall closer to the laggard end of the curve you will always be at a disadvantage when facing an opponent who is well schooled and adaptive of new technology. Those who use new technology in conjunction with a comprehensive electronic discovery strategy see advantages in three key areas: increased speed of processing, reduced cost per quality document decision, and improved hit ratios for relevant information.



Developing the Strategic Plan

When faced with the challenge of gathering data pursuant to an Electronic Discovery Motion the flow chart below offers a simple road map for developing a Strategic Electronic Discovery Plan. Experience has shown that the most common source of discovery disputes come from the responding party not providing sufficient details about the electronic discovery process. This ambiguity may result in concern on the part of the requesting party about thoroughness, compliance and credibility. A fully developed and documented discovery plan demonstrates that appropriate measures of preservation and a credible process were followed, avoiding conflict and challenges.



It is helpful to designate an Electronic Discovery Liaison (EDL) either from inside the organization or an outside party. The EDL will be the primary person responsible with knowledge about the information systems in question. The EDL should be given the authority to carry out all of the necessary duties to identify, collect and preserve potentially responsive data. A central coordinator avoids duplication of effort, facilitates more timely communication, and more importantly can prevent data and deadline requirements from being missed. Selecting an appropriate EDL lends credibility to the process.

One simple and effective approach to identify potential sources for responsive documents is the creation of a Document Matrix. You can add categories or locations that are appropriate to your particular situation. Identify the sources, the types of data that may be responsive, the physical locations of the data, and don't forget the backup tapes. Plan on modifying your Document Matrix once you have clearly defined what data will be considered responsive to the discovery request.

Document Matrix		Personal		Shared	Proprietary	
Custodians/Sources	Email	Documents	Databases	Documents	Information	Other
1. Bob Smith - Sales Mgr	X	X		X		
2. Jim Jones - Engineer	X	X		X	X	X
3. Betty White - Accounting	X	X	X	X		
4. Susie Packrat - Engineering	X	X		X		
5. Willard Reckless -- HR		X		X		X
6.						
7.						
8.						



This process helps identify the people in the organization that should be interviewed before a Meet and Confer is scheduled with opposing counsel. In addition, you will begin to get a sense for the potential volume of data to be collected and processed.

**Identify Type
of Data That
May Be
Relevant**

Early discussions with the requesting party are essential to hammer out a clearly defined and narrow scope of discovery. If opposing counsel is reluctant to discuss the definition and scope of discovery, or is overly broad in discovery demands you should do two things. First, document your attempts to understand what is responsive to the case and the opposition to your efforts. Second, consider taking the issue to the Magistrate or Judge presiding on your matter and ask for direction. This is where your documentation comes into play. Don't be afraid to show your willingness to be reasonable, most judges prefer a reasonable position and look for middle ground.

If the requesting party is not forthcoming in identifying potentially responsive information, ask a person(s) that is knowledgeable about the issues involved in the matter (the EDL would be ideal) to participate in a role-play as the requesting party and create a list of what you believe the requests might be.

Below is a sample list of questions that could be used in the investigatory discussion or role-play. This list is, of course, not exhaustive and should be tailored to your specific matter.

1. What are the date ranges that are relevant to this matter?
2. Who has possession of this data?
3. What keywords or combination of keywords will help identify relevant documents?
4. What are the main concepts that are important to this matter?
5. What file formats potentially contain relevant information?
6. What file format needs to be produced by the opposing party?

**Meet &
Confer with
Opposing
Side**

During the Meet and Confer, counsel can decide what type of preservation needs to occur (general data pulls, forensic images, tape restoration, etc.) and agree on major milestones and timelines.

It is highly recommended that the parties involved make a formal agreement to clearly outline the expectations of the discovery process. Occasionally, your opponent may become unreasonable or the parties have a legitimate dispute. Armed with factual information and your reasonable behavior you should take your matter before the Judge for assistance in working through the issues.

Feedback from a number of Judges on what they look for in situations is almost always the same — they want the parties to be reasonable in their requests and responses. It sounds pretty simple, but at times is difficult to achieve. Consequently it is critical to have documentation of your efforts. You want the Judge to know that you have done your due diligence, and even better, you are coming to the table with a well thought out solution to the disagreement. What you don't



want to do is go in unprepared and have a frustrated Judge lay out a plan for you. Odds are it won't be pretty.

With an agreement between the parties or a court order, you can now begin the physical acquisition process. Under the direction of the EDL a party using collection and handling techniques that preserve the chain of custody can begin the collection of data. Horror stories abound about mishandled data resulting in a challenge to the validity of the chain of custody, spoliation, and even sanctions. It is critical that whomever implements your plan, fully understands how to capture data so that it is not affected by the process and is preserved in a manner that survives chain of custody challenges. Storage and isolation of data are critical issues and should not be taken lightly.

Acquire the Potentially Relevant Data

Armed with an agreement, your Electronic Discovery Plan can be shared with the appropriate parties, renegotiated (if necessary) and ultimately implemented. There are those in the industry that feel strongly about not providing too much detail to the opposing party for fear of handing them a strategic advantage. However, more often than not, greater sums of money and effort are spent fighting a process than would have been spent through collaborative negotiation.

The EDL can now start directing the process of collecting the responsive data. The process should begin by notifying all pertinent parties of the specific information to be identified, preserved and protected from destruction. This is best served in writing. Some of you might object to this however, your process is going to be scrutinized with regard to your communication. Make certain all communications are clear to avoid confusion. In addition, the EDL should require affirmation that each person who received the message, will comply with it, and will notify the EDL if there are any problems or extenuating circumstances that prevent compliance. Each person should also provide a list of where and how they keep their documents during the normal course of business. Provide a template for responses so that everyone is documenting their data in a consistent manner.

The next step is to substantiate all responsive data sources, document their existence and ensure they have been properly preserved. The Document Matrix can be used to as a checklist to ensure that no stone is left unturned. This process should be carefully documented and mapped to record the intricate details.

Assess the immediate danger of potentially relevant data being altered or destroyed. If that danger exists forensics imaging and/or sequestering of the physical data should be considered. It is critical to establish a "chain of custody" to preserve the integrity of the data. The development of an evidence inventory list is a practical addition to the process. It can also be used to create estimates for the project, respond to requests for information from opposing parties, safeguard against spoliation.



**Process &
Review Data
Relevance,
Privilege, etc.**

Once the corpus of data has been identified, gathered, and secured it is time to begin processing and data review. There are a number of ways that processing the data can be accomplished. A flow chart of each process is included below with the pros and cons that each offers. Some will choose a process based on budget constraints, others select a process based on experience and comfort with technology. There are a broad range of tools and options available within each of the models below. The temptation is often to go with least expensive or easiest, which are probably the two worst methods to choose an electronic discovery model.

**Produce
Relevant
Data**

The meteoric rise in the size of matters coupled with increased capability of search software has made the cost of processing and producing relevant documents one of the most costly elements in the electronic discovery process. Consequently, the ability to avoid document conversion until the later stages of the process will reduce costs.

Conversion of documents to TIFF or PDF for online review has greatly reduced the number of documents being printed to paper and offers significant savings over traditional paper based review. However, far greater savings are realized when documents are reviewed in native file format and only those deemed relevant are produced. The savings and efficiencies are even greater when native review is enhanced with new concept and context technologies that can increase efficiencies by as much as ten times. By far, the greatest expense in electronic discovery is attorney review time, which is reduced significantly through the use of upstream technology.

High-end processes are not for everyone. It goes back to the level of technology that clients are willing to accept. However, eventually attorneys will be forced to move to higher-level technology or face losing their competitive edge.

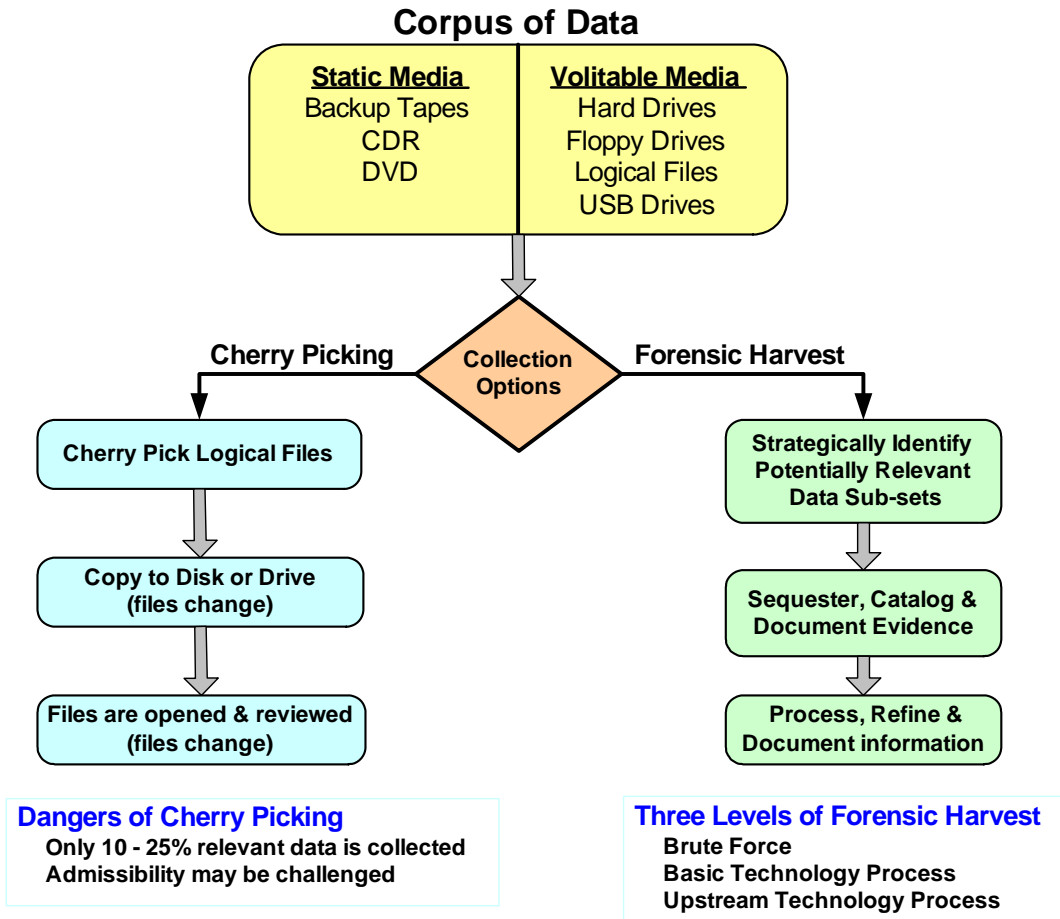
The examples on the following pages demonstrate four different strategies you can use in an electronic discovery project. Each has its own pros and cons, and in the right circumstances each is appropriate. However, for those who face matters with large data sets it is critical to embrace technology and realize the increased advantages of reduced time, reduced cost per quality decision, and other increased value offered by high-end technology.

Conclusion

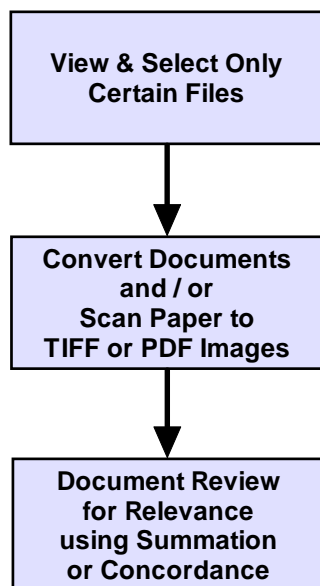
From the beginning of the electronic discovery process to the end; your strategy will influence not only the outcome but also the cost. With new case law and further clarification from the bench, electronic discovery is becoming less burdensome and more straightforward. Electronic discovery can be very complex...using simple strategies will help achieve your goal of addressing electronic discovery in a positive manner.



Electronic Discovery Overview



Cherry Picking Process

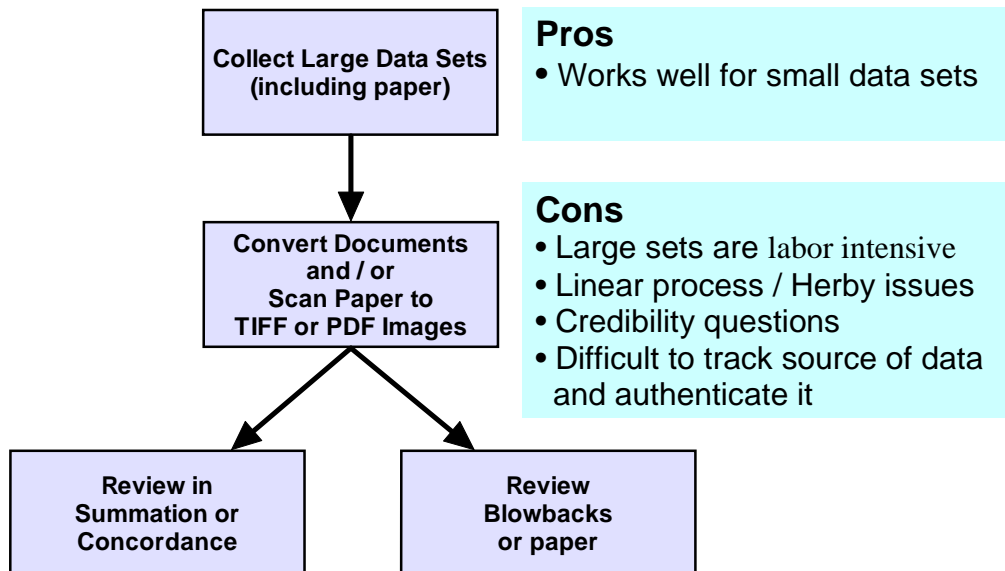


- Pros**
- Works well for small data sets
 - Low Cost

- Cons**
- Not a comprehensive search
 - Hard process to validate
 - Credibility questions
 - Difficult to track source of data and authenticate it

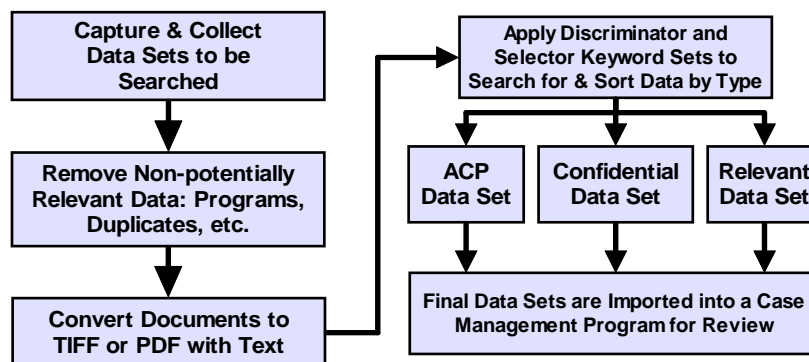


Brute Force Process



Basic Technology Process

(Have IT department retrieve using scripts or something similar)



Pros

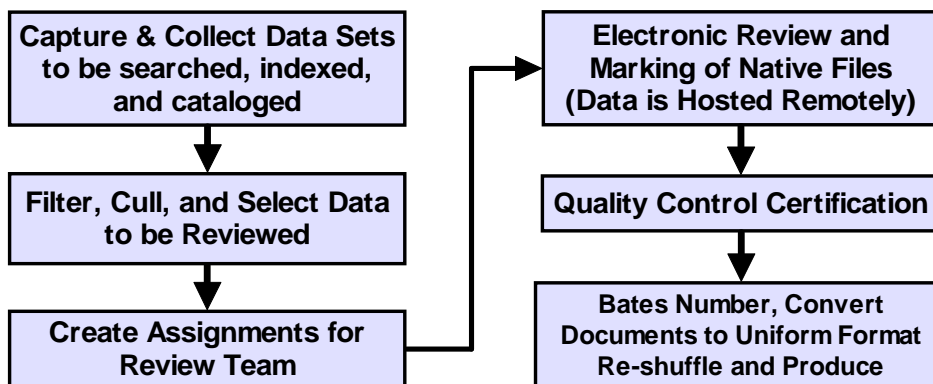
- Better control of Process
- Quality control and assurance are introduced

Cons

- Keyword searches require knowing the words or acronyms used by the author
- There is an increase in conversion costs



Upstream Technology Process



Pros

- Runs on SQL database increasing control & accountability
- Only responsive documents are converted greatly reducing cost
- Original data can be revisited without incurring additional cost
- Document decisions are aided significantly by technology

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