

Best Practices for Handling Electronic Discovery in Small Cases

by *Olivia Gerroll*

With nearly half of all states (Nebraska included) enacting eDiscovery provisions in their civil rules, and several more states right around the corner, electronic discovery continues to cement its unavoidable role in today's litigation. We can all agree that the question is no longer, "Do I have to?" but now, "How will I?" And not just in the billion dollar, "Bet the Firm" or Fortune 500 cases, but also in the small, routine, "meat and potatoes" cases, which are the lifeblood of law firms. Electronic discovery is unavoidable in these cases, too. But it can be manageable and while there are no easy, sure fire steps to making electronic discovery in small cases affordable and valuable-this article does not make julienne fries-there are number of essential best practices that will get us started down the right path.

Are Your Clients Litigation Ready?

The first and maybe most essential best practice is information management - a common phrase in our neck of the woods

is litigation readiness. This essential best practice can revolutionize you or your clients' experience of litigation and yet, in most instances, this is not the attorney's decision. This is a best practice your clients have to commit to (sooner rather than later, of course). We want to keep our focus on best practices that are within the attorney's control, but I cannot reiterate enough that the better your clients' data is logged, mapped and disposed of in the proper fashion, the easier, and more cost effective, the discovery process can become. A clearly stated, actively managed retention and disposition policy helps companies reduce the amount of unnecessary information they are storing and a thorough "data map" can help clients be more aware of where all of their information is located.

There are other steps, too: designating experts ahead of time who would testify in any depositions or trials, limiting employee opportunities for data transfer, and reevaluating methods of digital backup to make for easier discovery. There are many valuable resources on litigation readiness available for your clients if they are interested. This best practice is helpful for businesses of all sizes.

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Smart Consumerism

The limited budgets in small cases magnify the prices of eDiscovery software and services, as well they should. It's possible in a big budget case to purchase a full forensic drive collection instead of a "forensically sound" targeted collection without even blinking, but in a small case, making a decision like that could render the case too burdensome to continue. The second best practice for handling electronic discovery in

PRACTICE TIP

small cases is smart consumerism.

Oversimplified, the work of electronic discovery is identification, preservation, collection, processing, review and production. This is the path you have to travel and the litany of service providers and software available ask you to decide between a Bentley and a Honda. One, while enviable, is full of unnecessary extras and, in small routine cases, you only need to get from point A to point B (identification to production). You do not need all the amenities. Purchase only what you need. This includes the choice between a targeted collection and a full-drive forensic collection, as well as choosing which software technology you need - early case review, analytics or a simple linear review package. Technology can reduce your costs; the work is in identifying the appropriate technology.

Another cost-cutting decision to make is whether to handle tasks in-house or to outsource them. This decision is about the simplicity or complexity of the data in your case. Simple file conversions and data extractions might be more reasonably priced if handled in-house, while legacy data, multiple software platforms and high capacities of data might require the assistance of a qualified electronic discovery vendor.

Don't feel the need to purchase all or nothing: if you are going to outsource one collection, you do not need to outsource all of them, if you are going to forensically collect one custodian, you do not need to forensically collect them all, and so on.

Smart consumerism is prioritizing and, also, education. The more you know about the components of electronic discovery the better purchasing decisions you can make. For example, do you know the difference in benefits between forensically collecting a hard drive and "ghosting" a hard drive? Demystifying the processes of electronic discovery allows you to better decide what technologies or services will or will not help you in your case.

Challenge Your Vendor

Your vendor needs to assist you in being a smart consumer. It is a best practice for electronic discovery in small cases to challenge your vendor to meet your specific needs.

Too often, vendors attempt to bully their clients into fitting their service models. This is, as the saying goes, the tail wagging the dog. Your relationship with your eDiscovery vendor should be a partnership. You should be able to present them with the specifics of your case and they should employ creativity to help solve your discovery-related problems. Ask yourself with every purchase: What is the provider offering? What is the cost? What is the impact on my case?

Also, do not feel the need to purchase services from only

one vendor. You've got to compare prices, expertise and experience. As you get to know the experts available to you, you will start to develop a preferred provider list. This will outline whom you call in what situation.

Practice Makes Perfect Cost Reduction

A valuable tool I've found for soliciting vendor help is the Request For Proposal (RFP). When I worked in-house for a law firm, developing an RFP template that met my firm, review team and client expectations allowed me to compare apples to apples with multiple vendors. I came up with a matrix that outlined what I needed every single service provider to do, and what expectations they needed to meet. There is not a one-size-fits-all solution for this approach. The most important thing is to understand and to ask for exactly what you need - no more or no less - and ensure that the bidding vendors actually respond to your questions instead of twisting your questions to fit their model response.

It is important for the RFP to be specific. Too many open-ended questions leave the opportunity for the vendor's service model to drive their answers, as opposed to the unique needs of your case. The value of the service provider or expert is that they've experienced and overcome the challenges that are new to you in your case. The right RFP can give them the opportunity to empower you with that experience.

On the other hand, we are looking for standardized, repeatable processes. We do not want to reinvent the wheel with each case. Each case may make you reexamine your RFP. Is it specific enough through each stage of eDiscovery? Have your preferences changed because of what you've experienced? Refining the procedures you use, and knowing exactly what you need from a service provider, will keep the steering wheel in your hands when it comes time to tackle small budgets and tight deadlines.

Conclusion

These best practices are valuable in cases of all sizes, but it is the limited time and budgets of small and routine cases that magnify every decision we make about electronic discovery. It is in these cases that we feel most tempted to opt out of any electronic discovery. But this is becoming less of an option. Not only because it can be a disservice to our clients and the case, but also because in some cases the only discovery is electronic. We've got to face the challenge by planning thoroughly and intelligently. In our offices, we refer to electronic discovery as The Beast. By following these best practices, we've found time and again that The Beast can be tamed. 