
White Paper

Early Case Assessment: Limit E-Discovery Expense and Improve Litigation Results

July 2008

The argument for performing Early Case Assessment (ECA) is compelling.

A recent survey of 341 practicing litigators reported that more than three-quarters of cases are resolved favorably, and litigation expenses cut in half in all cases, when thorough early case assessment is performed. With all this upside benefit, why do most organizations fail to conduct ECA at all, or do so only shallowly?



In a perfect world, as soon as defense counsel is notified of a pending litigation, counsel performs enough analysis to create a detailed plan regarding the scope of the case, paying special attention to identifying relevant electronic documentation (“E-Discovery”). This includes all locations of data and its custodians. In our imperfect, actual world counsel is buried under the current case load and has little, if any, time to plan for a case in advance. Absent a “Rocket-Docket” scenario, or rules in certain local jurisdictions that accelerate the process, E-Discovery proceeds slowly on the new case—with much rework, reprocessing and scope-creep compounding the problem. Often, significant attorney attention is applied only during the review phase. If the case settles, it does so on the steps of the courthouse just prior to trial and after spending the maximum possible on E-Discovery. The solution, of course, is to accomplish meaningful ECA with minimum attorney labor by leveraging scarce attorney time. This is now possible with sophisticated but easy-to-use E-Discovery automation tools. But before we dive into what technology can do for early case assessment, let’s take a look at the objectives of ECA. What questions should we be able to answer?

- What are the legal hold requirements and challenges?
 - What are the potential issues with the data? Are there retired or legacy IT systems to consider? Are all key IT individuals knowledgeable at the time of the matter still employed by the company?
 - Does the initial analysis of custodians reveal a wider range of players than you (or your adversary) initially thought?
 - Is any of the data damaged or difficult to restore? Is there a “Not Reasonably Accessible” scenario in the making?
 - How should counsel prepare for the FRCP 26(f) “Meet and Confer”?
 - What keywords and other search criteria should be negotiated? What is the preferred production format?
 - What is the value of the claim/action in comparison to the estimated costs of discovery and litigation? Could this be a precedent type of case, which if successful would be fatal to your client or bring an onslaught of similar cases?
 - What are the estimated “soft” costs of litigation, accounting for time required by senior management, employees, and other parties to respond and assist in the litigation? How does this impact or disrupt your client’s business unit(s)?
 - Should counsel seek an early mediation or proceed to trial?
- What is the cause of action?
 - Who are the “key players”?
 - Is there real liability—does the case have merit?

Early case assessment lets you take control of the case within days of the notification and reduces legal risk by providing information about custodians, context, and third parties before the all-important Meet-and-Confer date (approximately 90 days from the complaint), on

which legal counsel from opposing sides discuss and agree on the E-Discovery scope. Because ECA empowers you to be more informed and reasonable in your negotiations with your adversary, it lets you take the “better prepared and more reasonable” high ground. This is always the better way to be perceived by the judge, especially should you be unable to reach agreement with your adversary. The outcome of the Meet and Confer session will certainly influence the total E-Discovery costs and often the final outcome of the case. A well conducted early case assessment not only puts a strategy in place quickly, it also dramatically cuts the amount of data (by as much as 90%) that must otherwise go through the very costly review process in which attorneys review each document for relevance

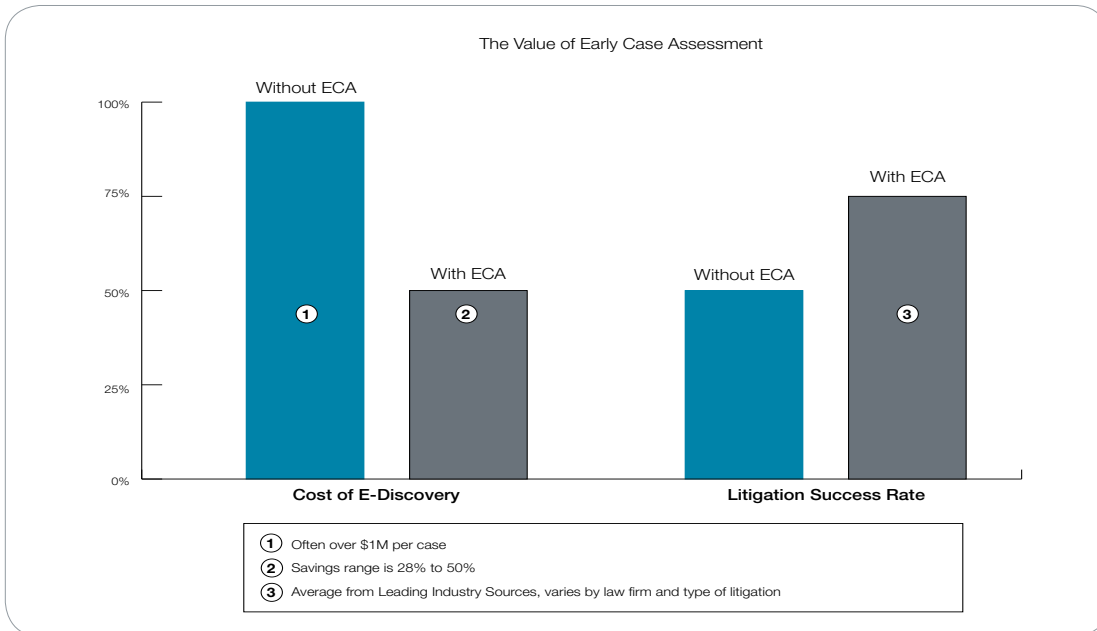
Early case assessment also puts inside and outside counsel together as a tight team at the very beginning of a case. Within the first few weeks, in-house and outside counsel investigate the allegations, identify the type of discovery needed, interview key witnesses, and determine the strengths and weaknesses of the

A case in point:

DuPont, the 200 year old, \$29 billion corporation has pioneered the use of early case assessment and proven its effectiveness at saving time and money while producing superior litigation results.

The DuPont cases where ECA was rigorously followed resulted in higher satisfaction from the business unit, faster cycle times and an average of 28 percent less cost.

ECA at DuPont requires outside trial counsel, DuPont in-house counsel and the designated DuPont business representative to produce a detailed analysis of the lawsuit using the DuPont Legal Model. This is the



case. Outside counsel provides an evaluation of the opposing counsel’s case, evaluates relevant law and decisions, and formulates a detailed discovery budget. At the end of this two-to-three month process, counsel is prepared to form a litigation strategy. With an early case assessment in-hand, counsel is better able to determine whether to pursue settlement or to take the case to trial. Essentially, successful ECA gives counsel the needed information to create a cost -benefit analysis that suggests how best to resolve the case.

culmination of a process that began in late 1992 and focuses on early case assessment. The details and procedures needed to meet the model’s express guidelines have evolved over the past decade, compelling both DuPont corporate lawyers and outside trial counsel to rethink how best to handle the first segment of defending a lawsuit. It has taken enormous effort on all sides, but the positive results were recently confirmed by an independent study using the Six Sigma quality initiative at DuPont, which was verified by the

national accounting firm of Deloitte & Touche. The result? The DuPont cases where ECA was rigorously followed resulted in higher satisfaction from the business unit, faster cycle times and an average of 28 percent less cost. *For more information go to www.dupontlegalmode.com/competitiveedge.asp#.*

How do companies like DuPont get these types of results? They have a stable, well-articulated process, and have armed their legal teams with the best technology, including advanced content analysis tools in discovery and review. These have been a topic of much discussion among attorneys, litigation support personnel, the judiciary and technologists. Although no case citation is available yet there is a growing consensus that:

1. To obtain the necessary level of accuracy, the use of simple keyword search techniques alone is also producing an unacceptable percentage of “false positives”.
2. The use of advanced analytical tools in conjunction with keyword searching is becoming the default method to address the mega-collections of documents seen in today’s cases.

Opinions by Judge Grimm¹ and Judge Facciola² underscore the importance of this technology, emphasizing that parties should not discount its use in the just, speedy and inexpensive dispatching of cases.

Justice Facciola specifically states that “concept searching, as opposed to keyword searching, is more efficient and more likely to produce the most comprehensive results.”

Of course Court and Counsel must be secure that the technology being utilized is explainable, scientifically sound and not a “black box” type of technology.

One such technology is that supplied by the Seagate Services Electronic Discovery business unit MetaLINC. Its software automatically analyzes emails, documents and associated metadata, and presents visual analysis of interrelated people, conversations, concepts and communication patterns. It also guides investigators to the most important items, and presents every email or document within its full context. The software’s intuitive interface lets users process massive amounts of electronic evidence quickly and conduct early case assessments. Companies can execute the entire E-Discovery process in-house or use the MetaLINC solution as a managed service through Seagate Services or through selected service providers. *For more information go to www.seagateservices.com/ediscovery.*

Summary:

1. Take control of the case from the beginning with goals of learning 80% of what you need to know and agreeing on a case strategy within the first 90 days.
2. Use the best technology available to process the masses of electronic data.
 - Use automated deduplication and first-pass culling with a goal of reducing the data by 80%
 - Extract and leverage metadata to enhance searching
 - Analyze data for keywords, concepts, timelines, people and threads
 - Prioritize the data for a more efficient and effective review
 - Quickly identify irrelevant data determined to be non-responsive
 - Verify that your custodian and witness lists are correct
 - Use the results to credibly argue against your adversary’s overly-broad discovery requests.
3. Get organized for review. Create folders that are the result of concept, people and thread analysis so that your reviewers can examine data in context. Populate those folders quickly to get your review team started immediately. By moving quickly from document review to context review, you will probably double your reviewed pages per hour.
4. Examine applicable laws and venues.
5. Change your definition of “winning” to include the business perspective. “Winning for the business” may not mean victory in a trial but preserving management time and protecting the business’s reputation and brand.

¹ VICTOR STANLEY, INC. v. CREATIVE PIPE, INC,

² DISABILITY RIGHTS COUNCIL OF GREATER WASHINGTON, et al., v. WASHINGTON METROPOLITAN TRANSIT AUTHORITY, et al 2007 U.S. Dist. LEXIS 39605.