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Time, Risk, and Cost in eDiscovery

An Orange Paper from Orange Legal Technologies

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Considering eDiscovery Options? Understanding Time, Risk, and Cost

Balancing *time*, *risk*, and *cost* in the conduct of electronic discovery continues to be one of the greatest challenges faced by legal professionals today. Technology advances, laws which further define electronically stored information (ESI), and current economic conditions all serve to increase both the importance and complexity of meeting this challenge of “balance”.

With this balance in mind, how does one best approach the conduct of the key electronic discovery tasks of evaluating (analytics), processing, and reviewing ESI in preparation for use discovery and possible litigation? To get to the answer of the best approach, it seems reasonable that one would first define the issues that make *time*, *risk* and *cost* important and then view these factors through the lens of the typical approaches used in the conduct of electronic discovery today.

Time: The Need for Speed

The ability of legal professionals to quickly gain an understanding of potential evidence is of paramount importance if they want to seize the initiative in the conduct of litigation. In practical terms, the quicker a legal team can gain an understanding of available ESI, the quicker they can make early case assessments in relation to key questions to include:

- Does it appear that opposing counsel has an evidential basis for pursuing the case?
- What type of electronic discovery resources will be needed to conduct a complete document review?
- Based on FRCP 26(f)ⁱ, what are the timeline requirements for “Meet and Confer” preparation?
- Based on potential evidence and resource requirements, will it be more cost effective to settle or pursue?

By quickly being able to answer these questions, legal teams can gain the “litigation high ground” and ensure they are making informed client recommendations as early as possible in the litigation process – thus ensuring economy of effort without sacrificing the ability to achieve a desired outcome. Understanding of available ESI can also ensure counsel is prepared to proactively shape the direction of handling ESI during the federally mandated “Meet and Confer” process.

Traditional electronic discovery approaches typically can provide a legal team access to ESI in 2-3 weeks, however new approaches can provide access to ESI in as early as 2-3 daysⁱⁱ.

Risk: More than a Board Game

Litigation is inherently rife with *risk*, and the complexity of discovery of ESI only increases this *risk* based on the intricacies of digital data, the continually growing volume of data available, and evolving ESI related law. Managing this complexity requires an understanding of what is an acceptable *risk* in relation to the time available and the financial resources available. In determining acceptable *risk*, three of the key concerns of legal professionals are:

- Will the electronic discovery approach reduce the risk of missing potentially responsive documents?
- Will the electronic discovery technologies used minimize risks associated with the transfer of data between organizations and platforms?
- Will the electronic discovery effort be conducted in a legally defensible manner?

“The message to be taken from O’Keefe, Equity Analytics, and this opinion is that when parties decide to use a particular ESI search and retrieval methodology, they need to be aware of the literature describing the strengths and weaknesses of various methodologies.”ⁱⁱⁱ Judge Paul Grimm, District of Maryland Judge

In viewing traditional electronic discovery approaches and with these *risk* considerations in mind, it appears that time available and financial resources determine the level of acceptable *risk*. However, newer electronic discovery approaches can reduce the *risk* of missing potentially responsive documents, conduct the entire process in a legally defensible manner, and also do these things in the most time efficient and cost effective manners.

Cost: Show Me the Money

The economics of electronic discovery are such an important factor in litigation that, in some cases, they may drive counsel recommendations as much, if not more, than the actual evidentiary position of the client. Additionally, based on the current economic conditions worldwide, many law firms and corporations have been significantly impacted financially and while litigation related to the financial crisis may be on the rise, there is also a corresponding decrease in the number of discretionary litigation efforts due to *cost* constraints.^{iv} With this economic importance in mind, legal professionals not only want to but need to be able to conduct as thorough electronic discovery effort as possible at the lowest monetary *cost* possible. Key questions needing to be considered when evaluating the financial factor of electronic discovery may include:

- Based on *time* requirements and acceptable *risk*, what is the best electronic discovery approach congruent with firm and client financial resources and *cost* management objectives?
- Do we have the electronic discovery systems and expertise in place to conduct the electronic discovery tasks using the best electronic discovery approach congruent with client financial and *cost* management objectives?

Traditional electronic discovery approaches typically can cost anywhere between \$40,000^v to \$130,000^{vi} – exclusive of attorney review costs – to conduct the necessary electronic discovery tasks on 100GB of ESI. However, new approaches can cut these costs significantly as they can perform the same tasks for less than \$30,000^{vii}.

Through an understanding of why the factors of time, risk, and costs factors of electronic discovery are important, we can now view these factors through the lens of two of the most commonly used approaches to electronic discovery as well as view these factors in relation to one of the newer approaches which is gradually gaining acceptance.

Considering eDiscovery Options? Three Different Approaches

While there are numerous electronic discovery offerings available in the market today, there appears to be three generally accepted and distinct approaches to the conduct of the core electronic discovery tasks^{viii} – the tasks conducted after data collection and prior to final production. These three different approaches – consisting of two traditional approaches and one newer approach - are as follows:

- Approach #1: *Traditional* - Process all ESI to TIFF and Native for Full Linear or Conceptual Review.
- Approach #2: *Traditional* - Index, Cull, and Process ESI for Native or TIFF Review.
- Approach #3: *Advanced* - Index, Cull, Conduct 1st Pass Issue-Based Review, and Process for Final Linear Review.

A description of these three approaches and how they are typically considered to effect the *time*, *risk*, and *cost* factors of electronic discovery are provided in the following paragraphs.

Traditional Method #1: "To process everything or not to process everything, that is the question."

Processing all ESI to TIFF and Native or extracting text and metadata for a TIFF or Native for full linear or concept review is one of the most traditional of electronic discovery approaches and typically consists of four key actions (Figure 1) that include:

1. Litigation Support Manager provides ESI to the team/organization handling ESI processing.
2. ESI is processed and converted into either TIFF or Native format.
3. Processed ESI is exported and delivered to a local or hosted review system in preparation for legal team review.
4. Legal Team provided access to local or hosted review system for the conduct of a full linear or concept review.

In viewing these actions through the lens of time, risk, and cost, this traditional approach to electronic discovery for 100GB of ESI can be characterized as follows:

- Time Requirement: High Delay - Typically greater than 2-3 weeks (high delay) before legal team gets access to data for strategy formulation.
- Risk Factor: Low Risk - Low risk factor for execution of processing and review, however time requirements may increase litigation risk and monetary cost may create budgetary challenges.
- Monetary Cost: High Cost - Processing /Hosting 100GB of data typically costs¹ between \$56,700 (Native Review) and \$132,700 (TIFF Review) making it the least cost efficient of electronic discovery options.

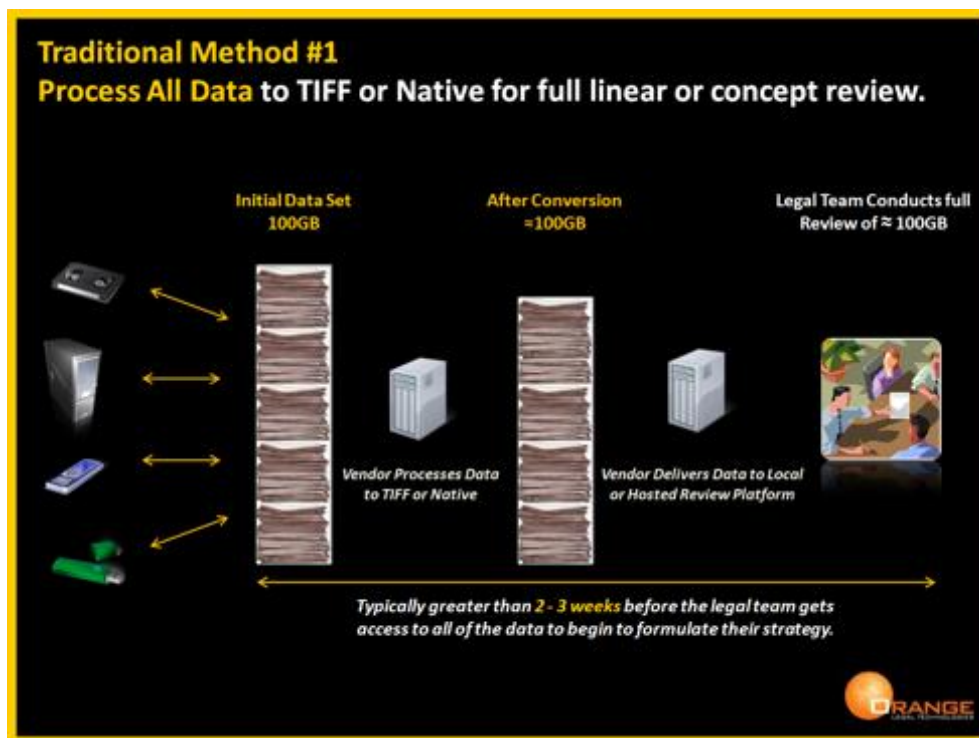


Figure 1 – Traditional Electronic Discovery Approach #1

¹ @ \$500/GB for Processing or \$1,250/GB Conversion (TIFF) and \$67/GB/Month Hosting.

Traditional Approach #2: "The Legal Team is restless, where is the data, is it ready yet?"

Indexing, culling, and processing ESI for Native is a common traditional approach to electronic discovery and takes advantage of newer, more advanced discovery technologies to accomplish four key actions (Figure 2) that include:

1. Litigation Support Manager provides ESI to the team/organization handling ESI processing.
2. ESI is indexed, culled, and processed into Native format.
3. Processed or TIFFed ESI is delivered to a local or hosted review system in preparation for legal team review.
4. Legal Team provided access to local or hosted review system for the conduct of a full linear review.

In viewing these actions through the lens of time, risk, and cost, this traditional approach to electronic discovery can be characterized as follows:

- Time Requirement: Moderate Delay: Typically 2 - 3 weeks (moderate delay) before legal team gets access to data for strategy formulation.
- Risk Factor: High Risk: High risk factor as vendors conduct keyword searching with limited input from client legal teams – thus substantially increasing the risk of missing potentially responsive documents as well as decreasing defensibility of the search process.
- Monetary Cost: Moderate Cost: 100GB initial data set with Indexing/Culling/Processing/Hosting typically costs² \$40,850 making it more cost efficient.

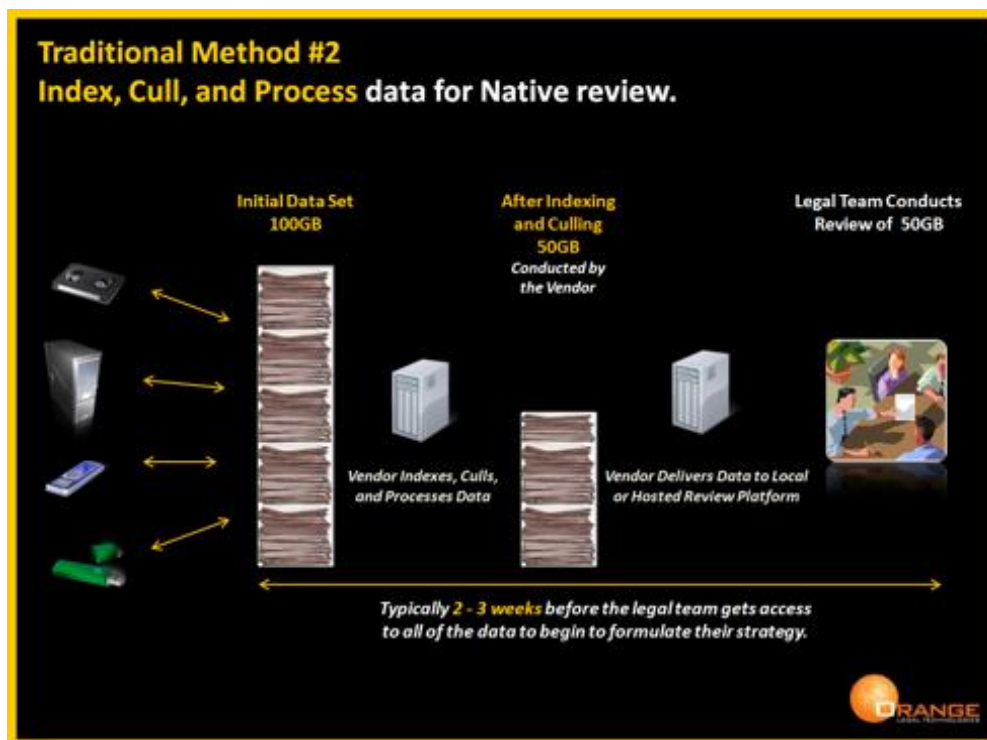


Figure 2 – Traditional Electronic Discovery Approach #2

² * @ \$125/GB for Indexing/Culling, \$500/GB for Processing and \$67/GB/Month Hosting.

Advanced Approach #3: "½ the Time, ½ the Cost, Lower Risk"

Indexing, culling, conduct of 1st pass issue-based review, and processing for final linear review is an advanced approach to electronic discovery and takes advantage of the latest, most advanced discovery technologies to accomplish six key actions (Figure 3) that include:

1. Litigation Support Manager provides ESI to the team/organization handling ESI analytics, processing and review.
2. ESI is indexed, culled in preparation for a 1st pass, high-level, issue-based review.
3. 1st pass, high-level, issued based review is conducted by legal team.
4. Remaining ESI is processed in preparation for final review by the legal team.
5. Processed ESI is delivered by to a local or hosted review system.
6. Legal Team provided access to local or hosted review system for full linear review within 2 to 3 days of receiving ESI.

In viewing these actions through the lens of time, risk, and cost, this traditional approach can be characterized as follows:

- Time Requirement: No Delay - Typically 2–3 days (virtually no delay) before legal team gets access to data.
- Risk Factor: Low Risk - Low risk factor as legal team can assist in search term scoping and sampling of data as well as conduct keyword searching – thus substantially decreasing the risk of missing potentially responsive documents – with access to analytics – thus increasing defensibility of the discovery process.
- Monetary Cost: Low Cost - 100GB initial data set with Indexing/Culling/Processing/Hosting of data typically costs³ \$21,742 making it the most cost effective of available options and with reduced data for review substantially reducing review costs which can easily be over 70% of the overall cost of electronic discovery^{ix}.

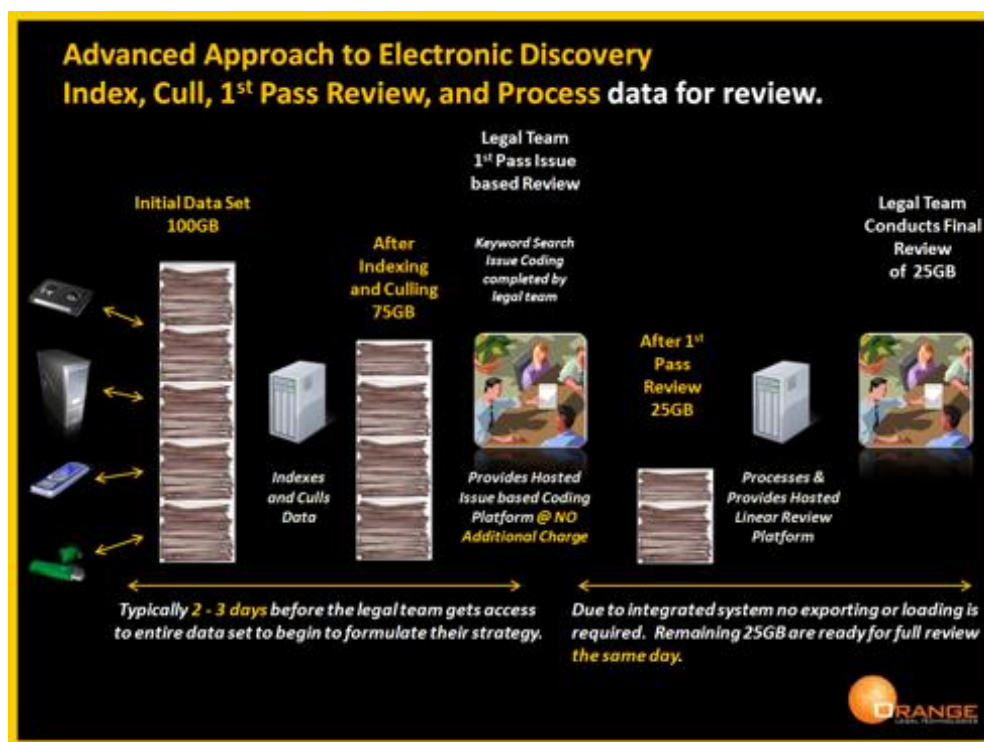


Figure 3 – Advanced Electronic Discovery Approach #3

³ @ \$125/GB for Indexing/Culling, \$350/GB for Processing and \$80/GB/Month Hosting.

Comparing the different approaches? A Time, Risk, and Cost Comparison

In comparing the time, risk, and cost considerations (Figure 4) for both traditional and advanced electronic discovery approaches, it appears that while each approach may have certain advantages, the advanced approach *provides clients the best capability to access to their data quickly, with minimized risk, and the lowest cost.*



Figure 4 – Comparing Electronic Discovery Approaches

Conclusion: Technological Advances Provide More Advanced Approaches

One of the biggest concerns in handling ESI is the cost as well as the fear of not properly handling electronically stored information and therefore having evidence thrown out in court or facing sanctions and suffering embarrassment to corporate clients. For legal professionals desiring immediate access to potential evidence at the lowest possible risk and cost, the advanced approach to electronic discovery appears to be the most effective approach for meeting electronic discovery needs *as it benefits from technological advances to accelerate the electronic discovery process and lowers risk and cost.*

Epilogue: Need an Advanced eDiscovery Platform or Process?

Orange Legal Technologies' OneO® Discovery Platform provides distinct and quantifiable advancements over current electronic discovery services as it is one of the only offerings in a marketplace of over 600 electronic discovery companies that provides all of the following capabilities with in-house proprietary technology:

- A Complete Electronic Discovery Platform: OneO® can provide analytics, processing, and review – the core tasks of electronic discovery (Figure 5) – from within a single platform. *This means that once data is received and ingested, there is no need for an additional platform or provider to complete these key discovery tasks thus saving clients over 50% of the time and 50% of the money required for electronic discovery^x when compared to traditional offerings.*

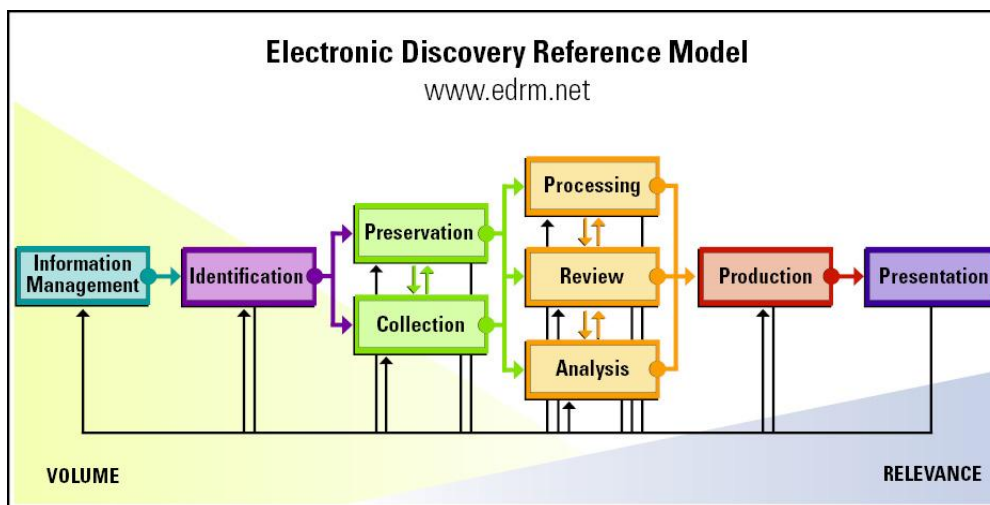


Figure 5 – The Electronic Discovery Reference Model

- An Integrated Electronic Discovery Platform: OneO® architecture provides for integration of electronic discovery tasks at the application level vs. the platform level and leverages your data throughout the entire discovery process (i.e. collection or chain of custody information can be tracked throughout the entire system and is not lost due to lack of interoperability). *First, this means that data transfer between the key tasks of analytics, processing, and review occurs within the OneO® platform thus increasing the defensibility of evidence by both reducing the risk of potential spoliation that can occur when transferring data between platforms and/or service providers and providing a defensible process. Secondly, this application level integration helps OneO® index documents twice as fast as other leading solutions^{xi} - substantially decreasing the time and cost of electronic discovery.*
- An Online Delivery Model: OneO® is delivered to clients via a Software-As-A-Service Model (SaaS). *This means that there is no additional client-side resource or infrastructure investments necessary to implement and maintain the OneO® Discovery Platform – thus providing client's cost savings for today and investment protection for tomorrow.*

In addition to the competitive advantage of the OneO® Discovery Platform, Orange Legal Technologies also has the competitive advantage of having an experienced and proven management and support team with over 156 years of combined expertise in the litigation support arena – making it one of the most experienced teams in the industry.

Contact

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With over 13 years of proven litigation support experience, Bret Laughlin oversees the technology, expansion, marketing and administration of Orange Legal Technologies. Bret started in the litigation support industry in 1995 and has successfully built several successful litigation support companies to include the Litigation Document Group and Orange Legal Technologies.

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ⁱ Federal Rules of Civil Procedure, Rule 26(f), <http://www.law.cornell.edu/rules/frcp/Rule26.htm>.

ⁱⁱ Orange Legal Technologies, OneO® Discovery Platform, <http://www.orangelt.com/technology/>.

ⁱⁱⁱ E-Discovery Rulings: 2008 in Review, By Cecil Lynn III & Alexandra Hicks, Law Technology News, January 9, 2009.

^{iv} E-Discovery 2.0, Aaref Hilaly, January 8, 2008, <http://snipr.com/9n1wz>.

^v @ \$125/GB for Indexing/Culling, \$500/GB for Processing and \$67/GB/Month Hosting.

^{vi} @ \$500/GB for Processing or \$1,250/GB Conversion (TIFF) and \$67/GB/Month Hosting.

^{vii} @ \$125/GB for Indexing/Culling, \$500/GB for Processing and \$80/GB/Month Hosting.

^{viii} Electronic Discovery Reference Model (EDRM), Processing, Review and Analysis, http://www.edrm.net/2008_2009/evergreen_012.php.

^{ix} Orange Legal Technologies, Predictive Pricing Estimator, August 2008. <http://orangelt.us/estimator/pricing.html>

^x Orange Legal Technologies, Predictive Pricing Estimator, August 2008. <http://orangelt.us/estimator/pricing.html>

^{xi} Clearwell Systems Rapid Indexing, <http://www.clearwellsystems.com/products/e-discovery-processing.php>, December 28, 2009. (Clearwell Indexing @ 10-12GB/Hour, OrangeLT® Indexing @ 25GB/Hour).