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The Bastardization of Early Case Assessment and the Emergence of Rapid Investigative Review™



AN E-DISCOVERY WHITE PAPER FOR LITIGATION PRACTITIONERS

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The legal community is at a watershed point in its history. In-house and outside counsel have integrated technology into every aspect of their operations, from back-office accounting functions to the highest profile courtroom battles. They are faster, leaner and more capable than ever before. It may seem surprising then that the digital revolution, instead of enabling practitioners, has instead impeded their efforts to find the critical facts and set smart legal strategies to free their clients from the fray. Many legal teams are so consumed by the proliferation of content, that they are unable to give clients a genuine understanding of the facts of the case – its strengths, weaknesses, and the smartest way to achieve the best possible outcome.

The rise of electronic discovery has distorted traditional notions of Early Case Assessment (ECA), which once provided practitioners with insight into the how, what, why, when, where, and who of the matter.

The most successful advocates seek advanced capability and simplicity in their technology so they can focus on finding answers in a time-sensitive environment. They find facts, follow data threads, track relationships and are enabled rather than impeded by technology.

The rise of electronic discovery has distorted traditional notions of Early Case Assessment (ECA), which once provided practitioners with insight into the how, what, why, when, where, and who of the matter. That assessment enabled legal teams to quickly establish the merit of a case and to execute tactically with an eye toward achieving a good outcome.

Today, the process of ECA is often reduced to merely gathering information about the evidence (file types, quantities, sizes and locations), rather than processing and interrogating the content to produce insight on key facts, players, relationships and communications. Review statistics, cost containment strategies and generic search results have replaced old fashioned “digging” into the facts of the case. Amazingly, legal teams routinely compute the number of documents for consideration and their varied composition without actually studying the content. In some instances, ECA includes converting key words into concepts, and clustering the resulting material based on those concepts. How does this approach truly enable the earliest assessment of a case?

Recent manifestations of ECA fail to satisfy an experienced attorney, who is interested in learning about a case, instead of solely whether the documents are or could be potentially responsive. The initial period when counsel receives notice of a pending action is critical and requires investigation to quickly determine implications of the claims. In fact, regardless of the size of the dataset, counsel must be able to consider the matter, including locating key items and constructing a fact-based plan of action.

This is where advanced technology is key, for it is the only option that enables legal counsel to deliver value to their clients. The ability to intuitively delve into the data, move through it effectively, parcel out subsets for closer scrutiny, probe the facts and follow leads, rather than merely quantify the documents that may contain the facts, is the essence of the Rapid Investigative Review™ evolution. This approach, which enables fast investigation and early insight, is fast replacing ineffective ECA data pre-qualification procedures.

Facts have been reduced to figures without producing evidence or conclusions on which counsel could rely to predict a matter's viability, or develop a creative approach to the matter.

Technology now enables legal counsel to rapidly understand and review the facts of each matter instead of simply generating figures about potential discovery problems.

I. THE BASTARDIZATION OF EARLY CASE ASSESSMENT

Although the original intent of ECA was to quickly find the few important documents in a potential field of millions, modern discovery has, for various reasons, morphed into a numbers game where the ultimate goal isn't victory, but just getting a cost estimate.

II. BEST PRACTICES FOR RAPID INVESTIGATIVE REVIEW™

Advanced technology now exists to simplify and structure information. It is enabling legal counsel to rapidly understand and review the facts of each matter instead of simply generating figures about potential discovery problems.

Leading teams identify a single point at which to begin an assessment. Their preliminary focus might be a key custodian, a project title, or even a narrow date range. Advanced tools can make this identification easier and faster by providing clusters of related information and enable users to find a small number of relevant documents. Those documents might reveal significant case details, with a specific focus on correspondence between individuals, including highlighting records relating to lawyers, accountants, and other professional advisors. These people are often central to important discussions about universal organizational changes, as well as macro-level decisions. After all, "People communicate in patterns, according to relationships".ⁱ

Technology also helps teams to evaluate these threads in a visual manner, enhancing the speed and accuracy of the lawyer's understanding. Images of ranked documents and visualized timelines allow teams to create an immediate impression of the strengths and weaknesses of a particular case.ⁱⁱ They will also reveal irrelevant material and certain issues of lower significance that counsel can avoid during the early investigation period.

III. VALUE INVESTIGATION OVER PRE-EMPTIVE ASSESSMENT

Following a traditional pattern, many legal teams focus on pre-emptive review in the early stages of a matter's lifecycle. Rather than working to find high value information within the content, they instead focus on the size and character of the data.

Advanced technology can change the pace of an inquiry and enable legal teams to approach the case in a more direct way. Value can be placed on the inspection of the material itself, rather than the determination of what might be required to thoroughly evaluate every document. Documents can be collected from a myriad of sources – computers, mail servers, and SharePoint sites, to name just a few – then lawyers can quickly analyze the content and present strategic options, based on solid facts.

This direct and linear approach offers clients a smarter and swifter solution during the early litigation phase.

The ability to interact with a set of data can give immediate access to core details which can change the course and cost of a case.

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IV. FOCUS ON INTERACTION, RATHER THAN SIMPLY REVIEW

Legal analysts who interact with the data to quickly understand the details of a case secure an advantage. An element of settlement is often based on costs that are typically driven by the technology and the human effort required to process and review data. However, the ability to interact with a set of data can give immediate access to core details which can change the course and cost of a case. It also distinguishes the rapid investigation effort from a fairly standardized document review, which at least one court has called “the 21st Century equivalent of making copies”.ⁱⁱⁱ

This practice of interacting with information returns the early assessment method to an evidentiary endeavor. It also allows legal teams to circumvent the budgetary concerns typically associated with preliminary review because they are concentrating on a smaller pool of documents with a higher potential value in the matter. As a result, technology supports, rather than hinders the evaluation effort.

V. FOSTER A CONVERGENCE OF THE GENERATIONS

While more experienced practitioners have correctly focused on genuine investigation over surface review, their junior counterparts remain heavily dependent on technology. Too often, modern practitioners allow digital tools to distract them, resulting in discussions about processes, instead of decisions about outcomes.

With outcome-driven judges calling for document reduction and laser focus on key items that prove or disprove the facts of a case, Rapid Investigative Review™ represents the future of first-stage litigation. Those who concentrate on a unified approach between human intelligence and modern search technology are likely to find a smaller and more manageable number of pivotal documents. Such findings will encourage collaboration between the technically-savvy and the strategically-experienced, which offers clients a potent combination.

VI. THE CHALLENGE IS CAPABILITY, NOT VOLUME

While cases featuring terabytes of data are now commonplace, the vast volume of data that exists in modern litigation is not the most significant problem lawyers’ face. Powerful software can now process a terabyte of material overnight. The biggest challenge for legal teams is the inability to quickly cull through the information they process and surgically identify relevant documents to provide their clients with knowledge at the earliest possible stage.

When one knows the type of information for which he or she is looking, it should require minutes or hours, rather than days or weeks, to evaluate a body of content. Practitioners cannot afford to waste precious weeks on an ECA exercise that simply results in assigning probable costs rather than setting strategy. Moreover, corporations will no longer tolerate law firms that do this.^{iv} There is a strong movement in corporate legal departments to measure performance and responsiveness. Both qualities are tied to a legal team’s ability to investigate, manipulate and quickly develop a working familiarity with compelling data.

Modern eDiscovery technology can simplify evidence collection and review and better equip legal teams to form faster and more accurate conclusions.

VII. HARNESS ADVANCED TECHNOLOGY TO INCREASE SPEED AND SPECIFICITY

Almost every firm, regardless of its size, sophistication and eDiscovery budget, faces the same problem: how do I look at the first pieces of data coming in from my client? Often this is merely a couple of key custodians' emails – the rough equivalent of seizing their filing cabinet. In the old days, the attorneys would sift through the folders and files to get a sense of the case, perusing the files. In today's eDiscovery context, most attorneys have lost the ability to focus on looking at the evidence with speed. With advanced technology so easily available, it is surprising to see so many firms still relying on low-tech solutions.

Modern eDiscovery technology can simplify evidence collection and review and better equip legal teams to form faster and more accurate conclusions. More importantly, in an environment of almost limitless information, those teams are now capable of automatically removing mountains of irrelevant data and investigating the contents of reduced pools of material to find answers.

Conclusion

Ultimately, success in modern litigation, particularly in the early stages of evaluation and review, depends on a proactive approach that delivers the most appropriate legal strategy at a reasonable cost. Those organizations that conduct a Rapid Investigative Review™ using advanced, yet easy-to-use technology, will not only find answers to case-oriented questions, but will develop a deeper understanding of a clients' most vital business concerns. Lawyers who artfully navigate that process will find short-term triumph coupled with long-term loyalty.

Nuix's Rapid Investigative Review™ is powered by the Nuix eDiscovery platform:

- Loads, processes, and makes email and data available for search – from multiple GBs in minutes to a TB overnight
- Allows attorneys to immediately interact with the data: investigate key custodians, follow leads, develop a fact-based case strategy and organize topics for detailed investigative review
- Easily scales the review to multiple attorneys, each investigating a specific fact pattern
- Transitions to a linear first pass review to ensure that all the necessary documents receive a detailed review.

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Nuix3 delivers a series of user interfaces which make Nuix's powerful eDiscovery solutions more intuitive, efficient and simple to use. The advanced interfaces join with Nuix3's superior processing, search, analysis and production features to drive more knowledge into the hands of litigators and empower them with the information they need.

Nuix software has unique capabilities, including indexing almost all email formats, forensic images of hard disks and network file shares directly. Whether rapidly indexing an entire email and document archive and making it available for instant search and discovery, or undertaking a rapid review involving a dozen or more lawyers in different locations, Nuix offers the fastest, most complete and most advanced eDiscovery platform available.

A case can be established within 30 seconds, processed at a rate of multiple terabytes per day, and a user with minimal training can easily find all relevant evidence if it is present in the data set. Nuix is the only option that enables legal counsel to undertake a genuine Rapid Investigative Review™, delivering a fast investigation and early insight and assessment based on key case facts.

Nuix solutions for law firms and in-house counsel offer unrivalled speed to provide answers to clients in record time, scalable solutions to handle the smallest or largest cases and a powerful technology platform that lets litigation professionals use their legal expertise to full advantage.

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- ii Conrad J. Jacoby, Using Technology To Estimate, Control And Manage Litigation Document Review Budgets, Metropolitan Corporate Counsel (September 2009).
- iii CBT Flint Partners, LLC v. Return Path, Inc., No. 1:07-CV-1822-TWT, 2009 WL 5159761 (N.D. Ga. Dec. 30, 2009); See, Craig Ball, Are We Just Makin' Copies?, Law Technology News (February 01, 2010).
- iv See Amy Miller, Cash Still the Best Feedback When Pressing Law Firms for Value, Says GC, Corporate Counsel (December 4, 2009).

**The world's most advanced eDiscovery
 and electronic investigation software.**