

Ten Tips to Clip the Cost of E-Discovery

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E-discovery costs *less* than paper discovery. Honest. *In comparable volumes*, it's cheaper to collect, index, store, copy, transport, search and share electronically stored information (ESI). But we hoard data with an indiscriminate tenacity we'd label "mental illness" if we were piling up paper. It's not just that we keep so *much*; it's that our collections are so *unstructured*. Squirrel away twenty years of National Geographic with an index and you're a "librarian." Without the index, you're that "crazy cat lady."

So the number one way to hold down the cost of e-discovery is:

1. If you don't need to keep it, *get rid of it*

Preservation obligations aside, if you're keeping backup tapes you don't need for disaster recovery or that you can't *read* because you no longer have the hardware or software, *get rid of them*. The same holds for all those old computers, hard drives, floppies, CD-ROMs, Zip disks and former e-mail accounts. Don't stick tapes in a closet intending to someday wipe and sell them on e-Bay. *If they don't hold information you must retain*, wipe them, shred them or pulverize them *now*.

2. Get tough on e-mail

E-mail *should* be easy. It's got those handy subject lines. It's electronically searchable. The circulation list's right up front. It's a cinch to file.

In reality, e-mail conversations (*threads*) veer off topic, search is a hit-or-miss proposition (*CUL8R*), addresses are cryptic (*HotBob37@aol.com*) and only the most organized among us (*anal-retentive*) file e-mail with anything like the effort once accorded paper correspondence. Personal messages rub elbows with privileged communications, spam and key business intelligence.

During WWII, everyone knew, "Loose lips sink ships." But does every employee appreciate the risk and cost of slipshod e-mail? Get tough on e-mail through policy, then train, audit and enforce. Train to manage e-mail, appreciate that *messages never die* and know that hasty words are eaten under oath. Tame the e-mail beast and the rest is easy.

3. Have a data taxonomy and standardize storage

Paper discovery cost less, in part because we generated and retained less paper, but also because we did a better job managing paper. We didn't search everywhere because there was always a file, folder or cabinet where we kept "that stuff." That's the power of place.

Records management isn't a form of personal expression. We must restore the elements of good records management to ESI. Want a desktop background with puppies? *Fine, but you must use the company's folder structure and naming protocols*. Want to send an e-mail? *No problem, but if it's personal, you must designate it as such, and if not, you must assign it a proper place within the company's information management system*.

4. Trim ESI requiring attorney review

The costliest phase of e-discovery is attorney review, so big savings flow from shrinking the volume of ESI reviewed, shifting the review burden to the other side and using cheaper talent.

Pare review volume by filtering and de-duplication to cull non-responsive data *before* attorney review, and work with the other side to identify irrelevant file types and target discovery to specific custodians and date ranges. Discovery rules permit production of ESI as maintained in the usual course of business, so consider leaving review to the opposition, protecting privileged content through claw back agreements. Finally, must a local attorney pore over everything, or can some of the work be done by legal assistants or outsourced to lower-cost lawyers in Indiana or India?

5. Keep responsive ESI on the servers

Between road warriors, at-home workers, local drives and smart phones, ESI has gone off the reservation, straying beyond the confines of the company's servers. Harvesting maverick data is costly, so employ policy and technology to insure that responsive data stays on the servers where it's more efficiently secured, searched and backed up.

6. No new gadgets without an e-discovery plan and budget

Everyone loves new toys, but the price tag on the latest PDA, messaging system or software won't reflect the costs it adds to e-discovery. You don't have to give up gadgets, but factor their impact on e-discovery into the total cost of ownership, and be sure preserving and harvesting their contents is part of your e-discovery plan.

7. Build cross-enterprise search and collection capability

Harvest is e-discovery's second costliest component. Eliminating onsite collection adds up to major savings. Emerging technologies make it possible to remotely search and harvest ESI from all machines on a network. Though still in its infancy, cross-enterprise search and collection makes sense for serial litigants and large workforces.

8. Develop in-house harvest expertise

If you want to destroy evidence, ask the IT guy to preserve it. Forensically sound preservation isn't the same as copying, Ghosting or backing up. It demands special tools and techniques. Oil well firefighter Red Adair put it well: "If you think it's expensive to hire a professional, wait until you hire an amateur!"

Learning to be a computer forensic *examiner* is hard, but learning to do forensically sound *acquisitions* isn't. You'll preserve more data than you'll analyze, so having an IT staffer trained in forensically sound preservation saves money on outside experts...and spoliation sanctions

9. Know the component cost of vendor services

Though e-discovery vendors tout "proprietary technologies," all use pretty much the same prosaic processes. Still, some are especially efficient at particular tasks (like tape restoration or scanning) and price these services competitively. When you understand the pieces of ESI processing and what each adds to the bill, you can match the task to the best-qualified vendor and get the best price.

10. Work cooperatively with the other side

This tip saves more than the others combined. Being forthright about your ESI and transparent in your e-discovery methodology fosters the trust that enables an opponent to say, “You don’t have to produce that.” The e-discovery horror stories—the ones that end with sanctions—all start with, “Once upon a time, there was a plaintiff and a defendant who couldn’t get along.”