

The Changing Business of Litigation: Early Case Assessment Rises in Prominence

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While the legal landscape is fraught with misconceptions about early case assessment (ECA), it is the very thing driving significant changes in how cases are litigated. While ECA seems new to many, in reality its roots are almost two decades old. In fact, in 1992, DuPont created a “Legal Model” designed to develop procedures to save time and money on company lawsuits. This innovative framework was the genesis of today’s ECA movement.

Not surprisingly, during DuPont’s early days of ECA, the necessary software tools and processes were virtually non-existent. As a result, there was significant room for improvement, meaning that adoption of the process by both inside and outside counsel was reluctant at best. Over time, however, the process has incrementally improved, and the benefits have now been confirmed via several independent studies (by Cogent Research and others). Among the results:

- **Successful outcomes:** Attorneys responded that, on average, performing ECA resulted in a favorable outcome in 76 percent of cases.
- **Strategic planning:** 87 percent of respondents said case assessment was beneficial for determining the best ways to proceed with cases.
- **Reducing expenses:** Respondents indicated that conducting ECA had enabled attorneys to reduce litigation expenses in roughly half of their cases.
- **Managing budgets:** More than half of attorneys surveyed (57 percent) said ECA had assisted in their abilities to prepare more accurate litigation budgets.

THE ECA VALUE PROPOSITION

Over time, the ECA value proposition has become clearer, but also more diverse. Most agree that an ECA approach is critical to solving three key needs at the outset of litigation: estimating the scope (i.e., duration and cost) of the e-discovery effort, assessing case facts to evaluate risk and settlement value and preparing for Meet and Confer requirements.

For many litigators, the first challenge to overcome is the traditional reluctance to spend any money until absolutely necessary. It’s easy to tout the fact that only a few cases ever make it to trial, but such statistics mask the fact that more than half of matters will make it in some way, shape or form into the discovery phase. Because attorneys often are required to spend some time and money up front in the litigation process in order to conduct ECA the right way, there must be a significant return over the life of a case – one that can reduce costs for law firms – which, in turn, saves money in the long run for end clients.

Fortunately, ECA’s promise quickly becomes reality even in the earliest stages because the first major benefit (project scoping) is a mission-critical task for every significant piece of litigation. For the novice attorney who has failed to scope his or her first e-discovery project – only to get a six-figure invoice at the end of the matter – accurately assessing the cost for processing, reviewing, hosting and producing data is a task taken lightly only once. While ECA won’t solve this problem alone, it is very useful in estimating data volumes because the amount of data in a case typically forms the basis for all subsequent costs, especially given that vendors usually charge on a data volume basis.

NEW APPROACHES

In past methodologies, all electronic data was typically collected and then processed via hosted service providers who would charge per gigabyte of collected data. Often, this workflow wasn’t phased or iterative, thus making e-discovery an all-or-nothing proposition. Today, the scoping process has been revolutionized by the ECA methodology and, as a result, has become quicker and much more accurate. The first phase is to “right-size” the discovery initiative by ensuring that the collection component isn’t unduly restrictive (too few custodians) or overly broad (too many custodians).

ECA often plays a particularly valuable role here because one of the main functions of any enterprise class

ECA product is the ability to rapidly process and analyze case data to help legal teams determine the most likely corpus (i.e., amount and form) of relevant ESI. The use of “pre-processing” types of functionality allows legal teams to estimate total data volumes, file types and date ranges, which in turn facilitates more accurate estimates for the duration and cost of downstream e-discovery phases.

After the initial scoping phase, the next logical step in the ECA process is to begin analysis of the case facts to determine an early posture for the matter – meaning an assessment of the merits of the claims contained in the complaint (whether formal or not). The goal here is to create a formula where the firm and client can analyze the costs of e-discovery and litigation collectively, weighing them against the amount in controversy and the likely outcome. This phase is well supported by analytics and statistical sampling tools to ensure that decisions on a limited data population can reasonably be extrapolated from the entire data corpus.

Finally, ECA’s value is also demonstrable when preparing for the escalated timelines of the Meet and Confer process. When the U.S. Federal Rules of Civil Procedure were amended in 2006, the most significant changes were to numerous procedural rules involving the Meet and Confer process, the goal of which was to force opposing litigants to discuss e-discovery prior to disputes forming. Nowadays it’s quite common for topics at Meet and Confer discussions to include e-discovery topics such as relevant date ranges, data types, custodians, potential keyword strategies and production formats. These objectives can be accomplished in a timely and cost-effective manner by leveraging ECA tools and proactively preparing for this early stage of litigation.

For example, the opposition in a given matter may come to the Meet and Confer with a laundry list of search terms and key players. An attorney who isn’t leveraging an ECA methodology is then forced to negotiate key words in a vacuum, typically without looking at the actual data. This approach simply isn’t effective and often paints both parties into a corner because the negotiated list is not likely to accurately reflect a search protocol with the requisite levels of precision and recall.

WHY IT MATTERS

Ultimately, ECA is a great weapon to combat the rapid proliferation of ESI volumes and the attendant costs and challenges. But, to leverage this emerging

methodology, savvy litigators must change how they think about expending up-front energies and correspondingly become more deft in their use of next-generation ECA tools. As the sun sets on the manual review (“paper-esque”) model, ECA stands ready to rise to prominence for those willing and able to embrace this exciting new approach. ✱

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