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Seven strategies for effective oversight and control of eDiscovery spend

This white paper details seven key strategies that high-performing, efficient law departments employ to control discovery costs and develop—and then stick to—workable budgets, making discovery a repeatable, predictable business process.

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Introduction

Gone are the days when corporate law departments could fly under the radar, operating outside of budgets (or without budgets) because litigation was deemed too capricious and unpredictable to manage as effectively as other business units within the company. Yet, legal leaders are expected to run as any other high-performing business department: on budget, on time and with measurable results. This comes at a time, however, when law departments are experiencing severe cutbacks to mitigate economic effects of COVID-19, facing a higher volume of work, including unplanned, high-urgency work largely related to regulatory and compliance investigations and response, and are being tasked to oversee new areas outside of traditional litigation and investigations. Even the largest law departments are struggling to manage workload and budget, and default to their outside counsel providers to get fast turnaround, regardless of cost or budgets.

Discovery offers the largest opportunity for repeatable processes (associated with both anticipated and unplanned work), along with cost-savings, since it comprises an estimated 70 percent of litigation spend.

Legal operations maturity model for eDiscovery and litigation management

The Association of Corporate Counsel (ACC) has developed a legal operations maturity model for eDiscovery and litigation management. It explains how to "master the curve" for eDiscovery readiness and how to make change happen (and stick!).

The journey begins with the early stages of eDiscovery maturity, in which all eDiscovery is coordinated by outside counsel, to whom eDiscovery work is outsourced. In the intermediate stage, corporate law departments use alternative legal service providers (LSPs) on a limited basis, have some alternative fee arrangements (AFAs) in place, and work towards better collaboration between LSPs and law firms. They have limited use third-party services for first-level document review and use in-house tools for collections, search and preparation of electronically stored information (ESI). In the advanced stage, law departments have full end-to-end eDiscovery programs, regularly use technology to limit human review, regularly use document review services, and collaborate with IT on new technologies.

Overview of ACC's legal operations maturity model for eDiscovery and litigation management*

Stages	
Early	• All eDiscovery coordinated by outside counsel
	• Litigation support (including document review) handled by outside counsel
Intermediate	• Internal dedicated eDiscovery resource to coordinate collections and advise on strategy
	• Limited use of third-party services for first-level document review
	• Use of in-house tools for collections, search and preparation of electronically stored information (ESI)
Advanced	• Full end-to-end eDiscovery program
	• Use of predicative technology to limit human review
	• Regular use of document review services
	• Internal coordination with IT to identify potential eDiscovery issues with new technologies

* See appendix for full model description

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The legal departments that have effected change and reached the advanced stage benefit from repeatable, cost-effective discovery. Given the measurable advantages of a mature eDiscovery program, why haven't more legal departments moved to the advanced stage?

First, a majority of law departments default to expensive outside counsel to get fast turnaround, regardless of cost, and most go over budget by 50 percent when relying on outside counsel—even for tasks like routine (but law firm lucrative) document review (which comprises on average 25 percent of corporate spend on law firms!) and eDiscovery.

At the same time, data volumes, new data sources and the time demands of investigations and "rocket docket" discovery cases have not let up. Today, these issues are exacerbated by an increasingly remote workforce using personal devices who intermingle work and personal data. Cases that once involved a manageable 30,000 Microsoft® Word and email documents routinely encompass three million or more documents comprising all types of ESI, from traditional sources to cloud repositories, chat, instant messaging (IM), and other ephemeral data including social media. Even the most advanced IT teams are taxed with searching email boxes, identifying and collecting data, and preserving potentially relevant data, particularly when tight timelines are involved, and many legal teams remain reactive.

In light of these challenges, how have high-performing law departments gotten to where they are in terms of people, process and technology?

This is where mature legal departments have the advantage in oversight, control over eDiscovery spend and repeatable processes. While every law department's journey is different, they share a set of best practices.

Start with strong foundations

An organization should start by establishing the core foundations and themes that can be relied on to control costs and build successful discovery budgets: Focusing on legal operations as a business process and knowing their employees better. Budgeting success depends on applying and supporting these themes. "Perfect" discovery is an unattainable myth, the pursuit of which can bleed a budget dry.

These seven practical strategies can help keep a discovery budget on track. They are arranged from left to right on the Electronic Discovery Reference Model (EDRM), though need not be followed linearly:

1. Optimize "time to results" for effective discovery

2. Hold, collect and preserve wisely

3. Gather actionable intel prior to review using front-end analytics

4. Manage discovery centrally

5. Limit human review

6. Develop repeatable processes

7. Leverage business intelligence for data-driven decision-making

Before discussing the strategies, first it is important to set the five foundational themes:

Understand the role of legal operations

The rise in legal operations is showing no sign of hitting an inflection point as legal departments struggle to gain insight into employee, vendor and outside counsel performance, and manage spend. Of course, legal operations are about more than spend,

but the most pressing need, and thus the most attention, is for budget management and cost containment.

Legal operations require a holistic approach, treating all legal functions—and all of a company's offices, wherever they may be in the world—as interrelated components of a whole. That means that instead of pigeonholing every unique situation or matter into a different box or category with a distinct toolkit, it makes sense to work with fewer vendors that can each provide a broader range of technology and/or services and to provide a defined approach for using particular vendors based on the type of matter.

In short, the focus on legal operations ties into the question of how to develop effective strategies for reducing legal spend on discovery. But operations involve people and it is important to know who they are.

Know your people better

It is impossible to manage a budget without knowing the people working within (or who are affected by) that budget. What exactly do they do for the company? What types of data do they generate, manage, retain or archive? How well do they understand discovery and their roles and obligations? How well do they comply with those obligations and communicate their concerns?

Organizations must know all the different sectors of the business and understand how each department uses data. This knowledge helps reduce spend, adjust operations and create policies that will make a business stronger and more cost effective.

It is incumbent on legal operations leaders to understand, in depth and in detail, the business operations of the entire company. That means conferencing with all the different business unit leaders, interviewing custodians and figuring out what the business needs to collect for a potential litigation or investigation matter.

The better an organization knows its people, the better it can define and reduce scope—without losing valuable discoverable data—and the more efficient it can be. Of course, part of the reason an organization needs to know its people is so it can understand its data.

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"Metrics are key in planning your litigation. Know where your data exists so you can make the argument against over collection using those metrics.

TracyAnn Eggen
eDiscovery Specialist
Dignity Health

Know your IT environment better

In a perfect world (for ESI management, at least), an organization's data would be stored in one place, and would be secure and readily accessible for collection and review.

In reality however, that has never been the case, and data management represents a pain point for most businesses. Some fraction of the modern workforce has always been mobile, not only requiring remote access to enterprise locations and data, but also typically generating local repositories that need to be considered, and may well be implicated, in the context of litigation and investigations.

The benefit of an approach that consolidates and centralizes ESI storage is obvious, and such an approach serves the dual objectives of timeliness and comprehensive coverage. With data primarily in one location, identification and collection can be expedited, and standardized protocols can be adopted for consistency. Likewise, the potential for missing ESI that may be directly pertinent to the case is minimized.

Ultimately, eDiscovery and investigations are driven by the data, so every effort to make data thoroughly and quickly available will improve efficiency and effectiveness.

Know your data better

Data maps are terrific, but developing them and then keeping them up to date can be a huge undertaking. And data mapping is not everything. Knowing data better is a combination of smart data management (understanding and making the most of an organization's existing data) and metrics (capturing specific performance measurements about data that explain trends in discovery spending).

Data management demands not just knowing where data is but also what that data means. The way to build that knowledge is to do a post-mortem analysis on every case, every time. Within each subject area, whether labor grievances, patent or trademark issues or business issues, such as contractual compliance, revisit each matter at its conclusion. For example, organizations should maintain custodian profiles for each matter, so as not to reinvent the wheel with each new case, while simultaneously assessing metrics for each case to effectively hit targets.

Based on that knowledge, they should start a conversation with outside counsel about what custodian and non-custodian data needs to be collected. When an argument for limiting the scope of discovery is based on hard data from numerous prior matters, they can identify ways to reduce overall spend without losing important data.

Bear in mind that knowing data also means building a partnership with the IT department and vendors that are supporting the applications. Organizations should not wait until they urgently need data or information to open that discussion. They should start building the relationships and gaining the knowledge needed to be an effective liaison between IT and outside counsel as soon as possible.

Proportionality is the watchword

Key to limiting discovery spend and controlling budget is an understanding of what discovery encompasses under today's rules. Ever since the December 2015 amendments to the Federal Rules of Civil Procedure, the emphasis of discovery has shifted. Today, the biggest problem is not recognizing helpful or relevant or even dispositive information—it is finding that information within the morass of millions of unhelpful, irrelevant and meaningless documents. That is why discovery is now thought of with a modifier: Everything should be about proportional discovery.

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"Requests are becoming more burdensome—they're broader and encompass more sources of data. In-house counsel are in the position to untie the knot and see where there is overlap and what's really necessary. That translates into a reduction in scope."

Sharyn Procaccio
VP and Assistant General Counsel
Hunt Companies

Rule 26(b)(1) redefined the scope of discovery to include "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."

Proportionality is explained via six factors:

- The importance of the issues at stake in the action

- The amount in controversy

- The parties' relative access to relevant information

- The parties' resources

- The importance of the discovery in resolving the issues

- Whether the burden or expense of the proposed discovery outweighs its likely benefit

Balance is the key here. In a world of devices, there will always be too much data. The critical question, then, is how much data is proportional to the needs and demands of each case. Organizations must keep the limit of proportionality top of mind at all times. Every time an organization considers a request for access to data or access to personnel, they should evaluate whether what is being sought, or what an opponent is seeking, is proportional to the matter. The most effective and least painful way to limit discovery spend is to limit the amount spent on nonproportional information; conversely, the best way to blow a budget is to fruitlessly pursue "perfect" discovery.

With that caution, these next key strategies will help put these foundations in place and produce proportional discovery within any budget.

1. Optimize "time to results" for effective eDiscovery

Every legal matter brings with it a sense of urgency, and "time to results" is critical for eDiscovery to be effective. Optimizing time to results means looking at the entirety of the eDiscovery process, and taking advantage of every opportunity to improve and expedite workflow. And the transition to an increasingly remote workforce provides a clear opportunity to focus on workflow components that can be leveraged with the ease, availability and cost-effectiveness of the cloud.

Thus, consider cloud-based capabilities for data-intensive activities, or a hybrid approach.

Collection is often the first physical activity undertaken during the course of any legal matter. To expedite the process, there should really be a direct, predefined and battle-tested seamless pipeline to move collected data into a hosted environment to ensure prompt availability of ESI for review. Combining that pipeline with the hosted review and analytics platform means that an investigation or eDiscovery review can begin almost as soon as the data is collected. No time is wasted in arranging for, training or coordinating with disparate providers, or coming up to speed on the most efficient and effective way to locate the documents necessary to respond to the information needs underlying the matter.

Taking full advantage of cloud capabilities (particularly for data transfer and access) is another way to enhance the workflow. Modern collection tools can simply be pointed at the appropriate document collection, and the documents will automatically be uploaded to the cloud in the most nonintrusive and expeditious manner (discussed in greater depth below). From there, the documents can seamlessly be transferred to a review and analytics platform, and made available to any number of members of the legal team for investigation, analysis and/or review.

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And the availability of the cloud approach underscores the need to avoid traditional disjointed early stage in-house eDiscovery techniques, particularly given the obligation to be sufficiently thorough.

The implications on the time to results are obvious, and can completely abrogate the costs and inefficiencies of multiple vendors, law firms and point solutions to execute the various parts of the EDRM process.

2. Hold, collect and preserve wisely

Legal holds arise from the duty to preserve information from pending or reasonably anticipated litigation. In practice, many legal departments still issue holds via email and track them using spreadsheets—a time-consuming, risky and expensive "one off" way to manage holds. Litigation typically begins with a hold notice and then continues with communications, collection and preservation for the anticipated litigation. As the number and complexity of holds increases, however, relying on email and memory becomes increasingly dangerous, particularly when those managing holds move on to other jobs or leave the company. Sanctions for failure to properly preserve evidence are increasing in severity and number.

Implementing holds manually—or in a one-off manner—can blow a budget even before the first stage of discovery. Many legal departments still use a traditional workflow in which outside counsel conducts in-person interviews of custodians to identify potentially relevant data sources. Then, a forensic collection vendor may collect data and a specialized eDiscovery vendor may process the data and load it for review. Under this model, legal holds and collection alone can reach upwards of $500,000 per matter (not to mention the disruption to employee productivity).

Automate legal hold, collection and preservation

Automated legal hold technology delivered via the cloud simplifies these processes within a single, cost-effective system. Automation reduces errors, risk and time, and adheres to a defensible process. Furthermore, automated legal hold solutions can connect to endpoint collection and preservation software (also cloud-based) for seamless access to critical documents in minutes—not days (or weeks!) when relying on IT.

Legal hold notification

Automated legal hold notification sends notices to inform custodians of their obligations and tracks custodians' responses to holds, ensuring timely acknowledgment of every hold and the associated statements of compliance. Also, legal hold notification tools automatically generate periodic reminders to ensure that custodians remember obligations even when other holds are released.

IT system integration

Automated legal hold software can be integrated with internal email and HR systems to mitigate the risk of legal exposure when employees exit the organization. When status changes are detected, the system automatically assesses custodians against the legal hold criteria and the appropriate communications are sent to legal, IT, operations, and HR staff. This simple communication triggers department stakeholders to run their preservation protocols to make sure that the departing employee's data is appropriately preserved.

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Accelerate investigations with legal hold questionnaires

In an investigation, there may be little to go on and investigators likely will not know exactly who is involved or the precise circumstances. The complaint typically leads to the identification of some limited number of potential custodians who are likely to have at least some level of knowledge of the facts surrounding the complaint and data related to it. It is critical to quickly leverage the knowledge of those known custodians to expand the scope of the investigation.

Since time is of the essence, an automated legal hold application can expedite the investigation process. Automated legal hold offers the opportunity to quickly and easily elicit information from key custodians and simultaneously collect documents for review. Questionnaires can be structured to quickly and efficiently elicit substantive information about the complaint from all of the known document custodians at the same time that their documents are being collected. That information can then be used to scope and focus the document review even before the custodians can be interviewed. At the same time, as new information surfaces, investigators can continue to define potentially relevant data sources and start piecing together a chain of events.

Employee questionnaires

The software also notifies and surveys key employees to gather important information and identify relevant data sources and documents to take the guesswork out of what needs to be preserved. Critical stakeholders are locked in first with the discovery effort phased in from there as needed based on what the questionnaires reveal. Questionnaires also help determine exactly how data is managed by important custodians. Do they have files on a hard drive? Have they strayed from the expected data map? Do they have issues with the accessibility of their data? What mobile devices (whether company or personal) are they using that may be storing relevant data? Questionnaires are the quickest and most cost-effective way to glean these answers and can be customized with pre-drafted templates.

The data gathered from legal hold notification questionnaires can be used to understand the extent and volume of potentially relevant and proportional discovery before collection starts. This helps to better plan for and control the scope and cost of the effort.

Preserve and collect immediately, expansively—and discreetly

Typically, in-house eDiscovery historically relied on the IT department to apply search strings to locate emails for review. Not only have studies shown that Boolean search is not an effective way to locate pertinent documents, but the possibility of missing critical acronyms, product codes and formulaic designations is obvious—not to mention overlooking an entire category of electronic documents in, for example, a network share or collaboration platform. In order to avoid this potential impediment to a thorough investigation or eDiscovery review, the scope of document collection should be designed expansively, to do little more than eliminate documents that are virtually certain to be irrelevant. This not only ensures coverage, but also avoids the need to constantly go back to the well to have the IT department collect documents with new, unanticipated search strings which, in turn, advances the timeliness objective.

In the same vein, in-house legal matters focusing on emails often relied on a single reviewer using nothing more than the search capabilities of, for example, Microsoft™ Outlook™, to locate relevant documents. In reality, given the limited analytics capabilities of Outlook that meant reviewing the entire document collection. Outlook is, after all, an email platform, not a review and analytics platform.

Using simple yet powerful cloud-based tools, an organization can rapidly collect and preserve in place once a hold has been issued. Legal hold notification software can "talk to" the archiving software to enforce data preservation obligations and enable centralized management of retention requirements. By the systems exchanging information about which custodians are on hold, the data collected is preserved by overriding existing data disposition policies. This reduces the burden on IT to search, collect and preserve data, and gives legal teams more control over the process. At the same time, many collection tools can operate in the background without disrupting employees while they work.

Depending on the matter and ESI sources, other collection tools may be necessary. The best end-to-end eDiscovery and ECA platforms can collect data from file shares, enterprise content management systems, email and cloud sources, and endpoint devices.

Bear in mind that preservation is the stage at which discovery failures can be expensive to fix. And those failures can be terminal to a case if they are egregious. Fortunately, there is no need to rely solely on custodians. Organizations that use automated cloud security software for endpoint collection and preservation, for example, need only rely on back-ups if a device is stolen, compromised, or subject to user error (whether purposeful or inadvertent). In other cases, organizations can instantly suspend any deletion practices

that are in effect, preventing many types of spoliation from the moment a notice of a potential matter has been issued.

Regardless of how data is collected, it should be immediately made available to the legal team in an investigation or full eDiscovery review platform.

3. Gather actionable intel prior to review using front-end analytics

Many organizations, in an effort to limit the volume of documents they send to outside counsel for first-pass review (along with the associated costs) invested in first-generation "early case assessment" (ECA) software for collections, search and preparation of ESI. These tools are effective at collecting from data sources, de-NISTING, sorting, filtering and culling based on keyword search—mostly narrowing down the data set prior to sending the documents to outside counsel (or a third-party review service for intermediate-stage eDiscovery teams) for first-level review.

Without analytics tools to go deeper, these tools not only often fail to surface the who, what, when and other pertinent questions; they also often generate over-inclusive data sets (resulting in outside counsel billing for the review of a good number of irrelevant documents to find just one relevant document). They simultaneously generate under-inclusive data sets (risk of missing critical evidence, especially the "unknown unknowns" at the beginning of an investigation or data exploration). Significantly, traditional ECA tools may delay access to key evidence that might inform case strategy earlier.

Over time, additional functionality has been added to some of these systems for limited review capabilities, including less mature forms of technology-assisted review (TAR), but as document volumes expanded, scalability limitations—such as the inability to handle more than one million documents for a single matter—necessitated investments in more fully developed eDiscovery platforms with greater scalability and flexibility. Thus, many organizations have been left with legacy tools with overlapping functionality and limited interconnectivity.

Today, next-generation ECA tools (both on-premise and cloud-based) offer the same collections, search and processing capabilities as earlier systems, and can flexibly scale (on demand) to up to 30 million documents for just a single matter, overcoming the shortcomings of earlier systems.

Most importantly, however, next-generation ECA tools are truly designed for ECA. That is, they front-end analytics for true ECA, giving legal teams and counsel valuable upfront information on whether to settle or proceed with the case. For example, predictive searching and filtering leverages advanced algorithms to quickly surface data that is closely related to known responsive data to make interrogation more efficient and effective than keyword search, particularly where there are many unknown unknowns. Other tools automatically disclose common phrases amongst documents and group data by their contextual concepts. Further, interactive text mining tools provide unprecedented insight. Text analytics automatically summarizes content so reviewers can see what documents warrant closer review, assesses the sentiment within documents to steer reviewers to the most negative and positive data, and automatically surfaces the entities within documents (people, places, and organizations) to help answer "who, where" questions.

The use of next-generation ECA tools saves substantial cost down the road, regardless of whether the case proceeds or settles. The addition of analytics enables swift decision making to inform case strategy by identifying pivotal events, key players, chronology and evidence to answer key questions: "Is the wind at my back, or in my face?" "Should the

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How a front-ended analytics ECA approach saves substantial costs over legacy "ECA" tools

Take a 1.5 million document collection. Under a traditional review even using TAR, it would take 52 days to give the legal team an understanding of the issues at hand. Using ECA loaded with analytics, it would take just a few weeks to arm the team with the data to "fight or flight." In terms of cost, a traditional law firm model responsive review using TAR would cost upwards of $3 million (including hosting and law firm hourly billing).

Using a next-generation ECA system, the legal team could very well find the information that informs them to settle (thus $0 in document review costs) or move to a full review ($337,000 in review costs when using a managed document review provider, discussed in greater depth below).

case proceed or settle?" "Are we sure no one cooked the books?" "Can we thoroughly and statistically demonstrate that there is no evidence to support the allegation?"

Moreover, when a full litigation or compliance review and production is warranted, the data can be seamlessly transferred within the same system to full review and analytics capabilities, including advanced TAR based on continuous active learning (CAL). (We will discuss TAR based on CAL as another cost-cutting technique in a later section.)

4. Manage discovery centrally

Now that the benefits of seamless cloud-based legal hold, collection, preservation, and advanced ECA tools have been discussed as key strategies to save substantial time and costs, let's turn to another key way advanced eDiscovery teams can create efficient, cost-effective and repeatable business processes.

Traditionally, corporate legal departments have managed portfolios in silos—sending data to multiple vendors and law firms, perhaps by area of expertise or to balance workloads across teams. Under this model, documents are collected, processed, loaded into a review platform and reviewed for a single matter. This occurs even when many of these documents, such as common technical documents related to one patent infringement suit, are likely to be relevant where that patent has been alleged in another matter. Once the case is complete, the documents, coding and work product—including the costly review of privileged documents by outside counsel—is dispositioned and human judgments are lost for the next "like" case.

Thus, working in silos misses the opportunity to review once and produce many times. Documents that frequently come up in litigation need to be collected and reprocessed, re-reviewed and reproduced each time. Instead of viewing each case or each data point individually, which is inefficient and costly, organizations can use a multi-matter management system with a core document repository and data warehouse for reuse across future cases.

When using a multi-matter management system with a data repository, each new matter creates greater efficiency because data is collected and processed just once. When new matters arise, documents can be assigned from the data repository to a new matter without needing to collect or process the same data (additional costs), and prior coding can be pre-populated (greater efficiencies). That is, coding decisions or "tags," such as privileged, confidential and other designations, are retained for use across multiple cases. Documents can then be efficiently reproduced across matters, allowing for a "review once, produce many times" workflow for commonly produced records.

A central data warehouse provides a holding area for data about frequent flyer custodians and data sources, along with sensitive documents, such as privileged, trade secrets, financial information, personally identifiable information and protected health information. The documents can then be applied to each new matter as needed, without incurring repeat costs.

Centralizing case data and documents offers the following primary advantages over the traditional data silo model.

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Cost-savings and process repeatability of centralized eDiscovery

Imagine a large pharmaceutical company has 10,000 R&D documents related to a core compound used in multiple drugs.

Over time, 50 lawsuits have hit relating to each of the drugs. Under a traditional siloed approach, assuming it costs $1 to review one document, it would cost $500,000 across the cases. This does not include the additional costs of interviewing the same custodians again, collecting and processing the same documents or the immeasurable costs associated with the risk of inadvertent production of sensitive materials by one or more vendors and law firms hosting copies of that data. In a centralized model based on multi-matter management and data re-use functionality, these same documents are reviewed and coded once—costing $10,000, one time only and **saving $490,000.**

Collect, process and load once

A centralized model collects, processes and loads documents to a core repository once from which they can be assigned to individual matters, avoiding unnecessary repeat fees with each new matter. More sophisticated systems integrate legal hold and collection functionality for efficient data flow, to understand custodian and non-custodian data from legal hold through production.

Propagate coding decisions within individual matters

Legal teams can reuse valuable attorney work product (coding decisions from prior matters) in support of matters that arise later. While relevance coding may vary from case to case, issues such as privilege, privacy and proprietary information generally remain consistent and are retained and reused across cases. Keeping that reviewed data in a repository with its tags intact shortcuts that portion of review in the next matter, saving on the most expensive stage of discovery.

Review once, produce as many times as needed

Legal teams can reuse entire documents produced in a prior matter without further review. This opportunity often arises with common business documents and in intellectual property disputes. The documents can often be reviewed and categorized once and assigned to as many matters as needed at no additional effort or cost, enabling rapid response and supporting a strategic advantage, especially when large sums are at stake.

Reduce risk

Centralization also means less risk. First, there are fewer coding mistakes across documents, driven by consistent process and work product from prior cases. Second, centralization reduces the risk of inadvertent production of sensitive material. Third, it helps keep data secure by allowing in-house teams to control access and limit the flow of sensitive information across disparate law firm and vendor databases.

Report across matters for better decision-making

Finally, data centralization is a key component of enhanced cross-matter reporting across enterprise custodians, collections, deadlines, review metrics and related legal spend—all necessary for daily management and strategic planning. This will be explored further during a discussion on metrics in the next section.

Centralization is more than just a multi-matter management system. It is about taking control of the entire eDiscovery process, understanding the rules governing proportionality and streamlining systems and processes to cost-effectively manage legal data.

5. Limit human review

Document review is the most expensive stage of discovery—making it the most immediately impactful stage at which to control and limit spend. Those legal departments just starting their eDiscovery journey may still rely on outside counsel (and/or a review provider) using keyword search, looking at as many as nine non-responsive documents for each responsive one. That means these organizations are wasting time and money on approximately 90 percent of review efforts.

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"It baffles me that attorneys overwhelmingly still use keywords instead of TAR. I don't know why. Perhaps they don't understand the technology. We cannot be afraid of technology."

Andrew Peck,
U.S. Magistrate Judge U.S. District Court Southern District of New York, 1995-2018 Senior Counsel, DLA Piper LLP (U.S.)

Today's more advanced legal teams use technology-assisted review to limit human review. TAR based on a continuous active learning protocol is one of the lowest-hanging fruits to reduce discovery costs. The ratio of responsive documents reviewed with TAR based on continuous active learning is far superior to that of keyword search followed by linear review or other less sophisticated forms of TAR, achieving an average ratio of two to one. This means that the review team looks at just two documents to find one relevant one. That team finishes faster and bills less—saving up to 80 percent (or more) on the total cost of review.

How does CAL work? CAL is like Spotify for discoverable documents. As relevant data is coded, CAL organizes the discovery set by how closely related it is to offer results that are closer and closer to the universe of responsive documents. The richest information rises to the top of the pile. Since learning is continuous, CAL easily accommodates rolling collections with none of the subject matter time and cost used to train earlier TAR systems.

When a team begins coding the documents, the TAR engine continuously surfaces the most likely relevant ones first based on the previous coding decisions. CAL systems also mix in contextually diverse documents, a process by which the algorithms actively find documents which may be related but are unlike other documents that have been reviewed. This helps reviewers find documents they might not otherwise see.

With recent advancements in TAR, it is now very effective in all contexts. Next generation TAR featuring continuous machine learning and contextual diversity algorithms is equally effective for review tasks of any size and document collection richness (including low richness collections), and today is used for investigations, opposing party reviews, deposition preparation, issue analysis, privilege assessments and privilege quality control (QC). The result is that an organization can continue to increase review savings—notably outside counsel fees—at every stage, including QC.

The importance of continuous active learning for many types of review cannot be overstated. Do not leave this powerful tool on the table.

Regularly leverage review partners to further limit human review while improving quality

The harsh reality of modern eDiscovery is that document collections continue to grow, without a commensurate increase in the time available for review. That places a mounting pressure on managed review teams—which more advanced eDiscovery teams regularly rely on—to develop techniques to maximize their efficiency, while simultaneously ensuring the utmost in quality. Indeed, sacrificing quality not only jeopardizes the sanctity of sensitive information, but often incurs significant external costs for corrective quality control reviews by outside counsel.

Technology can certainly help. An experienced managed review team can effectively limit the number of documents that need to be reviewed by using a continuous active learning protocol. On average, a typical CAL review requires the review of an equal number of responsive and non-responsive documents to achieve the high levels of recall most often necessary to meet production objectives in litigation.

But technology alone is not enough—more responsive documents still require more review, even with continuous active learning. Innovative and consistent best practices that take advantage of human insights and extract every measure of efficiency from modern review platforms are necessary to truly optimize a managed review, and drive efficiency up while providing a high-quality service. With the right approach, consistently aligned with the legal team's objectives, a managed review team can improve on the exemplary efficiency of even the most effective technology-assisted review protocol.

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Finally, when fixed-fee arrangements (similar to AFAs) are provided upfront, costs are capped. Let's take a look at two examples.

By leveraging CAL, and an experienced managed review team, the benefits are clear. In the instance illustrated below, an expert CAL review results in more than $2.4 million savings compared to an outside counsel review and more than $200,000 savings over an alternative managed review vendor:

High-Efficiency Review Savings Compared to Law Firm or Contract Review: 650,000 Documents

	Document Collection Size	Number of Documents Reviewed	Review Rate	Hours for Review	Billable Rate***	Cost
Outside Counsel Review*	650,000	325,000	50 docs/hr	6,500	$400/hr	$2,600,000
Managed Review Vendor*	650,000	325,000	50 docs/hr	6,500	$55/hr	$357,500
OpenText Managed Review**	650,000	130,000	50 docs/hr	2,600	$55/hr	$143,000

*Using keyword search; assumes culling 50% of the documents.
** Using OpenText TAR 2.0 technology, with 10% richness, the managed review team typically reviews 20 percent.
***Assumes OpenText billable rate is the same as another managed review vendor.

By designing and adhering to strict QC protocols and thus substantially reducing errors, an expert managed review provider should be able to reduce outside counsel QC review—which is typically 20 percent of documents—to just 2.5 percent. Here's a real-life illustration of the measurable savings just in law firm QC review:

Lower Outside Counsel QC Review Spend Because of Higher Quality Review

Outside Counsel QC Percentage	Document Collection Size	Number of Documents Reviewed by Managed Review Team*	Number of Documents for Outside Counsel Review	Outside Counsel Review Rate	Outside Counsel Hours	Outside Counsel Billable Rate	Cost
Standard: 20%	650,000	130,000	26,000	100 docs/hour	260	$ 400/hour	$104,000
OpenText Managed Review: 2.5%	650,000	130,000	3,250	100 docs/hour	32.5	$400/hour	$13,000

*Assumes OpenText technology-assisted review culls 80% of document collection, leaving 20% for further view.

Finally, when the review team is tightly integrated with the in-house legal team and their outside counsel, the opportunities for more efficiency gains occur over time as review staff becomes knowledgeable about the specific issues and risk areas.

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6. Develop repeatable processes

Whether managing data internally or working with a partner, standardizing workflows and leveraging technology around a central data repository can help gain control over data and ensure consistency across all cases. This eliminates redundant efforts and establishes efficiency-promoting best practices.

First, organizations should develop a standardized approach to discovery. They can start by evaluating the impact of current processes and tools and investigating best practices they can integrate into the approach. A corporate playbook can memorialize these standards to ensure consistent application and support process defensibility.

A well-thought-out playbook should cover the entire discovery process, from data preservation and collection formats and labeling to processing, loading and reviewing data. The process should include determining what types of searches will be used, how data review workflows will be organized and the respective roles and pass-off points for internal reviewers, managed review teams and outside counsel and how data will be produced. Organizations should develop overarching best practices and build them into processes.

But they need to be careful not to mistake this thoroughness for complexity. Plain language, simple policies that are clear, concise and usable by the entire team, including in-house counsel and eDiscovery professionals, vendors and outside counsel are preferable to complex and theoretically complete but unreadable tomes. If possible, incorporating a diagram describing the process and clarifying timeframes and expectations is helpful.

The playbook should answer key questions for the department, employees and discovery partners. As noted above, it should address every component of discovery, from the initiation of a potential matter to its eventual resolution in clear terms. What happens after a legal hold has been issued? What is the process for collecting data? What is the most efficient process for review workflow and who are the responsible parties for first-pass review, document prioritization, enhanced QC and privilege review? Organizations should establish clear expectations and consequences for failure to meet those expectations.

Second, to take full advantage of every opportunity to control discovery costs, they should regularly evaluate and optimize techniques as discovery technology evolves, avoiding the tendency in discovery to "set it and forget it."

As important as it is to create consistent, repeatable processes, the playbook should be fluid so it can grow and adapt to meet requirements. It will consistently improve discovery practices and find new ways to save money and keep the budget under control.

By continually evaluating protocols and partners, an approach to discovery can be both more accurate and more affordable. Over time, consistency and efficiency lead inexorably to cost savings as organizations learn from data, build a data repository and spot new areas for improvement.

7. Apply business intelligence for better decision-making

Taking another page from the legal operations playbook, using data metrics and business intelligence (BI) strategies and tools can both improve matter management and drive informed strategic decision-making to reduce costs.

Only when data is aggregated and integrated into a central repository does meaningful reporting become possible. With good reporting legal teams can better budget, properly manage day-to-day legal operations—including the daunting task of resource allocation across multiple matters—catch problems before they occur and easily keep other stakeholders informed.

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Sophisticated tools display up-to-the-minute metrics and analytics that support day-to-day discovery and budget management. For example, knowing at any moment how many custodians the organization is waiting to hear back from, the status of collections, how many documents have yet to be reviewed or if there are enough review resources to meet current timelines, helps estimate whether deadlines can be met and budgets adhered to.

A good BI strategy should help legal department professionals accomplish the following:

- Aggregate key eDiscovery metrics, such as custodians, collections, matters, deadlines, resources and allocations across matters, comparing them with historical review metrics. With historical trends and project reports, get to know who data holders are and marry business operations and document management protocols with investigation and litigation portfolios.

- Integrate information from the core repository with other relevant systems within the corporation, such as legal hold and collection technology, and accounting and human resource systems, for a more comprehensive understanding of costs and establish and adhere to a discovery budget.

- Understand key performance indicators to track the progress of cases, ensure proper resource allocations based on availability and deadlines, evaluate pricing models and assess legal spend across vendors and outside counsel.

- Make informed strategic decisions. For example, if 60 percent of a custodian's collections were identified as privileged across all prior matters, that insight can be used to collect differently from that custodian. At the very least, know there will be budgetary impact and plan accordingly, since it is costly to review a privileged document.

- Integrate TAR metrics into the dashboard to stay apprised of the progress and the cost of a review.

- Scrutinize counsel performance to help vet billing rates. This keeps outside counsel diligent about billing and logging hours and shows how to save money without sacrificing quality.

- Provide easy access to only the metrics that matter for a particular role, and external reporting to inform critical players who might not proactively engage the system.

By aggregating organizational data across matters, organizations can identify process improvement opportunities and work these into the evolving discovery playbook. After getting a realistic sense of how closely the organization sticks to budget estimates and how discovery spend varies month to month, they can quickly decide what actions to take—aiming for predictability, control and reduced costs. Any decision made will be based on sound data.

Conclusion

With the right technology and best practices, legal departments can improve daily operations, more effectively plan for and control discovery costs and continually evolve the organization with data-driven intelligence.

Organizations need to remember the key themes that both support and are supported by the strategies outlined. For example, the key theme of "know data better" makes it easier to implement legal holds and develop repeatable processes using a centralized data management system and dashboard metrics to assess moment-to-moment success. And applying technology and services to expedite and enhance review makes it quicker and more cost-effective than ever to review data and extract critical insights.

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Keep an eye on those foundational themes—approach the legal department as a business operation and know people, the IT environment and data better—while implementing these strategies for successful oversight of discovery spend and budgeting.

Consider the cloud for end-to-end eDiscovery capabilities, automate and streamline legal holds, data collection and preservation, front-end analytics for true ECA, centralize data management, develop a playbook of repeatable processes, expedite review using TAR based on continuous active learning and track metrics across matters via up-to-date dashboards to better predict and manage discovery spending.

Appendix: ACC's legal operations maturity model for eDiscovery and litigation management

Stages	
Early	• Virtually all work that is outsourced is directed to law firms
	• Law firms are at arm's length from in-house department; relationship may be somewhat untrusting or adversarial
	• Law firms are managed by frontline counsel
	• Ad-hoc billing rates, engagement, and billing standards
	• Limited invoice review and analytics
	• Lack of supplier evaluation program
Intermediate	• Limited use of alternate legal service providers (LSPs)
	• Concerted effort to improve collaboration with law firms and other LSPs (e.g. through feedback, conferences, joint process improvement efforts)
	• In-house resources (often legal operations) are overseeing cost effectiveness of law firms and LSPs
	• Billing guidelines are acknowledged & enforced through rigorous bill review.
	• Alternate free arrangements (AFAs) are in limited use and are not incorporated into billing/management systems.
	• Some informal or ad hoc law firm/supplier evaluation

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Stages	
Advanced	• Sourcing decisions are ongoing considerations and LSPs are integrated in legal service delivery model; use of legal supplier is driven by value provided at phase/task level
	• Law firms/LSPs are considered value producing business partners; remove, duplicate sentence; continually improving performance and relationship
	• Outside counsel and vendor management are centralized function(s) within legal operations; involvement in RPFs, engagements, pricing, and performance review
	• AFAs considered on all matters and heavily used; systems smoothy incorporate/ support AFAs in billing and metrics/dashboards; procedures exist to assess value and reconcile pricing to cost variances
	• Frequent review of budgets and performance (at least quarterly); standardized supplier quality/performance metrics; regular, structured and mutual feedback
	• Vendor management metrics integrated with GC dashboard
	• Systematic use of value-adds (e.g. training, secondments) and value-enabling capabilities such as firm/LS-provided project management and technology
	• Win rates (outcomes) are considered in vendor selection

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