Common Pitfalls

- Rush to collect ESI without strategic plan
- Reliance on client to provide ESI for custodians without clear plan or understanding of sources
- Trying to deal with ESI on the cheap— not using review tools, not processing and indexing data for searching and culling, etc.
- Over-collection— don’t always need to collect all data for all custodians, focus on relevant data sources and carefully document excluded sources
- Over-collection— who are the key players?
- Blind use of search term filters
- Failure to document what has been done to avoid repeating steps
How can costs be contained?

- Litigation readiness on client side (topic for another day)
- Biggest expense is review
- Must get universe to be reviewed reduced to save costs
- Explosion in volume of ESI stored by companies requires early case assessment and carefully planning to avoid spiraling costs
- Look for opportunities to contain costs at all stages (preservation, collection, processing, review, and production)

Cost Containment Opportunities at Preservation Phase

- Avoid later costs associated with spoliation or sanctions by carefully crafting preservation plan
- Identify key custodians through careful analysis and early case assessment – expand or contract list as case progresses
- Use questionnaires and interviews to focus sources for preservation and collection
- Interview IT to identify sources for key custodians’ ESI and potential areas for loss of data (automatic deletion policies, de-centralized systems, etc.)
- Consider seeking agreement of opposing counsel to limit scope of preservation
- Decide whether some (any?) back-up tapes must be preserved
- Consider whether some sources may need to be collected in order for them to be preserved
- Evaluate client’s internal systems and practices to determine if adequate to preserve ESI

Cost Containment at Collection

- Evaluate need for forensic collection by outside vendor – consider amount in controversy, nature of claims, client’s internal IT capabilities, and risks associated with improper collection
- Consider risks associated with custodian “self-collection”
- Consider options for targeting collection
- Focus collection to key sources while preserving others
- Does the client have internal tools and skills for preservation and collection? Evaluate them and understand their limits
- Document the process to avoid repetition
Cooperation Cost Containment Opportunities

- Seek agreement from other side to limit scope
- Offer specific plan for e-discovery based on knowledge of case, sources, and costs
- Outline ESI issues to discuss at meet and confer and list areas where specific information will be needed to reach agreement
- Limit custodians, date ranges, file types, sources
- Identify sources that are "not reasonably accessible" as well as the specific burdens and costs associated with producing ESI from such sources
- Consider staged or tiered discovery
- Be candid about e-discovery
- Consider shared production database

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Cooperation Cost Containment Opportunities

- Consider claw back or "sneak peak" agreement (may be part of protective order)
- Negotiate production format early and agree to cooperate to cure problems — and there will be problems
- Consider native productions (note risks and issues)
- Plan for rolling productions with set priorities
- Agree to global de-duplication with preservation of record of all sources
- Negotiate search terms — if appropriate
- Consider using e-discovery liaison to negotiate these points

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ESI Processing Cost Containment

- Use preferred vendors for preferred pricing
- Use hit reports and similar reports to help negotiate with opposing counsel
- Use vendors who can de-duplicate globally and preserve information regarding all original custodians
- Filter data by file type, date, key terms
- Consider how vendor determines duplicates to avoid duplicative review — MD5 Hash? Email threads?
- Use early case assessment tools for filtering data if appropriate
Document Review Cost Containment Opportunities

- Use staff attorneys and contract attorneys for first level review.
- Conduct quality control and upper level review by using associates and discovery attorneys.
- Make sure your reviewers are trained in the tool as well as on the facts of the case.
- Implement quality control protocols to oversee review including statistical sampling.
- Use tools that track reviewer pace and audit decisions made on documents.

Document Review Cost Containment Opportunities

- Contract lawyer rates vary by agency – in the range of $50/hour.
- Consider off-shore review options and risks.
- For review of opposing party’s documents – make sure you request ESI in useable format with specific metadata needed for cost-effective review.
- Craft your requests carefully to avoid data-dump from opposing counsel.

Document Review Cost Containment Opportunities

- Limit first pass review to initial privilege call (broad), responsiveness, and a few core issues.
- Use near duplicate, email thread, and clustering to bulk tag documents (consider risks and use sampling to confirm results).
- Additional coding creates additional delays in review and greater room for error.
- Have upper level reviewers conduct full second level review, or limit to statistical sampling depending on budget and risk.
- Use “Big Brother” tools to ensure reviewers keep appropriate pace and monitor progress.
Document Review Cost Containment Opportunities

- Consider risk and benefits of producing without review and relying on reasonable targeted searches for privileged documents (Rule 502) or claw back agreements.
- Select appropriate review platform for improved efficiency and monitoring — analytics, near duplicates, bulk tagging, work-flow tools, conceptual grouping, management tools for monitoring review, privilege log generation.
- Consider targeted searches for privilege pre-screening.
- Consider document review companies offering per GB or per page pricing for start-to-finish e-discovery and review.

Benefits of using Early Case Assessment Tools

- Identify significant concepts and key words.
- Assess the numbers of documents associated with predefined categories including custodians, key concepts, languages, dates, entities.
- Identify possible missing custodians through Social Network and email Thread Analysis.
- Target custodians and documents most and least likely to be responsive.
- Gain detailed knowledge of database for scope negotiations with opposing counsel.

Conceptual Analysis
Social Network Analysis

- Dynamically display communication patterns over a date range to focus on key terms.
- Social network analysis helps identify key terms.
- Drill down to refine communication traffic between stakeholders.

eMail Thread Analysis

Interactive, zoomable, and online analysis.

Smart Review

- Integrated Review and Analysis
- All metadata preserved and displayed
- View documents in native or HTML format
- Efficiently tag documents with single click and drag
- Unlimited Customized Flags and Bulk Tagging
- Progress Reports
- Highlighted relevant terms
Production Cost Containment

- Document everything
- Track productions by source and Bates range
- QC vendor productions
- Native productions v. image productions
- Production of duplicates
- Vendor pricing – flat fee v. per page
- Consolidate production sets

Cost Saving Trends

- Clients bringing e-discovery functionality in-house at varying levels - ESI management tools, document review, e-discovery teams
- Vendors (technology vendors, staffing agencies, and accounting firms) offering all-inclusive e-discovery services (including review)
- Greater reliance on technology for review – volume too great and human accuracy too poor
- Judiciary getting more sophisticated about e-discovery issues and expect lawyers to do the same

Questions?

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