

How To Reduce e-Discovery Costs In A Down Economy

The Editor interviews **Mary Mack**, Corporate Technology Counsel, Fios, Inc.

Editor: What are the biggest cost drivers today when it comes to litigation and e-discovery?

Mack: e-Discovery is by far the most significant cost driver where a case involves a large volume of electronically stored information (ESI). The e-discovery process includes going out and finding the data, collecting it, getting it ready for review, and then having attorneys review and produce it. The most expensive part of that process is the cost of human review. The cost is driven by the number of documents requiring human review, the hourly rate and the efficiency of the reviewers. Newer search and review technologies can reduce the number of documents requiring human review and reduce costs; there are also significant cost-saving processes that can be put in place in advance of the review.

For instance, costs can be greatly reduced by identifying at the outset the types of documents that need to be collected, so that only relevant documents are collected and processed for review. Although the identification process involves the upfront time of lawyers or consultants, significant cost savings can be achieved because it can reduce the number of documents subject to human review.

Editor: So, it is important to have a big-picture person make the initial determination with respect to documents to be reviewed?

Mack: Yes, exactly. A big-picture person, with knowledge of the issues and exposure in the current case as well as the total litigation portfolio, supported by others seasoned in the particulars of e-discovery, should make the preliminary decisions that define the document universe. This will help prepare the team for an efficient review downstream, as well as set the stage to narrow scope and reduce costs via the "meet and confer" negotiations.

Editor: How has the current economic crisis changed how law firms and corporations are addressing e-discovery costs? Are they saving money at the expense of possibly losing the case?

Mack: We've seen a shift in the market due to staff reductions and budget-tightening. Right now we are in a situation where the credit markets are so frozen that even cash-flush companies want to conserve their cash. Companies are spending only on things that produce an ROI and a fairly quick one. For example, we are working with clients who have been considering investing in technologies for addressing e-discovery demands but are delaying that purchase because it's viewed as a discretionary spend. In terms of cases that are ongoing and are in the throes of e-discovery, it's probably too late to change how they are being managed, except that lawyers, IT and executive teams are much more cost-conscious. In new cases, the legal teams are



Mary Mack

working smarter by employing early case assessment and discovery conference planning, so they can make decisions earlier in the litigation lifecycle that can significantly reduce costs. And yes, AI, some are delaying decisions to review to the last minute. This only delays, incurring an even greater cost and could cost the case.

Editor: How can early case assessment reduce e-discovery costs?

Mack: Early case assessment offers counsel the opportunity to use sampling techniques to get a handle on e-discovery scope and costs. Through the analysis process, counsel can get a snapshot of the key evidence involved, including dates, relevant keywords, target custodians and storage locations. Early case assessment can provide the insights needed to value the case and to determine appropriate meet-and-confer, settlement and/or defense strategies.

Editor: Don't some recent court decisions make it more difficult to save on costs by using machines? For example, Judge Grimm's decision in the *Victor Stanley* case.

Mack: I think Judge Grimm created a framework for dramatic cost reduction and a way to structure that. My reading is that Judge Grimm and other judges have been blistering in their criticism of some of the conduct in recent cases. They would say that, yes, you can use machines to cull your data, but don't just tell us that you used a magic black box and expect us to trust it. How you apply the technology, train the reviewers and document the process is critical for demonstrating good faith.

Judge Grimm laid out a framework where you would not have to have human eyes on each and every potentially privileged document, but you could use a machine to cull and categorize items as potentially privileged if you could validate your search methodology and the bona fides of the individuals creating the search. While he didn't say that no attorney could create a valid search, he did say that search expertise or linguistic capability would be necessary. The expert could validate before the judge that a certain group of data was looked at,

within a range of statistical accuracy, and have it deemed to be either privileged or non-privileged. Judge Grimm was very clear that it was not enough to just look at the type of file or the file name.

Editor: Does a judge have greater confidence in the process if you are working with viable partners?

Mack: It is important that your law firm and technology partners make a favorable impression on the judge. Law firms may only have a few litigators trained in the intersection of law and technology applicable to e-discovery. The same theory applies to your electronic discovery provider. Does the provider have the expertise and longevity in providing e-discovery services, and do they have trusted experts who can testify to the processes and results in front of the judge? Judges, like Judge Facciola, are demanding competence in e-discovery from the attorneys before them.

Editor: Is technology available that will enable a company to organize documents in such a way that they can be quickly retrieved, so that the early case assessment that you talked about can be done more promptly?

Mack: Yes. Document management, email archiving and preservation systems are available that can facilitate the early evidence assessment, but they are only as good as the people using those systems. There are also emerging systems that use sophisticated search and review technologies to find privileged documents, such as Fios' newly released *Fios On Request*TM, and that can validate the effectiveness of the search. Fios is actively investing in technologies and services to facilitate cost-effective and defensible e-discovery.

Editor: To what extent has outsourcing to low-wage countries been effective to reduce the cost of human reviewers?

Mack: Outsourcing is something that is on everybody's mind. I am sure you saw the ABA's opinion that it is fine to outsource so long as there is attorney oversight. I thought that was a watershed moment. Outsourcing is now here to stay. You do have bear in mind that, when you are outsourcing, the distances involved may make it more difficult to assure IT that you are working with an organization that has the appropriate security and training. The economics are very compelling, but you do have to remember that the data is being stored in another country. There may also be cross-border data laws at issue.

Editor: The emails most likely to cause trouble are probably of the gossipy, personal kind. Have companies tried to control this?

Mack: This is where the intersection of compliance and e-discovery occurs. There has been a concerted effort to limit the use of office computers. Many organizations have in place policy statements that people sign to restrict the use of

office computers to business communications. Some organizations do a good job training their people about what to put in emails and what to avoid. But with the explosion in social networking technologies, such as Twitter and Facebook, it is even easier to communicate casually. Just training employees about what to put into an email isn't enough; there needs to be an across-the-board assessment of the communication technologies currently in use and how they impact both business and legal purposes.

Editor: Do you see any organized effort to reduce the volume of emails or to provide some kind of email monitoring system?

Mack: Some companies do sweeps of emails and regularly monitor for compliance purposes. For example, some compliance tools can monitor anger indexes or sexual harassment alarms. These tools can also be leveraged by members of the legal department, who could start tagging for privilege as they are creating a document. This can save significant costs downstream in the e-discovery review process by ensuring the most relevant documents and emails are captured. This is a topic that Carole Basri and I addressed in our Thomson Reuters West book, *eDiscovery for Corporate Counsel*.

Editor: Is there any likelihood that, given the state of the economy, the e-discovery rules will be revised to take into account that current e-discovery requirements create a tremendous cost burden?

Mack: The Sedona Conference's new white paper proposes that a cost-benefit analysis be applied to the preservation of not reasonably accessible data. That is something that your readers will want to follow to see if the proposal gets a judicial nod; it would save a lot of money. People were surprised that FRCP 37(e) has not been interpreted to allow backups to be overwritten.

Additionally, in the *Twombly* case, the U.S. Supreme Court talked about the costs of e-discovery in some dicta to justify increasing a fact pleading requirement, creating a higher bar to proceed. Although many decisions consider cost, I haven't seen any yet that look at what is happening in the economy and take that into account when considering the cost and burden arguments. Just recently, the Office of Federal Housing Enterprise Oversight was sanctioned on a third-party request costing 9% of their annual budget: *In re Fannie Mae Securities Litigation*, F.3d __, 2009 WL 21528 (C.A.D.C., Jan. 6, 2009).

Judges see that cooperation is the way to reduce the costs. For example, the attorneys can agree to narrow the scope of e-discovery in the meet-and-confer. It's not in our nature to want to collaborate with our adversaries that early; however, to the extent that the scope of e-discovery can be narrowed and agreed upon in an organized procedure, it is less likely that you will, at the last minute, find out that your \$100,000 case has turned into a \$1 million case.

Please email the interviewee at mmack@fiosinc.com with questions about this interview. Her blog is *Sound Evidence*, hosted on DiscoveryResources.org.