

Controlling Legal Costs – Service Providers

The Evolution Of Early Case Assessment From Simply A Good Idea To An Enterprise Solution

Rich Cohen
and Joe Garber

RENEWDATA

Ask 10 people who are “in the know” about managing electronic data for legal or regulatory purposes, and I suspect that you wouldn’t find one who says that Early Case Assessment (ECA) isn’t a great concept. The idea of leveraging advanced technology to help you be smarter about how you approach eDiscovery and save millions of dollars in downstream legal review would seem to be a slam dunk. Yet despite the obvious benefits, the adoption of ECA technology has been slow to rise.

The reasons for this apparent anomaly are actually threefold: 1) despite a great amount of buzz on the topic a clear definition of ECA has yet to emerge, causing many organizations to remain hesitant about deployment; 2) the software that has been introduced to the market so far has been somewhat misaligned with the fundamental needs of its users; and 3) a simple approach to evaluate the various technology options for this process has been unavailable to date.

This article will address these issues head on. In the process, we will clear up any confusion about what ECA is, identify the gaps in how this technology has been delivered thus far, provide a new framework for evaluating different solutions available, and ultimately tell you about a unique approach to ECA that is much more in line with the needs of the market.

What Is ECA?

Today, many organizations are finally starting to get their arms around their total costs of eDiscovery, and they’re finding that the primary cost driver is attorney review. To combat excessive spending in this area, many smart organi-

zations are looking for ways to analyze their data further upstream in the eDiscovery process so they can make some strategic decisions before involving large teams of lawyers that they pay by the hour.

To that end, ECA tools are designed to quickly provide a snapshot of what is contained within all your data and help you make sense of it all. Knowing where all your information is, and what risk exposure your organization has right up front will help you decide if you want to settle...or if you intend to fight the case, ECA may help you determine how you will staff the case and what approach you’ll take as a defense. Perhaps just as important, it can help you set aside clearly non-responsive data so you don’t have to pay to review it later on.

ECA is attractive to organizations in virtually all industries, particularly those that have a high volume of legal or regulatory actions who are facing pressures from budget cuts and/or downsized legal and IT staffs. It is contrasted with traditional review technology because it takes place much earlier in the eDiscovery process, is generally conducted by a more senior-level attorney (who has the experience to make the strategic decisions), and provides a higher level of analysis than that which often takes place in review software to prepare your data for use in court.

The ECA Challenge (So Far)

Again, despite the obvious benefits, many organizations have been slow to adopt ECA to this point. There are several reasons for this, including internal cultural issues (e.g., people have a hard time adapting to change), and that ECA technology was a bit in its infancy until recently.

But possibly a bigger barrier to adoption has been how this technology has historically been delivered. ECA came to pass when some of the larger software companies figured out that the conceptual search technology they’d invested in over the past few years had some clear overlap with the need to analyze a great amount of data, very quickly, for legal reasons. This software, which uses some complex mathematics to find patterns in data, could help you more quickly categorize the data you were looking at and thus expedite your search.

However, what was taking place under the hood was difficult to understand – and more importantly, difficult to explain to opposing counsel and the courts. As a result, many felt they really couldn’t re-use their work product in the subsequent review stage. That meant users had to use one technology for ECA, and then start all over with their search efforts in a separate review application they could better explain to all parties later on. Naturally, using one application for ECA and a second for review led to more risk and cost than most organizations were comfortable with.

The other drawback to how ECA technology was traditionally being delivered was that you didn’t have a great sense that you had really seen “everything that

needed to be seen.” It’s no surprise by now that ECA is about looking at only a small subset of your overall data to make some strategic decisions – and most technologies built for ECA do not have the tools in place to provide confidence to its users that they haven’t missed a critical piece of evidence as they did their quick analysis.

The Market Evolution

As we set our sights on a new decade, ECA technology is poised to make a leap from simply a good idea to being a true enterprise solution that can deliver on the promises made when the technology was originally conceived. This is because a small handful of providers have arrived at the inevitable conclusion. In order to deliver software that is widely adopted in the market, a number of changes have to be made to how it is packaged and delivered.

The new market mandate is for ECA technology that is able to provide a quick snapshot of an organization’s data, can be leveraged for both ECA and review, is simple enough to be used by the senior-level attorneys who generally conduct this work, and provides users with measurable confidence that the data they’ve based their strategic decisions on is truly representative of the entire corpus.

Translated more simply, the ECA technology that will provide the greatest value to organizations subject to legal or regulatory action will be those applications that cast a wide net on all your data, are simple to use, are highly transparent (i.e., do not rely on black-box search), are integrated into an end-to-end eDiscovery solution, and can deliver measurable certainty that you’ve seen what needs to be seen.

While simple in concept, this is a tall order that very few technology vendors will be able to fulfill going forward.

A New Breed Of ECA Technology

One company that has made great strides in delivering a market-driven ECA solution is RenewData, an eDiscovery, archiving, and information governance service provider. Its Vestigate software is based on a methodology that was being used with an exclusive set of clients and which has just recently been translated to a technology-based offering for the mass market. This Software as a Service (SaaS) solution lets humans take back control of their data, and is ahead of the curve in terms of delivering the value that organizations are now demanding.

There are three key components of the software that accelerate access to relevant documents and provide measurable accuracy to ensure that important documents have not been missed:

1. The first key component is a simple user interface that allows a small team to quickly identify what’s relevant in a given document just by using a mouse to highlight critical language (or metadata) that’s relevant to the case.

2. The system then finds all similar documents using nothing more sophisticated than Boolean searching, and automatically bulk tags those documents to

eliminate the need to read significant amounts of redundant data. This happens until it appears that all potentially relevant documents have been identified.

3. The final key aspect of Vestigate is statistical sampling for quality control. This important analysis is put in place to provide confidence that you have taken reasonable steps to locate and analyze the most critical data. This process, based on zero-defect testing that is widely used in many industries (such as pharmaceutical drug testing), delivers a measurable confidence level...up to 99.9 percent certainty that all relevant documents have been identified.

Most Vestigate clients start out with an 85 percent confidence level that the critical data has been analyzed during the ECA stage, which is much higher than humans are capable of achieving on their own with redundant tasks, according to a wide range of published reports. After reading only five to six percent of the total data in question, organizations have a very good sense of what’s contained within their data and have their most senior-level attorneys interact with the system (regardless of their comfort with technology) to make the key strategic decisions for a given case.

The ease-of-use and measurable certainty are two clear differentiators for Vestigate, but another is its integration in an end-to-end eDiscovery solution and its ability to be leveraged for both ECA and review. If the senior attorneys decide that they intend to fight a case after their analysis, they can then go back to the data in Vestigate and keep working. Using the exact same tool, they can proceed with first-pass review and have a very small team mark data for relevance. Generally, using the same text-highlighting, bulk-tagging, and quality-control capabilities, the team will only review about 15 percent of the overall dataset, achieve up to a 99.9 percent confidence level that they’ve reviewed all potentially relevant data, and can ultimately save the organization up to 70 percent in overall review costs.

Summary

ECA is a hot topic in eDiscovery circles (and boardrooms) today for a good reason. The cost of attorney review is extremely high, and it’s only destined to increase as the volume of data expands. A number of technologies are available to help organizations bring these costs in line.

But buyer beware – not all ECA solutions being sold in the market today are the same. In fact, there is a wide range of offerings available, many of which have yet to evolve from concept to solution. Make sure you understand what each software provider is delivering and look for a solution that allows you to get a good sense of what your data is telling you about the case at hand – without forfeiting overall cost savings or certainty that you’ve seen what needs to be seen before you make your decisions.

Rich Cohen is Executive Vice President of Legal Services at RenewData. Over the course of his 20 years of experience, he has held executive management, consultant, and general counsel positions at multiple organizations, including a large legal services organization, Ohio Power, Columbus Southern Power, Integrex Professional Claims Services, Lexis-Nexis, Lexford Residential Trust, the City of Cuyahoga Falls, and the City of Akron. Mr. Cohen is a graduate of the State University of New York and the University of Akron School of Law, and he is a member of the American and Ohio State Bar Associations.

Joe Garber is Senior Director of Product Marketing for RenewData. During his 15-year career, he has also served as Director of Market Strategy for Autonomy ZANTAZ, as a management consultant for IBM, and a press secretary for a U.S. Senator. Mr. Garber is a published author, has appeared in nationally broadcast interviews, and holds a BA from Pepperdine University and an MBA from Cornell University.

Please email the authors at rich.cohen@renewdata.com or joe.garber@renewdata.com with questions about this article.