



Gaining a Competitive Advantage in Electronic Data Discovery
by Julie A. Lewis

Whether you are representing the defense or plaintiff, this article will help you gain a competitive advantage over other law firms by optimizing the electronic discovery process while minimizing costs. With decreasing corporate budgets at your clients, law firms that can differentiate their services have an opportunity to expand their client base. Those firms that can embrace change and use data discovery as a tactical tool in litigation will best position themselves for the future.

With 93% of communication now performed electronically, the days of associates pilfering through boxes of paper documents in a warehouse are becoming extinct. Daily e-mail communication alone in the United States is surpassing annual mail messages delivered by the U.S. Postal Service. With such accelerated growth in electronic communication, the procedures for legal review need to go through an evolutionary transformation. By embracing the digital world, law firms can use data discovery to win a case. As those of you grappling with electronic discovery are well aware, the Achilles heel of electronic discovery is the exploding costs. If you haven't felt the pain on your wallet, your client or your client's insurance carrier certainly has. This article is about taking proactive versus reactionary measures in data discovery to retain or increase your customer base. The following are three tips for your future electronic discovery travels:

1. Go Native When Possible

Although there is an "industry think" that electronic files need to be converted into PDF or TIFF, law firms should consider maintaining electronic evidence in its native file format. With one GB representing 75,000 pages on average and TIFF/PDF file conversion costing approximately \$.08 per page, this additional step costs \$6,000 per Gigabyte on average in extra costs. How much would your own hard drive cost to TIFF?

We've heard four reasons for this "extra step" by law firms: 1) concern that opening a native file may launch a computer virus 2) need to view files in a common format in a medium that closely resembles paper review 3) incompatibility of other file formats with case management systems (e.g. Concordance) and 4) preference for TIFF/PDF to prevent the plaintiff from viewing metadata. As the electronic discovery customer, it's important that you think about the reason behind the file conversion to TIFF/PDF and consider whether the costs are worth it to take this extra step. There are preview technologies out there such as Infranview and QuickView Plus that your case management vendors and external hosting vendors should be integrating. If they are not, they may be trying to preserve their existing TIFF or PDF revenue stream at your expense. QuickView Plus allows for over 250 different file types to be viewed without needing the original program!

2. Do Data Discovery Planning Upfront

Electronic evidence collection and analysis is expensive. Initial planning upfront can mitigate future problems and increase client satisfaction. Similar to building a new house, as a consumer you try to understand what you are trying to build and the costs to do so. As an informed consumer, you have an architect walk you through benefits and pricing of taking particular actions before construction ever begins. Why should electronic discovery be any different?

To architect the most optimal electronic discovery plan upfront, law firms should consider such factors as:

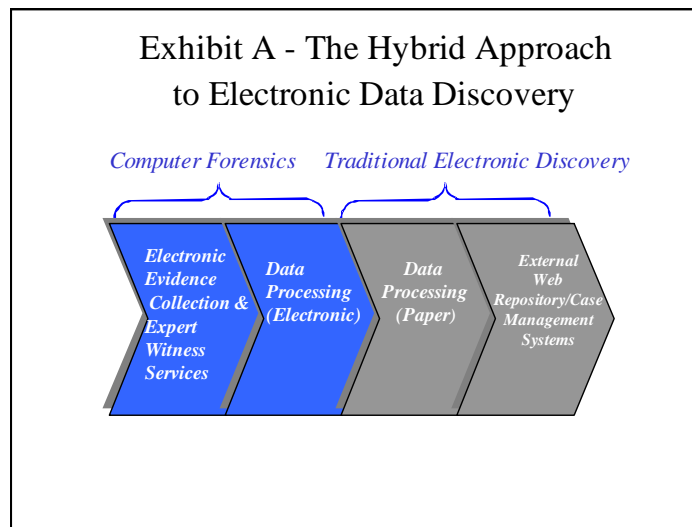
- Define what storage media you will target for electronic evidence collection
- Limit the request to specific date ranges and subject matters
- Target relevant employee data
- If tape restoration is involved, evaluate what tapes really need to be restored (e.g. sampling method, incremental and/or full back-up)
- Define the parameters for electronic discovery (e.g. just what's able to be seen within the file system or all files including deleted and ambient data)
- Keep electronic documents in native versions versus converting to PDF or TIFF
- Use filtering, de-duplication and advanced search technologies to narrow down the files for review
- Hire experienced electronic discovery/computer forensics providers with proper tools and training

By evaluating what actions need to be taken in advance versus performing procedures without questioning the end goal, you will differentiate your firm from the masses. As part of the electronic discovery planning process, Digital Mountain has developed an electronic discovery cost estimator tool. This tool allows law firms to quickly ballpark the costs of decisions they may make in electronic discovery.

3. Take a Hybrid Approach to Computer Forensics and Electronic Discovery

If you're representing the plaintiff or defendant, you may consider taking a hybrid approach to computer forensics and electronic discovery. Computer forensics is the non-invasive recovery of all available information including deleted files, file fragments, and temporary data from hard drives and data storage devices. The computer forensics process is one step beyond traditional electronic discovery, and therefore increases the chance of finding the needle in the haystack.

There is an urban myth out there that computer forensics is extraordinarily expensive. When compared to traditional electronic discovery, computer forensics techniques - whether applied to data viewed within a file system or all available information - can actually be less expensive. By using a computer forensics vendor with an enterprise storage background, electronic evidence collection and processing can actually be done on average at three times lower than traditional electronic discovery. Although traditional electronic discovery providers are strong in document imaging, OCR, TIFF/PDF conversions and bates numbering, computer forensics vendors specialize in data discovery as their core competency. Please see Exhibit A for a break-down of the hybrid approach to electronic data discovery.



Rationale for using a hybrid approach if you are representing the defendant:

The strategy of data dumping and burdening the plaintiff with as much information as possible does not translate well into the digital world. Because data collection and processing of Gigabytes or Terabytes of data can be very expensive, it may lead to bills higher than your client may be willing to pay. If you are the defense, consider the hybrid approach when:

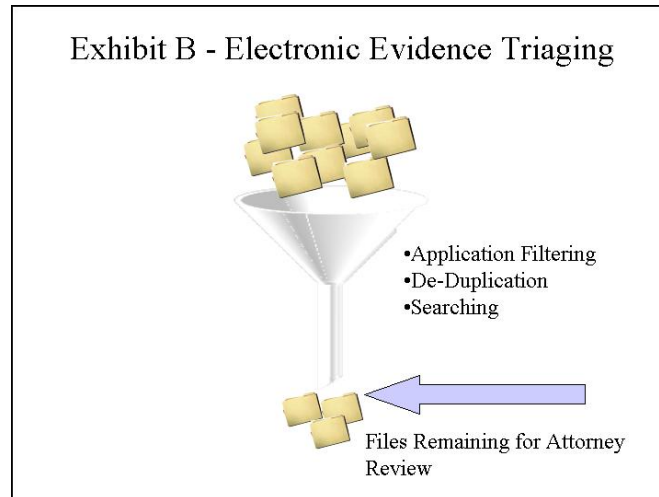
- It is believed that your client is innocent. By using a vendor that can effectively collect and process data efficiently, you can minimize production costs for your client.
- If you want to ensure that proper electronic production occurs so the court does not fault you with inadequate production procedures, choosing a vendor with the latest technology and training can make the difference between winning and losing a case.
- If the plaintiff wants to proceed to tape discovery which is **VERY EXPENSIVE**, it may be better to convince the judge that looking at ambient data on a hard drive achieves comparable results and is more cost effective.

Rationale for using a hybrid approach if you are representing the plaintiff:

Using advanced technologies and processes in computer forensics can help you find the electronic evidence you've been searching for at a cost effective price. Examples of when a hybrid approach may make sense for you as the plaintiff:

- High volumes of electronic data need to be triaged for relevancy.
- Metadata is a critical component to the case.
- Data discovery is expanded to deleted files, file fragments, and other ambient data from hard drives and data storage devices.
- If you'd like to proceed to tape discovery which is **VERY EXPENSIVE** and it looks like some of the cost may be shifted to you, it may be better to convince the judge that looking at ambient data on a hard drive achieves comparable results and is more cost effective.

Computer forensics costs less because many of the technologies used in computer forensics were created by or for the government realm and are now being commercialized. Also, the tools can filter file types by file signature and can eliminate duplicate files. Please see Exhibit B for the types of triaging that are performed. If a law firm has the data triaged (reduced) upfront and is using a Web-hosted review system, it can save its client \$680 per Gigabyte alone on external hosting costs.



Beyond using computer forensics experts as electronic evidence collection specialists, key differentiators of computer forensics over traditional electronic discovery include:

- Computer forensics allows for a wider variety of different search techniques and approaches that can more effectively reflect your end goal. Some examples include:
 - Unicode for foreign language searching
 - RTL for searching Hebrew, Arabic and languages that read “right to left”
 - GREP for advanced searching (GREP is a mini-programming language that is used in forensics tools for Windows, Unix, Linux and other operating systems).
- Beyond actual e-mails in Outlook, computer forensics data discovery techniques include searching e-mail attachments and other files. Electronic evidence from Internet e-mail that may have occurred in Hotmail, Yahoo! and other non-Outlook types of accounts may be captured and processed.
- Ambient data (e.g. deleted files and data residing in unallocated hard drive space, swap file, volume slack, file slack, etc.) may be recovered holding relevant evidence.
- If you plan on doing data discovery beyond traditional storage media, computer forensics is key. With computer forensics, in addition to hard drives, electronic data can also be captured from PDAs, phones, fax machines, printers, tape and a variety of other storage media.

By utilizing a hybrid approach to electronic data discovery and using an external vendor to assist in reducing data for attorney review, a law firm can create a competitive edge in the data discovery process by minimizing costs and providing more effective results.