



Benefits of Measuring E-Discovery Metrics

One of the biggest challenges for legal teams when faced with litigation is determining the value and potential costs of a case — and avoiding unexpected surprises.

Does the claim have merit?

Should we pay to settle the claim? How much should we spend defending the case? What are the potential discovery costs, specifically those related to e-discovery? Do we have all the facts? Answers to these questions are typically based on judgment and historical experience. The legal team must quickly and accurately assess all potential outcomes, issues that might arise and different cost scenarios in order to formulate “try-or-settle” strategies. One of the most problematic parts of pre-litigation activity is trying to assess e-discovery

strategies, because metrics and costs are not typically tracked in a way that makes it easy to extract the information.

Deterred by uncertainty and complexity, many companies tend to overreact and deploy “collect everything” strategies. This only adds to the potential issues encountered during e-discovery and increases costs. Without clearly defined metrics and measurements, managing these growing data volumes during discovery is (and will continue to be) extremely challenging and could result in unnecessary overspending.

WHY METRICS MATTER

The inherent benefits of tracking and keeping historical metrics for e-discovery is simple: to control and predict risks and costs associated with litigation. E-discovery metrics enable legal teams to:

- **Explain What Happened:** Metrics around data preservation, collection, processing, review and production should be known upfront and can be very important for demonstrating defensibility before a judge. Having these metrics can also help defend

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against overly broad discovery requests, proactively negotiate e-discovery terms and avoid cost overruns during collections, processing, hosting and review. More important, tracking metrics from case to case can arm the legal team with historical data and current facts to make informed decisions about case strategy, negotiation tactics and staffing assignments (internal and external).

- **Budget More Effectively:** Over time, having a tracking system in place allows organizations to catalogue data volumes by custodian or case type, collection speeds, deduplication rates, recall and precision, date spans, file types, file locations and, downstream, reviewer effectiveness and timelines. Having this historical data readily available in the e-discovery system arms internal and external stakeholders and counsel with the facts needed to understand case values upfront, justify technology investments and plan and schedule case tasks much more effectively.
- **Determine Future Investments:** Historical metrics around e-discovery provide the information and input necessary to help a company determine how to spend proactively on process and technology to better measure future e-discovery costs and limit future spending.

- **Improve Processes and Quality:** You cannot make improvements without knowing the details. Defining and tracking metrics makes it much easier to control the e-discovery process and make informed staffing decisions. For example, if a case is escalating and going to require a full-scale review, and there are only 30 days to the production deadline, the best strategy might be to apply analytics and a technology-assisted review workflow early in the process, and then conduct a quality control check with the most effective reviewers. Advances in e-discovery software technology make it possible to assess the most cost-effective option before a single piece of data has been collected.

GATHER AND REPEAT

At the outset of a case, legal teams rarely have access to historical metrics that enable them to project potential e-discovery costs. After the collection, processing and review of the data are completed, e-discovery costs usually break down as followings:

- The cost of collecting electronically stored information (ESI)
- The cost of processing and hosting data from its native format into a format that can be loaded into a document review system
- The cost of reviewing the data for responsiveness and privilege

- The cost of producing responsive, non-privileged ESI

The challenge with this approach is that all measurements and metrics are gathered after the processes are completed, limiting early-stage decision-making and budgeting control. This also does not allow you to consider cost-savings that can be applied much earlier in the process during the identification and preservation stages.

Legal teams should rethink when and how they can utilize metrics. With the right historical metrics, the scope of discovery can be reduced early in the case life cycle, well before the Federal Rules of Civil Procedure (FRCP) Rule 16 Scheduling Conference. Having defensible metrics to present to the court when arguing how long discovery will take or how much it will cost can be invaluable in arguing a party's position in the conference. This capability is also especially critical for building proportionality and cost burden arguments, with the results directly affecting what needs to be collected and reviewed for the case.

Does your organization have the following metrics gathered from historical matters?

- Average number of custodians by type of case (key custodians versus secondary or tertiary custodians)
- Average volume of data potentially requiring collection per custodian (whether full collection, targeted collection or hybrid approach)

- Variances whether corporate versus field custodians are involved
- Variances based on the type of data required for collection (email versus non-email versus structured data)

- Average filtering percentages (and the levers affecting filtering percentages, e.g., use of email thread suppression, removal of custom file-type exclusion)
- Average turnaround time and cost-per-custodian all-in and broken down by:
 - Preservation
 - Collection
 - Processing and hosting
 - Review
 - Production
- Average recall and precision numbers broken down based on applied filtering percentages

APPLY METRICS HERE

It's one thing to talk about metrics; it's another to apply them. Metrics can be applied to reduce e-discovery scope and costs in the following areas:

Meet and Confers: This is best explained in the two scenarios below.

1 Scenario One: After performing diligence and reasonable inquiry with a client, 10 custodians are identified as likely to have relevant information to respond to discovery. During the meet and confer, the requesting party requests the collection, processing, review and production of 100 custodians. Understanding the turnaround time and costs associated with the original 10 custodians versus the requesting party's 100 will go a long way in guiding the proportionality and burden discussions. For example, if the variance between the parties is millions of dollars and years to complete, those are important facts, especially when the additional custodians are peripheral, at best.

2 Scenario Two: Another example is related to pre-review filtering. Let's assume the requesting party is objecting to the use of alternative filtering criteria like email thread suppression. If the attorney can demonstrate that use of an email thread suppression workflow would eliminate an additional X percent of documents from review and production while the requesting party is still receiving responsive, not privileged content of the suppressed email messages, it strengthens the organization's position.

Case Management: Best explained in scenario three:

3 Scenario Three: Regarding internal management, there are several ways to leverage metrics to control costs and quality. During review, metrics can be used to identify the average review rates per reviewer per day and the appropriate levers — including type of review and how the data were collected — to properly staff for matters and meet project deadlines. Metrics can also inform the purchasing of outside provider services and, if used appropriately, can assist in adding “buying” power. For example, being able to track, year-over-year or case-to-case, the amount of data collected, processed, reviewed and produced, as well as the various profiles and levers applied, can deliver much-needed intelligence for negotiating volume discounts or relationship-level alternative fee arrangements.

By going into the negotiations with metrics rather than pure guesses, a firm's position is strengthened during the meet and confer process, and through the internal management of a matter.

ENRICH YOUR PORTFOLIO

Once a standard process for keeping and utilizing metrics has been established, legal teams can also use metrics to help uncover numerous facts about their legal portfolio and/or corporate environment, including:

- **Corporate Data Profile:** What data sources are most frequently being preserved and collected? Was data collected that should have been deleted as part of the company's retention policy? Who are the primary data stewards? Are data in the current case relevant to other matters? Can the data be released from hold?
- **Custodian Data Profile:** Who are the custodians involved? Are the custodians subject to other matters? In what divisions do the custodians work? Are there key custodians that must be monitored more closely due to the nature of their work?
- **Case Data Profile:** How long did the case take to manage? Did the case settle or go to trial? At what stage of the process did the case settle? How many hours were spent by outside counsel or third parties on the case?

MEASURE TO PREDICT

Metrics can improve information governance policies, interdepartmental communications, staffing, technology investments and overall legal department processes. With the growing sophistication of e-discovery, anyone managing these projects must have a working knowledge of metrics and what metrics mean for their organization. After all, you cannot predict and control e-discovery costs if you cannot measure them. 



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