



Key areas for collaboration between lawyers and eDiscovery professionals in South Africa

February 2021

Time is money. For litigation, the more time spent on preparing for an upcoming court case, the more expensive the process becomes. Globally, the eDiscovery industry has invested heavily in people, process and technology. It is best known for its advanced technology for properly, and efficiently, managing costs and time in preparing for litigation. The modern-day lawyer is challenged by the need to project manage multiple specialist skills for effectively managing evidence. A law firm that collaborates with an end-to-end eDiscovery specialist will derive greater value from its services providing a competitive advantage in the market. Arguably, a lawyer has an ethical duty to outsource elements of the discovery process to specialist eDiscovery professionals.

Lawyers have faced unique challenges in 2020, such as, an economic downturn combined with COVID-19 and the commencement of certain provisions under the Protection of Personal Information Act (no 4 of 2013) on 1 July 2020 (POPIA).

eDiscovery can empower lawyers to become the go to specialist for “big events”. A big event could be an investigation, litigation, employee (or third party) request for information under POPIA or an increase in regulatory scrutiny (for example, price fixing, anti-competitive behaviour in the production of PPE).

Further, organisations may require a retrospective look at any legal ramifications of strategy initiatives implemented under extreme pressure. For example, a migration to the cloud to facilitate remote working during COVID-19 lockdown, process and policy alignment with changing data privacy regulations or retrenchments and organisational structure changes to cope with the economic downturn.

Organisations face an increase in brand and reputation loss, financial penalties and, in severe cases, criminal charges due to missed evidence when dealing with regulators and litigations. eDiscovery methodologies and technologies have been developed globally to mitigate risk and, applied properly, increase client confidence in forward-thinking law firms in dealing with these types of issues.

Influx of Regulatory and Legal Matters

History suggests that there will be, and we are already witnessing, an influx of litigation and regulatory scrutiny. This leads to an increased need for lawyers to partner with eDiscovery specialists to reduce costs and standardise processes in relation to preservation, review and production of documentary evidence. A successful litigation is only as good as the evidence found and the ability to rely upon it.

Lawyers will need to consider how to effectively handle the new data sources emerging from remote working. Law firms should seek eDiscovery service providers that have, and continuously invest in developing, a full suite of tools to avoid lost, stolen, corrupted and missed information that could win a case. This

includes automated legal hold processes and sophisticated data recovery tools. Automated translation and transcription services enable audio and foreign language evidence sources to be easily referenced, searched and potentially produced, such as, meeting recordings and custodian data spanning across Africa and globally.

Lawyers will also need to quickly become accustomed to handling instant messaging information, such as Skype, Bloomberg, Teams and Slack instant messaging, that has increased due to remote working. This should include the ability to easily filter and identify who was involved in the part of the group message of interest.

Case Example – Regulatory Disclosure

Providing an end-to-end eDiscovery service for a UK regulatory disclosure relating to a South Africa entity:

- forensic collection of devices relating to a small number of custodians
- processing and hosting of data in secure, document review tool, Relativity
- collaborated with the South African client and a third party law firm based in London, England
- Assisted third party law firm to agree the search criteria with the regulator for identifying the document review pool through multiple iterations and reporting on date ranges and search terms
- Provided guidance on potential gaps in the data and false positives produced by the search criteria
- Set up and managed a three tier review for relevancy and two tier review for legal privilege, performed by the third party law firm
- Utilised analytics to run quality assurance checks to identify any other potentially privileged or confidential information contained within the pool of documents to be produced
- Produced relevant documents adhering to the specific requirements of the UK regulator, including:
 - Native format
 - Image format, where information had been redacted for privilege
 - Disclosure schedule containing specific fields of information retained from the metadata of the document during collection and processing

Information governance

Information governance will become a more onerous task for organisations as a result of the implementation of the POPIA. Organisations will need to proactively establish relationships between its IT security, compliance, data privacy and legal departments.

Many organisations will not justify the cost of additional internal resources and will need to outsource certain functions to assist in meeting legal, regulatory and business requirements. For example, data mapping and defensible deletion can significantly reduce the risk security profile of an organisation, the volume of regulatory fines and the cost of data hosted in its environment. A collaboration between a law firm and eDiscovery service provider can provide significant value to clients.

Case Example - Information Governance – Insolvency Matter

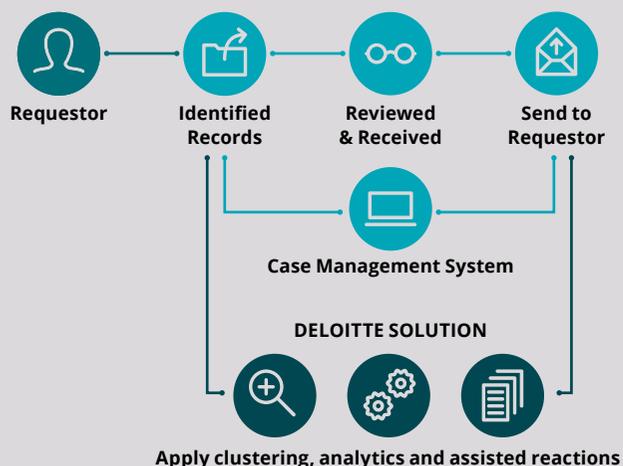
Organisation is placed into administration. An eDiscovery provider can assist with the preservation of its information assets, including structured accounting systems and customer data across various sites.

Hosting vast amounts of data in a database environment to provide a complete and intelligible view of the data with an experienced team of insolvency and legal managed reviewers to verify and reconcile it. The data is then available to assist in resolving disputes with creditors and provide information to regulators in a timely and cost effective manner.

Data Subject Access Requests (DSARs)

Large organisations may see an influx of Data Subject Access Requests from its employees under the POPIA. This may be due to savvy lawyers understanding the benefits of this litigation tactic to circumvent the litigation process – an early discovery process. It may be an employment related issue, class action against an organisation for insolvency or a change of terms and conditions under TUPE relating to COVID-19.

South African lawyers can benefit from the more mature markets that have been dealing with DSARs for many years. By way of example, Deloitte has developed a custom solution specifically for dealing with similar data subject requests under the Freedom of Information Act (FOIA) requests under US law.



Case Example – Responding to DSARs

Organisation receives a data subject access request. The law firm determines whether it is a valid request under the POPIA. If it is a valid request, Deloitte identifies the potentially relevant information and hosts the data for review by the law firm and, if needed, a scalable managed review team with expertise in data subject access requests.

eDiscovery experts use case management, analytics and automation to help increase efficiency and accountability while reducing costs and addressing the risk of inaccurate results. Advanced algorithms scan the materials for keywords and expressions regularly identified as exempt, redacting them automatically.

End-to-End Collaboration: **People, Process and Technology**

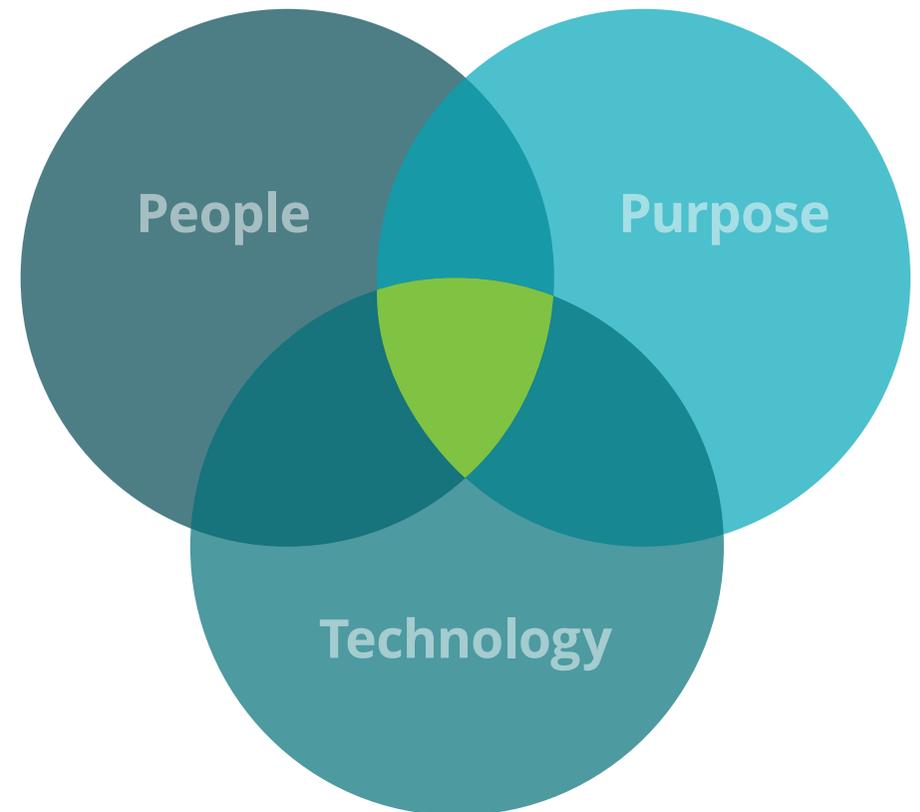
Regulatory and legal matters, Information Governance and DSARs have one key factor in common – significant volumes of data to filter through in order to get to, and categorise, relevant information. This is a daunting and costly exercise for organisations and law firms. It is the bread and butter for eDiscovery professionals.

The key to managing and reducing costs whilst maximising results and alleviating pressure on the legal team is a technology-driven process involving a mix of the right specialists.

Traditionally, managed document review is the provision of an outsourced team of junior lawyers contracted on an hourly basis at very low rates. The objective of a managed document review team is to quickly sift through the ever increasing amount of data for relevant information and categorise according to agreed criteria. The team of junior lawyers is managed by the outsourced provider, alleviating the pressures and pain points of recruitment and employment law issues, provision of computer equipment and managing large teams of junior lawyers. This creates great value in empowering legal teams to focus on the more important, and multitude of, activities in a regulatory or legal matter.

As early as 2011, the Richmond Journal of Law and Technology Vol.XVII, Issue 3 considered the notion that manual review is far from perfect and that technology-assisted processes “exceeded” the levels of performance in comparison to a manual review performed by law students and lawyers.

Deloitte has taken a fresh look at managed review for law firms to derive greater value. Deloitte has implemented an end-to-end collaborative approach between the legal team and eDiscovery experts to ensure the evidence being identified will lead to a successful litigation and comply with regulatory requirements.



People

To make the most out of eDiscovery technology, you need the right team of experienced and certified specialists supporting you. It is common in South Africa for lawyers to carry out the discovery process alone or collaborate with eDiscovery vendors that do not cover the entire process.

In a recent case, US Magistrate Judge William Matthewman, considered the ethical violations for a lawyer to sign and certify that discovery is complete and correct if they allowed a custodian to self-collect its own data for discovery. The Court warned that counsel “must take a role in assisting [the defendant] with the search, collection, and production of discovery and may also consider retaining an [eDiscovery] vendor to assist with the process”. eDiscovery professionals provide an independent and legally, defensible methodology for search, collection and production of discovery that can be relied upon in court.

In this digital era, lawyers are required to work with increasing amounts of information across disparate data sources (e.g. hard copy, emails, voice calls, social media, file sharing platforms etc.). Sensitive data hosting and review workflows should be kept within one vendor to minimise IT security risks and internal and external project management. One vendor will be able to provide testimony in court for the entire review lifecycle.



Deloitte's deeply experienced teams can scale as needed, support clients in any location globally, and has developed the most flexible and effective collaborative team approach:

- **End Client.** An organisation that is facing a “big event” or proactively wants to get its electronically stored information in order to mitigate risk and reduce cost.
- **Lawyers.** The contract is typically between the law firm and the end client. The law firm subcontracts elements of the process to an eDiscovery vendor (with the end client's permission).
- **Project Managers.** Experienced in defining each stage of the process and coordinating the people, process and technology to maximise benefits and reduce costs. This role is often covered through a collaboration between an associate lawyer and eDiscovery professional.
- **Digital Forensic Experts.** These are technical experts that collect and process data in a legally, defensible manner. They typically have backgrounds in computer science and would know how to take a computer apart and put it back together again. They can map an organisation's data to identify potentially relevant information and recover deleted information.
- **eDiscovery Experts.** They have technical skills in administrating document review platforms. They also require consultancy skills and a strong understanding of the regulatory and legal landscape to provide best practice and customised technology workflows to suit each project's needs.
- **Subject Matter Expert (SME) Review Team.** The predominant SME review team members are lawyers, depending on the matter. The review may require assistance with specific technical issues or documents in the case from another specialist, such as, a chartered accountant, forensic accountant or insolvency expert. Deloitte has such specialist resources immediately available meaning the instruction of a third vendor is not required.
- **Managed Review Team.** A mix of first level review contract lawyers from the law firm and/or contract lawyers under the direction of the eDiscovery team. Deloitte provides growth potential for the managed document reviewers resulting in dedicated, experienced and happy workers.
- **IT Security Experts.** Whilst they are often behind the scenes and forgotten, these are arguably the most important people on the team. They protect the end client and law firm from reputational, financial and criminal damage in relation to data security. For example, law firm Mossack Fonesca was forced to close its doors due to the reputational damage from the hacking of its systems resulting in the Panama Papers' leak in April 2016.
- **Global Reach.** Regulatory and legal requirements in one region or country often clash with privacy mandates in another. Global data privacy rules provide complex and varying requirements depending on where the data resides. Certain countries do not allow data to leave its borders. Deloitte's global reach enables any matter to be collected, processed and hosted appropriately, according to specific in country requirements.

Process

A collaborative approach with regular communication between the different experts results in the most efficient and optimised delivery to the end client. Deloitte has developed repeatable, scalable and defensible methodologies around project planning and execution.

The Global Framework for eDiscovery

Since 2005, the Electronic Disclosure Reference Model (EDRM) (Figure 1) has helped guide organisations through information governance and the discovery process for electronically stored documentation. The EDRM is created and maintained by a community of eDiscovery and legal professionals. It helps organisations select eDiscovery software tools, determine the skillsets needed to operate those tools, and design documentation that maps the process from end-to-end for legal purposes.

Electronic Discovery Reference Model

Standards, Guidelines, and Practical Resources for Legal Professionals and E-Discovery Practitioners

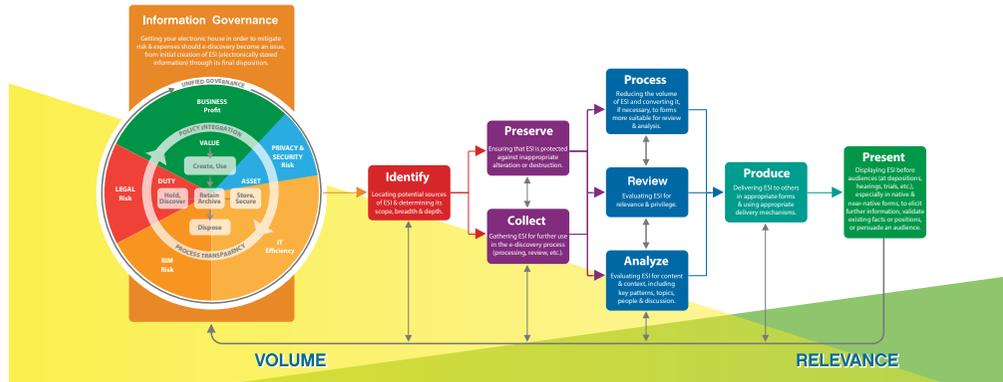


Figure 1 - EDRM diagram - May 2019 version

The Information Governance circle on the left hand side of the EDRM model provides guidance on the need to mitigate risks and expenses in regulatory matters and litigation by an organisation having its “electronic house in order” throughout the lifecycle of its data. One of the key aspects for South African law firms to consider is an organisation’s need to defensibly delete data under POPIA and the increase in data sources leaving organisations oblivious to where its data resides.

For legal hold, there is a need to understand the data landscape in order to identify where potentially relevant information may reside. Should an organisation receive a request from a data subject, it will need to be in a position to respond within a reasonable timeframe.

For the creation, use, retention, archiving, storing and disposition of data, lawyers should be well versed in the legal, risk and operational requirements. A collaboration with eDiscovery

professionals, drawing on their expertise in technology and handling vast volumes of data, will drive the process in order to comply with these requirements and derive value in data as an asset (not a hindrance).

Maturity Benchmarking in eDiscovery

In 2010, the eDiscovery Maturity Model (Figure 2) was created and it shows the evolution across five levels of maturity, from chaotic to optimised, representing the acceptance and incorporation of eDiscovery as a necessary business process. The discovery rules in South Africa allow for the ad hoc, chaotic maturity level. The inherent risks found at the lower levels of maturity shifts to cost savings at the higher levels.

E-Discovery Maturity Model				
Level	Focus	Strategy	Expertise	Costs
5 Integrated and optimising	Automate and integrate	Legal and IT. Manage in-house with strategic vendor use.	Expert team of legal and IT	Shared costs, mainly with IT
4 Semi-integrated	Reduce costs	Legal Manages Blend of Vendor and in-house resources	Single expert in either Legal or IT	Targeted reduction
3 Standardised	Standard, repeatable process	Vetted and trusted vendor(s)	Expert at trusted vendor	Controlled
2 Managed	Plan and manage	Outside Counsel Manages many vendors	Expert at outside counsel	Overruns, unexpected costs
1 Ad hoc, chaotic	Just get it done	Individual heroics	None	Surprising

Figure 2 - <https://www.edrm.net/papers/the-e-discovery-maturity-model/>

A level three maturity can be achieved by simply outsourcing discovery, information governance and DSARs to eDiscovery vendors. This will achieve standard, repeatable processes that can be relied upon in Court and control costs. The eDiscovery maturity model advocates a collaboration between legal, IT and eDiscovery experts to reach level 4 or 5, where organisations can focus on reducing and sharing costs.

Globally, the growing demands, cost and risks associated with discovery is driving organisations to take more control internally. These companies see the need to transform eDiscovery from an island of activity into an integrated, end-to-end business process.

An evolved set of Discovery Rules in South Africa that is more seamlessly integrated into the EDRM framework, and which dramatically changes when and how data is collected and processed, can support the maturity transformation of organisations and legal teams locally.

Technology

A law firm holds highly sensitive information and this is attractive to hackers. Client data should be hosted and managed by eDiscovery and ISO 27001 certified IT security experts. Data transfers should be encrypted and tracked through robust chain of custody methodologies. Safety in numbers does not correlate when dealing with client data. The less parties involved and the less data transfers between those parties, the better. Select an eDiscovery vendor that can provide the entire EDRM methodology as well as ensuring any managed review team has the necessary security in place.

Whilst the project team require sleep at night, technology works tirelessly and consistently. An eDiscovery expert can use machine learning to:

- Get to the most relevant documents first, potentially significantly reducing the number of documents required for review and thus time and cost.
- Refine search criteria to reduce the number of false positives.
- Identify inconsistent approaches to relevancy across the review team.

A technology based approach provides the following benefits:

Defining the best document review pool

eDiscovery experts can optimise the lawyers work flow by utilising advanced early case assessment (“ECA”) tools in conjunction with a structured review of search criteria responsive documents, as opposed to relying upon keywords alone. Search criteria can include the use of complex keyword phrases, concept searching, domain analysis, regular expressions, file type and data source filtering. The search criteria will be optimised through the use of ECA tools visualising the conversations taking place in the data set and offering up colloquial language and code words being used by custodians. This can assist in identifying conversations that are similar in nature to those identified as relevant but not necessarily keyword responsive.

Prioritisation of the review pool

The review itself will be optimised by incorporating machine learning to actively prioritise the review of information that is highly likely to be relevant and categorising documents by issue, language and technical complexity so that the most appropriate member of the review team is assigned to the most relevant documents to them. For example:

- French speaking reviewers will be assigned documents in French.
- Chartered accountants will be assigned documents requiring accountancy expertise.
- Machine determined less likely to be relevant documents will be assigned to a junior team.
- Machine determined highly relevant documents will be reviewed immediately and passed to the senior lawyers on the team for strategising.

The same techniques combined with a team of experienced and diverse managed reviewers can assist in data mapping or responding to Data Subject Access Requests.

Legally, Defensible Process

It is vital to have followed, and documented, a legally, defensible process. It is widely accepted that the review standard should be reasonable and proportionate, not perfect. However, the process followed must be legally defensible.

With the right project management and collaboration, the process will be defined upfront and updated as priorities change throughout the project. eDiscovery review platforms provide a structured review process with recorded user tracking. An eDiscovery expert can provide the law firm with a documented process of the entire methodology and can testify to the process followed in court, where necessary.

Quality Control

Advanced review platforms provide the ability to automate the “human” feedback process so that reviewers get real-time updates without inundating lawyers’ inboxes and filling up their calendar with feedback meetings. In conjunction, machine learning can be used to identify where the computer would have

made a different decision to the reviewer for a more advanced level of quality control.

Reviewer statistics assist in identifying the weakest and strongest reviewers enabling the review team to be optimised throughout the review.

Technology can also be utilised to identify inconsistencies in review decisions to mitigate the potential discovery, or non-discovery, of certain information. This can include:

- Identifying inconsistent reviewer decisions, such as, where an attachment to an email has been flagged for discovery, but its covering email has been excluded from the production.
- Identifying exact and similar copies of confidential, sensitive and privileged information contained in the review pool that may need to be excluded to avoid waiving privilege.
- Identifying partially privileged documents that have been redacted but may be inadvertently disclosed by producing the native covering email that contains the same document as an attachment but not redacted.
- Applying automated redactions to specific information, such as, sensitive personal information and privileged information within a litigation, regulatory or DSAR production.

Productions

During a structured document review, the review team electronically categorises the documents for relevance to specific allegations and issues as well as identifying the evidence to be annexed to pleadings and witness statements and, ultimately, the trial bundle. This significantly reduces the administration time and error in producing the documents, including:

- A visual timeline is automatically built during the categorisation by linking allegations, issues and key role players to specific dates and events that assists with the drafting of the pleadings and witness statements.
- Hyperlinked index to the native documents and paginated, searchable PDF version of the trial bundle is created electronically for immediate extraction from the eDiscovery review platform in chronological or a custom sort order.

If you would like to learn more about the potential collaboration between lawyers and eDiscovery, please contact us. We would be happy to provide your team with a workshop on how eDiscovery can optimise your workflow.

Deloitte's dedicated team of regulatory, legal and forensic professionals can assist companies in navigating through these uncertain times, helping organisations to manage and mitigate documentary evidence risks and potential resulting in reputational and financial damage.

Deloitte has experience assisting in the following areas:

Digital Forensic

Apply forensic practices to collect preserve and process structured and unstructured data in a legally, defensible manner.

eDiscovery services

Deliver solutions to complex document review challenges using a wide range of advanced technologies to process, host, search and produce relevant and reliable evidence. Depending on the matter type, data volumes, case theory, and number of concurrent users, we match the right technology, people and processes to meet our clients' unique needs.

Managed document review

Deliver efficient and defensible managed document review services to clients and their legal counsel in complex business disputes and investigations in a controlled operations environment. Combining multidisciplinary teams of expert

document reviewers, such as lawyers, chartered accountants and certified fraud examiners, with tested methodologies for conducting defensible technology-assisted document reviews.

Corporate Intelligence Services

Conducting in-depth investigations in the context of due diligence, fraud, asset searches, litigation support and other matters. Conducting a variety of open-source intelligence investigations around the world and extensive research using an ever-changing universe of online databases, on-site public records, and open source internet sites.

Forensic Investigations, Litigation Support, Business Rescue and Regulatory compliance

Assist companies throughout the forensic investigation, criminal and civil litigation, internal disciplinary, business rescue and regulatory compliance lifecycles to effectively conduct matters remotely while maintaining confidentiality and information security.

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