Conceptions and Misconceptions about ECA

By David Chaumette, Adam Rubinger and Jay Stromberg

Early Case Assessment (ECA) has garnered much praise in the last five years in the media and the e-discovery industry generally. But as the industry matures, ECA increasingly becomes misused and misunderstood. Most available ECA tools do two things: cull large amounts of data quickly, and provide instant access to and analysis of the data, so decisions can be made quickly.

Done properly, ECA can be a cost-effective first look at a piece of litigation, and a vehicle for controlling costs and managing the litigation process. New tools are being rolled out daily, but without a sound structure and approach, any product will be of limited usefulness.

This article discusses the various definitions of ECA, how communication among various ECA constituents can break down, and how ECA can best be understood and used.

THE ATTORNEY PERSPECTIVE

For lawyers, ECA traditionally has meant interviewing custodians, witnesses and parties to the litigation, as well as reviewing sets and subsets of hot documents, in an attempt to gather as much information about the case as possible.

Most discovery lawyers would say they do this every day, and have been doing it since the day they started as discovery counsel. To them, ECA is hardly a novel idea.

Today's ECA is more than this traditional approach. It's also a self-service tool that enables lawyers to take vast amounts of data, perform keyword searches, and produce results within days of collecting the data. ECA provides reports with a wide range of information, including who is writing emails to whom, how much and what types of data are in the collection, and how much it will cost to review it.

Many attorneys would prefer to combine the technology solution with face time with clients, but find it difficult to get.

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The first meeting with the client or information custodians can be months or even a year into the case, and by then the potential benefit of ECA may be lost. Ideally there will be a balanced process that includes face time and the employment of tools to ensure that only the most relevant information is considered during a document review.

As the document volumes continue to grow, and with lawyer's time at a premium, narrowing the field to the most critical information as soon as possible becomes even more important. ECA tools can perform this function at the crucial points as the case progresses, notably prior to a meet-and-confer (required under Rule 26), and at the point when cost-shifting arguments are made.

THE VIEW FROM TECHNOLOGY PROFESSIONALS

IT professionals generally view ECA as a tool that can scour their network, indexing every bit and byte on it, and then create a database for search and collection of the data relevant to an upcoming lawsuit. They worry about security, but they also know that they will be responsible for litigation holds, ensuring data preservation and possibly data collection for litigation.

Unfortunately, there is a history of failed communication between IT and legal, and that situation is getting worse. The goal is an IT manager and in-house counsel who communicate about a case, and an IT group that understands the concepts of legal holds, preservation orders and spoliation of data. The meeting of minds between IT and legal is a necessary preliminary step to good process.

The next challenge is determining the right ECA solution, in the face of vendors who will try to sell their ECA appliance as a black box that can solve all problems, save millions on e-discovery projects, and obviate the need for other service providers.

For IT staff addressing e-discovery issues, one challenge is recognizing they now must manage a process that looks like traditional IT, but is in fact very different. Traditionally, IT focus has been keeping the network up, keeping the right people connected to the network, and protecting the network from unauthorized use.

ECA involves another skill set entirely. Many corporations manage this process through the legal department, with involvement from someone on the IT staff. Others, assuming that since they are using a software solution, the project should be run through IT.

Initially, legal teams will fare better managing the process due to their experience with litigation. But because it involves both information and corporate security, successful application of ECA requires both legal and IT working together.

THE VIEW FROM LITIGATION SUPPORT

To litigation support professionals (LSPs), ECA is an important tool needed for two important and interrelated goals in the discovery process: reducing data and saving money.

LSPs are less focused on the substantive matters than the lawyers, and usually less familiar with the actual manipulation of the software tools than IT staff. As a result, their use of ECA can be fundamentally different, with getting as much data through the system as quickly and cheaply as possible as a key goal.

LSPs might therefore award e-discovery projects based on price alone, without adequately considering the needs, capabilities, or skill sets of the vendor, or that different tools are best used in different cases, and that ECA does not work well with a "one size fits all" approach.

LSPs also can be expert in the technology and process of ECA tools, providing valuable cost-saving assistance to the attorneys and review teams, as they cull and analyze vast amounts of data.

VENDOR VIEWPOINTS

As ECA has garnered more credibility, the market has become more crowded. At LegalTech 2010, the show floor was flooded with vendors offering either a tool they had licensed or new software they developed. Prices of traditional processing have fallen rapidly, from thousands of dollars to a few hundred dollars per gigabyte, but at the same time the volume of data continues to increase, and vendor differentiation has become more complex.

Sometimes more than the characteristics of the tool are in question. A quality vendor will take time to understand the case team's goals and to map out a strategy and a workflow map. Clients should ask: Has the vendor thought through how to get data in and out of the tool? Is there a seamless way to get data to an online review platform, or back to the

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in-house review tool? If the vendor lacks experience with the elements of workflow, mistakes are likely.

No one solution will handle all permutations of e-discovery and ECA challenges. Each ECA tool can serve a specific purpose. None will win a case by itself. None will reduce the volume of data without a well conceived strategy, and none will be able to pinpoint every responsive document without significant human intervention.

What ECA can do is significantly aid in the quick review of data sets, providing a draft strategic overview of the case at an early point. ECA tools can allow end users to cull data themselves, and to analyze that data in ways previously not available.

Unfortunately ECA has become a buzz word, and it has become more difficult to sort out conflicting and overlapping standards in order to determine which tool is best for a particular matter. Clients need to ask: Is the main issue culling and data reduction? Is it data analysis? Is it some of both? And, does the vendor know how to use the tool, and can it offer resources that will help achieve the desired result?

ECA can be a useful approach to a significant cost center facing any company. By reducing the quantity of data, ECA tools effectively impact data review, the most expensive portion of e-discovery. But to choose the right ECA tool, clients must understand the vocabulary, be willing to ask questions, and consider how the prospective tools will address their particular needs.

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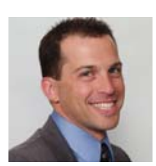

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