

Preparing for eDiscovery in Uncertain Economic Times

Eight Key Steps to Balance eDiscovery Inevitability with Fiscal Responsibility



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In the course of conducting regular business, most enterprises have been, or will become, involved in litigation that involves electronically stored information (ESI). Electronic Discovery, or eDiscovery, is thus one of the most pressing concerns in corporate America today. Not only are the demands for finding and sharing email, files, and IM that may be relevant to a given lawsuit widespread, but the costs associated with these activities may also run into the millions of dollars – or even more, if not done correctly.

Unfortunately, the bad news gets worse. These challenges have become further exacerbated in the last few months, as the credit crisis and market volatility have forced most enterprises to re-examine their budgets and look for opportunities to cut costs. Often this means cutting back on expenses that are earmarked for growing the business, which may directly affect spending on eDiscovery. But betting that legal action will subside is a long shot; in fact, litigation often grows during a bear market with additional HR and product liability lawsuits (among others) increasing in number.

The smart plan is thus not to simply cut back on eDiscovery spending in hopes that you won't be surprised by a legal matter, but instead to take calculated measures so that you balance eDiscovery inevitability with fiscal responsibility. This white paper will outline several easy steps that your organization can take – starting right now – so that you are prepared in advance for legal matters involving ESI and are confident that you are addressing these challenges as efficiently and cost-effectively as possible as they come up.

Traditional Drivers of eDiscovery

Most readers know already that eDiscovery is a problem facing virtually any organization doing business in North America today. With an ever-increasing volume of information being stored electronically and a spike in lawsuits that involve ESI, organizations are facing a number of new challenges, including:

- **Compliance with FRCP** – Organizations must more effectively manage all of its data and make it available more quickly than ever before, as dictated by the revised Federal Rules of Civil Procedure
- **Escalating IT costs** – Too much redundant data being stored, leads to excessive investments in hardware, infrastructure, and administration
- **Unrestrained downstream legal review costs** – Without proper controls placed on information entering the legal process, there is no way to effectively rein in attorney review costs
- **Sanctions, fines, and bad press** – Courts today are not as lenient on excuses such as “I accidentally deleted it” or “I didn't know the data was there” as a defense. Companies that rely on this approach often find their mistakes yielding negative news coverage and eroding shareholder value
- **Settlements of frivolous lawsuits** – In many cases, enterprises find themselves being forced to settle lawsuits that have no merit simply because they don't know what data they have or the costs associated with fighting the case are too high

Many enterprises have already taken steps to address the above challenges. Unfortunately, these measures often involve a good deal of manual work, significant investments in information technology, or a leap-of-faith that a third party vendor will deliver on a project that is

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extremely time sensitive or is budgeted based on some 'best guesses' regarding the volume of data involved. Such action plans are palatable in a solid economy, when cost sensitivity isn't top-of-mind within IT and legal departments. But they are less acceptable when dollars become more scarce, and are competing against other investments designed to stabilize a company during the more difficult times.

The Changing Face of eDiscovery

By now, it's no surprise that the global economy has softened. Since September 2008, we have seen countless stories in the news about large (and small) corporations feeling the pinch of a tight credit market. This news, combined with subsequent turmoil on Wall Street and overseas trading, has fueled the talk of an economic collapse and forced many organizations into a defensive position – in some cases dramatically reducing their budgets for even business-critical projects such as eDiscovery.

The strategy to be smarter about spending money in such a market is absolutely rational – even in the area of eDiscovery. But beware, not all game plans are created equal. A knee-jerk reaction to a difficult economy may result in a simple decree being handed down from the top of the organization that result in layoffs and decreases in IT spending without a clear understanding of the downstream risks.

A better plan is to be very clear on the problems you're trying to solve, ensure that you have protected your organization from the biggest risks, identify the largest cost drivers that can be reduced, and then start preparing today for a more streamlined and cost-efficient process. This is how smart organizations will prepare for eDiscovery in 2009 and beyond.

Eight Steps to Prepare for eDiscovery in Troubled Times

In order to help your organization prepare for eDiscovery in a troubled economy, we have outlined eight simple steps that can help your organization more effectively respond to legal matters involving ESI. These include:

1. Don't Panic, Be Opportunistic

The first step in responding to any challenge is to step back and understand the complete scope of the problem. Again, simply cutting budget without understanding the downstream risks can backfire quickly. Instead, use the attention that our economic struggles have generated to your advantage.

There is no, more noble objective than fiscal responsibility, so leverage this theme to get the right people in your organization – e.g., senior-level representatives from IT, legal, risk management, compliance, etc. – to come together and make a consensus decision on how to best prepare for eDiscovery. In many cases you'll find that the added sense of urgency will facilitate collaboration and lead to a decisive action plan that makes everyone's job easier and further protects the organization from risk.

Also use this time to opportunistically cross-train your departments. Training legal staff on high-level information infrastructure, where potentially relevant data resides, and the steps required to obtain ESI (e.g., how tape processing works) are all critical steps to ensure in-house counsel are working efficiently with their counterparts in IT. Conversely, training the IT staff on how to manage data as potential evidence is just as critical. This requires greater discipline for tracking where data is and what is happening to it (chain-of-custody), as well as what will happen to that data going forward.

Once your legal and IT department heads begin to think cross-departmentally, you're likely to see greater teamwork and efficiencies going forward.

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2. Prepare in Advance

In order to truly simplify the eDiscovery process, you first have to get out of a reactive mode. Many organizations are constantly responding to unforeseen eDiscovery requests, which leave no time for planning on the front end and invariably leads to greater inefficiencies and higher costs on the back end.

Part of the solution is to simply identify who is doing what. This means clearly articulating key players and assigning roles to each – and then codifying this information in a summary email sent to all involved. This exercise also lends itself to identifying gaps in processes and personnel, so make sure you are diligent and think through multiple scenarios to test out your battle plan in advance. Equally important, take the time to find out what types of data you have and where they're located. Depending on the history of your company, you could be looking at a simple series of servers or at terabytes worth of unrelated storage devices that you'll want to learn more about.

Such a process is commonly called a data map. This lists all locations of electronic data and lets you know exactly what you can expect from those data sources. You get not only the physical location of those servers or computers, but any associated metadata that might be necessary. When you know where everything is, it will be easier to know what has to be set aside and what can be skipped over in favor of more relevant information – and possibly most important, you will be able to react more quickly and focus on legal strategy earlier on.

3. Take Control of Your Tapes

For many organizations, one of the biggest eDiscovery-related cost drivers is data sitting effectively unmanaged on backup media – often numbering in the thousands of tapes. Many enterprises simply pay a third party to manage this information for them as it accumulates over time. Such a practice certainly requires little effort from the corporation, but there is a simple and much more cost-effective alternative available. And when budgets are tight, low-hanging fruit for cutting costs are always attractive.

The better plan is to gather all your tapes into one central location, de-duplicate all of the data across those tapes, and then dispose of the information for which you no longer have a need (i.e., the data has passed its retention period and there are no legal holds). This process, often called Backup Tape Liability Management (BTLM) helps an enterprise significantly lower several hidden costs such as: tape storage, data access charges, inefficient eDiscovery processes, and internal administration required to manage and track chain-of-custody for all of this data.

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To illustrate this point, consider an organization with a conservative 5,000 tapes being managed by a third party. This enterprise is paying \$0.66 per tape per month to store all 5,000 tapes, and then pays an additional charge per tape to access roughly 1% each month for eDiscovery purposes. By conducting a BTLM project, this company was able to dramatically reduce the tapes that are held at the third party and ultimately lower its total tape storage costs over time. In this example, the savings totaled more than \$800,000, for a return on investment of 175 percent – clearly indicating that the cost to maintain the status-quo process is much higher than the alternative.

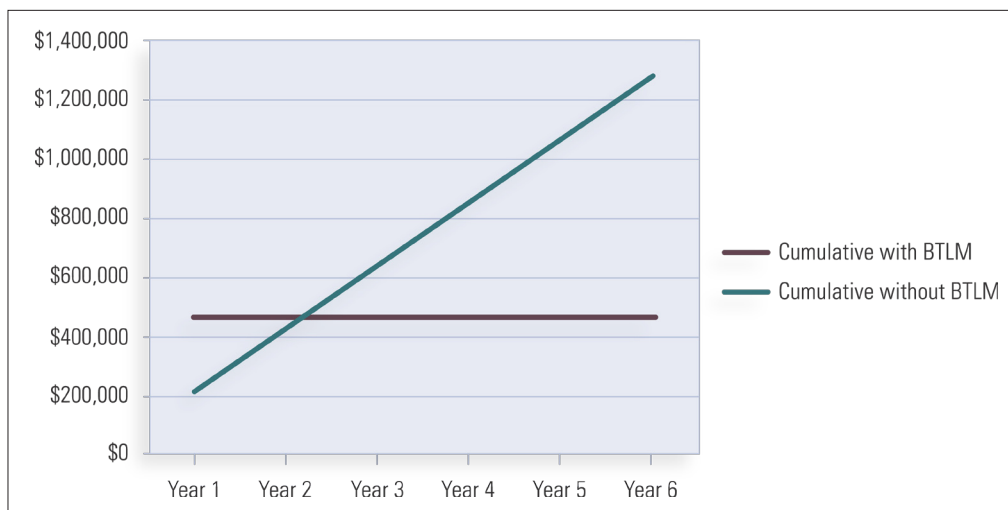
Of course, the savings cited above are only focused on hard costs. They do not take into account the savings that can be achieved by protecting the enterprise from fines or sanctions, or even lost or settled lawsuits, which may result if even one of the thousands of tapes are mishandled by the third party.

4. Have a Solid Data Retention Plan

Unfortunately tough times can result in an increase in employee departures, and additional lawsuits (e.g., HR) for your enterprise. To be prepared for these challenges, it is critical that you retain all potentially relevant information in a manner that is reasonably accessible.

Naturally, make sure that you keep track of ESI associated with people leaving your organization and take measures to ensure that this data isn't inadvertently (or intentionally) deleted. This includes both the primary data, such as an email, and the related metadata. The latter, sometimes described 'data about data,' can be used to determine when information was sent, who it was sent to, and if it was viewed, among many other things.

Just as important, the ESI you have retained must be defensible in court. This means that the data may not be altered in any way. In order to prove the authenticity of the data and avoid allegations of mishandling, chain-of-custody must be tracked with calibrated precision. This means that every time a tape is handled, accessed, or moved, that this action is precisely documented.



Reducing tapes being stored at a third party yields clear ROI over time.

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By following these simple best practices for data retention, you are taking proactive measures to protect your organization from risk, and you are helping prevent future 'red alert' searches for misplaced data that can cost hundreds of thousands of dollars.

5. Focus on Information Governance

Despite your best intentions to retain all potentially relevant ESI, it's impossible to keep every piece of data the company has ever produced. Not only does the 'keep everything' approach cost your organization significant amounts of money for storage (as data piles up over time), but such an approach also leaves your organization at risk that older information will be viewed out-of-context in a future legal action.

Many organizations have developed data retention policies already, which outline how long different types of data must be retained before it is disposed of. But a large percentage have not created those policies yet, and even those organizations that have may find that the policies are outdated or not being enforced. Make sure your organization places a high priority on developing or reviewing these policies to lower your risk and costs.

Once you have established sound policies, look for a means of automating their enforcement. The sheer volume of data you have on hand will make it virtually impossible to manually go through each piece of data and determine if it must still be retained over time. The key is to uniformly manage all of your data, and to do so consistently. Data classification technology or retention management technology built into archiving software can certainly help, but it is up to your organization to be diligent about leveraging these solutions and sampling the results to make sure appropriate data is disposed of appropriately.

Just as important, be sure that the technology you choose to automate the enforcement of retention policies also has the tools to analyze this data and lock down any information that may be relevant to a legal matter. If a legal hold has been placed on a piece of data, the tools must be available to easily find this information and override any act of deletion, until you have explicitly told the system it is acceptable to do so.

By prioritizing information governance within your organization, you are taking simple steps in advance of inevitable litigation to protect your enterprise and potentially save millions of dollars in lost or settled lawsuits.

6. Lower Your TOTAL Spend

Until recently, most organizations didn't have a clear understanding of their total expenditures for eDiscovery. Often, costs were split up between several departments (e.g., legal, compliance, and IT) and/or were hidden in 'standard' budget line items such as full-time personnel, technology infrastructure, or legal fees. But enterprises are becoming much more savvy about eDiscovery expenses today and are looking for ways to lower their total spend – particularly in this economy.

Many companies have acknowledged that one of the biggest cost drivers for eDiscovery has traditionally been reactionary eDiscovery processing. This practice of quickly searching for information on backup tapes once a legal action emerged and then giving an outside vendor a short period of time to process and index this information in advance of review was a very costly procedure – in large part due to the 'rush-job' nature of the work that the vendor had to staff for quickly. As a result, many organizations purchased email archiving software to proactively consolidate all of their email (the most common type of data in litigation today) in one place, for more efficient and cost-effective access over time.

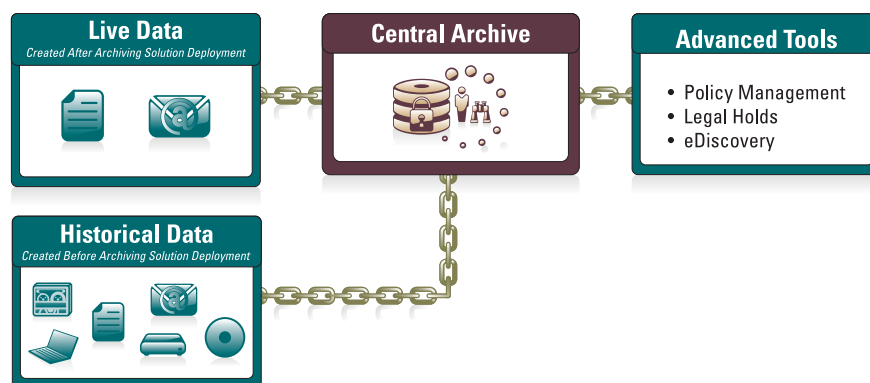
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But the problem is many of these archiving solutions are solving only a portion of the problem because they are focused only on live data that was sent after the system was deployed. What is often overlooked is an organization's historical information, which was created before the archiving solution was deployed. This data on backup media is often an organization's most at-risk information because they don't know what's on the tapes, the data isn't fully managed under the company's retention policies, and most important this data is just as likely to be called for during litigation as its live data.

A better plan is to deploy an archiving solution that consolidates both live and historical information in one place. Not only does this approach ensure that retention policies and legal holds are uniformly enforced across ALL corporate information, but by consolidating all this information in a single place – in a controlled timeframe – you are taking steps to protect your organization from the rush-job eDiscovery processing on backup media that often sinks an organization's budget without warning.

But that's not the only way to lower your total spend. Another important strategy is to look for a means of decreasing the costs of the single-biggest expense in most eDiscovery cases today – the review stage. Generally, organizations involved in litigation pay hundreds of thousands of dollars to have high-priced attorneys analyze potentially relevant ESI. If the data isn't appropriately de-duplicated on the front end, or if the most advanced review technology isn't being leveraged by the attorneys completing this manual work, then inefficiency creeps into the process and often the organization pays for slow or duplicative work – important when you're paying by the hour.

Another way to lower downstream review costs is to leverage emerging technology that allows you to get a sense of what is contained within your data, and then determine a legal strategy prior to any expensive legal review work. This software, known as an Early Case Assessment (ECA) application, helps a company evaluate the merits of a case early on and assign appropriate resources from the outset – if it intends to fight the lawsuit after rapidly evaluating all the facts. ECA is quickly gaining traction as a cost-containment measure and is often packaged with archiving technology.



Proactively consolidating historical and live ESI lowers total eDiscovery spend over time.

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7. Outsource for Greater Flexibility

It's no surprise that the concept of business process outsourcing (BPO) became popular during our nation's last economic downturn. This term originally cropped up when the dot-com bubble began to strain and organizations looked to outsource technology development overseas to increase their flexibility and lower costs. As the economy further soured earlier this decade, BPO came to mean outsourcing virtually anything that wasn't a core competency (or that drove business growth) to a trusted third party.

As the economy begins to turn again today, BPO is becoming a hot topic once more. In eDiscovery, this often includes outsourcing tape processing to a specialist, leveraging best-of-breed hosted review tools, and working with service providers to manage live and historical data in a hosted archiving solution. These actions help organizations lower up-front investments in technology and personnel, focus on the things that build competitive advantage, and rein in expenses over time.

If outsourcing is something that your organization wants to pursue, be sure you do your due diligence to find the right outsourcing partner. Some keys to look for include:

- **History and experience** – In general, you want to connect with a service provider that is established in the market and has done a good deal of eDiscovery processing in the past. This is a business that requires a good deal of tribal knowledge, which can be applied to future jobs for greater efficiencies and output. Ask for references that can speak to magnitude and complexity of your particular project.
- **Capabilities** – You also want to make sure the vendor has the capacity to handle your volume in the time you've agreed upon. There's nothing that can sour a project more than if it is continually being delayed because a vendor oversold their capabilities. Generally, submitting a Request For Proposal (RFP) to evaluate a potential vendor's capabilities is an appropriate method of determining whether or not that particular vendor will provide a good fit for you.
- **Project management** – A project manager can make or break your project. When seeking out vendors, look for one with a solid project management team that understands your problem and communicates effectively. Proactive communication through daily or weekly status reports is a bare minimum. Also watch out for the bait-and-switch approach, whereby a seasoned project manager is introduced early on but a more-junior project manager takes over after the initial sale.
- **Facilities** – Make sure you visit your selected vendor's facilities before finalizing your decision. With data that carries as much risk as ESI, you cannot risk trusting your potential evidence with a company that does not have the facilities that map to your needs. Some of the specific things you should look for include: disaster recovery capabilities, redundant safety measures, quality control methods, 24-hour support, personnel identification measures, entry and exit manifests, updated chain-of-custody logs, and restricted access to client data.

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8. Don't Get Caught by Surprise

Fear and uncertainty often push even the savviest of organizations to make decisions without looking at the downstream consequences. And many technology vendors or service providers prey on this by offering pricing models that look inexpensive on the surface but carry significant 'overage' costs that are not uncovered until it's too late. Don't get caught in that trap.

A common example of this type of surprise is tape processing for eDiscovery. Most vendors that provide this kind of service, charge on the amount of data (gigabytes) that was processed. Such a pricing model works well for the vendor since it bolsters top-line revenue. But pricing based on volume is a leading contributor to low-ball quotes for service, since most organizations often do not have a clear idea at the outset on what volume they have over hundreds (or thousands) of tapes. The result is often a bill received after the service was rendered that is orders-of-magnitude higher than what was originally budgeted.

Today, a small handful of service providers have embarked on a crusade to help eliminate budgetary surprises by charging based on a metric that an organization can readily count – the number of custodians that are involved in a case. This move to drive visibility and predictability into the eDiscovery process will have clear downstream benefits to your organization. Not only will finding a vendor that offers custodian-based pricing eliminate the strain of predicting the volume of data you have on tape, but it will also help eliminate budgetary battles between your legal and IT departments that emerge once the extra charges are uncovered.

Look for a vendor that knows the law (and how to manage data as evidence), that has technology that is trusted and proven with enterprises like your own, and that offers custodian-based pricing to eliminate surprises that lead to budgetary strain when you're serious about containing costs.

Conclusions

Recent events in our economy are forcing you to be even smarter about managing your budget, and unfortunately your eDiscovery challenges will not go away in a bear market. In fact, they are likely to escalate. That means that you need to pursue well-planned measures to balance your inevitability of eDiscovery with fiscal responsibility. In this white paper, we have provided several suggestions to help you achieve that objective, including:

- Don't panic, be opportunistic
- Prepare in advance
- Take control of your tapes
- Have a solid data retention plan
- Focus on information governance
- Lower your TOTAL spend
- Outsource for greater flexibility
- Don't get caught by surprise

Probably most important, make sure you're not caught off guard – being prepared for eDiscovery is paramount to controlling costs. Also remember that processes and strategy will solve part of your problem, but technology and expertise are also a critical part of the equation. And sometimes, your challenges are better solved by a third party that has seen your same problems hundreds of times with other clients and can leverage this knowledge to deliver an effective and cost-effective solution for your organization.

About RenewData

RenewData is a leading provider of eDiscovery and ESI risk management services to assist corporations and law firms responding to lawsuits, investigations, and audits.

Our archiving services include ActiveVault 4.0, which is the industry's first hosted archiving service dedicated to historical information. We also offer data migration service offerings to load historical information into archiving software sitting behind our customers' firewalls. Most archiving software is supported, and we have strategic partnerships with many of the top software providers in the space including Symantec, Mimosa, and AXS-One.

RenewData's other offerings include eDiscovery services that cover the five critical steps of the eDiscovery process, including planning, preservation and collection, processing, review, and production. Our ESI risk management services provide corporations with a proactive means of managing the risks associated with ESI.

Superior legal expertise, scalable technology, and a state-of-the-art facility featuring government-level physical security enable RenewData to provide clients with secure, accessible, and manageable data in a cost-effective and timely manner. The company has been ranked a "top provider" in the Socha-Gelbmann Electronic Discovery Survey Report for four consecutive years and was ranked in the 2006 and 2007 Inc. 500 lists of fastest-growing privately held companies in the U.S. For more information, visit www.renewdata.com or call 888.811.3789.



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