



WHITE PAPER

Controlling Discovery Costs: Early Case Assessment Manages Litigation Costs

By Rich Turner and
Vice President, Marketing, Content Analyst Company

Cathy Story
Senior Consultant, INCEPT Technologies, LLC

“A funny thing happened on the way to becoming successful: despite our best corporate governance, we got sued,” said Stuart Taylor, National Journal columnist. The not-so-funny part is that despite their best intentions companies do get sued: the average Fortune 2000 company is involved in more than 100 legal matters at any given time. Many company executives and managers have attended seminars on compliance, risk and retention policies, yet few have ever looked at how modifying their business processes can affect the cost and potentially the outcome of such involvement whenever there’s litigation.

Most of the work of the general counsel and the legal department in companies today is supervisory: determining policy, directing legal efforts, managing outside law firms who typically handle legal complaints. However, the astronomical growth of electronically stored information (ESI)—largely attributed to how companies use and archive email correspondence—has had a parallel effect on rising litigation costs. Companies are realizing that they need to be more directly involved early on to better understand their exposure and manage these costs. Law firms, too, are being held accountable for some of these cost pressures so they also need to analyze discovery early on to identify issues, project costs, and determine appropriate strategies before they undertake a costly review cycle.

Early case assessment is all about understanding volume and related potential cost: how many documents exist, how responsive are they, who are they from and ultimately what will it cost to manage this case. The earliest solutions functioned primarily as culling tools: taking a large pool of potentially responsive documents and filtering them down—generally via keyword—into the smallest likely set. Once the documents had been identified, the potential cost to review and produce could be estimated with some degree of confidence.

There is a paradigm shift underway in today’s environment that greatly affects how these tools are used, and more importantly what tools are used. The early case assessment tools that grew out of culling solutions are still based on keyword and tagging methodologies; their strategy is one of matching larger and larger volumes of ESI with bigger systems and more horsepower. It is an “arms race” that is further compounded by legislative constraints, like the FRCP amendments in December, 2006. For clients, it is starting to feel like “boiling the ocean”—there doesn’t seem to be any way to get ahead of the problem.

New “intelligent” early case assessment tools are emerging that take a different approach. These tools perform a preliminary analysis in the ingestion phase to identify duplicates and near-duplicates, as well as details about the types of documents and the topics they cover, to more accurately assess the potential review workload. Furthermore, concept search technologies can enhance these tools by using a set of known responsive



documents to accurately identify all other potentially responsive documents that might be buried in email, in more of a ground-up approach.

Concept searching goes beyond synonym or keyword matching to include all documents that describe the same subject matter regardless of the specific terms or words used. For example, concept searching understands that the words “terminating” and “firing” and also the phrase “ending association with” are all describing the same idea. The result is a more accurate identification of privileged and responsive documents.

This detailed analysis enables law firms to meet client requirements to provide reliable estimates of the potential time and cost to handle a case and to develop strategies to reduce the document collection and overall costs. For companies, it can help gauge whether they can handle a matter internally or if they will need outside counsel.

The cost implications of not conducting a thorough early case assessment are huge. Two different factors drive up the cost of review. The first is sheer volume: at \$200/hour for typical outside review and a review speed of 40 documents per hour, it can cost \$5 to review a single email. In an average case of 30GB, that’s 300,000 emails or \$1.2 million. Removing duplicates and non-responsive documents is one way to attack the problem of volume.

The second factor goes to complexity. If a simple case can be reviewed offshore or using contract attorneys, that \$200/hour figure can drop to \$65 or less. If, on the other hand, the concepts involve complex industry-specific issues, outside counsel with specific expertise may be required.

A tool that is smarter, that can provide visibility into a case’s complexity—the kinds of topics and concepts at the heart of the case—is invaluable to determining who and where to review it. Similarly, by knowing what is potentially responsive well in advance of the meet and confer, savvy clients can negotiate more reasonable document production guidelines, and the litigation strategy can be formulated around cost implications.

The sheer costs of e-discovery preparedness and litigation in the 21st century mandates specific and thoughtful business processes that support strategic litigation planning. The ability of the intelligent early case assessment tool to provide a clear view of a party’s potential exposure in specific matters and reduce the review workload has a bottom-line impact that should not be ignored.

Content Analyst Company and INCEPT Technologies, LLC

INCEPT, a new e-discovery tool powered by Content Analyst’s CAAT platform, provides review cost projections and a detailed analysis of your discovery data so you are fully prepared for the meet and confer, and includes concept searching and extensive filtering options to cull down the collection. Compatible with any review platform, including iCONNECTnXT. To learn more, send an email to info@incepttech.com.

Content Analyst Company is a provider of advanced search and document analytics software to e-discovery providers and the public sector; headquartered in Reston, VA, it can be reached at 1-888-349-9442, or info@contentanalyst.com.

INCEPT Technologies, LLC software meets the prereview requirements in the Electronic Discovery Reference Model (EDRM), and is compatible with any review platform for a seamless end-to-end workflow. Reach us at info@incepttech.com.