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Legal Strategies. Business Solutions.

"ECA" Tools Enhance Efficiency, Reduce Litigation Costs

by Michael Arnold

"ECA" is one of the more misunderstood acronyms in the legal marketplace, despite the buzz it is generating throughout the e-discovery industry. ECA is most often accepted to mean Early Case Assessment, but sometimes it is referred to as Early Content Analysis or Early Cost Assessment. Furthermore, in some vendor self-brandings, the term Early Data Analysis (EDA) is used. Regardless of the letters in the acronym, the concept remains the same -- reducing the volume of reviewable data to more efficiently manage litigation costs and time.

ECA can properly refer to a process, a system, or even a product. To help clarify this overworked acronym, this article will explain some of the basics of ECA and how it can help attorneys better manage e-discovery. If we approach ECA as a process, then the *tool* that is often sold by vendors as ECA is in fact a software product designed to accomplish a portion of that process. (The remaining portion of the process is the work performed by the attorney and client to define terms, dates and other factors.) This software can be on a server, sold as an "ECA appliance," or accessed online at a hosted website. When ECA software is hosted, it is sold as a service and may be combined with yet another acronym -- SaaS (Software as a Service).

How ECA Works

The common goals of ECA tools such as Clearwell and Stratify's eVantage (just to name two of the many) are to (1) enable attorneys to make more intelligent decisions at an earlier point in the discovery process and (2) reduce the volume of reviewable data in discovery by using advanced search and analysis tools, while maintaining

TABLE OF CONTENTS

"ECA" Tools Enhance Efficiency,
Reduce Litigation Costs

DSP Version 2.0 Reshapes
Internal Business Process, Saves
Clients Money

DSP Leader Quoted in National
Business Publication

DSP's Blog Aims to Dispel E-
Discovery Myths

DSP's Documentation Process
Upheld in Bankruptcy Case
Involving Fortune 500 Client

Meet DSP

**Chuck Milkis Brings Business
Savvy, Legal Knowledge to
DSP's Document Collection
Process**

Chuck Milkis is the manager of document and electronic data collection for LeClairRyan's Discovery Solutions Practice (DSP). In leading DSP's collection team, he specializes in planning and executing the collection of hardcopy documents and electronically stored information (ESI) from employees at our clients' facilities. Chuck collaborates with

defensible strategies for what is and is not reviewed and eventually produced. To accomplish these two goals, ECA tools perform five key functions. They:

- Pre-digest or "explode" collected information so the attorney will know how much data were actually collected, since many files can be contained within other files as attachments or embedded objects.
- Allow for some basic restrictions, such as date filtering, de-duplicating, or de-NISTing, all of which reduce the volume of data for later analysis. De-NISTing is a process during which certain known "non-data" files, such as programs and system files, are removed.
- Use advanced technology to index each file's basic details and contents, as well as many, if not all, of the extended attributes about a file, which are referred to as metadata.
- Present indexed data with specialized summaries and search capabilities, allowing a system user to tag, or identify, documents based on their contents.
- Export tagged documents (a process commonly referred to as promoting) out of the system for loading into a review platform or another purpose.

Although many vendors will bundle services around ECA tools to aide in the actual collection of the files or provide a review repository, it is important to note that ECA tools are *not* designed to *be* the review platform, nor are they considered production tools (the final phase of the e-discovery processing model that generates the production set containing images, files, load files and data as agreed to in the earlier stages of a case).

Nevertheless, ECA tools, when used properly, can provide the attorney and client with (1) access to terms, concepts and connections among documents; (2) emails and the names of people to which they relate; and (3) organization by dates and common terms, phrases and metadata that otherwise may not be readily visible. These capabilities can and should be used to assist the attorney not only in preparing case budgets and strategies, but also in constructing effective search term strategies to propose in discovery conferences between parties.

Sound Strategies Yield Success

One typical strategy for the use of an ECA tool is to load the collected data prior to a meet and confer, test the keywords considered and

DSP partners and associates, trial counsel and key client personnel, including in-house counsel, paralegals, records managers and information technology (IT) managers, to develop and execute document collection plans. To ensure success without incurring excessive fees, in appropriate cases, Chuck and his team employ an intelligent, targeted collection model involving a detailed assessment of the collection requirements and on-site or remote desk-side collections to minimize the volume of ESI collected.

Effective communication is critical, and Chuck's legal experience combined with his practical business knowledge make him uniquely qualified to bridge the communication gap between legal departments, IT personnel and business users, ensuring that legal requirements are met, IT capabilities are respected, and business users are not inordinately inconvenienced. Chuck and his dedicated team of professionals offer innovative, yet defensible solutions to the challenge of ESI collections, always keeping the client's business interests in mind.

Prior to joining LeClairRyan, Chuck owned and operated a group of radio stations in Richmond, Virginia, and worked in network television production in Los Angeles, California. He also practiced communications law with the federal government and in private practice.

[Learn more about DSP](#)

sample the data. Taking these steps will allow for the best understanding of the data and contents without expending significant cost on a comprehensive review beforehand. Vendors who provide ECA as a service will typically supply a 'search terms hit report' with some sampling reports. Additionally, the tool can allow for better forecasting of the volume of data, or number of documents that will need to be reviewed, which will assist in allocating the proper number of review attorneys to the project.

Another strategy to manage the review costs is to use the ECA tool to perform specific searches across the data and tag documents that relate to specific terms or concepts. Bulk tagging by concept can allow for specific categories of documents to be reviewed by attorneys specializing in or familiar with that material. This process generates a more consistent and efficient review and can also eliminate many extraneous and unnecessary documents (such as spam email, sports and weather updates or other nonrelevant items), resulting in significant cost savings.

In addition, the risk of inadvertent disclosure of privileged information can be mitigated by leveraging the analytics of ECA tools to search for keywords and other indicia of privilege, so that potentially privileged documents can be swept to the side and reviewed by key attorneys at the front of a review as opposed to as a final step. Additionally, electronic and computerized searches for privileged information can support the Federal Rule of Evidence 502 requirement of reasonable effort.

It is not uncommon today to collect several gigabytes of email data just from one custodian, often presented as a single collected file, such as a PST (personal file folder). This is not to mention the many files stored on personal computers and networks. Considering that one gigabyte of data can represent anything from a few files to tens of thousands of individual emails, attachments and other files, it is little wonder that litigation costs can get out of hand quickly. Even though ECA tools come at a price, with so many files today being embedded as attachments or "pasted" within other documents, it may well be unreasonable to make early case decisions without leveraging ECA tools to analyze the data. ECA tools can strengthen a case and enable attorneys to be as knowledgeable as possible about the data involved, while significantly reducing effort, time, and most importantly, cost.

[back to top](#)

DSP Version 2.0 Reshapes Internal Business Process, Saves Clients Money

In 2010, the legal services market underwent enormous change brought on by a host of factors ranging from the continued emergence of innovative technologies to ever-shrinking corporate legal budgets spurred by the nation's struggling economy. LeClairRyan's Discovery Solutions Practice (DSP) also saw radical change this year, and fortunately, it was *for the better!*

Following a transition in DSP's management in the first quarter, the practice seized the opportunity to usher in an entirely new spirit and vision driven by its core values (Can Do, Integrity, Precision, Respect and Teamwork) and its unwavering commitment to providing clients with the highest quality document review and e-discovery services at lower prices.

DSP's new spirit and vision took the form of a reorganization and redesign plan called "DSP Version 2.0." While the plan's name may not sound that exciting, the results of Version 2.0 certainly are. The plan consists of more than 35 initiatives, many of which have numerous sub-initiatives, corralled into over-arching categories such as client service, pricing and pricing models, workflow and process improvement, technology and equipment, staffing, space, and vendor partnerships.

To date, DSP has substantially completed 75 percent of the plan's initiatives, and the team is poised to complete the remainder in December. The impact Version 2.0 has had on DSP internally, in terms of energy, spirit, focus, efficiency, productivity and creativity, is palpable and positive. For DSP's clients, the results are beginning to show in big ways. For example, every DSP client spends less (per hour and/or per unit) for document collection, review and production services now than a year ago. Clients seem to like spending less for document review, even if they don't know that DSP Version 2.0 is the cause.

So what's happening next year at DSP? Well, DSP is already compiling initiatives that complement Version 2.0 as well as entirely new initiatives. DSP will launch Version 2.1 on February 1, 2011, and it will be bigger and better than its predecessor. Stay tuned for updates.

DSP Leader Quoted in National Business Publication

Nathan Koppel of *The Wall Street Journal* recently reported on the increasing use of technology to analyze and filter data based on content at the point of collection and later in the e-discovery process in an effort to reduce costs. Noting that e-discovery "has grown into one of the costliest, and most nettlesome, aspects of litigation," Koppel reports that large companies expect to spend as much as 7.1 percent of their litigation budgets on e-discovery this year, up nearly 2 percent in the past five years. Among the attorneys specializing in e-discovery who were quoted in the article was LeClairRyan's own Dennis Kiker, who specializes in helping companies implement processes and technologies to reduce discovery costs. Dennis observed that the source of much of the pain felt by corporate litigants comes from ineffective records and information practices: "If companies have less junk on their computer systems or in the backup tapes or email archives, it's easier to find relevant information...and produce it for litigation."

Source: Nathan Koppel, "Using Software to Sift Digital Records," Wall Street Journal, Nov. 23, 2010.

DSP's Blog Aims to Dispel E-Discovery Myths

In its ongoing effort to bridge the gap between technology and the courtroom, LeClairRyan's Discovery Solutions Practice (DSP) has launched a blog entitled *The E-Discovery Myth: Dispelling Misconceived Notions Related to e-Discovery*.

For many, "e-discovery" is more often a problem than a solution, because in their experience, technology has created more questions than answers. DSP's goal is to dispel the myths, demystify the scare tactics, and provide facts and analysis that bring clarity to the confusion that is often associated with e-discovery.

Realizing that technology and the law seldom provide clear lines, DSP professionals hope their real-world perspective initiates a dialogue that helps business leaders across industries better understand the benefits and promises of e-discovery.

Please [click here](#) to view our blog.

**CASE RESULTS DEPEND UPON A VARIETY OF FACTORS
UNIQUE TO EACH CASE AND DO NOT GUARANTEE OR
PREDICT A SIMILAR RESULT IN ANY FUTURE CASE**

DSP's Documentation Process Upheld in Bankruptcy Case Involving Fortune 500 Client

LeClairRyan's Discovery Solutions Practice (DSP) served as the gatekeeper of electronic data stored on servers and paper records retained by a Fortune 500 financial services company, whose bankruptcy was one of the largest filed in 2010. As part of managing the data, DSP advised the liquidation trust on how to collect, review and produce responsive electronic data and paper records to respond to dozens of subpoenas and document requests from creditors and third parties.

Several months after a document production, a creditor notified the trustee that it intended to file a motion to compel, alleging various discovery issues. DSP worked with counsel for the trustee and was able to resolve many of the issues raised by the plaintiff's counsel, but the plaintiff's counsel ultimately filed the motion. DSP provided thorough documentation detailing its process for collecting, reviewing and producing responsive data as well as its procedures for identifying the sources of responsive data. DSP assisted with drafting the trustee's response to the motion, drafted an affidavit for a member of the liquidation trust's legal department and assisted with hearing preparations.

During the hearing in the United States Bankruptcy Court for the Eastern District of Virginia, the plaintiff's counsel abandoned one of its assertions – that documents were not produced in compliance with the Federal Rules of Civil Procedure. In the trustee's response, trial counsel and DSP cited Fed. R. Civ. P. 34(b)(2)(E)(ii), which permits a party to produce electronically stored data in a reasonably usable form. DSP produced the documents in a standard format with images and searchable text. Counsel for the trustee argued that the scope of discovery was limited based on a prior court order and that DSP went to extraordinary efforts to collect, review and produce responsive data. These efforts involved a complete data environment assessment and collection from the company's data archiving server and litigation database, more than 1,000 hours of document review time, a production of several thousand pages of responsive data, and the creation of a detailed privilege log.

DSP also summarized for the court that 285 documents withheld as privileged equated to approximately 100 documents because many were duplicative and many of the unique documents were produced with redactions. Counsel for the trustee argued that the privileged documents and their attachments were reviewed and approved at

several levels by contract reviewers and counsel for the trustee. The plaintiff's counsel acknowledged that the privilege log prepared by DSP was "very well done."

Before counsel for the trustee commenced its argument, the judge denied the plaintiff counsel's request for sanctions. After more than an hour of argument, the judge also determined that an in camera review was unnecessary, as counsel for the trustee had demonstrated that DSP went to great efforts and expense to comply with the court's order to produce responsive documents. The judge agreed, stating the trustee has "fully complied with the [c]ourt's prior order," the privilege log was "extremely well prepared and very detailed," ... "[t]he [c]ourt is satisfied...that a thorough review of these documents has been done, and the trustee -- to the best of the trustee's ability -- has claimed attorney/client privilege in this case." The court denied the motion to compel in its entirety, and the plaintiff's counsel has indicated that it will not appeal the ruling.

[back to top](#)

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