




VENIO SYSTEMS

WHITE PAPER

The Early Case Assessment Value Proposition

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THE BENEFITS OF EARLY CASE ASSESSMENT: DETERMINING THE VALUE PROPOSITION

In the midst of litigation, law firms, their clients and their service providers have many things to consider. With pressure from stakeholders, stressful timelines and extensive e-discovery projects to complete, it's tempting to jump in right away and focus on the details later.

However, there is a great deal of value in pausing to conduct an early case assessment (ECA). An ECA utilizes processes and technology to analyze potentially evidentiary data early in a litigation or regulatory investigation in order to: (1) better understand case facts; (2) become familiar with the amount, nature and location of the electronically stored information that must be preserved, collected and analyzed; and (3) reduce the size of the data set for downstream processing and review. Along with providing invaluable strategic insights into a particular litigation, ECA can lower costs, improve defensibility, speed the entire process and offer a better quality of review.

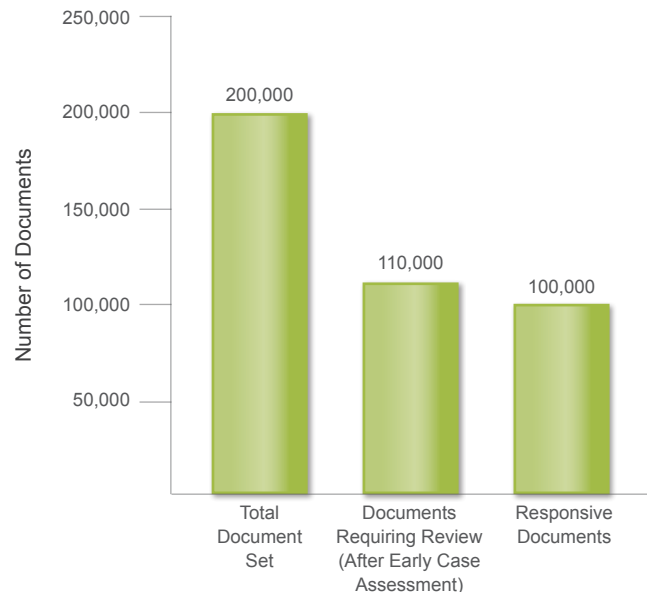
Here, we will explain the value proposition from ECA. In a forthcoming paper, we will offer best practices for ECA, to ensure that a law firm's investment pays off as quickly as possible.

UNDERSTANDING THE CASE FACTS

There are many advantages to understanding the case facts early on. The legal team can gauge the case's value, the likelihood of prevailing and whether the case has important precedential value. The team can develop a litigation strategy and determine if it is ripe for early settlement. Among the advantages of ECA in this realm:

- ▶ An ECA provides early visibility into the details of the matter, so the legal team can focus on developing case strategy as quickly as possible. After conducting an ECA, it becomes easier for the team to decide what sort of resources should be devoted to the matter and whether to take the case toward trial. The opportunity to settle early is of particular value, considering the high correlation between litigation costs and cycle time.

- ▶ With a strong understanding of the case facts, law firms and their corporate clients can work together more cohesively as a team. This leads to sharper insights into the case and the client's goals, and it helps to develop a deeper partnership between the law firm and the client.



MANAGING ESI

In any discovery project, developing an understanding of the amount of potentially responsive data early on can be extremely helpful, and ECA can help accomplish this. This is especially true in preparation for a Meet and Confer, which is required under Rule 26(f) of the Federal Rules of Civil Procedure. According to the Committee Notes to Rule 26(f), the amendment is intended to "direct the parties to discuss discovery of electronically stored information during their discovery-planning conference."

- ▶ **An Essential Weapon for Rule 26(f) Meet and Confers**
Conducting an early case assessment prior to the Meet and Confer gives the discovery team the knowledge it needs to understand the impact of opponents' requests, raise issues related to volume, cost or inaccessibility of data and time needed to fulfill requests. A more complete understanding early on should give the team the opportunity to negotiate a more effective plan, based on their knowledge of who the important custodians are and how difficult it may be to produce each pocket of data.

There are other advantages to developing an early understanding of the ESI, including:

► **Better Positioning for Discovery.**

An ECA will help identify sources of additional evidence, such as custodians, keywords, topics and discussion threads, earlier in the litigation. This can save significant time and money, since the legal team won't need to go back and conduct discovery again later in the process to pick up files that it missed the first time. It also reduces risk, as judges and adversaries do not look kindly on discovery errors.

► **Minimizing Risk.**

An ECA can identify “smoking guns” and other issues that may otherwise remain buried until the litigants are deep into discovery or even in the midst of a trial. By finding as much information as possible early on, legal teams can plan and adjust their strategies accordingly and anticipate the reaction of the adversary and the court.

► **Improved Defensibility.**

Email analytics provided as part of an ECA offer a visual map of communication patterns that can provide further insight on evidence. Users can be more confident they are preserving and collecting the right data from the right custodians, and that they are producing all responsive documents.

REDUCING DATA SETS AND DISCOVERY COSTS

The cost pressures that have been weighing on corporations and legal departments for years have spread to law firms and service providers. Law firms understand they need to consider ways to help their clients reduce expenses. Much of value of ECA can be found in its ability to reduce the sheer number of documents that need to be processed and reviewed.

Processing non-responsive data is enormously time-consuming and expensive. In today's corporate environment, a lawsuit may potentially include terabytes worth of Word files, Excel spreadsheets, emails and other types of ESI. And once all of this data has been processed, it must be reviewed.

Reducing the amount of data at the beginning of the e-discovery process reduces the number of documents that reviewers will need to look at during the review phase.

As part of the analysis, ECA tools, such as Venio FPR, can do a “first pass review” of the ESI and cull out most of the non-responsive documents – up to 90%. When attorneys review troves of unresponsive documents, the legal team wastes time and money. Substantially reducing the document set for processing and review optimizes their time and reduces discovery cost substantially.

For example, consider a project with 200,000 documents, half of which are responsive. Culling out 90% of the unresponsive half, or 90,000 documents, prior to review can save upwards of \$45,000 on review alone (assuming an average of 60 documents reviewed per hour at a below-average rate of \$30 per hour of review time). Additional savings are available from not processing or hosting all those unresponsive documents.

Without Early Case Assessment



Responsive Cost to review: \$50,000
Unresponsive Cost to review: \$50,000
Total Cost to Review Documents: \$100,000

With Early Case Assessment



Responsive Cost to review: \$50,000
Unresponsive Cost to review: \$5,000
Total Cost to Review Documents: \$55,000

And while the dollar amount is significant, there are other benefits to minimizing the number of documents that must be reviewed. With fewer documents, reviewers will have fewer opportunities for inconsistencies and missed items.

And for a law firm, delivering this type of value to clients can be extremely meaningful, especially if the reviewers are contract attorneys rather than the firm's own staff. When law firms can demonstrate risk reductions and cost savings, clients will see they provide more value.

DEFENSIBILITY

Achieving the cost savings described above is worthless if the culling process is not defensible to courts and adversaries. When litigants are challenged about their processes, it is expensive to defend at a minimum. At worst, if the process is not managed correctly, the legal team can face criticism or sanctions.

A defensible ECA will rely on well-proven methodologies, such as keyword searching, rather than the less-proven types of search methodologies that many service providers are suggesting. There is substantial court backing for use of keyword searching in discovery. As Magistrate Judge Paul W. Grimm noted in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008), "Keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval..."

In his ruling, Judge Grimm also cited the Sedona Conference's "Best Practices and Commentary on the Use of Search and Information Retrieval Methods in E-Discovery." In that publication, the Sedona Conference confronts the "myth" that manual, human review "of large amounts of information is as accurate and complete as possible—perhaps even perfect—and constitutes the gold standard by which all searches should be measured." The paper, which delves into the issues and challenges and offers practical guidelines, can be downloaded at http://www.thesedonaconference.org/dltForm?did=Best_Practices_Retrieval_Methods___revised_cover_and_preface.

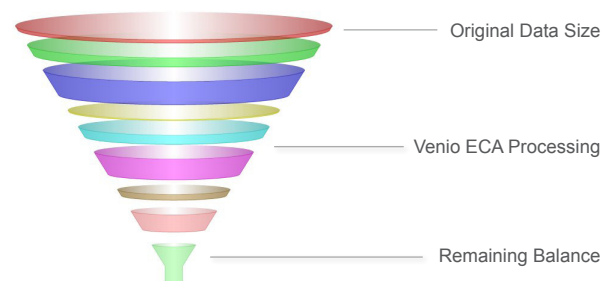
In the same decision however, Judge Grimm also notes that "...there are well-known limitations and risks associated with (keywords), and proper selection and implementation obviously involves technical, if not scientific knowledge."

Judge Grimm goes on to provide guidelines that can be very useful for those seeking assurances about the defensibility of keyword searches with ECA: "Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology. The implementation of the methodology selected should be tested for quality assurance; and the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented."

CONCLUSION

By taking these considerations into account, law firms can be more confident that they are conducting defensible ECA.

When clients are involved in litigation, they are looking to their law firms for any strategic advantage they can get. They also want to cut costs as much as possible. Through ECA, law firms can provide both of those things in a defensible, thorough way.



Venio's Value Proposition

Venio FPR provides the technology to support Early Case Assessment program that achieves the value proposition described in this paper. The product helps clients reduce electronic discovery data early in the process – by an average of 70%-80%. Processing less data and reviewing fewer documents results in commensurate cost savings, allowing Venio clients to receive a substantial return-on-investment almost immediately