

## The Litigation Support Marketplace – An Analytical Framework

The purpose of this white paper is to detail an analytical framework used to categorise and assess the tools and suppliers available within the Electronic Data Discovery (EDD) marketplace.

In broad terms there are three main stages to the litigation lifecycle:

- Capture of information.
- Preparation for trial.
- Presentation in the courtroom.

### 1.1 Litigation Lifecycle - Information Capture

Before the advent of Electronic Stored Information (ESI), in terms of EDD systems, the first stage of the lifecycle was primarily concerned with the scanning of pages, coding of documents and creation of Optical Character Recognition (OCR) text. Over the past 10 - 15 years this has been a stable and easily understood process, with suppliers able to provide relatively accurate estimates of the volume of paper within lever arch files and hence fairly rigorous costing estimates for the process. These estimates are based on industry normalised prices for handling the individual elements of the procedure, i.e. so many pence per document/page to disassemble files, scan pages, reassemble documents, produce OCR, conduct objective coding, etc. Although there will always be minor variations between suppliers due to different quality control procedures, software used, and plain old human errors, effectively the scanning and coding of documents has become a commodity item, with known elements of risk and risk reduction management processes.

### 1.2 Litigation Lifecycle - Trial Preparation

The trial preparation element of the lifecycle was where the majority of technical innovation took place from the mid 1990's onwards. Software tools emerged which provided functionality for lawyers to handle larger volumes of documentation. They enabled users to review documents on-line to establish their relevance, privileged and trade secret statuses, and then develop the issues and themes required to support the defence or prosecution of the case. Users could carry out the exchange of disclosure information and ultimately produce the documents required for the courtroom bundle. The software in this area developed from MS-DOS roots, into Windows based applications and then technology employing the design principles which underpin the Internet, i.e. becoming web based.

Examples of this kind of software are Concordance, Summation, IntroSpect, Ringtail and iConnect. The initial focus of the development of these tools was on the requirements of this part of the lifecycle, with an emphasis on strong searching capabilities, identification of issues, key words, and themes, linkage to chronological analysis of events and very robust production capabilities. The development emphasis of these tools has changed over the past few years in response to the increasing volumes of ESI, see 1.6 below for further exploration of this proposition.

### 1.3 Litigation Lifecycle - Courtroom Presentation

Though quite a significant technological area within the United States, differences between the US and English legal systems, technical infrastructure and cultural acceptance, means that this is a very small element of the analytical framework. Effectively the UK does not have the "show and tell" approach to evidence favoured by the US and, with the exception of Livenote for stenography, there is not a lot of technology deployed within UK courtrooms. The one exception to this "rule" is the kind of technology deployed in the Bloody Sunday enquiry, or the Hutton enquiry into

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the death of Dr David Kelly. Outside of these examples, the UK courts remain worryingly Technology free.

### 1.4 Litigation Lifecycle - Advent of ESI

Though ESI had always formed part of disclosure material, from late 2003 (particularly in the United States) there was a significant increase in both the percentage of disclosure consisting of ESI and the volume of the material itself. In reaction to this various companies developed software products to enable users to meet the challenges of conducting Electronic Data Disclosure. These applications generally comprise of two elements. The first allows for the collection and filtering of the ESI. In this process, superfluous electronic files are discarded, duplicate documents removed and techniques employed to try to weed out irrelevant material. At the end of this filtering process, the data is passed into an application that is geared to allow a large number of simultaneous reviews to occur under a robustly designed workflow, with comprehensive QC and reporting faculties. The main feature of this part of the lifecycle is the sheer volume of ESI and the impracticability of any supplier being able to provide an accurate estimate of eventual volumes and hence costings.

Examples tools here were products such as Kroll's Electronic Data Viewer (as was) and nMatrix's (now Epiq) initial offering. These products initially focused on the "pure" processing and review of ESI, with data being handed off into systems such as Ringtail or IntroSpect. However, they very quickly evolved into systems which also try to provide the functionality required to support the preparation part of the lifecycle. Hence Kroll's Ontrack Inview offering, Discovery Mining's eponymous product and Epiq's DocuMatrix application. In response to this encroachment upon their marketplace, products such as Ringtail, IntroSpect and to some degree iConnect and Concordance's FYI application have added "data processing" tools that offer functionality to pre-process, filter and sort data before it is loaded into their main software engine.

The main issue to be aware of when evaluating these tools is that there is, to some degree, a danger of comparing "apples with pears". The ESI review tools come from a background of very strong review and workflow, ideal for dealing with the large volumes of ESI that are generated at the start of a project. They have only lately turned their Research and Development budgets towards the different requirements of the middle stage of the litigation lifecycle. Similarly the electronic case management vendors are moving into unfamiliar territory with their attempts to control the overwhelming flood of ESI at the start of the lifecycle.

The key point is to be aware of the different strengths of the products, balance that with the individual requirements of specific cases, tempered with the ethos and approach of the law firm and arrive at the most suitable software application for that situation.

Finally, within this area there is also the specialist sub-topic of Computer Forensics. The functionality provided here ranges from the detailed restoration of "deleted" information from a computer hard disk, through to the bulk processing of information stored on back-up tapes. The specialist organisations that operate in this area can provide a legally sound evidence trail for electronic information which may be appropriate for some cases. The majority of EDD projects will not need this kind of input, but it is an essential weapon to have in the EDD armoury.

### 1.5 Emergence of ESI based analytical tools

Along with the problems raised by ESI, its very nature means that it also offers the potential for significant advantages in terms of evaluating and automatically grouping

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information. An early player in this area was the Autonomy product which employs Artificial Intelligence techniques and a “learning” process to identify patterns and documents corresponding to a certain type, i.e. initial Privilege calls based on a knowledge base built up over months of training. This approach relies upon users supplying the key words and issues which they think are relevant before the analysis works starts.

Increasingly, the marketplace is seeing products which work by grouping similar documents together. The “similar” assessment is done by linguistic matching, i.e. documents with the same sets of words are grouped and similar groups are linked via a concept spine. These “Analytic” tools do not rely upon user preconceptions as to the relevant or important themes before the case, instead they reflect what actually exists with the electronic material. A known player in this market is the US product Attenex, which is now being challenged by the built-in analytic tools of Kroll’s Ontrack Inview, Discovery Mining’s product and Epiq’s DocuMatrix as well as direct competition from Recommind’s Axcelerate eDiscovery product.

Though this category of tools provides significant savings in terms of time and effort in cutting through the initial review phase for ESI and can provide valuable assistance in case development, they do not (at present) provide enough functionality to take a case all the way through to the end of the preparation phase. As such, they would currently be used as an adjunct to a electronic case management system.

### 1.6 Analytical Framework

Based on the above analysis, the following categories / functional groupings exist within the analytical framework. Because of the overlapping nature of this environment, there are some companies/products which will span more than one category, however, this approach does provide a methodology for conducting the review process required within this assignment. The groupings are:

a) Provision of scanning / coding facilities

Despite the increasing volume of ESI within disclosure material, there still is a residual element of paper. Currently, even if firms are moving towards a electronic case management environment based on an electronic approach, then there will be an ongoing need to scan, OCR and code paper files.

b) ESI collection

The issue of collecting ESI at the start of a project can be a problematic one. In a number of large cases, it may be prudent to employ a third party organisation to assist / carry out the process. This service is normally provided by vendors who also process the data, though it also part of the “one stop” approach offered by accountancy consultancy firms.

c) ESI processing / review tools

The need here spans both the in-house requirement to process information and the need to establish preferred suppliers to cope with larger volumes. The cleaned and de-duplicated data might then be returned to a law firm for loading into their selected environment, or might be reviewed in a hosted application.

d) ESI analytic tools

The selection of an analytic tool is not an essential part of establishing an EDD environment, but given the fast moving developments in this area, it is considered as an issue which should be evaluated. The key decisions in this area will probably focus on either using the “built-in” analytics modules of

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EDD tools (normally provided at an additional cost), or deploying a discrete tool in its own right. As ever, the particular requirements of individual cases will define the outcome.

e) Electronic Case Management applications / vendors

This is the area of greatest overlap and the one where individuals should try to understand the differences between the different software vendors as well as the similarities. Products which are excellent at the large scale processing and review demands of cases will be ideal for some large volume collection exercises with tight deadlines. Relatively smaller cases with more complex issues leading to deeper demands on the case preparation side of things will suit the products with roots in that part of the litigation lifecycle.

f) Computer Forensic capabilities

Within law firms there is normally a low level requirement for these specialised services which should be addressed by the establishment of preferred suppliers. Experience normally shows, that when these kind of services are required, they are needed on very short notice with immediate effect, i.e. we need to image a suspect PC tonight in a forensically sound manner, or we have 200 backup tapes we need to restore and examine. Once organisations with the required skill set have been identified, then a preferred supplier status should be established with selected companies.

g) Overall EDD project management / consultancy support

A number of the professional services firms operating in this area, e.g. KPMG, Deloitte, Ernst & Young, PWC offer overall project management support for larger EDD projects. However, this area is also considered as a strategic requirement as the role of litigation support within a law firm, increasingly moves from an individual who knows how to get the best price per page for scanning and coding, into the arena of central co-ordinator, orchestrating a project involving the firm's lawyers, the client, external vendors and external parties including barristers and joint/opposing law firms.

### 1.7 Conclusion

The aim of this white paper is to provide an overall analytical framework so that readers can have a reference model in order to compare the relative merits of competing vendors. There is no "right" answer to the question "which product is the best?". When law firms establish panels of preferred suppliers, the successful vendors vary according to which provide the tools and personnel which most closely fit the work type and ethos of the law firm. As in all things in life, you get what you pay for, and if in doubt, take advice from those who know what they are talking about.