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eDiscovery and the Midtier Law Firm and Corporate Markets

BY RICK CLARK

The Past 10 Years: Why Are We Here?

To frame this discussion, it is important to understand why technology exists in its current form. Without protest, eDiscovery is a young and growing industry, and by many accounts legal is well behind the general technology curve.

Fingers are pointing in two directions for multiple reasons, and here is how that goes:

Technologists: We have created great technology that serves the broad market, but attorneys just don't want to adopt it.

Attorneys: It is WAY too expensive for my case and isn't easy to learn and adopt.

Both are legitimate arguments, so let's dissect them. Technology is caught up to where it needs to be for lawyers, but with the slow yet growing adoption of technology-assisted review, it will be years before the industry has it fully deployed.

Advanced data analytics and improved streamlined processes and workflows also equip the industry with the proper tools, but we can't ignore the lack of adoption especially in mid tier markets, which are still using legacy review platforms and processes.

Too often we hear that the proposed costs of eDiscovery processing, hosting and review outweigh the case value. This is especially true of the midtier in how they are servicing their clients and with Big Law's thousands of smaller matters, as the cost of technology doesn't match the needs of the cases.

Our industry over the past 15 years has followed the natural progression in technology development: Big data needed its solutions first.

The race to solve this problem created a large gap by ignoring the bread and butter small-to medium-size matters regardless of the corporate or firm size.

The costs associated with this technology catering to monster matters didn't scale down economically nor with regard to complexity.

The nature of this development has left small cases to be managed in legacy systems not originally created for eDiscovery, and the companies that own that software have failed to bridge that gap. It is no wonder much of the industry continues to only slowly adopt new technologies.

The Rise of SaaS

So here we are in present day with a growing divide between large and small eDiscovery matter management, but now that complex matters have their solutions, the small transactional cases are starting to get theirs.

The proliferation of eDiscovery SaaS platforms has filled the scene with similar approaches: drag and drop data processing, early case assessment, review and production.

Unfortunately, not all platforms bring the sophistication that the larger cases are accustomed to and need to revert to processes similar to legacy platforms once the data is loaded. SaaS platforms are still getting built and cobbling features together as they grow. There are currently only a few SaaS products that offer the sophistication to address simple and small to complex and large data volumes and the workflows that respond to scaling.

When approaching multiple software and services providers, it is important to understand there are three main elements that all have to be in sync for an offering to be a viable option. These are simply software sophistication, services and support and the pricing model.

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This seems fairly basic, but for some reason companies still design their three-legged stool with the legs not evenly supporting the seat. Some are even missing a whole leg of support.

Platform Sophistication. Platform sophistication is generally where one starts in an investigation of what technology to utilize, so we will start there as well. (Keep in mind, you can easily rule out a SaaS provider quickly by asking a few questions on pricing and services, but we will get to that.)

Whether you are in the top 200 firms globally and managing thousands of small cases or a midsize firm that manages many small and a few large eDiscovery cases per year, data analytics is the first place to look at in ensuring that you have access to the best processes in investigations and early case assessments.

The definition of data analytics is becoming watered down with a few providers calling general data reporting with graphics ''analytics,'' but true analytics includes concept indexing, emotion analytics or anything that promotes a process other than solely relying on keyword filtering for the investigation. Many of the SaaS providers that are releasing products are missing this crucial piece to equip all cases with the same technology as the larger sophisticated platforms.

Services and Support. To make things slightly more complicated, the integrated technology also needs to be easy to use when rolled out to the attorney teams applying the solution for the first time. This brings us to the second leg of the stool: services and support.

The software developers work to ensure an easy onboarding experience for both the attorneys and administrators, but there is always a learning curve and access to experts on the software and its workflows needs to be readily available.

Platforms that market ease of use that doesn't require support typically mean providers that don't have support for the platform. Key elements to know about the provider are the tenure of its project managers and data processors in both the industry and with the company, support hours and established processes in support that match your specific needs.

Pricing models have to match regardless of size.

Pricing Model. The industry continues to complain of the high cost of eDiscovery on the technology and services side. Whether through a SaaS product or services from the traditional provider, unless the case is large and/or complex, the economies of scale for technology have a threshold, and scaling down has been the most difficult aspect.

Often cases settle because of these costs, and merit isn't ever even determined. Worst case, settling can cause that company or corporation to become the target of future litigation. The last leg of the stool is that pricing models have to match regardless of size. The growth of SaaS products has led to inroads into a predictable pricing model, and some vendors work specifically with their clients to ensure pricing models match in the off-cases.

When these three legs aren't balanced, counter beneficial measures can be put in place to compensate. One notable example is the pre-culling of data using keyword filtering to cut down on initial costs.

Date range, file type and de-duplication are all necessary for pre-culling, but when keywords are introduced, it may cause downstream issues. Many hours can be spent working back and forth with counsel to create the terms many times before the data is even indexed.

Savvy teams will load the culled data (without keyword culling) and use data analytics to investigate the entire corpus, build better arguments and cull again during this investigation.

An Easy Explanation. The easiest way to explain this is by dissecting a normal case involving data as part of the discovery process. The complaint is filed, and the proof is up to the company/corporation to defend.

Whether the data collection presents 1,000 e-mails and documents or tens of thousands, the strategy with in-house and outside counsel should be to quickly find information that presents the actual merit of the complaint to make the best decisions on the issue(s) and next steps in the case.

Data analytics, TAR and keyword investigations paint the proper picture of what really went on in the data.

SaaS providers are fixing this issue and quickly by including data analytics with a proper business model to allow for all data to process into the database. Exact match (even fuzzy) keyword filtering to search the data is determined as approximately 20 percent effective. Generally, this methodology could miss roughly 80 percent of potentially relevant information that can prove the defense.

Whether you cull with terms on the front end or simply use keyword searching in your investigations, critical data will be missed. Work with your provider to find the best ways to leverage the platform to improve your effectiveness in your investigations.

The software, people and pricing all need to be in sync to ensure you are conducting your investigations, reviews and productions most efficiently.

The Next Five Years

With recent acquisitions and overall commoditization of the services market pivoting off of just a couple mainstream platforms, a vacuum has been created for other technologists to enter the scene with success. Many similar eDiscovery SaaS products have entered the market and are racing to be considered in the top.

The next few years will start coming together with three main elements—speed, efficiencies and pricing—all working together. It is unlikely that there will be a shiny new specific piece of technology released on the market. TAR was arguably the last of this for a while, as adoption and trust are still growing.

Should my predictions work out correctly, with increased efficiencies, the changes will be the assimilation of this technology in how corporations, firms and providers all work together. The three will rely on each other and collaborate to improve the overall process.

Though this exists already with many of the Fortune 500 and their outside counsel and managed services providers, the smaller companies and midsize firms can begin working in the same manner.

Data reuse is a growing topic and one that is born out of the pressures of multiple cases and discovery on the same key custodians in a given organization. This is an

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important but unleveraged workflow in the current market. It often appears to be ''easier'' to recollect, reprocess and rereview the same data.

There are obvious inefficiencies in this process, but there are unfortunate reasons why it still remains the norm. Providers make profits on reprocessing and hosting and law firms on reviewing and billing hourly for that review. Because SaaS and traditional service providers are promoting data reuse, it is important to sound them out as part of your investigation of product and service offerings.

If you don't get the sense that your provider has the experience or willingness to assist, move on. The law firms and providers that are proactive with their clients will ensure a mutually beneficial long-term relationship.

Collective case intelligence is the by-product of data reuse, and this effect happens when the same data, with memorialized work product, will gradually build better decisions on future cases.

Data reuse and this intelligence make up a strategy we will see going forward now that there are SaaS and traditional providers experienced in this process. Should this paradigm shift grow in popularity and be forced by corporate in-house counsel, this alone will radically change how our industry is run in the next five years and beyond.

Conclusion

The legal process has always been reactionary, starting with the sudden and immediate case needs and moving beyond this to growing data volumes with technology matching pace.

The current challenges are natural and one shouldn't expect anything different, but now technology has caught up with the times and processes and pricing models need to do the same.

The vicious competition among law firms and technology providers has created a ''race to the bottom'' as we hear on the legal conference circuit, but if we take a step back, define the specific issues, measure current process performance and analyze the defects, we can improve specific processes with our clients and create the proper controls. This Lean Six Sigma process (DMAIC) is the approach that will reshape our entire industry.