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Technology and "Try vs. Settle" Decisions

Evidence lifecycle management provides a solid and validated framework for bridging the gap between information management and electronic data discovery, while reducing the risks and costs of electronically stored information processing and legal review.

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Today, many organizations have information management systems that assist in data retention and disposal. Companies facing frequent lawsuits often use electronic data discovery (EDD) vendors and outside counsel (e.g., ALA member firms) to process, review and produce electronically stored information (ESI) during discovery. Unfortunately, neither creates a framework that addresses all data as potential evidence and employs a consistent methodology for handling ESI efficiently and cost effectively.

Enter evidence lifecycle management (ELM), a framework that bridges the gap between information management and EDD, speeding up ESI delivery while reducing the risks and costs associated with ESI processing and legal review (see Figure 1). Administrators can help their attorneys to be aware of ELM and their firms to pursue the technology as a viable, cost-effective tool.

LEVERAGING ELM TECHNOLOGIES

Corporations and the law firms representing them are on an aggressive “quest” to utilize technology to be proactive in achieving a more time-efficient, fiscally sound approach to EDD. Take Microsoft, for example. Having recognized the need to convert ELM theory into practice, the technology giant enables existing technology investments (e.g., Microsoft Office SharePoint Server 2007, FAST ESP and Microsoft SQL Server 2008) to be leveraged by ELM process technologies, such as the MatterSpace® ELM platform, thus resulting in a predictive data custodian-based e-discovery cost model.

By embracing ELM and ELM standardized technologies, your firm is not only making technology investment planning an easier and less costly task, but is also empowered, jointly with your clients, manage each case in a more automated fashion, with predictive costs. In effect, ELM will enable you to leverage Microsoft technologies such as SharePoint Server 2007 (which many firms already own and use for other business processes) to help manage the litigation process.

PREDICTIVE PRICING AND COST CONTROL

What attributes of ELM drive effective “Try vs. Settle” decisions with lower costs and risks, and how do corporations and law firms leverage technology to accomplish ELM?

First, ELM improves early case assessment. A company wants to be able to get a quick snapshot of ESI that may be relevant in litigation. It wants to know whether there is a “smoking gun” that would cause

the company to settle before turning the harmful e-mail over to its litigation adversary in discovery because, after it is produced, it will significantly drive up the settlement value of the case.

Alternatively, a company wants to know if it has a solid foundation that will allow it to vigorously prosecute or defend a case. In addition, organizations need to assess the potential costs of e-discovery early on, and determine whether those costs exceed the cases’ value. By employing an ELM model and related technologies, organizations are better equipped to determine what ESI they have, where the information is located, and the potential costs to produce it – all of which are necessary for early case assessment and effective “Try vs. Settle” decisions.

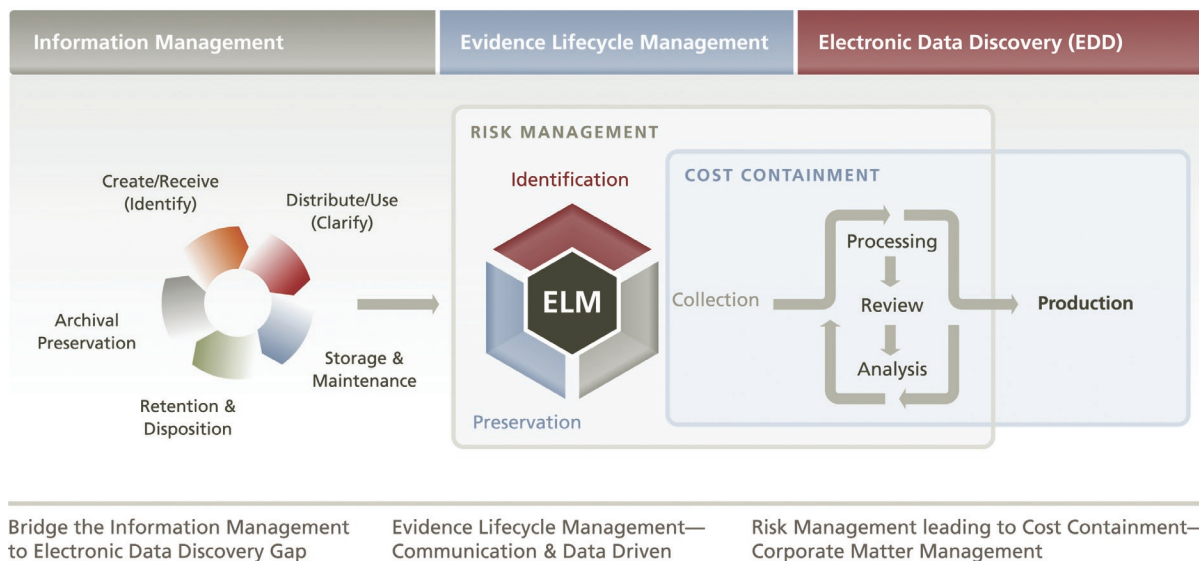
THE MEET & CONFER PROCESS

Further, ELM assists in streamlining the mandatory “Meet & Confer” process. Through the advent of the FRCP ESI Amendments, litigants have been forced to focus on the Meet & Confer process to involve substantive discussions on accessible ESI sources and applicable data custodians. In preparation, outside counsel need to be part of the “team” (corporate legal, IT, information security, records management and ELM Experts) that can quickly create and leverage a foundational knowledge base to accurately begin to analyze whether each matter is a “Try” or a “Settle” and can come to the Meet & Confer conference prepared with accurate and insightful answers facilitated by ELM.

Additionally, in preparation for the Meet & Confer conference, litigants must identify

Figure 1

Evidence Lifecycle Management



the responsive ESI, the repositories where it is located and related costs to locate and retrieve it. Given that these conferences are conducted early in the cases, companies can no longer wait to be involved in litigation before answering these questions. Instead, they must get their e-discovery houses in order in advance of litigation. In essence, the ELM model and the employment of ELM technologies are essential parts of an effective e-discovery response plan, built on a solid records management foundation.

ENHANCED ABILITIES

Doing this is imperative for the smallest of cases – such as an alleged wrongful employment termination case worth \$10,000 – to a bet-the-company case worth millions of dollars. Facilitated by standardized Microsoft technology and ELM technology and process, both corporate legal departments and law firms can:

- Connect and real-time sync on each ELM phase, step and task for each matter jointly “behind the firewall”/ “in the cloud” for the corporation and the law firm;
- Allow for quick, possibly one day, pre-configuration deployments to meet the demanding needs of litigation and investigations;
- Provide “consumable” predictive data custodian-based pricing, with fixed-price licensing per preserved and analyzed data custodian/applicable ESI sources per legal matter;
- Provide an iterative process for preservation management, early case assessment, Meet & Confer readiness and ESI delivery;
- Connect to existing storage/archiving platforms, matter management/e-invoicing platforms and discovery review/production platforms (ELM-enabled).

It is critical for corporate and outside counsel to know that such ELM technology has been “battle tested” in litigation, vetted by the courts and supported by an “ELM ecosystem” of companies with ELM certified professionals, including Aquipt, CDW, Commonwealth Legal, CT TyMetrix, ELM Solutions, IKON/Ricoh, Océ, Prism Litigation, Teris and Texas Star. Such MatterSpace® ELM certified professionals work closely with law firms and corporate attorneys, IT, information security, and records managers on each legal matter.

PUTTING ELM PROCESS TECHNOLOGY TO WORK

Of the aforementioned benefits associated with the ELM discipline, quick deployment, consumable and predictive custodian-based pricing (versus data volume based) and the iterative process approach across the industry standard Electronic Discovery Reference Model (EDRM) are most crucial. Why? Traditional providers within the EDRM framework typically only offer point solutions, based on software license pricing for specific EDRM steps, such as preservation, collection or on gigabyte pricing for processing, review, analysis and production. This results in a disjointed, non-integrated and costly approach to making early and often “Try vs. Settle” decisions with traditional e-discovery.

The ELM illustration sequence in Figure 2 provides a process technology that works iteratively across each respective EDRM item to provide for quick deployment and consumable predictive data custodian-based pricing to make early and frequent “Try vs. Settle” decisions.

KEY PHASES IN MATTERSPACE® ELM PROCESS

Attorneys, IT and certified ELM professionals with distinct, matter-specific roles work with data custodian communications and/or data in “Phase One Notifications” with a dashboard concurrently “behind the firewall” for the corporation and “in the cloud” for each respective law firm/ELM provider (phases, steps, and tasks activities are tracked with automated business rules driving progress views.) Concurrently, “Phase Two Early Case Analysis” involves forensically preserving and collecting case data for searching, analysis, data culling and tagging. As data analysis is ongoing, increasing or reducing the scope of preservation hold on IT systems and custodians in Phase One may result. All tasks are documented with available audit reports.

The “Phase Three Meet & Confer” timeline is commenced to complete Phase One and Phase Two, providing for an auditable, litigation-tested, defensible case strategy and ongoing “Try vs. Settle” decisions. The Meet & Confer conference then provides a forum to expose the opposition’s case weaknesses in not having followed its own ELM process. If necessary, all work product developed can be further utilized for ESI delivery/production at later stages of the litigation.

A SOLID FRAMEWORK

While ELM may not provide a “silver bullet” for addressing all of the e-discovery challenges encountered by corporations and their law firms, ELM provides a solid and validated framework for bridging the gap between information management and EDD, while reducing the risk and cost of ESI processing and legal review. Add to that the proactive ELM approach by technology leaders such as Microsoft – and the fact that ELM technologies can help “price” “Try vs. Settle” decisions – it is clear that corporate legal departments and law firms now have viable and cost-effective options when it comes to the EDD process. ✨

about the authors



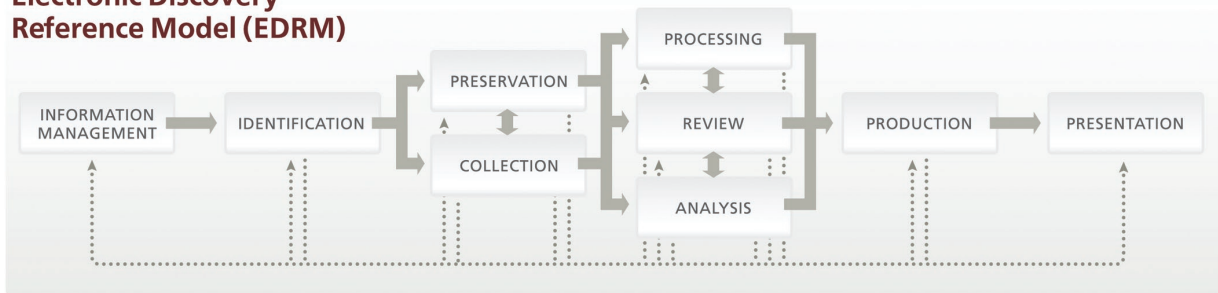
Bruce A. Radke, Chair of the Records Management and eDiscovery Practice Group at Vedder Price P.C., regularly counsels private and public sector clients on all aspects of records management, e-discovery and data privacy.



Steve Lilley, Founder and CEO of WorkProducts Inc., has more than 20 years of e-discovery and legal compliance domain technology and process re-engineering expertise. Learn more about MatterSpace® and evidence lifecycle management at www.workproducts.com.

Figure 2

Electronic Discovery Reference Model (EDRM)



MatterSpace® ELM Process Technology



MatterSpace® ELM Iterative Process

Case Management	●	Preserve/Collect Case Data	●	
Document Retention Policy	●	Search and Cull Data	●	Determine case strategy
Issue Litigation Hold Notices	●	Review and Analyze Data	●	Finalize - Custodians, Search Terms, Dates
Interview Custodians	●	Custodian Scope Review - Add/Remove Custodians Litigation Hold Notices	●	Determine Final Timeline & Costs
Determine Scope & Cost to Identify & Preserve	●	Data Risk Analysis	●	Document Discovery Plan - Form 35
Determine Scope & Cost to Collect	●	Determine Scope & Cost to Process and/or Review	●	ESI Export
Document Procedures Phase 1 Audit	●	Document Procedures Phase 2 Audit	●	Document Procedures Phase 3 Audit



● NOT STARTED ● IN PROCESS ● COMPLETED