

# MOVING BEYOND THE MATTER AT HAND

*Building a Modern eDiscovery Program*

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**E**Discovery has changed dramatically in recent years. As the way we conduct business has evolved, as data has grown in scope and makeup, and as technology moves forward faster than ever, the approach an organization takes to managing eDiscovery must adapt as well. The reactive and near sighted approach of tackling eDiscovery for a litigation or investigation as an independent matter that ends and is quickly forgotten is no longer viable. It does a disservice to the organization because the data, workflows, and knowledge gained from the matter are useful to the organization and its future eDiscovery dealings. If an organization has repeat eDiscovery work and a medium to large litigation/investigations portfolio, the days of simply offloading a matter to outside counsel without any eDiscovery controls or guidelines should be over. While outside counsel is a vital stakeholder, such an

approach typically leads to cost and process inefficiencies as well as loss of useful knowledge that can be applied to future matters. Now, more than ever, it is imperative that internal legal departments take a holistic approach to eDiscovery and build programs that efficiently manage data as well as standardize processes and procedures to set their organizations up for sustained success. Below we outline the high-level steps to building a modern eDiscovery program

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### **Step 1: Build an Internal Team**

The first step to building a modern eDiscovery program is to create a dedicated internal team of legal professionals – stakeholders invested in the success of the program. This team could be made up of stakeholders from the legal department, the legal operations team, procurement, or ideally some combination of all three departments. Once the dedicated team is identified, the focus of the team

should be on 1) identifying the right strategic partners based on organizational needs and 2) creating goals for the program (what does success look like?) with an emphasis on standardization, appropriate resource allocation, and cost efficiency.

### **Step 2: Identify and Select Review and Technology Partners**

The second critical step is to undertake a thorough vetting and selection process to identify managed review and

eDiscovery technology partners to support and be invested stakeholders in the eDiscovery program. We place a strong emphasis on the word “partners” here as these partners should be focused on continually improving processes to make the overall program successful. Vetting should focus on selecting dedicated partners that can be steady actors over time, thereby adding continuity, efficiency, and the ability to gain insight and further refine the eDiscovery program continuously. As such, partners that can provide stable core teams dedicated to the organization are key.

Also consider the size, complexity, and frequency of matters the organization expects when deciding whether the proposed providers would make a successful partner. Finally, choosing separate partners for the review and technology functions can ensure that each is purely focused on their particular roles and responsibilities. This bifurcated approach to review and technology also ensures that there are checks and balances in place, with each partner bringing their particular strengths to the table and reporting them to the internal eDiscovery team.

### **Step 3: Establish eDiscovery Guidelines**

The third step is to develop guidelines for each dedicated stakeholder in the program. Consider these guidelines as playbooks that lay out, step-by-step, the responsibilities of and standards for not only the review provider and technology provider, but crucially, outside counsel and the internal team. This should cover not only the lifecycle of a matter, but also overall data and relationship management that continues across matters and informs improvement of the program over time. This is an iterative process that should be adjusted as and when opportunities for improvement come to light. Any changes to the guidelines should be approved by all stakeholders before implementation to ensure that everyone in the program is rowing in the same direction.

### **Step 4: Develop Standardized Workflows, Protocols and Templates**

Based on these guidelines, the next step is to create standardized workflows, protocols, and templates for use across all matters. It is hard to over-estimate the benefits that are gained when this step is fully executed. This ensures continuity of approach across the program, even where outside counsel changes from matter to matter. It

also reduces the risk inherent with an ad hoc approach to many of these tasks. Here are just a few examples:

- Outside Counsel, Review Partner, and Technology Partner Guidelines including Conflicts Check Templates; Project Initiation Templates; Reporting Templates
- Review Partner Specific Guidelines: Document Review Protocol Template (with standardized privilege instructions); Review Workflows including quality control and privilege logging protocols
- Technology Partner Specific Guidelines: Collection Workflows; Document Production Standards

While adjustments must be made to account for the particularities of an organization or the matter at hand, these standardized tools will increase efficiency and reduce risk.

### **Step 5: Evaluate/Implement Technology**

Another step to building a modern eDiscovery program is to evaluate and implement technologies that increase efficiency in various areas, but particularly in review. Not all technological advances are necessarily beneficial to an organization. The team should undertake a thorough evaluation of the benefits and costs of technology solutions to determine what is best for the organization. This is where your dedicated technology and review partners can spearhead the initiative to leverage technology and make recommendations to the organization based on the organization's data and needs. Below are a couple of examples of technology solutions that have made drastic improvements recently:

- **Technology Assisted Review (TAR)** – Allows streamlining of document review including prioritization and/or exclusion through the use of AI. TAR is not necessarily ideal for all matters and should be assessed on a case by case basis based on the scope, goals, and risk profile of a particular matter.
- **Machine Translation** – Uses technology to translate documents from one language to another and has seen marked improvement in recent years. The technology does not yet work very well with certain language types but strides continue to be made.

The cost of implementation of technology, of course, is always a factor. And that factor needs to be weighed against the benefits of implementation on a case by case basis. Once again, your dedicated partners can help lay out the pros and cons of implementation based on a particular fact pattern.

## Step 6: Establish Reporting/Auditing

Reporting and auditing are key to ensuring all parties are aware of the progress of the program and the pain points that may still exist to target improvement. When building out what reporting and auditing should look like from each stakeholder, look to both determining usable content and achievable frequency. A robust reporting and auditing regime enables the team to periodically take a holistic look at the program and next steps forward for improvement. But you also do not want reporting to be so frequent that it is paralyzing to the overall program.

By building a modern eDiscovery program, an organization can position itself to mitigate risk, reduce unnecessary costs, and create efficient, consistent results. By implementing the same approach and processes across all matters, an organization can ensure a repeatable

process is applied to eDiscovery across its litigation and investigations portfolio. As the program is established and improved, an organization will be in position to strategically select their outside counsel based purely on the legal expertise and abilities they bring to a particular matter knowing that the eDiscovery framework is already established and set up for success. It also allows outside counsel to focus on their strength, substantive legal expertise, and for the program to address many of the administrative, technical, management, and workflow aspects of eDiscovery. By establishing a modern eDiscovery program, an organization can ensure that the stakeholder with the right skillset at the appropriate cost is focused on the tasks designated to them at all times. **ILTA**



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