

Early case assessment  
Finding value beyond  
your next lawsuit





# Introduction

In-house legal departments — already under cost pressure before the “Great Recession” of the 21st century — are showing growing interest in finding new ways to manage discovery and to reduce their eDiscovery spend. The management concept loosely classified as “Early Case Assessment” (“ECA”), which includes newly developed tools, may overcome many significant and longstanding limitations in managing the electronic discovery process. ECA technology is poised to radically change how companies approach electronic discovery, and many corporations (particularly those with large litigation portfolios) are already on track to significantly reduce their eDiscovery costs using these tools.

Yet those who view ECA technology only as a point solution for eDiscovery may be taking too narrow a view of its potential application. The distinguishing capability of the tools in this space — rapid search and intelligent classification of vast stores of unstructured information — can help companies manage their data and reduce costs outside the realm of eDiscovery. With the right tools, and with effective processes, corporations can integrate ECA capabilities today into a comprehensive strategy focused on discovery, data privacy, data loss, general records and information management, and cost.

Most significantly, the future development of ECA presages a true paradigm shift in the way corporations will be able to manage information. As technology-enabling content awareness inevitably evolves, companies will be capable of translating vast stores of unmanaged information into that most valuable, but elusive, corporate asset: knowledge. At that point, the greater challenge will be to develop methods to capitalize on this capability, and develop effective ways to use the knowledge to mitigate risk, monitor compliance, and reduce costs.

## Highlights and key takeaways

- ECA is a managed process that allows an organization to gain greater insight into case-related information.
- ECA signifies a change in how companies can manage risk, compliance, and information across the enterprise.
- The traditional eDiscovery approach can cause over collection of data — affecting subsequent stages of the process.
- ECA technology has matured and when coupled with effective processes can provide unprecedented capabilities.
- ECA as a core competency can help to mitigate legal risk.
- Return on investment for an ECA solution is now more measurable than ever before.
- ECA benefits extend beyond eDiscovery, into the areas of records management and data loss prevention.

# Challenges of “traditional” eDiscovery

The greatest challenges to analyzing and managing data in eDiscovery stem from three core limitations: (1) the inability of companies to reliably identify data likely to be relevant to a matter; (2) the challenge of preserving company information without having to collect it (i.e., copy it); and (3) the inability to interrogate data for useful knowledge without first collecting, processing and reviewing it. Taken together, these limitations can make it more difficult and costly to analyze the issues presented in a matter, which can further delay the point when a company has sufficient knowledge on how to proceed.

## Identification and scope limitation

As ably described by the Electronic Discovery Reference Model (<http://edrm.net>), the traditional eDiscovery process is comprised of steps designed to decrease overall data volume while building relevance and knowledge. The primary weakness of the traditional model is the challenge of effectively limiting the scope of data identified at the outset of the process. Even when a company has an effective records taxonomy, data maps or knowledgeable individuals to help identify potentially responsive data — capabilities which many corporations lack — these sources generally provide only the highest-level insight into relevant content. As a result, corporations justifiably fall back on a conservative approach. They cast a wide net over their data stores and collect more than needed in order to reduce the risks of failing to preserve responsive data or uncover important facts.

The inability to reliably limit the scope of electronically stored information (“ESI”) at the outset of discovery has a cascading impact on each subsequent stage of the process. Particularly in larger cases, corporations are forced to commit resources to collecting, processing, reviewing and analyzing volumes of information known to be irrelevant to the matter at hand. Project costs increase, and data management is made more difficult and, perhaps most important, it can take more time and cost more money for a company to gain sufficient knowledge to decide with confidence on an appropriate course of action.

## Preservation and collection

Historically, the most practical means to ensure the preservation of ESI in discovery has been to collect it. Nonetheless, preserving data by collection presents both operational and strategic disadvantages.

From an operational perspective, once data is identified, collection presents several important challenges. The collection process itself often requires several Legal and IT resources to coordinate, conduct and document their efforts, often interfering with schedules and existing operations. Where collection efforts depend on vendors, costs may also increase and a company’s data will no longer be in its direct control. If wrongdoing is suspected, special efforts often need to be taken to collect data without triggering awareness. Furthermore, though many companies by this point have taken steps to manage the collection of email, many specialized datasets (such as collaboration sites) continue to present challenges to preserve and collect efficiently. Finally, perhaps the most significant disadvantage of preserving data by collection is that it creates a new copy of data that is no longer linked to its source, and therefore may be removed from the company’s normal cycle of retention and disposition.

From a strategic perspective, preservation by collection cannot easily accommodate the iterative scope refinement often required during the life of a matter. At the outset of a matter, the events triggering preservation obligations typically occur weeks or months before scope negotiations can take place, and preservation activities themselves often inform later negotiations. As new facts are learned and theories are tested during discovery, scope is modified further. Yet when preservation efforts depend on a process of collection, changes to scope can require further collection and its attendant disadvantages, or further processing of existing data with new filters, both of which can be costly and take time to complete.

## Document review

Having identified, collected and processed large volumes of information, there remains a need to have individuals review most every document identified — including many known to be irrelevant to the matter at hand — to gain sufficient knowledge of the facts. Advances in review tools (such as concept clustering) have made it easier to identify the most relevant documents. However, these efficiencies can be diminished by the inability to narrow the scope early on and accurately reduce the larger volume of potentially responsive documents, as well as by the time lag caused by the need to collect and process data before it can be reviewed. For these reasons, document review remains by far the most expensive and difficult phase of discovery.

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# ECA is an eDiscovery “game changer”

ECA capabilities have now accelerated to the point where they are fulfilling the promise made when the technology first emerged, and utterly “change the game” of how electronic discovery can be conducted when combined with effective processes.

For some time, software and hardware marketed as ECA solutions provided only an incremental advantage over traditional eDiscovery tools. Because they enabled interrogation and analytics only after data was collected and processed, the assessment capability afforded by these tools was therefore not “early” and was only marginally more effective and less expensive than the traditional eDiscovery route. To varying degrees, the current crop of ECA tools appear to have overcome the most serious handicaps of traditional eDiscovery — those aspects of the process that have hindered a company’s ability to gain rapid, deep and relatively inexpensive insight into a matter.

The salient distinguishing capability of existing ECA technology is that it permits counsel to target and identify unmanaged, unstructured data most likely to be relevant to a matter. Typically installed behind the corporate firewall (i.e., integrated within the corporate infrastructure), some ECA hardware and software solutions unobtrusively pre-index unmanaged content of all integrated data sources they point to, permitting counsel to query all those sources together and review (and act on) the results. Some will also seamlessly reach out to unmanaged content kept on company laptops and desktops.

These tools have advanced search engines that are geared to eDiscovery, going beyond keyword and Boolean searching to include metadata fields, proximity searching, and, most significantly, algorithms permitting conceptual analysis of content. Though discovery review platforms have offered conceptual searching capabilities for some time, they were limited to analyzing data that had already been collected and processed. ECA technology can now allow counsel to apply intelligent classification and concept searching to data in situ, without spending the time or money to collect and process it.

*What this means is that for the first time, counsel can have a direct, interactive and intelligent interface to huge amounts of unmanaged company data.* Because company data is pre-indexed, query results are provided instantaneously. By receiving instant feedback, counsel can iteratively refine criteria and test new concepts. Progressive filtering allows counsel to identify and eliminate false positives (which can reduce costs by shrinking the volume of found documents), detect the absence of documents known to be responsive (targeting a relevant dataset with greater precision), and minimize duplication of results.

Once a satisfactory set of documents has been identified, ECA solutions let companies act on the results — for analysis, review, tracking or export — and are beginning

to provide the innovative ability to preserve unstructured documents in place, without needing to copy them.

Breaking the tie between preservation and collection has significant implications beyond the operational efficiencies gained by not having to copy responsive data. First, relying on automatic controls to prevent the deletion or alteration of data means that companies would have less need to depend on custodian cooperation to preserve data under hold. Further, preservation obligations no longer require making single-purpose copies of large datasets that often get removed from the normal cycle of record retention and disposition, which may potentially be kept years after the underlying records have expired.

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As an added benefit, data (much of which may be irrelevant to the matter at hand, and is likely to include proprietary, private or confidential information) remains more firmly in the company’s direct control. Having preserved data in place, it also becomes much less burdensome to “go back to the well” during the life of a matter to find data to support or defend new legal theories or investigate facts. Because ECA solutions keep track of what information has been identified and preserved for a given matter, counsel can more quickly identify ESI that has not already been reviewed. Finally, many ECA tools have also begun to integrate more complete legal hold capabilities, including notifications, reminders, and hold management.

Overall, ECA advances represent a generational shift in how companies may conduct matters requiring large amounts of eDiscovery. Their impact will be most clearly seen downstream during the document review process. The primary purpose of document review is not to learn every fact or review all documents; rather it is to gain *sufficient* knowledge of a matter’s operative facts to confidently decide how to proceed. The faster a company gains that level of understanding, the less money and time it will need to spend on review. Having more accurately targeted the scope of matter-specific documents, there will be less data requiring expensive, manual review; and with better analytic and predictive coding capabilities being integrated into ECA tools, the point at which a company can reach that point of sufficient knowledge is further accelerated.

# ECA risks, opportunities, and considerations

## Core competency and resources

As more corporations integrate in-house ECA capabilities, a shift can be expected in the internal and external resources and expertise they will need to rely upon in discovery. Particularly for large matters, companies typically turn to outside service providers to manage data collection and processing. But with a diminishing need to process data to analyze it, companies who embrace these solutions will be less dependent on vendors to collect data and normalize it for review. The costs of data processing services can also be expected to fall with decreasing demand.

At the same time, ECA development foretells an increasing demand for more specialized resources who can harness the power of these tools to identify, filter and manage vast stores of company information based on its content. Like any other enterprise technology effort, ECA management requires human expertise to design and integrate appropriate processes. From an internal perspective, companies would best support these efforts by cultivating a cross-functional core competency around data stewardship, which, applied to ECA, would be key to reliably and defensibly identifying relevant information. The new core competency would be charged with a broad understanding of the nature and content of ESI across the enterprise. Such resources would go beyond traditional records management, integrating aspects such as data classification, ownership, confidentiality and privacy, and would develop cohesive programmatic strategies to manage information across the enterprise.

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## ECA management requires human expertise to design and integrate appropriate processes.

## Potential Risks

With the availability of a direct interface to so much enterprise data, many companies will also face the question of which of the new capabilities should be brought in-house (even if they can be conducted in-house). Though every company has its own risk tolerance, it is likely that many will continue to draw the line between decision-making and execution while adapting their

eDiscovery processes to suit the new capabilities.

Ultimately, companies will need to consider the extent to which they want to take on additional responsibilities and resource requirements necessary to implement ECA in house.

One model in the management of these solutions is to use internal resources to identify and preserve potentially responsive data, but rely on outside vendors positioned behind the corporate firewall — either physically or virtually — to filter for relevance, sensitivity, and privacy issues at the direction of counsel. Such a model shifts to the vendors the responsibility for conducting actual filtering operations, data management and documentation, but also permits a company to retain direct control of its information until a targeted, matter-specific dataset is delivered offsite for any further eDiscovery services. At the same time, a company following this model also needs to decide the extent to which it is comfortable providing outside vendors with direct access to their live systems to manage the ECA process. From a practical perspective, bringing these capabilities in house also permits legal hold tracking to be integrated with the data itself, and allows companies to keep track of what data has been identified for earlier matters (either in a physical or virtual discovery repository). This model also presents an opportunity to rely on experienced non-company resources to provide testimony about the process under Fed. R. Civ. P. 30(b)(6) if needed.

Other risks to consider will be familiar to anyone who has helped identify and select technologies for the enterprise. First, the capabilities of early case assessment tools are still advancing, and like any other space, the question arises when is the right time to step in. Second, some tools in the space are complex enough to require expert IT support from dedicated resources, and may be more than needed by companies without significant litigation portfolios. Finally, with a very wide range in costs and capabilities of ECA tools, it is important to work with stakeholders in all relevant areas to understand functional and business requirements and get buy-in: legal, IT, records management, compliance, privacy and risk.

### Return on investment

A company's anticipated return on investment from ECA technology will depend in large measure on its current litigation spend, the cost models and capabilities of the solutions under consideration, and anticipated future discovery needs. Certain other considerations should be included in any calculation. First, a company considering investing in this technology should understand that much of the savings afforded by ECA tools will be downstream, reducing the costs of document review; rather than upstream, in collection and processing costs. It therefore makes sense for a company to examine its relative spend on collection, processing and review.

Second, metrics of past discovery projects can be helpful indicators of how effective ECA tools are likely to be to reduce costs. For example, comparing the quantity of data collected and processed for a matter against the quantity ultimately found to be responsive after review (i.e., the rate of responsiveness, or "cull rate") can indicate whether ECA tools could sufficiently augment existing data identification processes to warrant the investment. Analysis may also indicate greater value or faster return by applying these tools only to particular geographies, data sources or businesses that present the highest risk or greatest frequency or complexity in the company's legal matters.

Finally, and most importantly from a strategic perspective, a strong argument can be made that much of the value of ECA technology lies beyond what can be measured on a straight-line return on investment calculation. From the narrow perspective of electronic discovery, the ultimate value of ECA is the promise of being able to make strategic legal decisions more quickly, a significant benefit and advantage over traditional eDiscovery. But taking a broader perspective, these evolving technologies can serve as important building blocks in a long-term programmatic strategy that can help companies re-imagine their entire model of enterprise information management. As described in the balance of this article, they have potential application beyond electronic discovery that can be realized in the short term, and anticipate even farther-reaching applications in the future.

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# ECA technology beyond eDiscovery

The capabilities offered by ECA technology are leading companies to explore innovative ways to tackle a number of enterprise information issues outside the realm of eDiscovery, and thereby potentially increasing their return on investment in the technology.

## Records management

ECA solutions and practices are currently being brought to bear in the area of records management for at least two purposes. The first and most obvious use is to augment shares of unmanaged documents with enterprise search capabilities. Many businesses could benefit by adding search and classification capabilities for selected point applications like knowledge or intellectual property management.

The second, more strategic use is to leverage the power of ECA as part of a program to rationally dispose of unmanaged stores of legacy data. Remediating obsolete files can mitigate risk and increase operational efficiency by reducing the amount of unstructured data available for discovery, and its cost; getting better control over the privacy, confidentiality and risks of obsolete data; and reducing time and expense for storage, backup and search. Yet, while many companies maintain extensive stores of inactive and legacy data, these have historically been difficult to dispose in a rational and defensible manner because companies lacked insight into their content.

Directing content indexing tools at unmanaged data stores does not substitute for a comprehensive records management strategy. However, because the process of identifying data for remediation is analogous to identifying it for discovery, emerging ECA technology presents an opportunity to design defensible methods to remediate inactive data. Using similar techniques to those employed for eDiscovery, relevant stakeholders (e.g., counsel, records management, IT, compliance, risk and business owners) develop search criteria and parameters to find documents that meet relevant preservation criteria. ECA tools can then quickly identify and accurately classify ESI most likely to be responsive to preservation or retention obligations, leaving the balance as likely candidates to consider for disposition. With iterative validation procedures, statistical sampling and analysis, and documentation, rational methods can be designed to identify and dispose of expired data in a defensible manner.

## Data loss prevention and privacy

With the complex proliferation of laws and regulations governing privacy and data protection, companies are increasingly sensitive to how enterprise information is being collected, managed and transmitted. The same capabilities that enable documents to be identified by relevance (for discovery) or obsolescence (for records management) also afford companies the opportunity to detect and classify any number of criteria for special treatment: information that is proprietary, privileged, private, personally-identifiable or otherwise designated for protection. Such capabilities can integrate data loss prevention (“DLP”) steps into the eDiscovery process itself, or may be employed as part of broader detection efforts across the enterprise.

ECA tools let corporations integrate another step into the eDiscovery process where data is analyzed for DLP criteria before it is delivered outside the “four walls” of the company for processing, hosting or production. ESI can be segregated and redirected through any number of different workflows for special handling depending on its content. For example, documents flagged as containing health information can be imaged and reviewed for redaction; data containing nonresponsive trade secret information may be analyzed by those with specialized domain knowledge; and documents containing sensitive employee information can be retained within a geography prohibiting their export. Because it relies on the same ECA technology that manages the entire set of responsive documents, DLP detection can be directly integrated into a single discovery workflow.

DLP applications can extend beyond eDiscovery. Companies may find value in directing ECA’s powerful analytics and conceptual content algorithms to augment the capabilities of existing DLP tools, which typically rely on search patterns, keywords or static dictionaries. Further, where a corporation employs only network DLP tools that detect and prevent unauthorized transmission of protected information at the endpoints of the company’s network, ECA tools can be deployed as a point solution to analyze “at rest” data storage contents for sensitive, confidential or secret information for further treatment.

# Looking to the future: From early assessment to early awareness

Existing ECA tools are designed to extract useful knowledge from documents and files in reaction to an external event that triggers awareness of some point of risk, such as a subpoena, lawsuit, or investigation. The inexorable evolution of technology points to the development of tools that will grow increasingly effective at drawing useful knowledge from electronic content, promising to equip companies with even better ways to assess known legal matters and formulate a response.

Yet the most transformative potential of this evolving technology lies in the possibility of using it proactively to uncover nascent activities that put a company at risk soon after they occur, presenting an opportunity to stem them before they bloom into matters with more serious legal consequences. As they improve, the same algorithms that now enable identification, intelligent classification and conceptual analysis of unstructured data that matches discovery criteria for a known legal matter could eventually help companies proactively target enterprise data sources to detect activities identified as likely to pose undue risk. Although such capabilities have been in place for some time to detect anomalies in populations of structured data (e.g., flagging journal entries that meet a given risk profile such as fraudulent transfers), the promise of the technology underlying ECA is that it will enable intelligent search, analysis and risk detection of data in and across unstructured data sources. Given the increasing accuracy with which these algorithms can interpret the content of unstructured information against discovery profiles, this is a logical extension of existing technological capabilities.

The key to making these capabilities effective will be the technology that lets companies employ and refine profiles that effectively characterize and detect known risks. Many existing ECA solutions already allow users to iteratively refine profiles by seeding their engines with documents that match certain concepts, progressively achieving better accuracy and reducing false positives. As technology improves, these tools will become better able to interpret useful patterns and make more complex connections from the content, metadata and transmissions of wider populations of unstructured data. But rather than running profiles in reaction to a known matter, the next generation of ECA tools would deploy automated software agents that actively monitor company data stores and communications, comparing them against defined risk profiles and flagging notable items for further review.

The move from early assessment to early awareness, and the resulting ability to identify predicate activities closer in time to when they first occur, could have far-reaching

implications for how companies manage their legal, compliance and risk functions across the enterprise, for example: monitoring for compliance with fraud, anti-money laundering or foreign corrupt practice statutes; protecting intellectual property; protecting data privacy and complying with data protection statutes; monitoring marketing and antitrust activities; preventing harassment and discrimination; and complying with any number of domain-specific legal requirements.

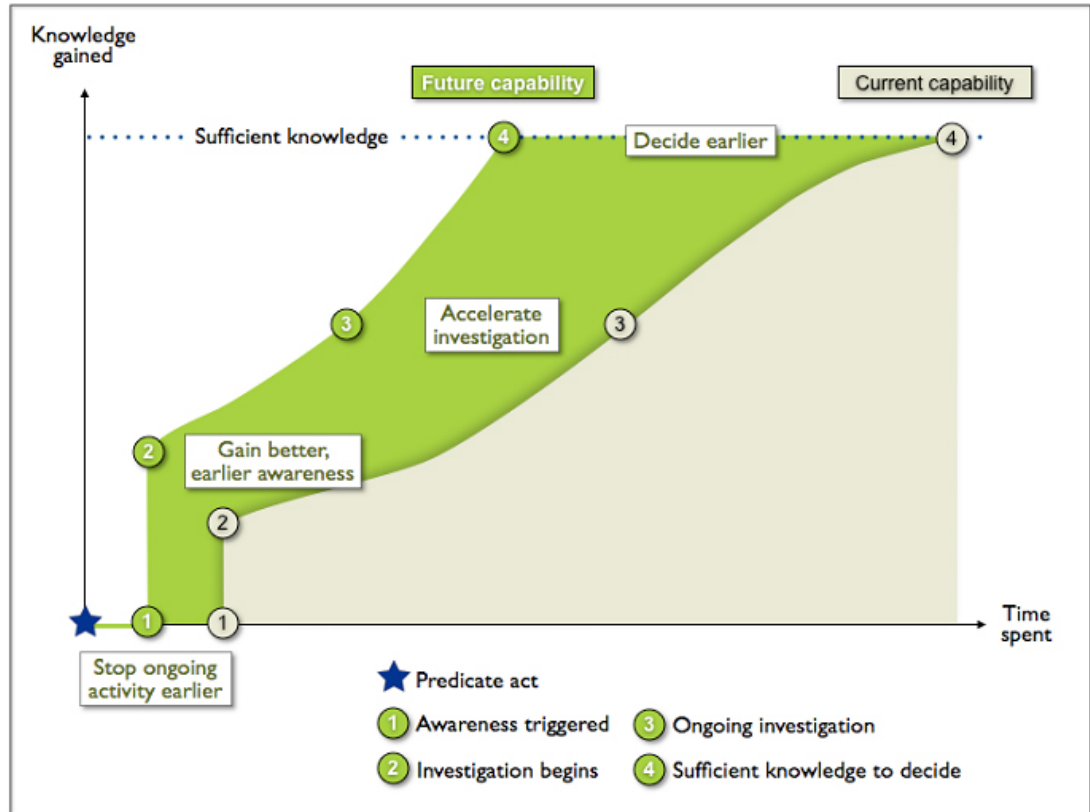
As depicted in Figure 1, a shift from early assessment to early awareness could broadly impact an enterprise's ability to reduce exposure and costs and accelerate the point when the company has sufficient knowledge how to proceed. The most consequential result of learning earlier about such activities is the opportunity for the company to cut off behavior that could have continued unnoticed (1). Depending on the nature of the behavior and the length of time it might have continued, the benefits could be substantial. Where such behavior could result in legal exposure, early awareness could mitigate or eliminate such threats entirely.

To the extent that deeper investigation is required, or a lawsuit and discovery cannot be avoided despite exposure, the same technology that exposed the potential risk points would make it easier to pursue. At the point when the predicate activities are initially discovered (2), companies would have immediate access to the artifacts (such as documents and communications) reflecting the activity at issue, providing a deeper knowledge of a matter right at the outset than without such tools.

As a matter or investigation proceeds (3), ECA technology could accelerate the process over traditional methods, offering the benefits already discussed. Furthermore, lawsuits and investigations typically have a long lag time, and implicate facts, events and documentary evidence from years earlier; thus, just as important from the perspective of discovery, cutting off suspect activity earlier in time means that fewer documents and communications (both relevant and irrelevant) will have been created in the first place, reducing the volume of documents, and concomitant cost, required to identify and review them if a matter ensues. Finally, by exposing activities closer in time to when they occurred, individuals with knowledge of the operative facts are more likely to be available, and to have better recall of facts, to support legal or investigatory efforts.

Taken together, such technological advancements could be expected to enable companies to reach the point of sufficient knowledge sooner and less expensively (4).

Figure 1:



As content-aware technology improves, companies will become aware of predicate events closer in time to when they first occurred

**Conclusion**

ECA is becoming a practical way for companies to reduce eDiscovery volume, lower cost and manage risk in reacting to legal matters once they are discovered. With the advancement of technology that more accurately translates volumes of unmanaged data into usable knowledge, companies will be able to take more proactive steps, harnessing these abilities to detect and mitigate latent risks. Taken together, these innovative capabilities seek to transform how companies manage risk, compliance and information across the enterprise.

For more information, please visit [www.deloitte.com/us/eca](http://www.deloitte.com/us/eca)

**Contact**

**Benton Armstrong**  
Principal  
Deloitte Financial Advisory Services LLP  
+1 415 783 4089  
[barmstrong@deloitte.com](mailto:barmstrong@deloitte.com)

**Rich Simon**  
Senior Manager  
Deloitte Financial Advisory Services LLP  
+1 212 436 3438  
[risimon@deloitte.com](mailto:risimon@deloitte.com)

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