



Prioritize Tasks and Maximize Value

Find the Right Approach to Early Case Assessment

By Michael S. Kraft

Early Case Assessment (ECA) has become a frequent topic of discussion among corporate litigants and their outside counsel, even as it has become apparent that the term is applied to a variety of strategies and technologies. As a result of this linguistic ambiguity, it is possible for a litigant, outside counsel, and a litigation support vendor to have a three-way conversation about ECA that results in strategic decisions—even though the issues are never jointly understood. The fallout from inevitable problems in the ensuing project often leaves clients and counsel ambivalent about the value of ECA, and may even result in ethical considerations related to how, why, and by whom subsequent litigation strategy decisions are made.

As its name suggests, ECA occurs as early as possible in the lifecycle of a dispute. A more refined definition is harder to pinpoint. Vendors consider ECA an act—loading case data into their processing systems. Consultants define ECA as organizing a firm's processes. And clients define ECA as thinking about cases carefully and frugally.

Different vested interests notwithstanding, ECA is the process of evaluating case-related information to make decisions about case strategy. Based on this assessment, litigants make decisions about potential legal and financial liability, ways to develop cases efficiently, and the costs of bringing cases to preferable resolutions. Today, ECA is best known for focusing on finding beneficial—or damaging—documents that would materially influence the outcome of a case. But the ECA process as a whole is consistent with the sorts of questions that counsel have always used to analyze legal disputes. Should we fight or settle? Who knows what? How much will it cost to litigate? The major difference today is the degree of accuracy with which we can now answer some of these questions and assess the costs of litigating a case.

Seismic shifts in technology have helped litigants greatly increase their confidence in ECA. The transi-

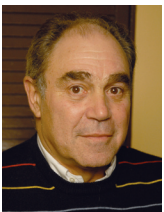
tion from paper to digitally based communication and information storage, combined with ever-improving tools to search these archives, has made vast numbers of documents readily accessible in ways never before possible. Such access, in turn, greatly increases the possibility that lawyers and clients can find key documents early and with much less effort—providing greater and better-quality information on which to base legal analysis. The corollary to these seismic shifts, however, is the explosion in the volume of data that requires processing. What once was thought to be a large number of documents is, by today's standards, a trivial amount of data. While ECA once meant interviewing “key” people, which is still necessary, and reading a few boxes of “key” files obtained from those people, the data volume and data types today are significantly different, and require new techniques. Fortunately, new technology can solve the very problems that the expansion of technology has helped to create.

Present-day ECA—driven by new search, clustering, and relevance-ranking technology—promises substantial increases in efficiency to litigants. However, not all ECA “solutions” provide the same information or display analytical results in ways easily understood by lawyers. New offerings in the legal sphere allow users to train the software to distinguish between relevant and irrelevant documents. This type of technology—as used, for example, in Equivio Relevance, Recommind, H5, and Vestigate—is gaining traction rapidly, and offers the ability to address the core business needs manifest in ECA, and in ways not previously conceivable. In evaluating ECA solutions, a few basic questions can help litigants and their counsel choose between the many products and service providers available.

How Are Key Issues Identified?

Not an end unto itself, the ECA process must generate meaningful information. However, ECA analysis is useless if it does not use accurate, well-articulated criteria as its foundation. Different ECA technologies use a variety of methodologies to develop these criteria. For example, one approach requires reviewing a sample of documents and determining whether each is relevant

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to a dispute; the system extrapolates this subjective analysis to suggest the potential relevance and importance of the other documents in the collection. An opposite solution uses trained linguists to interview subject-matter experts and develop appropriate vocabularies of key concepts and concerns for classification purposes. Both approaches, and other less dramatically opposed approaches, return relevant documents and identify some—or many—documents of little relevance that may not require review. Properly done, such analysis can also highlight true “key players” in a dispute.

Does the Solution Help Build Arguments and Defenses?

The technology chosen should do far more

than simply divide materials in a document collection into large “relevant” and “irrelevant” piles. Instead, ECA solutions should materially improve the analysis from which to derive strategies. The systems should lead to the highest-value materials first, so that even a small amount of case development will reap the largest possible benefits. A system that ranks documents based on their potential relevance and importance to a case will reduce the time and effort needed to find key documents.

Does the Solution Improve Estimation of Litigation Costs?

Some litigation matters can consume up to 70 percent of a total litigation budget just in the discovery phase, due to the number of factual, evidentiary materials that

attorneys must review for relevance and potential legal privilege. By providing fast insight into the quantity and subject matter of documents that are likely to be relevant to a dispute, ECA technology can help a legal team budget appropriate amounts for document review, or even help defensibly decide not to review or produce categories of documents that would have been included in a traditional document review. The right ECA solution can also help a legal team prioritize tasks and maximize the value of work provided to the client, particularly when litigation budgets are limited. 