VENIO SYSTEMS

eDiscovery Accountability

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INTRODUCTION

Litigation is a disaster response effort: "All hands on deck!". And while everyone is putting out fires, they are not always thinking ahead and managing the budget, timeline, or assuring quality. As "fire-fighters", litigators don't think of cases as business processes and Legal Project Management is only now becoming a trend in law departments and law firms.

Corporations, in their role as serial litigants, have taken discovery processes under their wings to save costs and deploy business practices. They are insisting on **Accountability** from outside counsel, eDiscovery vendors and in-house legal teams by gathering and analyzing volume, cost, timeline and outcome data in real time. Sophisticated litigation teams are embracing project management techniques that support accountability and cost savings.

DEFINITIONS

Accountability

Accountability is the duty and ability to communicate the status of an effort between one or more entities. The basic tasks of accountability in eDiscovery are: gathering metrics related to data volumes; analyzing the information into estimates for cost, time, and potential outcomes; and sharing metrics and analysis (Project Intelligence or "Project Intel") between participants.

Client and Provider

The term "client" is used as a catch-all to refer to the person or organization that receives information. The "provider" is the entity that is performing some service and must be accountable to their client. In eDiscovery, there can be several clients and providers, and some providers are also clients. The ultimate client is the litigant (acting as the litigant may be the General Counsel). eDiscovery service providers may report directly to the litigant or may communicate only with outside counsel and refer to the former as "the client".

ACCOUNTABILITY BEST PRACTICES

Effective Accountability has several important characteristics outlined below as Accountability Best Practices. A number of these best practices over lap in that they support and enable one another; forming a comprehensive accountability method. The most important aspect of all of these best practices is that true accountability is based on proactive, two-way communication. Clients are encouraged to select providers who have accountable practices in place and are

likewise encouraged to actively empower their providers with project intel.

These best practices aren't just "window dressing". The courts have reminded litigants that responsibility cannot be transferred to a provider. In Discovery, responding parties and their counsel of record, are ultimately answerable for the success of the project.

> **Peerless Indus., Inc. v. Crimson AV, LLC, No. 1:11-cv-1768, 2013 WL 85378 (N.D. Ill. Jan. 8, 2013)**
>
> "Defendants cannot place the burden of compliance on an outside vendor and have no knowledge, or claim no control, over the process."

1. Managing Expectations

Smart professionals manage expectations. Managing expectations means gathering information, estimating various scenarios, planning a response, and making all of that clear to the client. Managing expectations keeps everyone accountable, the provider and the client. The Discovery Process, itself, mandates gathering eDiscovery volume metrics, analyzing, and reporting during several phases.

Two firms that have launched legal project management initiatives are Seyfarth Shaw LLP, with their client service program: branded SeyfarthLean and Goodwin Procter LLP. According to Goodwin Procter's website:

> "The Goodwin Procter Pricing and Project Management Team provides counsel and support to attorneys on pricing, budgeting, and all aspects of project management. The team also ensures that the firm's attorneys have the necessary tools and support to efficiently and effectively budget and manage matters to provide maximum value to clients."

Identification

Identification and preservation start as soon as "litigation can be reasonably anticipated". Litigant and counsel, must immediately gather and share information as to potential custodians and data sources. An idea as to the accessibility of these sources and their volumes, including the volume of relevant information, should be determined as soon as practicable during Early Case Assessment (ECA) to fuel strategies and project timelines and costs. The litigant is accountable for gathering data about its information landscape and/or empowering outside counsel with information and/or access to organization subject matter experts, such as IT personnel.

In the graphic below, Venio Email Analysis shows who is communicating with whom – a very helpful tool for identifying potential custodians and lines of inquiry during ECA and later phases of Discovery.
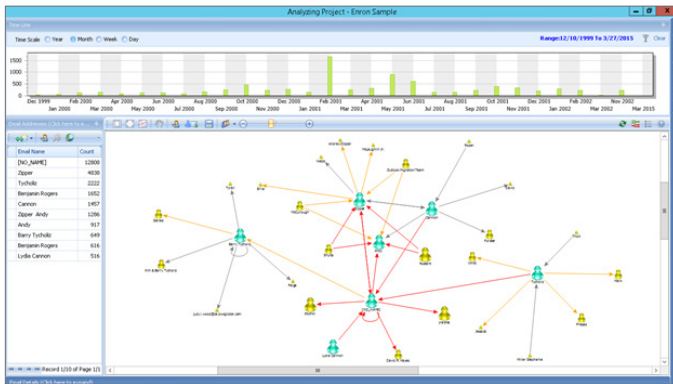
Meet and Confer 26(f)
The meet and confer process is all about managing expectations. It's about understanding data volumes and, more importantly, it's about negotiating with opposing counsel to focus preservation, collection and production. Therefore, the expectations that need to be managed are of the adversary and the court.

Proportionality – F.R.C.P. 26(b)(1)
The changes and amendments to the Federal Rules of Civil Procedure, which go into effect December 2015, require courts to take a more active role in managing discovery and compel parties to make fact-based arguments about costs and proportionality.

> Discovery must be "proportional to the needs of the case" and parties are required to provide a cost-benefit analysis.

One hot-off-the press decision underlines the need for hard numbers supporting cost estimates, as well as, specific evidence that the estimated money and time, is not of value proportionate to the litigation:

> **Cargill Meat Solutions Corp. v. Premium Beef Feeders, LLC, No. 13-cv-1168-EFM-TJJ, 2015 WL 3937410 (D. Kan. June 26, 2015)**

> "The Court finds that Plaintiff has not satisfied its burden to show that producing the requested documents would be unduly burdensome. Although Plaintiff articulates the issue as one of proportionality, the only factor Plaintiff mentions is the cost of the discovery. Plaintiff does not set forth what the relative cost of production would be as compared to the amount in controversy.

The Court notes that both parties seek damages/setoff in excess of $2,000,000. Plaintiff's unsupported estimate of $4,000 to $5,000 per custodian in discovery costs does not lead the Court to find that ordering the requested discovery violates proportionality, particularly given the history, scope, and nature of this case."

2. Proactive Communication
It isn't enough for a provider to have project intel. They need to relay it to the client proactively to be truly helpful and aligned with best practices. The experienced project manager calls ahead with status updates, especially the problematic ones. The number one criticism with any provider is having to call to find out why something is delayed. Most project delays can be seen as they come over the horizon and the client should be informed at the first hint of trouble, not when the work is already overdue. No one wants to be the bearer of bad tidings, but mature business people put feelings aside and call the client as early as possible.
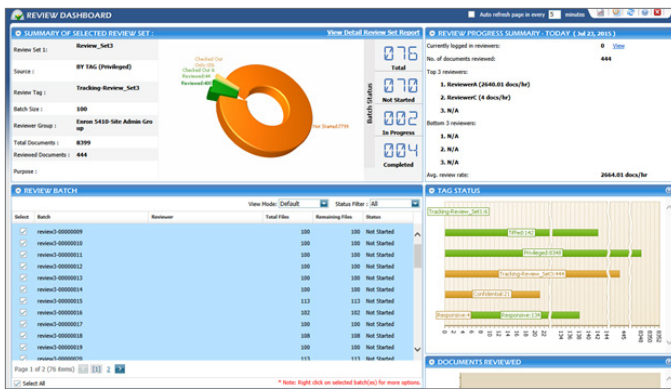
Dashboards
Transparent, client-facing tools such as dashboards and mobile apps and user reports can eliminate some of the delay or lack of communication that plagues eDiscovery projects. End-to-end processing/review applications that communicate dashboard metrics through every stage of the process are even more helpful in supporting communication and volume and cost tracking.

The Venio dashboard example below, makes it easy for the client to follow the progress of each media or custodian ingested, as well as the project as a whole.
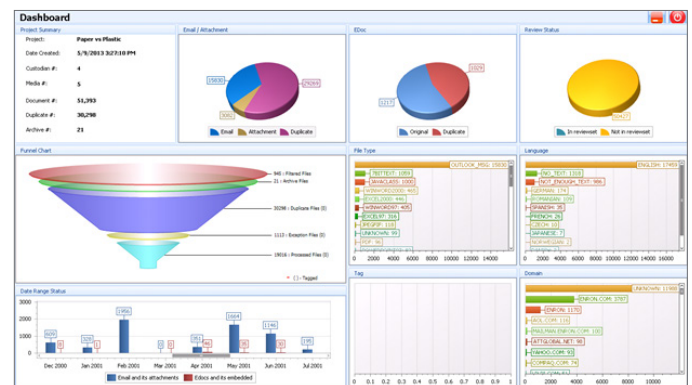
The Venio review Dashboard makes it easy for review managers and clients to track the progress of review in real-time.

The Review Dashboard can be accessed via Venio Touch™ on a mobile device such as a smart phone or tablet. Now it is easy to track projects while commuting or traveling on business without having to wait for reports or phone calls with a project manager.
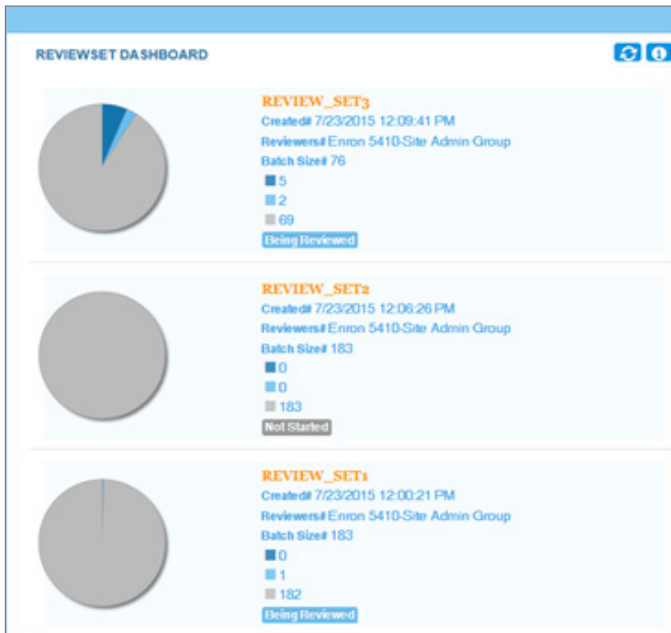

Cloud

Cloud computing is ushering in a new era in accountability by making more facets of the eDiscovery process transparent to clients and providers. Cloud environments, especially "public clouds" can be accessible from anywhere and the infrastructure can be configured for one client or even one matter. In the cloud, fixed hardware costs are a thing of the past. Law firms will not have to guess the cost of matter-specific storage and clients will see data volumes at every stage of Discovery, understand when to archive matters and collections, and monitor detailed system usage. In-house

eDiscovery departments will be able to judge the fiscal appropriateness of in-sourcing versus out-sourcing.

The public cloud, Amazon Web Services (AWS) screen, below, reports and projects usage in order track and estimate costs.
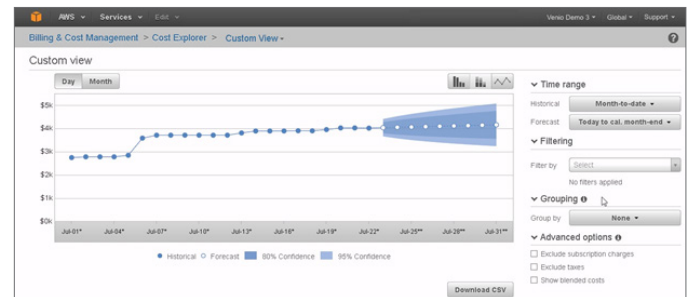
Proactive communication from client to provider is just as important. Unfortunately, clients are notoriously bad at provide helpful information to their providers. The biggest mystery information has always been *the deadline.* Clients are doing themselves an enormous disservice by making this kind of information hard to come by. Don't expect the provider to make multiple calls in an attempt to find out a deadline or understand the case timeline. The client is responsible for communicating deadlines, priorities and changes to any of those factors and when they do not, they have only themselves to blame.

3. Project Management
Communication Plan
Accountability is a responsibility which must be determined at the outset of any large project such as a litigation. Setting up a communication plan with known points of contact, escalation protocol, deadlines, benchmarks and reporting schedules is the first step in successfully managing expectations. Most importantly, the communication plan and schedule must go in both directions: from provider to client and client to provider. All team members within the client organization, just as much as with the provider entity, must know what is required, to whom they report and when reporting is required.

Burn Rate
The "Burn Rate" report is a great vehicle for managing expectations and assuring accountability on large projects. A monthly or even weekly statement showing how much of the budget as been spent or alerting a client to budgetary or volume benchmarks is a very useful communication tool. A burn rate report may be configured so that each phase of Discovery has its own budget.

4. Institutional Metrics

Volumes

Managing expectations requires an understanding of potential costs. An organization that is a serial litigant owes it to itself to gather and maintain information about its own information landscape and historic Discovery costs rather than "guessing" or continually reinventing the wheel. Past performance can inform current and future efforts and make the process easier.

Legal, IT and Business Analysts can partner to gather the following institutional metrics from email and document systems such as: average mailbox size, average document age/usage on shared, mapped drives or in document management systems, average deduplication rates during discovery, filtering and culling percentages and predictive coding outcomes. Clients who gather and maintain this kind of internal business intelligence are not just settling for creating a "Data Map" during the Identification phase of Discovery.

Costs

Clients can gather institutional metrics in two important ways, by memorializing expenditures from previous matters and/or by having preexisting agreements with providers setting the rates for services. Cost metrics are gathered from a litigant's internal eDiscovery department, a law firm's litigation support department, or from a third-party eDiscovery vendor.

When clients select preferred vendors, often through an RFP effort, they can use their volume metrics to negotiate pricing and be prepared for litigation with vendor relationships and preset pricing. Gathering institutional metrics and selecting preferred vendors fulfills the organization's accountability for fiscal efficiency. And is also the first step in a defensible Discovery process.

Outcomes

Serial litigants also gather information on litigation success rates or "outcomes". This past performance information can be helpful during ECA to determine strategy, formulate settlement plans, and estimate litigation and litigation department budgets. Obviously, not all events or issues result in litigation, therefore; a comprehensive outcome tracking program would look at types of problems that do or do not evolve into litigation, as well as, areas or business units that are most at risk. Additionally, some organizations are charging-back the cost of litigation to the business unit responsible – the ultimate form of accountability.

5. Quality Control

No one wants to do quality control so it's always left for last, the end of the project, the back-burner task. Yet, Quality Control is an important component of accountability that should also be performed proactively. Proactive QC is often called Quality Assurance. In eDiscovery, if you wait till the very end of a phase or project, it may be too late.

End-to-end applications simplify the workflow and quality assurance because the data doesn't move out of the software for tiffing, OCR or review and their end-to-end, real-time dashboards help to catch errors and issues before they become problems. In Venio, data is quickly ingested, processed, and ready for review and production in hours or even minutes. Users can report concerns while later data is still being ingested alleviating the delays that plague eDiscovery when users have to wait months for the start of review to see problems that happened earlier in the process, even as early as collection.

The following quality assurance "war stories" are good examples of the types of issues that can and should be caught by an accountable litigation team.

Real-life Example: #1 - Custodians

When processing data, the obvious first quality assurance task is to make sure the correct custodians, media, or data sources are being ingested. This might seem like standard operating procedure but it is often missed. One real-life incident occurred when a vendor received approximately 200 custodian mailboxes from an earlier, processing vendor. While ingesting the mailboxes, the second vendor requested and finally received from the client, the actual list of custodians who were supposed to be processed. After careful examination, the second vendor's team reported, proactively, that the delivered custodians didn't match the client's list. Some were missing, names were misspelled and a small group had been erroneously collected and processed. This shows accountability failures both during collection and at the initial ingestion by the first processing vendor. Accurate reporting and quality assurance, by both the client and the vendor, would have fixed these errors earlier in the process.

The Venio screen, below, makes it easy to track custodian and media ingestion:
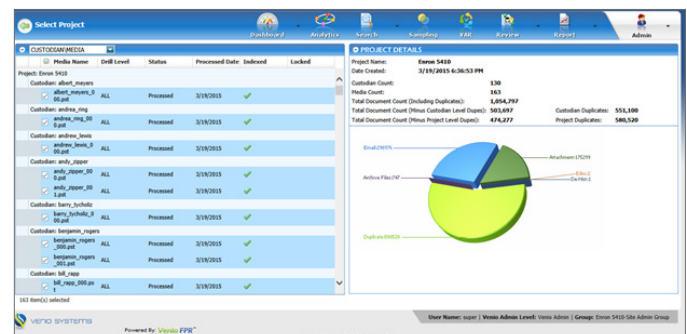
Real-life Example #2 – Dates

Date formatting and spoliation are a real problem in eDiscovery, but fairly easy to monitor because they are structured fields in the metadata. The project in example #1 had an additional problem, even more serious, related to date spoliation. As mentioned, the data was processed by vendor number 1 and then exported and transferred, at the client's request, to vendor number 2. Vendor number 2 ingested the exported data and realized, that vendor number 1 had over-written all of the date fields with a random day in August 1997.

A more common date problem relates to incomplete collection or intentional deletion. A client-facing interface, such as the Date Panel from Venio Dashboard below, is an easy way to quickly see ranges of data that are "missing" or have been spoliated in some way.
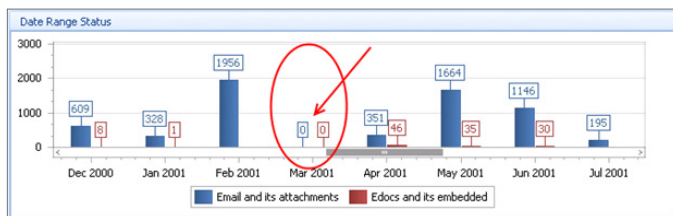
Real-life Example #3 – Attachments

Believe it or not, emails and their attachments can become "detached". This often happens during collection but can also occur during processing. During collection, attachments may be stored in a different location than the parent email due to archive methods, or the collection tool may not be configured incorrectly. In two real-life projects, the processing vendor received emails with no attachments and had to report this to the clients, who had both unfortunately self-collected. A dashboard metric, such as the Venio pie chart below is an easy way to see the makeup of emails, attachments and duplicates.
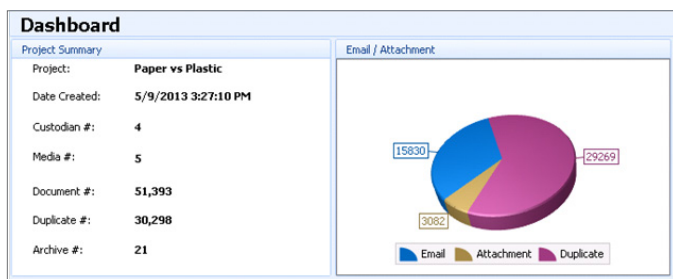
Exception reporting

All eDiscovery processing involves exception tracking. Each application handles the various ingested file types differently.

No matter how powerful and flexible the processing software, there are always files that cannot be processed due to corruption, uniqueness, or encryption. Additionally, some files must receive additional attention such as tiffing, OCRing or structured data review. A client should not have to request exception reports. OCRing and other tasks should be handled automatically by the processing software and exception reports should be easy to generate and sent proactively to the client. The reporting schedule, described in the previous section on Project Management, should always include the generation and review of exception reports such as the example below.

CONCLUSION

Accountability is the collaborative responsibility of all project participants. Although it is supported by technology, it is a human-dependent process that works most successfully when there is a respectful partnership between client and provider. Clients cannot delegate responsibility to a provider and providers cannot passively wait for clients to ask the right questions. Project management methods, rising in use by sophisticated corporations and law firms, mandate proactive communication of metrics, gaps, challenges, deadlines, requirements and costs. Savvy providers are deploying client-facing dashboards, proactive reporting, and workflow methods to make the client a member of the team to reduce communication delays and tighten efficiency. Clients are selecting providers, including outside counsel, based on the provider's ability to manage eDiscovery processes through accountability best practices.