

The secret to successful e-discovery

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Every lawsuit, investigation, audit, or regulatory review requires evidence—much of which is digital these days. Electronic discovery (e-discovery) is the process in which electronically stored information (ESI) is identified, collected and preserved, and then analyzed, culled, and reviewed to find the relevant data for use in a case.

With the increasing amount of data on devices and in the cloud, e-discovery methods and technologies are [constantly evolving](#) to have more capabilities, find hot documents more quickly, decrease legal spending, and to adapt to regulatory changes and recent case law. To complicate matters further, e-discovery isn't the same process for every case and client. It can be a lot to keep up with if you don't deal with it every day.

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The best e-discovery vendors furnish more than a technology platform—they also provide a skilled team with a deep understanding of legal matters and evolving technologies. That team should have years of proven knowledge and expertise in building the right, custom solution for each case. Indeed, e-discovery teams are most effective when they include professionals with the backgrounds and specialties needed for the case at hand. Specifically, a competent e-discovery team should include at least these four people: someone experienced in the rules for managing ESI; a digital forensics expert; an attorney who is well-versed in e-discovery practices, document review, and review platforms; and last, but not least, a highly qualified and, preferably, certified project manager.

Without the appropriate people participating in conversations from the outset, it is inevitable that things will be missed. For example, important files may not get collected or even identified, relevant data could be overlooked during the review process or industry regulations might be violated. I have seen seemingly self-sufficient organizations realize, often too late, that they couldn't handle everything on their own. Sometimes a client or their counsel may delay engaging a vendor early in the process in an attempt to reduce costs, but this often leads to problems in how data is analyzed, reviewed, searched or presented during trial or mediation. Ultimately, that delay results in the opposite effect by significantly raising overall costs due to wasted efforts, repeated work or, at worst, significant and costly sanctions. A multidisciplinary advisory team helps ensure a higher success rate and fewer issues throughout the e-discovery process—and can actually save costs considerably.

I recently worked with a construction company that had a year to gather and produce ESI for a legal matter but continually put off doing so. Eventually, with only a month left to meet the court's production deadlines, it contacted my team. The company and opposing counsel had never agreed on an ESI production protocol, so once the company began receiving opposing party productions, there were gaps in information, such as missing metadata fields. Fortunately, our multidisciplinary team was able to work with the client's management and IT leaders, as well as inside and outside counsel, to locate the data and resolve the ESI production issues within the timeframe. However, it doesn't always end that nicely.

To avoid a similar situation, you should work with an e-discovery team that's made up of these four members—involving all of them from the very first initial scope-of-work conversations all the way through the final presentation of data.

Expert in ESI rules and protocols

Think about all the places where you have ESI. It lives in your work computer, personal computer, email, the cloud, scanned documents ... I'll stop there. A case involving the data of an individual is complicated enough; imagine one involving an entire company. That's why it is essential that your e-discovery team includes someone with knowledge of the various types of ESI and the rules and protocols surrounding them.

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An ESI expert will have knowledge not just of the usual suspects for data storage but also all the latest and developing apps, cloud storage, social media platforms, and other sources where that data might live. The expert also will be able to guide you and your counsel through the steps needed to identify, map, preserve, and collect all relevant data, including helpful steps such as how best to use custodian questionnaires and perform custodian interviews.

That expert will also be able to pull from his or her vast experience in the legal and e-discovery fields and may even provide regulatory and case law references to assist with overall case strategy. This can be especially beneficial for companies that don't often find themselves involved in litigation and therefore would benefit from more guidance.

Your ESI expert should also have the knowledge and experience to review protocols (both those proposed by your counsel and opposing counsel) and offer direction in ensuring a [comprehensive e-discovery process](#) aimed at the best possible outcome. It's important to remember that every case, court, and opposing counsel is different, so protocols aren't going to look exactly the same every time litigation occurs. Your ESI expert can help you navigate the ins and outs of e-discovery and any data challenges.

Digital forensics experts

While the ESI professional can help identify and even collect data, some cases may need a digital forensic expert to retrieve data from more complex, advanced, or unexpected places such as video doorbells, social media accounts, smart speakers, and even gaming platforms, among others. This person can also determine the best method for gathering the data (onsite versus remote collection) so that metadata and other details are maintained. A forensics expert will ensure that data collection is performed defensibly and that the data is, and stays, securely encrypted and protected.

It is especially important to have a digital forensic expert involved in cases where malfeasance is suspected, such as in theft of digital property, harassment claims, and the like. A forensics expert will know the questions to ask and what to look for, such as a suspect's inappropriate viewing, deletion, or duplication of data, unapproved access to company resources, accounts, and systems, unauthorized use of or installation of certain software or applications, inappropriate internet browsing history and much, much more.

By including an experienced and qualified forensic expert in initial conversations, you can better determine the scope of work, correctly design the project from the outset and avoid having to modify anything or start over later on. It's especially essential in these types of cases to consult a digital forensics expert from the very beginning to ensure that other seemingly innocent "looking around" for evidence of inappropriate actions by IT staff or others doesn't inadvertently spoil or destroy critical data.



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Of course, there are instances when a forensic professional may not be needed—and your ESI expert can help you determine if that’s the case.

Review platform expert

The review process should be overseen by a licensed attorney with trained experience in [machine learning](#) technologies, technology-assisted review (TAR), and other review platforms. This person will handle the process efficiently and accurately and can provide guidance on which tools to leverage for each case. That guidance should extend beyond determining which review platform to use; it should provide understanding about which tool is best for the current case and the organization overall, as well as which analytics tool or other machine learning tool would best locate relevant files.

Your review platform expert should have experience in cases of various sizes, complexity, and industries to ensure all data handling remains compliant with regulatory bodies and measures, such as the Health Insurance Portability and Accountability Act, the Food and Drug Administration, and more. Additionally, this person can set up and oversee the attorney team that handles legal document review. That includes establishing a stringent quality control process that prevents privileged files from being produced and makes sure redacted files stay redacted.

There’s no denying that the review process can be time-consuming and expensive. But with help from the right review expert, it is entirely possible to receive timely, accurate and defensible service, all while keeping costs down.

Project management

Last, but not at all least, is the need for an experienced, qualified and proactive project manager. Too many vendors use the term project manager to describe individuals who solely coordinate meetings and do simple tasks. A true project manager, however, is not just the coordinator for an organization and its e-discovery firm; rather, the project manager should be almost as knowledgeable as the expert members of the team. Project managers are responsible for driving and overseeing the entire e-discovery process, keeping the project on budget and spotting issues and opportunities to improve the process along the way. They should have extensive experience in workflows and technology options and should help you determine the best method to meet desired goals.

With these responsibilities in mind, there are certain skills you should look for in a project manager, including:

- **Proactive communication:** They shouldn’t just answer your questions when asked—they should anticipate your team’s needs and proactively provide regular status updates and

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comprehensive reporting, all of which are key to establishing confidence in the team that is handling your sensitive data.

- **Task management:** We are not just talking about entering a task into a task management system. A good project manager should actively oversee the people, processes and technology being used in those tasks. That requires discipline, planning and organization. Look for someone with strong critical thinking skills who gives careful attention to detail.
- **Resource coordination:** The project manager should be able to navigate a myriad of resources and tools, orchestrating each step so that one neatly dovetails into the next, so that you end up with an e-discovery process that is smooth and seamless.

There are endless moving parts to the e-discovery process and, in the end, every case will have different needs and require different services. Your case may involve simple data collection of email files, or it may be more advanced, requiring a forensic expert and an IT manager from your company to help locate relevant data. There are no hard and fast rules as to who should be involved in initial discovery conversations, but these are some guidelines to consider when entering an e-discovery contract.

Most importantly, your e-discovery team should be a group of people you can fully trust to handle your data, provide defensible, competent services and help you discover the evidence you need to win your case.



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Schwartz is highly proficient in discovery and document review matters, with more than 35 years of legal and business consulting management experience. Schwartz oversees BIA's advisory division and is primarily responsible for providing consulting and advisory services to BIA's clients. He can provide experienced, sound insight in multiple areas, including information management, litigation and discovery, document retention and management, regulatory compliance and IT security.

BIA was formed in 2002 as a computer forensics and e-discovery company that creates and implements technology solutions to help clients meet even their most challenging legal needs. For more than 17 years, BIA has been building and implementing defensible data preservation and discovery solutions. The maturity of BIA's technologies, processes and experience in digital forensics and e-discovery is critical to its clients when choosing the best platform and analytics to support their projects.

