

## Cost-Effective E-Discovery for Small Cases

Vol. 30 No. 1

By Tom O'Connor

Tom O'Connor ([toconnor@gulfftc.org](mailto:toconnor@gulfftc.org)) is director of the Gulf Coast Legal Technology Center in New Orleans, Louisiana. He is the coauthor with Bruce Olson of *Electronic Discovery for Small Cases* (ABA, 2012, [tinyurl.com/andh5er](http://tinyurl.com/andh5er)).

The economic downturn of the last several years has had a particularly chilling effect on solos and small firms. And an area where this effect is particularly noticed is in electronic discovery, a notoriously expensive and time-consuming aspect of the litigation process. Once viewed only as a concern for large cases and federal forums, the fact is that firms of all sizes now must know how to handle electronic discovery cost-effectively and successfully. Why?



First, two-thirds of the states have passed their own e-discovery rules. Coast-to-coast, from California to Florida and from states as populous as New Jersey to mostly rural states such as Louisiana and Alabama, e-discovery is now a local issue. The result of all that state activity is a dramatic increase in e-discovery activity for small local cases, especially in the area of domestic disputes.

And second, with the increase in digital activity by people in all areas of their lives, we are now seeing e-discovery become an issue in criminal cases. Again, starting at the federal level with an agreed-upon e-discovery exchange protocol between the offices of the U.S. Attorney and the Federal Defenders, this development is now bleeding down to state and local criminal matters.

### Edna and Ernie

My involvement with this issue began in 2010 when noted e-discovery consultant Craig Ball wrote a 2009 article for *Law Technology News* called "*E-Discovery for Everybody*" ([tinyurl.com/36ua6kh](http://tinyurl.com/36ua6kh)). This article came to be better known as the "EDna Challenge" because in it he proposed a solo practitioner named Edna with an e-discovery budget of \$1,000 and asked how she could possibly perform any e-discovery on that amount. The problem as Ball defined it was simple:

The vast majority of cases filed, developed and tried in the United States are not multimillion dollar dust-ups between big companies. The evidence in modest cases is digital, too. Solo and small firm counsel like Edna need affordable, user-friendly tools designed for desktop e-discovery—tools that preserve metadata, offer efficient workflow and ably handle the common file formats that account for nearly all of the ESI [electronically stored information] seen in day-to-day litigation.

The response to the column was overwhelming, with dozens of consultants, attorneys, and vendors, myself included, proposing solutions. The next year, ABA TECHSHOW asked attorney Bruce Olson (a former TECHSHOW chair) and me to speak on the subject. We both thought that by then the challenge would have been met by the high number of e-discovery vendors and resultant stream of e-discovery conferences, seminars, and online training venues, but in fact the room for our presentation was packed, and Craig Ball himself was sitting in the front row.

It was then that Bruce and I realized the problem had not only persisted but grown larger. In response we decided to write a book about the issue, *Electronic Discovery for Small Cases: Managing Digital Evidence and ESI* (ABA, 2012, [tinyurl.com/andh5er](http://tinyurl.com/andh5er)). To drive further data for the book, I drew up the “Ernie Challenge,” with advice from Craig Ball and DLA Piper senior counsel Browning E. Marean III. Named for my good friend Ernie Svenson, a solo attorney with a general practice in New Orleans, Louisiana, this challenge covers those “tweener” cases that fall in the range between the Edna Challenge and mega-cases suitable for the larger brand-name products that dominate the e-discovery world.

The Ernie Challenge posited a case with roughly 1 TB (terabyte) of data to collect and a final amount of 200 GB (gigabytes) of data to review, the majority consisting of e-mail, with the balance being various types of financial data. The challenge asked for some form of web review tool in order to work with the clients’ counsel and contract staff in a separate location.

## The Small-Case Dilemma

By the time the book was released, Bruce and I referred to this situation as the “Small-Case Dilemma.” Although it is not automatically true that small cases require different tools for managing e-discovery, the fact remains that small cases often mean small technology budgets. Unless your practice is sufficiently mixed with big-budget cases so that you already have a full complement of litigation support tools, you probably don’t have the tools necessary to handle anything but the smallest e-discovery matter. And the small budget also prevents you from engaging an outside consultant or vendor.

But the “new” e-discovery rules at both the federal and state level don’t apply exclusively to large cases. They force civil litigants into a compliance mode with respect to the retention and management of electronically stored information. The risks that litigants face as a result of improper management of electronically stored information can include findings of spoliation of evidence, summary judgment findings, and sanctions, including adverse inferences, adverse jury instructions, and even complaints filed with state bar associations.

**Price.** The first problem for small firms is current market pricing. Many, if not most, e-discovery vendors have their roots in the per-unit commodity pricing days of photocopying and imaging. The standard practice for years now has been to charge hundreds of dollars per GB each time data is handled.

In the early days of litigation support, you simply purchased a product such as Summation or Concordance for a flat fee plus annual maintenance. This model doesn’t exist for e-discovery products.

Instead, for each step of the e-discovery process, you pay an exorbitant per-GB price: \$X per GB for processing, \$X per page for OCR, \$X per document for near duplicate detection, \$X per page for Bates numbers, \$X per user and per GB to host, and so on. And each of these tasks could be performed for different units with different unit pricing that could run from a penny to \$500 per unit.

So if a forensic collection starts with 800 GB of data (the size of the hard drive of one typical computer), and that data set eventually yields 200 GB of reviewable material, a typical e-discovery company will charge \$200 per GB for the processing (\$160,000) plus \$50 per month per GB (\$10,000) and \$90 per month per user for the hosting. If the case lasts 18 months, this cost alone will be just under \$350,000.

And if we accept the commonly cited statistic that housing cost will account for only 30 percent to 40 percent the total project price, and the review process will account for the remaining 60 percent to 70 percent, then we’re looking at a project cost that will eventually be close to \$1 million for only 200 GB of data.

Although these figures might be imposing for a solo or small firm practitioner, they look like loose change to e-discovery vendors. As a result, most of these vendors have simply not been interested in 200 GB cases. The simple

fact is they can't support themselves on small jobs. Large companies have large overhead and need large revenue amounts to support that infrastructure.

And these companies may have spent millions of dollars developing software or, more commonly, acquiring another company with its already-existing software. When this cost is added to the unitized pricing structure outlined above, these vendors are locked into a system of set monthly costs and simply cannot, from their perspective, give away their services to small firms with small cases.

**Scale.** The second problem is that technology for e-discovery was developed initially for large cases with large data sets. Companies with revenue streams based on processing or hosting terabytes of data cannot easily adapt to projects consisting of several hundred gigabytes, much as you cannot expect a 747 jumbo jet to be used as an effective or cost-efficient means of transporting commuters during rush-hour traffic.

Products that have been designed to work with immense data collections cannot easily scale down to small sets of information. A product working with terabytes of data on a distributed Internet framework needs a certain hardware and software infrastructure to operate. That type of system can't be scaled down to load on a laptop or iPad.

So these big products have big prices, and both the products and the prices are beyond the scope of most small firms and small-case budgets. If a case is valued at \$100,000 or even a \$500,000, and you believe you cannot spend more than \$50,000 on handling e-discovery, then you have a problem.

## Small-Case Solutions

The good news is that low-cost programs designed for small cases have begun to appear. Most of these products are modestly priced, and in several cases the cost is low enough to justifiably be passed on to the client directly rather than being absorbed as overhead. Functionality may be somewhat limited for each product as compared to higher-end solutions, but given the immediacy and lower data set sizes of small cases, that may not be a drawback. The leading products in this class include:

- Acrobat Legal Edition: [www.adobe.com](http://www.adobe.com)
- Digital WarRoom Pro: [www.digitalwarroom.com](http://www.digitalwarroom.com)
- Discovery Cloud: [www.discoverycloud.nextpoint.com](http://www.discoverycloud.nextpoint.com)
- dtSearch Desktop: [www.dtsearch.com](http://www.dtsearch.com)
- Harvester: [www.pinpointlabs.com](http://www.pinpointlabs.com)
- Intella: [www.vound-software.com](http://www.vound-software.com)
- Lexbe Online: [www.lexbe.com](http://www.lexbe.com)
- Quick View Plus: [www.avantstar.com](http://www.avantstar.com)
- SafeCopy: [www.pinpointlabs.com](http://www.pinpointlabs.com)

The list above is just a small sample of what's out there. For a larger selection, look at the reviews in our book or look online for a CLE session on small firm e-discovery.

Traditional e-discovery pricing is also changing, with per-GB processing prices dropping and hosting fees changing to a combined monthly fee incorporating both user and per-GB charges. There has also been the beginning of a trend away from the unit-pricing model toward a flat-fee or "all-in" pricing. These sort of bundled flat-rate prices, whether it be "per drive," or even "per case," cover all the variables currently priced as separate line items.

This development stems from two factors: increased pricing competition among vendors and newer, cheaper technology. In the past year, many commentators have remarked that per-GB pricing cannot continue to maintain its stranglehold on the e-discovery process. Indeed in a 2011 *eDiscovery Journal* interview, Craig Ball said, "I'm seeing some behind-the-firewall products, even desktop products, that are going to be able to allow lawyers and people with relatively little technical expertise to handle small- and medium-sized cases. Some of the hosting services are putting together pricing where [they] are starting to sound rational and less frightening."

Regardless of the product you choose, there are several basic considerations for working with e-discovery in small cases:

1. Work data in its native format. The types of files you will be dealing with are likely typical or standard files created by common programs used for e-mail, word processing, and other office functions.
2. Host the data yourself. There are many good Internet-based hosted solutions that can fill your needs, but the typical storage fees charged for a case that exists for any length of time can bust a

modest technology budget. So small cases work best with programs that can be installed on one computer for processing and review.

3. Keep the data sets manageable. This means getting agreements to dedup and cull data down before you receive it, whenever possible.
4. Agree on exchange protocols. The single most effective way to keep e-discovery costs low is to work with your opposition in a cooperative manner so you can stipulate to the use of low-cost solutions.

This last issue is paramount. The fact is that technology is not the key to successful management of e-discovery in small cases. Rather, in my estimation, it is the process. We all must change to the new paradigm of working in the digital world. In the words of The Hon. Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas and Chair of the Judicial Conference Committee on Rules of Practice and Procedure, "Litigation habits and customs learned in the days of paper must be revisited and revised. The culture of bench and bar must adjust."