

A STEP-BY-STEP GUIDE TO EFFECTIVE EARLY CASE ASSESSMENT (ECA)

How companies can use investigative review techniques to achieve the best eDiscovery results for your clients >>

Leading edge legal teams are increasingly using investigative review techniques to perform genuine and effective early case assessments (ECA) to get the best possible outcomes for their companies. These teams provide their internal clients with more thoughtful options, greater insights and a fact-based legal solution early in the litigation process. This white paper explains ten practical steps which we believe can help any legal team provide the best ECA result. It has been developed by NuiX from our discussions and engagement with our customers, including leading corporations, law firms, in-house legal teams, regulators, advisory firms and litigation support service providers in over 25 countries. These customers have placed strategic considerations and the critical facts of their cases at the center of their eDiscovery efforts, driving smarter and more innovative approaches to litigation.

WHITE PAPER



Simple. Powerful. Precise.

A STEP-BY-STEP GUIDE TO EFFECTIVE EARLY CASE ASSESSMENT (ECA)

How companies can use investigative review techniques to achieve the best eDiscovery results for your clients

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INTRODUCTION

Leading edge legal teams are increasingly using investigative review techniques to perform genuine and effective early case assessments (ECA). These teams are giving their internal clients more thoughtful options, greater insights and a fact-based legal solution early in their litigation process.

Why is this happening? For a start, many organizations are making significant increases in litigation spending, but this has not resulted in the creation of large legal teams. Despite the rise in litigation, 79% of U.S. companies reported employing five or fewer in-house lawyers and 61% of U.K. companies reported the same staffing deficiency.ⁱ This lean staffing approach, coupled with more activity, is prompting a renewed urgency for results-oriented techniques that maximize all available resources. An area where companies are spending more is eDiscovery. In fact, 40% of large companies have highlighted eDiscovery as their primary focus for investment.ⁱⁱ

At the heart of investigative review is the ability to automatically eliminate most of the irrelevant data quickly and locate key documents early in the process. This enables fast and smart decisions about the best legal strategy.

It has always been the case that the core elements of any claim mostly rely on a relatively small number of documents, so it is imperative that those documents are uncovered quickly and accurately. In the recent past, this has been a slow and expensive process, requiring teams of attorneys to actually read great numbers of irrelevant documents to try and find the key facts.

However, many Nuix customers, including leading corporations, law firms, in-house legal teams, regulators, advisory firms and litigation support service providers in over 25 countries, have forged a better way. They have brought investigative review techniques to the forefront, harnessing the most advanced eDiscovery technology available, because they want to enable their talented legal practitioners to use their skills and intelligence to their best ability. These customers have placed strategic considerations and the critical facts of the case at the center of their eDiscovery efforts, driving smart and innovative approaches to litigation.

This white paper explains ten practical steps for effective ECA, which we have observed and participated in with our customers. It describes how to use real-world investigative review techniques to help any legal team provide the best result.

ⁱ Fulbright & Jaworski, 7th Annual Litigation Trends Survey Report (2011 The Rise of Data Interaction)

ⁱⁱ Fulbright & Jaworski, 7th Annual Litigation Trends Survey Report (2010) at 28.

At the heart of investigative review is the ability to automatically eliminate most of the irrelevant data and locate key documents early in the process

TEN STEPS TO EFFECTIVELY USE INVESTIGATIVE REVIEW TECHNIQUES TO DELIVER A GENUINE ECA

Nuix has identified ten key steps to effectively use investigative review techniques to deliver a genuine ECA result for your company. Each step has merit and while some cases may not require the team to follow all ten steps to accomplish its objectives, it may also be that some cases require a few steps to be repeated multiple times.

1. UNDERSTAND YOUR CASE

The critical first step - before collecting documents, listing potential sources of electronically stored information (ESI), or looking at data maps – is to understand your case. This is achieved by reviewing the *Five Ws*, that is – the What, When, Who, Why and Where – of the matter. Using the *Five Ws* in your early approach will distinguish a targeted investigation from a broad and ineffective review based methodology.

- **What** – The “what” is the difference between fact and fiction. This is where you ask yourself or your internal clients what you think really happened. This is often times where your lawyering instinct and sense of human nature come into play. However, getting an idea of what you think the reality is will also get things moving in the right direction.
- **When** – When did this happen? How long has it been going on? Getting an idea about the timeline of the case will help you get a mental framework of what has to be accomplished. For example, are you investigating a single event or what seems to be a systematic issue that could have been occurring for years?
- **Who** – Who are your key custodians? Don’t start with entire departments (that may come with time), but instead ask yourself: “If I can only depose 2, 5 or 10 custodians, who would they be?” Too often people talk about collecting hundreds of custodians, but at the end of the day the courts will only allow you to depose a handful. Start with the handful, and allow their data to shape the rest of the collection strategy.
- **Why** – At this stage, the “why” will be subjective, but you might have some sense of the motive(s). This may seem very “investigative”, but you will improve your ECA if you can surmise early what the participants were trying to gain.

- **Where** – Where do you think the evidence might reside? This should be your first true thought about the data. However, in many cases, starting with the email accounts of the people identified in the “who” stage, will provide you with a sense for the rest of the “where”.

2. UNDERTAKE FAST, TARGETED AND FORENSICALLY SOUND COLLECTIONS

The way you approach collection will impact both the cost and efficiency of your ECA. The most efficient way will depend on your company’s IT systems and any existing collection and storage technologies. For example, it can be cheaper and faster to collect one or a hundred custodians’ emails directly from the Exchange database rather than individual collections from their laptops. In some cases you may want to copy the hard drives and SharePoint sites of the main custodians or directly copy relevant file servers. None of this requires an expensive forensic practitioner if you leverage advanced technology to collect and process the data sets in a forensically sound manner.

3. USE FAST AND SCALABLE PROCESSING TOOLS

Modern eDiscovery technology is capable of processing enormous datasets very quickly or small datasets in the blink of an eye. Starting with the email of your 5-10 key custodians, and using a tool which gives you direct access to the data, puts the control in your hands. You are no longer waiting for someone else to do their work before you can start doing yours. By rapidly processing the most easily available information at the outset, legal teams can begin investigating and evaluating highly relevant data immediately, which will reduce both time and cost.

What do you really think happened?

Who are your key custodians?

4. USE TARGETED SEARCHES TO THOROUGHLY INVESTIGATE YOUR CASE AND KEY CUSTODIANS

If the initial searching process is executed intelligently, you can quickly uncover a goldmine of relevant information and key people to help your case strategy.

i. Start With Your Initial “What” Findings (Step 1)

Use key information from your initial “what” analysis and run a search. This may be a project or product name, a person or place, or simply an idea. If you only have vague details, try to come up with at least a handful of words.

THE DRIVE FOR COST REDUCTION AND BETTER OUTCOMES

The drive for cost reduction and better outcomes in the legal profession has inspired leading law firms and in-house counsel to find faster and smarter ways to approach litigation matters, in particular eDiscovery. The combination of simple to use but powerful technology, skilled practitioners and a more dynamic approach to the eDiscovery process is empowering corporate legal teams of all sizes to deliver more cost-effective, fact-based and strategic assessments of their cases earlier in the litigation process.

We are nearing the end of an era where technology has often overshadowed legal technique and where eDiscovery has been a technology exercise rather than a means to clarifying and investigating a legal dispute. Legacy technology has made eDiscovery a slow and expensive process, requiring large teams of expensive attorneys to read many documents to try and find the key facts. Some companies are still caught in the trap of using both legacy technology and practices but those who have embraced ECA and investigative review techniques have significantly reduced their costs and are achieving better results.

Ultimately, the distinction between ECA and discovery is the ability to focus on a manageable number of relevant documents which can help determine the characteristics and strategy of the case.

From the results of this initial search you might consider:

- Looking for other custodians of interest by seeing which custodians are exchanging emails
- Looking at a list of all email addresses and domains to see if anyone is talking about this topic with external parties
- Scoping your search to when you think these events were happening, or plotting findings against a timeline
- Finding similar documents to the initial ones you have uncovered
- Identifying which custodians have received or sent similar or duplicate key emails, documents or attachments
- Looking at listings of every word in the collection to see if any other facts emerge.

ii. Target Suspicious Behavior

Another approach is to target “suspicious” behavior. This entails looking for people who:

- Blind copy external domains
- Send encrypted content
- Send zip containers with key information to outside parties
- Re-name documents and forward them under some type of innocuous name.

iii. Look at Deleted Information

You might also want to look at what people have deleted. Most Outlook users know that if you delete something it just goes into the trash, but people trying to cover their activities might “shift+delete” which permanently deletes an item. Forensic-based eDiscovery tools can retrieve permanently deleted items and often the most telling searches are those which identify the documents, items and emails which were most recently deleted.

iv. Conduct a Domain Analysis

Conduct a domain analysis to incorporate domains you would not expect to see or that you might find of interest, as well as external e-mail accounts (e.g., Gmail, Yahoo! Mail or Hotmail). If the case involves a third party organization, it could pay to look at all the emails going to that organization in the lead up to and after the particular event. This might identify another player. You may also want to consider the domains of competitors, inappropriate websites and banks as they often provide interesting results. Based on your findings you may then want to go back and selectively collect information from additional custodians or specifically target other information locations (e.g. Hotmail or Gmail accounts).

Once you have found the key facts of your case it is critical to understand their context

v. Examine Relationships

After undertaking the relevant searches discussed above, it may be useful to display a relationship diagram which identifies the key players and their key relationships. This would identify the individuals they talk to most, or some individual emailed infrequently, or an internet based email account that seems out of place. Review the email content and work out the relationships between individuals. This can have key consequences in how a case develops.

Note: The capability to easily perform all of the above searches needs to be available at your fingertips, without having to wait or pay for an expert to help with either the searches or technology. Once you have found some core facts it is also important to be able to easily widen the scope and look for additional relationships, context, insights and documents. The technology must enable you to meaningfully visualize the associations between documents and potentially important corporate actors and then to study their dialogue to identify if there are additional unexpected connections.

5. ESTABLISH THE CONTEXT OF YOUR KEY FACTS

Once you have found the facts it is critical to understand their context. This can be achieved by using the initial relevant information as a base, and extrapolating a number of searches, concept searches and document groupings to show a greater level of context around the core items. These core items can be reviewed quickly because they are a small and focused group. Often the investigative process, if executed properly, can enable a legal team to find the five or ten records which are central to a case, as well as thousands more that support their context.

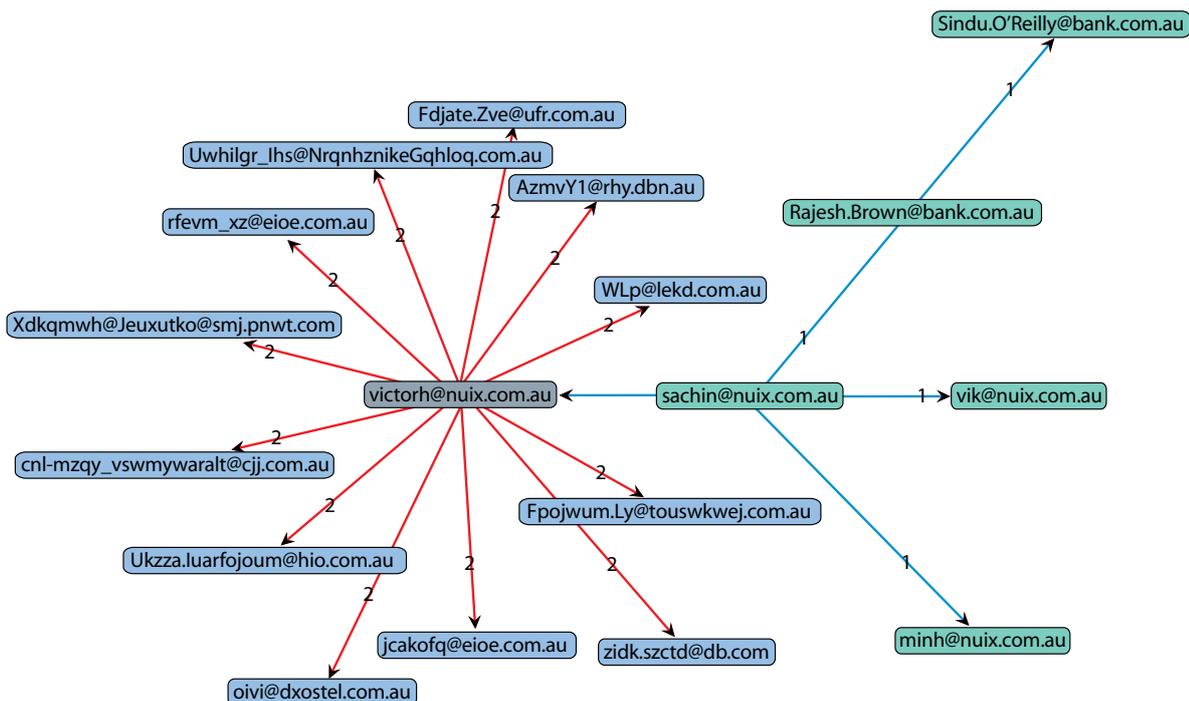


Diagram A: Shows a person of interest (Victorh) and his social network, as related to a single investigation.

Identify 5 or 10 records which are central to a case

Find thousands of documents to support the context

CASE STUDY:

Fred Olsen, the Litigation Support Manager for USIS LABAT, applied these ECA principles in a textbook investigative review of 700 GB of material for a United States investigative agency. He processed the set in a single day and immediately began searching key terms, date ranges and custodians with the goal of dividing the data set. He took those smaller sets and distributed them to appropriate members of the review team. At a pace of 150 documents per hour, the review ultimately took days instead of weeks or months.

Outside of the US, litigation support service providers such as PricewaterhouseCoopers, EPIQ, and Deloitte have achieved similar results in Moscow, Luxembourg, London, Brussels, Bucharest, Dubai, Frankfurt and Zurich.

6. NAVIGATE AND ORGANIZE THE DATA IN SECONDS

Given its potential to influence the entire timeline, a critical element to successfully investigating your case is the ability to interrogate and navigate the data in real-time.

Clearly, the most powerful tools lawyers and investigators have for eDiscovery are their brains and their instincts, but most tools do not enable them to use either effectively. The ability to quickly navigate and interact with data is very potent as it permits seamless legal analysis during the earliest stages. Any useful eDiscovery tool must be able to work quickly and flexibly enough to keep up with and adapt to the thought process of the person using it.

For example, during the course of an investigation, an idea may jump out of the data. You don't want to lose your train of thought, but you want to be able to quickly read through potentially related documents and email threads. You might also want to quickly tackle an entire collection, with simple searching and grouping of documents. This will enable you or someone else in the team to return for a more thorough review at a later time.

7. SEAMLESSLY ADD ADDITIONAL SETS OF EYES

There comes a time in every investigation where you simply need more eyeballs to look at the various groups of documents. After you have achieved an initial organization of your thoughts, it is important to bring in additional people to look through some of the actual documents for extra information.

This isn't yet a full review, but rather an extension of the initial investigation. For example, it may be that one lawyer or investigator is directed to look through one specific pile because it looks like they are related to a particular project. Using simple and advanced technology to facilitate this process ensures that you can quickly and effectively control and organize how you work through the "piles" of documents, no matter how many there might be. It also means that you can easily and defensibly audit the activity if required.

8. UNDERTAKE A RAPID FIRST PASS REVIEW

A key element of undertaking an effective first pass review is dividing the data into smaller parcels and distributing them to appropriate attorneys who can undertake fast analysis. The review team should be looking for results which are relevant to the legal team's strategy, rather than the elusive singular clue to solving the entire case riddle.

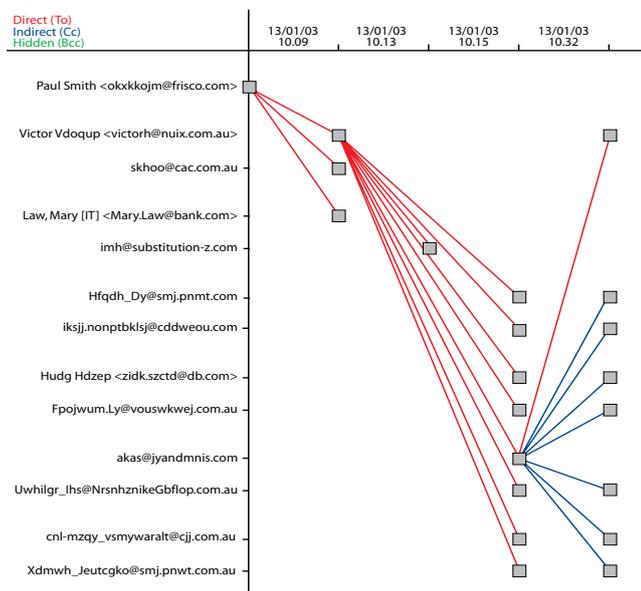


Diagram B: Displays how a piece of evidence was distributed both across an organization and externally over a period of 23 minutes.

The ability to quickly manipulate and interact with data is very potent as it permits seamless legal analysis

9. CONSIDER THE METADATA AS WELL AS THE DATA

It is critical that legal teams study the metadata as well as the document/email content to determine whether you can rely on a particular piece of evidence. For example, if the signing date of a contract precedes the date on which it was created, it is likely that the contract was created after the fact and predated to make it look authentic. The strength of a matter will often depend upon these metadata specifics and indeed, they are the first things that regulators look for in contract investigations.

To give a recent real-life example, a high profile case related to an allegation of an illegal stock trade being made by the managing director of a bank was proved via the metadata. It showed that, contrary to his claims, emails were indeed sent via his Blackberry and correspondingly received by his broker. It was the Blackberry's metadata codes found on the managing director's handset, the Blackberry server and the broker's email server, which proved the regulator's contention that he had indeed breached insider trading rules. Most eDiscovery tools provide only basic metadata, but it is often the more detailed, harder-to-find information, which provides the critical evidence.

10. ITERATE THE PROCESS

Investigative review and ECA are most effective when you can rapidly iterate and evolve the *Five Ws* and expand or narrow the scope of your investigation as warranted by the facts. In a traditional approach where you have locked in your custodians, keywords and timeframes, your hands are tied. You will be forced to make decisions based on statistics, not facts.

An iterative approach enables you to shape the investigation, prioritize your custodians, scope and re-scope your time range based on the information that you uncover, and expand or narrow the content and the team as your case evolves.

CONCLUSION

By thinking strategically, harnessing the most advanced technology and applying human intelligence to each stage of the ECA process, it is possible to understand the key facts, documents and context of a case very quickly.

The investigative review techniques described in this paper enable talented legal professionals to use their skills to full advantage, improving outcomes for themselves and their clients.

INVESTIGATIVE REVIEW – TEN KEY STEPS

- 1 Understand Your Case
- 2 Undertake Fast, Targeted and Forensically Sound Collections
- 3 Use Fast and Scalable Processing Tools
- 4 Use Targeted Searches to Thoroughly Investigate Your Case and Key Custodians
- 5 Establish the Context of Your Key Facts
- 6 Navigate and Organize the Data in Seconds
- 7 Seamlessly Add Additional Sets of Eyes
- 8 Undertake a Rapid First Pass Review
- 9 Consider the Metadata as well as the Data
- 10 Iterate the Process

FURTHER READING:

1. *eDiscovery Data Processing as a Critical Bottleneck in Litigation*, Chris Dale and Nuix, November 2010
2. *The Bastardization of Early Case Assessment and the Emergence of Rapid Investigative Review*, Eddie Sheehy and Stephen Stewart (Nuix), June 2010

Find these and more at www.nuix.com

Does the metadata substantiate your evidence?

Do you need to search deeper for more evidence or context?

RAPID EARLY CASE ASSESSMENT WHICH FINDS EVIDENCE FAST

Nuix solutions for in-house counsel and law firms offer unrivalled speed to provide answers to clients in record time, scalable solutions to handle the smallest or largest cases and a powerful technology platform that lets legal professionals use their expertise to full advantage.

Nuix's Rapid Investigative Review™ is powered by the Nuix eDiscovery platform:

- Loads, processes, and makes email and data available for search – from multiple GBs in minutes to a TB overnight
- Allows attorneys to immediately interact with the data: investigate key custodians, follow leads, develop a fact-based case strategy and organize topics for detailed investigative review
- Easily scales the review to multiple attorneys, each investigating a specific fact pattern
- Transitions to a linear first pass review to ensure that all the necessary documents receive a detailed review.

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