



## DISCOVERY DISPUTE SUPPORT

It is becoming increasingly-common for litigants to strategically utilize the Federal Rules of Civil Procedure (FRCP) by claiming inclusion of electronically stored information (ESI) in discovery would be disproportionately burdensome to the producing party. Having a legally defensible method to estimate the cost of production, as well as the supporting documentation and expert testimony is crucial to an organization attempting to make these claims.

What is needed is a better method for estimating cost that will acknowledge that a range of values is possible and further identifies the values within that range that are most likely to occur.

### THE SITUATION

Organizations are strategically utilizing changes to the FRCP to cut costs in preservation, such as claiming information as not reasonably accessible. The not reasonably accessible claim has been applied to ESI maintained on older media using outdated or obsolete technology and/or ESI generated by proprietary software, both making the export of any discoverable ESI very difficult and costly. It is generally accepted that any/all ESI is “accessible” in theory and it therefore is a matter of the effort and expense required to restore it. The factors involved in developing a cost estimate to restore the ESI vary greatly, are difficult to subjectively estimate, and are highly sensitive to relatively small fluctuations.

While it may be possible to improve the estimates of the variable factors by cataloging and/or sampling, it is always the case that most of these factors have a range of reasonable values. With the bottom line highly sensitive to some of these factors it follows that individual calculations can result in values that may differ widely. It would be possible to run a series of calculations using the reasonable ranges of the input factors, but the result will be a range of values that can be quite large.

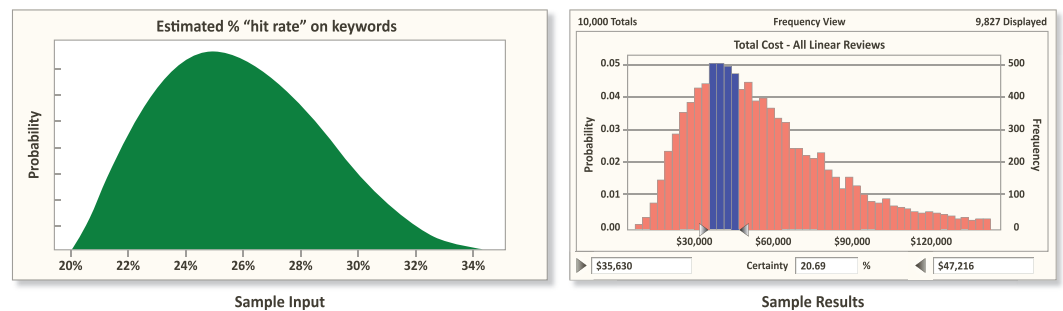
This creates an unusual and awkward situation for the court, when asked to judge the proportionality of the dispute, which often results in experts, each relying on their reasonable assumptions and providing testimony which is vastly different. Judges, who may lack technical knowledge and experience with e-discovery, are left to determine the credibility of testimony or they order the parties to a Special Master or Neutral Expert, which can add time and expense to both parties and further delay progression of the case.

### THE SOLUTION

Scarab Consultants offer a newly-developed method of estimating cost that addresses this dilemma. The method, based on probability analysis and the Monte Carlo method, has been said by judge(s) to have “solved” the problem. The method consists of two steps: (1) define the range(s) of the input variables and the most likely values therein, and (2) perform a series of calculations encompassing these ranges and arrange the results in a manner illustrating the range of outcomes and their respective probability of occurrence.

The appeal of this method lies in its inherent defense against manipulation of the results. Although the results can be somewhat sensitive to any particular subjective input range, the output results will not be significantly changed without heavy-handed skewing of multiple input criteria.

Scarab delivers a document describing the estimating basis used, calculation model, methodology, input criteria, and results, and consultants are available to provide supporting testimony if necessary. The following illustration is a sample input distribution and the resulting sample output distribution. The blue section of the output distribution indicates the estimated cost range with the highest probability of occurrence.



## THE BENEFITS

Discovery Dispute Support from Scarab Consultants provides the necessary foundation to make a not reasonably accessible claim. Benefits include;

- ✓ Legally defensible calculation method to support burdensome cost claims
- ✓ Supporting documentation of input criteria and results
- ✓ Reduced costs and time of e-discovery production
- ✓ Supporting expert testimony
- ✓ Better negotiation of e-discovery protocol
- ✓ Reduction of time and costs spent on unnecessary discovery activity

## ABOUT SCARAB CONSULTING

Scarab Consulting provides global, results-driven, litigation and investigation oriented discovery services including collections, social media surveillance, processing (electronic and paper), hosting, managed review and court reporting/ deposition services to corporations and their law firms, managing the risks and cost before and during litigation. Scarab Consulting's professional consultants utilize their industry-proven experience inside large corporations and law firms to provide proactive, legally defensible and technically sound services relative to information governance and litigation preparedness. With a suite of fixed-priced consulting solutions, Scarab Consulting is able to custom design a solution to fit each client's needs. Legal/technology driven solutions for litigation and e-discovery including electronic data processing, review, and hosting, as well as document scanning and coding, help increase efficiency and reduce costs for organizations. Powerful technology enables Scarab Consulting's Social Media Surveillance Services to monitor web sites and collect information related to the issues and target individuals associated with a particular matter. In addition, Scarab Consulting provides accurate, timely, and quality court reporting and deposition services delivered by a highly qualified, dedicated Scarab Consulting case management team. Scarab Consulting's alliance with numerous technology providers ensures that the industry's best practices e-discovery and litigation tools are utilized, guaranteeing the best possible solution for every client. For more information, go to [www.consultscarab.com](http://www.consultscarab.com).