

“Thinking of Bringing eDiscovery In-House? Understanding the Risks and Costs of In-House eDiscovery”

The Problem – Data Volumes and Costs Continue to Grow

Regulatory investigations, audits, and lawsuits are increasingly on the rise. The “old” days of paper discovery are no more. The Sedona Conference – an eDiscovery think-tank – estimates that as much as 93% of all information created by companies today is created electronically¹. (It’s only converted to paper once attorneys are involved!) As such, insurance companies particularly need to accept this reality and understand the implications and complexities that modern discovery brings.

The single largest expenditure in discovery today is related to having attorneys review documents for responsiveness and privilege. According to a recent publication by the Rand Corporation, document review accounted for 73% of the costs of producing electronic documents in litigation. The collection² of electronic documents – physically locating and copying them for use in litigation – accounted for 8%. Processing³ electronic files made up another 19% of the total cost. Pricing for eDiscovery services – processes, database hosting, and productions – has steadily declined in recent years, and new entrants to the market bring new pricing models. However, the cost to process data can still be quite significant when large volumes are implicated. Corporations that have consistent litigation can see significant bills for processing the same data for multiple cases and reviews.

Aside from the major components outlined above, other costs – sometimes referred to as hidden costs – can contribute to the overall eDiscovery budget. This is particularly true when service providers are engaged. Project Management fees, storage costs, technical time and other fees can seem minimal when reviewing a statement of work; however, those fees can quickly add up once a project gets underway.

¹ The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (January 2004).

² The Electronic Discovery Reference Model (ERM) defines “collection” as the gathering of ESI for further use in the e-discovery process. <http://www.edrm.net/resources/glossaries/edrm-metrics/collection-phase>

³ The Electronic Discovery Reference Model (ERM) notes “Some primary goals of processing are to discern at an item-level exactly what data is contained in the universe submitted; to record all item-level metadata as it existed prior to processing; and to enable defensible reduction of data by “selecting” only appropriate items to move forward to review.”

<http://www.edrm.net/resources/guides/edrm-framework-guides/processing>

The “Solution” – Just Do It

Many companies are tempted to reduce costs and some of the burdens associated with eDiscovery by taking control of the process. However, in my experience, companies have moved too quickly to do so, without considering all of risks and issues associated with essentially becoming its own eDiscovery vendor.

Companies must consider a number of variables when bringing eDiscovery in-house. Does the company have the staff to handle multiple matters and meet outside counsel deadlines? Is its IT department adequately informed on the network issues and server space impact that it will bring?

The Ethical Challenges and Common Problems

Problems arise even when the most competent outside vendors are engaged and attorneys with significant eDiscovery experience are on the case. Clients who seek to control costs by internalizing operations may unwittingly be setting up for failure. From lack of training and experience with the tools and procedures used, to failing to recognize the time issues involved, corporations must adequately consider a host of issues before pulling the trigger.

Creating and performing productions on tight timeframes and on complicated data sets opens the door for incomplete or inadequate productions – innocent or inadvertent as it may be. The *Qualcomm*⁴ is an example of the consequences on the most extreme end of what can happen as a result.

The inadvertent waiver of privilege in eDiscovery poses a significant risk in all eDiscovery matters, but particularly in those with significant volumes of data. Does your internal process include measures to identify and segregate potentially privileged documents based on in-house and outside counsel email and domains?

The revised ABA Ethics Rules expand the concept of “competence” to embrace technology. In 2012, the ABA Model Rule 1.1 was amended to include: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

⁴ *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7), *vacated in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

Choose Wisely – What to expect when you choose to bring it in house

DIY – Do It Yourself - models have become commonplace across all industries, including the legal community. It is understandable how the potential cost-savings and in-house management can be tempting, although you must be aware of the downfalls and the preparation needed before taking these projects in-house.

As with any DIY project, you should create a corporate user guide or handbook that identifies the team who will be put in place to carry out the project. Additionally, workflows and directions should be developed in that handbook and shared amongst the organization to decide whether bringing the work in-house makes sense from a cost, resource and implementation perspective. The book should be shared with all the departments that will ultimately be involved in a discovery project - including but not limited to legal, IT and HR.

The exercise of putting this book in place may reveal that a DIY model for eDiscovery may not be the right solution for the organization, or it might reveal that a hybrid in-house and outsource model might be a better mousetrap to build.

Requests for proposal are challenging because they typically don't lend themselves to an apple-to-apple comparison. Services provided and pricing structures don't fit neat boxes or line-items that can be easily compared and reviewed. Therefore, sometimes the best way to proceed with these requests are to test software and services with table top exercises or mock projects, which would also include factoring the pricing into the review of the exercise. Choosing random custodians, collecting data and processing and reviewing the data will offer tangible results that could be reviewed for cost-effectiveness and efficacies of the solutions.

It is critical to establish a team ahead of time who can be the eDiscovery squad. The team should include representatives from various departments and they should all be assigned roles and responsibilities that are realistic given their current workload.

Most importantly, to the extent there is a captain on the team, one individual should be assigned the task of being responsible for issuing the legal holds and also releasing the legal hold when appropriate. Legal holds are usually the first response when there is an event and assigning someone to be responsible for the issuance, management and suspension of the legal holds is critical if you are going to handle the discovery process in-house.

As you would review the capabilities of any vendor, you need to review your own capabilities as an organization, which would include the expertise of the in-house

members who would form the team, the ability of the available technology to handle potentially large amounts of data and/or complex data and the number of locations where data is typically stored. To the extent data is stored in remote locations, including the cloud, it is critical to understand before there is an event whether an organization would be able to handle the data collection on its own without suffering too much business interruption.

Additionally, as you would require any vendor to carry insurance, it may be relevant to consider your own insurance program, should you decide to bring eDiscovery in-house. Any errors incurred by your organization in the management of eDiscovery, including document review by in-house lawyers, could potentially lead to a loss for which you may need first party coverage. Alternatively, in-house counsel covered by traditional lawyer professional liability policies may look to add coverage for document review services.

Alternatives to the All-In Model

While cost may be the driver to trigger the option to insource eDiscovery, outsourced expertise and bandwidth may underscore the option to take it outside the confines of the organization. An organization may simply not be able to handle the voluminous data in-house and the distractions away from the ordinary course of business eDiscovery requires may outweigh the cost benefit, and in some instances, result in more costs than originally anticipated.

The decision does not have to be all or nothing. A hybrid model may be an excellent course of action to balance all the factors that need to be considered. Assuming that the EDRM model outlines the generally-accepted steps in the eDiscovery process, dividing those steps between the in-house team and outsourced team might be a cost-effective solution that balances the risks appropriately.

Typically, the left side of the EDRM model which includes identification, collection, and preservation would require deep involvement from the organization – regardless of whether it's insourced or outsourced, so these steps may prove to be the right ones to handle in-house completely. Processing and reviewing data requires advanced technology, expertise and time, and may be better suited to be handled by specialists in these areas which include vendors and law firms.

Either way, the decision to insource or outsource must be reviewed periodically and can be changed as circumstances dictate. As technology advances, the Federal Rules continue to be updated, and an organization's litigation profile continues to evolve, what may be appropriate for an organization one year may not be appropriate in the future.