

Keeping Up With Evolving E-Discovery

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Inside Counsel

As the digital universe continues to evolve—unleashing new forms of communication and innovation, while simultaneously creating a vast footprint of electronic data—law departments struggle to maintain an efficient, affordable e-discovery approach. In the not-so-distant past, it was common for companies to delegate the entire e-discovery process to outside vendors and law firms. These days, many budget-conscious legal teams are reassessing the costs of outsourcing, opting instead to bring e-discovery in-house.

Getting Started

When first developing in-house e-discovery strategies, general counsel must consider company needs, the involvement of other business units, and how much and which parts of the e-discovery process to bring in-house.

Mark Diamond, founder and CEO of Contoural Inc., a consulting firm focusing on records management and litigation readiness, compares the different in-house e-discovery approaches to forms of transportation, urging companies to decide if they need a "Cadillac, Chevy or walking" strategy. For companies with sizeable legal departments and large litigation needs, going "Cadillac" and insourcing most or all of the e-discovery process might be appropriate. But for most, a less-inclusive "Chevy" strategy, which brings parts of the process in-house while continuing to outsource some aspects, is more suitable and cost effective.

"A lot of companies today are walking, meaning that when litigation strikes and there's a duty for discovery, they're completely dependent both on their outside law firm and their outside e-discovery [vendor], and that can get very, very expensive," Diamond says. "Do you need the Cadillac, Chevy or walking strategy? It's going to be based on your litigation profile, your regulatory environment and some other factors."

Diamond says all companies looking to bring parts of the process in-house should start with the left side of the Electronic Discovery Reference Model (EDRM), which includes identification, preservation and collection of discoverable information (see page 62).

"Which steps you want to do in-house are going to vary, but at the end of the day you're going to have to do identification, preservation and collection," he says. "You have to know how to do an effective, defensible legal hold, for example."

True Team

Experts stress that before any portion of e-discovery can be brought in-house, legal departments must cultivate meaningful relationships with their corporate IT departments. Frequent meetings about e-discovery will help both departments recognize their different decision-making styles, tempos, personalities and jargon.

"There's inherent tension between the legal department and the technology department. They speak two completely different languages," says Anthony Reid, national practice leader, discovery advisory services at Deloitte. "What I typically recommend is that IT and legal get together to help each other

understand from the other's perspective why e-discovery is important and discuss some of the challenges that one faces from both a legal perspective and an IT perspective." Reid says his company often brokers such conversations to help companies create the framework for a sound e-discovery plan.

"You really have to bridge the IT team with the legal team and records management and information governance," echoes Jim McGann, vice president of information discovery at discovery solutions provider Index Engines. "The successful projects fall in place when the IT organization and the legal counsel build a methodology and a process. There definitely needs to be a team that's put in place."

McGann and other e-discovery experts say that if companies don't feel comfortable developing these methodologies, they always have the option of hiring consulting organizations, many of which have experience helping law departments develop a playbook for bringing e-discovery in-house.

Adam Feinberg, vice president of professional services at BIA, a data solution provider, recommends that companies that are serious about taking control of e-discovery consider bringing in an expert—such as someone with law firm or consulting experience centered on e-discovery—as part of the law department. Having that expertise on the team can be invaluable in navigating the hurdles of beginning an in-house e-discovery plan.

C-Suite Approval

Regardless of how a company approaches the e-discovery planning process, Diamond emphasizes the importance of a thoughtful pitch to senior management when justifying the initial cost of such an endeavor.

"There are three steps to the best pitch," he says. "Step one is that legal needs to build a consensus with IT, compliance, audit and risk, and identify this as an issue that multiple organizations have a stake in. Second, when presenting it to senior management, talk about this as a risk/cost-benefit analysis. The third thing you want to do is break this up into pieces. Too often, organizations make this one big project, and the problem is that it's hard for organizations to execute big projects internally."

Survival of the Fittest

One of the worst mistakes a legal department can make is selecting e-discovery software on its own without consulting IT. "IT departments are used to evaluating, analyzing and purchasing software—lawyers are not," says Jake Frazier, managing director at Huron Consulting Group, a provider of discovery consulting services and solutions. In some cases, legal departments will inadvertently purchase "off-label e-discovery software," or software that is marketed as an e-discovery solution but was actually built to perform another task, such as simply locating or providing electronic imaging of documents. "If it wasn't tested for the rigors of e-discovery, it's not going to work, and it could be a disaster," says Frazier, noting that inexperienced software buyers could spend \$1 million on software that, unbeknownst to them, requires an extra \$2 million to work properly.

Michele Lange, discovery product manager at Kroll Ontrack, a company that provides e-discovery consulting services and products, agrees that software decisions should be made jointly between the departments. "I've seen a lot of situations where IT has purchased something and legal won't use it because they weren't involved and it doesn't meet their needs," she says. "At the same time, I've seen legal drive a decision to purchase something and IT refuses to support it or to assist with maintaining it."

Number Crunching

The biggest problems arise when legal teams underestimate the total cost and commitment of bringing e-discovery in-house. "You have to keep in mind that you have hard costs, such as technology and hardware or software, as well as people costs, in terms of having to staff up your organization," Reid says.

Experts encourage in-house teams to consult with their companies' IT and accounting departments to solidify a workable budget and accurately compute costs.

"Most CIOs have an actual template that they use to calculate total cost of ownership—things like how many people something will take to run, how much storage, how much it is going to cost to back it up," Frazier says.

Costs can skyrocket when companies bring large data-storage appliances and other pieces of hardware in-house. "There are lots of reasons as to why it may be risky to put a piece of technology behind your firewall," says Lange. "That hardware needs to be maintained by someone, and you probably will have to hire some sort of database administrator to run that appliance. You also need to think about what happens when you reach your capacity. There are some fairly big limitations with regard to scale and expertise to set up and maintain any piece of hardware in house."

In terms of staffing, assessing your true e-discovery workload will help prevent unnecessary spending. "Some companies make the mistake of going too big. They spend millions of dollars to get an in-house e-discovery group—they'll hire experts and get the software. And then they'll have no cases for nine months," says Frazier. "So those people will sit around and have nothing to do."

Sticking to the Plan

What distinguishes a successful e-discovery program from an unsuccessful e-discovery program is a thorough outline of policy, procedures and practices.

"The successful companies have a program that is well defined—it's in writing, there are process flows, a data map and a discovery manual that addresses the individual responsibilities of each member of the e-discovery team," Reid explains.

Companies that create haphazard plans with unclear responsibilities are asking for trouble. "People don't know what they're supposed to do when an event occurs, and they're making it up on the fly in a way that could cause detriment to the collection, preservation and production of data," says Reid.

When a matter arises, it's imperative that all members of the cross-functional task force adhere to the plan to avoid mishandled or permanently deleted data that can ultimately lead to severe repercussions.

"There are sanctions a judge can issue against a corporation, and in some cases its attorneys, if the e-discovery process isn't executed appropriately," Reid says.

Lange says she frequently sees companies facing consequences for accidental data deletion. "If you are working with original source data and you do something wrong and data is erased or lost forever, a court may see that as spoliation and start asking questions about whether that was intentional or not," she says.

Solution Evolution

Deciding to insource e-discovery does not necessarily mean cutting all ties with previous vendors, law firms and consultants. For most companies, the goal of in-house e-discovery should be to tackle portions of the process in a way that saves money and time, and in a way that can be appropriately managed, measured and tweaked to perfection for defensibility.

Experts say a blended approach to e-discovery, which involves outside vendors and consultants in addition to a strong in-house process that uses the appropriate technology, is the wisest option for most companies.

"It's about trying to find the right blend," says Frazier, who adds that there are several ways to set a threshold of the kinds of matters a company wants to handle in-house. "Some companies base it on size—they'll handle anything under 50 gigabytes. Some companies use the amount in controversy—they'll handle anything less than \$200,000. Some companies do it by types of cases—they'll handle civil lawsuits, but will use a neutral third party for government investigations."

Software Offerings

The software solutions available to companies looking to move part or all of the e-discovery process in-house are evolving to keep up with growing demand to address more aspects of the EDRM internally. Historically, solution providers have been very specialized, offering support for only one or two parts of the EDRM. Now, experts say the trend is to expand offerings, a move that can help law departments by reducing the number of providers and the frequency of moving data.

"There are certain boxes of the EDRM model that it makes sense for companies to capture," says McGann. "With partnerships and integration of technology, you're going to see [e-discovery support] companies stretching out, and that's going to add to the cost efficiency for the end users. The challenge in terms of cost and time that companies are seeing is really about moving data. So if data can stay within specific platforms and not have to move around frequently, that's going to be a benefit for the end-user."

Diamond says there are four categories of solutions that companies should be looking at: archiving products, legal hold products, collection and e-discovery products, and analysis and review products.

"Very few products cover all four parts of the solution," he says. "So most organizations are going to be looking at buying multiple products when they want a complete in-house e-discovery solution. Among these four components, there are probably 40 or 50 different products, and all of the vendors who have capability in one of those four areas are expanding to get capabilities in other areas, so it gets a little bit confusing about who's in what space."

Experts agree that while the technology may be intimidating to corporate legal teams, the times are changing, and in-house lawyers previously resistant to tackling e-discovery must now come to terms with learning new terminology, procedures and software. In order to succeed in creating a workable, defensible e-discovery strategy, general counsel must develop a focused plan that centers on collaboration and clear goals. Theresa Beaumont, global e-discovery counsel at Google Inc., says legal teams that approach e-discovery in an organized way at a steady pace will succeed.

The important thing is to begin somewhere and take a reasonable approach to solving a particular e-discovery problem in-house, conduct a cost-benefit analysis against that process and have outside counsel weigh in on defensibility," she says. "Even if slow, progress will be made."