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In-House EDD: Pot of Gold or Can of Worms?

Bringing electronic discovery in-house has its benefits and challenges

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Is there a pot of gold at the end of the e-discovery rainbow?

As the amount of litigation, regulatory and compliance-related e-discovery grows to epic proportions, some law firms are wondering whether it's time to make capital investments to bring e-discovery processing in-house rather than outsourcing it to vendors.

In fact, many firms have instituted far-reaching initiatives to address the burgeoning need to deal with e-discovery file processing and have planned significant technological, infrastructure, operational and capital investments to facilitate their own e-discovery workflow. Some firms see these expenses as necessary to facilitate their core business, but others find that the operational and capital outlays allow them to create e-discovery profit centers in their organization.

For firms with in-house e-discovery processing capability, benefits include greater consistency of document-production methodology and better cost control. As for those firms with a primary impetus to change cost centers to profit centers, a host of metrics supports their decision. Recent e-discovery market-growth statistics indicate that about 33 percent of an estimated \$233.4 billion (\$77.02 billion representing the sum of claimants' and defense costs) was spent on attorneys' fees and litigation-support related activities in 2002. Last year, the number rose to \$253.2 billion. "Productized" off-the-shelf e-discovery package processing began in the late '90s with annual revenues of about \$40 million for the AmLaw 100. These numbers alone are often enough for many firms to make the foray into the arena traditionally reserved for litigation-support service providers.

WHEN DOES IT MAKE SENSE TO BRING IT IN-HOUSE?

The salient questions for many firms are:

- What is the threshold revenue point at which to make an investment in processing capability?
- Does the way the firm recaptures or passes through expenditures on e-discovery to clients leave anything on the table?

Your firm may be spending \$500,000 on discovery per year. At that level, it may be worth bringing the work in-house. There's an obvious attractive opportunity for law firms to add e-discovery capabilities in-house, because it theoretically opens a new -- potentially substantial -- profit center, and can have a significant impact on revenue for many firms. Simply put, a lot of money can be made (or saved) by adding or augmenting in-house capabilities. This in itself can be very enticing and law firms need to look at the whole picture before embarking on this journey, because such a decision can be fraught with risk and should not be taken lightly.

TASK AT HAND

There is a substantial difference between "some ability to perform in-house e-discovery services" and managing an entire

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e-discovery project from end to end. While not all processes described below may be invoked in every project, firms taking on the task of e-discovery project lifecycle management must have rigorous:

- Evidentiary document data assimilation guidelines;
- Judicially noticeable or acceptable document analysis and normalization methodologies;
- Judicially noticeable or acceptable objective culling of electronic evidence data methods;
- Efficient coding and indexing-strategies guidelines, methodologies and considerations;
- Subjective-review methodologies of electronic evidence and documents;
- Abilities to manage multiparty document productions; and
- Abilities to use trial technologies in war rooms and courtrooms.

To make the proverbial rubber meet the road in providing end-to-end in-house solutions, firms must at a minimum have the framework outlined above in place, and be able to execute on the functional levels listed below. For example, a typical e-discovery project has these basic tasks (although no two electronic-discovery projects are substantially alike). They are:

1. Scope. Figure out what data must be collected to respond to a request.

2. Computer forensics and data collection. This is the forensics piece of gathering the data while retaining critical evidentiary information, such as chain of custody.

3. Data review/culling. The initial phase of reviewing the data to determine whether it's relevant and responds to the request, and culling out nonresponsive or irrelevant data.

4. Data processing. Converting the information into a standard viewing format (TIFF, PDF, HTML, native, etc.) and organizing it for further review.

5. Production review. Reviewing the processed data for litigation-related categories such as privilege, confidentiality and relevance.

6. Production. Putting the data into a format (paper, image and data files, or native files) as the response to the request.

For each of these elements, there is a role to play for attorneys, paralegals, in-house litigation-support departments, vendors and consultants. It is up to the internal personnel of a law firm, in conjunction with its client, to determine which of these elements the client should handle, which the firm should handle and which should be outsourced. Often, the most prudent decision is to engage a data lifecycle-management consultancy from the onset. There is no right or wrong answer, but confidentiality, accuracy and cost are all relevant considerations.

WHAT IT TAKES TO DO THE JOB

Certain e-discovery projects are well suited for in-house processing -- small, loose e-file collections, and MS Outlook-based e-mail and attachment analysis, for example. If the e-discovery project falls outside these specifications, then a firm should consider outsourcing the project to an organization with the requisite competencies.

The annual cost to create an infrastructure internally that can process 20 gigabytes of e-discovery data weekly is about \$650,000 (given a firm's existing IT infrastructure), including people, hardware and software. The high-level breakdown follows:

- **People:** Six -- one litigation support manager, four analysts/project managers. Cost equals \$300,000.
- **Hardware:** Four to five high-end servers with high-capacity tape devices and workstations (1 + terabytes RAID or comparable shared storage), printers and computer peripherals. Cost equals \$200,000.
- **Software:** A combination of off-the-shelf packages with various tools to address data-encryption issues or proprietary file and media types, or both. Cost equals \$150,000.

Keep in mind that this is in relation to today's market price for processing 20 gigabytes of data a week for a year and is an approximate cost estimate. The annual open-market processing cost averages about \$2.4 million (this may vary widely as a result of competitive pressures and price volatility), which includes conversion to TIFF, data and metadata extraction, and various search capabilities.

If firms purchase the correct software and have an IT department that understands e-discovery, then there's no reason why they can't do simple conversion projects in-house.

CAVEATS TO DOING E-DISCOVERY IN-HOUSE

A law firm first must consider the potential conflict of interest if it has to provide expert testimony regarding chain of custody for digital data obtained in a case. Processing and accounting for digital data is not like running piles of paper through a copy machine. If a firm does any kind of digital-data handling or processing, it must be able to explain and defend what it did, if challenged.

Another factor to consider when a firm invests in e-discovery services infrastructure is that software tools will evolve. There will be improvements, shortcuts and upgrades predictably per quarter, if not more frequently. While vendors are more able to scale their resources to respond to fluctuating revenue streams that come from project-based litigation work, law firms need to upgrade, retrain, redistribute and constantly accommodate -- or they will be out of the game. It becomes a continuous expense.

The ebbs and flows of litigation also have an impact on staffing levels. e-Discovery data throughput largely depends on hardware and software scalability, but when discovery includes paper processing, such as document scanning and coding, scalability is effectively a human-resources function. Vendors that provide e-discovery and paper-discovery processing services have found ways to smooth out the peaks and valleys in order to remain in business. For example, e-discovery and litigation-data lifecycle-management vendors such as Planet Data Solutions, National Data Conversion, Syngence and CaseCentral offer e-document production and management solutions to the financial verticals, and retain highly experienced production staff. If a firm finds that it needs to lay production staff off, then scaling up again for big litigation will require recruiting and more training. Perhaps this isn't the most effective way to manage the business of practicing law.

WHEN TO OUTSOURCE

It takes a lot from an organizational and business perspective to build, support and manage an e-discovery processing center. Counsel manages the delivery of legal services on the client's behalf in which costs, strategy, policy and outcomes are largely contingent on counsel's decisions. Many firms recognize that to reap the maximum return that their specific competencies afford them, they must leverage those of others and hire vendors that are experts in a particular area, namely complex technical discovery management.

While some small e-discovery projects are well suited for in-house production, certain projects fit the outsourcing mold. These projects include:

- High-volume projects that are beyond in-house capacity;
- Complex projects that are beyond in-house expertise, such as complex spreadsheet analysis and data extraction;
- Data conversion, such as standardizing data from different hardware and software platforms to a common format; and,
- Computer forensics, such as data extraction from legacy data hardware and software formats.

If a firm's litigation-support department engages in e-discovery projects, it should not offer forensic preservation /gathering of data. It's a good idea to bring in an outside consultant for this process because: a) it requires technical expertise and that the firm be equipped with the hardware/software to accomplish a task; and b) the firm needs to be qualified as a testifying expert in this area. In many cases, clients deliver high-capacity optical or magnetic storage media with disparate data types that must be reviewed and culled again for production. It is imperative to recognize that some projects are beyond in-house capacity and capability, and at that point, the firm should find the best vendor for the job.

One often-overlooked area when a firm is in the process of providing more client services is the need to involve human resources and the different operating groups in the firm. Failure to do so can result in internal organizational culture clashes, which can undermine even the best-laid course of action.

WHAT TO LOOK FOR IN A VENDOR

A plethora of vendors exists that understand the issues of privilege and confidentiality, and that can handle e-discovery chain of custody.

To achieve optimal results you need to: 1) truly partner with the outsource vendor by bringing the vendor into the case by explaining not just the project specifications, but also the issues involved (and this usually means bringing the vendor in early enough to have time to assist the firm in this regard); and 2) selecting a vendor not purely on cost, but also on quality (expertise, knowledge, processes, etc.).

When choosing a litigation-support service provider, look for the following:

- **High-quality service.** Empathy plays a role here. If the company has management with significant experience dealing with litigation and e-discovery projects, then the chances of smooth sailing are much greater.
- **Impeccable reputation, good references.** Talk to other firms and see what they're saying about the company. Trust should be a keyword in that discussion.
- **Fairly priced.** Sometimes it's hard to compare apples to apples, but pricing should be clear, concise and have no room for surprises.
- **On-schedule delivery.** Have a large-capacity threshold and be able to "scale up" at a moment's notice.
- **Able flexibility.** The vendor can work when needed and respond to unforeseen demands — there really is no standard project when it comes to litigation support; the vendor needs to be flexible and advisory.
- **Excellent technical and operational capabilities, along with understanding of unforeseen demands.** Experience is about the only thing that can help manage this aspect of litigation.
- **Secure data-delivery system; files that load properly.** Make sure a vendor test loads files/CDs, because it will mean less work and headache when fighting deadlines.
- **Financial flexibility to do tactical pricing.** If many projects are going to the vendor with similar specifications, then talk to the firm about strategic project planning and strategic pricing options.
- **Critical mass of work to carry assets and invest in technology.** A steady workload insinuates a steady company, one that will be worth the time and effort needed to develop a relationship.
- **Experienced labor pool.** Personnel who are well trained, and well conditioned for the task at hand.

Each project should be carefully scoped and analyzed before a decision is made to do it in-house, or to outsource -- or to do some of each. It's not wise to make a universal decision to do one or the other (in-house or outsource) for all cases. Advances in technology come from all players: the vendors, the law firms and corporate counsel. A firm should have some ability to perform in-house e-discovery services for easy file-conversion, data-extraction and review projects. A firm should also engage a consultant to vet capabilities of prospective vendor partners to help handle projects outside the scope of firm capabilities, capacity and expertise.

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