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Expert Analysis

In-House vs. Outsourcing: What's the Best Method to Streamline Your Company's e-Discovery Processes?

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Personal computers began to enter the workplace in the late 1970s, soon after companies began to move from mainframes and UNIX terminals to networked PCs. The late '80s and early '90s brought the infancy of the Internet, and just prior to the millennium, Web browsers and a surge in the use of e-mail for communication and the exchange of communications.

As the falling cost of storage coincided with the rising ease of content creation, this new media for discoverable material grew, and predictably, disputes erupted. The frequency of these disputes and the cost of managing electronically stored information created new issues for the courts as litigants abused the high cost of discovery of ESI in efforts to create new economic burdens. The judiciary responded with changes to the Federal Rules of Civil Procedure in 2006.

"E-discovery" is somewhat of a misnomer for the process of discovery during legal events. Since parties now maintain records and correspondence electronically (e-mail), there is a vast trove of discoverable information that did not exist in the past. Fortunately or unfortunately, people have a distressing tendency to commit thoughts to record in e-mail as casually as if they were involved in a conversation.

The result is the collection of the unfiltered fragments of thoughts and feelings surrounding business decision-making — a goldmine for experienced legal counsel seeking to support specific arguments and themes that have been developed by achieving mastery of the discovery materials.

Global companies have global networks. Many global companies are the outcome of a series of mergers and acquisitions and thus have networks that are often an integration of disparate operating systems or e-mail architectures. This creates the potential for knowledge gaps when an information technology department receives requests and legal direction. Without effective communication, these gaps can be paralytic and problematic.

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The increased frequency of discovery disputes leaves corporate counsel looking for ways to stabilize e-discovery expenses. One approach is to bring the entire life cycle of e-discovery in-house, although when litigation counsel are retained, they have an attendant duty to the court to supervise this process.

Alternatively, e-discovery can be outsourced to third-party vendors. Because e-discovery is here to stay, it is important for in-house counsel to consider the potential ramifications of taking different parts of the e-discovery lifecycle in-house and understand the corresponding risk.

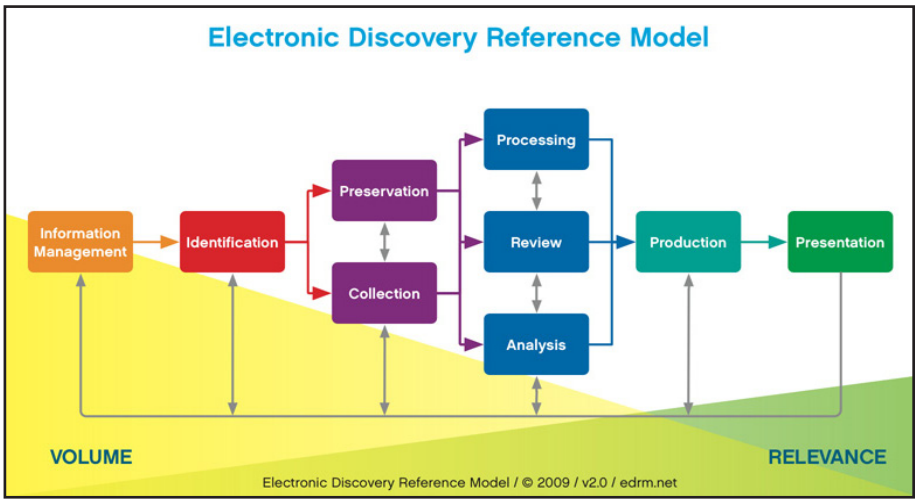
STAGES OF E-DISCOVERY AND THE ELECTRONIC DISCOVERY REFERENCE MODEL

There are various stages in e-discovery and various degrees of importance in how these stages are approached, depending on the nature of the task. Proportionality is a key concept. A "slip and fall" and a government investigatory subpoena are not equal.

Despite the rising frequency of e-discovery, there remain relatively few attorneys with the knowledge required to formulate effective strategies for the process. There is a strong business desire to smooth production costs for regulatory and litigation discovery and to make them more predictable for budgetary reasons, which cannot be achieved without careful attention to selecting the proper advisers.

The best way to limit cost is to limit how much ESI is collected. This is easier said than done with great assurance. The Electronic Discovery Reference Model, found on www.edrm.net, is useful for visualizing the various stages in the e-discovery lifecycle. The EDRM diagram highlights the need for information management (this can also be read as effective communication between all participants) at all stages. EDRM was created in 2005 to address the lack of e-discovery standards — a problem identified as a major concern for consumers and providers alike.

The completed reference model provides a common, flexible and extensible framework for the development, selection, evaluation and use of electronic discovery products and services. The completed model became part of the public domain in May 2006.



Many of the difficulties, large bills, sanctions and other horror stories related to e-discovery can be attributed to communication breakdowns that highlight a lack of process and attention to careful supervision and detailed contemporary knowledge of what is occurring as the process unfolds.

In early 2010, a federal court sanctioned a plaintiff corporation $8.5 million for discovery misconduct and vacated orders to show cause as to attorneys for their failure to supervise the e-discovery process. *Qualcomm Inc. v. Broadcom Corp.*, 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010). The ruling is testament to the need for adequate communication and how foolish it is if a party appears to be, or actually is, trying to hide discoverable material.

Half of the EDRM — identification, preservation, collection and even processing — has been brought in-house with varying degrees of success, since once outside counsel become involved they have a duty to the court to supervise the process. However, there are many reasons a company may not wish to do so.

In the United States' adversarial legal system, what should be a relatively neutral task (assembly of the necessary information) can be targeted and transformed into a minefield of litigation. If handled in-house, every stage of the process can be attacked based on the company's status as an interested party. This creates unnecessary and expensive satellite disputes.

Money spent up front, where the risks justify the expenditure, can head off unnecessary and expensive disputes over the discovery process itself rather than the case or investigation. For significant matters, the cost of keeping collection, processing, review and production outside the company is justified by the potential risks to reputational interests and the outcome. As an example, maintaining credibility during the course of a regulatory investigation can avoid potentially ruinous decisions by governmental authorities.

Unfortunately, there is no way to place the entire e-discovery lifecycle outside the company since anticipation of probable future litigation triggers a duty to identify and preserve potentially discoverable information. Consequently, in-house counsel cannot responsibly and credibly avoid the task of identifying potential upcoming litigation and issuing "preservation and hold" orders to avoid inadvertent destruction.

When it comes to ESI, the bulk of all created and saved materials that may be discoverable in corporations today, company counsel must maintain an effective communication conduit with technical staff in the IT department, who are the key group in understanding company protocol and how to implement legal directives.

Volume influences whether this conduit for communication can be an individual or requires the input of team members from both the IT and legal departments. The need for effective communication between what have historically been disparate sections of most corporations highlights the importance of assembling an effective and informed e-discovery response team to handle the left side of the EDRM.

While vendors such as Guidance Technologies, IPRO, NUIX and Clearwell are all happy to sell tools for collection, processing and review, it is important that companies understand what they are purchasing, how they are going to use it, and for which cases they would rather have the work supervised by outside counsel and at what

stage. Simply having the "tool" does not ensure that the experience exists to use it effectively.

Possessing a forensic collection tool is not equivalent to having an experienced user who has testified in court and again highlights the need to assess proportionality when deciding which stages of the e-discovery lifecycle to bring in-house, and for which cases. The costs of maintaining skilled personnel for infrequent events may simply not be cost-effective.

While it may be appropriate to self-collect for a minor event (it is particularly easy to challenge the self-selection of materials for discovery), avoiding challenges down the line may make collection by a certified forensic collector supervised by experienced outside counsel more appropriate and cost-effective in larger or more sensitive matters.

In the case of review, because of the changes in media and increasing use of e-mail for communication, the volume of the available materials has exploded. Consequently, developing a facile knowledge of the related discovery materials has become a group endeavor rather than an individual exercise.

The first chair is now dependent on thoughtful and subjective decisions made by large groups of junior professionals as they parse the relevant discovery materials for those "hot" enough to command the attention of lead counsel. A jury can remember only so many exhibits. When the pool you start with is in the millions, finding the important ones can be a costly endeavor.

Despite the advancement of tools for culling processed data (de-duplication, near duplication, clustering, predictive coding), the available pool of documents to be reviewed in any significant matter is commonly in the millions and requires specialized management tools (such as Iconect, Concordance, Relativity, Ringtail, etc.).

There is also the question of hosting the data: Will your outside counsel host it or sub it out, will the company host it, or will an outside co-location facility be chosen for the task? The impact on cost depends on the corporation's IT infrastructure (utilization of excess capacity, or a new addition), the frequency of discovery events, and whether outside counsel treats hosting as a cost or a fee.

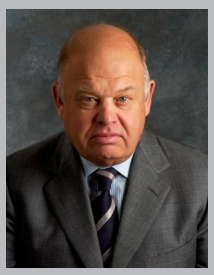
Because review can become quite costly, many companies choose to hire staffing agencies claiming to have effective project document review management to make what is known as a "first pass" review of their documents to further reduce the number that will eventually be reviewed by outside counsel. It is important to monitor such operations carefully to ensure that the review staff is adequately briefed and has the incentive to do careful work.

There is no doubt that companies will increasingly encounter e-discovery in the course of litigation and governmental regulation. Perhaps the most significant way to undertake this is to work with a skilled and experienced e-discovery team.

Proportionality of individual legal events and total volume, whether you choose to assemble such an experienced team by adding personnel or working with outside advisers, depends on whether their proportional risks justify creating your own internal staff or relying on specialists to do it. The limited talent pool of those with

appropriate experience to manage the entire e-discovery process is an important constraint in such decision-making.

In an imperfect world, there remain ways to mitigate risk: Assemble an experienced and well-informed internal e-discovery team so that you can respond proportionally. When the circumstances warrant, engage counsel with e-discovery experience and a trial record demonstrating it. Or, you may place such a firm in the role of regular e-discovery counsel to watch out for your interests even though you may choose a different firm to act as actual litigation counsel.



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