eDiscovery Workflow Report Series

Outsourcing eDiscovery: The Three-Legged Stool of In-House Legal, Outside Counsel and Third-Party Service Providers

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There is a vexing question that many in-house legal departments have had to ask themselves in recent months: do we want to handle our eDiscovery workflow in-house or outsource it to a qualified service provider?

If you've already conducted your due diligence on this high-stakes question and decided you want to outsource at least a portion of your eDiscovery workflow to someone else, you now need to figure out who that will be and make sure it all works well for a price you can afford.

To help in-house legal professionals understand the tactical considerations involved with outsourcing eDiscovery, LexisNexis partnered with George Socha, a highly regarded eDiscovery consultant and the co-founder of EDRM, a guidelines and standards organization that creates practical resources to improve eDiscovery and information governance.

Socha actually moderated three workshops at Legaltech West Coast 2015 that were centered around the theme of eDiscovery management. The first workshop tackled the broad theme of whether to bring eDiscovery in-house or outsource it to a managed services provider. The second workshop was designed for in-house legal professionals who have done all of their homework, conducted all of the analysis and decided to bring their eDiscovery in-house.

Now, to help those in-house legal professionals who have decided to outsource eDiscovery, we present the third and final white paper based on the "Everyday eDiscovery" workshops.

The Three-Legged Stool

"In my experience, the best way to think about the workflow for outsourcing eDiscovery is to picture a three-legged stool comprised of in-house legal department professionals, outside counsel and third-party service providers, such as software vendors, hosting companies and managed services providers," said David Yerich, director of eDiscovery for UnitedHealth Group, one of the nation's largest health systems. "You need to start with that picture of mutual interdependence because the truth is that each leg of the stool must be sturdy and effective in order for the outsourcing of your eDiscovery workflow to be successful."

The panelists identified the three most common types of relationships between each member of the outsourced eDiscovery workflow:

- **Co-Existence –** this is where each leg of the stool works in their own silo most of the time, which is not a very effective approach but is obviously preferable to resentment and dysfunction;

- **Forced acceptance –** there may be occasions when the client (in-house counsel) is required to lay down the workflow the way they need it to be implemented in the interests of the company who is ultimately paying all of the bills, leaving outside counsel and third-party service providers to accept it and make it work; and

- **Collaboration –** this is the ideal relationship, in which each participant in the workflow understands their important individual role, strives for maximum efficiency and respects each team member for the contributions they make.

"The outsourcing of eDiscovery shouldn't be viewed as a one-track approach, it should really be dependent upon what the client is asking for, where it makes the most sense and where the value-add is best found," said Patrick Oot, partner at Shook, Hardy & Bacon.

The most savvy service providers also understand the importance of the three teams working in a way that delivers maximum value to the corporate client, the ultimate buyer of all legal services. The workshop participants reported that a more collaborative strategy to outsourcing eDiscovery is definitely taking hold in the marketplace. Service providers acknowledge they don't try to practice law – but they do know data and take that side of the eDiscovery workflow very seriously.

For in-house legal department professionals, the most popular strategy for outsourcing eDiscovery is to let each strategic partner focus on what they do best.

"I think most in-house counsel really want to have their outside counsel contribute where we think they do best, and that's at the litigation strategy level and providing high-value legal counsel," said Yerich. "When it comes to the area of litigation technology, there are some excellent software vendors and managed service providers who are experts in that field."

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An eDiscovery Outsourcing Checklist: 7 Areas to Tackle

Once your three-legged stool is in place and each member of the team understands its role in the outsourced workflow, the panelists advise that the best way to proceed with the implementation of your new eDiscovery model is to chew off some small pieces, one at a time. Based on their experiences from the perspective of an in-house legal department, an outside law firm and a third-party service provider, here are seven areas to tackle for starters:

1 Map out your workflows

It all starts with process, so it's crucial to map out workflows between your in-house team, your third-party service providers and your outside counsel. For example, who will be responsible for the initial collection of eDiscovery data, loading those files into a database and immediate culling of the non-responsive documents? It's likely you can reduce the initial data set by up to 85% by having your service provider handle this first piece, leaving you with a much smaller group of documents to review by either a managed review service or your outside counsel.

2 Match the right personnel to the right job

Make sure that you have the right people with the right skills for each phase of the outsourced eDiscovery workflow. This rule applies in both directions. It's important to have highly skilled and well-trained litigation technology professionals who are handling the process of hosting and securing your eDiscovery data, for instance. When it comes to de-duplication scans, though, it's not necessary to pay costly hourly fees for someone to operate software tools that do the heavy lifting for you.

3 Ensure that you have the right security protocols

Data security is a serious threat throughout our industry, so it's critical to work with partners who have the most rigorous information systems security protocols in place. One way to verify this is to inquire about their industry certifications, such as ISO 27001 (2013), ISO 9001, SOC1 and SOC2. If you're partnering with a hosting solutions provider, make sure that their services are backed by many years of legal industry experience, strong data management and world-class Tier III, SSAE 16 Certified Data Centers.

4 Protect the privilege

The general rule of thumb is that, as long as the technology provider is working at the direction of outside counsel to assist with providing legal services, work created by the service provider (as well as communications involving the provider) should be protected from disclosure. Legal experts advise to make sure there is a clear paper trail between your outside counsel and third-party service providers to establish that your attorneys do not waive the privilege by contracting with a technology vendor or other litigation support provider.

5 Hold each team member accountable

The buck stops with the client, so you need to make sure that all third-party service providers and outside law firms are held accountable for their performance in the new outsourced eDiscovery workflow. You may want to establish clear metrics for performance in advance and regularly evaluate each service provider on a quarterly basis, at least until the outsourcing process has been established and is functioning smoothly.

6 Put in place regular monitoring and reporting

It's also important for the in-house legal department to establish an ongoing effort to track, monitor and report on the overall efficacy of the outsourced model. You may want to establish key performance metrics around costs, production timeline, responsiveness review, etc. Create regular dashboard reports and review them in an open and transparent way with both outside counsel and third-party service providers.

7 Keep your technology current

One of the major benefits of the eDiscovery outsourcing model is that you can rely on outside service providers to deal with the technology requirements. Every year, we see what feels like an avalanche of new eDiscovery technology, each targeting a different part of the EDRM. By outsourcing your workflow to strategic partners, in-house legal departments avoid the headaches and costs of owning software tools that will soon be outdated. However, make sure that your partners are using products backed by companies that have been around a long time and have the resources to continue investing in the development of those products.

Conclusion

There is no way around the fact that outsourcing part or all of your eDiscovery workflow is a major undertaking with serious implications. But if that pathway is the one that holds out the greatest potential benefits to your organization, our expert panelists advise to narrow your focus onto a few manageable areas – starting with these seven considerations – and you will find yourself moving down the road in the right direction.

Throughout this three-part series of white papers, we've attempted to explore the "Outsource or Bring In-House?" question from all possible angles. Our goal for the first white paper was to tackle the broad theme of whether to bring eDiscovery in-house or outsource it to a managed services provider, and help readers navigate the key factors to lead them to the best decision. The second white paper was designed for in-house legal professionals who have conducted all of the analysis and decided to bring their eDiscovery in-house, to provide them with some best practices for achieving that workflow. And we hope this third white paper – written for in-house legal professionals who have decided to outsource eDiscovery – has provided some helpful suggestions for working through the implementation of that approach as well.

Different in-house legal departments will come to different conclusions about which model is best for their unique needs. No matter what you decide, by assembling the right people, deploying a proven workflow and procuring the right technology tools, you can manage everyday eDiscovery in a way that contains costs and minimizes risk.

About the Experts

George Socha is the co-founder of EDRM and the president and founder of Socha Consulting L.L.C., an electronic discovery consulting firm. George is an advisor and expert witness who focuses on the full range of electronic discovery activities. His clients include corporations, governmental agencies, legal vertical market software and services providers, investment firms and law firms. Before launching his consulting firm, George spent 16 years as a litigation attorney in private practice. He received his law degree from Cornell Law School and his undergraduate degree from the University of Wisconsin-Madison.

Shimmy Messing As chief technology officer, Shimmy oversees R&D for Advanced Discovery's proprietary software, infrastructure and the selection and implantation of third-party tools. Shimmy came to Advanced Discovery in 2014 through the acquisition of Responsive Data Services (RDS), for which he was a founding partner. At RDS, he was the executive in charge of the hosting and electronic services division. Shimmy's career in the litigation support industry spans more than 12 years. Prior to RDS, Shimmy was the director of operations, electronic services for an international eDiscovery services organization. Shimmy earned his bachelor of science degree in business administration and computer information systems from Towson University in Maryland.

Patrick Oot Jr. is a partner in Shook, Hardy & Bacon's General Litigation and Business Services Division, where he leads the practice on e-compliance and digital investigations. He is one of the few eDiscovery and compliance attorneys in the nation that possesses the tripartite experience of an in-house corporate counsel from a Fortune 16 organization; a senior attorney at a federal regulatory agency; and a partner in a large law firm. Before joining Shook Hardy & Bacon, Patrick served as senior special counsel for electronic discovery in the Office of the General Counsel at the U.S. Securities and Exchange Commission (SEC). Prior to serving at SEC, Patrick was an experienced in-house counsel Verizon.

David Yerich is the Director of eDiscovery for UnitedHealth Group, a Fortune 25 company headquartered in Minnesota. David's responsibilities include designing, updating, and implementing the processes, protocols and tools utilized by the company related to electronic discovery for regulatory and legal matters. Prior to joining UnitedHealth Group, David worked as the Electronic Discovery Consultant at a Minneapolis law firm and worked at a large agri-business where he implemented the rollout of a worldwide document management tool for the legal department. David is a graduate of the University of Minnesota and Hamline University School of Law and is licensed to practice in the state of Minnesota.

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