Insourcing or Outsourcing E-Discovery?
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As a result of recent economic developments, corporations and law firms are seriously considering whether they should outsource E-Discovery. This article discusses building the business case and developing appropriate policies and processes to achieve a cost-effective and defensible E-Discovery response.

Insourcing or Outsourcing E-Discovery

With the advent of electronic discovery, different organizations have explored the possibility to insource or outsource it. However, in order to make such an important decision, they must assess a number of factors that this paper will look at. We will look at the different parts of the EDRM (EDRM.net) that can be insourced or outsourced:

The initial question that any organization should answer is “why”? What are the motivations behind the decision to assess how they currently handle electronic discovery and what is it they are trying to achieve.

Motivations

The motivations to insource or outsource electronic discovery will normally differ based on variables such as:

1) The type of organization;
The Costs

expenses, discovery, processes
However, firms experience discovery about burden, hardware, increasing the organization’s risks. In fact, realizing its responsibilities that they are capable of reducing their burden, to realize that it only created a new one – while increasing risks and costs.

2) Its information management maturity;
3) Its human resources savvyness and availability;
4) Its IT infrastructure;
5) Its litigation and investigation profile.

However, the motivations themselves are often quite similar: costs, burden and risks. We will look at each of them and provide examples of how the abovementioned variables impact on the motivations

Costs

The leading motivation for all organization is costs. Often this motivation finds its roots in a costly experience where a lot of money was spent on handling electronic discovery via a third party. However, after the shock, it is important to look back at the incident and objectively look at cause(s) behind the expenses that were incurred. What one normally realizes is that given the source(s), merely insourcing e-discovery wouldn’t reduce the costs of the next occurrence.

Another version of the monetary motivation is for law firms and lawyers to think that they can make money out of e-discovery. This impression created a trend starting around 2005 during which many – major law firms – decided to acquire sophisticated software to collect, process and review electronic documents. However, by now, most of them have realized that technology is a minimal part of the equation: it also requires a methodology, a business model, a scalable team of skilled professionals that will stay current about new issues and technology, hardware, an organizational culture, etc. Therefore, a large number reassessed their strategy and decided to re-outsource, at least partially, electronic discovery.

For those organizations - law firms and corporations – that are looking at whether or not to insource e-discovery, the clear answer that should come out of the assessment is how much money will be saved or made by insourcing which phase of the EDRM (EDRM.net) and perhaps, most importantly, at what cost? In the end, many organizations – with the exception of organizations that are in the business of being sued - realize that cost rarely is the most compelling reason to insource e-discovery.

Burden

While we are convinced that eventually e-discovery will ease discovery and streamline litigation and investigation, for the moment, it is a truism to state that it is burdensome to most organization. Accordingly, corporations and law firms alike have dreamt that by acquiring expensive software and hardware, they would be capable of reducing their burden, to realize that it only created a new one – while increasing risks and costs.

In fact, e-discovery being a process, not a technology™, the only proven way to reduce the burden of e-discovery on any organization is to have clearly predefined processes with policies, procedures, responsibilities and resources. The one positive aspect of acquiring technology is that it forces the organization to train a number of resources who, in turn, will be capable of documenting and improving processes to effectively reduce the burden.
Risks

Delays or loss of control over confidential information are just two of the numerous risks that exist when an organization decides to outsource e-discovery. Conversely, these risks are often the motives behind an organization’s decision to insource. Under such circumstances, the burden and cost do not weight much in the balance as the priority is to reduce, if not totally mitigate, these risks.Insourcing or Outsourcing E-Discovery? Monday, April 11, 2011, 10:30-11:30am

Capacity

At this time, many organizations do not have the inherent capacity to handle e-discovery internally. This situation can be explained by the fact that we are still in a transitional phase from the paper to the electronic world and that the information management maturity of organizations is nascent. Accordingly, in order to insource any phase of the EDRM, an organization needs to have the capacity to do so from a human and technology perspective.

Technology

Technology-wise there is a lot to know. First of all, the e-discovery software market is still fairly green. Every year sees its load of new e-discovery technology, each targeting a different part of the EDRM. This creates a number of challengers for organizations who may end up needing too many technologies and will likely find themselves, in the near future, with outdated and unsupported solutions.

Stay current

In choosing to insource e-discovery, it is primordial to retain technology, and therefore providers, who will be around in one, three and five years, and will keep on investing in the development of their product. A number of companies are created just for the purpose to be acquired by a major player and many of the latter purchase their competitors just to take them out of the market without any interest to support their technology.

Another reality of the e-discovery market is that one rarely ends up owning the technology. Most companies license their technology on a per gigabyte basis so that, month after month, or quarter after quarter, the “owner” is forced to pay for the use of its technology...

Scalability

An important challenge of e-discovery is that each case and each technology are not created equal. While a piece of software may be perfect for small and medium cases, it may not be suitable for larger cases, and vice versa. Therefore, in assessing the technology before its acquisition, one must look at its liti/investigation profile.
Human

The human factor is probably the one that is being overlooked the most when decision is made to insource e-discovery. We have seen many organizations invest millions of dollars in technology to realize that they did not have the man power to support, maintain and use it, or the volume of work to justify the head count. Once again, one of the challenges of e-discovery is that it exists at the limit between the legal and technical expertise. Accordingly, depending on the case, it requires different skills and experiences that are rarely to be found in one person.

Stay current

Given the constant evolution of the law, the case law and the technology, software and hardware alike, it is necessary to ensure that any employee involved in the e-discovery process is knowledgeable about the potential issues that exist and is capable of cost-efficiently deal with them.

Scalability

As previously mentioned, some cases require a large number of experts or simply an important number of tactical delivery people. Unfortunately, most organizations cannot afford to have all these people on staff at all time, just in case. Therefore, some part of the EDRM should systematically be outsourced, at least in part, to take into consideration the need for scalability. This can be achieved by having a preferred relationship with a vendor that will know and understand your internal process and jump on board when the need arises.

What can you afford to in/outsource?

Having the EDRM in mind, the next question normally relates to what an organization should or can insource. Depending on the abovementioned variables, different parts of the EDRM may or should be internalized by an organization.

Information Management

In fact, electronic discovery is after the fact information management (“IM”), i.e. that we try to find, retrieve and organized unorganized information for the purpose of a litigation/investigation. This part of the EDRM must be insourced by all organizations. IM is a cost of doing business. In the paper world, no one would have invested in a company where higher management would refuse to provide their employees with folders, filing cabinets, etc. and that tolerated that its employees keep unsorted files under their desks, in their car or at home. Interestingly enough, this is exactly what is happening in the electronic world...
Identification

This part of the EDRM relies heavily on the previous part. Once the information is managed, it should be easier to identify which information is or is not relevant. However, it is unlikely that all the material will ever be perfectly tagged and organized. Accordingly, it is necessary for organizations to have a robust enough search capacity to find relevant information across its network. As one can imagine, this need exists from a productivity and efficiency standpoint. We should not wait for e-discovery to justify such an acquisition.

Preservation

Preservation is an important challenge given the volatility of electronic documents. Therefore, until all companies convert their documents to a static format, such as PDF/A, on a WORM (Write Once Read Many) medium, it will be necessary to find means to ensure that relevant documents are not altered once a preservation obligation arises. What is seen in most organization is a preservation-collection effort, where data will be copied and set aside, similar to what we did in the paper world. As in the paper world, this part of the EDRM should be internalized as it merely requires the electronic version of a photocopier. In fact, software is often a lot smaller than the later and in some cases, as easy to use, a getting user-friendlier by the day.

Collection

As previously mentioned, we feel this part of the EDRM must be internalized by organization if they want to keep control over their information ecosystem. Depending on third parties to extract our own information seems awkward. That being said, it is obvious that an organization will not, and should not, be capable of collecting all of its data forever. It should focus on active files as opposed to, for example, archived, deleted or legacy files.

Processing

This is the area where we doubt the most about the realisticness of full internalization. Given the subtlety and the number of technology that exists in the processing phase – denisting, indexing, coding, sorting, filtering, concept, context and pattern searching, clustering, deduping, etc. – it is impossible for an organization to internalize processing. What makes sense however is to identify the 20% of technology that will support 80% of the cases and rely on third parties for the remainder; there may even be a proportionality call made for these remaining cases...

Review

Unless you are a law firm or your corporation is in the business of being sued, it is not practical to insource review from a technological standpoint. Even in such a case, it may not be the best solution. Most review platforms have been developed for one particular case and are therefore excellent for similar matters but may not be suitable for other types of cases. For instance, some of these technologies are excellent with
emails while others support databases like a charm. In such different scenarios, which platform should your organization choose? An alternative to client solutions, it may be sensible to leverage SAAS for document review as new affordable platforms appear every day.

Analysis and Production

Evidence analysis has historically been left to lawyers and many good and relatively cheap litigation support software exist to support this phase. There is no doubt that any litigator should have the tools required to perform his work in the 21st century...

Conclusion

Questions relating to the pros and cons of internalizing vs. outsourcing e-discovery are just starting to be identified as more organizations look seriously at it. Until the market matures, i.e. likely over the next 5 years, it is uncertain that any of the answers provided will stand. The reality of the current market is such that what was thought as being impossible, disproportionate or unreasonable only 3 years ago is now done on a daily basis. Accordingly, in assessing your organizations needs, you should make choices that are scalable and have a good life expectancy.

Contract Attorney Guidelines and Considerations

By Megan McCarthy and Browning Marean

1. Assess Document Review Project

Before engaging a staffing firm or seeking contract attorneys, it is important to assess the document review project to determine its scope, identify what needs to be accomplished, and what resources you’ll require. Determining the type of documents, timeframe, number of documents and other issues will assist in engaging an effective staffing firm and will play an important role in retaining contract attorneys.

- Below is a list of questions and issues that should be considered at the outset of any project:
  - How many documents need to be reviewed?
  - What is the timeframe associated with this project?
  - Are the documents in hard copy or in electronic format?
  - If an electronic review, what software is being utilized? Do additional licenses need to be acquired?
  - What type(s) of documents will the contract attorneys be reviewing? Technical documents, emails, contracts, handwritten documents, etc....
  - Are there sensitive or personal materials that should be removed from the data set prior to the review?

Consider culling out potentially embarrassing or highly personal documents related to high-profile clients, or employees of clients, for law firm attorney review. While contract attorneys are required to sign confidentiality agreements, it’s best to reduce any risk of such information leaking outside the firm or project.
- What is the purpose of the contract attorney review?

Is it a review of client documents for production, third party documents, or opposing party production? Are documents being reviewed for relevance or privilege, or to categorize into discrete topics?

- Will internal litigation support be involved, or a third party document vendor?

All these questions will help you, and the staffing firm, determine how many contract attorneys are needed. In addition, it will assist you in determining how much the project will cost.

2. Contact and Retain Attorney Staffing Firm

The best resource for finding a reliable staffing firm are your colleagues and co-workers. Talk to fellow attorneys, local associates and law firm litigation support personnel to seek recommendations for reputable firms, and specific contacts at those firms. Assess your colleague’s experiences with various organizations, satisfaction with the final work product, interaction with the firm’s project managers, reliability, prices and services offered.

Consideration of a new staffing firm, or one not utilized previously by colleagues, should include a request for references and examples of work previously done. Follow up with the references provided and determine whether they can service your unique requirements.

In considering a staffing firm, it is important to determine whether they provide the following services:

- Offsite space for document review project
- Use of laptop or desktop computers throughout the duration of the project
- Internet access to facilitate review
- Project managers to oversee daily operations, assess progress and provide regular reports
- Payroll services
- Hourly rates for document review attorneys will vary among markets, but should normally include the services outlined above.

While contracts among staffing firms will vary, ensure that the following topics are included before agreeing to any services:

- Scope of Work
- Responsibilities of staffing firm
- Added services
- Pricing or cost break-down
- Benefits
- Ability to remove unacceptable reviewers
- Supervision
- Reports
- Indemnification
- SHA compliance
- Billing, payments and timecards
- Payroll services
- Solicitation of employees
- Arbitration
- Termination

3. Hiring

The hiring of contract attorneys is a lengthy process, and significant time should be dedicated to this aspect of the project. Individual résumé review, background investigations and conflicts checks must be conducted for each individual considered for any document review project.

Conflicts, malpractice insurance and liability are concerns inherent in retaining any contract attorney. As such, before embarking on the document review process, propose that the client retain the staffing firm and contract attorneys directly. While the law firm would screen initial résumés, supervise day to day operations, approve paychecks and manage the project as a whole, the client would contract directly for the contract services.

a. Individual Résumé Review

Request a variety of résumés for review and select those attorneys with experience that fits the current project. Request résumés of individuals who participated in previous law firm related document review projects. In addition, request input from others who have utilized these individuals before in previous projects.

b. Background Investigation

While staffing firms commonly conduct their own background investigations, the law firm should require that each individual undergo the firm’s own investigation.

c. Conflicts Check

All potential contract attorneys must undergo a thorough conflicts check before participating in any project for the law firm. Each individual must provide the title of each case they've participated in, nature of the case, party represented, other parties involved, nature of work performed and approximate hours worked. Each entity or client the attorney has worked for throughout their career must be cleared. In the event of a conflict, the individual attorney must seek a written waiver from the conflicting party. All information should be submitted to the law firm. This process takes approximately two weeks, and may take additional time depending upon the number of individuals who require clearance.
d. Confidentiality Agreement

Before beginning any document review, each contract attorney must sign a confidentiality agreement.

4. Training

Conducting a comprehensive training upfront will facilitate a thorough document review and address any questions and issues early. While training may take place at the law firm, advocate for a training session to take place at the off-site review offices. This provides and opportunity to inspect the offices and computers early on, test software in the review environment, and observe the contract attorneys at work when the review begins.

Case Background and Purpose of Review

Provide each contract attorney with a memorandum which provides details regarding background of the case, who the law firm represents, any defenses or claims asserted, the purpose of the review and specific details they should know before proceeding.

This memorandum should include details surrounding the purpose of the review and why their services are needed (e.g. review of party documents for production or privilege, categorizing documents, or review of opposing party materials). If the review is for relevance, provide specific examples drawn from the universe of documents for attorneys to review. For a privilege review, provide a list of attorney, paralegal and other exempt names that may appear for privilege purposes. In addition, provide examples of privileged documents and a brief review of what documents are considered privilege. While the example of an email between an attorney and client may be obvious, an email sent at the instruction of an attorney by a client’s employee seeking information related to the case may not.

Software Training

While many document review attorneys have extensive experience in document review software, it is advisable to conduct an overview of the software being used and have the attorneys utilize the software during the orientation. The law firm’s litigation support personnel or a third party vendor hosting the database should be in attendance to field any technical questions and provide ongoing support throughout project.

5. Review Process

Throughout the review process, require staffing firm project managers to provide regular updates regarding process and attorney performance. Specifically ascertain how many documents are reviewed each day, perceived complexity of the project, and any common questions or concerns that arise. Project managers should field individual questions for daily submission to the law firm. In response, adjust project guidelines and provide more training as necessary.
In addition, to assess progress and field questions personally there should be periodic unannounced visits to the off-site review office.

6. Post Review Follow-up

Upon completion of the review, ensure that all computers utilized by contract attorneys are wiped clean of law firm software and confidential information. In addition, all hard copies of law firm confidential information should be destroyed at the review site.

Confer with the project manager or staffing firm representative regarding the quality of work conducted by review attorneys and note those individuals who exhibited exemplary performance for consideration in future projects.

7. Miscellaneous and Other Considerations

Outsourcing document review to India is a cost effective alternative to the potentially higher costs of local market based review. Yet many risks are associated with this alternative that must be considered, specifically those related to the control of confidential information, project supervision and data protection. The legal system in India is based on English Common Law, all training is conducted in English, Appellate and Supreme Court proceedings take place in English, and a majority of legal opinions are written in English. Attorneys recruited by Legal Process Outsourcing (“LPO”) firms have attended the top law universities or colleges in India and often have completed an L.L.M program in the U.S. or UK.

Joining an LPO has become a popular alternative for Indian lawyers as salaries are competitive with established firms. The popularity of the LPO outfit has given rise to an standardized exam for those wanting to work in outsourcing (Global Legal Professional Certification Test) that test’s the individual’s command of the English language, substantive law, legal skills and ethics.

Yet one must consider the ethical and practical implications inherent in retaining foreign lawyers. Below are some of the many issues that will arise in such a project:

- Distance and time differences can make communication difficult and may cause the project to lose focus.
- Proper supervision and oversight may be difficult when contract attorneys are continents away and working in a dramatically different time zone.
- Substantial issues exist with sending a client’s sensitive and confidential information overseas. If divulged, legal action to remedy any harm may be difficult to impossible. The cost of pursing a foreign action may far outweigh any benefit.
- Continued adherence to the ethical considerations may prove challenging when supervising attorneys half-way around the world. Such considerations are competence, supervision, protection of confidential information, reasonable fees and not assisting in the unauthorized practice of law.