Do You Really Need End-to-End Litigation Support?

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For some, the 2006 changes to the FRCP (Federal Rules of Civil Procedure) created a new list of e-discovery considerations in the event of litigation. For others, the changes created a business opportunity that has since grown into a billion-dollar industry. Suddenly, everyone from enterprise content management (ECM) vendors to data storage vendors began offering e-discovery solutions.

The nine nodes of the E-Discovery Reference Model (EDRM.net) are a good tool for evaluating how complete and appropriate e-discovery services are:

- Information Management: Is there a strategy for storing and retaining ESI?
- Identification: Where is the relevant information likely to be and how am I going to find it?
- Preservation: How do I make sure that the legal hold is enforced and there's no spoliation?
- Collection: How do I collect it in a way that is defensible, effective and auditable?
- Processing: How do I make sure I have relevant information with good reporting and a clear chain of custody?
- Review: Which documents are relevant and not privileged?
- Analysis: Where are the potential gaps in data collection?
- Production: What format(s) have opposing council and I agreed to provide for the e-discovery materials?
- Presentation: What is the best way to display the e-discovery findings at deposition, hearing, trial, etc?

But you don't necessarily need to outsource every node of the EDRM or perform every activity in-house. Focused e-discovery services can address aspects of the EDRM that cost the most time and money, allowing the litigation team to focus on the overall case.

"It's unusual for a client to want a partner for all of the nodes of the EDRM," says David Haines, solutions consulting for Pitney Bowes Management Services. According to Haines, general counsel are under pressure from the CFO to reduce the overall cost of litigation, which is obviously complicated by the fact that it's hard to predict when you might be sued. By

outsourcing one or two areas, such as those with high volumes or specialized expertise, and better leveraging their own resources, companies can trim the cost of e-discovery.

However, working with an end-to-end litigation services provider may be a smart decision for some, notes Joe Garber, assistant VP of product marketing at [RenewData](). "Companies and firms that are newer to e-discovery, SMBs, or companies in industries where litigation is less common may not have the infrastructure to support a full e-discovery," Garber comments. "Outsourcing allows them to share the risk and leverage the experience of the litigation support vendor."

Both Haines and Garber advise caution when you're looking for a vendor to address all nodes of the EDRM. "Yes, there are organizations that can provide services that touch on every section," admits Garber, "but they aren't always appropriate and not every vendor that says they can deliver those services really can. Some outsource to make up for their weaknesses; some simply can't do it at all."

When determining how to allocate resources and when to bring in litigation support services, time, money, and risk are the primary drivers, says Haines. That's why it makes sense to prioritize two of the highest volume, highest cost areas of the EDRM when working with e-discovery providers: Information Management and Review.

Information Management

More information is discoverable and it comes from more sources than ever before, so information management is a logical way to mitigate risk and reduce costs. At one time, ESI used "in the course of normal business" may have simply meant e-mail, files on a network, and data in business applications such as accounting or ERP. Not only are more business processes being managed electronically with these systems, but Twitter, Facebook, SMS text messages, and handheld devices are commonplace—and discoverable, according to Haines.

A consultant with experience in information management and e-discovery can provide technical and policy guidance. Attorneys should encourage their clients to build an information management strategy that addresses potential risks for all forms of content:

- Information management is the one node of the EDRM where it's possible to be proactive. If data has been properly mapped, retention policies are in place (and enforced), and employees are trained, it will take less time and effort to produce documents and data. There will be less risk because documents that have outlived their retention are destroyed and no "surprise" documents exist in file shares or hard drives.
- When there is a solid information management strategy, other nodes of the EDRM will be easier to accomplish. For instance, information management technology supports preservation with audit trails, disaster recovery and the ability to perform legal holds. The EDRM also advises that the e-discovery presentation be archived appropriately to support a possible appeal, and an ECM or records management solution is a secure way to protect these documents.
- Though it's hard to get budget for technology that addresses a "what if" scenario, information management solutions generally reduce overall operating costs. Increased

efficiency makes information management a sound business decision because there is a return on the investment.

"You can't leave IT people out of e-discovery; it's ECM at its core," states Haines. "When I ask people, 'Have you initiated a data mapping process? Do you know where this information is?' many organization have not begun the fundamental steps. Records managers, IT, and legal should be working together."

Graber agrees. "There are many companies that do have retention policies, but most don't enforce them or do it only on a subset. Some of the common challenges are e-mail archiving and files and backup tapes that don't have the same retention policies as other systems. That creates a need for backup tape liability management because there is data in the backups that shouldn't have been there." Even with relatively mature technologies like e-mail management, some companies forget that employees may keep copies of the e-mail on their (discoverable) desktop computers in violation of retention policies.

Review

The second area where volume and cost become a particular concern is the review node, the point at which collected ESI is evaluated for relevance, confidentiality, and privilege. Even with advanced technology like context and concept searching, there is often an overwhelming amount of data.

"Traditionally, review and analysis are areas that are outsourced because they represent about 80% the spend," observes Graber, but he admits, "There is some risk there." Litigation support services may also be needed if the review requires that data be restored from backup tapes or other media for which the hardware is no longer available because of obsolescence or M&A activity.

"De-duping data sets and related early case assessment and preparatory analytic services are another way a litigation support service can reduce the costs of review. A significant percentage of the documents collected will be duplicates, Haines points out. Using technology to cull the redundant data to be analyzed means fewer hours of manual review, making this service a good investment.

Cost-conscious corporations are also outsourcing first-pass review to services that specialize in US or British common law, which Haines estimates could reduce the cost of the expensive review process by a third or more. Domain experts can then perform the second pass and privilege reviews.

"E-discovery is about people, process, and technology," emphasizes Haines, so it's important to consider all three when evaluating when to use third-party services and which ones to use. The EDRM, along with the Sedona Conference, case law, and analysts, provide a basis for determining the risks and costs impacting e-discovery.