JANUARY 2008

InsideCounsel Roundtable

Bringing E-Discovery In-House

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Over the last several years, e-discovery has become the stuff of nightmares for in-house counsel who find themselves embroiled in litigation. The amount of electronic data the average businessperson produces has grown exponentially, the costs to conduct e-discovery have soared and the revised Federal Rules for Civil Procedure have increased the burden on litigants to dig through any and all potentially responsive files.

Of course, more and more outside vendors have stepped in to offer their services—for a price. As expenses mount and the risks for failing to comply with discovery demands have grown, more companies are considering bringing e-discovery in-house. However, doing so is not an easy process. A legal department must have the budget, the caseload and the personnel with expertise to justify the process.

Recently, *InsideCounsel* brought together in-house counsel and others with e-discovery expertise to discuss the pros and cons of bringing e-discovery inside the company.

Keith Ecker, InsideCounsel: **Bringing the process of e-discovery in house is a big trend. What does that process mean to you?**

Julia Brickell, Altria: It is a very broad range of issues that in-house lawyers need to address well beyond the processing of electronic information. Regardless of whether one decides to bring processing in-house, one needs to bring information management in-house. And for this, you need to understand what your electronic information sources are.

Kathleen Harris, Merrill Lynch: We see electronic discovery and its tools as ways to diminish risk, as well as reducing cost in the heavily regulated environment we work in. Those are mandates for us to be able to help the business do better.

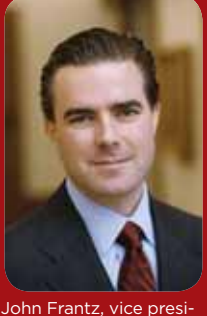
David Boyhan, Merrill Lynch: We were really very surprised by the cost savings when we looked at bringing tools in-house. We felt that many of the vendors were trying to sell us magic beans. There are a lot of folks out there with some very compelling tools, but there are also a lot of people who will over-promise and under-deliver. It is very easy to get caught up in elaborate technology promises that are either very difficult to manage or that just don't deliver all that you need.

One component of bringing e-discovery

Keith Ecker, technology editor at InsideCounsel

David Boyhan, director of e-mail and electronic discovery at Merrill Lynch & Co. Inc.

Julia Brickell, associate general counsel at Altria Corporate Services Inc.



John Frantz, vice president, associate general counsel and head of litigation at Verizon Communications Inc.

Kathleen Harris, senior vice president, discovery and regulatory response team at Merrill Lynch & Co. Inc.

Photography by Jeffrey Weiss

in-house involves making sure that folks internally understand the risks. The folks inside must understand that just because you purchased a package or a suite of packages, that doesn't make you an electronic discovery expert. There are real risks associated with processing and producing that data. One of the core reasons you go with vendors is because of their pool of knowledge and ability to address some of the risk that can only be developed through experience.

Dominic Jaar, Bell Canada: One of the first steps with bringing e-discovery in house is to take a look at your infrastructure. That's the place where you can save the most money-wise, at least by reviewing your records management process and having specialized people internally who know where to find what type of data, how to freeze the data, collect the data, etc.

There is another part to in-sourcing, and that is the lawyer part of it. You can in-source a lot of work that is being done by outside counsel by having an e-discovery team that knows as much—and in some cases, more than—what your outside counsel know. They know the business you are in, they know how you do business and they know what type of data to look for. They know the regulations and laws that apply to the core business you're in. That's a big part of the case for in-sourcing.

***Ecker:* At what point does it make sense for a company to start bringing this process in-house?**

John Frantz, Verizon: There are four aspects to bringing e-discovery in house. The first is preservation and electronic information. Any company that has litigation has to take the initiative to do that for themselves. That's really a core in-house function.

The second part is collection of electronic information. When a company has more than two or three cases going on at the same time, it really makes sense to internalize that function. That achieves a degree of a consistency across cases, and there is really a pretty minimal threshold for doing this internally.

The third piece is vendor selection management. A company with more than $50,000-$100,000 in e-discovery expenses can achieve very significant savings by taking the lead in that process internally and managing that effectively. Being an educated consumer and negotiating with vendors can yield significant price savings.

The last piece is internalizing all of the functions that a vendor might perform by, for example, posting your own documents where you platform internally. I don't think there are that many companies that do it. From an economic perspective, you need to have a pretty high volume in order to really consider doing that.

By moving the process in-house, you achieve millions of dollars in savings, you can scale up the process to meet tight deadlines and cases as they come up and you have a consistent game plan. We're well able to minimize our risk pretty effectively.

Anne Kershaw, A. Kershaw P.C.: Being in a reactive mode after the case has been filed is not the time to try to bring processes in-house. It has to be done well in advance and in preparation for the cases that likely will come.

Brickell: There are times where cases are small and the issues are fairly discreet, and it should be possible to negotiate a sensible discovery plan with your current outside counsel and your IT people, without the need to go to expensive outside vendors.

Even if in-house counsel don't have a plan to bring everything in-house, there may be an opportunity to contain costs and negotiate sensible plans with the other side in particular cases.

***Ecker:* How do you go about convincing your business people that this is a priority, that it is a necessity to invest in this and approve the budget for it?**

Harris: The business people were right in step with us. E-discovery is something we're spending a lot of money on. The case law in recent years has been kind of scary, and that was an incentive for them to want to support the fact that we could put an infrastructure in place that would allow us to be able to act consistently in almost all cases. And then it's just a function of looking at the volume. How much are we spending? Where can we get our biggest bang for the buck by bringing what pieces in? That analysis is what drove us to the specific types of things that we're looking to internalize.

Dominic Jaar, legal counsel at Bell Canada Inc.

Anne Kershaw, founder of A. Kershaw, P.C. // Attorneys & Consultants, a litigation management consulting firm

Patrick Oot, director of electronic discovery and senior litigation counsel at Verizon Communications Inc.

Frantz: In our case it was a general counsel-level discussion, and it is good to get buy-in on that level.

***Ecker:* How do you go about analyzing what to in-source in order to reduce costs?**

Harris: We took a look at what activity was actually being done by the vendor and then compared it to activity that we do already. For us, it was really a build-out from the initial group that was doing the regulatory responses. We saw an opportunity for David and some of our other team members to start working on litigation, where we had large cases that we were concerned about how they were being managed. We were able to see that some practices weren't generating any value, other practices were really quite valuable. To some extent, it was actually being inside the bigger cases, looking to find what we could do better and less expensively.

Boyhan: I'll confess the low-hanging fruit was very, very low hanging indeed. And I am a little bit embarrassed to say that it came to a point where we used very low-cost or even free programs, like Microsoft Windows search application, for very simple inquiries. It became obvious that there was simply no reason to go to a vendor for those sorts of things.

***Ecker:* How do you go about finding someone to fill the position internally, and who do you designate as the internal expert of e-discovery?**

Patrick Oot, Verizon: It is very difficult right now. I am sure that everybody in this room has recruiters calling on a weekly basis. The consultants received a huge boom in work after the new Federal Rules of Civil Procedure took effect in December 2006. There is huge competition in the market, which means the service providers and consultants and the in-house folks are each going to the same people, so you're seeing a lot of movement between the organizations. That's bad for clients, because it takes quite a bit of time for these folks to learn your processes and policies, how to manage your data, how to manage your information.

Frantz: When I put our group together, I identified two functions that needed to be filled. It's not necessarily the same person that's going to fill both, and that's why we've got two key people who have separate responsibilities. One person is an IT expert, who is internal and is responsible for managing our relationship with IT, knowing our technical systems and for interfacing with them on a day-to-day basis. That person came out of our IT organization. He is able to explain technical concepts in a way that lawyers and judges can understand, which is a key qualification for that job.

> One component of bringing e-discovery in-house involves making sure that folks internally understand the risks.

The second function is more of an external-facing person who is responsible for managing relationships with vendors and outside counsel. You're looking for a lawyer with a more technical practice.

Oot: When I speak at events, I constantly hear from people who say they aren't Verizon, they aren't big enough to have the staffing or HR capabilities to put somebody in this particular role. My advice is that you may not have someone inside—there are people outside.

Boyhan: It's important to remember just how perishable all this knowledge is. For those of us caught up in the Internet boom of the 1990s, anybody who knew what an IP address was brought incredible value to a company, and that's not valuable anymore. It's the same now. The tools that exist today are completely different from your tools that existed two or three years ago. The case law today has a lot of contours that didn't exist two or three years ago. So look for somebody who has either a technical interest in the law or legal interest from a tech side. Understand you are not going to find a perfect candidate. They are going to have to get up to speed and stay up to speed until the needs change.

***Ecker:* What other departments should legal work with as far as e-discovery, and how do you coordinate with those departments?**

Brickell: You are always talking to your business clients, of course, about how they are doing business. In terms of getting the groups together, all of us have to think about what's in it for those groups to be part of this party. The lawyers need to step up and take charge of pulling the groups together. Everybody thinks, "Well if the lawyers needed something from me, they'd come tell me."

Kershaw: Depending on what is going on, we may have bi-monthly meetings or weekly meetings with records management and IT and legal. If nothing is going on, we have monthly meetings at a minimum.

***Ecker:* There are so many different vendors selling similar products. What makes you decide on one or two vendors over the others?**

Oot: Cost and customer services are the two factors that are the strongest. It's unfortunate, but I really have to look at every single bill that comes in. It is not so complex, but there's a lot of research. It takes days and homework. Constant monitoring goes on with your service providers, and that's yet another reason for internal e-discovery.

Kershaw: You need to see how the vendor works. It's easy to promise and often hard to deliver. You need to see what they can deliver, how they address problems.

And once you decide on a vendor and have a contract, it is key to have service-level commitments and financial setoffs. People get comfortable. All of a sudden it takes a lot longer for your phone call to get returned. Or they found some other big client, and you're no longer the favorite client. If you have financial penalties

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for failure to provide according to an agreement and at the service level they committed to, that can be very effective. You may not use them, but you certainly can remind them that they are there.

Frantz: There is a lot of competition, but in most cases that has been to the detriment of quality. And if there were a provider out there that actually provided great service and delivered on its promises, even if they priced accordingly, they would get a lot of business by getting over this general inconsistency and customer service issues.

Companies can, especially if they are new to the vendor selection process, get educated at the beginning of the process about what things are necessary and productive and what things you don't need.

> Sooner or later, we will have to... balance the requirements for privacy and confidentiality against the requirements to produce things.

***Ecker:* What e-discovery issues do you see on the horizon?**

Frantz: There is no case that I can read, no rule that answers the question about what you need to do with IM's or voicemail or a new VOIP telephone system or any of the other kind of new technologies that have the capacity to store new types of information. There is so much risk associated with making a mistake, and you have to make a preservation decision at the beginning of a case. I see a trend towards a lot of risk aversion in this area.

Kershaw: The reality is that no matter what technology you use, no matter how much technology you use, no matter how much money you spend, unless you can look over every employee's shoulder and watch what they do all day long, we will never get it to be perfect. It is just impossible. And the courts and the litigants and the vendors would love to propel you to try to make it perfect, because in doing so, you have to spend a lot of money. But we can resist that. We can keep talking to the judges and we can work with the rules. For example, there is the proposed Federal Rule of Evidence 502, which deals with the waiver of privilege issues. No matter what we try, there may be a privileged document that slips out.

When we got involved, the Federal Rules Advisory Committee was looking at proposed amendments. Corporations and law firms stood up and testified before the committee and said, "This is a problem, this really does exist and we need to contain this." It caused meaningful, positive change. As you watch other cases going down a road that will create bad law and standards that really are impossible to meet, companies can weigh in and say, "Hold on. Let's take a real look at this. Does it make sense?"

Oot: It does seem that we're moving towards the direction of perfection. That direction is only going to cost clients and law firms and defendants and plaintiffs money. We really need to move back to a reasonableness standard—not this consistent rule of perfection. That's just not going to happen.

Jaar: One of the e-discovery issues I see is internationalization, which would involve the privacy laws in other countries. You also have language issues—in Canada, it's French and English.

The other main problem that will appear is legacy systems. A couple of years ago, systems were lasting for a couple of years, five years, 10 years. Now, within one year, you change a format for memory. It's going to be costly to retrieve the information from our old systems.

Boyhan: I see three big issues. First, you will see a tremendous amount of focus on security and data. If you think about it, the principles of electronic discovery and the principles of securing data against inappropriate use or theft are almost adverse to each other. On the one hand, you are trying to make it very difficult for people to read data and, on the other hand, the law is insisting we need to be able to read this. Sooner or later, we will have a situation where we have to balance the requirements for privacy and confidentiality against the requirements to be able to produce things.

The second thing I see is runaway technology, from the standpoint of so many new devices being developed.

Third, people will have to be careful about the level of mystification that goes with technology. If something is being done in an electronic format, people seem to think it has been transformed and takes on a different quality. Voice-over IP is an example. People don't believe that they need to preserve analog voice communication, even though it was entirely possible to set up vast banks of tape recording devices. The fact that it is now a digital communication over the Internet and, therefore, somewhat easier to capture and produce doesn't change the fundamental aspects that this is a telephone recording that people are not expecting requires recording.

Frantz: We really need to see an evolution away from standards and towards rules. These standards were stated in very general terms that require a reasonable safe harbor. Things like that are not really even applicable under the current regimes of preservation decisions. What's needed are some actual rules, a bright line that says this has never traditionally been required to be saved. The advent of some new ability to store it doesn't change that basic requirement. Some additional rule amendments would have significant benefit in the future to at least establish a kind of guideline that says, "If you can prove that this source of information has very little unique, relevant information, you don't need to save it." Without some kind of protection like that, the inherent risk you have with lawyers in general is that they will propel us towards saving more and more. ■

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