Roadblock Ahead!

Overcoming the Reluctance to Bring E-Discovery In House

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There are significant benefits for organizations that bring some or all of their e-discovery work in-house. Here are a few:

- **Substantially cut costs:** Having tools to identify, preserve, collect and process your own electronically stored information (ESI) is far less expensive than relying on outside services;
- **Reduce risk:** Having an internal process and tools to quickly identify and proactively preserve relevant ESI from spoliation can substantially reduce your risk;
- **More control:** More than a few commentators have noted that e-discovery should be a controlled and measured business process. Having in-house tools enables that controlled process, particularly for routine, repetitive cases; and
- **Conduct early case assessment:** Companies that “own” their e-discovery process can access their ESI at the outset of a matter—as opposed to having to wait weeks or months for someone to collect and process the ESI for them. This earlier knowledge can help to quickly establish the appropriate path and posture for a case, resulting in more efficient outcomes.

Roadblocks to In-House E-Discovery

But what about those roadblocks? If in-house e-discovery is so great, why are some people still talking about it instead of just doing it?

**Bringing more of the e-discovery process in-house truly is not for everyone—but probably not for the reasons that you think.**

In many cases, the risk perceived is likely just a function of the company’s legal and IT departments failing to communicate about e-discovery issues and to implement a good plan. Get them working together and many of the concerns about risk will fall by the roadside.

If something goes wrong, many companies are also comfortable with the thought that having a third-party provider for their e-discovery work will shield them if something goes wrong. Sometimes, this concern is even personal—“I don’t want to lose my job if we fail to preserve relevant ESI.”

In reality, companies cannot pass their e-discovery responsibilities to third parties, and the “safety net” that many companies think they have is likely non-existent. If e-discovery sanctions were ordered, they would be levied against the company as a party to the litigation, not against the non-party service provider. If the provider were actually at fault, the company would be left with trying to recover for breach of their agreement—and if you have seen a typical contract in this industry, you know that is a difficult process.

It is even more difficult for the organization’s attorneys. Courts are increasingly holding in-house counsel responsible to ensure that the e-discovery process is done properly. (Swifitford v. Eslinger. (Sept. 28, 2009); Phoenix Four, Inc. v. Strategic Res. Corp. (Aug. 1, 2006). Hiring a third party does not shift this obligation.

There are certainly times when having a third party assist with e-discovery is useful and counsel should determine when those situations are appropriate. But it does not provide an automatic shield.

**Solutions are too expensive.** Investing in e-discovery tools is just that—an investment. Good infrastructure tools can cost tens of thousands up to millions of dollars, depending upon the size and complexity of the infrastructure, the type of tools purchased, etc.

The important question in this area should not focus on cost, but on whether there is a worthwhile return on investment. Will you save money by making an investment in e-discovery tools? If you have more than a few modest cases per year, the answer is almost always “yes.” Gartner notes that companies with active litigation can get a full return on their investment in three to six months, or after just one large case.

Our law firm won’t let us. Some law firms do not like their corporate clients to bring e-discovery processes in house. Often, this is simply because the firm has a preferred vendor with which its attorneys are comfortable. They know exactly how and why certain tasks are completed, and they do not want to change. Others have not yet had the time to understand these “new” tools and might be afraid of the unknown.

Regardless, law firms need to get on board with a movement that can save significant dollars for their clients—and an encouraging number are already doing so. And there really is something in it for everyone. Forward-thinking firms see a potentially large increase in the amount of litigation that they handle for clients when they are the driving force behind bringing a new system in-house. After all, they have invested time and effort in getting the right solution. And they understand exactly how it will operate in their client’s environment.

Mapping it out. Bringing e-discovery in-house is not for every company, but it can create tremendous savings and reductions in risk when done properly. When charting the course to an in-house solution, keep in mind that many of the roadblocks you find along the way could be artificial, so do your homework and be ready to maneuver around them.