

A problem shared

The increasing sophistication and cost of handling e-discovery in-house means that law firms are examining the benefits of turning to outsourced providers, writes **Mike Brown**

E-DISCOVERY HAS become an indispensable part of the litigator's armoury as the shift of business communication from paper to electronic forms has increased the number of electronic files generated each year.

This has created a need for new systems to deal with the huge volumes of documents and the range of formats and locations that they are likely to be in. Fortunately, technology has kept pace with the demands being made on e-discovery professionals, but at a price. As the available tools have become more sophisticated, the cost of purchasing and maintaining them has also increased dramatically and the market is now at a tipping point. Many firms are soldiering on with their legacy systems, upgrading and maintaining them as best they can, but without the resources to completely overhaul them, the systems do not meet current standards.

Even five years ago, the range of e-discovery tools was not vast and there were few providers of sophisticated outsourced e-discovery services in the market. Consequently, most large law firms bought their own e-discovery systems and maintained them in-house. Many of these law firms are now faced with a strategic and economic dilemma. Do they continue to buy and operate their own e-discovery tools, or do they outsource them to a specialist provider? Both strategies have their advantages and disadvantages.

Pros and cons

While expensive, retaining an in-house e-discovery system does have its advantages. It is very useful for law firms to have their own staff that are experienced in using e-discovery software – and for their lawyers and litigation support to have hands-on experience too. Having direct experience with the operation of e-discovery systems can enable them to provide better advice to their clients on discovery issues, as well as assist them in monitoring the progress of their cases more closely.

However, these advantages are increasingly being outweighed by the downsides and being completely self-sufficient is looking like an impossible job. Two major issues stand out when weighing up in-house versus outsourced.

The first of these is the cost (time as well as financial) of upgrading in-house systems. E-discovery tools are advancing very quickly and, for law firms, keeping in-house systems at the cutting edge of what is becoming a technological arms race is becoming a very costly exercise. The expense of replacing existing systems is often prohibitive and unlikely to be attractive at a time when the cash flows of many partnerships are under severe pressure. Such capital expenditures are typically not a disbursement, whereas using outsourced services usually is.

Staking your reputation

The other growing downside of retaining e-discovery in-house is the reputational risk that comes with being responsible for client data.

There are, broadly, two main processes that e-discovery systems handle. The first of these is data processing – the identification, extraction, sorting and preservation of the document set. The second is data review, in which the document set is searched and relevant material retained and organised. The risks typically occur at the processing stage and the technology behind data processing has become increasingly complex in recent years.

Forensic techniques for identifying links between documents and uncovering attempts to conceal or destroy data have become more important. Meanwhile, the need to preserve the integrity of data – especially the metadata (the hidden record of when a document was created and modified, and who has seen it) – has also become more apparent.

If the process is not followed correctly and the data is not stored securely, the consequences can be serious. The risks associated with getting it wrong have grown as the courts are taking the issues of evidence spoliation very seriously. Indeed, the primary concern for law firms when deciding whether to outsource or in-source discovery should lay in risk assessment.

A wise choice

Care needs to be taken to choose an outsourced provider that has made the investment in the systems and security that will protect the integrity of data. The best providers will have invested considerably to ensure that the data they handle is kept safe and not spoiled. This will include data protection compliance, back-up and disaster recovery plans, data encryption and strict data-tracking controls to ensure that the data they process remains in a 'defensible' position. This is their core business and maintaining data integrity is the key focus of their efforts.

Staying ahead of the game in this regard is increasingly expensive and becoming more a function of significant economies of scale which most law firms will not have. While the advantages of having in-house e-discovery expertise are likely to remain, and buying in

**Growing pressure:
navigating the maze
of e-discovery has
become very hard**



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new systems to deal with specific parts of the discovery process is still viable, retaining wholesale ownership of e-discovery systems themselves is likely to become the exception rather than the norm.

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