

## Advice From Counsel: The Emerging E-Discovery Playbook



*Law360, New York (May 29, 2014, 4:58 PM ET) --* FTI Consulting Inc.'s first "Advice from Counsel" study was conducted five years ago, with the goal of learning how leading e-discovery practitioners within corporations were managing e-discovery and to share their advice with peers just beginning to undertake the e-discovery process. One of the first questions was: "For companies just beginning to develop their e-discovery program, what advice would you give to reduce the overall cost of e-discovery?"

The fifth edition of the "Advice from Counsel" study was recently released and, in a relatively new industry, the fifth of anything is a significant milestone — one that begs the question: What has changed? And, perhaps more important, where will we be five years from now?

E-discovery is increasingly considered its own specialty area, requiring a dedicated manager or team. In the original survey, all of the respondents held e-discovery responsibility, but only 14 percent had e-discovery or technology as part of their title, compared with 37 percent of respondents this year. This specialization is positively impacting each company's approach to and control of its e-discovery process. This is just one of the many examples of how the industry has changed.

Most corporations today are actively working toward greater e-discovery efficiency, transparency and cost predictability. This year's study includes responses from 30 Fortune 1,000 legal professionals, with responsibilities that include e-discovery. The study uncovered many key components of an effective corporate e-discovery playbook, giving corporate e-discovery practitioners a benchmark for their own programs. Following is a summary of the top "plays" recommended by participants in this year's study along with some of their advice to other practitioners.

### **Handle Preservation Through Collection Internally**

Overwhelmingly, 90 percent of respondents reported that in-house teams handle most of the preservation and collection responsibilities. Only three percent stated they outsource the entire e-discovery process, including identification, preservation and collection. The remaining seven percent take a hybrid approach where, depending on the details of the case, in-house or outsourced resources

are deployed.

There are some important exceptions. Respondents outlined four areas when third parties are called in to assist with preservation and collection:

- In large, high-stakes matters where a third-party expert may need to testify on the defensibility of the collection process.
- In matters where compliance with data privacy regulations for global matters involving data from outside the U.S. needs to be ensured.
- For matters involving social media platforms with unusual preservation or collection requirements.
- In “bring your own device” environments where employees may have relevant data on personal devices, such as laptops and cell phones.

### **Outsource to a Vendor Whose Sole Job is E-Discovery**

It is faster, cheaper and service providers track the trends better. This frees counsel to focus on the strategy of the case.

Just as collection and preservation are well-suited to be managed in-house, corporations are mostly outsourcing review and production. Eighty percent of respondents reported that they outsource review and production. Of that group, 60 percent outsource directly to a service provider and the remaining respondents rely on their law firms to manage the service provider relationship. According to respondents, the outsourced model was found to be the most efficient and cost-effective approach to review and production.

### **You Don't Need to Handle Predictive Coding In-House, but you Should be Involved in the Decisions**

Only 17 percent of respondents recommended that companies bring predictive coding in-house. Most of the feedback suggested that while corporations should control the strategy, service providers are better equipped to execute predictive coding. “While the company does not manage predictive coding internally, it does drive the selection process and other elements,” noted one participant.

### **2014 Goal: "We Would Like to Leverage Prior Work Product"**

Forty percent of respondents currently reuse coding decisions made on documents for previous matters, including on privileged documents. Eighty percent of this year's participants would consider deploying a multimatter repository that enables the reuse of document coding decisions if it required standardizing on one legal review tool. “Data reuse is an area we've identified for improvement since we've found that we review the same documents multiple times,” reported one respondent. Another respondent said, “Typical litigation tends to involve the same custodians and require the same general information.” As a result, these numbers may increase in the next year or two.

### **You May be Better Off to Have a Good Provider Support Your Work**

The corporation's relationship with its service provider(s) played a prominent role in this year's responses. Most acknowledged that bringing the entire e-discovery process in-house was not feasible due to budget, staffing, and the volume and variety of matters. In fact, 86 percent of respondents said

there were no plans to bring the entire e-discovery process in-house.

Because of this, maintaining a strong, collaborative relationship with service providers was seen as a key imperative for any e-discovery program. More than half of the respondents, 53 percent, already have standardized on two or three e-discovery service providers, and 17 percent are planning to do so in 2014. Some interesting data points that stress the growth in developing more strategic service provider relationships include:

- Eighty-seven percent of this year's participants directly negotiated their agreement with service providers, 10 percent worked with a law firm to determine the providers and only one respondent relied on a law firm to choose the company's e-discovery providers.
- Eighty-six percent of the participants have a master service agreement ("MSA") with their legal service provider(s). While not all corporate MSAs are the same, service providers typically undergo a rigorous selection process as part of an MSA, including security checks, client references and workflow training.

### **New Challenges Emerge**

While respondents were confident in how they had operationalized their e-discovery program, they also were quick to identify new challenges. When asked to highlight the top three information challenges, 37 percent of respondents identified growing data volume as the highest priority, followed by 23 percent who struggle with data mapping and identification of sources of information. A majority of participants, 52 percent, identified the cross-practice (i.e., information technology, compliance and legal) collaboration required to develop and implement a plan as the most significant inhibitor to establishing an effective information governance strategy.

The increasing number of devices and data locations — many with potentially discoverable information — further compounds the challenge of growing data volumes for corporate e-discovery professionals. Although it is a relatively recent phenomenon, 67 percent of respondents work with organizations that have implemented a BYOD policy within the last four years. Another 14 percent will implement a BYOD policy this year. In fact, by 2015, up to 90 percent of respondents expect to have such a policy at their company.

Costs often are directly linked to data volume, but predicting these amounts remains a mystery to 43 percent of survey participants and their legal teams. Conversely, 57 percent of respondents reported being able to quantify how much data they collect, review and produce in a typical matter. Those amounts range from two to 20 gigabytes per custodian. Sixty-two percent of participants expect a continued upward trend in e-discovery data volume over the next few years.

The study also identified findings about e-discovery software, including ease of use, analytics and predictive coding. The number one complaint about legal review software in the study was ease of use, with nearly a quarter of respondents seeking usability improvements for existing software, including for advanced analytics capabilities, which are gaining adoption across the board.

Looking ahead, 53 percent of the respondents expect costs to increase over the next few years, while the remainder of respondents expected costs to decrease or remain the same. Generally speaking, "The proliferation of different systems and tools and the expansion of data are forcing higher costs," said one individual.

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