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A Two-Pronged Approach To Handling E-Discovery

The Editor interviews Sophie Ross, Senior Managing Director, FTI Consulting.

Editor: Please give our readers some knowledge of your background.

Ross: I joined FTI in 2008 when the company acquired Strategic Discovery, a leading e-discovery services firm. I was Strategic Discovery's chief operating officer responsible for e-discovery operations. With FTI, I led the integration with Strategic Discovery and also began investigating new ways we could better serve our clients leading towards the launch of Acuity within FTI. A key pain point that emerged was document review. This is a natural fit with my background, as I worked in the outsourcing world prior to Strategic Discovery. I'm quite familiar with setting up outsourcing facilities, especially in China, where I set up an operation involving 500 engineers.

Editor: What is your title now at FTI?

Ross: I am a senior managing director responsible for Acuity, an e-discovery and document review business within FTI. I'm also responsible for all the services that we provide for the western U.S. region for FTI Technology – from data collection to production.

Editor: You recently published a white paper on the topic of cost reduction in e-discovery, specifically focused on legal review. Exactly how big is the problem?

Ross: There are a lot of industry statistics and anecdotes about the high cost of e-discovery in general and legal review in particular. As an example, Fulbright & Jaworski recently published a report stat-

ing that on average a corporation spends \$3 million per legal case, and many analysts estimate the cost of legal review comprises about 70 to 80 percent of total e-discovery costs. In addition, the amount of data and the volume that corporations have to deal with has increased exponentially and continues to increase year after year. We all know that the volume of corporate electronic data is growing, and the number of matters is increasing as well. The problem will only increase in the future. This is a problem not only for corporations but also for law firms, which are concerned about managing budgets for their clients. Many companies will decide to use a given law firm that can best manage this expenditure.



Sophie Ross

Editor: Do you feel that with the increasing volume of data there is also an increasing improvement in e-discovery technology that might counteract the impact of that increasing volume?

Ross: A very good point! We are definitely using technology so that the percentage of documents reviewed is reduced. But even with predictive coding, human review will still be necessary since you will still need to train the tool and use human reviewers to look at the documents and employ the technology. So the percentage of mixed technology and human interface will increase, but it doesn't mean that the number of reviewers is necessarily going to decline. The whole process will be more efficient, but companies will need to know how to use

that technology with greater sophistication than the basic straight-line review with workflows and methodologies reducing costs. On a holistic basis, looking across the project's timeline is even more important because you need to know from the outset how you're going to use your technology and how it's going to affect the workflow throughout the project.

Editor: Do you think early case assessment may help to bring down the cost?

Ross: Early case assessment allows companies to have a quick look at the data and a better understanding of some of the substantive information that they may have available to them so that they can decide on the best approach. Should you go through the entire process and review, or should you settle? I think the one thing early case assessment may do is change some of the strategies and allow companies to decide which strategy is best. We suggest that we and the client review the data for the first week of a litigation. We learn a lot from this data and then can apply the best workflow to get the best outcome as well as minimize costs.

Editor: For such an expensive process, why are companies unable to assess their e-discovery costs?

Ross: The e-discovery process is quite complex. For large matters you typically have several providers and several law firms involved as well as data moving back and forth, so the project management requirements are important. Our experience in working with clients has been that a holistic approach can really simplify the process. A lot of times many companies are looking for the cheapest vendor for each process – whether it's

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collecting the data, processing the data, using the review tool and carrying out production – in the belief that if they can get the cheapest provider at every point in time they will have an overall cost that is lower. In reality that is not necessarily the case. The handoff of data to subsequent vendors and the fact that the company that is collecting the data is not necessarily thinking of how the data is going to be handled by the later processor negates the strategic planning that needs to happen.

Also, e-discovery requires in-depth knowledge. Many companies have started building their own in-house small e-discovery teams using inexperienced teams, so even if you have a small team you may not have the full expertise in-house to plan this really daunting process and project. This is why companies such as FTI can be helpful in assisting clients to manage that process and fill that gap.

Editor: Your white paper also discusses how two main models have emerged to address these costs. What are their key attributes?

Ross: The two main models are the line-item model and the total cost model. The line-item model really divides up e-discovery into a series of commoditized steps, requiring the handoffs of the data and information from one step to the next – collection, processing, document review and then production being the main steps. In this model corporations select preferred vendors in the different areas and then negotiate the lowest price possible. For a single project you may have all these vendors involved throughout the process. There are a number of issues with this kind of a model – what happens if keywords change late in the process? Who is accountable for the finished product? While you may have the lowest price point for each step, this does not mean that you'll have the lowest price for the cost of the entire project.

The total cost model, on the other hand, really looks at the entire e-discovery process for that particular matter provided by a single vendor who recommends the best workflow and who streamlines and provides an efficient e-discovery process that also translates into a lower cost. We also look at the total cost for the project based on a cost either per document or per gigabyte so you can actually measure the cost, not just on an

hourly basis but across the project.

Editor: What are the benefits of the line-item model?

Ross: The main benefit is that it is simpler to understand. If you work on a legal team with a large in-house e-discovery group, this may be the most beneficial model since you'll have the people and resources to manage the multiple vendors and providers, oversee data handoffs and generally project-manage the process. In such instances, the line-item model can be very effective in providing corporations with transparency and control of their process.

Editor: Please describe the total cost model and its advantages.

Ross: The total cost model streamlines the e-discovery process with one provider and creates a structural incentive for the service provider to reduce cost and control enough steps in the process to eliminate inefficiencies. Most offerings within this model price through a flat rate per custodian, per document reviewed or per gigabyte. There are a few key benefits with this model, especially for those companies that cannot bring a full e-discovery and legal review team in-house. First and foremost, you know your total cost – the cost per document or the cost per gigabyte – so you're able to budget more effectively. So let's say that if you're assuming you're going to be handling or reviewing 100,000 documents and then suddenly when you collect the data you realize that the number of documents or the amount of gigabytes per custodian is higher, you're able to quantify exactly by how much higher your total cost is going to be. There are no surprises.

Editor: How can companies choose the best model for their legal review?

Ross: For simple and routine e-discovery matters or for more complex matters that can be effectively managed by your team, a line-item approach may provide all of the cost efficiency and transparency needed. Those using this approach need to be mindful of key areas where costs and risk can increase, such as when the scope of a matter changes, or during handoffs from one provider or

vendor to another. Having a keen understanding of the pricing, process and technology at work can help line-item practitioners achieve control and transparency in their e-discovery.

For more complex matters or repeat matters, or for companies that don't want to invest in a large in-house team or are otherwise facing budget pressure, a total-cost approach may provide greater efficiency. It's important to remember that all total-cost models are not equal, however. My budgeting white paper, available at www.ftitechnology.com, includes a self-assessment to help companies gauge their level of cost control and budget transparency.

Editor: Do you see consolidation within this industry as a result of the preference for vendors that are able to complete the entire process?

Ross: I think the industry consolidation is happening for many reasons, but one key reason is that most corporations would prefer to work with fewer providers that can do more of the process. As evidence of this, FTI recently conducted a survey of Fortune 1000 inside counsel and found that 70 percent found it important to streamline the process using fewer tools, and 93 percent said the same when it came to service providers. Counsel is rightly risk averse when it comes to selecting their software and service providers and want to partner with large, viable firms with proven track records.

Editor: Is there anything more you'd like to add?

Ross: Budgeting and predictability are top of mind for counsel. My goal in developing this white paper was to help companies get control and predictability over their e-discovery budgets. Readers can expect to learn how to identify the e-discovery model in use at their company, pinpoint the areas within their program that lack transparency, assess the efficacy of each model for their particular litigation profile and resources, and perhaps, most importantly, ask the right questions of software vendors and legal service providers when selecting and/or implementing either model.