



White Paper

Attorney Review in the Enterprise

Choosing Deployment Options

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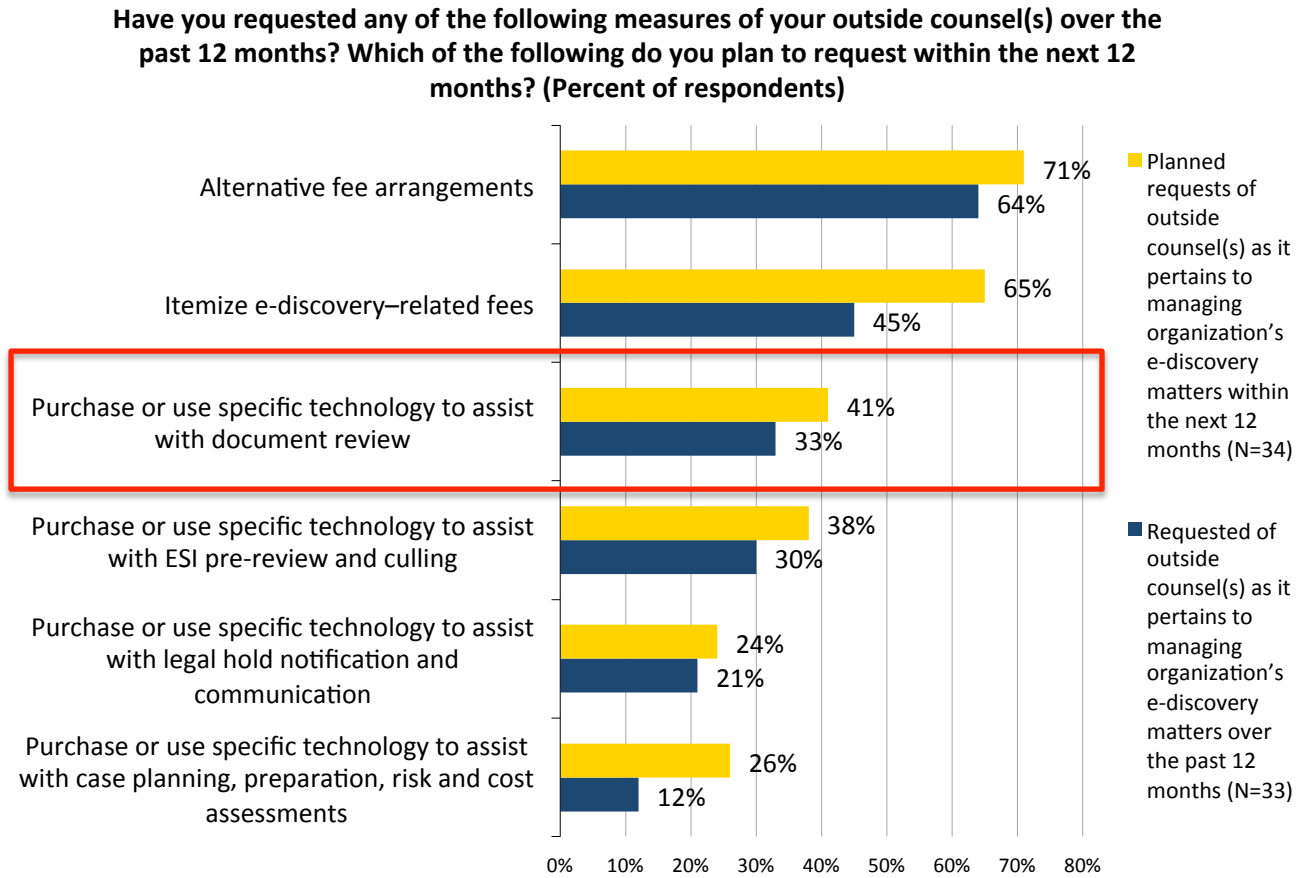
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e-Discovery Review Control Moves In-house

In response to exploding volumes of digital evidence for litigation and competition in the legal sector, more and more corporate counsel are demanding greater accountability for the price of attorney review. Inside counsel are increasingly influencing the review strategy of outside counsel, suggesting specific e-discovery technology for use in optimizing document review, or buying review tools themselves to facilitate in-house review in smaller matters. In ESG’s 2011 corporate counsel survey, 33% of respondents had requested that outside counsel use specific technology to assist with document review, and 41% planned to request it in the coming year.¹

Figure 1. Measures Requested of Outside Counsel, 2010 and 2011



Source: Enterprise Strategy Group, 2011.

This report will outline several options available for conducting e-discovery review, either through the use of internal technology investments or by outsourcing technology infrastructure, additional services, and even review management and staffing to a third party.

Making an Informed Investment

Choosing a review strategy, whether for a single case or as a long-term investment, involves careful consideration of the legal, technical, and organizational factors involved. Enterprise customers weighing their options should take the following into account when determining viable approaches to managing attorney review technology and outsourcing.

- **Case assessment:** What are the size, risk profile, and potential impact of the matter? What are the outsourcing and oversight needs for litigation response and document review, and likely collaboration approaches?

¹ Source: ESG Research Report, *E-Discovery Market Trends: A View from the Legal Department*, October 2011.

- **General counsel:** What is the overall frequency, type, significance, duration, and geographic location of matters in the corporation, how often do they involve ESI, and how much? What is the anticipated frequency and volume of in-house usage vs. outsourcing to legal service providers? What are the necessary internal resources, staffing, and IT support and infrastructure involved?
- **IT:** What are the staffing, resources, and expertise of IT for handling e-discovery infrastructure support on-demand? What is the security and governance policy regarding risk tolerance for moving data outside corporate firewalls or allowing third party access inside the firewall? What is the budget and deployment timeframe for a technology investment?

Understanding these factors up front and applying them in the context of different types of cases can establish more consistent process and policy in administering different litigation scenarios. Consider these examples:

- Companies performing their own in-house review for ongoing day-to-day matters might choose an on-premises license to avoid long term per-case usage charges associated with SaaS subscription pricing.
- Companies lacking the IT infrastructure and support for in-house review tool deployment might prefer a SaaS option to “get out of IT.” This can support a number of scenarios: limited episodic usage on small cases which would not justify a license purchase, outsourcing the risk and IT support in large scale, high-stakes litigation on an overflow basis, or for all litigation under a master services agreement negotiated at a competitive rate with a preferred provider.
- Outsourcing both technology and labor through SaaS and outsourced legal review and technology services may be preferable for a one-time large scale review project, such as multi-district litigation or M&A second request work.
- In other cases, companies with strong governance mandates and limited risk tolerance for moving data outside their firewalls may not consider outsourced hosting via SaaS to be a viable option under most circumstances.

Finally, organizations balancing both regular small scale in-house review and sporadic high-volume engagements may benefit from a hybrid approach. An investment in internal technology can be augmented by outsourcing cases via SaaS and legal review services as needed rather than applying one-size-fits-all tactics for every matter.

Review Tool Options

Whether used in-house or chosen as a preferred tool for use by law firms and service provider partners, e-discovery review tools are commonly available as on-premises licenses or as SaaS subscription-based model accessed via the web with external hosting, though not all vendors offer multiple options. What follows is a definition of the terms of each deployment model and the considerations for selecting each.

On-premises Software

On-premises software enables corporate counsel to conduct internal review behind the firewall, limited only by the internal infrastructure required to support it. A license is usually purchased with an up-front fee and no ongoing usage costs.

Overview

Purchasing: On-premises licenses are sold directly to be implemented on-site within a customer’s own infrastructure or hosted internally to be run on a customer’s internal network.

Pricing: Pricing for on-premises software is typically a flat deal with annual maintenance fees. Software may be priced by the seat or tiered by organizational size, and it may be limited based on volume or capacity of the underlying infrastructure. Pricing tends not to be based on usage, data volume, or duration of a case, as hosted or SaaS offerings often are.

Implementation: Implementation services and ongoing support may be available from the supplier or a partner, but managing and maintaining the broader internal infrastructure of servers, databases, and storage hardware to support the system is the responsibility of in-house IT staff. Security provisioning and business continuity planning, either for an internally-hosted version or for remote desktop access, are the responsibility of the customer as well.

Benefits

On-premises licenses offer the benefits of internal custody and control of data to customers who may be wary of moving data outside their firewall. Clients may wish to manage their own data and infrastructure rather than rely on third parties to provide data protection, security, and access, particularly when hosting data for multiple clients at once. Additionally, high-volume serial litigants or those with long-standing cases may prefer the value of a flat in-house license fee rather than paying for ongoing hosting, usage, and services through the life of a matter as part of a SaaS application.

Considerations

The trade-off of investing in on-premises software is the time spent in evaluating, selecting, purchasing, and deploying a tool as well as the internal investment and effort in supporting the required infrastructure to run it. This is an important point for attorney review tools as document review can involve large amounts of confidential data, often used under time-sensitive conditions for long stretches by multiple users, potentially from outside the firewall. IT environments required to support peak demand during attorney review necessitate extra storage and leverage host CPUs and RAM through sophisticated capacity planning and provisioning.

Additionally, those with on-premises systems are responsible for importing collected evidence from disparate sources into the tool prior to review. This can require a separate processing tool, as well as extensive manual effort to create a custom load file. It also carries the risk and burden of defensibility in handling evidence without losing, altering, or otherwise spoliating it through negligence. Devoting internal staff to this sidelines resources and requires training, and disrupts regular internal operations if staff members are not otherwise dedicated to litigation support. Outsourcing these tasks on a regular basis incurs other costs, schedules, and resourcing considerations. In contrast, processing and data loading is often included in a SaaS model, either supported on the back end as a service by the provider or offered in collaboration between the provider and the client's internal IT or litigation support staff.

With an on-premises license, IT staff must also stay on top of software releases and may need to change, augment or reconfigure backend infrastructure. For SaaS customers, version upgrades occur automatically and are typically charged as part of a service subscription payment.

Outsourced Technology

Whether it's called cloud, hosted software, or SaaS, attorney review software is also available fully outsourced over the network, just like other enterprise applications such as Salesforce.com, Google Apps, and Microsoft Office 365. SaaS review tools are hosted by service providers and accessed over a network connection, typically through a web browser.

Overview

Purchasing: SaaS review software can be purchased from a vendor directly over the web or through a service provider. Data must be sent to the provider for processing and loading into their cloud, either over the network or manually if data volume and timeframe make this impossible. In e-discovery, SaaS tools are sometimes used as a web "portal" to give customers a menu of service options on the back-end to be performed by a provider, such as additional processing, or other specialty handling of data. Because SaaS has little impact on internal IT systems and staffing and is charged on a subscription model rather than requiring capital expenditure, it can be (and is) often purchased by business users at the departmental level or billed back to general counsel by law firms.

Pricing: SaaS is usually priced per-case and per-use according to the provider's individual fee structures, which may contain minimums, varying rates or capacity-ceilings, or other provisions. Individual arrangements with managed hosting providers vary, but typically support more high-volume or serial usage by frequent litigants rather than one-off cases.

Implementation: Outsourced options such as SaaS offer quick deployment compared to on-premises software, without interrupting IT or legal operations. SaaS also provides "always-on" availability with elastic capacity for large jobs. SaaS options are often used for "overflow" capacity on large cases. This is true even for customers that already own an on-premises license of the software, but may lack the internal infrastructure and resources to handle big volumes on short notice.

Benefits

SaaS tools offer fast deployment, "always on" availability, and typically low up-front investment. This makes them an ideal choice for companies lacking the technical support for an in-house tool or requiring overflow support on large cases. SaaS poses an appealing option for outsourcing high-profile or high-volume cases, or "trying before you buy" in testing out a potential on-premises license.

Many SaaS tools offer easier remote access for external teams, one of the reasons why attorney review has been available for so long through e-discovery service providers. Cases may now involve legal process outsourcing (LPO) and contract reviewers around the globe working at all hours, litigation support teams, software vendors with specialized culling, and service providers working in multiple international sites. Outsourced tools enable easier collaboration between teams outside corporate firewalls, and sometimes project management, tracking, documentation, and batch assignment workflow to accommodate distributed, large scale projects they're involved in, depending on the tool. This is a key benefit for large, geographically-dispersed projects.

In other cases, enterprise customers may choose SaaS to push the risk of high-profile cases to a trusted provider. This is particularly true for investigations or regulatory matters in which adversarial parties must access and review the same information, but may not want to host it behind their firewall themselves. Customers may also require a "deal room," for highly-classified and high-profile transactions like M&A negotiations or regulatory review requiring secrecy and a neutral, tightly-secured environment. A trusted provider may have more robust and current security provisions for handling usage scenarios involving adversarial parties compared to the typical enterprise customer. Certifications such as SAS-70 auditing distinguish data centers with verifiable hosting controls and safeguards.

SaaS also offers the benefit of choice. Service providers may offer multiple review tools in hosted deployment to accommodate customer preference and cases with different requirements. Conversely, many SaaS-based review tools are available from multiple service providers with years of experience, giving customers options for working with preferred providers in a familiar environment.

Considerations

For those attracted to the lower initial investment of SaaS subscription pricing, it's worth noting that the cumulative costs of long-term litigation can offset the up-front savings of using SaaS over a license purchase. On the other hand, fees may be negotiable and may become more favorable should a customer standardize on a particular SaaS platform for all of their litigation needs, with certain expectations of volume and usage.

Just like an on-premises review tool, using SaaS still requires that data be ingested, processed, and imported to the application before it is available for review. For high-volume or high-risk cases, data transfer may not be possible (or preferable) over a network connection. And while processing can be done with on-premises or SaaS tools, additional processing may be required as a service from the provider, making SaaS not necessarily fully self-service or immediate.

Outsourcing hosting also means outsourcing infrastructure requirements and maintenance, which depends on the reliability of the provider. Typically a service level agreement (SLA) dictates expectations between customer and provider for terms of service, infrastructure and technology requirements, and agreed-upon metrics for uptime,

availability, accessibility, and data protection. These legally-binding contracts may either be boilerplate and relatively non-negotiable or individually negotiated, depending on the provider.

It's important to note that when using a third party for hosting, the provider has physical custody and control of the data and is responsible for infrastructure, security, and performance. However the customer is still legally tied to its data and obligated to produce it for litigation purposes. Customers must seek assurances (if available) regarding provisions or liability in case of disaster recovery or systems failure, should they occur, as well as bankruptcy or act of God data loss.

International standards of data protection and privacy pose another concern in outsourced e-discovery. As business becomes more global, litigation and regulatory response can require collecting, processing, and hosting data in countries with different and even *conflicting* guidelines on legal process and the rights of their citizens to data protection and privacy. There are numerous individual provisions that vary by country in complying with these. Those anticipating cross-border disputes are well-served by choosing providers with data centers in multiple relevant international jurisdictions, and with global service arms for on-site collections and processing in addition to consulting local experts on legal protocol.

Technical Considerations

With an understanding of the considerations for specific deployment alternatives, customers can make a more granular inventory of their technical requirements in the context of available options. The following are important factors in choosing a specific tool for long-term (or short-term) use:

- Existing e-discovery software and workflows from collection to production
- Location and descriptions of the most likely sources of ESI
- Data processing – DIY or utilize SaaS vendor or third-party processing firm to do it for you as a service
- Data capacity requirements and likely volume of ESI
- Pricing options for short- and long-term usage
- Deployment requirements and timeframes
- Compatibility with existing systems or integration efforts required
- Customization needs
- Availability of multiple deployment options if needs change or overflow capacity is required
- Availability and pricing of additional services
- Collaboration options for remote parties, including security, access, workflow customization, and oversight
- Security and compliance requirements (e.g., encryption, access control, role-based security, and data privacy)
- Business continuity (high availability, failover, and storage archiving)
- Upgrade, sunseting, or migration options
- Terms of license or service level agreement (SLA)

Outsourced Legal Review and Technology Services

For those seeking greater cost-accountability in review projects without the burden of supporting either the technology or labor involved, outsourced legal review and technology services can provide an attractive alternative. The rise of LPO and more advanced technology has produced new approaches to prioritizing, tiering, and assigning workloads in review projects that emphasize speed and efficiency in results, often at fixed-fee rates more predictable than traditional law firm billing.

Overview

Purchasing: Outsourced legal review services consist of a service provider acting as liaison for the client, the law firm handling the strategy and trial preparation of a legal matter, and document reviewers examining evidence. Depending upon the provider, they may develop their own review software or use a third party tool.

Pricing: Outsourced review services are typically priced using a flat fee, a per-gigabyte rate, or other alternate fee arrangements, rather than charged strictly on the time required to complete the project. This makes costs more predictable than traditional billable hour rates for attorney review.

Implementation: Outsourced review services are fully outsourced to third parties with oversight through a chosen service provider and law firm administrating the case. Lower fixed-fee rates for outsourced review services are often possible through the use of outsourced contract attorney or litigation support labor and, frequently, more advanced methods for filtering, culling, and prioritizing documents in a data set for more streamlined execution. Optimized search functionality and automation offer better speed and efficiency than traditional “linear” review methods done document by document in chronological order (or even no order at all)—a method no longer practical for large cases involving terabytes of evidence to be reviewed in short timeframes.

Benefits

Outsourced review services often offer an “all-in” fee structure for outsourcing the management and expense of technology and labor involved in document review. This requires less client involvement in the process, and no responsibility for technology or infrastructure acquisition and support. It offers more predictable cost structures than traditional legal service billing, and potentially more favorable pricing and timeframes for completion, depending on the case and provider. Up front pricing also offers the ability to request and compare bids for review projects from multiple providers.

Considerations

Pricing pressure on the legal sector has made alternate fee arrangements and legal outsourcing such as those provided by outsourced legal review services increasingly appealing to clients. The danger of this market cost-sensitivity is the potential for reverse auctions commoditizing legal services. This practice, while effective at securing low prices in the short term, also runs the risk of unsustainable under-bidding to win a deal, or resulting in cut-rate services that affect review quality, case outcomes, and even endanger the client through evidence mishandling. For these reasons, it’s vital to choose a trusted partner and negotiate expectation of the outcomes and services delivered up front. An outsourced legal document review service provider should meet criteria for experience, staffing, and process quality, as well as collaborating well with other parties on a case and providing adequate oversight and accountability for the project.

Another reason not to compete solely on price for document review is that using the same service provider on repeat engagements may yield better overall results. Anecdotally, a third party’s familiarity with a client’s organizational language, procedures, and litigation profile can lead to a more efficient review project, better accuracy, and faster times to completion. Depending on the project, the same may be true for individual attorney reviewers who may or may not be available on repeated engagements if they are outsourced contractors. On the other hand, clients often like the flexibility of hiring contract attorneys for specialized cases—for example, those involving multiple languages or subject matter expertise.

Table 1. Comparing Attorney Review Options

Deployment Method	Pricing	IT/Technical Requirements	Use Cases
On-premises	Larger up front expenditure for purchase of technology license with no additional ongoing usage charges	User responsible for deployment, support, maintenance, back-end infrastructure, and processing and loading data for import	Serial or routine litigation with low data volume suited for internal use and technical support behind the firewall
On-demand	Low up front investment, with use-based or subscription pricing for software, hosting, and additional services while in use	On-demand availability, no infrastructure investment, support or maintenance, elastic capacity for large jobs, menu of auxiliary services, typically including processing	Episodic litigation benefiting from outsourced IT, collaboration among geographically-remote parties, or otherwise pushing risk outside the firewall to a trusted provider—particularly class action, multi-district litigation, or other large-scale matters
Fully Managed	Document review services including technology, priced based on volume or at a flat rate, rather than hourly	Fully outsourced technology and labor with third-party oversight	Projects with large data volume and demanding deadlines requiring additional resources for tactical or first-pass document review

Source: Enterprise Strategy Group, 2011.

The Bigger Truth

General counsel among enterprise litigants increasingly influence review tool purchasing by third parties and even invest in review tools for their own use. Rising volumes of electronic evidence and the increasingly disaggregated and multi-sourced nature of the legal services market are creating new opportunities and threats for corporate litigants weighing options for document review, requiring many organizational and case-by-case considerations in choosing the right tool for the job including pricing, risk, resourcing, maintenance, provider experience and viability, and other factors. While each approach has its benefits, one may not be suitable for every scenario. Whether for the short- or long-term, customers must establish their own requirements and educate themselves on viable options in order to make a sound investment—including considering hybrid approaches or managed review services for particular cases.



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