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E-Discovery Moves In House

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On Nov. 30, the **AIIM Golden Gate Chapter** in San Francisco hosted a high-profile panel of e-discovery experts including both in-house and outside counsel to discuss the benefits of and their experiences with bringing e-discovery in-house. The panel was moderated by George Socha, president of Socha Consulting, and was comprised of Browning Marean, senior counsel at DLA Piper; Adam Sand, general counsel at ZL Technologies; Eric Sinrod, partner at Duane Morris; Mark Sweeney, litigation counsel at Pacific Gas and Electric Co.; and Reg Thompson, senior corporate counsel at Netflix.

The discussion was lively and included a number of current topics, such as:

- Cost optimization through review provider segmentation.
- Reducing the amount of ESI on both the left and right sides of the Electronic Discovery Reference Model.
- Information governance challenges with social networking.
- Combating fear, uncertainty and doubt by sharing information between in-house and outside counsel.

One of the first topics addressed by the group was whether there is a trend to bring e-discovery in house. Surveys by Fulbright & Jaworski, Enterprise Strategy Group and others have indicated that a large portion of respondents have already done so or plan to bring all or a portion of the e-discovery process and tools in house for 2010 (47 and 73 percent, respectively). The responses from in-house panelists confirmed that they are bringing portions of the e-discovery process in house but have not yet moved to a full end-to-end approach.

Review continues to be a driver in e-discovery costs and is one of the primary areas targeted when seeking to lower those costs. Cost reduction covers the areas of review segmentation to optimize provider costs, establishment of close relationships with offshore Legal Process Outsourcing (LPO), and use of automated review technologies to reduce the amount of ESI handled by human reviewers. ZL's Sand, formerly litigation counsel at eBay, mentioned use of segmentation to group ESI into several large data sets to help reviewers become more efficient (and thus lower overall review costs). Specifically, he suggested segregating ESI into three broad categories for better control:

- Likely not relevant ESI: could be handled by low cost, offshore LPOs.
- Likely privileged ESI: could be reviewed by senior attorneys.
- Everything else: could be reviewed by non-attorneys with attorney supervision.

Segmentation is effective when work can be directed to low-cost providers. The trend towards outsourcing e-discovery to offshore LPOs has been running strong with Valuenotes, an Indian consulting firm, forecasting the Indian LPO market to grow from $440 million in 2010 to $1 billion by 2014. This is being driven by the low costs of

such outsourcing, typically $10 to $25 per hour for commodity work and $25 to $90 per hour for advanced work, a fraction of what traditional U.S. law firms charge.

By forming close working relationships with their vendors, Netflix has been able to achieve both low-cost and high-quality results. From the outside counsel perspective, DLA's Marean indicated his support of ESI segmentation with his own work focusing on the higher end of the spectrum.

In addition to lowering the costs of e-discovery review, the opportunity to simply reduce the amount of ESI was also discussed. This is especially important as the amount of ESI continues to grow. Industry analyst IDC estimates unstructured content to grow at a compound annual rate of 60 percent leading to an ever increasing amount of ESI that may need to be preserved and reviewed for litigation purposes. Factor in the results from the 2010 Information Management Health Check survey that show 75 percent of data on backup tapes are on infinite retention or legal hold, never to be deleted, and it is clear that reducing the amount of ESI to be reviewed is a potential area of large savings. Sand addressed this topic directly, mentioning ESI for review can be reduced on both sides of the EDRM:

- Left-hand side: Reduce the amount of ESI in the enterprise before litigation arises by setting and applying retention-policy based deletion.
- Right-hand side: Reduce the amount of ESI for review by attorneys by using machine-learning technologies such as automatic classification and predictive coding.

While many enterprises still have a "keep everything" approach, the panelists noted that they have seen increasing interest in deleting information unnecessary for business using a comprehensive retention management strategy or policy. For example, by deploying integrated content archives and "manage in place" solutions, organizations can apply retention policies that delete ESI after it has passed its retention period, resulting in potential savings not only for e-discovery, but also for IT hardware and processes such as backups. This is consistent with the results in the Information Management Health Check Survey, where 87 percent of respondents believed a proper retention strategy should allow deletion of unnecessary information.

On the right hand of the EDRM, Sand and others discussed their evaluation of automated review software using machine learning algorithms that replace human reviewers with automated software, at least for a portion of the ESI. Sand had compared two types, fully automated and human assisted. In the latter, commonly called predictive coding, human reviewers code a portion of the ESI after which the software learns from the judgments to complete the review. Sand mentioned that, in his experience, the hybrid approaches were more successful and promising than the fully automated approach. Marean agreed and noted the predictive coding review software was very cost-effective in reducing the amount of ESI that needed to be reviewed by humans, offsetting the larger upfront acquisition costs.

PG&E's Sweeney noted a special area of concern for ESI exposure was the prolonged legal hold that data may be under, making it subject to subsequent litigation. This can be especially problematic for people Sand called "usual suspects" — subject to litigation often enough that their ESI is put on a permanent hold. The traditional exclusionary, custodian-based e-discovery approach often preserves too much data, much of it irrelevant to the case. An alternate, inclusionary, matter-based approach that identifies ESI for collection and preservation based

on subject matter can provide a much more targeted hold, maintaining defensibility while also reducing risk. This latter approach is enabled using archiving and Manage in Place tools that can leverage built-in enterprise search engines.

On the topic of information risk management, in addition to lowering the amount of ESI exposure, the topic of social networking sites (SNS) was also discussed — a fast growing area where many enterprises do not yet have proper governance procedures in place. Discussion of this topic is especially timely as production of SNS data from Facebook and MySpace was recently compelled in two separate cases, *Romano v. Steelcase, Inc.* and *EEOC v. Simply Storage Management*.

To address this new area of exposure, organizations have put in both guidelines and technology solutions to prevent the use of social networking sites from the enterprise. However, as noted by Sand, “every single one of the custodians we interviewed had found one way or another around the restrictions” noting that some circumventions were as simple as changing the web link for a social networking site from the default HTTP protocol on port 80 to the encrypted HTTPS protocol on port 443.

It was also noted that organizations that were on the leading edge of governing their SNS exposure were in regulated industries where they are required to store and retain all social networking and instant messaging communications for audit and discovery purposes. In these cases, purpose-built compliance solutions are often more effective than the simple firewall rules. These solutions can also provide the necessary identification and collection of social networking communications that would be otherwise harder to control from inside the organization. It is clear that social networking is here to stay and is covered under e-discovery protocols, and that legal departments will need to manage this ESI through a combination of education, policies and technology.

Of special note was that, as more of the e-discovery process is brought in house, there is an increased need for communication between in-house and outside counsel. While generally agreed to by the panelists, Duane Morris’ Sinrod mentioned an especially sinister case highlighting the growing importance of the threat of spoliation and sanctions. In this case, he represented a party that was accused of spoliation using fear, uncertainty and doubt (FUD). In the end, the party successfully defended against the threat, but the case was mired in disputes for a month over ESI that never existed in the first place. This example and others highlighted the need for in-house counsel and outside counsel to communicate and share information so these threats can be addressed quickly and cost-effectively.

According to the panelists, firms are seeing the benefits of bringing control of the e-discovery process and technology in house to both lower costs and reduce risk. As the amount of ESI within enterprises continues to grow, the application of proactive, in-house approaches to process and technology can decrease costs, while lowering risk and improving compliance with laws and best legal practices.

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