

When it comes to legal services, companies have long balanced the appropriate mix of in-house versus outsourcing. Fifty years ago, in-house legal departments, even at the largest companies, were tiny, and nearly all legal work was handled by outside counsel,

specific civil procedure rules governing it, in both federal and many state courts — the rising tide of charges from vendors forced companies to take a hard look at ways to control costs and reduce risk. As was the case decades ago with legal services, many companies have found that it is less expensive, and less risky, to

tion of the various steps involved in electronic discovery.] Many companies have found that the steps on the left-hand side of the overall process — such as managing the company's information, collecting data from its IT systems and processing or filtering the data — make economic sense to conduct in-house, because the company can deploy technology to use on case after case. Analysts at the Gartner group comment:

Insourcing ediscovery saves money in three ways. The first relates to . . . overlapping custodians. To launch a new ediscovery effort [i.e., hiring an outsourced provider] with every new issue often means starting again from the beginning. . . . A second big saving — and substantial reduction of risk — comes from unified and consistent handling of information inside the organization. . . . Third, the process of collecting and processing files in-house reduces their number significantly.¹

Having a dedicated in-house team that understands how the company stores and manages its data, and how it can be collected, leads to lower costs and improved defensibility. In addition, many of the core functions involved in the early stages of ediscovery, such as searching for and collecting information from widely scattered laptops, desktops or servers, are useful to the company for non-litigation purposes, such as preventing the loss of sensitive data, PCI compliance, responding to regulatory requests or making sure that unauthorized applications are not being used.

Within the Legal Department, History Repeats Itself

BY KENNETH A. CUTSHAW

who typically sent a non-itemized monthly bill “for services rendered.” But as the years passed, companies found that it was much more cost-effective and less risky to have dedicated in-house legal capabilities, with the largest companies now employing hundreds, or even more than one thousand, in-house attorneys. Outside counsel, on the other hand, tend to provide specialized expertise, either for unusual transactions or in areas that the company does not wish to directly employ legal talent.

The same is true of the electronic discovery field. When ediscovery was new about a decade ago, it surfaced only intermittently, with most litigation matters not requiring ediscovery. At that time, it made economic sense for companies to outsource these activities rather than have in-house capabilities. Indeed, it was common for service providers to send non-itemized (or incomprehensible) invoices for their ediscovery services.

As ediscovery became more common — highlighted by the passage of

manage portions of electronic discovery in-house.

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What Makes Sense In-house?

Ediscovery encompasses a number of different processes, including managing the company's information prior to litigation, collecting potentially relevant information, processing (filtering) the collected information, and having attorneys review the filtered data for privilege and relevance. [See www.edrm.net for a detailed descrip-



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What Makes Sense to Outsource?

As is the case with legal services in general, few companies in-source their ediscovery activities. In fact, most of the later-stage activities, such as attorney review of processed data, production of data to the opposing party or presentation of the data at trial, are typically outsourced. These are areas in which there often are no economies of scale. For instance, if a law firm is handling the case, its lawyers are going to have to become familiar with the relevant documents, so they will need to review them. Similarly, Bates numbering (whether electronically or manually) is typically specific to the case, so having Bates-numbered documents for a previous case provides little advantage.

As is the case with legal services in general, very few companies in-source all of their ediscovery activities.

Past is Prologue

With the advent of electronic discovery over the past decade and the emerging trend of companies bringing functions in-house, we are witnessing a repeat of the process that led to the development of the in-house bar. Certainly, the specifics are different — for instance, this time, colleagues from IT are involved — but the overall trend is the same: Companies are finding that it makes economic sense to control certain aspects of the process, to have dedi-

cated resources who know the company inside and out and to outsource only those areas in which it is more efficient to do so. As is the case with the in-house bar, the result is better service to the company, with lower overall cost. 

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NOTE

1. Gartner, “Reduce the Cost and Risk of E-Discovery in 2009,” (Jan. 9, 2009).

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