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TRUE GRIT

Scrapping for e-discovery
business, law firms push
new creative options.

Paul Weiner, Littler

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TRUE GRIT

Scrapping for e-discovery clients, firms seek the right mix of people, processes, and technology.

By Robyn Weisman & Monica Bay

Today's top law firms and their corporate clients are struggling to find the right combination of people, processes, technology — and facilities — to effectively control the quality and costs of electronic data discovery. The risks are acutely visible for those who stumble: not just court-ordered sanctions, but lost data, cases, clients, profits, and reputations. So how can major firms speed up the processes, hire the right personnel, meet ethical obligations to protect client confidentiality, cooperate with opposing counsel, maintain proportionality (i.e., not spend more on EDD than appropriate for the potential exposure of a case) — yet quickly find and process appropriate data? There's no "one size fits all" single answer, but four models seem to be developing as loose frames:

- Many firms — including Littler Mendelson; Fenwick & West; Winston & Strawn; and K&L Gates — have established dedicated e-discovery practice groups, to keep most EDD functions inside their walls. Typically, these teams include both partners and associates, and often include staff and/or contract attorneys who primarily handle document review. Many have document review facilities in their offices or nearby. In some cases, these firms market themselves to other law firms, offering to serve as e-discovery counsel.

- Wilmer Cutler Pickering Hale and Dorr is among the firms that have created practice groups, but locate their document review operations in "secondary" markets where they can get qualified lawyers at significantly lower annual salaries.

- Drinker, Biddle & Reath, and Holland & Hart are examples of firms that have established stand-alone entities to handle document review and other e-discovery functions. Sometimes these entities eventually spin off as independent companies, as did H&H's Catalyst Repository Systems.

- Some firms outsource most e-discovery functions (such as collection or review) to third-party vendors who often use off-shore or secondary market facilities to contain costs. Pillsbury Winthrop Shaw Pitman has created a variation of Groupon, if you will — by organizing a formal alliance of preferred vendors, where participating firms can enjoy discounted rates.

These four models do not have sharp boundaries, and as e-discovery evolves, so do the prototypes. And when faced with massive volumes of electronically stored information (ESI), almost all firms take a hybrid approach and turn to trusted vendors for help.

Last fall, The Cowen Group, a New York-based EDD staffing and management consulting firm, conducted a survey about the "models and structure" of litigation support operations at Am Law 200 firms. Of the 47 respondents, 33 were from the top 100, most directors or national managers of litigation support or EDD practice group leaders. The survey found that 53% have established an EDD practice group, another 39% have set up a task force, committee, working group, or dedicated counsel. Only 8% said their firms had no attorney focus on EDD.

But the report concludes, "The size and make-up of a firm's e-discovery practice group is widely divergent, both in size and make-up." Twenty-eight percent of participants reported that five or fewer attorneys participate in their firm's EDD practice group, while only 10% of the groups have more than 20 attorneys, and most of those are predominantly non-partner track/staff attorneys.

Here are some exemplars.

Paul Weiner, national e-discovery counsel and a shareholder at Littler Mendelson, says people are the most important element of the three-part formula for successful EDD: people, processes, and technology. "You can have the best processes and technologies in place, but you need professionals who have the depth of experience, credentials, and training to use [these processes and technologies] strategically to help win the case," says Weiner, who is based in Philadelphia.

Littler, a management-side labor and employment firm, uses a practice group approach to e-discovery. With 52 offices, 851 attorneys and 704 support staff, the firm established an e-discovery shareholder track in 2008 when it concluded that EDD would be vital to its overall objectives, says Weiner, who reports to the firm's management committee.

The practice group includes three shareholders (Weiner, Cecil Lynn III in Phoenix, and Michael McGuire in Minneapolis), senior associate Aaron Crews in Sacramento, and associate Niloy Ray in Chicago. "Given the footprint of our firm, geographic diversity and the ability to have coverage in every time zone across the country is important," notes Weiner.

"Case teams or clients request our assistance on a case-by-case basis," says Weiner. The EDD lawyers serve both as general litigators in the cases and provide EDD assistance, depending on what the trial team and/or clients request.

"In many instances we are on the 'frontline,' handling the depositions, witness interviews/preparation, motion responses and argument, court conferences and hearings, interactions with opposing counsel, discovery responses, etc.," says Weiner. "In other instances e-discovery lawyers are assisting the lead trial lawyer who handles the activity."

All five lawyers dedicate their practices full-time to EDD; each has extensive trial experience. This differentiates them from other firms' EDD practitioners who have not and do not appear in court — such as pure technicians, academics, and attorneys who have never practiced, says Weiner.

"[We] can take a first chair, 'hands-on' role in litigating the e-discovery aspect of cases (which in today's digital world encompasses a lot in cases large and small)," he says. Because of the shareholders' trial experience, they bring a practical and cost-effective perspective "to what can otherwise appear to be esoteric EDD issues that can hijack a case," says Weiner. The shareholders mentor the junior lawyers and provide "hands-on supervision and oversight of cases."

Little's EDD counsel are assigned to cases based upon the type of case and capacity, and they work with regional litigation support specialists, says Weiner. Paralegals, chosen by the trial team, are generally resident in a particular office and work on cases in those offices.

Document review staffing decisions are handled by the Little trial team, on a case-by case basis, says Weiner. Because document review can be so expensive, "we often recommend that our clients directly retain managed document review vendors to assist with large document reviews — especially where those vendors offer alternative pricing approaches that can help achieve significant costs savings," he says.

In large cases, the firm turns to third-party vendors. Usually the volume of data controls outsourcing, rather than the potential exposure, as a factor in the decision, says Weiner. As a general rule, in cases involving more than 300 GB of data, the team will outsource document review. The firm has a roster of preferred vendors, but Weiner declined to identify them.

The firm's National Data Center, in San Francisco, handles data processing and hosting, including kCura Relativity databases that contain the electronic evidence in specific cases, he says. The firm's litigation support team trains attorneys on e-discovery technology tools, including Relativity.

Clients are billed by volume for data processing and hosting, says Weiner. "For services provided by e-discovery counsel and litigation support specialists, by the hour."

John Rosenthal, a partner at Winston & Strawn, chairs the firm's e-discovery and electronic information practice group. The firm has eight U.S. and seven overseas offices, 868 lawyers, and 904 support staff.

"Today, the only realistic way to reduce the overall cost to clients and risk from e-discovery is to approach it as a unitary process, with emphasis that the analytics begin at the identification [and] preservation stage and continue through production," says Rosenthal, who is based in Washington, D.C.

Winston's group was formed three years ago with the merger of the firm's EDD practitioners and the litigation support department, says Rosenthal. It includes 22 lawyers — partners, associates, and one staff attorney — who are located throughout the firm's offices. They do not work full time on e-discovery matters. The practice group also includes 25 full-time litigation support professionals and 23 project managers), as well as 12 part-time paralegals.

The firm also operates an E-Discovery Review Center in Washington, D.C., with about 35 review lawyers, some full-time, others brought in on a project basis. All are direct hires.

"Our clients expect us to own the e-discovery process," says Rosenthal, so the practice group has "designed our own integrated approach to e-discovery that relies on highly-trained people and best of breed processes and technology to reduce the cost and risk of e-discovery."

The group's services are offered "to clients, and other firms to the extent where there is a joint defense or common interest" (after running conflicts checks). The practice group "handles all aspects of the firm's EDD needs across the entire spectrum of the [Electronic Discovery Reference Model] including collections, early case assessment, culling, processing, hosting and review," says Rosenthal, referring to the widely-used framework established by consultants George Socha and Thomas Gelbmann (www.edrm.net).

To keep EDD costs down, the group focuses on reducing the amount of electronically stored information (ESI) subject to e-discovery, and on efficient review strategies — using a variety of tech-

nology, including Guidance Software's EnCase, Nuix, kCura's Relativity, and Equivio tools, says Rosenthal. Because Winston keeps so many EDD processes in-house, it helps the firm get accurate analytics, further reducing costs, he says. The team has created a Microsoft Excel-based tool, complete with decision points and formulas, to help the firm and clients calculate the most appropriate EDD pricing for each matter. "Clients want to have cost certainty," says Rosenthal.

Pricing can be based by custodian, gigabyte, hourly, or can be a flat fee — or a mix of those, he says. EDD costs can also be part of an overall alternative fee arrangement for the matter. "We try to price substantially below market. It's a value-added service," he says.

In some situations, the firm will turn to an outside vendor, "selected from our preferred provider network." Inclusion in that network is based on an assessment of vendor capabilities, experience, expertise, staffing and pricing, he notes.

Morgan, Lewis & Bockius' eData Practice provides "full-cycle, all-in discovery services, offering start-to-finish counseling, project management, data analytics, processing, hosting, review and production," its website proclaims. The firm has 22 offices, 1,300 attorneys, and 3,000 support staff.

The eData group "services its own client base of companies and their law firms, in addition to supporting Morgan Lewis clients," says partner Stephanie "Tess" Blair, who heads the unit. The team operates primarily from Philadelphia, Washington, D.C., New York, and San Francisco (where it has Discovery Management Centers), but works with clients in almost all firm offices. Personnel include two partners, one of counsel, and 40 associates. About 200 contract lawyers are used over extended periods of time and on multiple cases. "We've trained them, so that they understand our practice, our processes, our clients, our technologies," says Blair. "They become core members of our team, so we don't have a lot of attrition, and we get a much better work product out of our group."

K&L Gates, which has 40 offices worldwide, houses its document review troops on dedicated, lower level floors at its Seattle and Pittsburgh, Pa., offices. The firm was an early adopter of EDD technology and created Attenex software, which was ultimately acquired by FTI Consulting.

The firm's e-Discovery Analysis & Technology Group (e-DAT) was established in 1997 with an agenda that includes records management, litigation readiness counseling, EDD, and automated litigation and practice support. Partners Martha Dawson and Thomas Smith co-chair e-DAT, which includes three other partners, a few staff lawyers, full-time document review attorneys, litigation support managers, paralegals, clerks, and coders. Last year, 71 attorneys worked on e-DAT projects, says Dawson.

By hiring full-time, rather than project or contract lawyers, the e-DAT review attorneys have a deeper knowledge of the firm and its cases, says Dawson. "We have attorneys [who] have worked with us now for more than 12 years."

The firm charges clients less than the billable rate of the firm's first-year associates, and pays the lawyers less as well. "This is their real job, versus a revolving door of contract lawyers who do review work while looking for 'real jobs,'" Smith says. Clients are billed by volume, not hours, for review work. "It's based on how many gigabytes of data we're going to review," says Smith. "Clients really like that because it gives them cost certainty," he says. "You tell us how many gigabytes of data you have, and we'll help you through that process, and we'll try to narrow down the number of gigabytes you have to review. But once we figure out how many gigabytes of data you have, we'll tell you how much it's going to cost."

Some firms create stand-alone entities for e-discovery operations. Drinker, Biddle & Reath, which has 11 offices, 650 attorneys and 700 support staff, created a subsidiary, Drinker Discovery Solutions, says Thomas Lidbury. He serves as DDS chair and president, and also is an equity partner and heads the law firm's EDD practice group. The group includes four partners, two of counsel attorneys, and nine associates.

DDS has 10 litigation support personnel — three maintain its software and manage operations; seven manage projects. Staff attorneys and as-needed contract attorneys handle reviews, says Lidbury. The law firm handles implementation of internal procedures, processes, and technology for managing data, legal holds, and collection, he says. DDS, which operates primarily out of the Chicago office, handles review, analysis, production, and presentation. They use Autonomy software. The subsidiary offers services to both the firm and outside law firms and companies, says Lidbury.

Catalyst Repository Systems is another example of an EDD company that incubated within a law firm. It was started within Denver-based Holland & Hart by then-litigation partner John Tredennick. H&H spun off Catalyst in 2000 but still owned the company. "We worked with everyone — corporations, insurers, and different law firms," said Tredennick, who in 2005 bought out the firm's interest and now is CEO and chair of the board.

Tredennick argues that outsourcing EDD tasks to experienced vendors is a good business decision for large firms. It just doesn't make sense for every firm or corporate client to spend millions of dollars on the necessary infrastructure and equipment to conduct EDD in-house. "It's like a firehouse, where the staff is ready to run it should a big case come in, but meanwhile, they're sitting around and playing cards until the siren happens to go off."

Many vendors position themselves as offering cradle-to-grave EDD, including giant Kroll Ontrack, which promises on its website that "from the initial identification and collection of potentially relevant data located anywhere in the world to the final production of your responsive documents, Kroll Ontrack serves as an extension of your litigation support team to achieve your business objectives and comply with legal requirements for ESI."

Tredennick says Catalyst's Insight does everything but collection, which is typically handled by the customer. The automated systems help users upload raw or processed files directly into its system and then process, load, index, search, analyze, review, and produce right from there, he says.

Catalyst's client roster includes corporations, insurance companies, such as AIG (Chartis) and Liberty Mutual, and law firms. "Either directly or through alliances we also work with most of the largest law firms in the world." Catalyst partners with about 20 EDD providers, including IKON, BIA, and Ji2.

Because most firms won't address compensation, we asked The Cowen Group about current firm salaries for EDD lawyers. Contract lawyers range from about \$24 to \$30 per hour in major markets, says Jennifer Schwartz, senior director, advisory services and market research. Pay rates in secondary markets are predominantly in the \$20-\$24 range, she says.

Staff attorney annual salaries range from \$80,000 to \$120,000; but there are more opportunities with vendors and consultancies, where base salaries can be as high as \$90,000 to \$135,00 for a document review project manager role, not counting overtime and bonuses, she says.

E-discovery efforts at large U.S. law firms are still in the early stages of evolution, and many are experiencing growing pains, suggests Socha. He is leery of in-house practice groups, saying that most "continue to be marketing groups more than anything else. I continue to see that most lawyers at firms with putative internal EDD practice groups either do not know those groups exist or do not use them. Firms ought to do a better job of taking control of EDD, at least for those clients who lack the wherewithal to take on EDD themselves," says Socha. "Firms seem unwilling, however, to make the initial and on-going investments needed for that to happen."

Littler's Weiner rebuts the idea of lawyers not embracing his team. "Littler lawyers are definitely *using* our services," he asserts. Weiner cites three key reasons for his team's success: the firm leadership's commitment, the collaborative culture, and the team's proven value to the trial teams. "The market has matured to the point where e-discovery and litigation support are a baseline skill set for outside counsel," he says.

Winston's Rosenthal also challenges Socha's assertion. The firm's senior management is solidly behind the EDD program, he says. Educational tools include an internal extranet with resource materials and periodic live meetings with key partners in the firm's offices. "Perhaps the best selling tools are the price of the services and the value we bring to the case teams," says Rosenthal. "Those teams that have engaged us have readily seen the tangible benefits and word-of-mouth spreads very quickly," he says.

The bottom line, says Socha, a member of *LTN's* Editorial Advisory Board, is that a hybrid approach to e-discovery — using a combination of internal and external resources — "is not just the best model, but usually the only realistic model."

The more astute firms follow a power plant metaphor, he says. "They look at the day-in-day-out EDD work they feel they can handle internally, and build capacity to fit that, with some extra capacity for wiggle room," says Socha. "They establish relationships with outside providers to take on the excess demand. Then they continuously adjust as needs and circumstances require."

Clients and vendors must be involved, he argues, "to help identify, preserve, collect, and process data, to host data for review (perhaps to conduct some portion of the review), and to assist with production of data and possibly at some point presentation of that data to some audience such as a judge or a jury," says Socha.

"There is a range of clients out there. Some will rely on outside counsel 100% and need firms with established approaches who can take charge. Others will be in the driver's seat, looking for sophisticated partners who will work with them and not just try to dictate to them," says Socha. "General counsel should 'beware of the outside lawyer who thinks he is Richard Gere in *Chicago*, giving clients the old razzle-dazzle. That might work in the movies, but it can be disastrous in the real EDD world."

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