

The logo features the word "DSicovery" in a blue sans-serif font. The "i" is lowercase and blue, while "S" is uppercase and light blue. The text is overlaid on a light gray square that has a folded top-right corner with a small blue and orange triangle.

DSicovery

Enterprise eDiscovery Solutions™

WHITE PAPER

eDiscovery: In-house vs. Outsource?

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INTRODUCTION

eDiscovery is now an accepted component of practicing law. What is not settled, however, is whether law firms and corporate legal departments should handle electronic data discovery (EDD) in-house, or whether they should outsource it. There is no unyielding rule to answer this question, because the answer can vary depending on needs and resources.

DSi (formerly Document Solutions, Inc.) works with firms and corporations across the spectrum – from those who outsource everything to those who keep the lion's share of EDD in-house. We have also consulted with companies on their information management policies to help them better handle their electronically stored information (ESI) in-house. Our experience and unique perspective allow us to outline the arguments for both sides of the discussion, as we do below.

CONSIDERING COSTS, CONTROL AND COMPLEXITY

Firms that bring eDiscovery in-house often cite cost savings and the desire to maintain control of their data as reasons for this move. They note that development of relatively easy-to-use software now makes this possible, provided they have a basic understanding of the process and any limitations.

For some firms all of the above may be true, yet there is no one-size-fits-all software solution for in-house eDiscovery. An organization's overall management philosophy has a lot to do with it, as does the complexity of the kind of litigation they typically address. The more complex it is, the more likely it is that an outside firm will be brought in to handle eDiscovery.

To bring eDiscovery in-house and approximate its functionality as closely as possible to that of an outside vendor require enormous outlays of money and time. It takes more than investing in the necessary software and hardware, which can be very expensive. It involves building a safeguarded process that ensures proper handling and quality control. Perhaps most importantly, it means keeping people trained and continually apprised of new developments. If processing is viewed as a side job rather than a full-time position, the quality of the product and the speed of its production can be sub-standard. One inadvertent mistake at any juncture can create a ripple effect of costly negative consequences.



Bringing certain sections of eDiscovery in-house can be a way to get one's feet wet, however. For example, a corporation may start by using tools for information management or for early case assessment, or a law firm may use tools for de-duplication or review. Collection is an area that has been outsourced traditionally, but the recent availability of tools can increase the cost-effectiveness of handling it internally.

Some law firms and corporations will purchase tools to meet all of their eDiscovery needs in-house, but only for a certain size of case, such as those with up to 10 gigabytes of data that must be processed. These companies may determine that it is simply not cost efficient, time efficient, nor effective qualitatively to handle huge eDiscovery tasks internally.

While there is certainly value in performing eDiscovery in-house on a case with less than 10 gigabytes of data, the question is, how do you know it will remain under 10 gigabytes? The amount of data that needs to be processed for a case tends to grow beyond initial estimates. This has become something of a truism, since it happens so often. Also, other circumstances, such as the issuance of a motion to compel, may require the data be processed at a speed that can't be handled internally. A number of other issues may arise which will require the project to be passed to an outside vendor with the capacity and expertise to handle it. And there's the rub, because if the files weren't managed properly in-house, or if the software used in-house is not compatible with the outside vendor's software, then the entire process may have to start anew, which could mean losing data, filtering results or notes – as well as spending more money and time than if the project had been taken to an outside vendor at the outset.

Of course, every case does not run into these kinds of problems. Many do involve less than 10 gigabytes of data from beginning to end. It really comes down to making a reasonable assumption based on your experience and your willingness to accept the risk that the data set might grow significantly. Making decisions like this is what good managers do.

The size and the complexity of the case are key determinants in the in-house versus outsource decision, at least right now. Companies that handle all smaller cases internally may draw the line with large cases, such as antitrust or class action lawsuits. Depending on the case, there can be a comfort level in outsourcing the work. It can be more efficient

There is no one-size-fits-all software solution for in-house eDiscovery.



and it also spreads out the risk. Mid-range cases can be handled as a hybrid with internal collection, outside processing and internal review.

PLAN FOR POTENTIAL PROBLEMS

Before bringing eDiscovery in-house, the company needs to determine what will happen if there is a problem. DSi was involved with a case where counsel thought they could handle EDD in-house, but because of a lack of process and expertise, the files were mishandled and the law firm was eventually sued.

The nature of eDiscovery is that there are always problems without any ready-made solutions. Many of these problems are small and easily manageable, but they consistently appear and usually increase in proportion to the size of the project. One must be able

quickly and accurately to accommodate multiple applications, various software versions, homegrown data, password-protected documents, unreadable files and any other potential obstacle that may arise.

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Because of potential problems like these, there is value in having an outside vendor that handles eDiscovery work exclusively. They will have vetted the various technologies and had opportunities to use them in a variety of circumstances for a variety of clients. At a certain point, eDiscovery vendors provide an expertise level that many law firms and corporations don't have and it may never make sense to spend the resources needed to attain that level of expertise.

Another factor to consider is the cost-benefit analysis. One side may say that, because the market is so volatile and products become dated so quickly, it doesn't make sense to handle eDiscovery in-house, that it could be

cheaper and safer from a liability standpoint to use a trusted partner for eDiscovery. This has been the experience, for example, of a large corporation that typically asks DSi to handle its eDiscovery work. The associate general counsel has stated that it is actually more costly for the litigation support department of the corporation's law firm to handle



eDiscovery work than it is to use outside vendors, who also deliver a better work product.

The other side may decide that since technology is improving and costs are continually falling, the cost-benefit analysis in the long run will show that in-house processes for some or all eDiscovery jobs are more prudent.

DISCOVERY DIRECTIONS

eDiscovery continues to evolve and processes are still undergoing codification. As recently as six years ago, eDiscovery was a brand new phenomenon and most law firms and corporations were unsure how to incorporate it into their businesses. Now it's mainstream. Eventually eDiscovery will just become "discovery" and won't be a specialty.

As technology changes, allowing us to standardize eDiscovery methods, it also allows for the ability to support the tremendous growth in volume. There is a myth of the small case, but it's so easy to have a terabyte of information on a hard drive. You just never know when a molehill turns into a mountain. That's why a lot of law firms and corporations won't process in-house. It would mean having to hire many more people and purchase so much software and hardware to support it. Essentially, it would be starting a second company from scratch.

If eDiscovery is brought fully in-house, counsel needs to understand what their limits are, and plan for what happens if they reach a point where the timeframe is too narrow or the data size too large to manage the case effectively. One growing trend is to have an "overflow" vendor, in which case it is beneficial for the vendor to use the same software as its client so that files can quickly and easily be transferred without losing or corrupting data.

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IN-HOUSE EDISCOVERY: HIGHLIGHTS OF PROS AND CONS

<i>In-house eDiscovery</i> PROs	<i>In-house eDiscovery</i> CONs
<ul style="list-style-type: none"> • Save money • Maintain control of data • Easy-to-use applications, plus software costs are continually coming down • Can be brought in a section at a time • Smaller cases easier to handle in-house • Law firms can make eDiscovery a profit center 	<ul style="list-style-type: none"> • No one-size-fits-all solution • As case gets more complex, needs change • Software and hardware is expensive, plus the cost of keeping technology updated • Costs and time for training full-time, dedicated personnel • May not be able to work at the speed of more experienced, specialized vendor with multiple technologies • Firm or corporation assumes all risk in EDD process

SUMMARY

There is a valid case for handling at least a portion of eDiscovery work in-house. There is an equally valid case to be made for sending EDD work to an outside vendor.

Law firms and corporate legal departments arguing to bring more eDiscovery services in-house point to the evolution of more user-friendly software, the ability to maintain control of the data throughout the eDiscovery process and, for law firms specifically, the possibility of making eDiscovery a profit center by billing clients for work done in-house.

On the other side, firms and corporations that prefer to outsource eDiscovery work tend to be very focused on quality and risk. That is, they believe that outsource vendors focusing exclusively on eDiscovery are likely to have a higher level of expertise than would be possible from in-house efforts. And they note that maintaining control of data throughout the eDiscovery process also means accepting all of the risk inherent in that process.

When determining whether or not to bring eDiscovery in-house, cost is obviously a major



factor. Lawyers want to bring in revenue. They see the bills they pay to an outside vendor and think, “We can do that.” Some companies spend \$20 million and they’re right, they can do that. Some spend \$20,000 and discover that they cannot.

The EDD needs for a corporation often stand in stark contrast to those for a law firm. Also, a large law firm that handles a myriad of case types may have different requirements than a smaller firm that handles only a single kind of case. The bottom line is to find a reasonable, defensible solution that makes sense in the context of a firm’s size and scope.

CONCLUSION

Bringing eDiscovery in-house is not a decision that should be made lightly. Analysis should include past, present and projected uses, software and hardware capacity, and financial and personnel requirements. Additionally, there should be discussion with a reliable, proven eDiscovery partner.

Ultimately, each firm or corporation needs to determine what it can or should handle internally – how much time, money and manpower it is willing to allocate to ensure that eDiscovery is handled defensibly, efficiently and accurately.

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ABOUT THE AUTHOR



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Tom Turner is president and founding partner of DSi (formerly Document Solutions Inc.), a litigation support company providing advanced electronic discovery and digital forensics services, as well as all traditional litigation support, since 1999. DSi serves a national clientele of law firms and Fortune 100 companies. Mr. Turner is a Certified eDiscovery Specialist with over 12 years of experience in the eDiscovery industry. He can be reached at [tturner\(at\)dsicoverly.com](mailto:tturner(at)dsicoverly.com).