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Beyond Piecemeal

Making e-discovery decisions based on the lowest bids may not save money in the long run.

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IN 1962, John Glenn made history by becoming the first American to orbit the Earth in his Friendship 7 spacecraft. When asked about his feelings right before blastoff, he famously replied that he felt as good as anyone could, considering he was “sitting on top of two million parts all built by the lowest bidder...”

Many entities, private and public, purchase items part by part from the cheapest contractors. As we enter the e-discovery era, many companies that buy discovery services take a similar approach and build their discovery programs piecemeal from the lowest bidders. While this approach seems like it should save money, it often fails. And those failures can cost far more in lost time, missed opportunities and additional expenses down the road than the initial savings.

Under a piecemeal approach, each stage may cost less, but it often takes more “glue” to hold together, in terms of staff and (both in-house and outside) attorney time, and the approach often proves inadequate to the demands of the discovery. By concentrating on each item separately, companies involved in litigation lose focus of the overall project.

A more reasonable and responsible approach is to take into account “all-in costs,” which include every aspect of the discovery project, from staff time to the number of vendors that are involved to the types of software needed to the role of outside counsel. The approach considers the level of treatment that each individual discovery project requires and manages the identification, preservation, collection, preparation and production of materials that is consistent with the “value” of each case. This article will discuss three critical ways in which an all-in approach is reasonable, responsible and defensible.

First, an all-in approach can help eliminate scope creep; as collections progress, more and more potential custodians may need to be included, and the project becomes far larger than originally planned. Having a

careful method of tracking costs, size and the requirements of every phase allows in-house counsel to maintain a realistic view of the process.

Second, when a piecemeal approach is adopted, it often happens that tools are chosen for projects of one size, but these tools become unsuitable for the far larger dimensions that a discovery may eventually take on. Compatibility of technology is also important as part of an all-in approach. Third, one of the advantages of a holistic approach is that companies keep in mind the staff time spent during the critical review phase so it can work on optimizing or minimizing costs for such tasks.

The all-in approach demonstrates to opposing counsel and the court that responsible efforts have been taken to comply with the discovery guidelines laid out in the Federal Rules of Civil Procedure; and it addresses critical needs of business clients, including cost-efficiency, timeliness and quality, that are so important to corporations and their law departments. Perhaps most crucially, it creates a defensible discovery that can stand up to the scrutiny of the court and opposing counsel.

Tracking Costs

An all-in discovery approach allows a company to manage a number of high-profile litigations, by tracking overall discovery costs for each case and not relying on various supplier and law firm bids to estimate costs.

For example, with many custodians (individual keepers of data) in each matter, a huge number of documents and a large IT department, estimating discovery costs requires tracking the overall costs of data collection, which can be difficult and confusing. The Pfizer legal department created a spreadsheet that allows it to track all of the costs of litigation, not just obvious ones, such as vendor bills.

With this tool, a company can take into account all of the different costs related to collection, in a format that helps its decision-making. When service providers quote for document collection, they tend to charge per gigabyte of data or per hour. Obviously, such proposals do not take into account time spent by the client’s IT department, the costs of which would be billed to the legal department, at a rate of somewhere in the vicinity of \$250 per hour. In the early days of electronic discovery IT support could average \$1,000 per custodian (today, with improved processes and tools, it should be closer to \$550). By including



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this number, and considering total costs by custodian, a company can make much better decisions about its service providers, tools and processes. For example, do certain tools require fewer hours of IT support? And what is the dollar value of reducing collection efforts by negotiating a limited discovery scope?

Robust data and analysis provide the first step in tracking all-in costs. With disciplined cost-tracking and a spreadsheet, a company can estimate its own overall costs for any matter simply by entering the number of custodians, how big the collection is and what percentage is expected to be culled out of the collection electronically. That amount of data is then converted into a page count, the cost of review for that volume is estimated, and then a calculation is made for the cost of each discovery project, including review, per custodian. Once all those numbers are plugged in to the spreadsheet, the true cost of discovery becomes clear in a way that simply adding together quotes from service providers and law firms would not.

With a similar methodology, companies can calculate the actual cost of discovery, using metrics such as per-custodian cost by type of litigation. Such a tracking system should include the internal expenses of the IT department's time and other, frequently hidden costs, such as the staff time for others involved in the data collection and hours spent by the legal department. Just as law firms have been asked to prepare task-based budgets for clients using the uniform task-based management system (UTBMS), the same system can apply to discovery. A budget can show dollars for each phase of discovery: definition, identification, preservation, collection, conversion, review and production. A line item for case support, such as deposition preparation, can be included as well. Additionally, such a system can show how changing the costs in one area can impact the others.

Compatibility of Technology

Saving on the costs of technology may also seem attractive, but a piecemeal approach may also lead to technology that is not compatible. With a process as complicated as discovery that involves so many moving parts, incompatible systems can quickly become a major issue that affects the process at different stages and in different components. It is very easy to choose tools that may not be effective for managing documents past the discovery phase. For example, some products are effective at the first-level review, but are not adequate for second- or third-level reviews. Companies that

have not planned ahead through the life of the discovery project may find themselves paying to move the data elsewhere.

Similarly, companies should also look at the compatibility of their review platforms and whether every outside law firm and service provider working on the matter have similar technologies. If a litigant's collection and review needs become complicated during the course of discovery, any cost savings from using a less-robust technology may go out the window if it becomes necessary to migrate data to another, more comprehensive, system. By taking an all-in approach, in-house counsel will be prepared when a collection's parameters change at any point during discovery.

Frequently moving data between service providers also carries risk and cost.

The more people who "touch" a project, the more expensive it becomes and the less control the litigant has, all of which means errors are more likely to occur.

An all-in approach also allows in-house counsel to maintain greater control of the discovery from the outset; with a plan in place, in-house counsel can manage the process internally, without ceding authority to service providers or law firm attorneys who may not understand the company's objectives or priorities in a particular lawsuit. The legal department can also keep tighter control of the budget; the budget is often something that outside counsel may not be sensitive to, with their focus on reviewing as much data as possible, regardless of cost.

Review Phase

In almost any discovery project, the lion's share of the cost is in the review phase, usually 60 percent to 80 percent of overall discovery expenses. Many companies use law firm associates or contract attorneys provided by law firms to do this work at costs exceeding \$200 per hour. A holistic approach that takes account of staff time can therefore put tools and processes in place to limit review and provide a substantial return on investment. In fact, because every phase of discovery is based upon the amount of data (or pages of documents) in play, efforts should be taken at every phase to cull the data set of clearly non-relevant, non-responsive materials as early as possible.

As an example, attorney time spent at the outset of a matter to improve keywords for searches or better define a list of custodians reduces the amount of data (and cost) at every phase. Sometimes, turning legal or business staff loose to do a folder-based review prior to

processing data can be a very effective way to cull data, saving not only on review but also on processing and hosting. Additionally, tools that de-duplicate or otherwise automatically cull documents have the same result.

Finally state-of-the-art search technology, based on linguistic or statistical analysis, can be extremely effective in minimizing the time spent on review by organizing documents for review or eliminating the need to review some altogether. Many of these have proven to be at least as accurate as human review. However, all these advantages can be lost if the company focuses on finding the lowest-cost solution at each stage and not focusing on the solution that results in lowering the overall cost.

By seeking quantitative data with solid metrics, other companies can create a business case for an all-in discovery management plan that can prove how inadequate the "savings" of a piecemeal approach actually are. But while the actual costs of discovery are important, dollars and cents are not the only way to measure an optimal discovery process. Efficiency has value that goes beyond financial data, and an all-in approach improves the efficiency of the entire process.

Conclusion

In a faltering economy, companies are more concerned than ever with the bottom line, so shopping around for the lowest bidder can become very tempting. But while such an approach may cost less at the outset, it frequently becomes more expensive during the life of a discovery. To compensate for rock-bottom prices, litigants may need to invest a great deal of staff, attorney and consultant time to make the system work. The different aspects of discovery may not meld together, forcing companies to spend time and money getting the process back on track. Worse, by focusing on each phase itself, companies may lose the ability to leverage each step to minimize overall cost.

Developing an all-in approach can eliminate many of these problems. The best way to save time and money and minimize potential risks in discovery is to properly scope the work and develop a series of technologies and services that fit well together with the overall objective of a reasonable, responsible, defensible and cost-effective discovery.