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## COMING INTO THE FOLD: A 2017 IN-HOUSE LITIGATION COUNSEL GUIDE



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Once upon a time in a land far, far away, coming into the fold as corporate in-house litigation counsel was a move to be treasured. Gone were the days of billable hours being sweeter than flowers, and you were now both counsel to your prestigious internal corporate client and a valued client to others. In this magical world, your family and friends once again recognized you other than from pictures and life was good.

With the advent of increasing corporate efficiency analysis and spend reduction targets in a non-revenue producing position, a new recipe for in-house litigation counsel is the evolving rule of the road. Litigation counsel transitioning to an in-house position are now required to possess a dramatically increased set of knowledge, responsibilities and skills bridging the gap between law and technology.

This article opens the discussion on what transitioning in-house litigation counsel need to understand and master in order to be successful in their new role and with their business counterparts.

### Technology Essentials

Beyond litigation skills and understanding your company's business, the basics of computers, network/cloud storage, mobile devices (phone/tablets) and internet of things (IoT) devices are indispensable for incoming corporate litigation counsel.

What does the company infrastructure consist of and how is data mapped within it? Before we can identify, collect and analyze data, we have to know where it lives and how we can access it.



In our earlier article, “Battering Down the Hatches, a 2017 Corporate Investigation Playbook,” we discussed how data interacts between corporate infrastructure systems. Now we must refresh that analysis to provide transitioning in-house corporate litigation counsel an effective place to start.

Step 1 – Partner, Partner, Partner. In the absence of an existing, defined data map and/or playbook, interview IT, department

heads and other relevant system and process owners to determine data sources and storage methods. Learn your corporate systems, network architecture and how data lives, replicates and is distributed.

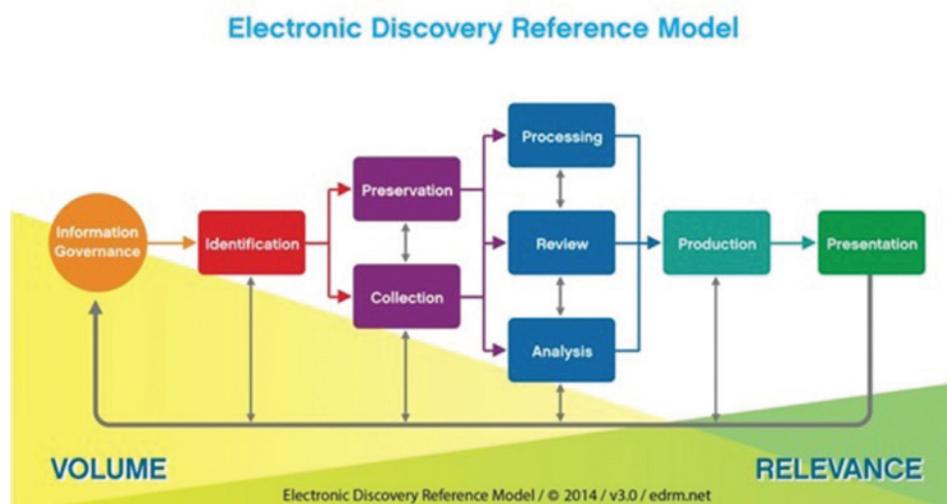
### Policies and procedures regarding data storage, email and records information management (RIM)

Step 2 – Ensure you understand how long data is maintained within your company. What are the regulatory requirements for each specific type of data to be maintained? Lack of compliance here equates to prospective exposure on multiple level (governmental, civil liability, monetary penalties, etc.). Learn where to find your data and how to collect it when needed.

### Understand the Electronic Discovery Reference Model (EDRM)

The EDRM is a highly detailed reference model which is the industry standard for both electronically stored information (ESI) and the legal discovery of ESI. It is required skills for in-house litigation counsel to both understand the EDRM and what best practices accompany the same.

Step 3 – Master and maintain compliance with best practices on information governance, data identification/preservations/collections (including forensics), processing/hosting, and review/production. These



skills are both essential to regulatory/legal compliance and corporate investigation/litigation exposure containment. An understanding of data security is arguably also required given its critical impact upon compliance and legal/financial exposure containment.

Step 4 – *What EDRM phases are the organization capable of handling in-house and what are outsourced?* This analysis encompasses cost/effective process decisions, so be thorough and realistic regarding the organization's core competencies, ability to support processes and the ultimate cost effectiveness in undertaking the same.

As new in-house litigation counsel, your thoughtful understanding and contribution towards an effective conclusion on this question and establishing a corresponding go-forward EDRM playbook cannot be underestimated. Our suggestion is to break out each aspect of the EDRM, and then engage in

discussions with your corporate team counterparts in legal, IT, procurement and finance to document the EDRM playbook with the following considerations:

1. What has been done historically regarding EDRM within the entity?
2. What are the current applicable industry best practices for each EDRM stage?, and;
3. Which EDRM stages are cost/process effective to own in-house versus which need to be outsourced?

Step 5 – Triage a matter need. With your EDRM playbook in hand, develop a collections scoping plan with established priority data custodians for the needed collection of ESI. Understanding the evolving technology with regard to remote, onsite and disparate systems data collection/forensics is crucial to ensure available data sources are effectively mined. Don't forget to maintain a full and complete chain of custody documentation for the data

collection, as you may be called upon to produce the same at a later time.

1. What types of data does the organization have that creates “records” – email, SharePoint, Skype, SAP, Salesforce, HR systems, etc?

2. What are the in-house applications that are used which create potential eDiscovery data sources?

3. Is there a data map of corporate systems?

4. What tools does in-house use to collect data for litigation?

5. What tools are used for issuing legal holds? While this may seem a remedial item, preserving data when there is reason to expect a need is a given.

For sake of discussion, let's assume your company has the ability to collect and initially cull ESI (eliminating junk, system files and other easy-to-eliminate non-relevant data) with some basic internal search and analysis capabilities. From there, that *initially* culled ESI needs to be searched for key words relevant to the matter to enable early case and/or compliance assessment. **SPOILER ALERT – ESI can be effectively culled, visualized and searched PRIOR to incurring data hosting and review costs, exponentially decreasing the overall cost of a given matter.** More on this to follow ...

Step 6 – What outside providers are involved for eDiscovery? Prior to deciding upon the best provider for your needs, it is crucial to do the following:

1. Develop an understanding of the true cost of discovery. Learn what key performance indicators (KPIs) enable proactive management of the discovery process – what is your total cost per GB (TC/GB) from collection through production? TC/GB is the true measure of an eDiscovery matter and the KPI which responsible corporate stewards must understand. *Unit rate prices are merely a shell game which mask the total cost of the project by obscuring the amount of data which ultimately gets promoted to data hosting and review. eDiscovery providers make their money from more data being processed, hosted & reviewed. The lower the unit rate clients extract, the less efficient a provider is financially incentivized to be. Hold providers accountable financially for efficiently reducing data prior to hosting and review.*

2. Establish alternative fee arrangements to drive substantial cost savings: negotiate total project fixed and/or capped fees at the outset of a matter based upon defined parameters and voilà, budget certainty! These fixed and capped fee agreements not only work but are available – demand them as a prerequisite of engagement and they will be made. Add the credibility of a well vetted project team and we are now in a good starting place.

3. Create enforceable standards for defensible data reduction prior to incurring hosting or review costs. *The industry average for*

*data cull rate (DCR) prior to hosting and review is approximately 75%. This means 25% of all collected data is promoted to hosting and review, where the clock starts ticking on the lion share of discovery costs (to the tune of \$0.88 of each discovery dollar spent)! It's not only possible to achieve a 90% DCR prior to data hosting and review in most matters, but here's the financial effect on cost take-out of an effective 90% DCR:*

A. Assuming a 100GB hypothetical project with 5,000 documents per GB, a review rate of 50 documents per hour and a \$42 per hour First Level Review Rate (FLR).

B. An Industry average of 75% DCR (25% document promotion to hosting and review) and \$42 per hour FLR.

I. 100 GB x 0.25 = 25 GB promoted to hosting/review

II. 25 GB x 5000 Docs/GB = 125,000 documents

III. 125,000 Docs ÷ 50 Docs/Hr = 2,500 hours

IV. 2,500 Hours x \$42/Hour FLR = \$105,000 review (not including hosting)

C. A 90% DCR (10% document promotion to hosting and review) and \$42 per hour FLR.

I. 100 GB x 0.10 = 10 GB promoted to hosting/review rate

II. 10 GB x 5000 Docs/GB = 50,000 documents

III. 50,000 Docs ÷ 50 Docs/Hr = 1,000 hours

IV. 1,000 Hours x \$42/Hour FLR = \$42,000 review (not including hosting)

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The Cost Take-Out between 75% versus 90% DCR = \$63,000

The Business Impact between 75% versus 90% DCR = 60% Spend Reduction (this scales across all data levels)

Step 7 – effective early data analysis = Speed to legal intelligence (S2LI). Now that we've mastered the above, we can turn to what wins the day: assessing your matter data at the earliest possible juncture. *In terms of controlling legal, regulatory and financial exposure (and revenue erosion in particular), there is nothing more game changing or important than S2LI.*

Visualizing searchable data at the earliest possible opportunity enables mission critical S2LI which empowers effective resource allocation, damage control and ultimately getting out in front of the issue. *Having the ability to analyze matter data within hours after collection (versus days and weeks) and prior to data being promoted to hosting and review eradicates unnecessary resource spend pure and simple.*

Once you effectively cull, visualize and analyze your data early and often, you can then decide what data population should be promoted to hosting and review (not before). From here, it becomes a matter of effective managed document review within your hosting

platform of choice. Given managed review consumes a full 88-90% of your electronic discovery spend, ensuring experienced eyes on documents/high degree of quality control with a reasonable document-per-hour (DPH) rate for the subject matter involved will yield the highest level of cost/process efficiencies. Determining variables here also include whether we are doing first level review (FLR), second level review (SLR), redactions and/or privilege review.

What objectives to do mastering the above 7 steps accomplish for the new in-house litigation counsel coming into the fold?

1. Effective investigation compliance exposure analysis and internal partnering towards a go-forward playbook for specific matter types tailored to your vertical enabling S2LI

2. Achieving S2LI at a greatly expedited basis prior to incurring data hosting and review costs (which can control and exponentially reduce nearly 90% of discovery costs)

3. S2LI enables cost efficiency decisions on whether or not to engage in further discovery and/or legal spend versus potential early settlement prior to such exponential unnecessary revenue waste/erosion

The moral of this story is that in our evolving global corporate

environment, in-house litigation counsel are obligated to bring a combination of legal skills, technical skills/understanding and business impact to successfully integrate and contribute. We invite your discourse towards building upon in-house litigation counsel thought leadership, as there can be no doubt this subject will continue grow as we move forward.

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