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REACHING CRITICAL MASS IN THE LAND OF BUILD, BUY OR RENT

At what point does a Corporate Legal Department reach critical mass deserving of building, buying or renting e-discovery related-software, platforms and service provision capable of addressing the company's global litigation and investigation needs?

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The old paradigm that litigation and investigations were simply an uncontrollable cost of doing business is dead and gone. Whether you are at a public company or a privately held one, we are all ultimately answerable to our shareholders/investors.

With the age of corporate legal spend accountability upon us, understanding and stewarding the course for litigation and investigation spend materially affects how we are ultimately graded as a corporate legal department and as its individual members. Under this state of being, how and at what point in time do we make the correct decisions on technology for cost and process effectiveness to ensure return on investment (ROI)?

In our last article series, we discussed Data Protection in the age of GDPR. In this first part of a new series, we open



the discussion of assessing at what point does a Corporate Legal Department reach critical mass deserving of building, buying or renting e-discovery related-software, platforms and service provision capable of addressing your company's global litigation and investigation needs.

Know Your Benchmarks

It is an unquestionable fact that not fully understanding

your company's current spend will prevent a comprehensive evaluation of where to go from here and how to get there. Better said, not knowing the true nature of spend is like throwing darts in the dark.

It's one thing to have an episodic one-off small litigation and/or investigation but anyone watching the pace of new state, federal and international privacy laws or litigation trends for their industry would

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be foolhardy to face increased exposure without knowing the potential effect on the company. If we don't capture metrics now, how can we justify the decision about which direction to take in-house e-discovery and litigation/investigation spend and what ROI can be expected?

In e-discovery, "Total Cost of Ownership" equals the sum total of all project costs from collection, processing/hosting, review and production, divided by the data throughput. This definition results in a total cost per gigabyte and is your true measure of e-discovery spend. Dan Panitz, ["A Seat at the Table: Making a Triangle Into a Circle,"](#) Corporate Counsel (March 8, 2019).

Begin by compiling the following categories of information (ideally, for a year or more to accommodate at least one full cycle of business) with participation of the legal department, IT and InfoSec:

- (1) E-discovery Providers (spend by provider and cumulatively)
 - (a) Technology
 - (b) Document review
- (2) Outside Counsel (spend by provider and cumulatively)
 - (a) Document review
 - (b) E-discovery tasks
 - (c) E-discovery technology costs
- (3) Total amount of discovery data (this can be accomplished through a data survey sent to each provider)
 - (a) Gigabytes collected, ingested, hosted, reviewed, produced, etc.

- (4) Establish a baseline of your total project cost per gigabyte of data.

Next, total your outside counsel spend on litigation and investigations over the same period and voilà, *we now know both our total spend and how that spend is broken down* in terms of outside counsel litigation/investigations, discovery costs and providers (including e-discovery and related service providers).

The Iceberg Effect

Absent a crystal ball, no one knows the future. That said, we can spot what is on the horizon potentially affecting our company on a forward basis over a two-year period. What are the industry trends within our vertical? What other potential trigger events may arise? Is the beginning point of a more sustained litigation/investigation exposure visible?

Knowing the current and future plans for the litigation portfolio can drive the decision to determine how much e-discovery work is done with in-house resources versus utilization of vendors. What metrics are important to gather?

- Number of custodians on hold
- Number of active litigation matters
- Volumes of data to be searched

Our historic litigation and investigation types and volumes, now quantified by spend detail, enable us to model where peaks and valleys are likely to

occur ahead. More importantly, we are in a position to make calculated decisions on addressing both our current litigation/investigational needs and those we expect to encounter in the coming quarters.

What are the platform and software tools already being used? Are these controlled by the e-discovery team or other groups? By tool, list the use capabilities these enable, limitations, resource burden, total cost and cost avoidance. For total cost, be sure to include initial spend on a respective tool, maintenance/upkeep, upgrade, resource burden and ongoing licensing fees, if any. For cost avoidance, the measure is what it would cost if we otherwise outsource the same functionality.

Do you want to have a 'single throat to choke' model to control the 'need to know'? Is there more functionality that can be licensed from existing vendors?

The next question is how much firepower do we need and how do we accommodate for usage peaks and valleys? Input for this can be synthesized from the results of our spend analysis, historical/modeled matter type volume (inclusive of complexity/data size) and an analysis of what tool or tools are needed. Whether we handle a certain type of matter or process in-house up to a defined threshold and then partner with a preferred provider thereafter is also a critical consideration here.

There are lots of providers with very good products

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already on the market. Consider if you need the Cadillac version when the Chevy will do. Money saved here can be used for resources elsewhere. Corporate IT does not want to have to support e-discovery on top of their current workload. The better investment is to work on improving processes and productivity to meet the demand. If the choice is for a SaaS model, ensure your infrastructure can bear the load of data transmissions this will require and that all privacy considerations are checked and approved.

Assuming reasonable competency with the complexities of current e-discovery tools, ensure your team's input toward the decisions for any new corporate applications that will store potentially discoverable data. If a system can store it, verify that data can be successfully exported for potential litigation discovery. When moving from a BYOD to corporate provided device model, ensure data collections will be handled in a forensically sound manner. In the reverse scenario, capture the last drive images from the corporate devices prior to the completion of the process.

Can your search tools run a basic proximity search with wildcards: (Animal* w/5 (Zebra OR Giraffe OR Lion))? Can you run searches against live network storage such as your departmental shared drives? How about removing duplicate

copies of files or emails? This is pretty basic stuff but not all tools have these capabilities so do your homework.

While we love our local IT department, we do not want to ask them to write software for functionality that is available in the market on a reasonable cost basis. It just does not make sense to build your own software which then requires ongoing support and updates.

A Few Words on AI—Hype Versus Reality

It has been said that artificial intelligence has more in common with the parking, stopping, and staying-in-lane capabilities of smart cars, than it does with future door-to-door automatic transportation. By this we mean, *AI is not actually smart (in that it doesn't think on its own or make unilateral decisions)*. AI is rather a series of technologies which currently include three simple tasks for the practice of law: pattern recognition (finding relevant clauses, extracting key terms, and classifying certain types of documents), prediction (a form of pattern recognition) and performing routine tasks and reasoning (utilizing very clearly defined rules to reach conclusions, produce documents, or replicate a series of steps that would otherwise have to be performed manually). Automating pattern recognition/prediction, routine tasks and reasoning certainly brings

us forward but is not a magic pill or light switch upon which we can rely to solve for our corporate litigation and investigational challenges as of today.

Next Steps

We leave you with the conclusion that any company can quantify litigation and investigational spend to enable informed decisions on technology for cost and process effectiveness to ensure ROI. As a result of this process, what critical mass looks like will become clear and optimized approaches corporate litigation and investigations can open up to become the rule of the road.

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