The Roundtable

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KEEPING E-DISCOVERY ON COURSE:

Strategies *for* Smooth Sailing

As in-house counsel know all too well, the costs of electronic discovery have skyrocketed in recent years as the amount of data that organizations create, receive and store has increased exponentially. Yet even as e-discovery has become more expensive, legal departments are being challenged to rein in their costs. "Amidst all of these challenges, smart in-house counsel are exploring different approaches to gathering and reviewing their electronically stored information in efficient, cost-effective and defensible ways," says Rob Hellewell, vice president, e-discovery for Applied Discovery. Recently, several in-house counsel gathered at the invitation of *InsideCounsel* and Applied Discovery to discuss how they have navigated complex e-discovery matters.

EDWARD RIPPEY: What is the most significant issue you are currently facing relating to e-discovery?

ALEX ARATO: In the post *Qualcomm v Broadcom Corp.* world, I can't get my vendors to understand I'm not their enemy. Law firms want to double-check everything I have already done, and vendors that we retain to assist the law firm want to double-check what the law firm and I did. While I understand the desire not to be left exposed, there is often a complete absence of trust at this point. We have to find a way to get back to where we actually are a team again, pulling in the same direction. The cost is considerable, but the non-monetary cost of this distrust is just crippling.

We are moving away from letting the law firm pick the vendor. We would like to be in a position where we tell the law firm, we are using this vendor—they are familiar with our data, where it is, who to talk to.

It's the third-party vendors the law firms bring in who never call me because they don't view me as their client. They generally think of the law firm as their client. Where I have the relationship with both, it's far more likely the other will call me and talk about working together as a team.

VINCENT CATANZARO: We have a dedicated in-house counsel managing the partnership network—vendors and law firms—who encourages the network members to market to each other. It's not just for DuPont work, but work where they can benefit other clients. This helps build relationships beyond a project basis. On a project basis, obviously, you will look out for your best interests. But if you build a relationship over time, partners become more willing to work with each other and develop a discovery strategy together. This takes some dedication from the top down.

MARTIN WILSON: We are forging relationships because of budget constraints. We are trying to work with one or two electronic discovery vendors who will work with our counsel and mold those relationships to make sure

everyone works in the same way. We have had push-back from our law firms, but it goes back to the trust level. It's important to get everybody in the same room, so they get that comfort level. But counsel has to realize that barring some valid objection, the ultimate selection of vendors is the right of the client.

ROB HELLEWELL: As an e-discovery and legal services provider, we are being called upon to deliver a broader range of expertise and services to our clients. Applied Discovery started as a pure play e-discovery company, but has since added data collection, forensics, consulting and other services to meet our clients' growing needs. In the past few months we have become more closely aligned with our partners in the staffing and legal process outsourcing world to provide an even more seamless and cost effective offering to clients.

MEREDITH DWYER: The more you use a vendor, the more they become familiar with how your company operates and how your data is stored. They can hit the ground running and there's less room for mistakes. That's one way to get law firms on board.

BUCKMASTER de WOLF: We have good relationships with vendors. The problem with vendors is, once you have chosen them, the staff constantly changes. So you find someone you like, then they are gone. We try to minimize vendors and do the work in-house.

We do most of the collections ourselves or with the firm. We have broken it down into steps and best practices. We have the preferred provider program on the firm side, so we have the advantage because we have the volume (unfortunately). We have done many cases with a lot of our law firms, so they know better than the vendors how our systems work. We can use that to our advantage.

SKYE PERRYMAN: From an outside counsel perspective, I find when there is collection effort in-house, it can be very, very successful once you get to know the client systems. After that it can work virtually seamlessly.

LYNNE MILLER: We are moving to a more robust process that utilizes technology solutions. The hope is to deploy this on the front end to reduce material that's duplicative, irrelevant, etc. This way, when the documents go to outside counsel, it's a complete, yet targeted, collection.

THE IT RELATIONSHIPS

CATANZARO: We have an in-house Discovery Management Team that is made up of senior paralegals. Aside from their day job as paralegals, they manage the discovery process, which entails everything from setting up design meetings with our vendors to doing the initial coordination. We have a fair amount of hard copy documents to deal with as well, even though that's not a popular topic. We also encourage outside counsel to help us collect documents and see the review as it's going on, to answer questions as they arise. I am not a fan of throwing it over the fence and telling outside counsel, "Now you make the argument to the court."

SNEHA DESAI: You hear all the time that the relationship between legal and IT is very important. We have a great IT staff, but no one is dedicated in their job description to only helping the legal department. As a result, assisting legal with e-discovery becomes something that is above and beyond IT's day-to-day responsibilities. Also, there is not anyone in IT with a background in legal who fully understands what has to be done in a litigation, in terms of preserving evidence and collecting data.

ARATO: I don't have someone who is dedicated to us, and I don't expect we will. I don't necessarily need someone who is dedicated to the legal department, but I need someone who is dedicated to getting the job done and who understands the problem. When you try to find someone dedicated to discovery, they don't see how that advances their career within the IT function.

de WOLF: We have a call at the beginning of every patent case. We identify the subject business and the location of that subject business. We have an in-house IP lawyer and litigator identify who the IT person is in that business. The call includes that IT person, the discovery czar at the firm we are using, usually an associate whose responsibility is to be solely discovery, the litigator, IP person and me. We have an IT guy who is a lawyer who sits at the corporate level and coordinates our e-discovery. On the call, we spend about an hour and a half walking through what we are about to undertake.

At GE, we have two dozen possible ways to electronically store information, so we discuss the business and location and what they are using. We ask about instant messaging, which server they are using and what we have to put a hold on. That helps set the tone going forward and avoid some of the problems. It's not perfect, obviously. We use this approach for all patent cases.

Once we go through this process, the outside lawyer can go in front of the judge and say, "I understand how the system works."

DWYER: At Schering, we don't really have dedicated IT staff for litigation or discovery. Several years ago, we met with senior management to present the risk associated with discovery. From there, it trickled down to IT, and IT designated certain resources from different groups to be what we call the Discovery Response Team. We have somebody we call to inquire about and assist us in collecting from databases and repositories, another contact team for collecting email, and a team that helps us to do our custodial desktop and network collections. We also have a dedicated IT colleague who helps us with rolling out special projects and training for the Law Department.

de WOLF: It can be a challenge to have somebody who is in IT being thrust into the role of validating the system and being the face of the company on these issues. It's a high stakes, significant role that is not easy, and the IT person is not always comfortable with it.

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MEREDITH DWYER, SCHERING-PLOUGH

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BUCKMASTER de WOLF, GENERAL ELECTRIC

RIPPEY: What other types of technology have you implemented in-house?

DESAI: In January, we implemented software to track and monitor legal holds. With the software, all of our matters and employees in the company are in one place. Prior to that, legal holds were distributed in hard copy. We would send out a notice to all the custodians and hope they read it, understood it and preserved everything. Now, we send our legal holds through the software, have employees read it and confirm they understand their obligations. If they don't understand, they are instructed to call the responsible attorney. We even get an automatic alert for follow-up if there is no confirmation from a custodian. This new software better helps us determine who is on hold for a case, what has been preserved and collected, and when cases are concluded, we can release a hold. That was not happening with regularity before. Holds were not being released when a matter concluded because you were never sure if the custodians were on hold for another matter.

de WOLF: If lawyers ruled the world, we would love to get rid of instant messaging and all of that. But that's how our company runs, and the engineers would go crazy if we got rid of that, so we are stuck with it. Rather than trying to address it on the technology side, we find it's better to address it on the litigation front. We pick up the telephone to call opposing counsel and say "We will both have this problem." It's a little more complicated with patent cases. But you can still negotiate, because it's mutually assured destruction.

ARATO: On the back end, if you can agree on the protocols and as long as you comply, then there's no issue to be escalated. On the other end of it, if the parties cannot agree and the other side takes issue with your preservation protocols you are far better off if you have documented those protocols in advance rather than making decisions on an ad hoc basis.

As long as opposing counsel is willing to be reasonable—or not unreasonable—you can get things done.

PERRYMAN: In every litigation I have done, we have been able to stipulate no instant messages, no BlackBerry, no flash drives, even when the other side feels that we have quite a few more documents than they do. We've been able to get on the phone with them and say it would be an undue burden and most of it is duplicative. If the other side won't stipulate, the court doesn't want to adjudicate a dispute over an instant message either.

We find that if you don't negotiate upfront, a lot of the courts just don't want to hear it. You can threaten to go to court, you can move to compel things and you may get some relief, but the judges are tired of hearing discovery disputes.

CATANZARO: You have to be cooperative. You should tell the other side what you will do from the get-go. It's the same when you negotiate search terms.

ARATO: I think the real bang for the buck is in early case assessments. Maybe it's not completely duplicative of what we would do on the discovery side. But it's close enough for us to figure out quickly what exists and where we need to look so that we can decide early on how best to proceed.

HELLEWELL: We have seen a lot of new e-discovery technology in the marketplace recently. We have to balance the promise of new technology with the need for legal defensibility. I am concerned that some firms and corporations may be embracing aggressive culling, clustering and review tools without a real understanding of the underlying technology and its potential limitations.

What specific technology is working for you, and how do you evaluate its effectiveness and legal defensibility?

DWYER: We are doing more and more early data assessments, because we have so much data. In a way, it's a blessing and a curse. We have a lot of data saved, so we have comfort in knowing that data that may be needed in litigation is being preserved. However, it is an enormous amount to process and review. With outside counsel and processing vendors, we are now trying to figure out early on the responsiveness of one of the biggest sources of data—e-mail. For instance, we have custodians we have been told were involved in a particular matter, and we have tried to rank them and figure out who did actually take part in email communication on a certain subject. Then, outside counsel has the ability to convince opposing counsel that we can limit the number of custodians to X, because we have assessed the data and these are the people we need to look at.

MILLER: We have settled on a combination process, where we are attempting to utilize forensic tools, at least against North American documents housed on North American-based servers. We're using that in connection with outside counsel's continued involvement in the personal interview and collection process. It's an evolving situation and only time will tell whether these technological tools, such as forensic software, will indeed be the magic bullet they are marketed to be.

THE DANGERS OF SELF-COLLECTIONS

RIPPEY: Do people worry about self-collection issues, given that many e-discovery opinions concern self-collection efforts in which someone was sanctioned for failure to pay attention?

WILSON: That's a concern we have had on a case-by-case basis. If the case is particularly complex or broad in scope, many times we will have counsel do the collection just to make sure. But on cases that are more straightforward we will have custodians self-collect and certify that they submitted everything.

PERRYMAN: Interviews with various document custodians can be helpful in working on a case. When you are instructing staff or contract attorneys, if you have some context about who this person is, what this person does and how he or she is relevant, you get much more efficient results than if you are blindly looking at docu-

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LYNNE MILLER, PROCTER & GAMBLE

ments and you have no idea that this person works closely with this other person.

MILLER: One of the brighter spots has been the deployment of technological tools on the collection side and the deployment of e-discovery operating procedures. This has been a wholesale change from how we have approached e-discovery in the past. Now at least we have standardized processes and increased discipline going forward.

DESAI: The implementation of the legal hold software has been successful, mostly in terms of having more control over that process, knowing who is on hold and in what cases we have holds. That also allows us to release holds when appropriate.

PERRYMAN: There has been a lot more interest within legal departments and business departments about managing costs and the discovery process. It's helpful to be able to work with developing IT teams and inside counsel that care about discovery issues.

WILSON: In our biggest success this year, we implemented an e-mail tool that actually logs and indexes everything as it comes in and out, subject to our overall document-retention policy. That has allowed us to form more effective searches in discovery procedures and to manage the process internally. It's efficient and cost-effective.

ARATO: For us, it has been the recognition across the company that this is a significant issue that doesn't only impact legal issues and legal challenges. So we have much better collaboration across the company. Is it as good as it could be? It never will be. But the other great realization is that perfection isn't our immediate goal. We have recognized that incremental progress is good and you can build on smaller successes.

Once we started listening more than lecturing, we were able to figure out real solutions. Spreading the message further down into the organization has probably been the biggest change we made.

DWYER: We are rolling out an internal website that documents the discovery process, so it's available for the law department as a reference. It's a good source of information and lays out the expected process. It's currently accessible to the law department, and a few members of IT have access as well. At some point we want it to be accessible to outside counsel as well.

ROUNDTABLE PROFILES

Alexander G. Arato is Vice President and Associate General Counsel for CA.

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