Insourcing and Outsourcing Discovery Tasks: Lessons in Adding Value & Minimizing Risk

Checklist for Decision-Making

Understanding Your Organization and the Market

1. Outsourcing process and technology: understand the interplay between potential insourcing / outsourcing models and your company.
   - Understand the risk and regulatory profiles of your industry
   - Determine whether your information security policies and practices mandate keeping categories of information behind your firewall
   - Assess the maturity level of your company’s information governance policies and procedures
   - Rate your organization’s cultural attitudes toward insourcing and outsourcing
     - Corporate and legal department philosophy towards shared services
     - Is the organization centralized or decentralized?
     - Has legal adopted elements of corporate shared services approach, e.g., centralized legal department and legal back office?
   - Evaluate whether you have executive support for changing status quo

2. Assess current and proposed in-house capabilities.
   - Outsourcing is not a “one-size-fits-all” solution. There are a range of options and most organizations build a hybrid model that matches their business needs
     - Outsourcing everything
     - Hybrid
     - Insourcing everything

3. Assess outsourcing options.
   - Third-party vendor
   - Legal process outsourcing
     - Onshore
     - Offshore
   - Law firm integrated solution

4. Understand your company’s existing technology architecture and strategic plan.
   - Staffing
     - Assess whether you have the staffing infrastructure (IT, legal and project management) and certifications to insource
     - Determine whether insourcing will require fully dedicated resources and whether you need to make new hires
     - Identify in-house expertise and staffing to assess ability to scale to meet often aggressive discovery deadlines
     - Build redundancy into your model and identify the resources will serve as backup
   - Tools
     - Identify the staff resources that will manage keeping your organization current with insourced tools (software updates, training, etc.)
   - Software
     - Analyze IT vendor licensing agreements, e.g., SQL, and other software:
       - To build out your infrastructure platform for internal tools
       - For processing specific file types
1. Identify function areas with scalable tasks well suited for disaggregation.
   - Examples include:
     - Copy center
     - Routine trademark and patent
     - Contract administration
     - Litigation hold administration
     - Discovery

2. Identify severable tasks within a project lifecycle.
   - There are discovery tasks that can be unbundled, including:
     - Data processing and hosting
     - Third party subpoena response
     - Document review

3. When insourcing or outsourcing business or legal processes, understand the process and technology integration challenges.
   - If outsourcing to a non-law firm provider, determine whether your communication will be privileged
   - Protect against consolidation in the market and personnel turnover
     - As provider develops valuable institutional knowledge, have the provider document it in templates and processes. That way, information is memorialized and not dependent on particular staffing

4. Understand the insourcing and outsourcing trends in the marketplace.
   - The vendor/technology that works for one matter profile may not be efficient for others
   - Many law firms do not have an efficient eDiscovery/document review model
   - Using a third-party nonlaw firm provider for document review adds cost and complexity
   - Learn what your peers are doing and what is working

5. Understand your litigation profile.
   - Know the volume and type of litigation your organization is facing
   - Analyze distribution of litigation workload over time and determine how this will impact staffing utilization
   - Plan for handling matters outside scope of your preferred model
   - Distinguish between building a model for routine matters and building a model to handle all matters, including “bet-the-company” matters

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• Augment human effort with technology
  – Develop customizable reports and dashboards to track matters, budgets, tasks, deadlines and other key project details
  – Create repeatable processes and templates
    ▪ Production specifications
    ▪ Processing specifications
    ▪ Data collection tracking
• Build ability to scale
  – Create a model that handles the full range of likely matter profiles
  – Know how you will handle matters outside the scope of your model
• Case team support – leverage historical knowledge of your review team for other tasks
  – Use the review team for more than just document review, including:
    ▪ Deposition preparation
    ▪ Drafting timelines and fact memos
    ▪ Locating documents for motions

Selecting and Engaging a Service Provider

1. Rather than selecting one service provider, select several with complementary strengths and push tasks to providers based on the matter profile.
   • Identify your typical matter profiles
   • Categorize vendors based on strengths relative to your matter profiles and pricing structure
   • For each matter, select the vendor based on the matter profile, including:
     – Data volume
     – Language
     – Geography
     – Data characteristics
     – Pricing
   • Consider prioritizing service providers that supply more than one service, even if that provider will not be your primary supplier for the other services
     – Example: select a law firm with a robust discovery offering even if you will not use that offering as your primary solution since there may be matters where disaggregation is not an option

2. Be proactive in defining the relationship with your service providers.
   • Negotiate a Master Services Agreement (MSA) with each vendor in advance
   • Tailor your Master Services Agreement to your data and business profile
     – Budget reporting, spend authorization and consequences for budget overruns
     – Billing guidelines, including timely billing and approved tasks/prohibited tasks
     – Volume discounts
     – Conflict provisions
     – Protocol for data disposition
     – Metrics tracking

Managing and Measuring the Work

1. Define the scope of work for each task.
   • For example:
     – Identify the resource that will manage the litigation hold software
     – Determine whether the collection vendor will also process and host the data and whether it will maintain documentation
     – If you are hire a document review vendor, determining whether that vendor also provides follow-up case team support, e.g., drafting fact memos, timelines and deposition preparation

2. Have a plan for reaggregating each task back into the broader project plan.
   • For example:
     – Define the mechanism for outside counsel to review, revise and ultimately instruct that the legal hold may be lifted
     – Plan for how your collection vendor will interact with the processing vendor to confirm all data was loaded
     – Identify the resource that will handle basic document tasks once the document review contract team moves on to another project
     – Have a plan for utilizing work product across service providers
3. Who is the quarterback? With tasks scattered across the insourcing/outsourcing continuum, it is important to know who is managing each piece of work.

- Models include:
  - National discovery counsel
  - In-house discovery counsel or director of discovery services
  - Project manager at vendor
- Here is a sampling of tasks to be assigned in the discovery context:
  - What is our communication protocol and who is responsible for managing it?
  - Who drafts and approves the collection plan and what is the process for modifying the plan?
  - Who is confirming the data collected is actually loaded for filtering and review?
  - Who approves vendor budgets, data processing and exceptions handling?
  - Who is responsible for ensuring technology is used effectively and defensibly?
  - Who decides when the initial analytics culling process is finished and approves start of review?
  - Who approves document review workflow and prioritizes custodians/data sources?
  - Who trains the document review team and ensures the quality of their work?
  - Who has daily calls with the review team to answer questions?
  - Who is making the final privilege decisions and approving the privilege log narratives?
  - Who is tracking overall pace to budget and who approves changes to the budget?
  - Who is responsible for flagging issues and escalating to the broader team?
  - Who is ensuring tasks are routed to the most efficient timekeeper?

4. Have a communication protocol that both pushes and pulls information.

- Schedule regular conference calls with all task owners
- Have a clear chain of command
- Publish a task list so everyone knows who is doing what

5. Metrics – it is tough to manage work if you cannot measure it.

- Track metrics across matters and vendors to predict spend on future cases
- Identify trends and use historical metrics when negotiating pricing and agreements

6. Maintain efficiency and standardization across service providers.

- Standardize technical specifications across matters and service providers
  - Define default processing specifications based on your company’s data profile
  - Draft default production specifications
- Reduce inefficiency and variation in output by building repeatable processes used by all service providers across the project lifecycle
  - Define and document steps taken to avoid process driven by tribal knowledge and oral tradition
  - Provide outside counsel with guide to how your company manages eDiscovery
  - Build a default workflow model that can be customized to individual matters
7. Regardless of the model you choose, the “set it and forget it” attitude does not work. Know who is driving continuous improvement.

- Improvements can include:
  - Evolving communication protocols
  - Using metrics to predict pricing and make workflow decisions
  - Automating bibliographic coding
  - Advanced data modeling using statistical analysis
  - Automating privilege log drafting (reducing drafting time by approximately 70%)
  - Building custom data deduplication tools for documents not de-duplicated by MD5 hash
  - Writing custom scripts for privilege screens that exclude footer language