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Survey Offers Practical Advice From In-House Counsel For Developing And Assessing E-Discovery Programs

The Editor interviews Mike Kinnaman, Senior Managing Director, FTI Consulting, Inc. FTI released a survey entitled "Advice From Counsel: An Inside Look At Streamlining E-discovery Programs." Conducted in the fall of 2011, the survey involved interviewing 31 inside counsel and seeking advice for their peers on streamlining and reducing the cost of e-discovery. The majority of respondents worked for Fortune 1000 companies, and all had e-discovery responsibilities.

Editor: Why should general counsel download the survey?

Kinnaman: The survey is a very useful tool for assessing where an organization stands with the e-discovery process, both within its own operations and relative to its peers. A lot of companies are in an evolutionary phase, moving away from the fire drill mentality of five years ago toward the idea that e-discovery is an integrated business process that should be consistent, repeatable and measurable. As such, e-discovery remains an emerging area about which clients are very interested to hear from other organizations and to have this information in one consolidated document.

Editor: What issues seem to be top of mind for today's GC?

Kinnaman: When it comes to e-discovery, major issues include gaining better control of the process and achieving greater budget predictability. Companies, and particularly lawyers, do not like surprises; they want to know what to expect with e-discovery, which explains why many more organizations are taking direct control over this process. Such control doesn't necessarily require insourcing the process; in fact, one of the things we found in the study is that improving the process often means narrowing the field of outsourcing providers so

that there are fewer points of accountability.

Editor: What do the survey results say about the state of the in-house e-discovery process?

Kinnaman: The state of the union is strong. Corporate clients are very smart about e-discovery and have become increasingly sophisticated, focusing specifically on identifying opportunities for cost savings and greater control. The survey demonstrates a more activist role for in-house departments than existed as few as five years ago, and there is a general increase in corporate oversight around e-discovery.

Editor: What was most surprising?

Kinnaman: In spite of greater emphasis and attention on e-discovery, corporations still don't have a concrete understanding of how much they spend year over year. Virtually all of the survey participants were able to give a ball-park estimate of e-discovery expenses and even identified some of the cost savings already achieved; however, most participants don't yet have a line-item tracking system for all expense areas. We expect this will change because e-discovery is, and will remain, a large and certain cost center when it comes to litigation; thus, it was surprising that many companies are still in the very early stages of taking control over this process.

Editor: What challenges do in-house counsel face in identifying specific e-discovery costs?

Kinnaman: Historically, it has been a challenge for companies to identify opportunities for cost savings, but that is all changing. For example, this year's survey results showed a decrease in the average number of e-discovery third-party providers retained, so companies are definitely narrowing the field to reduce costs.

Again, many companies are still evolving, which in itself is a challenging but constructive process. One major development on the in-house side is that we are seeing more people whose professional titles include the word e-discovery, for instance, senior counsel in charge of discovery or AGC in charge of discovery. As a result, there is increased corporate visibility for the e-discovery process, with senior members of the organization being specifically tasked with its management.

Editor: What were the key themes of the survey?

Kinnaman: Ninety percent of participants identified document review as the number-one cost issue, which, therefore, is a major target for expense-reduction efforts and the inspiration for heightened interest in managed document review as an outsourced service. Another key theme is better leverage of technology to accelerate review and improve accuracy. More companies are closely tracking e-discovery and using that information proactively to determine how many service providers they will need – a statistic that has changed substantially in just the past year, from an average of five providers in 2010 to a 2011 average of three.

To download the survey, please visit
www.FTITechnology.com/GCStudy

Please email the interviewee at mike.kinnaman@fticonsulting.com with questions about this interview.

Editor: Did the respondents provide any best practices or advice on how to predict e-discovery costs?

Kinnaman: Yes, quite a bit actually. As I mentioned, most respondents identified document review as a target issue to reduce costs and gain budget predictability. Another recurring recommendation focuses on the provider's viability and level of expertise, specifically highlighting the importance of a track record. Litigation can last for years, so companies need a proven provider that is going to be around for the long term.

Expertise also plays into a third point on best practices. While companies certainly recognize the value of technology, they also understand the critical role of expertise in leveraging the technology; thus, there is no clear consensus about insourcing the entire function, though some companies certainly are hiring senior people, such as discovery AGCs, to make decisions and manage the process.

Editor: Was there a consensus on using predictive coding as a cost-saving technology?

Kinnaman: There was no consensus but rather a wide spectrum of perspectives on this, illustrating that this is an emerging field. Overall, 55 percent of respondents would consider using predictive coding, but their biggest concern is related to defensibility. Our results reflected that people are more comfortable with predictive coding during certain stages, such as winnowing down the data populations and the more investigative applications when people are making early-stage decisions about documents that are going to be produced to opposing counsel. However, respondents are less comfortable with predictive coding as the litigation process draws closer to the actual production of documents.

Last year, overall skepticism was higher. While people are more open to the technology this year, they remain hesitant to actually use it and are waiting to see what other companies do. As with most new technologies, there is always a phase of finding the right case or other specific justification for adopting it. We should see many more people trying out predictive coding this year, particularly for applications like early case assessment or internal investigations.

Editor: Did the survey also touch on multinational litigation and investigations?

Kinnaman: According to our panel, this is a critical issue because most litigation involves multinational considerations. Frequently, companies in routine U.S. litigations need to collect data in Europe – mostly from the UK and Germany – but often in Asia too, and there are all sorts of local regulations and privacy laws that require compliance within each jurisdiction. Therefore, it is important to work with providers that can support those global requirements and that understand the local regulations.

Editor: What can e-discovery practitioners take away from this survey?

Kinnaman: For in-house e-discovery practitioners, the survey is a really good litmus test, and they can use the results to get a broad understanding of where they stand relative to their peers. Practitioners also can benefit from the discussion of best practices and specific advice, such as on the subject of detailed cost accounting and the need to get started down this path as soon as possible.

One of our panelists, for instance, suggested going out and observing an actual large-scale review in order to really understand both how efficient a particular process may be and what technology was used to good result. Ultimately, cost savings and risk reduction are more likely achieved by corporate clients that develop consistent and repeatable procedures, and this benefit becomes magnified over time as those original procedures are tested and further refined through repetition. Consistency in approach and execution is a theme our panelists returned to over and over again.

For us at FTI, the panelists gave welcome advice on how to tailor our offerings to what corporate clients need, and we certainly got the message that their number-one priority is budget predictability. We must be in partnership with clients to help them identify costs, isolate budget parameters and then construct our offerings to meet their need. As we look ahead to the next few years, we anticipate that this need will only increase.

Editor: One thing we noticed in the survey is the fact that there doesn't appear to be any satisfactory or agreed upon way of determining the cost of e-discovery.

Kinnaman: Many panelists looked at retention as the area of greatest opportunity for cost reduction, and so determined that effective data destruction policies are use-

ful and desirable. Companies first have to define the boundaries within which policies will be formulated, and I can say there is some nuance to that. We find that clients are most successful with this process when they step back, take a holistic view and focus on the total spend. If they find, for example, that reducing document review expense offers the best opportunity overall, then focusing here will have the biggest impact.

You can't try to solve everything at once, but you can seek to understand your current process and then identify the cost centers that you can address immediately. Throughout the process, use your providers to vet ideas and discuss possible solutions that work globally for the company or specifically for all parties in litigation.

Editor: There also seems to be great interest in comparative information from which to judge the cost-effectiveness of a company's operations against what other corporate counsel are doing.

Kinnaman: That certainly was one of the compelling pieces of advice from many of our panelists. Because e-discovery is an emerging field, people are just starting to be assigned direct responsibility for it, and there are not many documented or reliable resources in existence. Thus, people have the best luck by networking, going to conferences, meeting with peers from companies with similar profiles, talking through what they do and sharing tips and best practices.

Editor: Who participated in the survey?

Kinnaman: We had 31 participants, all from large enterprise environments. In fact, 74 percent were from companies of \$10 billion or more in annual revenue. A very good cross-section of industry was represented – everything from manufacturing and life sciences to telecommunications and technology – and almost all panelists held senior legal titles, including the VP and general counsel of the organization or AGC of discovery and other litigation-specific titles. In past years we had more representation from support staff, such as litigation support managers or paralegals, but this year's survey involved exclusively senior executives. This level of participation reflects the true interest of high-level people willing to give their time to be interviewed and participate in the discussion. Given the level of interest, we're looking at expanding the survey for next year.