

Editor’s Review – FTI Presents: “The Emerging E-Discovery Playbook”

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Readers are invited to download a complimentary copy of the “Playbook” at <http://tinyurl.com/mkktzkr>.

In 2008, FTI Consulting launched the Advice from Counsel Survey and Report with the stated goal of “learning how leading e-discovery practitioners within corporations were managing e-discovery and to share the advice they would give with peers just beginning to undertake the e-discovery process.” At that time, amendments to the Federal Rules of Civil Procedure were two years old, and many companies had yet to get their arms around the development of their own e-discovery programs.

In the five years since, against a backdrop of exponential proliferation and diversification of ESI, much has changed in the e-discovery industry. And in each of those years, FTI has conducted its annual survey of corporate e-discovery practitioners. For this year’s survey, Ari Kaplan Advisors personally interviewed 30 in-house legal professionals with responsibilities that include e-discovery. All 30 were from Fortune 1000 corporations and spoke by telephone, under condition of anonymity, in November and December 2013. Recognizing the landmark status of this five-year anniversary, the authors undertook to interpret, distill and publish the results of their survey in “The Emerging E-Discovery Playbook,” in which they ask what’s changed in the last five years and what lies ahead. The authors suggest that corporate e-discovery practitioners might use the “Playbook” to “benchmark” their own programs and perhaps identify opportunities for improvement.

The survey walks through the electronic discovery reference model (EDRM), asking respondents to qualify how matters are handled – in-house, by a third party, or a hybrid of the two. Respondents were also asked about maximizing cost-effectiveness by leveraging prior e-discovery work product, as well as building strong relationships with service providers. Not simply a check-the-box exercise, the Advice from Counsel study draws out what corporate e-discovery practitioners are doing and why.

While the survey questions cover the pertinent matters at hand, especially interesting are the respondents’ candid comments, which pepper the text, providing insight and perspective into practitioners’ decision-making process. The authors believe that overall, the survey’s data points reveal that a “clear operational e-discovery structure” has taken shape in the practitioner landscape. Later in the “Playbook,” the authors report other interesting findings that tell us where the practice is, or may be, headed. An Appendix features graphics that provide more detailed information on the respondents and their industries.

“The Emerging E-Discovery Playbook” makes for enlightening reading for corporate e-discovery practitioners – from veterans to those just cutting their teeth – as well as for inside and outside counsel who might want to expand their knowledge of an increasingly critical component of the practice of law.

Greater Recognition Of The Significant Role E-Discovery Plays

First, regarding what exactly has changed in the practice of corporate e-discovery, the survey reveals that e-discovery is today much more likely to be regarded as a specialty deserving of its own man-

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ager or team. In 2009, 14 percent of respondents who held e-discovery responsibility for their organizations actually had “e-discovery” in their titles as compared to 37 percent five years later.

This shift accompanied a greater awareness and better control of organizations’ e-discovery processes. Five years ago, 27 percent of respondents did not know how many service providers their company used, while this year all respondents knew. Five years ago, among the remaining 73 percent, an average of five service providers was reported, while this year the number was down to three or fewer. Clearly there is evidence that corporations are recognizing that effective management of e-discovery is crucial to their business.

Preservation And Collection

When asked how they managed preservation and collection, a staggering 90 percent of respondents reported that internal teams handled the process in-house. Only 3 percent outsourced the entire e-discovery process (including preservation/collection), while 7 percent used a hybrid approach that depended upon the particular matter.

That said, significant exceptions did exist for which third parties were called in to assist. Those include matters that may require expert testimony by a third party to verify defensibility of the collection process; global matters in which collection

requires compliance with foreign privacy regulations; matters involving significant data collection from social media platforms; and matters requiring collection in “bring your own device” (BYOD) environments.

It’s appropriate to note that the above scenarios will only grow more commonplace going forward, which implies that corporations will continue to recruit service providers for help, yet the responses indicate that in-house e-discovery practitioners nevertheless feel they “own” this stage of the process.

Review And Production

When asked how review and production were handled, on the other hand, the response was almost the inverse. A total of 83 percent of the interviewees said they outsourced the process – 60 percent directly to a service provider and 23 percent to an outside law firm. Respondents found the outsourced model far more cost-effective when it came to review and production.

Equally unpopular to conduct in-house was predictive coding – with the caveat that inside practitioners should be involved in the decision-making process.

Reusing Work Product

Among several interesting first-person comments, one respondent noted, “Data reuse is an area we’ve identified for improvement since we’ve found that we review the same documents multiple times.” Forty percent of respondents currently reuse coding decisions made on documents for previous matters, and a full 80 percent would consider utilizing a multi-matter repository that facilitated the reuse of document coding decisions, e.g., privilege calls. It’s likely, then, we will see the use of these repositories on the rise.

Developing A Strong Partnership

There was wide agreement on questions around the importance of building and maintaining a collaborative relationship with an e-discovery provider. The overwhelming majority – 86 percent – claimed they had no plans to bring the e-discovery process in-house, as it was simply unfeasible to do so. Similar or identical percentages of respondents 1. directly negotiate their agreements with service providers; and 2. have Master Service Agreements with their providers.

The authors conclude that while there

is no one-size-fits-all solution for e-discovery, most corporations are employing a model in which identification/preservation are handled in-house, with notable exceptions for which they turn to service providers for assistance. Meanwhile, processing, review and production – including predictive coding – is largely outsourced, with corporate practitioners playing the key decision-making role. Corporate practitioners will increasingly use software that enables the reuse of e-discovery work product. Overall, the authors write, “Seven years after amendments to the Federal Rules of Civil Procedure (FRCP), corporations now have a clear game plan on how to operationalize e-discovery for greater efficiency, transparency and cost predictability.”

Emerging Challenges And Growing Concerns

While the subjects of emerging challenges – BYOD, Big Data and information governance – may not be surprising, the survey offered compelling numbers around these challenges, for example, the rapidity with which BYOD policies have been implemented: 90 percent of respondents anticipate having a BYOD policy in place at their organization by 2015. Other figures as well as personal, first-person comments flesh out the timely topics.

What Else Is On Their Minds?

An eye-opening segment came toward the end of the “Playbook”: a collection of interesting findings that did not fit neatly into the e-discovery process narrative itself but that nonetheless shine light on the concerns of corporate e-discovery practitioners. The respondents reflected on end-to-end software, ease of use, and their use of analytics and predictive coding.

Receiving the most attention, and duly so, was the issue of budget transparency. Respondents opined variously about where they see the costs of e-discovery going. They did seem to have a lot to say on this subject of great concern for organizations. The obviously highly informed authors closely compare this year’s results to each of the previous four and also suggest possible explanations for some of the respondents’ answers, which placed the survey in a real-world context. Clearly, budget transparency is an issue that isn’t going anywhere in the next five years.

In concise, well-organized fashion, what emerges in the “Playbook” is an “inside” look at how practitioners are keeping pace with today’s fluid technological environment by developing best practices around e-discovery and related issues – as well as what new challenges are keeping them up at night. Whether you “own” your organization’s e-discovery function or simply want to get your arms around where the corporate e-discovery practice is headed, you’d be well served to download a copy of “The Emerging E-Discovery Playbook.”

About Advice from Counsel

Through in-person events, virtual meetings, webcasts, surveys and reports, Advice from Counsel helps e-discovery leaders share ideas and advice with peers in an open and collaborative forum. Begun in 2008 as an annual survey and report on top e-discovery trends, Advice from Counsel has evolved into an interactive community of e-discovery professionals working to strengthen the people, process and technology at the core of e-discovery. Advice from Counsel is sponsored by FTI Technology.

