

# E-Discovery Right-Sourcing: Cutting Outside Counsel Litigation Spend



By: Stephanie M. Maw

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Most in-house counsel agree that reducing overall outside counsel spend, particularly when it comes to litigation spend, is a laudable goal. While the underlying needs and high-stakes antes of this objective have admittedly increased following the Global Financial Crisis of 2007-2008 and subsequent recession, the need to reduce outside counsel litigation spend has always been present according to most, and, as such, is rather old news.

The fact is in-house counsel have increasingly embraced this longstanding initiative, adopting changes in both theory and practice, and even developing their own form of [Business Process Improvement \(BPI\)](#) policies and procedures to effectively decrease outside counsel spends. (*Hint: the latest buzzword—information governance—which many are wisely advocating, but proportionally very few are actively practicing yet, may arguably be seen as a form of BPI.*) This is genuinely really big news. While many outside counsel would like to say we saw this coming, it seems that very few things in life are either black or white, but rather a series of progressive gray scales.

Notably, a recent 2014 *HBR Consulting Survey* shows that while inside counsel legal spends, including compensation and operating expenses, are actually increasing (at an annual rate of 5%), outside counsel spends are decreasing annually by 2%. According to *Inside Counsel* in a recent article by Ed Silverstein, [cost-conscious legal departments may be keeping more work inside the company](#). Silverstein examines and reports on some interesting findings and established trends evidenced across the board.

Setting aside a growing movement away from Big Law in favor of regional and local outside counsel, the notion of e-discovery right-sourcing provides an interesting intersection point where law meets business and where the increasingly front-facing compliance initiatives step out of the shadows and comfortably walk hand in hand as the conduit between the two. As such, e-discovery right-sourcing provides one of the few but potentially enormously important business use case opportunities in which advanced technologies, when carefully chosen and properly implemented and maintained, can help drive these outside counsel litigation budget decreases.

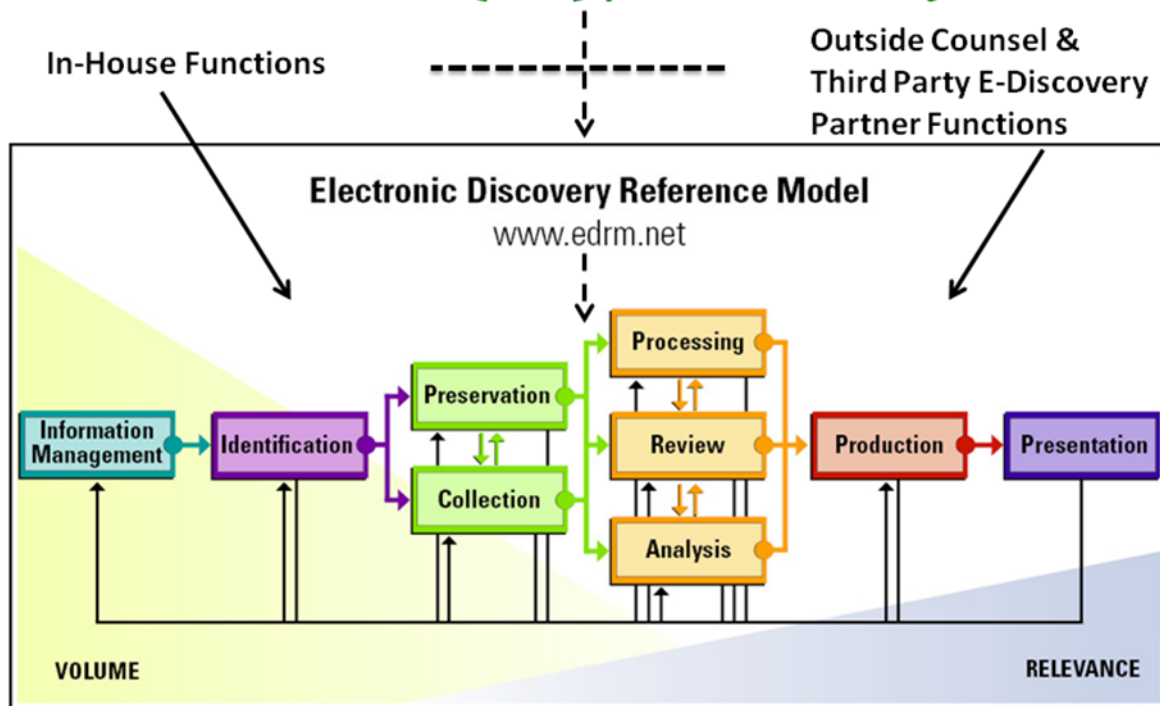
Now a popular buzzword often bantered about, “[Right Sourcing](#)” is defined by Orange Legal Technologies as: “... the balancing of internal and external resources in order to best accomplish a specific business function. In the area of electronic discovery, right sourcing can be considered the support of electronic discovery tasks with the best balance of internally and/or externally provided technologies and people.” At its core, right sourcing is simply ensuring the most suitable person or group available is performing a particular scope of work for which they are most qualified in comparison to other alternatives, with the highest expertise available in comparison to other alternatives, and, importantly, in the most cost-conscious manner available as compared to other reasonable alternatives.



A few industry-specific enterprises have a justified need (and therefore an otherwise luxury) of being able to maintain a deep palette of seasoned database administrators, data storage experts, e-discovery technologists, record managers, data stewards, and the like. These enlightened enterprises recognize the viral trend to further reduce outside spend. However, most enterprises do not have this luxury, and in those organizations, we find multiple information technology roles and hats often worn by a single employee. Similarly, while some enterprises may have the luxury of remaining in the minority of in-house counsel groups whose budgets have not become leaner and meaner, most are indeed being forced to make often significant operational changes internally to accommodate decreasing department budgets.

Ironically, under this challenging operating framework, either of the above monochromatic scenarios could just as easily lead to a services model for either exclusive e-discovery *in-sourcing* or exclusive e-discovery *outsourcing*. In several recent information governance and litigation readiness client consultations, I have yet to see such one-directional operating paradigms in real-world experience. Instead, I am finding an increasingly collaborative playing field emerging from the well-worn base runner paths leftover from fall, still hunkering down for the winter and optimistically waiting to re-emerge once again in the spring.

## EDRM Lifecycle for Electronically Stored Information (ESI) / E-Discovery Data



Source: www.edrm.net ; <http://www.edrm.net/resources/edrm-stages-explained>; Additional illustrative annotations by KMK 01/2015.



Potential E-Discovery Right Sourcing Function Opportunities

We have seen our corporate clients successfully bring portions of the [EDRM](#) e-discovery project work lifecycle in-house, typically beginning with the Information Management and Identification Phases, most with a primary emphasis on the Preservation Phase, and most generally ending with the Collection, and/or a new, Pre-Processing/ECA Phase. Best practices typically warrant the engagement of outside counsel and/or third party e-discovery providers for these right-side model phases of work, beginning with Pre-Processing/ECA or Processing Phases and moving forward through the model.

- **Information Management and Identification Phase:** Commonly referred to as ESI Data Mapping, during this process, the primary phase of work is performed by inside counsel, and in larger or more sophisticated operating paradigms, includes cross-disciplinary involvement and, in some cases, additional oversight by selected members of an enterprise’s information technology, information security, and compliance/risk management groups. This phase of work focuses on the initial investigative and organizational process of identifying and locating all sources of potentially relevant ESI and custodians of records, and subsequently determining its scope, breadth, and depth.

Right Sourcing Strategy: *Inside counsel* ownership, management, and administration of the process, including implementation of information management technology, when needed and appropriate. *Outside counsel and third party e-discovery partner* collaboration, best practices guidance, per-case/project management oversight, and technical support, when needed and appropriate.

Rationale: While outside counsel can help lead the dialogue to ensure a comprehensive series of questions are asked to the appropriate cross-disciplinary group of client employees, ultimately the core institutional knowledge base is and will always remain with inside counsel. Outside counsel will be most successful by learning to walk the delicate line between advisor and augmented, heavy-lifting support, while letting internal subject matter experts rule their own destiny and act as their own best data stewards.

- **Preservation Phase:** During this critically important EDRM phase of work, the Preservation Phase is performed primarily by inside counsel, and in larger or more sophisticated operating paradigms, includes cross-disciplinary involvement, and in some cases, additional oversight by selected members of the enterprise’s information technology, information security, and compliance/risk management groups. This phase of work is conditional upon legal rules requiring that all potentially relevant ESI (data) is preserved and protected against potential alteration or destruction. Preservation involves a two-part process: the first comprising a legal execution component beginning with issuance of the litigation hold notice, and the second comprising the technical implementation component, beginning with the cessation of any automatic record retention policies and procedures that will ensure applicable data is indefinitely preserved and not altered or destroyed until release of the litigation hold, typically following final adjudication of the litigation/investigation matter.



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Rationale: As with Information Management and Identification, while outside counsel can help lead the dialogue to ensure a comprehensive series of questions are asked of the impacted business unit and application manager teams, inside counsel teams and the custodians themselves, ultimately the core institutional knowledge base is and will always remain with inside counsel. Unlike the Information Management and Identification phases, however, in the Preservation phase, outside counsel has a stricter inherent compliance obligation (carrying with it the risk of sanctions if not properly undertaken) toward ensuring all potentially relevant ESI is properly preserved. In this role, outside counsel should be acting to protect both supervisory in-house counsel individuals as well as themselves and the firm, which often results in another delicate balancing act in determining a defensible preservation threshold position and approach on which both in-house and outside counsel agree is legally sufficient. Here, the development of various forms of risk tolerance matrices can often form a natural bridge between the key players and seemingly competing interests.

- **Collection Phase:** During this process, the primary phase of work is performed by inside counsel and in larger or more sophisticated operating paradigms, includes cross-disciplinary involvement and, in some cases, additional oversight by selected members of the enterprise’s information technology, information security, and compliance/risk management groups. This phase of work involves gathering or “collecting” the targeted ESI for further use in the discovery lifecycle; namely the pre-culling, culling, processing, electronic review, and electronic production of documents phases ahead. This process is also known by inside counsel teams as “production of evidentiary documents and data,” or more simply “productions,” and by outside counsel and third party e-discovery partners most commonly as “client raw collection exports.”

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Tip for Outside Counsel: Just because one law firm client manages its litigation readiness and EDRM process one way and uses one set of technologies (or not), does not mean that other law firm clients will or should necessarily follow suit. There are a multitude of varying policies, procedures, systems, and technologies used for ESI collection and export, all of which may be deemed defensible under a given industry’s financial and operating regulations, the enterprises’ published information governance policies and procedures, and a myriad of other case and fact specific scenarios that may be in play on a given matter. Outside counsel’s ability to become a super-flexible shape-shifter in this



process, and importantly, clearly state one's area of expertise and those areas which will need outside consultation and collaboration when necessary, will become crucially important in a successful collection phase implementation. Finally, outside counsel's ability to provide clear, prioritized collection requests with associated prioritized timelines, will greatly help inside counsel teams collect the data in the most efficient and least business-interruptive manner feasible.

- **Pre- (& Post-) Processing Phase (Big Data Analytics / Early Case Assessment (ECA)):** This phase encompasses the methodologies and technologies used to analyze various ESI data stores, typically unstructured ESI, by applying math and language algorithms to the data and objectively reporting the resulting statistics, patterns, and relationships surrounding the ESI in question, in order to more accurately determine scope and relevancy assessments.

Right Sourcing Strategy: Since its emergence in perhaps 2009–2010 as an important new kid on the e-discovery block, after surveying our own firm's project work history, we have seen relatively few clients select implementation of this optional phase of e-discovery project work (noting that initial per GB/TB/PB processing price points were proportionally high in the market, not yet normalized, and often viewed with sticker-shock as an added high price point among otherwise generally unavoidable but also high priced e-discovery line items). For those clients that do choose this optional phase, however, they generally implement it on every case and investigation matter, in an effort toward maintaining a consistent, repeatable, and therefore arguably more defensible e-discovery process across the board. From our particular client profile experience, the total number of clients leveraging these data analytics technologies began with perhaps 10% of the total population and through 2014 analyses reflects between 30–40% of our litigation/investigation matter clients adhering to this usage trend.

Within the roughly 30–40% of clients that do employ Pre-Processing ECA Analytics technology and analysis in their e-discovery project phase workflow, we find nearly an even 50%–50% split between client teams performing this work in-house, typically led by *inside counsel* versus the use of *outside counsel and/or third party e-discovery technology providers* performing this work. If performed in-house, this process is also commonly referred to as “pre-culling the collection data.” The growing numbers of inside counsel who have adopted and implemented this phase of work often express increasing rewards derived from the cost savings that are typically afforded by performing this optional phase of work at all, including when evaluated against the known counterpoint of small-to-moderate additional upfront technology costs for doing so (and business interruption costs, if performed in-house). The tradeoff typically yields demonstrable long-term cost savings due to its ability to identify, group, organize, report, and even pre-cull objectively discernible populations of data and documents that should absolutely be removed from the next EDRM Processing phase, understanding that they are either beyond the scope of production, absolutely privileged, or absolutely non-responsive on their face. These early analytics findings and decision points therefore allow a lower upfront per GB/TB/PB processing volume to move forward through the processing

queue, which therefore results in driving down both processing costs, and, notably, next phase review and production costs.

- **Processing Phase:** During this process also known as EDD Processing, Culling, or Filtering, the purpose of the work is to further reduce raw collection data volume (and hence future flow costs stemming from raw collection ESI/e-discovery data) by applying de-duplication, non-user generated system file removal (de-NISTing), date range filtering, and keyword search term filtering—all serving to cull or narrow the original collection set data into a narrower, potentially relevant, prioritized, and more cost-effective population of review set data. Best-of-breed e-discovery enterprise class processing platforms implement what is known as a Distributed Processing System (DPS), whereby multiple processing jobs and tasks are performed across multiple servers and workers to consecutively attack each electronic document record and move it through the workflow based on processing rules. By performing electronic file discovery, indexing, extraction, processing, and export “jobs”—all distributed across multiple servers or machines with multiple threads on each server/machine with purely optimized load distribution—a Distributed Processing System is specifically designed and built to address the otherwise unwieldy processing time/cost pain by minimizing downtime and human labor costs and maximizing processing consistency, accuracy, and performance.

Right Sourcing Strategy: As one might expect, due to the complexity described in a Distributed Processing System, it requires both significant capital and human resources expenditures in order to securely run, manage, and administer on-site. As a result, historical, real-world experience suggests that outside counsel and/or third party e-discovery partner ownership, management, and administration of process, including implementation of information management technology when needed and appropriate, will allow for an optimal right-sourcing opportunity for this phase of work. Similarly, inside counsel will have plenty to contribute and oversee in the form of per-case/project management oversight.

- **Review Phase:** This process is not new to e-discovery but rather has existed and been applied since the onset of rules and requirements now nearly 100 years in the making. While the process is not new, the environment has certainly evolved 360 degrees in a relatively short period of time. Previously performed using paper notes, charts, document summaries, and early days of “indexing,” now teams of primarily contract attorneys (often combining the use of Technology Assisted Review (TAR) and other Data Analytics technology) perform objective and subjective coding of the document records. As a bare minimum review assessment, their goal is to determine if the evidentiary document record is considered either responsive to the litigation/investigation matter, a protected privileged communication and therefore not subject to document production, or, for civil litigation matters, simply non-responsive to the subject matter of the litigation and actual request for production of documents.

Right Sourcing Strategy: As one might expect, the overwhelming right-sourcing opportunity trend followed in this phase of work places ownership, management, and implementation of process and procedure rightly in the hands of *outside counsel and*



*third party e-discovery and/or legal staffing providers*, ultimately providing significantly lower hourly document review costs (and/or per-document review costs). Following the highly effective collaboration model, the providers work in tandem with outside counsel, who then consecutively funnel key case/project information up the chain to *inside counsel* as strategic, critical decision makers, allowing for a seamlessly integrated and BPI intensive project management cycle from start to finish, when implemented properly.

- **Production Phase:** Similar to the Review Phase, document review is frankly nothing new. Indeed, document production requirements subject to the rules of civil and criminal procedure, and specifically the discovery phase, have been in play for nearly 100 years. However, just as the complexities due to volume and document record format (i.e., moving from simple paper to complex ESI with all of its potential file types, metadata fields, and other structural nuances) have expanded, so too have electronic document production complexities, for all of the same reasons. Previously producing manually assigned or Bates “stamped” sequentially numbered paper documents, today’s common document production formats include full litigation database load file formats (e.g., Ringtail, Concordance, Relativity, Summation, IPRO, iConnect, and other standard e-discovery/litigation database load file formats + associated production images + associated OCR .txt files + associated native files, all requiring special handling and exclusions in some cases for redacted documents), document foldered single page .tiff images, document level/multi-page full-text searchable .pdf files, EDRM .xml formats, and a myriad of other custom database load file formats often ordered by requesting party government agencies, in particular.

Right Sourcing Strategy: Again, as one might expect, the overwhelming right-sourcing opportunity trend followed in this phase of work places ownership, management, and implementation of process and procedure rightly in the hands of *outside counsel and third party e-discovery and/or legal staffing providers*. Similarly, *inside counsel*’s per-case/project management oversight can be of paramount importance in this phase of work, recognizing they must have sufficient involvement in the project management in order to ensure their trust and confidence level surrounding the types of documents and data to be produced in final form. When implemented properly, outside counsel provides the delicate balance of sufficient but not over-worked (and therefore more costly) type of case and project management communications over the duration of the production phase, allowing for a seamlessly integrated and BPI intensive project management cycle from start to finish.

*Noting it reflects the smallest percentage of work by inside and outside counsel, and for purposes of our discussion, treating it as an optional phase of e-discovery work, the final EDRM Presentation Phase of work is intentionally omitted from this analysis.*

While the decisions surrounding in-sourcing and outsourcing are not always a battleground, in far too many scenarios they can quickly become a tug-of-war between inside and outside counsel, causing unnecessary pain and expense to all, and, of equal concern, making the ultimate victim the quality of the underlying e-discovery work product rendered. When done well, right-sourcing is, practically speaking, a welcome safe zone for all of us.





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