Law Firms at a Rediscovery Watershed:

Embrace eDiscovery Entirely or Collaborate for Client Service?

Benchmarking Report

By Ari Kaplan
INTRODUCTION

As corporate legal teams increasingly focus on transparency and information hygiene, law firm leaders are responding by reinventing their practices to accommodate a host of changing expectations. They are exploring innovative ways of serving their clients, training their practitioners, and growing their organizations.

In an effort to highlight this shift, RVM retained Ari Kaplan Advisors to engage 30 senior attorneys at many of the nation’s largest law firms in detailed conversations during the first quarter of 2014 about past, present, and future trends in the legal community. The findings, based on these interviews, characterize the catalysts transforming the profession in an era of expansive eDiscovery and highlight how organizations are universally pivoting to remain current in their approach to client service.

Learn how expectations have changed and what is driving that movement; how your team members, whether serving as in-house counsel or outside advisors, can apply efficient best practices; and, ways to monitor the convergence of technology and the law, among many other trends.

PARTICIPANTS

Ari Kaplan Advisors personally interviewed 30 law firm attorneys who serve as primary outside counsel on electronic discovery matters. All participants were from AmLaw 200 firms and spoke by telephone, under condition of anonymity.

73% are partners and 27% are senior eDiscovery lawyers. All are members of an eDiscovery group within their firms to varying degrees. 100% recommend eDiscovery tools and vendors to corporate counsel, and also develop and implement eDiscovery processes. The vast majority of participating organizations had total annual revenues greater than $100 million and over 300 attorneys.

Which of the following activities are you involved in?

- Recommending eDiscovery
- Selecting eDiscovery
- Managing eDiscovery
- Developing and implementing processes

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As law firms continue to redefine their practices, the trajectory of these adjustments is often dictated, in part, by changing client expectations. In fact, 93% of survey participants agree that those expectations have changed with respect to practice support technology. 89% of the respondents note that higher client expectations relate to the costs of the changes in technology.

In an effort to be more responsive to these concerns, law firms are engaging in a variety of new strategies to demonstrate their technological prowess, as well as their commitment to efficient practices and transparent processes. Given its increasing prominence, eDiscovery is one key area where firms are showcasing their talent and ability in critical situations.

Some are cultivating nationally recognized and dedicated groups with a multidisciplinary staff of experts. Others are relying on a hybrid model that combines inside experience with outside efficiency. “The firm has developed its own internal eDiscovery team, which utilizes staff/contract attorneys and provides robust training on serving as the discovery liaisons to litigation teams,” said one participant. “The firm is bringing its ESI services in house and partnering strategically to handle overflow on larger cases to take greater control of the process,” added another.

Struggling to find equilibrium, many firms are at a crossroads in their approach to electronic discovery. While there are some that are expanding their internal capabilities, just as many seem to be concentrating on fostering relationships with software and service providers for referral purposes. “The firm has adopted a managed services approach with vendors; the internal litigation support team focuses on consultation and the vendors handle the data processing,” remarked one respondent.

They are building stronger vendor relationships to objectively evaluate all available products to guide clients more comprehensively, find cost-effective solutions (including providing basic eDiscovery services for little or no cost), and enhance information governance suggestions. “The firm has an established eDiscovery
practice group that meets weekly to align the different practices to create standards and protocols; it has a unified approach to vendors and vendor agreements.”

That uniformity in an otherwise fragmented field is a result of the popular impression that the technical aspects of eDiscovery are interchangeable. “Clients expect practice support technology to be cheaper and more efficient; it is becoming more commoditized,” remarked one participant.

That commoditization is impacting the overall impression of technology at all levels of law firm operations. As it becomes more ubiquitous, it seems to be losing value. “Some clients think that practice support technology is part of the cost of doing business and not a billable event,” highlighted another.

In addition, corporate legal teams are better educated and experienced in managing eDiscovery. “Clients are more sophisticated so they are more proactive, rather than responsive to lawyers,” noted one attorney.

Ultimately, law firms are trying to strike a balance. “There is an increased belief that technology in and of itself will deliver efficiencies and cost savings; however, it is not the technology, it is the management of the matter and good decision making.”

Much of the transition is driven by a renewed focus on efficiency to manage legal services. 93% of the survey respondents report that clients are demanding greater efficiency. As a result, savvy law firm leaders are focusing on providing clients with cost and status updates. “Firms can help to educate clients more effectively,” said one respondent, who noted that more clients are familiar with archiving systems and are in a ‘save everything’ mentality.

“Discovery has now become an archeological adventure,” the lawyer added.

In-house legal teams are acknowledging these challenges and considering different possibilities for overcoming them. “They are open to a variety of technologies, looking to costs and defensibility first, and will consider the range of options that are available to them making the decision based upon the best match,” commented one respondent.
Despite their interest in being more productive at a lower cost, “Clients still struggle with measuring efficiency correctly,” remarked one participant. As a result, law firm practices now anticipate that need for proficiency and promote it as a standard. “Using the technology correctly has eliminated many of the efficiency issues the firm faced,” highlighted another.

After all, when companies call for efficiency, their demands often relate to not over-collecting, over-preserving, or unnecessarily reviewing extraneous documents. “The brute force method of lining up documents in a database with a team of contract reviewers is on its way out; clients are demanding discovery solutions that will fit in their litigation budget,” said one respondent.

Ultimately, “It is all focused on driving the costs down,” added another. “Efficiency is one of the benchmarks for legal practice these days; you need to justify your time as opposed to simply billing it.”

While many firms are engaging in a variety of creative activities to demonstrate their efficacy to clients and prospects, this trend relates most prominently to spotlighting strategies for mitigating risk in the most cost-effective manner possible. Although the conversations are about transparency and budgeting on the surface, they are frequently focused on cost and risk at their core.

For example, some firms reported cutting back on quality control to reduce expenses. “Clients do not want to pay for second level review; they want things cheaper,” noted one attorney. This represents a classic assessment of the benefits of spending less and the burdens of missing an important element of discovery. Some legal teams are taking a closer look at this calculation in certain potentially lower value cases or in those where a thorough investigation is prohibitive.

Firms are also reflecting that calculus by quantifying the reduction in data volumes their teams achieve in detailed case studies or by conducting an ‘after action’ review with a focus on measuring the client’s return on its investment. “The firm tries to
illuminate that as much as it can,” said one respondent. “It also performs ongoing reporting, provides detailed bills, and applies alternative fee models as much as it can to move away from hours and per GB costs,” the lawyer added.

Some are maintaining a discovery center in-house as a means of controlling the risk, while others are investing in new review platforms and deposition management software since remaining as current as possible is often akin to hedging the potential for processing problems. “It all boils down to cost and risk; it is a difficult balancing act,” said one individual.

One common theme that resonated throughout the discussions was that in-house lawyers are taking more ownership of the law department’s eDiscovery effort, rather than leaving the key decisions to the organization’s outside counsel. They are establishing independent vendor relationships and dictating uniform process protocols that comport with their internal strategy.

“Clients have moved from expecting that the firm will host data and provide support, to outsourcing with a preferred vendor directly,” said one participant. In fact, “Clients are developing a better understanding based upon analytics about what things cost, and what they should cost; they recognize the value of institutionalizing things,” added another.

Despite those assertions, only a third of the respondents reported that clients are substantially influencing their legal strategy drawing a distinction between the macro issues and micro details. “Clients care about strategy, but are less concerned with individual tactics,” noted one participant, whose view is consistent with the 23%, who reported that clients are exercising a moderate level of influence on the legal technology the firm should use and the 27% rating it as average. Of course, “As their experience increases, the degree to which they are actively involved in the litigation tends to increase.”

That also applies to their familiarity with the marketplace and the leading providers. “Clients will have a strong influence if they have a preferred tool or vendor, but if not, they rarely have a strong preference and the driving force is the lawyers or technology group to which the client defers,” highlights one experienced practitioner.

Still, 40% of those responding to the survey advised that their firm has substantial influence on the client’s use of legal technology. “Clients follow the firm’s
recommendations,” reported one participant. “The firm is frequently recommending to clients what it thinks they should use and identifying the benefits based on their architecture,” another added.

Even though corporate legal teams are becoming more familiar with the technological landscape of tools and services available to them, they still apparently defer to their outside counsel for guidance when appropriate. “The clients accept the firm’s advice and it factors into the decision, but cost is the driver.

Beginning in about 2007, with a spike of 25% in 2008 and another 25% over the past two years, an increasing number of law firms began creating eDiscovery-specific legal positions. Today, 73% of respondents highlight that their firms employ eDiscovery counsel, though not all specifically designate their lawyers with that title and it has a varying degree of stature. At some firms, it is an equity partner level position and at others it is a senior non-partnership track role.

79% of participants report that the role of eDiscovery counsel is both an internal resource and an external marketing tool. In many cases, that lawyer and his or her team support merits counsel in developing a holistic trial strategy as it relates to discovery. In fact, this is becoming such a critical element of the litigation approach that 57% of respondents have had clients ask their firms to work specifically with eDiscovery counsel, either internally or externally. “It is a growing trend because clients like the firm’s geeks to speak to the law department’s geeks,” joked one respondent.

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As a result of this heightened interest in these capabilities, 100% of the respondents emphasize their familiarity with legal technology when marketing their services in live discussions, print media, and thought leadership. 100% also consult with clients on the practice support technology they are planning to use for a particular matter.
They are not, however, solely responsible for making technology-focused decisions. 93% of respondents reported that a combination of individuals is engaged in the practice support technology and vendor selection process. One respondent even admitted that “The firm knows a lot, but lawyers are not technologists; law firms work best when working with a good consultancy, but want the opportunity to provide perspective.”

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About half see themselves as counselors, who frequently need to provide guidance on technology. They are simultaneously strengthening their internal eDiscovery skills, while also serving as trusted advisors by knowing where to find the expertise if they do not possess it in-house. “Every firm should have a recommendation knowing that often the clients have their own solutions,” remarked one participant. The other half views its role much more broadly with the firm duplicating the work of an outside vendor when appropriate.

Many are at a watershed given the fairly even split between insourcing and outsourcing; hands-on expertise and general guidance; and, project management and eDiscovery consulting.

Those distinctions are critical because "It is a challenge to properly bill for eDiscovery services; firms need to educate merits counsel on why eDiscovery services need to be on an invoice,” said one respondent.

It is not simply an issue of law firms convincing their clients of the value they provide, but eDiscovery teams periodically convincing an internal partner not to write off the hours billed for their guidance. After all, “Clients think that eDiscovery services should be part of the operating costs of the firm.”
Despite that view, 93% of participants believe that the adoption of new technology can help law firms increase profitability. Since only 50% report that clients encourage their firms to outsource eDiscovery, there may be an opportunity for firms to continue to increase fees in this area.

Still, it is a challenge as 97% outsource some portion of their eDiscovery, with the most common aspect being processing, and 83% have received a client request to write off eDiscovery costs. The solution may be in segmenting the billable work to reflect a firm’s traditional counseling role and its evolving position as a service provider in certain circumstances.

"There has been a swing between what should be overhead and what a firm can charge for,” said one law firm leader. “It is becoming more acceptable for a firm to bill for eDiscovery to the extent that it is value-added and competitive with what a vendor would charge; you are billing at vendor rates, not at firm value-added rates," the individual added.

To strengthen this billing position, firms are changing their practices and actively:

- Replacing deficient data processing vendors.
- Ensuring that products and vendors perform as advertised. “Vendors spread the most talented employees too thin and the work product suffers.”
- Migrating to new software. A number of respondents reported that they were migrating away from one tool and beginning to support another, which is creating confusion.
- Maintaining pace with the speed with which practice support technology is changing. “It is important to stay current while balancing the cost of constant updates.”
- Managing the opposition, clients, and counsel. “There is an educational curve that has to be managed with clients, attorneys, staff, and vendors; the practice is still evolving.”
- Budgeting. “The biggest challenge has been managing the budgets and addressing issues associated with unusual hardware challenges.”
- Identifying knowledgeable and skilled outside partners. “There are many vendors selling tools, which use they cannot explain; there are also challenges for negotiating the use of some current technologies, as well as an educational component with adversaries and some judges.”
- Securing internal support. “There is often resistance to the buy-in at the firm and within the client’s law department; when you are dealing with a regulatory matter, merger, or contract review, clients do not want to pay the cost up front.”
- Establishing and maintaining a uniform approach. “Encouraging uniform usage within the firm has been a challenge.”
Despite their role in helping clients select tools (53% of respondents highlight that a combination of internal and external representatives help organizations decide whether to use practice support technology), 40% rate the knowledge of the practice support decision-making team at an 8 or lower, with the remainder giving their teams a 9 or 10. “We do a pretty good job on technology and it is something that the firm emphasizes,” noted one participant. 73% of the respondents rated their firm's overall use of technology as High and 47% are investing in new technology as part of an overall business strategy.

“The firm’s main focus is to limit the data it collects, set proportional limits, and then use the best available technology to evaluate the material,” said one attorney. In fact, many are in the process of retiring their existing technology in favor of either outside support or cloud-based tools that are easy to update.

Like all organizations, however, law firms face technical challenges that include:

- Overcoming bias based on experience. “At times, there can be complacency in favor of existing relationships and preferred technologies; we could do a better job.”
- Turnover in the current competitive market, which disrupts continuity. “The firm has had some key departures.” For many firms, maintaining personnel has also been a key concern due to an abundance of opportunities available with competitors, vendors, clients, and government agencies.
- Human resource limitations. “They could get better and have a broader knowledge of the industry.”
- Continuously investing in the newest technology and techniques. “There is not enough investment in remaining current; it is hard to stay current in this environment unless you proactively seek it out.”
- Internal education. “The firm is addressing its ability to get better educated; it is a significant deficiency … it is educating its team on more web-based technologies.”

Much of the feedback focused on the need to find, cultivate, and maintain talent in a highly competitive area. Law firms, vendors and corporate legal teams seem to share this challenge. The disruptive nature of attrition can have an adverse effect. Solutions like aptitude-nurturing training initiatives, reinvestment in technology, and an institutional focus on personal growth are having an impact, but until they are implemented collectively as part of a strategic plan, organizations may not realize their full potential.
Firms Will Adopt New Technology More Rapidly to Remain Competitive

72% of respondents expect law firms to increase their current level of practice support technology in the next three years. As a result, it is likely that the legal industry will continue to adopt new tools at a rapid pace, particularly as cloud-based technologies make it easier to update, change, or adjust without incurring additional costs or data loss.

Law Firms Will Maintain Their Course, But Pivot as Necessary

Given that 97% of respondents do not expect to change their model related to either insourcing or outsourcing (an issue on which there was an even split), the division between those firms who handle most of the eDiscovery internally versus those who engage an outside vendor is likely to continue. That said, regardless of whether the firm serves as both counsel and consultant, almost all of the respondents are focused on gaining a competitive advantage in a recovering market. With 93% spending money on exploring new future trends, law firms are likely to continue to adapt to the changing environment even if that means strengthening relationships with external experts, who can complement their legal guidance with technical distinction.

Client Influence on eDiscovery Will Grow

With 87% of respondents reporting that their clients influence what technology the firm uses for eDiscovery, it is already well settled that law department leaders are driving these critical conversations. “It is a cost-savings decision made by the client in favor of a preferred vendor,” advised one participant.

The Split Between Firms that Serve as Vendors and Those That Do Not Will Grow

60% of the respondents advised that the firm's eDiscovery team executes the same functions as the vendors it hires, albeit to varying degrees. There is a lot of overlap in almost every way,” said one lawyer noting that the firm handles collection, hosting, processing, and review. “The firm’s internal team can replace 95% of what a vendor does,” echoed another. Interestingly, 17% reported that in-house processing has posed a conflict in the past, but that the firm was able to resolve it.
The reality at many firms, however, is that they do not have the same capacity as vendors to manage the largest cases. “The firm cannot handle massive processing of data,” admitted one lawyer. “The firm handles small matters in house now, but anticipates that it will outsource the technology aspects only maintaining a project management function,” echoed another. That project management function is becoming increasingly complex and seems to be offering firms the opportunity to provide a deeper level of service by combining legal strategy with budgeting, vendor oversight, and IT collaboration with the client’s internal teams.

While the respondents were essentially split between those that insource and those that do not, there are some that admitted exploring future options. “The firm is looking to develop the skill sets of the internal team to match the project management skill sets of external vendors.” That type of interest is likely to fuel this trend in the coming years.
Ari Kaplan, Principal
Ari Kaplan Advisors, New York, NY

The New York Law Journal called Ari Kaplan’s first book, The Opportunity Maker: Strategies for Inspiring Your Legal Career Through Creative Networking and Business Development (Thomson-West, 2008), a “must-have treasure box of marketing ideas,” and CEOs have described his second book, Reinventing Professional Services: Building Your Business in the Digital Marketplace (Wiley, 2011), which was also released in Japanese, as “an essential guide” that “expertly showcases the multitude of opportunities the digital age has brought to the professional services market.”

After nearly nine years practicing with large law firms in New York City, Kaplan, named to the inaugural Fastcase 50, has become a leading legal industry analyst and has released a variety of benchmarking surveys over the past six years. He has also been the keynote speaker for events in Australia, Canada, the United Kingdom, and throughout the U.S., and has shared ideas with students and professionals worldwide.

The founder of two charitable endeavors, Kaplan serves as a Little League baseball coach and is an Ironman triathlon finisher.
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