

Building An Effective e-Discovery Team

Get Down, Get Busy, Be Prepared. Score A Touchdown — And Win.

By Chris May and Frank Butterfield

When faced with the unpredictable scope of e-discovery, today's corporate counsel require the adaptability of e-discovery teams to effectively manage electronic information involved in litigation. It seems a given maxim with sure results:

Chris May is CEO of IE Discovery. May is responsible for all aspects of IE Discovery's operations, including technology research and development, service delivery, project management, and client support. He has participated as a speaker at the LegalTech and LawNet conferences, and he brings hands-on practical knowledge and deep technical insight to these important educational forums. You can reach him at cmay@iediscovery.com.

Frank Butterfield is an e-discovery consultant with IE Discovery's Programming Services group, managing the development and implementation of e-discovery technology and processes for large-scale projects involving masses of electronic information. Butterfield's tenure with IE Discovery includes significant project management for government agencies and corporations. Reach him at fbutterfield@iediscovery.com.

IE Discovery, headquartered in Austin, TX, is on the Web at www.iediscovery.com.

Adaptability is a key component of being prepared. Indeed, by establishing clear lines of communication between its members, an effective e-discovery team is paramount to controlling costs and realizing production deadlines. Formalized lines of communication enable the team to quickly adapt as variables in the case change once the discovery process begins. Conversely, a corporation without such a team exposes itself to potentially problematic e-discovery efforts where spiraling costs and harried productions are common.

The team concept also balances the camps that often approach e-discovery from two distinct and, at times, conflicting vantage points: the legal and IT departments. And, of course, the means of assembling an e-discovery team shouldn't be an afterthought, but part of a firm's established, and evolving — read that as *adaptable* — business process.

ASSEMBLING THE TEAM'S CORE MEMBERS

Effective e-discovery teams are composed of people who represent diverse interests in the organization, and who bring specific priorities and responsibilities to their involvement and specific, or changing, roles in the litigation.

But start at the beginning, and before assembling the team, consider a few prerequisites. First, because of the nature of the responsibilities and the potential flux in caseloads, e-discovery team roles don't necessarily require full-time positions. Also, expertise goes a long way and so it's generally a good idea if one member, if not several members, of the team can claim experience with previous e-discovery cases so that they can provide perspective on potential hurdles, and possible ways of hurtling over or finessing around them.

Variables in most types of litigation, and preparation for it, are legion, of course. Depending on the breadth of the case, the overall team could enlist dozens of members to fulfill the objectives of the case; however, this discussion focuses on the following core members:

- Corporate stakeholder;
- Lead attorney;
- IT representative; and
- Team lead.

A treatment of these roles and what they involve follows.

Corporate Stakeholder

Representing the fiscal interests of the corporation, the stakeholder's sole responsibility concerns the success or failure of the corporation's

discovery process. The stakeholder is a key executive, such as an associate general counsel. This person tracks the cost of the e-discovery project, and balances the costs and benefits of each decision to collect, process and produce requested information within the overall objectives of the litigation process. If a cost-sharing agreement or order has been established, then the stakeholder plays an especially active and crucial role for the team, making certain that each expenditure is adequately justified. Without an engaged stakeholder from a senior level within the organization to command action, the data-collection process will face significant complications.

Lead Attorney

With a primary concern of collecting the e-discovery data necessary for a trial-team victory, the lead attorney communicates closely with the trial attorney — the legal stakeholder — to represent the legal priorities on the team. The lead attorney is responsible for understanding the overall litigation goals and making

sure that any collection, processing or production of information — or all of these functions — is in accordance with those goals. He or she must also inform the team of the appropriate discovery rules, such as specific local rules, to ensure that no discovery squabbles arise.

Depending on subject matter and the caseload of corporate counsel, the lead attorney can be drawn from either inside or outside counsel.

Typically, the lead attorney prefers to negotiate the discovery sticking points with opposing counsel before developing a contingency plan, should the negotiations stall. The natural tendency of a person in this role is to strive for maximum flexibility in the process, which might mean holding out until the so-called, and

often justly named, “bitter end” before committing. The creation of a contingency plan should not, however, be neglected. In regular meetings, the e-discovery team should apprise the lead attorney of any new or changing costs associated with e-discovery, providing ample notice to give the trial team the opportunity to negotiate with opposing counsel or the court, or both, to either narrow the discovery request or to request a cost-sharing agreement. Depending on subject matter and the caseload of corporate counsel, the lead attorney can be drawn from either inside or outside counsel.

IT Representative

A senior, hands-on network administrator with in-depth knowledge of the corporate network's protocol and procedures should fill this slot on the team. In addition to possessing a thorough understanding of the corporation's IT infrastructure, the IT representative should have historical knowledge of how the network was constructed and maintained, or be privy to that history, and be able to conveniently and quickly access it. Often limited by constraints that run counter to the lead attorney's penchant for flexibility, the IT representative prefers to initiate and manage the project with a detailed plan in which each contingency and scenario is carefully considered and specified. The IT representative may also need to manage resources for the project.

Team Lead

The fulcrum of the team, the team lead mediates the somewhat diametrical forces and priorities involved in the e-discovery project

The e-Discovery Team Roster

The effective, flexible e-discovery team includes the following players:

- Corporate stakeholder;
- Lead attorney;
- IT representative; and
- Team lead.

It might also – depending on the size of a corporation – include a representative from:

- Records management;
- Human resources;
- Finance; and
- Accounting.

Consultations with people in risk management or security might be needed to insure that proprietary corporate data is properly safeguarded.

From The e-Discovery Team's Play Book

Here are the team's primary roles:

- Creating a project plan with detailed deliverables;
- Determining and assigning discrete tasks;
- Tracking milestones (completed and projected);
- Monitoring costs in conjunction with the stakeholder (requiring close constant communication);
- Creating documentation;
- Setting schedules;
- Facilitating regular team meetings; and
- Becoming the central point for information about changes and issues.

by ensuring that the lead attorney and the IT representative work in concert. Simultaneously, the team lead is the guardian of the stakeholder's interests and remains in close contact with the stakeholder, providing a free flow of information about the project to the boardroom. Given the ebb and flow of most e-discovery processes, the team lead must manage resources required for the project, ramping staff up and down at the appropriate times. Initially, the team lead and stakeholder should work together to implement a modification of the disaster-recovery plan to preserve possibly discoverable data in the wake of a disaster that could have an adverse impact on the project, and the team itself.

The team lead's tasks include:

- Creating a project plan with detailed deliverables;
- Determining and assigning discrete tasks;
- Tracking milestones (completed and projected);
- Monitoring costs in conjunction with the stakeholder (requiring close constant communication);
- Creating documentation;
- Setting schedules;
- Facilitating regular team meetings;

and

- Becoming the central point for information about changes and issues.

Additional Members

In addition, depending on the size of the corporation, the e-discovery team may include members from records management, with contacts in human resources, and finance or accounting. Risk-management or corporate-security personnel might need to be consulted to insure that proprietary corporate data is properly safeguarded.

Structure Of The Team

The team lead should report directly to the stakeholder, who is charged with controlling the project purse strings and the cost analysis. Yet, the trial attorney, who is managing the case for trial, can operate through the lead attorney to direct the team lead and ensure consistency of the corporate position in the litigation. The team requires a tremendous amount of cooperation between the trial attorney and the team lead, either through the lead attorney or through a direct relationship. The trial attorney's need to stay informed is as great as that of the stakeholder.

TEAM ADAPTABILITY

From the onset of the discovery process, the e-discovery team can quickly adapt as the variables in the case change. To remain unfazed by the fluctuating discovery priorities, the team must constantly be reminded of the inevitability of changes in the case; in turn, the team must continually communicate this downstream.

The team should anticipate and adapt to modifications to the discovery process, including:

- Broadening or narrowing of the time period;
- Expansion of the types of information collected — for example, the unearthing of backup tapes that contain data generated from archaic systems; and
- Inclusion of additional custodians involved in the collection — for example, if the scope expands from discovery at corporate headquarters to one or more of its regions.

Typically, after initiating the process of e-discovery, the team will encounter many unanticipated issues.

Changes In Technology

When the process changes because of technology problems or technology innovations, the IT team needs to inform the legal team and update the project plan. For example, should the corporation change its e-mail package (such as from Lotus Notes to Microsoft Exchange), this will require a retooling of the methods used by the technology team, and can affect the costs and ability to meet the production schedule.

When instituting the alterations, a change-justification document should

be written to rationalize the cost-modification or any change in projected completion date to the interested parties.

Changes In Legal Issues

When the process changes because counsel agrees to a modification in the scope of discovery or the court imposes a change in the scope, the team should meet to discuss the IT implications. For example, the case might reveal additional search terms, causing IT to search data stored on backup tapes against the new terms. In this case, the lead attorney needs to modify the plan, and help update the cost estimates and anticipated completion date.

TEAMS SAFEGUARD AGAINST E-DISCOVERY QUANDARIES

It's most important that effective teams can work to eliminate discovery nightmares that could cause the corporation significant hardship in the form of fines, bad press and other penalties. Such typical problematic scenarios might include the following:

Quandary 1. The corporation finds it is unable to verify that its employees have ceased destroying information relevant to the case, such as with the recent Philip Morris litigation in which the court imposed harsh sanctions on the corporation.

Solution: Because the team lead's performance is measured against the success of the e-discovery process and project, he or she has the incentive to ensure, with the backing of the stakeholder, that company employees comply with the data-retention policy and possible litigation holds. The team lead plays an instrumental role in coordinating

with IT, legal and corporate records-retention management to craft and implement a document and data hold plan, devising methods to continually monitor the effectiveness of the plan.

Quandary 2. The trial attorney agrees to changes in search terms without contemplating the ramifications for IT, including prohibitive cost and unrealistic production schedules.

Solution: Through the communication facilitated by the team lead, the e-discovery team creates contingency plans for potential changes in discovery, ensuring that discovery requests can still be met if the trial attorney is unsuccessful in the negotiations. Again, the team lead provides pivotal assistance to the trial attorney in setting realistic expectations for the goals and results of the e-discovery project.

Calling Plays From The Field

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Solution: Because the stakeholder requires input from the e-discovery team, the trial attorney understands that the team must review terms before final negotiations can begin. If this solution is not taken under advisement, the trial attorney may agree to a deliverable timeframe that the e-discovery team is technically incapable of fulfilling. The team lead is a key player in making sure that, within the context of the team, IT and legal communicate fluidly regarding updates to search terms.

Quandary 3. The trial attorney thoroughly understands the issues involved in the case, yet instead of developing a backup plan confidently, believes that his or her negotiation prowess will minimize the scope of the discovery.

With proper planning, and possibly the assistance of an experienced third-party discovery-management provider, these quandaries and other typical e-discovery sticking points can be avoided or resolved, to the benefit of the corporation's bottom line. And that bottom line should remain firm with the preparation and role-assignment detailed above. It's that old solid business adage at work: An ounce of prevention is worth a pound of cure.



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