

Litigation Support, E-discovery and the Recovery of Costs

By Nathan Curtis

Discoverable data volumes have grown exponentially and continue to do so at break-neck speed — industry forecasts predict electronically stored information (ESI) will see a five-fold growth in the short amount of time between now and 2020 alone. This is, of course, the driving factor as to why enterprises across verticals are spending more on e-discovery: an aggregated view of publicly available data projects values the industry currently at \$10.1 billion and tracks the trend to nearly double in the next three years to each almost \$19 billion.

For law firms, this pace of exponential growth is a substantial problem — mainly due to the fact that the law firm business model of processing, hosting and storing this avalanche of client data, however, has not evolved as quickly as the data itself.

Specifically, firms are struggling with a legacy practice of writing off litigation support/e-discovery and related costs but have been challenged to identify and implement recovery models or managed services models that are both acceptable to the firm and to their clients. On top of all of this, many firms simply fail to dispose of the data at the matter closing and costs continue to accumulate year over year.

New data sources and unprecedented volume aren't the only challenges. Cross-border discovery and regulatory compliance, mostly related to new privacy

rules like the EU's General Data Protection Regulation, are forcing companies to re-evaluate their exposure while giving rise to new roles.

Of course, as well all know, you can't manage what you can't measure — but, to date, there's been no industry-wide measurement of firms' cost recovery practices, infrastructure and strategy of e-discovery and litigation support services that are both acceptable to the firm and to their clients. Mattern has launched the first ever e-Discovery and Litigation Support Cost Recovery Survey to gather that needed data to help drive firms' better business decisions.

Like Mattern's cost recovery survey, we expect the results of the e-Discovery and Litigation Cost Recovery Survey to quickly become an industry asset that helps provide the backbone for firms' recovery models in these challenging areas. Here's just a couple of samples of how firms are trying to creatively meet the market challenge and find the right model that is right for the firm and the client.

Scenario One: Creating a Scalable Recovery Model

In one recent engagement, we worked with a Texas-based, Am Law 200 firm to create a recovery model that is scalable to meet the firm's growing costs of infrastructure, software, and exploding data storage. This firm offered its clients



a full end-to-end litigation support solution that included collections, forensic analysis, early case assessment, data processing, document review, and production and trial presentation capabilities.

Unfortunately, the firm's hourly billing model stopped covering the true costs of litigation support services delivery, and the firm needed a new model to recoup overall costs for labor, infrastructure, and software while continuing to deliver first-class, market-leading service to clients. The firm also sought a current state assessment with roadmap recommendations to ensure its capabilities remained aligned with future client needs.

We analyzed the firm's litigation support workflow, which included efficiency recommendations for document handling — from collection through review and production. Staff skill sets and certifications were addressed, and a continuous improvement process was presented for inclusion in annual reviews, incorporating goal-setting and

billable hour targets.

Also, the technology tool-set was analyzed with a focus on efficiency and recommendations to cut down on the back-and-forth requests between attorneys and litigation support staff. Future-state capabilities were recommended along with associated products that would allow the firm and its attorneys to provide increased value to clients (e.g., having attorneys directly utilize early case assessment capabilities).

As for litigation support-related chargeback, the firm was only charging for the billable hours of its litigation support staff. The net realization of these receivables no longer covered the cost of labor, software, and the infrastructure required to deliver service. This problem was compounded by the exploding data storage requirement of e-discovery, the rise in software-related charges, and client push-back on billable hours related to mundane tasks such as “staging data” and “processing.”

We recommended a new model where the billable hour would cover the fully burdened cost of labor, with the introduction of a new unit-based model for data storage to cover the infrastructure and software costs. To ensure simplicity in client billings, all software and infrastructure were bundled into an associated per GB per month recovery plan for data storage under active review within the firm’s repository database.

The model was limited to one unit of recovery (data storage) and avoided the inclusion of processing, analytics, and software user fees to simplify the conversation. In addition, speaking points were developed for the attorneys on why the client benefited from this type of model – a market-leading solution at a below-market rate. The firm’s management committee signed off upon the implementation plan, and the new, scalable model was successfully implemented.

Scenario Two: Recovery for Managed Services Model

In another scenario, we worked with a firm to create a recovery model for its e-discovery managed services. This D.C.-based Am Law 200 firm was finding it difficult to keep current with technology, flexing to meet demand, and recovering costs for the internal systems and storage related to litigation support services.

This firm wanted modern applications, a reliable infrastructure that got them out of the business of being a client data center, and the ability to charge back hard costs to their clients—the billing model needed to overcome attorneys’ objections that internal costs are non-billable.

We helped analyze and detail the current charge back rate for those professional service hours and an estimated cost of performance under a new Managed Services Agreement with a 3rd party vendor. Furthermore, the firm required assistance with modeling various recovery models that would allow the firm to stay below industry benchmark costs as well as recover costs from any new Managed Service arrangement.

In the end, the firm was able to create a hybrid charge-back solution. In the first three months, the firm increased their recovery on the litigation support/e-discovery services to five figures per month while retaining the hourly rate for professional service time. This additional recovery covers the new, hard costs of the Managed Services agreement while they subset their legacy internal systems, infrastructure, and associated costs.

Conclusion: Fight Data with Data

The data explosion currently underway is only going to ramp up –which means firms’ struggles to create new recovery models must ramp up to meet the market need. The ability to recoup litigation services costs continues to pose questions as to how firms acquire infrastructure,

software, and the skilled professionals to run the systems. But the new models must simultaneously satisfy both the law firm and clients’ needs or firms will push clients to alternative service providers. We intend to fight the data explosion — with data. The 2019 e-Discovery and Litigation Support Cost Recovery Survey is open through mid-September – and we can’t wait for the results.



Nathan Curtis, a Six Sigma Yellow Belt, brings over 20 years of experience working with law firms in the U.S. and overseas in developing industry-first solutions across Information Governance, Litigation Support, Digital Imaging, and traditional Office Services. As a consultant for Mattern, Nathan is focused on emerging technologies and their application in the legal environment, driving results through Mattern’s customized RFP process, and overseeing service, technology and policy implementations.