



Now More than Ever, How You Charge Clients for Litigation Support Services Matters

by Nathan Curtis, IGP

Now is not the time to rely on the same old same old.

Mattern has been conducting cost recovery studies since 2004. During this time, we have seen economic slowdowns and recessions, unapparelled lateral movement of associates, a multitude of mergers, acquisitions, and international expansion--and now a pandemic.

With every challenge, there are opportunities—this time, one of those opportunities is the recovery of litigation support and e-Discovery costs. Historically, firms had absorbed at least some of these costs, and while that was untenable before the pandemic, it is certainly not sustainable moving forward. The good news is, firms that have been experimenting with new delivery models in this support service area are seeing significant increases in the recovery of costs while offering greater value to their clients.

Looking Back: Models and Recovery Rates

With big data and the resulting explosion of electronic documents, texts, images and voicemails that are subject to discovery, the cost burden of

e-Discovery was increasing at a pace that required firms to reconsider their recovery approach or lack thereof. This is why in 2019, Mattern went to the market to conduct our first deep dive into e-Discovery and litigation support cost recovery in the [2020 e-Discovery and Litigation Support Cost Recovery Survey](#) (“Survey”). Some of the results were expected, other results surprised us.

Some of the unsurprising Survey results included the fact that over 80% of firms reported electronically stored information (ESI) involved in discovery was on the rise. We expect this to continue despite the current turmoil in the marketplace. Disputes will continue to be filed with the courts, likely with a shift to employment and bankruptcy/insolvency matters, but the aggregate case volume will remain steady for the most part as affirmed by recent court filings data compiled by Lex Machina.

Mattern also suspected the more advanced activities, especially those typically scrutinized by opposing counsel, would largely end up vended to third-party providers. This certainly proved to be the case for forensics data collection, where

virtually all firms reported shifting this activity to organizations that specialize in this field. Mattern supports the decision most firms have adopted in this area; this is one of our core recommendations to avoid spoliation and scrutiny risks.

Furthermore, we expected to see firms with in-house IT or Litigation Support talent capable of processing and hosting ESI utilizing on-premises

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infrastructure to also rely on third-party assistance to manage larger data collections and, oftentimes, hosting.

Lastly, we found that the majority of firms pass through costs to clients without mark up, with only around 14% of respondents marking up their costs. Given clients' general lack of understanding related

to e-Discovery, the ability to support flow-through costs is reported by many firms as a success factor in improving their net recovery rate and to survive attorney write-off.

The Survey did deliver some surprises, though – rates were highly variable, far more so than anticipated. Processing fees, as an example, resulted in a high per GB rate 13-fold above the lowest reported and hosting fees followed a similar pattern. Firm success related to the net rate of recovery -- the proportion of costs deemed as billable, survive attorney write-off, and are actually paid by clients -- also spanned the spectrum. All indications of a market that is still trying to find its footing and relying on unbiased third-party data were apparent – and a primary reason for our survey.

However, some trends emerged from this, and it's a consistent theme we have noticed through the years with our traditional survey – hard costs trump soft costs from a recovery perspective. Simply put, the ability to reference a 3rd party invoice stands a better chance of surviving attorney write-off

and clients are less likely to (or less successful in) rejecting these expenses. This we believe will become even more crucial in the foreseeable future.

Internal soft costs, those driven by investments in technology and talent, are much more prone to be disputed by attorneys and clients as these are regarded as overhead by some and “a cost of doing business.” The top 3 billing points clients most commonly refuse to pay include data hosting, data processing and hard copy imaging – most of which are currently performed in-house by firms.

The Survey results also highlighted some challenges. For instance, the cost of keeping pace with technology from the perspective of the time investment wading through the variety of available applications, the question of whether on-prem vs. hosted software solutions best meet a firm’s needs as well as testing, implementing, training and providing ongoing support. Of course, there’s also the financial investment in technology, upgrades to hardware and the solutions themselves. Again, this will become even more of an issue as firms pivot to a pandemic cash conservation mode.

Another challenge cited by firms is the tug-of-war between attorney needs for a quick turnaround on ESI processing and ingestion into a review

platform against the reality that some collections far exceed in-house capabilities. The strategies deployed by firms to address these challenges varied, with Survey results showing that firms approach this in one of three models:

1) A case-by-case basis and engaging a preferred, off-site vendor for larger collections. These firms, which account for 56% of respondents, maintain in-house IT or Litigation Support talent capable of processing small to mid-sized collections utilizing firm infrastructure and applications.

2) Outsourcing on-site talent for moderately sized work and leveraging their off-site infrastructure for larger projects, thereby shifting the time and cost burden in keeping current with technology away from the firm. 13% of respondents rely on this model.

3) Hybrid of these two models are employed by 31% of firms, where a core group of IT or Litigation Support professionals project manage and/or carry out some finishing touches in a project, such as importing the final product into their review application and

quality checking. The balance of their on-site team is outsourced to manage the bulk of processing activities.

The three key drivers cited by firms that elected to outsource their Litigation Support departments include ease of expense recovery from clients (46%), ability to leverage expertise as opposed to developing in-house (31%), and data security risk mitigation (23%).

We also found billing models to vary, with some firms structuring client chargeback similar to 3rd party vendors by way of utilizing a per GB rate for data processing and hosting. Others include hourly fees to cover time spent by Litigation Support, IT, paralegal staff and some extend this to include project management efforts. Most firms also apply a threshold, typically set to 1 GB, before entertaining cost recovery.

The use of contract attorneys in document review was rare not too long ago but we’re finding that nearly three quarters of firms now rely on this as a strategy. Firms cite the obvious benefit that contract attorneys deliver the ability to scale resources during discovery while avoiding ongoing labor expenses. Whether firms continue to employ

these contract attorneys or use internal resources for these functions will be interesting to see with the anticipated legal slowdown.

In terms of review application popularity, CaseMap and Relativity are the clear leaders for on-prem solutions followed by Ipro Eclipse and then Concordance and Summation holding similar market shares. On the other hand, we found that Relativity out shadows the competition as a hosted application, tripling second place, Everlaw.

Looking Forward: Models and Recovery Rates

Overall, the value proposition firms are communicating to clients in justifying e-Discovery cost recovery is the savings potential – this will only increase in this post-pandemic world. Many clients don't fully understand the power that review applications deliver and firms are reporting success with leveraging the justification that this technology allows attorneys to target and flag relevant documents while protecting privileged information significantly faster than the traditional paper-based review.

In short, e-Discovery applications deliver an offsetting effect between processing and hosting

spend and attorney review hours with the bonus of improved accuracy. That's positive news for clients, however, firms have no viable option outside of deploying applications to cull, search and organize ESI given the sheer volume of data involved. We're finding a growing trend amongst clients limiting the number of attorney document review hours, thereby forcing billable hour write-offs and necessitating a streamlined approach to review. Those who choose to absorb these costs are cutting into their income and big data's march forward will quickly lead to this becoming an unsustainable model.

How much of an impact does it make? One firm we recently worked with 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—a problem which was compounded by the exploding data storage requirements and client push-back on billable hours related to mundane tasks such as 'staging data' and 'processing.'

Mattern 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. After one year, the model Mattern assisted the firm with increased their recovery of costs by 35%. That's a big impact, and it's only the start.

The three big opportunities we see for firms in this area in the immediate future are:

- The ability to drive deeper discounts and improved pricing and terms with their service providers and to pass through these discounts to their clients either through a hard cost pass through model or a decrease in their soft cost pricing. Recently, while working with one of our clients, we were

asked to review/benchmark their hosting contract for the coming year. With very little prodding we were able to receive a 25% “COVID-19” discount. This type of action will be critical as clients look to reduce their costs.

- Benchmark your internal Litigation Support/e-Discovery costs and practices. As the recent Mattern survey showed, firms are all over the spectrum with their internal costs. By the time you read this article, it will be an excellent time to undertake this review.
- Review your cost recovery model. As I mentioned above, the survey clearly showed that the Litigation Support/e-Discovery world, especially in the area of recovery, is still trying to find its footing and determine a path forward. Now, more than ever, is the time to do it.

For more information on the results of Mattern’s survey, or how Mattern can assist with the benchmarking of your in-house lit support department and service provider contracts in addition to the redesign of your cost recovery model, please contact litsupportsurvey@matternassoc.com. **ILTA**



Nathan Curtis has 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.