



Managing Electronic Data for Litigation and Regulatory Readiness



Introduction

In an environment of continuing growth in litigation worldwide, and the expansion of business regulation and enforcement actions globally, it is essential that companies are adequately prepared to respond to requests for the disclosure of electronic data. In the absence of appropriate systems, processes and controls, companies run the risk of fines, heavy litigation costs and damage to their reputation.

At the same time, managing eDiscovery is becoming ever more challenging due to the increasing volume and complexity of data and systems. Meeting obligations to respond to data requests is becoming increasingly difficult, representing greater risks and costs.

The 2015 KPMG Forensic global survey of general counsel, compliance and risk officers shows that, although more than 70 percent of respondents have processes and systems in place to manage litigation and regulatory requests, there remain several opportunities for improvement that would help companies execute eDiscovery in a more efficient and cost-effective manner.

The key findings of the latest survey highlight the need for proactive engagement by legal, compliance and risk departments to shape their strategy early in order to achieve the best outcomes for their business.

The key themes/issues from our 2015 survey are:

- 1. Cost of eDiscovery:** Although cost is a significant concern for the majority of respondents, there is no clear sign that many companies have a strategy in place to address the issue.
- 2. Manual document review and the application of technology assisted review:** The review of documents remains one of the largest cost elements in any eDiscovery matter, yet the adoption and effective application of technology assisted review and other technology-based tools continues to lag. The use of technology assisted review is seen as an additional cost, rather than a means of cost saving.
- 3. Internal versus external capability:** Many services provided by external vendors are viewed as expensive, yet many corporations do not necessarily have the skills or tools internally to manage the eDiscovery cycle.

In addition, our analysis generated some interesting findings which point to the evolving nature of global eDiscovery, as compared to the results received in 2008, when KPMG ran our first survey on this subject. These include:

- Not surprisingly, litigation continues to represent the largest source of demand for eDiscovery services (as compared to regulatory, competition or investigation matters).
- There was, however, a 50 percent increase in regulatory/competition related requests since 2008.
- Employee misconduct is the prime driver of both internal investigations and regulatory matters.
- Cyber security is cited as an emerging issue, but one which companies feel the least prepared to tackle.

1. Cost of eDiscovery

Internal and external spend related to eDiscovery is a key theme for respondents, with just under a third of respondents (29 percent) stating it is their primary concern. This is hardly surprising given that in the 12 months prior to the survey, 36 percent spent more than \$1 million internally and externally on the collection, processing and review of electronic data, and 15 percent spent more than \$10 million. Based on our experience working with clients, these expenditure estimates are likely to underestimate by a significant margin the actual costs incurred.

Twenty-nine percent of respondents say the cost of eDiscovery is a major issue and is of most concern to their organization. In addition, there were a variety of other concerns that also have a clear cost implication, such as the ability to comprehensively identify and access data, while keeping it consistent, secure and compliant.

Thirty-one percent of respondents say it is difficult to retrieve all relevant electronic data that would be subject to eDiscovery (compared with the 2008 survey when 38 percent said it was difficult). This suggests that the issue of data collection remains a significant challenge. Factors which contribute to the complexity and cost of data collections include dealing with data sources and volumes that are increasingly significant in size (big data), data privacy issues, and poor data quality.

The vast majority of respondents (94 percent) have a policy of some sort to address the process of collecting and analyzing data. However, the survey suggests there is still ample room for meaningful improvements.

KPMG view

It is critical to establish a consistent, repeatable and defensible process around the identification, collection and storage of data subject to eDiscovery requests. But insight and value do not come from the data alone; they must be supported by skilled staff with an understanding of what is required to comply with each specific request. By identifying and collecting the correct data at the outset, reducing the time required for collection, and re-using collected data where possible, companies can make significant efficiency gains by reducing data volumes at the 'source' and controlling downstream costs related to document review.

The manual review of electronic data was highlighted as a significant and ongoing expense to the business, with 42 percent saying it is extremely costly. This area of considerable expense is to be expected in the current environment of ever-increasing litigation, regulatory interventions and data volumes. A 2012 report on litigation costs by the Rand Institute for Civil Justice¹ indicated that document review accounts for 73 percent of the total cost of eDiscovery. Although it is unlikely to have changed much since then, it is encouraging that 27 percent of respondents regarded data review services as extremely cost effective and a further 50 percent as somewhat cost effective.

Technology assisted review and data analytics are also regarded as costly, which raises significant questions that we will address in more detail below. In short, technology assisted review and similar tools have yet to be viewed as generators of value and/or cost savings, and, instead, continue to be viewed as merely an additional cost.

While the cost of eDiscovery and management of data are a significant burden, respondents also identified data protection issues, consistency of records retention and data security in their top 5 concerns for their day-to-day operations.

KPMG view

Initiatives to reduce the cost burden in eDiscovery cannot be taken in isolation. When considering how to effectively and efficiently respond to data requests; data protection/privacy, records retention and security must be taken into consideration.

¹ Where the Money Goes, Understanding Litigant Expenditures for Producing Electronic Discovery, 2012, Nicholas M. Pace and Laura Zakaras

2. Manual document review and the application of technology assisted review

Whereas manual document review is a significant cost element, the survey results are striking in that technology assisted review and other technology-based tools continue to exhibit slow adoption. Furthermore, in the instances where they are applied, these technologies do not necessarily deliver the expected value or reduction in costs.

Our survey suggests that the development of analytics capability and technology assisted review tools will continue to be slow. Only 13 percent of respondents indicate that their

organization has made technology investments in this area, but a similarly small proportion have used, or are intending to use, external support to provide such tools to the business. It is difficult to identify the reason for this slow take-up in the use of technology assisted review, but clearly it has failed to live up to expectations and its value is questioned. The IT research and advisory firm Gartner refers to the “Hype Cycle Model” of adoption of various technologies and it appears that technology assisted review is currently sitting in the “trough of disillusionment” within this model.

KPMG view

Unit costs for document review services are falling, but the decline is being outpaced by the overall increase in the volume and types of data under review. In order to make a significant impact on the cost of reviewing documents, data analytics and technology assisted review must be integrated as a standard, transparent and defensible workflow in eDiscovery matters. Although technology assisted review may not have been widely adopted so far, we still believe that it is an area that, in the medium term, will yield benefits in terms of efficiency and effectiveness.

3. In-house capability versus outsourcing

When assessing how eDiscovery tasks are performed, the majority indicated that they have used, or intend to use, external service providers. The most common services were data processing (83 percent), the hosting of data (79 percent) and data review (75 percent). When assessing vendors, over half those surveyed deemed cost to be the most important decision criteria.

Many respondents regard external service providers as more expensive than internal resources, but it is a challenge to

hire and retain the appropriate skills in-house. Yet despite the importance of cost and doubts about the cost-effectiveness of external resources, only a small minority of respondents consider in-sourcing to be a high priority in the next few years.

This contradiction can in part be explained by the unpredictable nature of litigation and investigations, as well as the reactive and piecemeal nature of the response to such matters.

KPMG view

By quantifying the nature and potential scale of eDiscovery needs, companies can develop baseline requirements and an operating model. This framework can be used to determine how best to deliver a particular project, balancing the use of in-house resources with external providers.

A view of the future

The burden related to litigation and regulatory compliance is set to continue increasing for the foreseeable future. In light of the trend of spiraling eDiscovery costs, organizations are likely to face continued pressure to improve the management and control of eDiscovery request. Indeed, the need has never been greater for a consistent, repeatable and defensible process around the identification, collection and storage of data subject to eDiscovery requests.

If these activities are to be done cost-effectively, organizations must take the initiative to develop an eDiscovery strategy rather than wait for cases to present themselves. This entails a comprehensive assessment of the risk of litigation and regulatory actions that the entire organization is likely to face in the future and develop priorities in terms of the types of risks and the optimal methods of tackling them. This will help to inform expenditure planning and projected manpower needs.

Once there is a plan, organizations will be able to understand better how to meet their objectives. There is no hard and fast rule as to the allocation of resources internally and externally; this will depend on the in-house talent strategy and what skills will be required of external counsel. These decisions will help to guide the organization’s investment strategy: what new tools to buy, what to customize, and how best to integrate data analytics and technology assisted review into the eDiscovery strategy.

It is of paramount importance to develop an organization-wide approach to eDiscovery. By addressing each of the issues identified above individually, organizations are likely to generate some cost savings in the short- to medium-term. But only when organizations optimize all relevant areas together will they be able to achieve a transformational improvement in how they operate, and a sustainable impact on their eDiscovery risk and cost profiles.

Four actions to drive immediate results:

Make an organization-wide assessment of the risks in litigation and regulatory compliance to develop a coherent sense of priorities.

Establish a consistent, repeatable and defensible process around the identification, collection and storage of data subject to eDiscovery.

Quantify the nature and potential scale of your eDiscovery needs to develop baseline requirements and an operating model with respect to in-house vs. external capability.

Deploy data analytics and technology assisted review tools to reduce the risk and cost associated with eDiscovery.

About the survey

- The objective of the survey was to seek input about firms' litigation readiness and to gain an understanding of how various organizations and sectors are performing in regards to the litigation readiness. An online survey was designed to collect the responses and benchmark against all aggregate responses to provide the participants with unique and valuable insight.
- The survey gathered responses across 20 countries.
- Financial Services (22 percent), ENR (10 percent), Manufacturing (7 percent), and Construction and Real Estate (7 percent) constituted the top four sectors.
- Nearly half the responses were provided by General Counsel and Managers from Litigation, Finance, Administrator, Commercial and Compliance functions

Contact us

Paul Tombleson

T: +44 20 7311 3964
E: paul.tombleson@kpmg.co.uk

Kelli Brooks

T: +1 562 370 2535
E: kjbrooks@kpmg.com

kpmg.com/socialmedia



kpmg.com/app



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