



# *E-discovery: A review of challenges and best practices for insourcing*

Course Title: Knowledge Management

Course Number: ETM 567/667

Instructor: Dr Weber

Term: Winter

Year: 2017

Author(s): Tina Matthews

ETM OFFICE USE ONLY

Report No.:

Type: Student Project

Note:

## Abstract:

Companies often struggle with e-discovery challenges whether it is outsourced from an external service provider or done in-house. The biggest challenge companies face while outsourcing e-discovery is the high costs of using outside counsel and vendors. This is why more and more companies are now trying to bring e-discovery in-house. But bringing e-discovery in-house has its own challenges. Can companies overcome some of these challenges by prepping themselves with efficient information and records management systems, dedicated discovery response teams, and investing in smarter tools and technology? I conclude with a list of challenges and a set of recommendations and best practices to effectively and predictably bring e-discovery in-house.

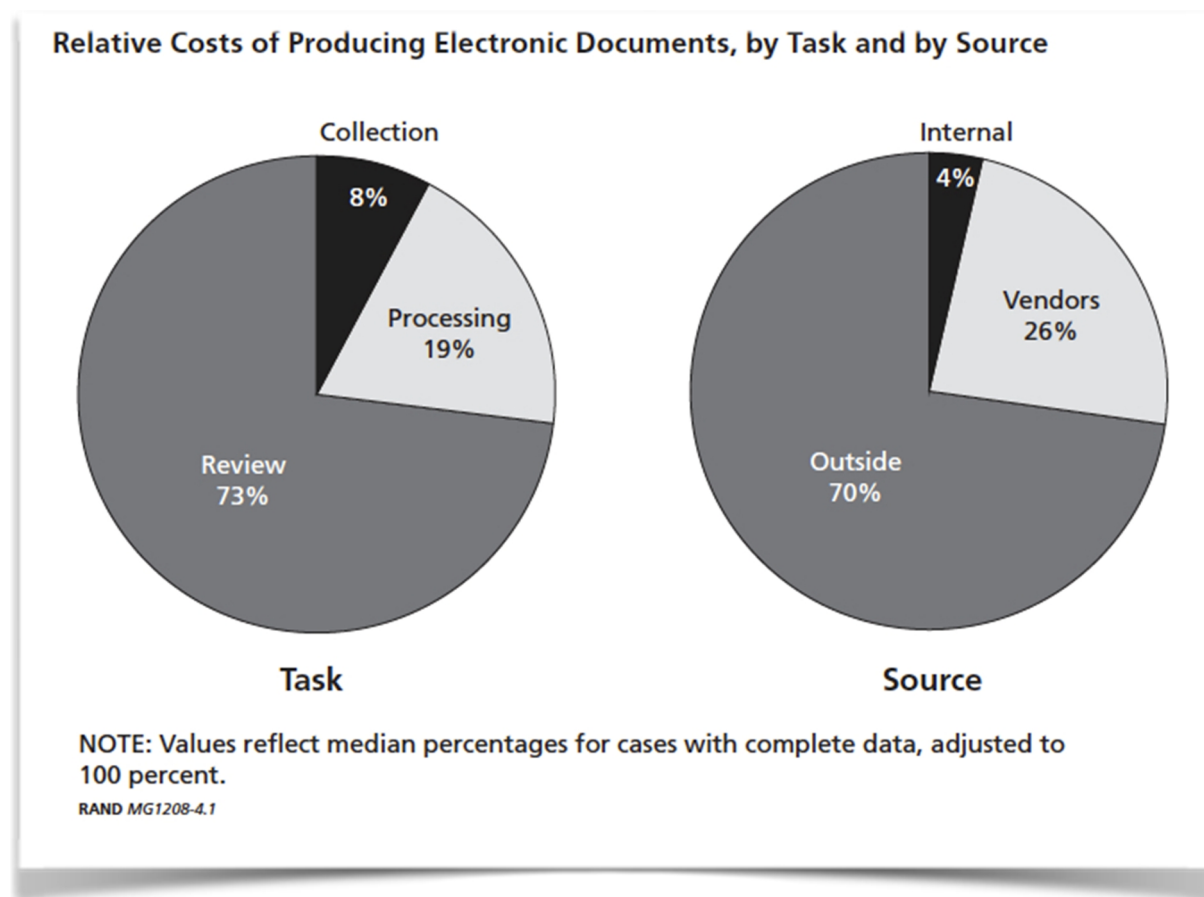
## Introduction:

According to the 10th Annual Litigation Trends Survey, conducted by Norton Rose Fulbright in 2013<sup>1</sup>, 32% of smaller companies in the United States, spent \$1 million or more annually on litigation, excluding costs of settlement and judgments. And 43% of larger companies spent \$10 million or more annually just on litigation.

---

<sup>1</sup> <http://www.iam-media.com/files/Norton%20Rose%20Fulbright%20Annual%20Litigation%20Trends.pdf>

In another 2012 survey by RAND Corporation<sup>2</sup>, 70% of e-discovery costs were spent on outside



**FIGURE 1: Source:**

[http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf)  
SUMMARY

council and 26% was spent on vendors and service providers. Only 4% was spent internally.

According to RAND, this trend is likely to change in the future. The RAND survey<sup>3</sup> also suggests that many company representatives who were interviewed were dissatisfied with giving full

<sup>2</sup>6 Tips for Successfully Adopting E-Discovery Technology, white paper by Exterro Inc., 09-14-2016 <http://www.exterro.com/resources/tips-adopting-e-discovery-technology/>

<sup>3</sup> [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf)  
downloaded on 02-07-2017

control of discovery tasks to outside vendors and law firms. These were some of the viewpoints from the survey<sup>4</sup>

- One company representative said that his company would try to insource as much of the tasks that it can do well in-house, and then outsource everything else that can be “commoditized.”
- Another company’s philosophy was to bring as much of the outsourced work in-house and handle it with enterprise-class processes.
- Most representatives wanted in-house legal teams to take a primary role in conducting their own discovery data collection rather than leaving all the work to outside counsel.
- Two of the eight companies in the survey were in the process of implementing an in-house automated, cross-network collection tool, and others were in the early planning stages.
- One very large organization explained that, despite its considerable revenues and positive technological reputation within its own industry, it continued to lack any in-house capability to search through data, de-duplicate, host for online review, preserve metadata, or produce in whatever required form.
- Another representative of the same company expressed considerable displeasure with the company’s current approach of allowing outside counsel to choose the vendor for processing services. In his experience, counsel-selected vendors simply do not do a good enough job of culling and other data-reduction tasks, choosing instead to convert larger-than-necessary amounts of data into image files and then send the product to outside counsel for an expensive, eyes-on review.
- Many respondents felt that having a law firm handle most of the key production decisions and arrangements is not the most cost-effective approach.

---

<sup>4</sup> [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf)  
downloaded on 02-07-2017

## **Problem Summary:**

The viewpoints from the RAND<sup>5</sup> survey; other similar surveys; interviews of subject matter experts; and various webinars conducted by corporations and research agencies (covered later in this paper), suggest that although companies are currently outsourcing most of their e-discovery tasks, they are definitely not satisfied with vendor services and the high costs of outsourcing.

## **Research Question:**

How can companies obviate the high costs of outsourcing e-discovery and overcome the challenges of bringing e-discovery in-house?

## **Thesis Statement:**

In this research paper I intend to show that companies can overcome some of the challenges of bringing e-discovery in-house by prepping themselves with an efficient information and records management system; an effective discovery response team; and investment in smarter tools and technology. I will conclude with a list of challenges and a set of recommendations and best practices to effectively and predictably bring e-discovery in-house.

## **Literature Review:**

The literature review will be from the following sources-

1. White papers, infographics, analyst reports, webcasts and e-books by Exterro Inc. and Zapproved.
2. Personal interviews of subject matter experts at Exterro Inc. and other published SME interviews.

---

<sup>5</sup> [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf)  
downloaded on 02-07-2017

3. Articles from journals such as Inside Counsel, Today's General Counsel, Entrepreneur, Legal Tech, The StartUp Magazine and KM World;
4. The following books:
  - E-discovery: Creating and managing an enterprise-wide program: A technical guide to digital and litigation support by Karen Schuler, 2009.
  - E-discovery: current trends and cases, Ralph C. Losey, Chicago, IL : American Bar Association, 2008
  - E-Discovery for Dummies: Linda Volonino, Ian Redpath, 2009

The literature review from primary and secondary sources will focus on the following terms and sub-topics within the main research question.

- What is e-discovery
- Why bring e-discovery in-house
- Risks and challenges associated with enterprise e-discovery
- How to effectively bring e-discovery in-house: Recommendations and best practices

## **Research Methods:**

The research methods I will be using are qualitative and quantitative in nature. Because e-discovery is not a popularly researched topic, most of the data available is qualitative, in the form of opinions of subject matter experts through published books, articles, interviews and webcasts. The quantitative data cited here will be from research databases and analyst reports by professional research agencies.

## **What is e-discovery?**

E-discovery or electronic discovery, can be defined as the process of identifying, preserving, collecting, reviewing and producing electronically stored information (ESI), with the purpose of using it as evidence in litigation. Although emails are one of the most important sources of ESI

in e-discovery, they are not the only source. Other data types include, files stored in desktops, laptops, SharePoint, file shares, network shares, email systems, legacy systems, cloud computing, or third party systems. Additional sources include, floppies, CD-ROMs, DVDs, zip drives, thumb drives, VOIP stores, mobile phones, palm tops, tablets, intranet, extranet, calendars, notes, backup tapes, etc.,

The key to addressing e-discovery according to [AIIM.org](http://www.aiim.org/What-is-eDiscovery)<sup>6</sup> (What is e-discovery) is to be proactive in the management of information and records, in order to gain control over the handling of potential e-discovery requests. The e-discovery process runs from the time a lawsuit is foreseeable to the time the digital evidence is presented in court. At a high level, the process is as follows:

- 1 Data is identified as relevant by attorneys and placed on legal hold.
- 2 Attorneys from both sides determine the scope of discovery, identify the relevant ESI, and make e-discovery requests and challenges.
- 3 Evidence is then extracted and analyzed using digital forensic procedures, and is usually converted into PDF or TIFF form for use in court.

With the recent change to Federal Rules of Civil Procedure (FRCP) making all lawsuits subject to e-discovery as soon as they are filed, it is more important than ever to make sure that good e-discovery practices are in place.<sup>7</sup> The recent amendments to FRCP, also makes it mandatory for all companies to complete an exhaustive search of ESI, noting its description, category and location, prior to the first pre-trial discovery meeting. ESI must also be provided in native format with all metadata intact and complete chain of custody.

---

<sup>6</sup> <http://www.aiim.org/What-is-eDiscovery> on 02-17-2017

<sup>7</sup> E-Discovery for Dummies: Linda Volonino, Ian Redpath, 2009

According to Rule 37 of the FRCP<sup>8</sup>, judges have the power to impose sanctions against a party who fails to obey an order to provide or permit discovery. With cases such as Zubulake vs UBS Warburg and Coleman vs. Morgan Stanley, courts have made it clear that spoliation will not be tolerated and that e-discovery responsiveness and due-diligence are requirements<sup>9</sup>.

Organizations therefore can no longer take the ostrich approach<sup>10</sup> of burying their heads in the sand waiting to deal with e-discovery when it arrives. They need to be prepared much in advance.

## Why bring e-discovery in-house?

The spiraling costs of e-discovery are prompting organizations to do more and more e-discovery in-house. The primary advantage therefore of bringing e-discovery in-house is cost cutting. With an average of 96% of all e-discovery expenses spent externally, organizations are beginning to realize that something needed to change, and that something was bringing e-discovery in-house with the use of technology.<sup>11</sup>

“Insourcing discovery can keep legal from being a ‘cost drainer,’” noted Jack Thompson, Senior Manager, E-Discovery and Legal Operations, for Sanofi US. He recommended that companies consider what steps or technologies will be the best investments going forward. In his view, “If the investment in a technology or tool will last 10 years or more, then it is beneficial to bring it in-house.”<sup>12</sup>

---

<sup>8</sup> <https://www.federalrulesofcivilprocedure.org/frcp/title-v-disclosures-and-discovery/rule-37-failure-to-make-disclosures-or-to-cooperate-in-discovery-sanctions/>

<sup>9</sup> Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support. pp. xxi, Burlington, MA: Syngress Publishing Inc, 2009.

<sup>10</sup> <http://www.ironmountain.com/Knowledge-Center/Reference-Library/View-by-Document-Type/White-Papers-Briefs/T/The-Ediscovery-Ostrich.aspx>

<sup>11</sup> 6 tips for successfully adopting e-discovery technology, white paper by Exterro 2016. Taken from <http://www.exterro.com/resources/tips-adopting-e-discovery-technology/> on 03-12-2017

<sup>12</sup> Bringing e-discovery in-house: A recipe for success, white paper by Zapproved. Taken from [https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved\\_WP\\_2017\\_In-HouseElevated\\_ARecipeForSuccess.pdf](https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved_WP_2017_In-HouseElevated_ARecipeForSuccess.pdf) on 03-11-2017



Becki Bottemiller, Specialist—Paralegal for Portland General Electric says, “ Instead of bringing a third party up to speed on the company and its data, a company can narrow the scope of its discovery and reduce the amount of data sent to outside counsel, given the internal legal team’s deeper understanding of business processes, organizational structure, data custodians, and information flows. So long as they are properly trained, internal staff can also do a better job of managing the process, including tracking custodians and information.” <sup>13</sup>

In addition, taking e-discovery in-house helps ensure a consistent approach between cases. This consistency has the secondary effect of lending greater predictability for cost cycles. A consistent model can also help counsel forecast when it will be appropriate to retain outside counsel or to solicit the help of discovery vendors. Finally, insourcing discovery also pays dividends when it comes to data security. Keeping tabs on your data and limiting access to it can give counsel peace of mind by reducing the opportunities for data to be lost or to become susceptible to hackers. In-house discovery also reduces the risk of mishandling or destroying data that is implicated in multiple legal matters.<sup>14</sup>

E-discovery has today, a rich history of interpreted cases, supported technologies and most importantly, specialists who actually make this their career. There is also an increasing willingness in the community to share information and best practices; and a sense of maturity in the service providers and the tools available in the industry<sup>15</sup>. With good planning and preparation, companies can turn e-discovery into a worthwhile and enlightening process. It can be an investment that equips companies with the necessary tools and knowledge to be litigation-ready, anytime.

---

<sup>13</sup>Bringing e-discovery in-house: A recipe for success, white paper by Zapproved. Taken from [https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved\\_WP\\_2017\\_In-HouseElevated\\_ARecipeForSuccess.pdf](https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved_WP_2017_In-HouseElevated_ARecipeForSuccess.pdf) on 03-11-2017

<sup>14</sup>Bringing e-discovery in-house: A recipe for success, white paper by Zapproved. Taken from [https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved\\_WP\\_2017\\_In-HouseElevated\\_ARecipeForSuccess.pdf](https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved_WP_2017_In-HouseElevated_ARecipeForSuccess.pdf) on 03-11-2017

<sup>15</sup> E-discovery day webcast by Exterro, Inc., December 2015  
<http://www.exterro.com/blog/register-now-for-e-discovery-day-webcasts-hosted-by-exterro/>

## Risks and challenges associated with enterprise e-discovery

### **Lack of awareness of what and how much data resides in the organization, what format it is in, and where it resides.**

How many companies are aware of how critical it is to understand and manage their data properly? Not knowing what data they have or where it resides, has become one of the most serious sources of legal exposure and risk.

According to thought leaders in the industry, companies have to take ownership of their e-discovery processes. E-discovery is not something that a company can blindly outsource. It is not a simple function that can be delegated or handed-off to somebody else.

Whether a company decides to in-source its processes or work in partnership with a service provider, it has to understand what its obligations are from the beginning.

Tara Jones, lead paralegal, e-discovery and consumer litigation at AOL, Inc. says<sup>16</sup>, “If a company doesn’t take responsibility for managing its own e-discovery process, it is very difficult to defend against things that can go sideways. If you don’t have a good grasp on the process because you’ve allowed someone else to come and own it or control it, you won’t know where your data is. You have to know where your data is, when to keep it and when to get rid of it. And if you don’t own your process, you won’t have that answer.”

### **Lack of a reliable and centralized strategy to tackle an e-discovery challenge in-house.**

Being forced by the courts to produce huge volumes of data in a short period of time can be a terrifying challenge. It is imperative that IT, Legal, HR and Administration work hand in hand to

---

<sup>16</sup> E-discovery day webcast by Exterro, Inc., December 2015  
<http://www.exterro.com/blog/register-now-for-e-discovery-day-webcasts-hosted-by-exterro/>

make sure that data protection and retrieval is quick and smooth during a litigation. According to Thomas Bahr, project manager for enterprise content management at BearingPoint, IT, legal and administration must work closely and as a single team during the preservation, collection, analysis, review and production phases.<sup>17</sup>

Bahr says that without a centrally owned and approved governance model, e-discovery will be prone to failures. He says, “Ill defined roles and responsibilities would result in everyone doing everything and no one doing anything.” It will also result in not being able to properly monitor and measure the effectiveness of the policies and procedures. According to Bahr, the discovery strategy should include the following:

- Defining e-discovery policies and aligning them with policies for information and content management.
- Designing and coordinating processes to enable each department/business to consistently fulfill their execution obligations.
- Executing and enforcing the policies and processes.
- Auditing and monitoring adherence to the policies and processes.

## **Lack of awareness or refusal to invest in smarter technologies.**

Gone are the days when legal teams and in-house counsel had to dig through boxes of files and piles of paper to find a tiny piece of information, and then realize that they didn’t quite find what they wanted. But there was no way of going back.

Today, with the magical “e” (electronic) added to discovery, technology is in the heart of the legal workspace, where it had no role so to speak, in the old paper-based discovery. In just ten

---

<sup>17</sup> 8 Things You Need to Remember About eDiscovery, by Thomas Bahr, Oct 15, 2009 by John F. Mancini

short years, technology has taken a central role in enabling litigators with a variety of evidence sources from electronic, to paper, to visual and audio.

Hyoun Park, chief research officer, Blue Hill Research, says<sup>18</sup>, “Most interesting is the maturity that we’re seeing in the solution sets that are available in the market. We’re increasingly seeing the best in breed technology. A year ago, the market was still primarily based on functionality. E-discovery is transitioning from this niche kind of technology based one-off solution, into a business-responsive need-based investment.”

E-discovery software solutions these days have the capability to address the challenges of legal hold management; automated preservation; deal with collection and preservation of texts and instant messages; search for voice recording; and review large volumes of documents using analytics and coding. They all offer the promise of making a litigator’s job easier in assisting clients in their preservation, collection and production obligations.

## **Taking the ostrich approach**

For years large organizations have taken an ostrich approach to the looming challenges of e-discovery trying to ignore the disastrous lawsuits that befall other companies (Losey, Ralph 2008)<sup>19</sup>. Consistent with this policy of denial and avoidance, they instruct their legal counsel to adopt the “don’t ask, don’t tell” agreements with opposing counsel (Losey, Ralph 2008). E-discovery can sometimes be long drawn, expensive and even a mind-boggling challenge. But organizations can no longer take the approach of burying their heads in the sand waiting to deal with e-discovery when it arrives. They need be prepared much in advance. Unfortunately the only companies that are taking a proactive approach are those that have had past e-discovery disasters. According to Losey (2008), outrageous sanctions and forced settlements running into

---

<sup>18</sup> E-discovery day webcast by Exterro, Inc., December 2015  
[http://www.exterro.com/resources/?topic\\_id=All+Topics&type\\_id=4353&sort=Featured&keyword=ediscovery+day&\\_ga=1.258588682.1865736639.1487306726](http://www.exterro.com/resources/?topic_id=All+Topics&type_id=4353&sort=Featured&keyword=ediscovery+day&_ga=1.258588682.1865736639.1487306726)

<sup>19</sup> Losey, Ralph. (2008). E-Discovery: current trends and cases, pp.26. Chicago, IL: American Bar Association ©2008

millions of dollars continues to be the number one trend due to the failure of companies to respond promptly or take proactive measures.

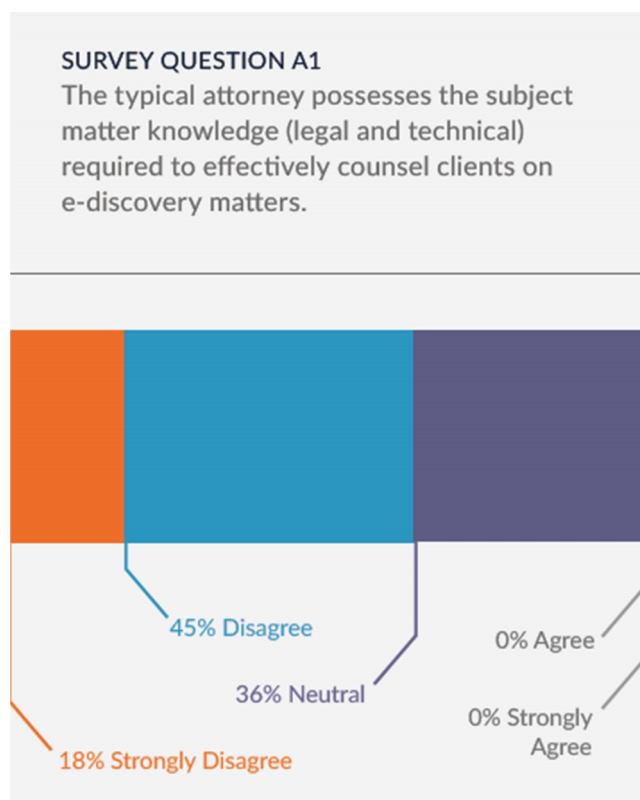
### **In-house legal team's lack of knowledge and expertise to effectively counsel clients on e-discovery matters.**

The explosion in electronically stored information (ESI) has introduced exponential risk around the security of data, an organization's ability to protect and produce that data, and that organization's ability to prepare in advance of litigation to comply with court requirements (Zeller, Patrick, 2011)<sup>20</sup>. But in-house lawyers may or may not be following consistent processes on how they respond to discovery on their individual cases (Schuler 2009).<sup>21</sup> According to

---

<sup>20</sup> Technology: Proactive ESI data mapping for e-discovery by Zeller, Patrick, 2011  
<http://www.insidecounsel.com/2011/09/09/technology-proactive-esi-data-mapping-for-e-discovery>  
on 02-17-2017

<sup>21</sup> Schuler, Karen. (2009). E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. 73. Burlington, MA: Syngress Publishing Inc, 2009.



**FIGURE 2**  
**SOURCE: 3RD ANNUAL JUDGE'S SURVEY 2017**  
**BY EXTERRO INC.**

Schuler(2009), often there are lawyers who are up to date on the current best practices and others who are still living in the dark ages of paper discovery and forget to look for ESI. And lawyers who are comfortable only reviewing paper are not the best choices to head the legal team. According to the 3rd Annual Judges Survey<sup>22</sup> conducted by Exterro Inc., 63% of the judges feel that the typical attorney does not have the required knowledge to effectively counsel clients on e-discovery matters. This perception has not changed within the three years of conducting this judges survey since 2014. In this 2017 survey 18% strongly disagree and 45% disagree that the typical attorney possess the subject matter knowledge (legal and technical ) required to effectively counsel clients on e-discovery matters.

<sup>22</sup> 3rd Annual Judge's Survey by Exterro Inc. downloaded from <http://www.exterro.com/judges-survey-17/> on 03-01-2017

## **Preserving broadly still being seen as a cost-effective risk-reduction measure.**

All too often, parties take the defensive position of casting a wide collection net to alleviate the risk of something important getting overlooked<sup>23</sup>. This method leads to hoarding large amounts of data taken from way too many custodians and data sources. When so much data is collected, the costs associated with outsourcing collection, and processing and storage to outside vendors is huge. Overall, the cost, time and effort put in to find a small amount (maybe 1%) of relevant or responsive information that can resolve the matter, is not an ideal situation.

A targeted collection approach on the other hand, involves applying technology and procedures to reduce the volume of ESI datasets collected. This approach is part of a larger defensible data reduction strategy, with the goal of eliminating all documents from review that will not be ultimately used to resolve the matter.<sup>24</sup>

Attorney reviews represent the majority (70-80%) of e-discovery-related costs. Efforts to limit document review to only the ESI that will ultimately be used in the matter can dramatically reduce expenditures.<sup>25</sup>

Taking a more targeted approach will also reduce costs associated with data hosting, processing and production (e.g., load file creation). More importantly, targeted collection

---

<sup>23</sup> Eliminating E-Discovery Over Collection - FEBRUARY 28, 2014, white paper by Exterro Inc. Taken from <http://www.exterro.com/resources/eliminating-e-discovery-over-collection/> on 02-17-2017

<sup>24</sup> Eliminating E-Discovery Over Collection - FEBRUARY 28, 2014, white paper by Exterro Inc. Taken from <http://www.exterro.com/resources/eliminating-e-discovery-over-collection/> on 02-17-2017

<sup>25</sup> Eliminating E-Discovery Over Collection - FEBRUARY 28, 2014, white paper by Exterro Inc. Taken from <http://www.exterro.com/resources/eliminating-e-discovery-over-collection/> on 02-17-2017

reduces the chance of inadvertent production of privileged ESI and the costs associated with retrieving it.<sup>26</sup>

## **Cooperation and proportionality measures available in the FRCP not being fully utilized by parties.**

Despite many judges' embrace of proportionality principles, the myths of preserving and collecting broadly to reduce risks, continue to lead many legal teams' approach to collection, which perpetuate practices that undermine proportional e-discovery.<sup>27</sup>

Proportionality principles in the Federal Rules of Civil Procedure (FRCP) encourage litigants to identify reasonable limits on the number of custodians, scope of the relevant subject matter, time frame that will govern the discovery process and, ultimately, the overall costs of discovery. Proportionality principles also suggest there should be a balanced, equal burden on both parties. Communication with the opposition, perhaps in the form of a "meet and confer" or other pre-trial conference, is an important part of ensuring proportionality and passing judicial muster. Sharing costs, such as both parties to a lawsuit using a common vendor or repository or review platform, can also be part of a proportional approach to the discovery process.<sup>28</sup>

---

<sup>26</sup> Eliminating E-Discovery Over Collection - FEBRUARY 28, 2014, white paper by Exterro Inc. Taken from <http://www.exterro.com/resources/eliminating-e-discovery-over-collection/> on 02-17-2017

<sup>27</sup> Eliminating E-Discovery Over Collection - FEBRUARY 28, 2014, white paper by Exterro Inc. Taken from <http://www.exterro.com/resources/eliminating-e-discovery-over-collection/> on 02-17-2017

<sup>28</sup> Eliminating E-Discovery Over Collection - FEBRUARY 28, 2014, white paper by Exterro Inc. Taken from <http://www.exterro.com/resources/eliminating-e-discovery-over-collection/> on 02-17-2017



## How to effectively bring e-discovery in-house: Best practices

### Adopt an investment model based on the volume of litigation and size of ESI

1. **Infrastructure investment in a complete e-discovery toolkit<sup>29</sup>**: For enterprises with high volume of litigation with predictable volumes of e-discovery demands, a capital investment in the essential tools of a fully in-sources discovery operation will have significant payback. Such enterprises will have to invest in the people, process and technology necessary for the operation. If the operation is highly automated, it can be effectively managed onshore. If it requires substantial human review, part of the operation may be handled in off-shore locations with remote access, security controls and other measures to prevent loss of confidentiality, competitive advantage and effectiveness. Outsourcing can be a viable solution for only that part of the e-discovery process that requires human review and analysis.
2. **Pay-per-use pricing<sup>30</sup>**: For enterprises where litigation is more volatile in terms of volume and timing, a pay per use pricing for insured use of third part technologies can prove cost effective. This pricing model provides benefits to organizations with very few litigations but a large volume of ESI for identification, preservation, collection, analysis and review.
3. **Consumption-based pricing<sup>31</sup>**: For enterprises that want to allocate litigation costs to individual lines of business, this could be the best option. This works as as a charge-back accounting principle that effectively rewards litigation-free business managers for staying away from the audial system.

---

<sup>29</sup><http://www.outsourcing-law.com/2009/12/e-discovery-and-legal-process-outsourcing-esim-process-design-and-choices-between-outsourcing-vs-insourcing/> pp.5, on 01-21-2017

<sup>30</sup><http://www.outsourcing-law.com/2009/12/e-discovery-and-legal-process-outsourcing-esim-process-design-and-choices-between-outsourcing-vs-insourcing/> pp.5, on 01-21-2017

<sup>31</sup><http://www.outsourcing-law.com/2009/12/e-discovery-and-legal-process-outsourcing-esim-process-design-and-choices-between-outsourcing-vs-insourcing/> pp.5, on 01-21-2017

## Choose the right e-discovery software solution:

The e-discovery field is undergoing rapid growth with a plethora of vendors, technologies and experts appearing on the scene. And some of these new choices available today are from organizations with limited experience in the e-discovery field. Therefore it is very important to identify those professionals who are truly familiar with the industry as well as the types of pitfalls that must be navigated<sup>32</sup>.

An ideal solution should have the following features<sup>33</sup>:

- A centralized and automated legal hold feature for preservation, even if old fashioned, is still the way to go. A 2017 Federal Judges Survey by Exterro<sup>34</sup> shows that 87% of the judges believe that legal holds should be sent. Legal holds have been proven to demonstrate that reasonable steps were taken to preserve, and meet the threshold in the first section of 37(e) of the FRCP<sup>35</sup>.
- An advanced enterprise-wide search feature with conceptual search, auto-categorization, and advanced algorithms for email thread detection and mapping is essential. In-Place e-discovery search<sup>36</sup> tools can search for content across all mailboxes. This includes searching permanently deleted items and original versions of modified items (in the Recoverable Items folder) for users placed on Litigation Hold or In-Place Hold.
- A tool that can assist in the review process by automating it to a large extent with predictive intelligence or TAR (Technology Assisted Review). Although some amount of review (such as for privileged documents) may still need to be done by human reviewers.

---

<sup>32</sup> Schuler, Karen. (2009). E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. xxii. Burlington, MA: Syngress Publishing Inc, 2009.

<sup>33</sup> Losey Ralph C (2008). E-Discovery: current trends and cases, pp. 26. Chicago, IL: American Bar Association ©2008.

<sup>34</sup> <http://www.exterro.com/judges-survey/> pp.18

<sup>35</sup> <http://www.exterro.com/judges-survey/> pp.18

<sup>36</sup> [https://technet.microsoft.com/en-us/library/dd353189\(v=exchg.160\).aspx](https://technet.microsoft.com/en-us/library/dd353189(v=exchg.160).aspx) on 02-18-2017

## **Have well defined policies for information management and records retention:**

While records retention needs and technologies vary from company to company, all organizations that use ESI (Electronically Stored Information) must understand the requirements of the FRCP. These federal rules require all parties involved in a litigation to have in place, the processes and tools to preserve information related to actual or reasonably anticipated litigation. But despite most communications and business activities today taking place in an electronic environment, many enterprises still do not have document retention programs and policies in place to appropriately address how ESI is created, managed and disposed. Fewer organizations have the tools to effectively enforce their information policies and, as a result, struggle with the discovery process.<sup>37</sup>

Ideally the information management solution should provide an intelligent infrastructure for storing, managing and enabling the discovery of corporate data from email systems, file server environments, instant messaging services, and collaboration with records management systems. These solutions can support retention policies that can ultimately help an organization demonstrate sound information management practice to the courts.<sup>38</sup>

- Retention policies must be clear, simple and easy to execute.
- Data that is covered by the retention policies should be stored in simple and easy to find locations.

---

<sup>37</sup> Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. 49. Burlington, MA: Syngress Publishing Inc, 2009

<sup>38</sup> Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. 58. Burlington, MA: Syngress Publishing Inc, 2009

- Appropriate software tools can be acquired or consultants can be employed to assist in records management and retention.<sup>39</sup>

## **Invest in a storage management and content archiving system:**

Stored content has a cost hardware devices, regular backup, tape circulation, and administration overheads. Policy driven content archiving gives IT management an opportunity to reduce the cost and burden of content storage as its value or usefulness decreases. As content ages or changes status, it is typically used and retrieved less frequently. Yet few organizations have solid insights into how often content is used, or what proportion of content is still viewed after 6 months. Intelligent storage management technology such as archiving can be deployed as an integrated component of ECM to give IT management the flexibility to move and store infrequently used or less critical content to more economical storage devices. While high value and frequently used content can be moved to premium storage devices for high accessibility and rapid retrieval.<sup>40</sup>

## **Incorporate an intelligent content management solution:**

According to Schuler (2009), an ideal Enterprise Content Management (ECM) solution for e-discovery must support five key stages of the life of content<sup>41</sup>:

- Collection
- Management

---

<sup>39</sup> Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. 11. Burlington, MA: Syngress Publishing Inc, 2009

<sup>40</sup> Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. 11. Burlington, MA: Syngress Publishing Inc, 2009

<sup>41</sup> Schuler, Karen, 2009. E-discovery: Creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support. pp. 48, Burlington, MA: Syngress Publishing Inc, 2009

- Storage
- Preservation
- Delivery

This type of ECM solution supported by records retention and archiving can meet e-discovery and preservation requirements. In fact, integrating this type of content management system with an email archiving system can enable users to perform in-place retention management of unstructured information such as email stored in the archive. The retention policies of this type of ECM are transparently applied to email messages, which are declared as records and then stored and managed solely by the archive.

In a 2008 survey conducted by Fios Inc and Ari Kaplan Advisors<sup>42</sup>, E-mail management was found to be the biggest concern after legal hold oversight. It was found that the single biggest conceived vulnerability for 21% of respondents is in decentralized e-mail and document management systems where the personal files of employees are not all stored on a common server. The legal hold process was another cause for concern for 11% of the respondents.

The document management component of ECM should provide a secure repository for content of all types and formats-office applications, email, graphics, CAD drawings, etc.

The ECM system should also contain sophisticated search engines and have fully integrated and permissions indexing and retrieval as part of the part of the core document and records management functionality.<sup>43</sup>

---

<sup>42</sup> <http://www.arikaplanadvisors.com/wp-content/uploads/2014/03/AriKaplan-ResearchStudyREV.pdf>

<sup>43</sup> Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support. pp. 25-26, Burlington, MA: Syngress Publishing Inc, 2009

## **Put together an in-house discovery response team with clearly defined roles and responsibilities<sup>44</sup>**

Once the process assessment is completed, the next step is aligning it with internal resources. Who will perform which tasks and how will performance be measured? Bringing more of the e-discovery process in-house often necessitates a reshuffling of the legal team to ensure there are dedicated resources in place to handle e-discovery tasks, and may also impact the IT, records, compliance and even HR departments.<sup>45</sup> This would lead to creating a whole new discovery response team.<sup>46</sup>

The goal of an effective Discovery Response Team (DRT) is to provide responsive information in a consistent, cost effective and timely manner regardless of the reason for the request.

Companies can no longer accept the risk of mismanaging this crucial obligation. The discovery response team should follow a repeatable process each and every time a request for information is received. To effectively execute and manage a discovery response plan, there should be well-defined roles and responsibilities and well-documented processes and procedures. Most companies do not currently have such a team. To bring a team like this into effect would need change in management, workflow and direction from executive levels.

- Most important therefore in the team organization is a strong leadership and direction from the legal department and top management.

---

<sup>44</sup> Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support. pp. 72-73, Burlington, MA: Syngress Publishing Inc, 2009

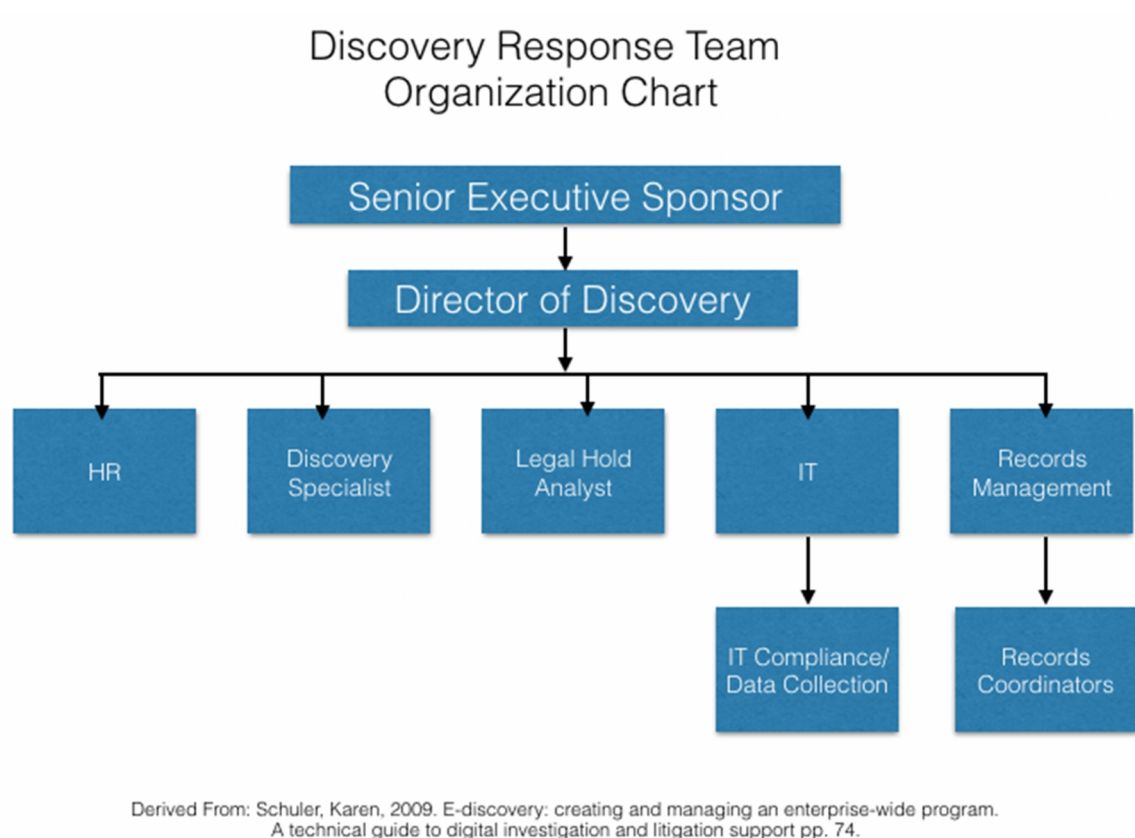
<sup>45</sup> Seeing the Big Picture: Why Legal Directors are Bringing E-Discovery In House. White paper by Exterro Inc., MAY 7, 2015 <http://www.exterro.com/blog/why-legal-directors-are-bringing-e-discovery-in-house/>

<sup>46</sup> Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support. pp. 72-73, Burlington, MA: Syngress Publishing Inc, 2009

- The other important component of such a team would be a strong information technology (IT) participation. This is to ensure that the team is meeting all the ever-increasing technology requirements and are not falling into needless traps.

The team organization chart can be on the lines of what is shown in the figure below.

**FIGURE 3**



- The third group that should be present on the team is the records management team.
- Finally, the team can also include HR, auditing, and third party vendors.

The following table briefly shows the job description of three of the team roles

**TABLE 1**

|                       |                      |    |
|-----------------------|----------------------|----|
| Director of Discovery | Discovery Specialist | IT |
|-----------------------|----------------------|----|

The following table briefly shows the job description of three of the team roles  
TABLE 1

|   |   |  |
|---|---|--|
| In-charge of policies, procedures and compliance processes; oversees and coordinates all team functions; plans and implements programs; trains and educates; ensures that company is current with trends and rule changes | Works with in-house staff to set-up legal holds and identifies custodians. Assists in data mapping, identification, collection and preservation. Coordinates with outside counsel and works directly with external vendors. | Manages data collection, acts as a liaison with outside counsel's IT dept., understands legal requirements for data collection; oversees release of data when a legal hold expires; provides necessary status reports. |
|---|---|--|

## Results, Conclusions and Recommendations

In this paper I have explored the various risks and challenges of bringing e-discovery in-house. I have also shown that despite these challenges, most organizations largely agree that it is the best way to reduce litigation costs. I have also shown best practices for creating a robust, defensible and cost-effective in-house e-discovery process. In conclusion, here is a summary of how to mitigate risks and overcome challenges to bring e-discovery in-house.

1. Do not wait till the last minute. Take proactive measures and respond promptly to an e-discovery challenge to avoid sanctions and forced settlements running into millions of dollars (Losey, Ralph 2008).
2. Know what and how much data you have, where it resides, what format it is in (Exterro webcasts, 2015).
3. Have a centralized e-discovery strategy with a centrally owned and approved governance model involving top management, legal, IT, HR and records management.
4. Put together an in-house discovery response team with clearly defined roles and responsibilities (Schuler 2009).
5. Be open to investing in a technologically advanced e-discovery software solution with the capability to address the challenges of legal hold management; automated preservation;



deal with collection and preservation; and review large volumes of documents using analytics and coding (Exterro webcasts, 2015).

6. Hire in-house legal team lawyers who are comfortable with reviewing electronically stored information (ESI) and have the knowledge and expertise to counsel managers on e-discovery matters (Schuler 2009).
7. Focus on targeted collections and make efforts to limit document review to only ESI that will ultimately be used in the matter (Exterro white paper 2014).
8. Fully utilize cooperation and proportionality measures available in the FRCP. Judges say that it is one of the best methods to reduce the overall costs of discovery (Exterro white paper 2014).
9. Adopt an investment model based on the volume of litigation and size of ESI (Outsourcing Law 2009)
10. Have well defined policies for information management and records retention that are clear, simple and easy to execute (Schuler 2009).
11. Invest in a smart storage management and content archiving system (Schuler 2009).
12. Incorporate an intelligent content management solution (Schuler 2009).

## Implications and suggestions for further research

Now that more and more organizations are starting to embrace e-discovery, further research can be done on-

1. The volume of e-discovery operations that was brought in-house by these organizations.
2. The areas of e-discovery operations that could not be in-sourced and why.
3. Actual figures of cost reductions after bringing e-discovery in-house, with a before-and-after cost comparison chart.

## References

<http://www.iam-media.com/files/Norton%20Rose%20Fulbright%20Annual%20Litigation%20Trends.pdf>

6 Tips for Successfully Adopting E-Discovery Technology, white paper by Exterro Inc., 09-14-2016 <http://www.exterro.com/resources/tips-adopting-e-discovery-technology/>

[http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf)  
downloaded on 02-07-2017

[http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf)  
downloaded on 02-07-2017

[http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1208.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf) downloaded on 02-07-2017

<http://www.aiim.org/What-is-eDiscovery> on 02-17-2017

E-Discovery for Dummies: Linda Volonino, Ian Redpath, 2009

<https://www.federalrulesofcivilprocedure.org/frcp/title-v-disclosures-and-discovery/rule-37-failure-to-make-disclosures-or-to-cooperate-in-discovery-sanctions/>

Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support. pp. xxi, Burlington, MA: Syngress Publishing Inc, 2009.

<http://www.ironmountain.com/Knowledge-Center/Reference-Library/View-by-Document-Type/White-Papers-Briefs/T/The-Ediscovery-Ostrich.aspx>

6 tips for successfully adopting e-discovery technology, white paper by Exterro 2016. Taken from <http://www.exterro.com/resources/tips-adopting-e-discovery-technology/> on 03-12-2017

Bringing e-discovery in-house: A recipe for success, white paper by Zapproved. Taken from [https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved\\_WP\\_2017\\_In-HouseElevated\\_ARecipeForSuccess.pdf](https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved_WP_2017_In-HouseElevated_ARecipeForSuccess.pdf) on 03-11-2017

Bringing e-discovery in-house: A recipe for success, white paper by Zapproved. Taken from [https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved\\_WP\\_2017\\_In-HouseElevated\\_ARecipeForSuccess.pdf](https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved_WP_2017_In-HouseElevated_ARecipeForSuccess.pdf) on 03-11-2017

Bringing e-discovery in-house: A recipe for success, white paper by Zapproved. Taken from [https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved\\_WP\\_2017\\_In-HouseElevated\\_ARecipeForSuccess.pdf](https://www3.zapproved.com/rs/503-UGJ-486/images/Zapproved_WP_2017_In-HouseElevated_ARecipeForSuccess.pdf) on 03-11-2017

E-discovery day webcast by Exterro, Inc., December 2015 <http://www.exterro.com/blog/register-now-for-e-discovery-day-webcasts-hosted-by-exterro/>

E-discovery day webcast by Exterro, Inc., December 2015 -  
[http://www.exterro.com/resources/?topic\\_id=All+Topics&type\\_id=4353&sort=Featured&keyword=ediscovery+day&\\_ga=1.258588682.1865736639.1487306726](http://www.exterro.com/resources/?topic_id=All+Topics&type_id=4353&sort=Featured&keyword=ediscovery+day&_ga=1.258588682.1865736639.1487306726)

8 Things You Need to Remember About eDiscovery, by Thomas Bahr, Oct 15, 2009 by John F. Mancini

Losey, Ralph. (2008). E-Discovery: current trends and cases, pp.26. Chicago, IL: American Bar Association ©2008

Technology: Proactive ESI data mapping for e-discovery by Zeller, Patrick, 2011  
<http://www.insidecounsel.com/2011/09/09/technology-proactive-esi-data-mapping-for-e-discovery>  
 on 02-17-2017

Schuler, Karen. (2009). E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. 73. Burlington, MA: Syngress Publishing Inc, 2009.

3rd Annual Judge's Survey by Exterro Inc. downloaded from <http://www.exterro.com/judges-survey-17/> on 03-01-2017

Eliminating E-Discovery Over Collection - FEBRUARY 28, 2014, white paper by Exterro Inc. Taken from <http://www.exterro.com/resources/eliminating-e-discovery-over-collection/> on 02-17-2017

<http://www.outsourcing-law.com/2009/12/e-discovery-and-legal-process-outsourcing-esim-process-design-and-choices-between-outsourcing-vs-insourcing/> pp.5, on 01-21-2017

Schuler, Karen. (2009). E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. xxii. Burlington, MA: Syngress Publishing Inc, 2009.

Losey Ralph C (2008). E-Discovery: current trends and cases, pp. 26. Chicago, IL: American Bar Association ©2008.

<http://www.exterro.com/judges-survey/> pp.18

[https://technet.microsoft.com/en-us/library/dd353189\(v=exchg.160\).aspx](https://technet.microsoft.com/en-us/library/dd353189(v=exchg.160).aspx) on 02-18-2017

Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. 49. Burlington, MA: Syngress Publishing Inc, 2009

Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. 58. Burlington, MA: Syngress Publishing Inc, 2009

Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support, pp. 11. Burlington, MA: Syngress Publishing Inc, 2009

Schuler, Karen, 2009. E-discovery: Creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support. pp. 48, Burlington, MA: Syngress Publishing Inc, 2009

<http://www.arikaplanadvisors.com/wp-content/uploads/2014/03/AriKaplan-ResearchStudyREV.pdf>

Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support. pp. 25-26, Burlington, MA: Syngress Publishing Inc, 2009

Schuler, Karen, 2009. E-discovery: creating and managing an enterprisewide program. A technical guide to digital investigation and litigation support. pp. 72-73, Burlington, MA: Syngress Publishing Inc, 2009

Seeing the Big Picture: Why Legal Directors are Bringing E-Discovery In House. White paper by Exterro Inc., MAY 7, 2015 <http://www.exterro.com/blog/why-legal-directors-are-bringing-e-discovery-in-house/>