

In From The Cold: Taking Control Of Electronic Discovery By Bringing It In-House

The Editor interviews **Frank Wu**, managing director in the Litigation, Restructuring and Investigative Services Solution Group of Protiviti Inc. Protiviti is a global business consulting and internal audit firm composed of experts specializing in risk, advisory and transaction services. The firm, which is a wholly owned subsidiary of Robert Half International, helps solve problems in finance and transactions, operations, technology, litigation, governance, risk, and compliance.

Editor: Electronic discovery issues started making headlines when the federal courts changed their procedural rules to address the unique nature of electronically stored information. Here we are, two years later, and e-discovery is still making news. Why is it taking so long for companies to come to grips with the new rules?

Wu: We are still in a transition period. Ultimately, the new rules should make legal discovery more consistent and predictable. But right now, two factors are making it difficult for companies to quickly develop enterprise-wide answers to the demands of e-discovery.

First, whenever changes to court rules are enacted, the understanding of those rules continues to evolve as courts address specific problems. Knowing this, some organizations have wanted to see how the courts would interpret and apply the rules before committing their companies to expensive solutions that might need considerable modification later.

Second, the serious jolts to the economy during the last year or so have caused many companies to rearrange priorities and tighten their belts. Unfortunately, the pain and drain of e-discovery continues to impact both the top and bottom line. A single failure in discovery can undermine all those cost-saving efforts, so corporations are wary of false economies that carry high risks of loss.

Editor: Have you seen any trends emerge as companies adjust to both the evolving discovery rules and an uncertain economy?

Wu: Companies are looking to do more with less. Outsourcing has been a convenient, though expensive, solution. Even before the rules changed, there were numerous litigation support and e-discovery providers. Since then, there have been many developments and disruptions in this industry. We've also seen more "do-it-yourself" software and tools maturing to become viable alternatives for addressing the demands of e-discovery.

Increasingly, courts are making it clear that companies are responsible for complying with the rules. Meanwhile, organizations have become more familiar with the "bits and pieces" of e-discovery and look to consolidate disjointed functions. These practical considerations, as well as economic ones, are causing many companies to bring dis-

covery functions back in-house.

Editor: Isn't it rather risky for a company to try to perform e-discovery on its own?

Wu: Litigation is a risky business, no matter who does it or where it's done. Even when a company outsources some of its e-discovery functions, it cannot outsource its litigation risks or responsibilities.

So, the question becomes this: How much direct control should a company retain over the discovery process? The answer depends on the nature of the litigation and the internal capabilities of the company. Where they used to just outsource e-discovery, companies are re-evaluating the costs and business justifications. Many are co-sourcing or even bringing the main components entirely in-house.

Editor: What about a software solution, as you mentioned earlier? It seems logical to use technology to handle technology that e-discovery targets.

Wu: Software and technology are key ingredients to any e-discovery solution. Unfortunately, we've seen too many instances where companies expect technology solutions to work right "out of the box." Or worse, they never even take it out of the box. Having the right technology tools without the right business processes just adds another layer of problems to the e-discovery function.

Too often, certain software issues don't become apparent until *after* a company has purchased and used the software. In a worst-case scenario, software limitations first come to light during a crisis, such as when a legal hold is suddenly imposed.

Editor: If software is so problematic, isn't outsourcing the better option?

Wu: Each solution to e-discovery has inherent limitations, and companies need to consider the costs, benefits and problems that come along with each option. Outsourcing on its own is expensive and can only help to the extent that you enable it and can afford it. Bringing e-discovery in-house can give greater control over the process and provide real cost savings, but it's not for everyone.

Editor: If in-house solutions aren't for everyone, then who – or what kind of companies – are they for?

Wu: In-house e-discovery is for companies that need to spend litigation dollars carefully and are serious about making it work. The key corporate players must buy into an in-house solution. This means that IT, legal, internal audit and compliance – all those departments – must understand and be willing to support a practical alternative.



Frank Wu

You also need to have cooperation from multiple levels of the organization. The C-level executives may see advantages to an in-house approach because it is a clear risk management strategy. But managers must see genuine benefits flowing from the practice, and the technical staff needs workable features and functionality built into any solution or the plans won't get implemented.

If you can get that type of organizational focus and support, you do more than save a good deal of time and money. The entire process becomes more transparent, effective and repeatable.

Editor: You've listed quite a few incentives, but how significant are they? How much money can you really save by going in-house?

Wu: Most companies don't have a detailed picture of the costs of outsourcing e-discovery. They may get an itemized bill, but in the end they just take a deep breath and pay for it. Still, there are many repetitive and duplicative tasks that must be performed during e-discovery. If you account for those tasks separately, you can get a better idea of what each one costs at each stage of discovery.

Studies indicate that it only costs 20 cents on average to buy a gigabyte of storage, but reviewing the stored material can cost about \$3,500 per gigabyte.

Today, it's not unusual for each employee in a company to have more than 10 gigabytes of data sitting on desktops or laptops. Add to that the data stored elsewhere on servers, backups, cell phones, peripherals and devices, and the gigabytes add up very quickly. When companies are compelled to preserve and produce potentially responsive and relevant electronically stored information, the costs can hit the roof.

If you look at conservative estimates from start to finish, outsourced e-discovery can cost more than \$5,000 per gigabyte. That includes all phases from identification to preservation, collection, removal of duplicates, conversion to a court-approved format, document review and, finally, actual production.

It's an expensive proposition, no matter who figures it. Clearly, if you can control and take any significant portion of the process in-house, you have the opportunity to save a great deal of money. At the same time, you can more efficiently package and greatly reduce the amount of material that must be outsourced.

Editor: In this economy, the bottom line is very important, but what about advantages other than reduced costs?

Wu: At Protiviti, we have found that as long as companies outsource their entire e-discovery burden, they tend to treat discovery and litigation as one-off projects. To get a better handle on litigation risk management, discovery effectiveness and costs, e-discovery must move from being a *project* to being a sustainable *process* that works as part of daily

business operations.

That shift, from project to process, not only gives a company a head start on litigation, but also provides for the systematic treatment of information that is both coherent and consistent. Organizations are looking for practical solutions to help them demonstrate reasonable and good faith efforts in their e-discovery practices. Without a good e-discovery process in place, the courts could impose a fine for lost or destroyed documents. They may even assume that the missing evidence indicates misconduct or supports the other side.

Editor: In your estimation, how many companies are able to meet the challenges to their e-discovery processes in court?

Wu: Only nine percent of the companies surveyed by AHIM in 2007 felt "very confident" they could show their electronically stored information was "accurate, accessible and trustworthy." That's down significantly from the previous year, when 12 percent reported feeling "very confident." At the other extreme, 20 percent of companies reported they had "no confidence at all" regarding their electronic information. In 2006, only 12 percent of companies expressed no confidence.

Since then, organizations have taken a number of steps to tackle this serious lack of confidence. Many have evaluated their litigation readiness. Some have even included e-discovery and records retention in their internal audit planning. However, as companies gain confidence by looking at where they are compared to where they need to be, they also should be cautious of hidden issues that could lead to a false sense of confidence.

Editor: Do you think an e-discovery readiness program can rebuild their confidence?

Wu: Confidence, I think, ultimately depends on actual practices rather than on intentions or policies. More than "readiness," companies need "effectiveness." Many organizations have done litigation readiness projects, and are finding that readiness does not necessarily translate to effectiveness. While litigation readiness is a good start, companies are looking to take the next steps to ensure sustainability in the policies, processes and practices affecting e-discovery.

Editor: Do you have any final thoughts you want to share?

Wu: As courts continue to hold organizations accountable for their e-discovery processes and procedures, it is more important than ever for companies to possess strong in-house e-discovery capabilities, whether or not they choose to outsource the capacity. Many companies can get there cheaper and better by setting up internal processes and taking back control of e-discovery.