

Today's GENERAL COUNSEL

E-Discovery

Insourcing, International Due Diligence and Data-Culling

Today's General Counsel Q&A with [Consilio's](#) Chris Adams



What are some of the major e-discovery trends to watch for this year?

The movement toward more flexible and adaptive technology is something that seems to be really taking hold with both law firm and corporate clients around the globe. Clients continue to express an interest in working with technologies that offer

more simplicity and clarity around analytics and predictive analysis.

For lawyers, this means that it's important to be able to explain the full e-discovery process to a potentially less technologically sophisticated judge, or even opposing counsel. If lawyers feel like they don't understand how the technology works, it can be difficult for them to effectively lobby for its use,

even where substantial cost reductions can be realized in a case. This puts the onus on [e-discovery providers](#) and counselors to provide not just the technology, but the process and people around that technology.

Another major e-discovery trend we see is an increase in insourcing inquiries, and I would expect to see even more of that in the coming year.

Insourcing in this context would be when in-house law departments or general counsel want to bring technology or people in-house, but they don't want to pay for the infrastructure or other associated costs. Rather, they are looking for companies to augment their current technology or personnel.

It's a smart move with several benefits. It moves the risk from their side of the ledger, provides immediate scaling to meet needs that can change throughout the year, and makes their overall spend far more predictable.

In cases of international M&A, what are some e-discovery issues and challenges? How can companies avoid the risks?

Interestingly, the biggest challenges in international M&A occur both at the very front end of the transaction during the due diligence process, and post-merger when companies are going through the transition work to consolidate operational procedures.

On the front end, the key is identifying and ameliorating risk through more effective due diligence, and paying particular attention to different compliance laws in different countries and across various jurisdictions. Unlike in the U.S., you don't find one set of governing laws that dictate what constitutes risky behavior that could impact an M&A deal. You need to know what raises red flags in one country that might be permissible in another. To do this, companies undertaking an international M&A transaction need to take a comprehensive view of the

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potential compliance issues to reduce risk early in the process.

Post-merger, the acquiring companies are suddenly confronted with all the same transitional challenges that domestic companies encounter. This is compounded by both the cultural and legal differences when the acquired company is in a different country. Often, we find that this is the area that companies considering an international M&A transaction don't think through during the merger process, and which turns out to pose substantial downstream risk and

costs. Knowing the culture and laws of that country and having a plan to effectively deal with the issues is essential to avoiding this type of post-merger risk.

As analytics and predictive coding for review processes have become more common, how are courts and government agencies across international borders accepting – or not accepting – this technology?

While [predictive coding and analytics](#) have become more mainstream and better understood in the U.S., we still aren't seeing a huge market for predictive coding and analytics use internationally. This isn't because agencies and courts refuse to embrace the technology, but rather simply because the technology hasn't been widely understood or utilized in those regions.

This trend reflects the smaller volume of e-discovery matters generally compared to the United States. A much smaller percentage of EU cases involve an e-discovery component. While there

is not a great deal of understanding of the process and technology that go into predictive coding internationally, there also isn't great resistance to it. As long as a company is working diligently to comply with a discovery request, agencies and courts aren't necessarily focusing on what technology is being employed to do it.

What is the next horizon of e-discovery technology? What are some of the new challenges and/or opportunities that will arise as a result of new technologies?

In terms of downstream [e-discovery technology](#), I don't see anything on the immediate horizon that will significantly impact the data review process itself. Rather, there seems to be a movement to employ technology to the left side of the EDRM [electronic discovery reference model] spectrum, to significantly impact the volume of data before it reaches data review. This is where we are seeing an increase in spend, investment and attention. We see that clients are hoping that downstream cost reduction will justify the investment of technology to more effectively cull data.

However, clients can't make these decisions in a vacuum. They need to fully understand the costs associated with supporting and deploying these technologies. This is where spend decisions often hit a wall, and where we are often called on to help with the analysis. ■



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