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Ediscovery Commoditization and the Coming Law Firm Boom

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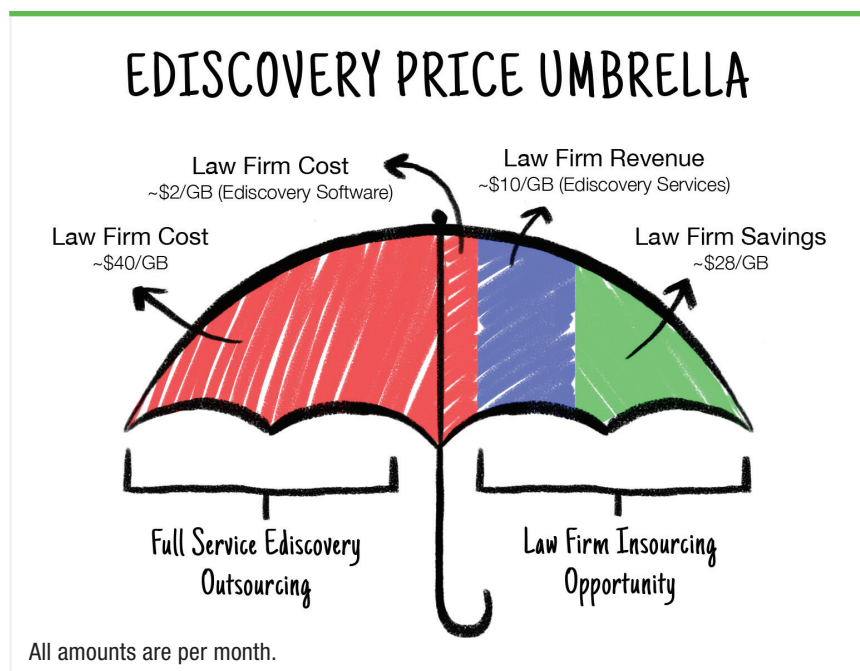
Digital WarRoom co-founder Bill Gallivan is on a mission to restore balance between law firms and ediscovery vendors. Ironically, he thinks law firms are getting the short end of the stick.

“In the last 20 years we have seen a nonexistent industry segment — non-law firm ediscovery services — grow from several hundred million per year in print and copy fees to a \$5 Billion ediscovery segment based on managing electronically stored information (ESI),” says Gallivan. “Meanwhile, litigation fees have not grown by a factor of 10-20 in the last 20 years. Law firms are not capturing all fees for legal services associated with their clients’ matters.”

Simply put, Gallivan sees an ediscovery services bubble and predicts that it’s poised to pop. This *TL Research Learnpaper* explores this prediction as well as how law firms can take advantage of it by insourcing their ediscovery — i.e., handling more of the work internally just as they do with all other aspects of their litigation cases.

The Ediscovery Price Umbrella

According to Gallivan, venture capital fueled marketing succeeded in making ediscovery



seem arcane. This resulted in ever escalating costs for ediscovery software and related services, which are typically priced by how much storage a case requires.

These VC-fueled prices have created a “price umbrella” that non-VC entities such as law firms can exploit. “Unlike law firms, ediscovery vendors are backed by private equity investors who demand a high rate of return,” says Gallivan. “We have recently seen competitors advertise \$35-\$40 per GB per month all in,” adds Gallivan.

What should the price be?

No more than \$2 per GB per month according to Digital WarRoom. “We believe the market will settle out at around \$10 per GB per month ‘all in’ with a service component that averages \$8 per GB and a software component that averages \$2 per GB. Law firms will want to pocket the \$8 and pass through the \$2 in technology fees.” (See the accompanying illustration on page 1.)

Drivers of Commoditization

Digital WarRoom has identified four drivers behind this commoditization:

1. Clients demanding lower costs and more transparency.
2. Lawyers increasingly comfortable with technology.
3. New ethics rules requiring technology competency.
4. A growing number of ediscovery platforms with similar features.

1. Client Demands

When ediscovery emerged earlier this century, law firms treated it as an anomaly so they outsourced the work. But law firms and their clients eventually realized that producing data in legal matters was not a single-instance happenstance. Instead, this obligation would occur in every case.

While outsourcing may still make sense for high-stakes cases, it has become too expensive for smaller cases and government matters. Today, clients want one thing from their law firms — efficiency. They do not want to pay more for ediscovery than necessary, especially in light of recently amended Federal Rules of Civil Procedure (FRCP) 26(b)(1) requiring proportional ediscovery. Along with operational efficiency, clients are demanding cost transparency, no longer offering their outside counsel a blank check. For example, clients are less likely to pay for task-based services, such as loading data.



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Digital WarRoom

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2. Tech-Savvy Lawyers

While civil procedure rules were progressing, so were litigation teams. The demand for tech-savvy litigation teams is high. Law firms are hiring people who know the ediscovery ropes — how to avoid pitfalls, scrutinize prices, and maximize the technology. Some firms even hire lawyers who specialize in ediscovery.

“Enter the Millennials,” says Gallivan. “Tech savvy lawyers are coming of age, eager to provide direct ediscovery services and help their firms recapture the legal services that have been outsourced and growing at a much higher rate than all other legal fees.”

3. New Ethics Rules

More than half of the states have adopted some form of ABA Model Rule 1 Comment [8] on technology competency:

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

From an ediscovery perspective, lawyers need to know where their client’s data resides

and how to access it. They have to speak intelligently at meet and confers. They need to know how much it all will cost. And more. Hands-off ediscovery has become a thing of the past.

4. Accessible Ediscovery Software

Thanks to improvements in user experience design combined with the increasing number of lawyers comfortable working in a web browser, modern ediscovery software is just as accessible as other sophisticated products lawyers use every day.

“Ediscovery has become a standard part of the paralegal and litigator skill set, and no longer something that belongs to specialists only,” says Digital WarRoom Vice President Robert Powell. “The core competency in documenting preservation of data, assessing relevancy, managing responsiveness review, and producing privilege logs are fully accessible to a trained legal professional in the same manner as the use of other productivity tools for document creation, deposition preparation, time recording, and other routine tasks.”

Nuts and Bolts of Insourcing Ediscovery

With quickly advancing technology and a maturing market, law firms need to look outside of traditional ediscovery outsourcing models. Various options exist, depending on the size and risk tolerance of the firm. For example, larger law firms and litigious corporations tend to create full-service teams, partnering with a small, select group technology and service providers. However, this model is not for everyone.

“Smaller and midsize law firms, specifically, are finding that they don’t need to make major investments to own discovery at each stage of the [EDRM](#),” says Gallivan referring to the popular reference model that describes



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the components of ediscovery. “By bringing some software strategically in-house, law firms can reduce future capital infrastructure expenditures and differentiate their services, creating the efficiency and cost controls their clients demand.”

In fact, almost 80% of Digital WarRoom’s law firm customers have moved to insourcing discovery for their matters to control costs and meet discovery burdens.

Gallivan recommends starting with the bread and butter of ediscovery — post-collection document processing, review, and production. Shopping for such a product involves three decision points — feature set, training, and price — each of which is explored below.

Features to Seek

The newest generation of ediscovery applications reside in the cloud and are the easiest to use without concerns about infrastructure and support. A hosted model mitigates some of the headaches traditionally associated with insourcing ediscovery. Multifactor authentication has become standard in such applications, eliminating threats from weak passwords. Furthermore, you don’t need to apply software updates, or worry about data backups or disaster recovery.

After collection, which you may still need to outsource, you upload the data for processing, including indexing for keyword searching, and filtering for relevancy. If you anticipate some large collections, select a product with predictive coding. This form of artificial intelligence can shorten the time to find responsive documents by training the software to recognize what's relevant.

Standard features include tools for reviewing and tagging documents, creating privilege logs, redacting text as needed, producing responsive documents in a variety of formats, and creating document sets for expert interviews or deposition preparation. For small cases, you can often process data and review documents within a single day.

Training Is Vital

Although today's ediscovery software is accessible, you don't want to go it alone. To increase efficiency and deliver better results, law firm ediscovery teams need competency in running the platform. Look for a software provider that provides some level of training and support at no additional cost. Ideally, this will include a project management assistance when needed.

"Building up internal expertise around the software reduces risk, and ediscovery software companies should want to partner with their clients to achieve that goal," notes Powell.

A Fair Price

Gallivan talks about price per GB because all ediscovery services can be reduced to this lingua franca metric for comparison purposes. However, Digital WarRoom offers a range of pricing options to meet different market needs, including a desktop Windows app that costs \$1,795 per year for unlimited use.

For its hosted solutions, Digital WarRoom focuses on cost control and transparency

Advantages of Hosted Ediscovery Software

- ✓ Eliminates Capital Expenditures
- ✓ Multi-Factor Authentication Enhances Client Data Security
- ✓ Consistent Upgrades Means You Always Use the Latest Tools
- ✓ Backups and Disaster Recovery Provide Peace of Mind
- ✓ Easy to Show Hard Costs for Client Reimbursement

via a feature-based subscription pricing model. For example, an annual subscription for unlimited cases costs \$2,000 per month for up to 500 GB of data. This works out to \$4/GB/month when maxed out. Additional storage costs \$1/GB/month. The typical Digital WarRoom law firm customer has more than 1.5 TB of data, which translates to just \$2/GB/month. This all-you-can-eat approach departs from traditional volume-based fixed pricing models, which may incentivize providers to retain increased data volumes.

"Ediscovery costs need to be proportional to meet requirements of the new FRCP, and the way to meet those obligations is through a hosted ediscovery model with a subscription-based fee structure," explains Gallivan.

Law firms or corporations looking to implement subscription pricing often ask, "How do we bill this to our clients" or "How do we account for department-level expense budgeting?" Look for an ediscovery software provider that has addressed these concerns. For example, to help a law firm bill their clients and recover pass-through hosting costs, some software platforms offer split invoicing options. This helps the firm demonstrate external hard costs, and reduces internal and external write-offs associated with discovery. Similarly, corporations can use split invoicing to calculate litigation costs at a case level for budgeting purposes.

Benefits of Insourcing Ediscovery

Commoditization always has winners and losers. Law firms that take advantage of low ediscovery costs are poised to emerge as winners as follows:

1. Provide Better Client Service
2. Acquire New Clients
3. Charge for Ediscovery Services

By controlling the ediscovery process, law firms provide faster, more reliable ediscovery services at a lower price versus the \$35-40 per GB per month and higher “all in” service providers that currently dominate the market. This results in satisfied clients sending them more litigation matters. These firms can also market themselves effectively against law firms that still outsource and larger firms with standalone ediscovery practices to win new business.

However, law firms can also add to their bottom line. For example, Digital WarRoom costs as little as \$2 per GB per month for the software, and approximately \$8 per GB per month for the full suite of services. A growing number of Digital WarRoom customers use only the software and handle all the services internally. These firms charge fees equivalent to \$10-12 per GB per month for this work. This enables them to capture all of this value rather than paying it to Digital WarRoom or

other service providers. According to Gallivan these law firms don’t typically hire new staff (except as the firm grows).

Take Our Business, Please

It seems odd for a company to want to give away ~ 80% of its business. However, Digital WarRoom doesn’t think it has a choice in the matter. “Ediscovery software should and is becoming a commodity,” says Powell. The company is content to focus on its software and training and only provide services as needed.

With clients demanding enhanced transparency, new levels of efficiency, and innovative technology to deal with the challenges of data production in litigation, investigations, and regulatory matters, will your law firm take advantage?



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