White Paper

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Addressing the Law Firm eDiscovery Cost Dilemma

These days most law firms that handle litigation and investigations engage in eDiscovery, and this necessarily entails incurring expenses. How law firms might handle these expenses is the focus on this paper.

In broad terms, eDiscovery expenses incurred by law firms fit into two categories: **people costs** and **technology costs**. Some of those costs are recurring, others one-off; some predictable, others vary greatly; some are small, others substantial.

When it comes to how law firms handle eDiscovery expenses, firms have four general approaches available to them: **avoid, absorb, recover, and profit**. Typically, firms use a combination of these approaches.

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eDiscovery Costs

As noted, eDiscovery costs incurred by law firms fit into two broad categories – **people costs** and **technology costs** – both of which firms must eventually account for.

People Costs

People costs consist of the money law firms spend to have individuals put in time performing tasks related to eDiscovery.

What Types of People Incurs People Costs

For eDiscovery to happen, a potentially wide range of people put in time.

At law firms, those people include lawyers, paralegals, and eDiscovery and litigation support professionals.

At service providers used by law firms, people incurring costs can include analysts, consultants, forensic examiners, reviewers, and more.

Law firms also might use outside individuals to help them meet their eDiscovery needs, people such as independent contractors who could work in any of a wide range of capacities.

What People Costs They Incur

The tasks undertaken by these various people align with every stage of the EDRM[i] diagram. Attorneys, analysts, and others put in time to:

- **Identify** sources of electronically stored information (ESI)[ii] that might be important to the matter they are working on.
- **Preserve** that data, so that it is not intentionally or inadvertently changed or destroyed.
- **Collect** some of the preserved data to work with, processing that data so that it is easier to search and work with.
- **Analyze** and **review** data with many objectives in mind: Will this data tell me something significant about the matter that I don't know? Is this case I can use to advance my case? Is this data I must turn over to an opposing party or an investigating agency?
- **Produce** data to others.
- **Present** data to an audience, either to elicit further information or as part of any effort to persuade that audience. This could be in a client meeting or at a conference with opposing counsel or a regulator; at a deposition, hearing, arbitration, trial, or appeal.
- At each stage, make sure that what is done with data conforms with client **information governance** policies and practices (at least to the extent that doing so is appropriate).

The tasks don't stop there. For lawsuits, eDiscovery efforts can start as soon as there is a reasonable anticipation of litigation, and they can continue until the final appeal is exhausted. eDiscovery can be a part of preparing a complaint or an answer, identifying and questioning witnesses, developing or responding to discovery requests, preparing for and handling depositions, and putting together motion papers – just to list some of the major steps in the life of a lawsuit.

For investigations, eDiscovery efforts can begin with the first intimation that an investigation might be necessary. They take place at just about every step of the investigation itself: identifying and talking with witnesses, scouring data from information related to the subject matter of the investigation, preparing and presenting reports, and so on.

Of the various people costs associated with eDiscovery, often the greatest are those incurred to review documents for relevance and privilege. Also substantial, although often not directly connected with eDiscovery, are the costs to analyze documents and synthesis content from documents in connection with activities such as working up the matter; eliciting testimony at depositions, hearings; and trying cases.

How People Costs Are Calculated

There are many approaches taken to account for the costs of the people who undertake eDiscovery activities. The most common is to track people's time by the hour or by a fraction of an hour. Other less frequently used approaches include tracking (and charging) by the task, the project, the document handled, the result obtained, or some other unit of time such as by the day.

Technology Costs

Technology costs consist of the money that law firms spend on technology to enable eDiscovery tasks to be performed: money spent on tools rather than money spent on people.

eDiscovery technology can be used at every step of the eDiscovery process, from initial identification of potential sources of data to the eventual disposition or other treatment of data following the conclusion of a matter.

The bulk of the costs associated with eDiscovery technology tends to be incurred as data is processed and hosted for review and production.

How Technology Costs Are Calculated

How technology costs are calculated varies greatly.

With some tools – generally smaller tools designed to accomplish a narrow range of tasks – those offering the software might charge a single fee for a single user to be able to use that tool. The fee might be a one-time charge, it might be annual, and it could include recurring support costs. Sometimes the fee is for a set number of users, such as 10 concurrent users, and sometimes it covers everyone in the organization.

For other tools – particularly those eDiscovery platforms that span multiple EDRM stages – pricing models have varied and continue to do so. Pricing models have been based, for example, on various combinations of the amount of data processed, number of TIFF[iii] pages generated, and number of users in the systems.

These days, a common approach is for a software or service provider to charge $X per gigabyte (GB)[iv] per month. Even with that approach, there are many variations. Are you charged per GB of data ingested? Processed? Actively hosted? In near- or off-line storage? Some combination? Some other measure?

Some organizations provide software. Others provide both software and services associated with the use of that software. With the latter group, at times it can be difficult to impossible to separate costs for the software from costs for the services.

Four Approaches to Handling eDiscovery Costs

When law firms deliberate how they intend to handle costs associated with eDiscovery, they have four basic options available to them: avoid, absorb, recover, and profit.

Typically, firms use a combination of these approaches. A single firm might elect to absorb some categories of eDiscovery costs, seek to recover other categories of costs, and generate a profit from yet a third ground of categories.

Avoid

Some firms attempt to avoid incurring eDiscovery costs themselves.

A firm might try to avoid eDiscovery entirely – basically pretend that electronic files do not exist. But in today's electronic world, with email, short messages, video and audio and image files, and the potentially critical metadata accompanying those and other electronic files, attorneys ignoring electronic content do so at their peril as well as the peril of their clients.

A better and more common approach is for a firm to remove itself from the billing process wherever practical. Firms do this in various ways; the simplest is to ensure that the contract for software or services is entered into directly between their client and the provider.

Sometimes this decision is made by the clients, not the firms. A client might require, for example, that a law firm use a review platform of the client's choosing or that the firm use the services of a service provider selected from a panel approved by the client.

Absorb

Firms taking the "absorb" approach treat eDiscovery expenses as a cost of doing business.

They might allocate these expenses to firm overhead, just as they might allocate the costs of office space, administrative staff, and software they use for billing, email, or word processing. They might be more granular, allocating eDiscovery costs specifically to the litigation practice group.

Recover

With the "recover" approach, firms spend money on eDiscovery software and services and then attempt to recover some or all those costs from their clients.

Law firms do this in various ways. They might, for example, set a flat fee they charge their clients to account for eDiscovery costs, pass through eDiscovery costs to the clients, or mark up the pass-through costs to cover additional firm expenses related to those costs.

Flat Fee

Some firms have had success with setting a standard flat fee they charge their clients to cover eDiscovery costs the firm incurs on behalf of the clients.

A firm might add this fee to its monthly bill to the client; some firms might charge this fee annually. The fee might be intended to cover all eDiscovery expenses. It is more likely, however, that the fee will be meant to cover routine and predictable expenses with a separate provision for such costs as time spent reviewing documents.

Pure Pass Through

With the “pure pass through” approach, firms track eDiscovery costs they incur on behalf of clients and then charge those costs to their clients.

In the simplest pass-through scenario, a law firm has only one matter that involves eDiscovery, and that matter is for a single client. Each month the law firm tallies up how much it spent on eDiscovery on that matter, along with how much others spent at its direction. The firm adds that total to its monthly bill to the client.

Of course, such a situation is rare. More realistic is the situation where a law firm has many clients, some with matters involve varying amounts of eDiscovery activities (litigation, investigations), some with matters that have no eDiscovery activity (corporate, real estate, trusts and estates, etc.), and some with a mix of eDiscovery and no eDiscovery.

Here, the biggest challenge for firms is to determine a fair – and ethical – way to pass through to its clients the varying eDiscovery costs it incurs for a varying number of matters.

Pass Through with Mark Up

With this approach, firms both pass through their eDiscovery costs and mark up their eDiscovery costs to account for the additional costs they incur in the process.

A firm might elect to mark up some eDiscovery costs but not others. For example, if a firm is using an eDiscovery platform that runs on server computers maintained by non-billing law firm personnel, the firm might calculate an amount to add to client bills to account for the cost to the firm of operating those servers. At the same time, the firm might elect to pass through the cost of outside document review services without marking up those costs.

As with the “pure pass through” approach, determining an appropriate amount of mark-up can be challenging.

Profit

Law firms also have built out their own eDiscovery offerings.

While these offerings take many different forms, they share a common theme. To varying degrees, these offerings compete with offerings available from service providers that the firms might otherwise engage to perform the same or similar work.

Law firms with eDiscovery offerings typically don't stop at delivering the same capabilities as service providers. Part of their pitch and their appeal is that they are uniquely positioned to take advantage of the synergies that come from combining both traditional service provider capabilities and traditional legal services under one roof.

One such firm has a team of 100 full-time, dedicated lawyers who, among other things, prepare and negotiate ESI protocols; manage and implement data retention and deletion; conduct and manage data preservation, collection, review, and production; defend eDiscovery practices in court; and more.

Another firm has a full-service eDiscovery advisory practice that is positioned to address client needs at every stage of the EDRM. That firm offers managed review; members of the firm serve as national counsel for eDiscovery issues; and members of their eDiscovery group regularly provide a broad range of eDiscovery, information governance, and data management consulting services.

The list goes on. The Legal 500 publishes law firm and lawyer rankings. For "eDiscovery in the United States", its rankings include 20 law firms in three bands. Chambers and Partners publishes "eDiscovery and Information Governance | USA" ranking tables the include 19 law firms in four bands. For every law firm that shows up in these rankings, there are many more that did not make these lists.

It is common for law firms to attempt to be competitive with service providers on pricing where the two types of organizations compete toe to toe.

While some law firms offering these services seek only to cover their costs, other firms view these services as part of their larger mix of offerings and expect these practice groups to generate a profit, just as they expect other practice groups to do.

Ethical Considerations

Most attorney rules and regulations take the position that lawyers may charge clients for fees and expenses included in the initial fee agreement, provided that those fees and expenses are reasonable.

The scope of what is deemed reasonable usually includes both the actual costs and some mark-up of those costs.

The American Bar Association Model Rules of Professional Conduct, "serve as models for the ethics rules of most jurisdictions." Rule 1.5 addresses fees and expenses.

Paragraph (a) of Rule 1.5 states that lawyers should not charge clients unreasonable fees or expenses. The rule lists eight facts to be considered in determining the reasonableness of a fee; the Comments to the rule note that other factors might come into play as well.

The rule does not contain a comparable list to consult when attempting to determine whether an expense is reasonable. The first Comment to the rule notes:

> Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

The second Comment provide some latitude with respect to basis or rate of fees and expenses, focusing more on assuring a common understanding and less on the actual amounts:

> When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

In ABA Formal Opinion 93-379. Billing for Professional Fees, Disbursements and Other Expenses (12/6/1993), the American Bar Association Standing Committee on Ethics and Professional Responsibility elaborated on billing issues, again focusing on common understanding and reasonableness rather on specific expenses or amounts. (This is the most recent ABA opinion on this topic.)

The Committee stated that "[c]onsistent with the Model Rules of Professional Conduct, a lawyer must disclose to a client the basis on which the client is to be billed for both professional time and any other charges."

With respect to charges other than professional fees, the Committee stated that "we believe that the reasonableness standard explicitly applicable to fees under Rule 1.5(a) should be applicable to these charges as well." Beyond that the Committee did not go, noting that "[t]he Rules provide no specific guidance on the issue of how much a lawyer may charge a client for costs incurred over and above her own fee."

It is evident from the wording of both Rule 1.5 and Formal Opinion 93-379 that when contemplating the handling of expenses, the authors of those documents had in mind routine and comparatively small expenses – photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime – and not costs such as data processing, data hosting, and document review that can account for a substantial part of the budget for a lawsuit.

Pros and Cons of the Four Approaches

Each of the four approaches to handling eDiscovery costs – avoid, absorb, recover, and profit – has its advantages and shortcomings. Here are some of the key pros and cons:

APPROACH	PROS	CONS
AVOID	• Avoid difficult discussions with clients about money. • Avoid carrying eDiscovery costs.	• Not pursuing eDiscovery at all can create serious problems.
ABSORB	• Avoid difficult discussions with clients about money. • Avoid clients saying "no" to necessary work. • Facilitate use of appropriate technologies.	• Send message to clients that the juice is not worth the squeeze. • Equitable internal allocation can be challenging. • Unpredictability of costs can be an issue for the firm.
RECOVER	• Increase client understanding and improve client decision making. • Provide financial resources to better represent clients.	• Client pressure to cut costs can compromise representation. • Unpredictability of costs can be an issue for the client.
PROFIT	Same as recovering costs, plus: • Expanded offerings. • Potential additional revenue. • Increased flexibility.	Same as recovering costs, plus: • Additional explanation may be required. • Clients that would agree to recovery may object to increases.

Avoid

Pros

Avoid difficult discussions with clients about money. If a firm avoids dealing with eDiscovery at all, its lawyers avoid – at least in the short term – having to raise with their clients the potentially unpleasant topic of how much eDiscovery might cost the client.

Avoid carrying eDiscovery costs. If bills for eDiscovery technology and services go directly to the client, then the firm does not need to carry those costs during the time that can elapse between when the law firm pays an eDiscovery bill to a provider and when the client pays that amount to the firm.

Cons

Not pursuing eDiscovery at all can create serious problems. An approach based on attempting to avoid eDiscovery entirely can put the firm, its lawyers, and the client at serious risk. For the firm and its attorneys, dodging eDiscovery entirely might signal attorney malpractice with all that entails. For the client, it might dodge costs in the short term, but those short-term savings can quickly be more than counterbalanced by the subsequent costs of having not dealt appropriately with eDiscovery. Even a quick perusal of eDiscovery case law shows how this type of avoidance can go horribly wrong.

Absorb

Pros

Avoid difficult discussions with clients about money. If a law firm elects to absorb eDiscovery costs rather than to charge them to a client, the firm's lawyers do not need to have uncomfortable talks with their clients about yet more fees and expenses that clients will have to pay.

Relationship partners worried that clients might walk if presented with yet more costs can rest easy a little longer. Lawyers and staff struggling with how to square eDiscovery expenses with billing guidelines can focus their energies on something less frustrating, especially as clients often insist that the guidelines are not negotiable.

Avoid clients saying "no" to necessary work. Not all clients see value in paying to have data found, gathered up, processed, and reviewed. Some will say some version of "that's overhead and I don't pay overhead." Others will insist that they can do the work themselves just fine; sometimes they can and perhaps better than you can, but other times they will quickly get out of their depth, and yet other times it would be inappropriate for them to be performing certain functions. Yet other clients will suggest that you just dump their data into your email system and go from there – and then you know you have a challenge ahead of you.

If your firm has a setup where eDiscovery expenses are rolled in part or entirely into overhead, included in hourly rates, or otherwise accounted for without separate charges to the client, you can bypass most if not all these challenges. Instead, you have the flexibility to use processes and tools appropriate to the situation without first getting approval from clients, insurers, and the like.

Facilitate use of appropriate technology. Clients who are asked to pay separately for eDiscovery software will sometimes veto the use of what they consider to be unnecessary capabilities. At times, they will do this even when they have little to no understanding of the benefits the vetoed technology might deliver.

By rolling some to all eDiscovery technology costs into overhead, you can place yourself in a position where it is easier to use the tools best suited to the needs of a matter or a project. If the pricing agreement you have with your technology provider permits, you can, for example, transcribe audio files, translate content from one language to another, identify content in images, or use a combination of search and generative AI to quickly find answers to questions along with supporting documents and deliver to you a summary of key information – and do all this without first having

difficult discussions with your client about needing to charge the client incremental technology costs to use these capabilities.

Cons

Send message to clients that the juice is not worth the squeeze. In today's environment, where a huge percentage of the potentially discoverable information you need to defend or prosecute is in electronic form, eDiscovery has become an essential part of many lawsuits and investigations.

By absorbing eDiscovery costs rather than passing them along to clients, you risk sending the message to clients that the cost associated with handling information in electronic form does not come close to delivering value to clients.

Equitable internal allocation can be challenging. Absorbed costs are still costs, and ones that need to be covered somehow. Figuring out how to allocate them appropriately inside a law firm can be challenging. If you attempt to roll eDiscovery expenses such as processing and hosting into overhead and allot a portion of the cost to each attorney as a part of the overhead that billable hours must be kept, that can be problematic. Lawyers in non-litigation practices – trusts and estates, for example – might not feel it is fair for them to cover expenses incurred for clients they do not service.

Unpredictability of costs can be an issue. Predicting eDiscovery costs can be difficult. At the onset of a new case, you may have only the vaguest idea of how much client data will have to be gathered and worked with. Even if you think you know, lawsuits and investigations routinely take unexpected turns that might significantly increase or reduce the amount of data involved. The mix of data types can vary greatly from matter to matter, adding uncertainty. And often you know even less about data you are likely to get from opposing or third parties.

Recover

Pros

Increase client understanding and improve client decision making. Explicitly charging clients for eDiscovery costs helps clients gain a better appreciation for what handling their matters costs and where those costs come from. This transparency means that clients and their counsel collectively can make more informed decisions about what actions to take with respect to the scope and extent of eDiscovery work performed on a matter.

Provide financial resources to better represent clients. If you attempt to absorb eDiscovery expenses rather than to pass them along, you risk creating a misalignment that potentially can limit or even degrade the quality of services they offer. The financial pressures created by absorbing eDiscovery costs can push firms to skimp on the scope of work performed, as well as to discourage them from adopting more up-to-date practices.

By recouping the costs of delivering eDiscovery capabilities to clients, you can be better positioned to deliver timely, quality services to your clients – not just eDiscovery services but the broader world of litigation and investigative services which your clients hired you to perform.

Cons

Client pressure to cut costs can compromise representation. Clients asked to absorb the costs of eDiscovery services and software sometimes balk. Not appreciating that eDiscovery now is an integral part of litigation and investigations or otherwise acutely concerned about the costs involved, some clients push outside counsel to minimize or even eliminate those costs. Law firms unduly constrained in their ability to preserve, process, and work with ESI can be hard pressed to deliver adequate representation.

Unpredictability of costs can be an issue for the client. Just as unpredictability of costs can be an issue for law firms that attempt to absorb them, unpredictability of costs can be an issue for clients when firms seek to recover those costs.

Profit

⊕ Pros

In addition to the upsides available to firms when they pursue a "recover" strategy, firms adopting a "profit" approach can enjoy these advantages:

Expanded offerings. By going beyond simply trying to recover eDiscovery expenses, to building out firm-based eDiscovery capabilities, law firms can expand and enhance the range of services they offer to their clients. Whether they join the ranks of firms recognized by organizations such as Chambers and Partners and The Legal 500, or aspire to something more modest, firms adopting a "profit" approach can find they also end up offering their clients more than they otherwise could.

Potential additional revenue. As the moniker indicates, firms taking a "profit" approach ought to increase their revenues. Of course, as they do this, they should always keep in mind the ethical frameworks within which they are meant to operate.

Increased flexibility. With a "profit" approach, firms can – as the two firms mentioned above have done – increase their flexibility to adapt to the needs of their clients. Keeping traditional legal and newer eDiscovery expertise under one umbrella offers firms the possibility of being more agile and nimble in how they seek to solve client problems.

Cons

Firms using a “profit” approach face the same downsides as those going with “recover”. They also have these additional challenges:

Additional explanation may be required. Not all clients will immediately understand the potential value presented by a “profit” approach, meaning that firm personnel might need to spend additional time and resources helping their clients appreciate the benefits they might be able to enjoy.

Clients that would agree to recovery may object to increases. For some clients, any attempt to mark up eDiscovery expenses or generate profit from eDiscovery activities will not be palatable, no matter what explanation a law firm offers.

Choosing Approaches

As between avoid, absorb, recover, and profit, there is no single answer that applies for all law firms and in all situations. Some law firms will attempt to adopt a single model. More commonly, firms use two or even three of the approaches.

Determining which approach or approaches to use can be complicated. Factors influencing the decision include:

- **Level of client involvement.** Some clients leave to their outside counsel the decision of what eDiscovery technologies and services to use – so long as counsel manage to control the budget. Other clients mandate which eDiscovery platform to use, which service providers to engage. Yet other clients fall in between those two extremes, expressing preferences or requirements as to some eDiscovery tools or services but leaving others to the law firms to choose.
- **Complexity and number of functions to be performed.**
- **Level of expertise required.** The level of eDiscovery expertise that law firms have covers the full spectrum from “none at all” to “at least as good as anyone else out there”. Firms that don’t have and don’t want to build or acquire the requisite expertise tend to lean in on “avoid”, “absorb”, and “recover” approaches. As firms build experience and capabilities, they tend to move toward and “profit” models.
- **Amount of money at issue.** For matters where eDiscovery expenses are nominal, there is no great impetus to adopt one cost approach over another. As the amounts increase, especially in relation to the overall costs and value of a matter, firms are more likely to consider “recover” and “profit” approaches. Similarly, as the volatility of the amount increases (a wider swing between low and high costs from one matter to the next), the more likely firms will be to steer clear of an “absorb” approach.

In some situations, it can be obvious to a law firm with option makes the most sense, but that is not always so. An example should help illuminate some of the challenges.

Let's use a hypothetical full-service law firm based in the Midwest with 150 lawyers in six offices across the country (not that different from the first firm I practiced at). The firm has 24 different practice groups in areas such as litigation, environmental law, and governmental relations and legislation. It does not have a separate eDiscovery practice group. It has a support team that manages systems such as the eDiscovery platform; for the most part their work is treated as non-billable.

The firm has selected a default eDiscovery platform that it prefers to use. There are, of course, situations where the firm needs to use other platforms, such as when directed to by a client, to meet the needs of a joint defense or joint plaintiffs' group, or because of special requirements; nonetheless, it has chosen preferred platform around which it has built workflows and on which it has trained its personnel.

The firm pays a set monthly amount to use its preferred platform. That monthly amount gives the firm 4,096 GBs of capacity that it can use each month.[v] I won't go into unit prices here, but whether the firm pays one penny or one hundred dollars per GB per month (neither one a realistic number), the costs add up.

Let's assume that last month the law firm used its preferred platform on 87 projects for 70 clients. Most clients only had one project in the platform, seven had two projects, and two had three.

Between them, last month these projects accounted for 2,015 GB. The average project size was 23 GB. At one end of the spectrum, 16 projects contained little to no data. At the other end, the largest project, at 358 GB, accounted for 18% of the data used.

In this example, how does the firm choose which approach – or approaches – to take?

Avoid

Avoidance won't work here.

The firm already uses an eDiscovery platform, so it is too late to attempt to evade eDiscovery entirely (not that evasion would have been a prudent choice).

Just during the month in question, 70 clients had matters in the platform. During months on either side, there might be fewer clients or more clients with matters in the platform. Given those numbers and that fluctuation, expecting the platform provider to be able to bill the end client directly would not be realistic.

Absorb

Absorption will be difficult as well.

Increasing the rates of all timekeepers to account for the additional cost of the eDiscovery platform would almost be guaranteed to result in heated internal discussions. Some of the firm's billable personnel work on matters where the platform might be used – those who handle lawsuits or investigations. Many others, however, derive no value from an eDiscovery platform and hence would be – and should be – loathe to ask their clients to help carry that cost.

Increasing the rates of only those timekeepers who work on litigation and investigation matters might be a more achievable objective. Given the variability in how much the eDiscovery platform is used from one client to another – just 25 of the 87 projects account for 92% of the data in the platform during the month in question – there is not one increase to all those hourly rates that would work.

Profit

For now, at least, the firm is not in a position where a “profit” approach would work.

It does not have in place the structures to support that, nor is there agreement that the firm even wants to go in that direction. There are discussions ongoing, but not yet any consensus to move forward.

Recover

For our hypothetical law firm, its best option is to use a “recover” approach, and that is what the firm has done.

It has set a standard rate of $X per GB per month that it charges clients for its use of the eDiscovery platform on their behalf.

To settle on $X, the firm did a survey of the market, wanting to make sure that the rates it asked of its clients were competitive with the ones that service providers charge. It also evaluated its cost structure, not just for the platform but more broadly, so that it could arrive at target dollar per GB per month charges that would not cause it to routinely lose money.

Pointers for Success

If your firm is considering switching to a "recover" or "profit" approach, the following points can help you have a more successful transition.

Educate

Educate everyone involved. Help them understand the shortcomings on the current approach, how the new approach will benefit them, and what the transition process will entail. Be prepared to educate early and often, not just one time. Have in place a process to field and respond to questions that arise.

Explain Benefits and Challenges

Everyone should know what's in it for them, how they stand to benefit from the change.

Everyone should know, as well, what might make for rough sailing; forewarned is, as the saying goes, forearmed.

Get Buy-In and Agreement

If you lack buy-in up and down the chain, your chances of a successful transition plummet.

Be Transparent

Let everyone involved know what to expect. Be ready to talk about what will happen to whom and when, how the changes will affect them. Be prepared to explain process and pricing in clear, understandable ways.

Have and Follow a Transition Plan

Create and follow a transition process so you can move effectively and efficiently from your old approach (or approaches) to your new one. Set milestones, so folks know what to expect and what is expected from them. Set switch-over points, so that you can have a measured transition rather than a mad scramble.

Manage Billing

If you are going to start billing for something that you did not previously bill for, you want to engage your firm's time and billing personnel, not just informing them of what's coming but including them as partners in the process so they can help ensure success. You want to make sure your team members have the workflows they need and that your firm's accounting and billing software and related systems can handle the change. Finally, you want to make sure that relationship partners, timekeepers, and clients all are ready for the billing changes.

Conclusion

eDiscovery costs can and should be managed in ways that lead to mutual success for law firms and their clients. By aligning client and law firm expectations about eDiscovery capabilities, deliverables, and costs, you can better place your firm to deliver and your clients to receive the services they want and deserve.

[i] **EDRM**. The Electronic Discovery Reference Model, at https://edrm.net/, is both a diagram and an organization. First published in January 2006, the EDRM diagram established a conceptual framework that defined the major stages in the electronic discovery process and provided a common language to use when discussed eDiscovery. Since 2005, EDRM (the organization) has delivered leadership, standards, tools, guides, and test datasets to strengthen best practices throughout the world. The nine stages shown in the EDRM diagram are Information Governance, Identification, Preservation, Collection, Processing, Review, Analysis, Production, and Presentation.

[ii] **ESI**, or electronically stored information. ESI is the term adopted in the 2006 changes to Rule 34 and other parts of the Federal Rules of Civil Procedure, as explained in the *Committee Notes on Rules – 2006 Amendment*. Rule 34 defined ESI expansively at 34(a)(1)(A), stating that parties could discover:

> **any** designated documents or **electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained** either directly or, if necessary, after translation by the responding party into a reasonably usable form…. (emphasis added)

[iii] **TIFF**, Tag Image File Format, or Tagged Image File Format. TIFF is one of the two most commons formats used when converting electronic files such as email messages or Word files to images. (The other common format is PDF.) It has been a long-standing approach for the producing party to deliver to the receiving party the TIFF images generated from files, additional files containing text extracted from each file being produced, and a load file that contains metadata for each file being produced as well as information needed to keep the right images, text, and metadata together when all that information is loaded in to an eDiscovery platform.

[iv] **Gigabyte** or GB. A gigabyte is a measure of the amount of memory needed to store information on a computer hard drive or similar storage unit. A single GB of storage might hold thousands of text documents, hundreds of photographs, or hours of video – or many more or many less depending on the sizes of the individual files.

[v] If these numbers seem very specific, it is because they are adapted from a real-world situation.