

# LAW FIRM PROFILE

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## David, you're an acknowledged leader on e-discovery issues. Bring readers up to date on its evolution over the past several years.

Society has experienced an explosion in the volumes and types of data generated by organizations. This is colliding directly with the broad parameters of relevance under the Federal Rules of Civil Procedure. These rules put just about any kind of record, electronic or otherwise, within the grasp of a litigation adversary through the "discovery process" in litigation, when the parties exchange documents and information. What this means is that the volume of discoverable information is growing by leaps and bounds, which is putting considerable stress on the legal process in general. This problem has been growing for years, but has reached a tipping point where almost every lawsuit potentially involves huge amounts of electronically stored information and a corresponding explosion in costs. Justice, in a sense, is getting very, very expensive.

I've been looking at these problems for some time on behalf of financial industry clients and others, and the financial sector has been a little bit ahead of the curve because they are required to comply with strict recordkeeping rules and a Securities and Exchange Commission

inspection regime. That sector has really been forced to take a proactive approach toward information governance, and this has a lot of unexpected benefits. These companies have been among the first to realize that addressing information governance and e-discovery is an essential part of controlling litigation costs and risks, but it also has other advantages as well.

## How has that learning curve translated into litigation practice in general? What are you finding as an e-discovery litigation leader in that field?

Organizations are usually slow to address the e-discovery process. In heavily regulated sectors such as financial services or healthcare, a significant boundary has been set by regulatory authorities imposing recordkeeping rules and compliance obligations for maintaining electronically stored information in an accessible format. For other business, however, the boundary tends to be purely financial. And this constraint is often not appreciated until the company experiences some kind of catastrophic e-discovery event, such as an adverse discovery ruling in a lawsuit or an exploding legal budget due to discovery costs. Then senior management starts looking for longer term solutions, and that's when somebody like me comes in.

The majority of organizations have not hit such a limit so they don't clearly see a return on investment for information governance or litigation preparedness, which are really overlapping considerations. It can be very challenging in these organizations for employees to escalate their concerns in these areas and there is usually nobody who is authorized to hire somebody like me to help the company deal with information issues and risks at the enterprise level. And despite a lot of thought provoking scholarship, most company employees are busy doing their day-to-day jobs, earning profits, keeping the ship afloat and managing other affairs. They don't have the bandwidth to deal with these broader information concerns, which can be quite daunting, and if it isn't laid out in a job description, there's little recognition or credit given to those who try to work on these kinds of issues.

So what I tend to encounter most often with clients are a few lonely Cassandras—usually in the legal, risk management or IT departments—who have learned enough about e-discovery and records management to see some problems on the horizon. They want to do something about it, but often don't know where to turn. Sometimes, these Cassandras get a budget. This can help, but if they aren't properly directed, or if they don't do something truly sustainable and fully integrated with the business, then their efforts can raise a lot of additional problems. We regularly see a small group implementing policies or procedures, engaging

consultants to produce a “data map,” or buying software applications, and then these systems are not properly implemented or supported. They become stale the moment they are issued, and tend to be neglected and honored mainly in the breach. Unless there is sufficient buy-in from senior management, unless the business users who generate most records can see the value in organizing them, then maintenance and enforcement of these programs will quickly lapse. The Cassandra moves on or changes positions, and nobody is left in charge of compliance. Then all these well-intentioned policies, procedures and maps lead to embarrassing non-compliance and reveal broad inconsistency across the organization, which is something a litigation adversary is going to exploit.

So it seems to me that organizations have a lot of inertia to overcome, and often come kicking and screaming to the information governance problem, usually in fits and starts. Their early efforts are often misguided, and there is a lot of need for legal counsel in this space. When companies do decide to start managing these risks, we can help them organize the relevant stakeholders and prioritize their efforts appropriately—focusing on the most cost-justified steps to improve the litigation posture and lower downstream costs. If they wait until a lawsuit is filed to deal with e-discovery, then they don't have time to make any improvements. But companies that tackle these issues proactively end up spending less to litigate their cases and they also achieve more favorable results.

### **Where does the insurance industry fit in this spectrum?**

We're starting to see some awareness around the underwriting of risk that relates to e-discovery costs, and I'm hearing rumblings from the insurance industry that they're starting to get a handle on this.

Insurers are in a very good position to perform broad analyses of the return-on-investment for litigation readiness efforts, because they have visibility into the discovery costs encountered by multiple policyholders. These costs fall within just few categories under the ABA UTBMS Task Codes (which really should be improved to capture more detailed discovery cost information).

Insurance companies also maintain decades worth of legal invoices, and they have sophisticated systems for analyzing law firm bills for reimbursement purposes. These can be used for meta-analyses of discovery costs across different businesses and industries, providing a reliable profile of the amount of money a company of a certain type or size is likely to spend. Underwriters also have the expertise to evaluate information risks along with other types of risks, and they can correlate how litigation preparedness typically pays off with a corresponding drop in discovery costs.

At some point, I think insurance companies are going to broadly provide financial incentives, and eventually impose eligibility requirements for repeat litigants, around litigation preparedness. They are going to require basic proficiency in the identification, preservation and collection of a company's data, or

pre-set arrangements to handle these functions effectively. And those who are unprepared are going to pay higher premiums. We haven't seen too much of this yet, but I think it's coming.

### **Is task coding a good system to have in place if you're going to start encountering e-discovery?**

Assigning task codes to categorize the time billed in legal invoices is very useful, but I'd go even further. I'd say that every organization that wants to manage the e-discovery process with some level of rigor should figure out how much it must spend to produce a gigabyte of data in a civil proceeding, and then figure out how best to lower that cost. One gigabyte is about 60,000 pages; roughly 10,000 documents. It sounds like a lot, but because almost all our communications are now electronic, most cases involve a whole lot more data than a single gigabyte. Still, it's a baseline, and the estimated costs to produce this much data should incorporate all the internal time by company employees, allocation of company resources, as well as the time fees charged by litigators and e-discovery service providers to locate, extract, sort, sort, review and produce the company's electronic documents. Until you have this kind of unit-based perspective, it can be very hard to recognize the true operational costs of e-discovery, and establishing this baseline is critical to controlling the costs and for building a business case for information governance.

Companies can leverage task codes and the task coding process in order to get at the underlying data they need to establish this kind of cost

estimate. I think most corporate officers would be surprised by what they'd find if they were to categorize their e-discovery costs using task codes and then take a focused look at the results.

### **How does a lawyer and law firm partner with a systems provider to bring a semblance of order to this process?**

Most organizations lack the expertise and resources to manage the e-discovery process themselves, and the traditional approach has been to delegate responsibility for this to whatever litigator is hired to handle the case. The problem with this approach is that litigators are hired for their subject matter expertise. They might not understand how IT systems operate, how the company maintains data, or the way the law has evolved, especially to deal with the discovery of electronic records. This is becoming an increasingly sophisticated field, and just as you hire a patent expert in a big patent case, you really want to have someone proficient with e-discovery managing these projects. All too often that's not the case. The legal department hires subject-matter experts who know the law of the case, who then spend enormous amounts of time coming up to speed on custodial practices and identifying relevant repositories. Then, when the next case comes along, they hire a different attorney who knows that subject matter, who climbs the same e-discovery learning curve. It's all very inefficient and, frankly, pretty risky too.

There's also lot of technology that's been sold to organizations to presumably help with the discovery

process, but often it's really not a very good fit, and the company might not really have the expertise or resources to operate the technology in a defensible manner.

My goal is to be information counsel for my clients. I'm a litigator, but I look to be in a position where I'm advising my clients about the entire information management lifecycle, and related issues like data breach, export controls and, of course, e-discovery. When I am engaged at this level, I can help build a consistent approach to e-discovery projects, which by their nature otherwise tend to be very ad hoc. Larger companies might hire someone like me in-house as a Director of E-Discovery or something like that. But most companies don't need this service on a full-time basis, and we provide a more scalable approach.

How we work with a company depends on the maturity of its information governance efforts. Generally, for those just embarking on this, I first try to get them to set up a steering committee with appropriate stakeholders from legal, business, risk management and IT. We set up routine meetings, and start scoping out the challenges and risks. After a while, the committee will move forward on its own, but at the onset we try to provide some early direction, set some realistic goals and gain some traction. As outside counsel, we can also help strengthen privilege protection while dealing with the inevitable skeletons we find in the various electronic closets.

Once a committee is up and running, one of the other things we might do is help to identify a discovery

response team, including us as e-discovery counsel, with some kind of oversight responsibility for discovery projects.

This is really where the service providers come in. If the company is large enough and wants to engage providers directly, we might help them conduct an RFI process, select preferred e-discovery providers, and negotiate discounted rates and appropriate SLAs. Alternately, Pillsbury has formed an alliance we call PEARL™, which is comprised of some of the best e-discovery providers in the business. These companies agreed to give us discounted bulk rates under a master services agreement, and we work with them as a sort of general contractor—managing the discovery process at very competitive rates. PEARL is basically, an outsourced solution to the e-discovery challenges most organizations face, and we can deploy it consistently, every time a company is sued, whether or not Pillsbury is also litigating the case.

I think PEARL and arrangements like this, which leverage legal process outsourcing and build seamless collaboration between lawyers and service providers, can really help companies lower their discovery costs and deal with e-discovery challenges effectively, without all the risk that bringing these functions in-house can entail. One of the strengths to this approach, of course, is that it puts highly qualified lawyers in charge of the process, each and every time, but at lower prices and with lower risks to the organization than just about any other approach.

**What you seem to be saying is that effective e-discovery administration is a capability that resides in the legal profession not the technology.**

Absolutely. Technology always changes, and so often we find companies lured by the idea that there is some kind of technological wizardry that will make the discovery a push-button process. It's just not like that. There is a unique mix of legal and technical considerations in every e-discovery project that must be carefully balanced. And, frankly, the lawyers need to be in charge. Relevance is a legal determination, and the ethical and privilege rules require clear attorney oversight and supervision of the entire e-discovery process.

There are, unfortunately, many consultants in the U.S. who offer litigation readiness services or help with the e-discovery projects. And quite often, I think, these companies are crossing the line and engaging in the unauthorized practice of law (UPL). Sometimes this is overt, but it can also be something insidious that comes about over time. A preferred discovery vendor, for example, might be the one consistent player in every lawsuit a company encounters, and because of that it establishes a certain routine way of doing things. When outside counsel is hired to litigate the case and instructed to utilize the preferred vendor, there can be a lot of unexplored assumptions, lack of oversight and lack of supervision that leaves everyone exposed.

**Are you suggesting that to get informational governance expertise you need to consult with professionals with demonstrable qualifications in that field? Just because someone says that I've done e-discovery work doesn't mean they're qualified to provide informational governance.**

Tangentially, I guess that follows. It's absolutely crazy when you think about it. Most organizations deal with this multi-million-dollar e-discovery problem by hiring people with expertise in an entirely different field to manage it, and each time the process starts all over again. They hire a patent lawyer or employment lawyer to deal with the substantive issues in a particular case and de facto entrust this same professional, who might have no expertise in e-discovery and no technical familiarity with information management systems, to handle the entire e-discovery supply chain. All too often, there's no enterprise view of the e-discovery process as a whole, and consequently no enterprise-wide strategy. This reduces the likelihood of success and increases the risk of sanctions. It's like an ad hoc exercise in crisis management every time a new case is filed. And there's often a complete absence in the legal department of the sort of project management discipline that exists in most other corporate departments.

My view is that organizations should have discovery counsel working with the company on a strategic level across the enterprise, overseeing, to some extent, each e-discovery matter to ensure consistency and cost-effectiveness. It's possible to

approach this by hiring or training someone to manage the process in-house, but if that's the approach, this responsibility needs to be clearly delegated, and there need to be performance benchmarks by which it is measured.

Most organizations don't need a full time person handling e-discovery. Even if they have a full-time litigation manager in-house, they rarely need a full time e-discovery manager. These projects tend to come in bursts. So a scalable solution tends to be more efficient, and like other activities that are not core to the organization's line of business, outsourcing this responsibility has a lot of benefits. By hiring outside counsel to supervise the e-discovery, or at least help steer the process in every case, companies have just-in-time, qualified resources that they can hire as needed, and because these arrangements are established in advance, there is more room for price negotiation and savings. And then the e-discovery counsel and its team of providers can work with the trial teams, helping them get at the relevant documents quickly every time. This improves litigation results, lowers costs, and at the same time spreads the risk of a discovery mishap outside the organization itself.

I mention this risk spreading because I think it is often overlooked. Lately, I've seen a lot of companies try to "unbundle" the e-discovery process themselves—engaging preferred providers and requiring outside counsel to use vendors that the law department has pre-selected. The problem, once again, is that after the preferred vendor is identified, the legal

department essentially bows out of the relationship and everyone goes back to what they were doing before. Nobody with appropriate expertise is designated to oversee the vendor across multiple matters. And when outside counsel comes in to work on the case, and is told it must use this provider or that provider, there's often a lot of confusion as to who's really in charge, what decisions the legal department has already made, what's left to be decided, what's a best practice and what's just an old habit. All kinds of assumptions can arise in this setting and there can be a real gap in responsibility. Plus, the external vendor becomes the repeat player in each lawsuit, and starts calling too many shots—especially if trial counsel doesn't have some expertise in e-discovery in advance. This is again how you can back into a problem of the unauthorized practice of law and failure to supervise non-lawyers.

### **Where do we go with all of this? Is there any guidance from legal regulators and bar organizations on the horizon?**

The American Bar Association (ABA) has been attempting to come to grips with legal outsourcing since issuance of Formal Opinion 08-451 (Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services) and more recently with establishment of the 20/20 Commission to deal the controversy that erupted when the ABA embraced global outsourcing. Other bar associations have also waded in. Most of the guidance boils down to some basic principles about appropriate supervision, transparency, conflicts-of-interest and billing.

Frankly, I think that the ABA and others will always remain vague on interpretive guidelines in this area, and understandably so. There's just no one-size-fits-all solution, and they really have no choice to but adopt a kind of principle-based approach. Any rules they provide must suit a range of providers and circumstances, not all of them related to e-discovery, but to legal process outsourcing in general. So the rules are going to continue to be fashioned broadly, and it will be up to the courts and market participants, including malpractice carriers, to sort out the details.

### **How is outsourcing going to fit into what is essentially the new legal services vertical of e-discovery?**

There is this view that legal process outsourcing, which is really just collaboration between service providers and attorneys, marks a kind of end of lawyers. But it's really not that alarming. Clients are demanding more value from their legal providers, and they're going to get it. We're seeing a lot of this in the e-discovery space, where clients are unbundling legal services, and making their outside counsel use a selected first-tier review firm in lieu of its own associates. Law firms will either lose this work entirely, or they'll get creative and come up with some viable alternatives. There are a lot of efficiencies that can be obtained by restructuring the traditional law firm model in this way.

In e-discovery, there's this stratification of legal services that is really spreading rapidly to other areas of the law, and I think the movement will be analogous to what occurred in the health sector with the rise of

managed care. We now have all sorts of non-doctors providing all kinds of medical services under doctors' supervision. It makes a lot of sense, it's a lot cheaper for the patient, and if it's a suitable model in that critical sector, it's hard to argue against a similar kind of delegation of responsibility in the legal field.

Still, supervision is the key. For example, it's really difficult to effectively manage a large scale document review. These are really very complex projects and aptly scaling the relevance assessments of a small group of trial attorneys across a large dataset is not a cookie-cutter task. But it can be done. Samples can be drawn and results can be tested, and one can be quite certain that a production set includes relevant, non-privileged documents. As the law evolves, I think we'll get a clearer picture of the kinds of testing and verification that must be done in other areas of the law to allow a similar kind of widespread outsourcing.

**What about offshoring? Where does it fit into the picture? Is India poised to become a dominant player in document processing and, by inference, in e-discovery?**

Well, if the labor markets remain static in the U.S. we'll have our own domestic India with lawyers desperate for work. But I am very upbeat about offshoring document reviews, if that's what you mean. I recommend it in almost every case. It

seems to me that clients in Europe are much more comfortable with this kind of approach. We're somewhat parochial in North America. But I'm a fan. I fully endorse outsourcing the grueling process of document review to someplace like India or the Philippines, for example, because we get great results. Whereas here document review is not highly regarded, there you have highly skilled, licensed attorneys specifically trained in document review who view it as a laudable, full-time career. There is a sense of pride in the quality of work they do. It's not a job of last resort for an attorney who can't get a position with a firm.

Plus the firms we work with that have established document review programs overseas have implemented some very robust quality controls and security measures. There are supervisory mechanisms built into the workflow and test and verification of results is routine. This is more effective, regardless of geographic location, than throwing a bunch of inexperienced junior level associates at a big document review project and trusting that they are smart professionals who will arrive at the best results. The research shows this is not the case; that being well-educated and well-intentioned is just not a reliable measure of accuracy in a big document review.

**In conclusion is it fair to say that within the information governance structure there's a real role for document providers/managers to play?**

Absolutely! And the truth is that the good providers have a lot of incentives to figure out how they should be supervised, and building reporting systems and feedback cycles into their workflow that allow attorneys to rigorously oversee their work. All of the legitimate providers I work with are giving careful consideration to the unauthorized practice of law and the kinds of things they are putting in place to avoid it are making them an invaluable adjunct to the legal profession—helping lawyers do a better job and to deliver more value to our clients for less.