

E-Disclosure Information Project

WHITE PAPER

How can we do this differently? How a law firm and a search company can work together for litigation clients

by

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for

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1 Introduction

1.1 Executive Summary

This is one of a series of white papers written by Chris Dale of the UK-based **e-Disclosure Information Project**. Its purpose is to show how a law firm and a technology supplier can work together to provide litigation services for the law firm's clients. The title *How can we do this differently?* is the question asked by major US law firm O'Melveny & Myers when it sat down to devise a better way of containing the costs of litigation for its clients. The firm's answer was to develop a relationship with search specialist H5 to ensure that the elements of the ediscovery function were managed as efficiently as possible, with the legal and search functions run collaboratively. That relationship has been in place for more than a year and this is a good time to see how it has been working.

1.2 The E-Disclosure Information Project

The e-Disclosure Information Project disseminates information for those with an interest in electronic disclosure in the UK courts, including judges, practitioners, suppliers and corporate clients. Its aim is the reduction of the expense of litigation. It is run by Chris Dale, a former commercial litigation solicitor and adviser on all aspects of electronic disclosure, including the court rules, the practical issues which arise and the solutions which exist to tackle them.

1.3 H5

H5 is dedicated to finding information that clients need to win cases, meet regulatory requirements, and address risks before they become liabilities. By combining advanced technologies with scientific expertise in search and information analysis, H5 delivers customized solutions to help corporations and law firms meet their legal discovery, compliance, and information management objectives.

1.4 Disclaimer

This white paper is written by Chris Dale in conjunction with H5 as an informational resource only. It is not intended to be relied upon as a source of legal or technical advice.

2 Outline of this paper

This paper first considers in general terms the changing relationship between clients, lawyers and technology providers in the management of litigation, with particular emphasis on the management of the electronic documents and data required for discovery. It then looks specifically at the relationship between law firm O'Melveny & Myers and information search specialist H5, a relationship which may point to a different way of marshalling the resources needed for managing document heavy litigation.

3 Litigation management functions

3.1 *Litigation as a Project*

Although few lawyers see it as such, a litigation case is a project not very different from any other. If you are responsible for constructing a building or producing a play or film, the elements include budgets and timelines, specific tasks which have to be performed in sequence or in parallel, tangible components to be ordered and delivered and, not least, the right number of people with a range of skills to be hired and directed, both from your own organisation and from contractors or partners.

There are deadlines – this stage must be completed before that one but cannot be started before that point; if you take too long, or spend too much money, on one stage, then at best you have to claw it back somewhere else; at worst, the client loses patience or runs out of money and abandons the project or sends it elsewhere. Like any other project, litigation may fail whether or not project deadlines are met, and part of the function of project planning is to be able to anticipate risks as early as possible – if the client is likely to lose or if costs are going to outstrip the value, then the client wants to know that sooner rather than later. The corollary to all this is that if you can manage the project successfully, on time and on budget, then that client and others will come to you for more.

3.2 *Ownership of the Litigation Project*

Until recently, lawyers could be confident that they "owned" the litigation process. They have always had to compete with rival firms, but clients kept on litigating and, for as long as they did, they needed lawyers from the moment that litigation seemed a possibility. Various things have happened to alter this comfortable state of affairs. Many clients have abandoned "optional" litigation entirely, that is, have surrendered their rights rather than sued for them, or settled cases which they would once have fought. They have put extreme pressure on their lawyers to reduce the costs of litigation by imposing cuts in charging rates, putting work out to tender, fixing fees or expecting various kinds of alternative fee structures, some of which pass part of the risk to the lawyers. Clients have both the incentive and the software to take work in-house, although the resources available have been less than used to be the case. In these circumstances, the lawyers can find themselves competing with their own clients to offer a service which is both cost-

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effective and of high quality.

3.3 Document volumes and sanctions get bigger

Meanwhile, document populations keep on growing and, in the US at least, the sanctions for mishandling them get higher and bite more often. Some in-house corporate teams, better resourced and better led than others, are able to make significant savings whilst maintaining quality. Others struggle, and find their external lawyers increasingly reluctant to take formal responsibility for work which they have not done themselves.

The real problem here is that the business of search, that is, the ability to find all the relevant documents without bringing back more documents than you need, is a skill and a science of its own, and not one for which lawyers are trained. They are also not trained as project managers and not necessarily good at estimating costs and time scales in advance, nor at meeting them in practice.

There are strong arguments for separating the practice of law and the conduct of the litigation, on the one hand, from the search function, on the other.

4 O'Melveny & Myers and H5

O'Melveny & Myers is a large US-based law firm with about 900 lawyers in 14 offices worldwide in major cities in the US, Asia, and Europe. Litigation, much of it of large scale, is a major element of its work. O'Melveny is accustomed to handling large volumes of its clients' electronic documents and data, engaging a number of providers of electronic document services, amongst them H5.

4.1 A new approach to e-Discovery

As recession tightened during 2009, O'Melveny found clients increasingly concerned about the costs of litigation and, like every other firm, had to compete on price to win some assignments. This is a firm that has spent three consecutive years on the American Lawyer's A-List – 20 firms judged best at balancing the practice of law with their obligations to the profession – a status which implies more than being merely commercially successful and competitive with its peers. With this in mind, members of the firm's management team sat down to consider the firm's entire approach to litigation, asking the question: "How can we do this differently?"

It was easy to identify that the handling of electronic discovery – in particular the task of document review and analysis – was a large and growing head of the cost and this was where O'Melveny focused. The firm observed, amongst other things, that:

- Search expertise was a distinct science of its own, and not necessarily the best use of lawyer skill or time
- It could distinguish itself as a market leader if it offered its clients a compelling alternative

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- to traditional manual document review and analysis.
- It could enhance its level of service to clients by building an “institutional memory” – that is, by developing an even more reliable and repeatable methodology, relevant to all litigators and to be used, or at least considered, in every case; every large document case is different, yet they all have elements in common for which an ad hoc approach was not necessarily appropriate.

O’Melveny’s conclusion was that the clients would be best served by a formal alliance with a suitably skilled technology provider, and it chose H5 based on extensive research and diligence and the success of earlier experiences working with them. H5 was selected over other solutions because (1) it offered a combination of truly scientific search expertise coupled with advanced technology, and (2) unlike other companies, it had submitted its search methods for evaluation under the TREC Legal Track¹ and achieved levels of accuracy that substantiated its claims.

The aim was to enable both parties to deliver higher quality services at lower cost, to both new and existing clients. But it went further than that. As search became both a bigger and more specialised element in disputes, O’Melveny recognized that it could gain another competitive advantage when pitching against rival firms for new work by being able to point to the jointly developed expertise – not just two expert contributors doing what they excelled at, but a set of procedures and a way of working which did the job better as well as more cost-effectively.

There is a further aspect of competitive advantage to do with attorney recruitment and motivation. Working with search experts can provide another interesting career path for younger lawyers with day-to-day responsibility for discovery. It gives the individuals a set of distinctive and marketable skills just as it does for the firm, and that gives O’Melveny an advantage when recruiting the best young lawyers.

H5, therefore, brings more than mere technology to the team. It allows O’Melveny to distinguish itself in the market, to deliver services to clients more efficiently, and to enhance the skills and capabilities of its trial teams.

4.2 Accelerated Delivery of Value

Neither O’Melveny nor H5 wanted to compromise in any way the quality of their respective services. The aspiration was to bring their joint capabilities to bear on the market, reducing inefficiencies common to a more conventional supplier-client relationship.

Neither side holds a financial interest or incentive in the business of the other, so that the value of the alliance offering stands on its own.

To streamline development of engagement proposals and competitive bids, the firms established standard templates and fee models which have enabled speedy response to client demands and accelerated new business opportunity. The two parties also designated business and technical alliance leaders, who have collaborated to implement contractual and workflow standards which mitigate the need to “reinvent the wheel” with the launch of each new alliance project.

¹ <http://trec-legal.umiacs.umd.edu/>

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Specifically, the streamlined procedures and standardized templates H5 developed with O'Melveny have led to greater cost-effective completion of the routine, repetitious tasks connected with discovery, liberating the lawyers to focus on substantive aspects of document review that require careful thought and strategic analysis. As the volume of projects serviced grows over time, these models will become more deeply integrated as standard procedure across O'Melveny's litigation practice.

5 Case Study

The best way of showing how the conjoined resources can be made to work for clients is to give an example. The context was an internal investigation managed by O'Melveny on behalf of a major company.

The time frame was tight and the legal team was small, with a corresponding need to minimize the number of documents which O'Melveny's lawyers needed to review without prejudicing the defensibility of the process. To complicate the situation, the subject matter was highly technical, case theories were not fixed, and the document collection was continually growing.

Crucially, H5's scalable automated process allowed O'Melveny to adjust search strategies as new theories developed and new documents arrived without having to restart the review.

Through strategic culling based on advanced linguistic strategies, H5 reduced the collection from over 1 million documents to 580,000 – saving \$1 million at the outset, which was returned to the litigation budget for more strategic, value-added law firm services.

From there H5's information retrieval experts identified a small subset of documents for review (17,000), and prioritized a targeted set of 427 documents.

H5's work enabled the small team of attorneys to conduct a quick document-by-document review and find the critical information that the client had requested. Even with rolling deliveries up until the final week of the project, H5 completed the review of the full document collection within the deadlines – a task that would not have been possible with traditional review methods.

The differentiator, so far as O'Melveny was concerned, was the integration of first-rate technology with the expertise and efficient service delivery made available to firm clients by H5. "By teaming up with H5, O'Melveny has the ability to provide a cutting-edge, highly effective, and economical model for document review as an alternative to traditional review methods," says Richard Goetz, Chair of the Class Actions, Mass Torts and Insurance Litigation Practice Group at O'Melveny. "More than ever, it's imperative that we offer our clients who are engaged in complex litigation an approach to document review and analysis that combines cost efficiency with procedures that meet legal and regulatory obligations, and incorporate scientific and disciplined approaches that will withstand judicial scrutiny. Our alliance with H5 helps us to achieve that goal."

Summary

The traditional model under which clients simply instructed law firms to manage their cases for them will not survive the twin pressures of recessionary cost-cutting and the increased volumes of



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potentially relevant data. Searching that data, for the evidence needed to assess the case up front and for compliance with discovery obligations, has become a major head of expense and one which requires a new approach.

It is not enough simply to separate the functions of search and legal analysis – the two are interdependent. Far better is an approach which brings the right skills to play at the right time, and an alliance like the one which O'Melveny & Myers has struck up with H5 is an innovative and exciting offering to clients for those cases which warrant it.

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