

BigLaw Wary As Discovery In-Housing Trend Grows

By **Gavin Broady**

Law360, New York (April 24, 2015, 2:30 PM ET) -- While Milberg LLP's recent appointment of a former legal services vendor to the seemingly unprecedented position of chief discovery officer may offer further legitimacy to those advocating for the in-housing of law firm discovery work, experts warn there are downsides to disrupting the existing lawyer-driven model.

The high costs of electronic discovery have driven the growth of a lucrative third-party vendor outsourcing market for years, but experts say some firms are looking to trim their cost margins by investing in IT infrastructure in order to bring discovery operations in-house.

"I'm seeing a lot of law firms transferring e-discovery responsibility in-house and away from vendors, because clients are not happy when they engage a lawyer who then tells them they also have to pay someone else," says Quarles & Brady LLP partner Steven Hunter. "So firms are making an investment in themselves and deciding to distribute the costs among all clients rather than hitting their individual clients with a massive third-party bill."

That's certainly true of Milberg, which has spent nearly a decade developing a set of proprietary document review and coding tools and staffing up with experts like Paul H. McVoy, a non-lawyer who founded a successful e-discovery vendor of his own before joining Milberg eight years ago.

Following a tenure as Milberg's litigation support manager, McVoy was named the firm's chief discovery officer last month, in what appears to be the first ever C-suite executive discovery position at a major law firm.

"I think it was really more a formalization of what Paul has been doing," says partner Ariana Tadler, who chairs the firm's e-discovery group. "As we were watching the space and seeing Paul's value and what he provides to the practice every day, we decided it really warranted a differentiated title to show just who he is and what he can do."

McVoy says Milberg attorneys have proven receptive to his new role, and says he hopes the elevated visibility will help win over co-counsel and clients who have occasionally given short shrift to the importance of e-discovery issues.

"The plaintiffs bar has sometimes lagged behind, often because it doesn't have the resources to invest in the technology or the right personnel," McVoy says. "In terms of that conversation, this helps further the recognition that this issue is something to be taken seriously."

Given the complex and rapidly evolving nature of the space, experts say it's a shrewd move to establish a central point of oversight for e-discovery matters, particularly where a firm has in-housed much of its work.

"It makes sense because the laws on e-discovery obligations and data security are in flux and changing all the time," says Anderson Kill PC shareholder Joshua Gold. "This approach allows you to have a core group within any law firm of a big size that lets you play to your strengths, while designating someone within the organization to keep abreast of these evolving issues."

The C-suite title also carries an element of credibility with it that may prove valuable in winning over older firm members who may otherwise be reluctant to take orders, according to Gold.

"In many instances there is a generational divide, where people my age have a higher comfort level with technology and its implications than someone who never had a PC until they were entering the latter stages of their career," Gold says. "Just by virtue of having that position, a person might be much more able to get the resources and attention necessary in this area. It's helpful to have that kind of clout."

While Milberg may be the first firm to formalize its discovery hierarchy under a C-suite executive, it's hardly alone in recognizing the importance of centralizing discovery work under the purview of a single leader, according to Hogan Lovells partner Alvin F. Lindsay.

"Over the last few years, it seems every significant U.S.-based law firm has created a department or group or single guru who focuses on e-discovery issues, while large clients are also devoting resources in-house to having a person take ownership of e-discovery," Lindsay says. "So they come in different flavors, and we may call them different things, but it's largely the same function."

Lindsay says firms should nonetheless be wary of jumping on the C-suite bandwagon given the legal industry's historic reluctance to warm up to non-lawyer executive leadership.

"That's something that goes back to the 1990s, when some law firms were making non-lawyers the CEOs of law firms and there were questions about whether lawyers would follow these non-lawyer leaders," Lindsay says. "That model did not prove to be particularly successful."

Hunter suggests that Milberg's use of the CDO title is most likely a business decision aimed less at firm attorneys than clients, who may feel reassured by knowing a top-level executive is responsible for handling their data security and discovery needs.

Whatever the client-facing advantages, Hunter agrees that the position is unlikely to proliferate given the reluctance of many attorneys to cede autonomy to non-lawyers in litigation matters.

"It's a tough sell because while lawyers are really amenable to having assistance from someone with a technology background, when it comes to explaining how their cases are litigated, I don't think they'll take that advice from a non-lawyer," Hunter says. "I'm the e-discovery liaison for our firm in Chicago, and what I've noticed is that partners really only want lawyers that they've selected working on their cases."

Hunter equates the situation to the widespread business model at hospitals where doctors are managed by non-doctors, noting that highly trained professionals are understandably protective of their hard-won

authority when they're the ones whose careers will be in jeopardy if anything goes wrong.

"Technical expertise only goes so far, because if you're going to advise people on what should be produced and how, the lawyer is eventually going to have to stand in a room with a judge or client and explain those decisions," Hunter says. "I don't know many lawyers that feel comfortable transferring that kind of responsibility to someone who doesn't have the same kind of liability if they get it wrong."

A preferable alternative would see firms appointing a tech-savvy lawyer to serve as a liaison between firm attorneys and the chief information officer, Hunter says.

"I would assume a CIO has under her purview securing all information that the firm receives, but I don't think the second element — how to best synthesize the information and get it to the other side in the cheapest way possible — is a C-suite level function," Hunter says. "Rather, I think it should be a lawyer knowledgeable about the area that will be consulted on each particular case that comes in."

At least one C-level executive is on board with the idea, however. Howard Phillips, CIO of Elevate and a former CIO at LeClairRyan, says designating a CDO is a good idea given the increasingly complicated and specialized needs of the discovery realm.

"Given the issues involved and the strategic significance for law firms, it is reasonable to create a lead or 'chief' role to apply and organize expertise, knowledge and resources to achieve a better outcome," Phillips says. "Just consider the parallels to the advent of other 'chief' roles in areas such as privacy, information security, etc. It's a logical response to need and opportunity."

Meanwhile, Lindsay suggests firms would be wise to take a step back and reconsider whether retreating from the third-party vendor model is such a wise idea in the first place.

"I think there's a comfort for law firms to be able to choose from outside vendors, to have them compete against each other and bear the cost of the constant tech upgrades as well as the risk of a data breach," Lindsay says. "The vendors I use generally seem to be very hardened in terms of preventing those kinds of things, and I would have as much faith in a vendor we've done due diligence on as I would in something in-house."

--Editing by John Quinn and Philip Shea.