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Selecting an Electronic Discovery Vendor

**Scenario**

A large, international company has been served with a complaint alleging antitrust violations. Vast amounts of electronically stored information (ESI) will need to be preserved, collected, reviewed and possibly produced in defense of this litigation. Over the years the company's legal department has retained many different vendors to assist with document collection and review, usually at the recommendation of outside counsel. A recent audit of the legal department questioned whether this is a cost-effective approach. Based on the nature of the claims, this litigation may continue for years.

**What are the Considerations of Vendor Selection?**

With so many electronic discovery vendors in the industry how does a company begin to select the most effective and efficient provider? Several general considerations should be addressed at the outset of the litigation: **Data Security and Privacy, Costs, Product Quality and Performance.**

Clearly defining the specific parameters of the case along with an analysis of the company's litigation risk profile will assist in selecting the most appropriate electronic discovery vendors. These considerations are important whether the company intends to enter into preferred provider agreements — to reduce costs and speed up the selection process when future litigation hits — or to hire a vendor that can get started immediately for this case only.

*Data Security and Privacy*

- A growing body of rules and regulations in the United States and internationally address data protection and privacy; these can, and frequently do, impact a company's operations. Consider whether a vendor is familiar with these rules and regulations and can provide viable options for compliance.
- Companies are legitimately concerned about how their data are managed, whether by outside counsel or third-party providers. Consider whether the vendor's data management policies and procedures meet the company's requirements.
- Information security is critical to business operations. Determine if the vendor has comprehensive guidelines in its policies and procedures addressing this risk.
- It is crucial to confirm the financial viability of any proposed vendor. There is significant volatility in the electronic discovery industry and data and time can be lost if a vendor unexpectedly ceases operations.

*Costs*

- Accurately predicting the final cost of a project is often difficult. Initial cost estimates are usually based on limited information. In addition, new issues will likely arise during the project that can have a significant impact on costs. Thus, it is very important to consider possible changes to the anticipated scope of work and to negotiate pricing for those tasks that is understandable and acceptable.
- Complex cases can require unique data handling, which may lead to additional resources and higher costs.
- Unexpectedly large data volumes and short production timelines also can drive up project costs.
- Various pricing options are available from vendors. Custom pricing and flat fees may provide more certainty, but they may not be the most cost-effective option for all cases. It is important to understand the cost factors, whether for the immediate case or for a longer-term engagement, before deciding on a vendor.

### *Product Quality*

- The experience and skill of the project managers and technologists at each vendor are often key discriminators among providers. Check the vendor's references, by consulting with colleagues and other counsel who have used them.
- Consider the capabilities of the vendor in the following areas:
  - Electronic Discovery Consulting Services
  - Data Collection
  - Data Processing
  - Data Hosting
  - Document Review Staffing
  - Production Formats
  - Hosting Inactive Case Data
  - Printing
  - Project Management
  - Training
  - Technical Support
  - Security
  - Use of Subcontractors
  - Conflicts checking
- A company may not need all of these services in each matter. Further, nearly every vendor has a "sweet spot" where its services excel; consider retaining more than one vendor, even for a single litigation, if there is a particular need.

### *Performance*

- An E-discovery vendor must be able to handle large data volumes, meet tight deadlines, and produce information consistent with specific requirements. The failure to produce documents in a timely fashion, or in the appropriate format, can lead to disputes with opposing counsel, loss of credibility with the court, and, at worst, sanctions. Many factors can affect production, including problems during

the data collection, processing and review. The best vendors can anticipate potential problems and resolve them in a timely fashion, allowing counsel to meet their discovery obligations

- It is important to inform the vendor of the services needed and time frames in the litigation and verify that the vendor can deliver the services that enable you to meet your discovery obligations.
- It is also important to confirm that the vendor understands and can meet your specific production protocols and deadlines.

## How to Get Started

For companies with routine or predictable litigations and investigations, it may make sense to enter into preferred provider agreements with select vendors. This can be done by issuing requests for proposal or requests for information to a number of vendors, evaluating the responses, and choosing several that meet the company's various ESI collection, review and processing needs.

Companies that face few or unique litigations or investigations may be more comfortable selecting a specific vendor for a particular matter when it arises. If time is of the essence, it may be most efficient to limit the selection to two or three vendors. Consult with your colleagues and outside counsel on their experience with vendors. Identify for each vendor the specific parameters and scope of your case and request a service agreement and Statement of Work (SOW) that suits your discovery plans and needs.

Despite some consistency throughout the industry in terms of the core services, there are unique approaches among vendors to pricing, functionality and workflow. Thus, you should determine key discriminators among the possible vendors. Further, consider how case priorities align with a vendor's policies in the areas of data security, project costs, review complexity and schedule. In addition, it is a good practice to have a comprehensive agreement that addresses various risks, including service level agreements, and that contains specific provisions regarding limitation of liability, indemnification, termination and restrictions on the vendor holding the client's data hostage.

While many vendors will try to convince you otherwise, no one vendor is the right choice for **every** litigation. Learning the strengths and weaknesses of each vendor, and comparing their services, will provide much-needed insight and will assist in the selection process.

For inquiries related to this Tip of the Month, please contact Patrick Garbe at [pgarbe@mayerbrown.com](mailto:pgarbe@mayerbrown.com), Chris Hansen at [chansen@mayerbrown.com](mailto:chansen@mayerbrown.com) or Allisa Vermillion at [allisa.vermillion@mayerbrown.com](mailto:allisa.vermillion@mayerbrown.com) from Mayer Brown's Electronic Discovery Services, or Kim Leffert at [kleffert@mayerbrown.com](mailto:kleffert@mayerbrown.com).

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