

ELECTRONIC DISCOVERY & INFORMATION GOVERNANCE

Tip of the Month



Managing the Electronic Discovery Vendor Relationship

Scenario

A large international company is in the midst of antitrust litigation. After carefully selecting the electronic discovery vendor that will handle the processing, hosting, review and production of the responsive documents, the company's counsel needs to manage the vendor relationship throughout the case to ensure success.

Does the Vendor Relationship Really Need Managing?

Even though you may have selected the best eDiscovery vendor for your case, that is just the first step. Actively managing the relationship with the vendor is important to ensuring a positive outcome at an acceptable cost. At the onset of every case, the vendor will try to set expectations of costs, timelines and deliverables. But, although litigants may attempt to anticipate the case needs during this preliminary assessment, the course of a litigation is unpredictable and surprises are likely. Issues arise throughout the matter that must be addressed. Establishing a few key processes and procedures with an eDiscovery vendor allows a company to identify and respond to the substantial costs and risks associated with the unpredictable issues that can arise during discovery.

Prepare Defensible Documentation

Documentation of the steps taken in electronic discovery is an important component of managing the vendor relationship. Counsel is advised to communicate the discovery plans with the eDiscovery team, and someone on that team should be designated to track the tasks, processes and decisions. Frequent communications and defensible documentation can be essential to a successful engagement with an eDiscovery vendor. These materials may include:

- Comprehensive training materials for the attorney review team stating the issues of the case, claims and defenses and the mechanics of the document review tool.
- Documentation of the data processing protocol listing the use of filters, such as date ranges and search terms.
- A detailed, written description of the use of advanced analytical tools, such as near-duplicate identification, concept clustering and predictive coding.

While this information is covered by the attorney-client and attorney work product privileges, it should be prepared with the understanding that, under extreme circumstances, it may need to be disclosed in defense of the party's discovery decisions and conduct.

Also, this documentation makes it easier to manage the discovery process, making systemic mistakes and resulting cost overruns less likely.

Managing Expectations, Roles and Responsibilities

Managing the expectations, roles and responsibilities of in-house personnel, outside counsel and the vendor can facilitate success in complying with electronic discovery obligations. It can also be invaluable in controlling costs. Steps to take can include:

- Creating or updating a Services Agreement or Statement of Work with the vendors and outside counsel so that each can gain a broad understanding of the other's roles and responsibilities—in particular, these documents should identify deliverables and performance guarantees.
- Communicating realistic expectations for meeting discovery obligations.
- Establishing a pre-defined escalation plan that includes a master team list with contact details that allows you to reach the key decision-makers on the team on a 24-7 basis, as necessary.

An increasingly important area for managing vendor relationships concerns indemnification and insurance coverage. Vendors should understand how possible coverage limitations may impact the delivery of services.

A key portion of the management and planning process is outside counsel's definition of the scope of collection through negotiation and litigation with the adverse party. Staging and otherwise limiting the scope of discovery may narrow the scope of the eDiscovery process substantially, making it easier to manage and less likely to result in large costs.

Managing the Workflow by Staging the Discovery Process

Managing the workflow by splitting it into distinct stages may also help contain discovery costs and ensure that the individuals responsible for handling discovery are not trying to accomplish too much at once. Steps to take can include:

- Consciously defining stages for processing the data and setting up the attorney review workflow. Identifying distinct populations of documents may make wholesale processing of all client data unnecessary and may give reviewers the benefit of human- or machine-generated analysis. By loading data in a designated order and applying early case assessment (ECA) techniques, a party may be better able to control and manage discovery services.
- Holding a kick-off meeting with all parties to review the goals of the case, timelines and strategy and to establish an electronic discovery processing workflow. Be sure to consider the end-to-end process from litigation hold and collections all the way to productions and possible trial.
- Scheduling conference calls on discovery planning and establishing clear lines of communication between the client, vendors and law firms.
- Establishing a standing meeting time. Too much time is wasted trying to bring the team together for discussions on a hot issue. Take the question of when can we meet out of the equation.
- Circulating supporting documentation in advance and finalize "to do" items during the calls.
- Establishing a primary point of contact with the vendor and clear guidance from the case team.

Consider a Managed Services Partnership with a Vendor

An eDiscovery managed services partnership can enable a litigant to offload discovery management operations and systems to a dedicated eDiscovery vendor, who then assumes an ongoing responsibility for hosting and supporting that organization's data through multiple years and matters. The advantages of this partnership can include:

- A predictable, fixed subscription-based price, which can offer considerable cost efficiency over buying such services on a project-by-project basis.
- A single overarching Master Services Agreement that precludes the need to negotiate case-by-case contracts.
- Access to a dedicated support team provided by the vendor, which gains experience handling the client organization's discovery needs over the life of the contract.
- The cost and burden of maintaining the discovery management software and storage space is wholly or largely borne by the vendor.

The managed services provider market has greatly matured over the last few years. Providers now exist that can maintain successful partnerships with several corporations and/or law firms.

Managing Services Provides Necessary Protections for All

It is important that clients, outside counsel and vendors discuss confidentiality and privilege issues as part of the increasingly complex relationships that arise with the delivery of electronic discovery services. While it is the client who holds the reins on maintaining privilege, providers of legal and technical services must be careful to maintain these vital, legal protections.

These protections require lawyers to actively participate in the process because many of the decisions made throughout the eDiscovery process constitute legal advice that may not be provided by non-lawyers. Consider, too, whether service providers will be called upon to provide expert testimony or to prepare an affidavit on some aspect of discovery. Discuss with providers which employees might be capable of testifying to defend the process, or can be relied upon for support when challenging the other side's discovery.

Importantly, while managing performance, consider auditing the vendor's data security and safeguards negotiated as part of the master services agreement. Although a formal audit is sometimes needed, generally, a thorough review of the evolving documentation surrounding the engagement ensures that procedures are being followed. Remember that it is far easier and cost-effective to maintain proper documentation from the start than to re-create it when the need arises.

For inquiries related to this Tip of the Month, please contact Patrick Garbe at pgarbe@mayerbrown.com or Chris Hansen at chansen@mayerbrown.com from Mayer Brown's Electronic Discovery Services Department, which supports the Firm's case teams and its clients in handling the demands of collecting and managing electronic discovery, or Kim Leffert at kleffert@mayerbrown.com.

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