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Choosing an e-Discovery Vendor: Ten Points to Consider

MIKE DROKE AND SKIP DUROCHER

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In late 2006, the Federal Rules of Civil Procedure were revised to specifically address the discovery of electronically stored information (ESI). As a result of the implementation of these rules, companies more than ever are required to effectively manage their ESI so it can be produced efficiently during the legal discovery process. Although the revisions are nearly two years old, recent studies have shown that companies are still struggling to adapt to the new e-discovery rules. Not only are attorneys and clients having to adapt to the changes within the legal environment, they also have to manage complex technological challenges at the same time.

A sizable percentage of business professionals acknowledge they're anything but confident regarding the e-discovery process. In a 2008 Deloitte Financial Advisory Services poll of 520 chief executives, almost two out of five executives reported to being anxious over e-discovery issues. Meanwhile, 18% reported they were uncertain as to how they'd even handle a request for ESI.

While the industry is struggling to adapt, the cost of document review has become the number one expense item in litigation discovery. Law firms and their clients have begun an intense effort to find e-document review solutions that will help manage and, hopefully, reduce these costs.

Rather quickly, a number of apparent "white knights" have ridden to the rescue: an influx of vendors are offering to provide services and assistance with the e-discovery process. Change, in any industry, creates a hotbed of opportunity for entrepreneurs and consultants. The e-discovery amendments have proven to be no exception. In 2008, it is estimated that over \$3.1 billion will be spent on ESI-related services.

Without a doubt, organizations can benefit from a competent e-

discovery vendor. However, beware of the "gold-rush" response to the situation: there are still only a handful of vendors equipped to properly handle e-discovery policies, procedures and processes. The sudden influx of vendors battling for a slice of the \$3.1 billion dollar pie has so far resulted in many vendors and consultants being under-qualified and ill-equipped to handle ESI processing and e-discovery demands.

Identifying and avoiding vendors that are struggling to perfect ESI processes isn't an impossible task. Yet learning about the e-discovery process and the new federal rules on the fly, at the moment you need to understand them, is ill advised at best. You don't want to be caught without the right knowledge or the proper resources in the heat of the moment.

This article will help you prepare to meet with an e-discovery vendor before you have a complicated matter on your hands that demands immediate attention.

UNDERSTANDING THE PROCESS

Selecting one professional in your company to oversee e-discovery matters is a best practice. It enables that individual to become fully knowledgeable about the process and unique terminology and saves your company money in the long run. This e-discovery manager can then educate others within the organization. Before this person begins talks with any vendors, it's wise to gain a basic understanding of the process.

To fully understand where the costs are, it's beneficial to understand the four main components of the e-discovery process.

1. Assessment. This is the process of determining the size and scope of the effort. It's smart to begin the process with a timeline for the entire project. If both you and the vendor have a consistent understanding of the anticipated volume of documents to be reviewed, budget and staffing needs can be better estimated. In order for any vendor to estimate a project properly, it must have some preliminary details regarding the project's parameters. Have your IT staff and e-discovery manager prepare a written scope of the project and review it thoroughly before sharing it with the vendor. You can always go back and revise the projection, but it works best to define a starting point.

Also be aware of the fact that your clients may be ahead of the e-discovery curve; an increasing number of clients are equipping themselves with early case assessments in which they bring tools that allow them to collect and pre-assess data, prior to first pass review. Early case assessment involves testing the selected custodians, keywords and other culling criteria to obtain (and minimize) estimates on the volume

Mike Droke is a partner and the head of the Seattle Office of Dorsey & Whitney LLP. He is also co-chair of the Computer Fraud and Abuse Practice Group, and member of both the Privacy Practice Group and Executive Compensation Team. He can be reached at droke.michael@dorsey.com. Skip Durocher is a partner in the Minneapolis, MN, office of Dorsey & Whitney and has been a member of the firm's Trial group since 1995 and is Chair of the firm's Insurance Law Practice Group. Durocher practices in the area of commercial litigation, with particular emphasis in the area of insurance coverage on behalf of policyholders. He can be reached at durocher.skip@dorsey.com.

of data to be collected, processed and reviewed. It may, in fact, find that the potential costs associated with the e-discovery process are greater than the value of the matter, causing the legal team to take a different approach.

2. Harvesting. This is the physical process of obtaining information from the various electronic sources within the client's organization. These include personal computers, Blackberries/PDAs, digital phones, servers, network storage, jump drives, memory sticks, CDs and DVDs, to name just a few. The list goes on, and it gets longer as technology advances.

3. First-pass document review. This is the point in the process where document clutter is substantially reduced. The documents that are most important and relevant to your case are "culled" from the larger pool of documents using a predetermined bank of key search words. This process is either done by staff, software or a combination.

4. Reporting. Project status is continuously reviewed and reported along with expense versus budget metrics. Documents are formatted to be stored for review and retrieval in a litigation database. Regular reporting also ensures adherence to any timelines or deadlines connected to the project, as well as the project budget.

IMPORTANT FEATURES OF AN E-DISCOVERY SERVICE

Choosing a qualified and experienced e-discovery vendor will save your clients money, preserve your involvement in the process (without the control risks of an outsourced approach) and provide you with the expertise your project requires to stand up in court. Although selecting a vendor may appear to be a daunting task at first, it will only make your life easier in the long run. Below are 10 key components of a strong e-discovery service. Asking the right questions about these elements can eliminate the "wanna-be's" from consideration and ensure that you make the right choice. Whether or not you want to involve your client(s) in the process is up to you. If you do feel the client should be involved, remember to ask if they already have preferred vendors.

1. Cost. Ask the proposed vendor for a written estimate. Clarify when it will be charged and whether it is a flat fee, a flat-fee plus or entirely an hourly or per-document figure. Be sure to also ask what isn't included. And don't forget to find out how long document-hosting fees will be charged.

2. Speed. Work with the proposed vendor to sketch out a preliminary timeline of the project. How quickly can the documents be uploaded and culled? How soon can the review start — and how long will it take? Note all of the responses from the vendor, and then use your best judgment to determine if the timing of the vendor's services is reasonable and predictable. Ask for a reference to determine how well the vendor met its estimate with a previous client or clients.

3. Vendor's Legal Knowledge. It's vital to work with a vendor that understands the legal context of the e-discovery process. The legal issues involved with e-discovery can be highly complex. Who, within the vendor's staff, has a J.D. or legal degree? Who understands how to adapt when the court changes its ruling or there is a jurisdiction change? If the vendor does not have legal expertise on its staff, to whom does it go for legal consultation?

4. Technical Integration. Technology quickly becomes outdated. How often does the vendor update its technology systems and software? Who monitors the updates? What software is used and will it effectively speed up the review process? What was cutting-edge yesterday can easily be outdated today. Be sure your proposed vendor is staying current on technology.

5. Security. What internal security measures have been taken to protect data? Who audits these security measures and how frequently?

6. Location. Most states in the U.S. have adopted the majority of

the Uniform Trade Secrets Act. Data sent to a vendor (including an off-shore vendor) is only as safe as the laws of the jurisdiction in which the vendor resides. Check the references of any potential e-discovery vendor as it relates to data security procedures and processes. Did previous clients feel their data was safeguarded properly? Ask about the most complicated matter the vendor has handled?

7. Quality. What quality control process is in place? Can the client periodically spot-check the process? Any reluctance by a proposed vendor to agree to such a spot check is cause for concern.

8. Integration with Trial Team. e-Discovery is a core part of the litigation process. Integration of the review and litigation teams is essential. How integrated can the trial team be in the review itself? How quickly will they learn when a "smoking gun" has been found? To what extent are they involved in early case assessment? What are the quick and early privilege determinations?

9. Staff. Experience is everything. How long has the vendor been providing services? What kind of training does the vendor provide its staff? What is the average time key employees have worked for the vendor? What is their project management experience?

10. Beyond Immediate Needs. How well developed is the vendor's customer service system? What are the hours available for support and technical questions? How difficult will it be to close out a case? What is the final format of the out-processing? Is the format acceptable for court? Where there be additional processing fees at that time?

TWO FINAL POINTS TO REMEMBER: DO NOT SIGN YOUR NAME ON THE DOTTED LINE WITHOUT...

1. Seeing a Service. Don't believe without seeing. Meet with a provider personally or view a demonstration. Providing "service" is an ambiguous description. Just because a service looks appealing in marketing materials or on the Web doesn't necessarily mean what you see is what you get. See the service site for yourself: what kind of resources can the vendor draw on? How big is its staff? Does it subcontract the majority of their work?

2. Ensuring Quality Control. The revised Federal Rules of Civil Procedure are in place to ensure that you do everything within your power to keep ESI organized and easily accessible for litigation matters. Quality control with a document-review service is a crucial step of the process and should begin with the initial review. Ensure that staffers are maintaining a high-level of accuracy and identify problems early on to keep a lid on unnecessary costs. Work with your service provider to identify policies that will be set in place to ensure service of the highest quality.

CONCLUSION

e-Discovery is a core part of modern litigation. Although the process of selecting an e-discovery vendor may seem quite daunting, the investment pays big dividends over the long haul. You are protecting your clients' information and conserving your clients' money and you can't afford to cut corners. Arm yourself with knowledge, prepare for the process with questions, and give yourself time to make a decision. The choice of a quality e-discovery vendor can significantly enhance your overall service level to your clients and will greatly increase the chances of a better result.