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Avoiding Pitfalls With eDiscovery Vendor Engagement

By Arnold Blair

Like every other aspect of the practice of law, electronic documents are an integral part of today's discovery process. Today, almost all legal matters involve some type of data that needs to be collected, analyzed, and potentially produced. This is often seen as a daunting and potentially expensive process. Not only are there legal standards regarding electronic discovery, but there are also potential legal and financial penalties if not done correctly. As a result, electronic discovery—"eDiscovery"—vendors have become essential for many law firms and in-house legal departments.

eDiscovery vendors' original mission was to assist with the collection, processing, review, and production of electronic data. This has not changed much over time, but the number of potential sources of data has changed greatly. While eDiscovery vendors originally dealt mainly with emails and electronic documents, they now are also expected to be experts in data from phones, cloud storage sites, messaging applications, crypto currency transactions, and anything else touched by technology. This explosion of data, and the need for expertise regarding it, has also created attorney positions at law firms and in-house legal departments whose work centers not only on the legal and practical intricacies of modern-day technology, but also the vendors who assist with the process.

As a result, in-house counsel needs to be prepared when any matter comes up that involves discovery, such as responding to subpoenas. Engaging the right vendor and experienced outside counsel will often go unnoticed when everything runs smoothly. Making the wrong choice, however, can create a nightmare scenario filled with large bills, potential legal consequences, and lots of unwanted attention.

To avoid this, here are several tips that can help make sure any engagement with an eDiscovery vendor runs smoothly and efficiently.

Discovery Counsel Are an Excellent Source To Consult With

Some eDiscovery vendors try to promise the moon but deliver something that is more grounded in reality. The main reason is, as with all types of technology, there are always new products getting developed that could revolutionize the analysis and handling of electronic documents. Although new and untested, these products are often talked about more than products that are proven to work. When a new matter comes up involving eDiscovery, it may be a good time to

consult with a Discovery Counsel who can offer an unbiased opinion on a specific vendor or product, whether new or already accepted. They are an excellent source to use when deciding which vendor to engage for a project. Companies may also want to consider hiring their own eDiscovery counsel if they deal with enough internal eDiscovery issues.

Not All Vendors Are Right for Every Job

No vendor can be everything for everyone. Some cases require different areas of expertise. Consider the following when choosing a vendor. Do they specialize in internal investigations or litigation? Do they have experience with patent litigation, antitrust, or criminal cases? Are they known for document collection, database hosting, staffing contract attorneys, or data analysis, or have they just started a division offering what is needed? Spending time investigating the experience of the vendors being considered can save a lot of aggravation in the long run.

Set Expectations, Develop a Relationship, and Keep the Lines of Communication Open

Good communication can help a relationship with an eDiscovery vendor grow and avoid it becoming a one-and-done project. Like any successful relationship, communication is key with vendors. Do not assume a vendor can read your mind or understand the significance of a deadline. Let vendors know your expectations, concerns, and deadlines. Unless these are known, it will be very hard to have a successful engagement. At the start of any matter, it is also important to make sure there are regular check-ins and updates provided. For example, if a large set of data needs to be processed over the weekend and this is known on Monday, do not wait until Friday at 5 p.m. to tell them. A simple heads-up will allow them the time to make sure the correct resources are in place to assist.

Do Not Just Sign the Vendor Contract—Make Sure To Review It

A statement of work (SOW) is a term that refers to a contract that governs your relationship with a vendor. SOWs may be written with language favoring the vendor, partially because vendors generally use a standard template SOW. For example, pricing sometimes does not match up with what was verbally promised, fine print can contradict what was represented regarding parties' rights and responsibilities,

and consent to third-party outsourcing is buried within. If, when reviewing an SOW, something does not seem correct or needs to be changed, remember the tip above and speak up. Do not assume everything will be fine and any issues can be addressed after the SOW gets signed. A written agreement has a way of making people forget what was verbally agreed upon.

Pay Attention to How Invoice Discrepancies Are Resolved

Disagreement over charges on an invoice can occur in any business relationship. More often than not, they are resolved amicably and within a reasonable time. There is nothing more frustrating than having a billing issue going unresolved for months and having a potentially large amount of money in dispute. Vendors will often use language in the SOW addressing the responsibility of their clients regarding disputed invoices, but often their obligations are open-ended and vague. One way to avoid this is to make sure language is included in the SOW setting a reasonable time period to address and resolve billing disputes. Remember to also have someone with knowledge of the engagement review invoices as soon as they are received and discuss any issues immediately.

Be Very Specific About What You Are Paying For

While it is true that there are some aspects of working with data that are unpredictable, most services can be estimated within a reasonable range. Sometimes, estimating the potential cost can be complicated. Pricing lists can be visually complicated to follow, costs for services is often a la carte, and fine print can alter the list price when examined closely. A lot of costs are also bundled into what is referred to as “project management” or “tech time.” While there is a certain amount of time which is justified and needed to work on any matter, be aware of charges that seem excessive or out of the ordinary or for additional services that were not agreed to. It is best to discuss what charges are acceptable and how they should get described on an invoice before an engagement begins to ensure everyone is on the same page.

Make sure what services are charged for is clear, unambiguous, understood, and agreed in writing. For example, a vendor may say the cost is \$40 per GB to process data. The SOW will also say \$40 per GB, but buried in the fine print is language stating the size of data processed is determined after data is ingested for processing. What some vendors may forget to mention is that, after data is ingested, the size becomes 30% to 80% larger than what was provided. That could lead to a huge increase in the total cost to process, say, 500GB of data. For that reason, make sure to have the vendor agree in writing how the data processed is calculated. This can save a lot of headaches in the long run.

Know Who Is Working With You

I have found one of the best and telling differences between vendors is the people they hire. They can vary from someone fresh out of college, who is still learning the ropes, to a veteran in the legal industry with years of experience. If there is any concern regarding the quality of people who work at a company, ask about their credentials and what value they bring to the table. Also keep in mind vendors often use third parties to perform some processes. If this causes concern, discuss it with them. It is no fun dealing with a situation that could have been avoided if only someone knowledgeable was available to assist.

If You Have a Whale of a Case, Go With a Vendor You Know

Every vendor wants the big case: the one with terabytes of data for collection, processing, and review that will last for years. They can also bring everyone out of the woodwork to offer better technology or a new way to keep costs under control. This may seem great, but handling a major litigation is not the time to hire a vendor you have no relationship with. Keep this in mind when a whale of a case comes across your desk—you want a vendor you have worked with before and has proven themselves with good work and service.

Conclusion

As technology continues to advance and artificial intelligence becomes the next big thing, it is important for in-house counsel to keep up to date on electronic discovery issues or have someone available with the expertise to assist with engaging eDiscovery vendors. Keeping the tips above in mind when engaging a vendor can help keep expectations in line with reality and avoid potential pitfalls. This can help reduce the risk and reduce the chances of it becoming a costly lesson rather than a positive experience. Remember, there is no such thing as a free lunch and experience matters when it comes to vendors, and that is especially true regarding electronic discovery.

Arnold Blair is discovery counsel at MoloLamken LLP. He is highly experienced with discovery, with a focus on practical and defensible solutions in connection with high-stakes government investigations and litigation. He is experienced in managing all aspects of eDiscovery and assisting case teams with strategies to achieve desired goals and outcomes. He excels in leveraging advanced technology, data analytics, and industry best practices within the discovery process.