

CONTRACTING WITH THE E-DISCOVERY VENDOR

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E-discovery has become one of, if not the riskiest and most expensive aspects of modern civil litigation. Breakdowns in a party's effort to collect and produce electronic records can all too quickly come to dominate a lawsuit, potentially undermining its substantive merits before even the first fact deposition is taken in the case.⁶ And even in the best of circumstances, the costs associated with a large scale, multi-million document production can be staggering.⁷ More, as any seasoned litigator will tell you, in any case involving the production of a significant volume of electronically stored information (or "ESI") you are almost assured of running into complications, set-backs, and delays.

While such problems may prove to be nothing more than a passing aggravation, even minor issues can rapidly snowball into major problems that consume inordinate amounts of time and money to remedy, while simultaneously damaging the credibility of both client and counsel by the court, and possibly even resulting in the imposition of sanctions.

As courts become increasingly frustrated—and impatient—with respect to the production (and use) of ESI in litigation, the collection, processing, review, hosting, storage, and production of electronic records and information is simultaneously becoming increasingly complex and demanding, consuming ever more time and resources. In such an environment, resort to the technical expertise and resources of outside discovery vendors and consultants can be an

essential investment for a litigant, as evidenced by the dramatic expansion in e-discovery businesses in recent years—a trend that is expected to continue for the foreseeable future notwithstanding the current economic malaise.

As with any vendor relationship, ensuring that you will get quality work product rendered in a timely and cost-effective manner from an outside e-discovery consultant requires careful planning and proactive management. It starts with due diligence in talking with the vendor to assess its areas of expertise. Next, it requires counsel to oversee conversations among people with the right expertise at the vendor and client to assess what needs be done and the problems that may be encountered.⁸ A well conceived written contract with a thoughtful, flexible project agreement or statement of work can be a useful tool in helping to facilitate a well-coordinated and disciplined approach to the demands of e-discovery. A close working relationship among the vendor, counsel, and the client is critical as well. The combination of the plan and the collaboration are essential to handling challenges from opponents, the court, and even clients and to avoiding breakdowns in the relationship.

E-discovery projects are as varied as the clients and cases to which they relate. By the same token, e-discovery vendors and the nature of the vendor relationship are incredibly varied. Vendors offer a broad spectrum of approaches, expertise, and resources, while vendor relationships may be preferred or exclusive; involve services, software or both; and apply to a single case, a defined type of litigation or a specified term. Structuring a sound contractual relationship with an outside vendor requires that you have a solid grasp of the nature and scope of the project at hand. Not only will this information allow you to identify and address potential problems before they arise, it will also help ensure that you select the right vendor for the job. In larger cases, a collaborative approach can be an invaluable tool for identifying critical path items and potential complications, as well as the right vendor for the job. Once you know the what and the who, you need to determine the how. This includes consideration of a broad spectrum of factors, including anticipated deadlines, demands, user access requirements, technology support needs, evidentiary considerations, data security, risk management concerns, and the like. Clearly identifying the role, needs, and responsibilities for each interested constituency in the project—vendor, counsel, and client—as early as possible is an essential component of any successful e-discovery strategy.

But even with all of this information in hand, fashioning a vendor contract that captures the elements and nuances of a particular e-discovery project in a manner that adequately protects the vendor, the lawyers, and the client is no small task, especially in a trying economic environment. The vendor contract needs to fit the project; there is no on-size-fits-all format or approach. Nonetheless, there are common topics and questions that need to be considered every

time a vendor is engaged to assist with an e-discovery project. Following is a brief summary of many of the basic areas of concern in most vendor relationships, together with examples of the types of questions that ought to be asked and answered as you prepare the vendor contract.

I. PROJECT SCOPE

Obviously it is impossible to anticipate every need and issue that may arise during the course of discovery. Litigation is a dynamic and often reactive enterprise, and e-discovery is subject to all of the same vagaries and unpredictabilities as any other aspect of litigation practice. Nonetheless, it is usually possible to articulate broad parameters for most e-discovery projects. Doing so requires consideration of the following issues:

- Will the project or particular phases in the project likely to be subject to significant time constraints?
- What is the volume of data likely to be involved?
- What types of data are expected to be involved (email, electronic files, databases, voicemail, instant message, picture formats, paper)?
- What types of storage media are anticipated?
- Are there any unique storage media concerns or issues?
- Will unusual or outdated storage media need to be mined?
- What staff resources can the client provide?
- Can the vendor scan, OCR and process up to *n*-boxes of paper documents collected from the client, too? What are the vendor's costs and capabilities for unitization and bibliographic coding?

II. PROJECT REQUIREMENTS

Once you have a sense of the scope and parameters of the project, the next step is to develop an inventory of the tasks and tools that will be needed to get the job done in an efficient and cost effective manner. This requires consideration of a variety of issues:

- What data privacy requirements apply and how will they be met (EU Safe Harbor, FACTA Red Flag)?
- How will data be transmitted, including the need for data encryption, virus protection, and the like?
- How will the relevant data be extracted?
- How will password-protected files and other exceptional items be handled?
- How will data integrity be preserved during the extraction process? In particular, how will the relationship between e-mails and their attachments be preserved?
- Will storage media imaging be required?
- Is data recovery or forensic analysis likely to be required?
- How will de-duplication be handled?
- What are the requirements for data processing (What metadata needs to be captured? What form of unique record identifier will be used things (like the notes section of PowerPoint slides, hidden columns or rows on Excel spreadsheets, and Excel formulas))?
- How and where will data be stored?
- How will data be made available to counsel and/or the client?
- What types of filtering tools and search technology may be implemented?
- How and by whom will the data be reviewed??
- How will data be organized or coded?
- In what form is data to be produced and who will produce it?
- How will the productions be organized and tracked?

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- What type of reports (e.g. exception reports) will be provided?
 - How will chain-of-custody issues be addressed?
 - How will any licensed software needed for attorney review and access be supported?
 - Will foreign language issues need be addressed?
 - How will legacy data and other data in inaccessible formats be handled?
 - How will transparency in the project be assured?
 - How will work product and attorney-client communications be segregated?
 - How will confidentiality requirements be met and policed?
 - Can the production be exported in a format compatible with the opponents' database product?

III. CONTRACT VARIABLES

Essential to the orderly execution of an e-discovery project is a clear understanding of the rights and responsibilities of the parties who will be involved. Addressing such issues up front can head off disruptive and potentially embarrassing disputes down the road.⁹ By way of example, consider the following questions:

- Who will contract with the vendor – counsel or counsel's client?
- Can the client demand the replacement of vendor personnel assigned to the project and under what circumstances?
- Will any work be subcontracted to other vendors?
 - will there be any cost mark-ups for work contracted out by the vendor?

- what sub-contractors will be used?
- may the client reject proposed sub-contractors?
- why is it necessary to use sub-contractors?
- have sub-contractors signed a non-disclosure agreement?
- what information must be provided about proposed sub-contractors?
- what mandatory contract terms are required in any sub-contractor arrangement?
- will the vendor need to obtain special tools or software and how will such costs be allocated?
- How will problems with data extraction or production be handled?
 - who bears the risk of unforeseen costs? who bears the risk for data loss or corruption, software failures, storage media deterioration?
 - what are the known file types that the vendor cannot process?
 - how frequently will the vendor be expected to alert the client to data that can't be processed?
 - what is the tracking mechanism for resolving these problems?
- Are there any special cost items?
 - for processing computer images?
 - for processing back-up tapes?
 - for processing audio or video files?
- How will change orders be handled (unanticipated increase in data volume or change in data format, changed search needs or production format)?
- Have potential business and legal conflicts been vetted?

- What limitations are desired with respect to the vendor's ability to assign the contract?
- Will testimony be required and, if so, who will be responsible?
 - has a suitable vendor representative been identified to testify as to the process as employed and/or to provide expert opinions
 - are there *Daubert* issues be addressed?
 - do anticipated expert witnesses need to be segregated from work product and attorney-client communications?
- What state's laws will apply?

IV. PROJECT MANAGEMENT AND SUPPORT

- Who will have project management responsibilities at the vendor, counsel, and/or the client?
- What measures have been taken to assure accessibility of project leaders for problem resolution?
- Will a formal project chain of command be established?
- What type of technical support will be provided, and will it be available outside of normal business hours?
- Is the document repository available 24/7?
- Are there regular downtimes for maintenance?
- How are emergency downtimes communicated? What's the record of emergency downtimes over the past year?
- Have any software upgrades been scheduled?
- Is a formalized reporting structure between vendor and counsel appropriate?

- How will complaints be communicated and addressed?
- How will status and progress reports be provided?
- Is the contemplated project documentation adequate?
 - are processes defensible as reasonable, appropriate, and effectively implemented and administered?
 - are processes being thoroughly documented?
 - who is in a position to testify about project and processes?

V. QUALITY CONTROL¹⁰

- What are the qualifications of the individuals involved in the review?
 - do they possess the competencies enumerated in recent case law?
 - how are each of their competencies applied to measurably improve results?
 - What level of experience do they have in:
 - knowledge transfer?
 - subject matter?
 - linguistics?
 - statistics?
 - computer science?
 - project management?

- How is the knowledge of what makes a document relevant accurately transferred from case counsel (supported by subject matter experts) to the system?
 - what is counsel’s involvement in the substantive design of the relevance criteria?
 - once the relevance criteria have been defined, what steps are taken to preserve consistency in the interpretation of relevance?
 - how does the process treat “gray” documents for which the relevance is unclear; is the status resolved; how does the treatment of these documents affect the definition of the target set, the sampling methodology, and the measurements of accuracy?
- What variables in the review are tested to ensure that the process is defensible and does not introduce elements that cause inconsistent or inaccurate results?
 - can the search method be reviewed and the reason for each relevance assessment justified; can counsel understand, explain, and take ultimate responsibility for the methods being employed?
 - what is the impact on the process (and the resulting assessments of relevance) when the document population grows over time?
 - how does the medium of communication (*e.g.*, email, formal letter) affect the ability of the system to consistently identify language that denotes relevance?
 - what is the role of “exemplar” documents in the process, and how are such documents chosen; are they used as objects of discussion to refine understanding of the relevance criteria, or are they inputted into a system that automatically adjudicates which words to search?
- What steps are taken for quality assurance?
 - how is the system corrected and improved?

- what quality control processes exist to improve the understanding of relevance and the retrieval of relevant information?
- what changes can be made to the process, how are they controlled, and how predictable are their effects?
- How sensitive are the metrics and measurement protocols to the requirements and risks of the review?
 - what expert guidance did counsel receive regarding the appropriate measures of precision and recall for the legal task at hand?
 - what if any sampling methodology is employed in the process; how is information provided by the sampling methodology used to improve performance; what is a satisfactory level of performance for the review, and how is that achieved?
 - how, and at what points, is performance monitored over the course of the review?
 - what is the quantitative effect on performance of the nature of the document population (*e.g.* type of document, heterogeneity, number for relevant documents in the collection)?
 - how are valid and precise measure of performance obtained when reviewing a changing document population?
 - how is the level of sensitivity to error of the measurement protocol characterized at each stage of the review?

VI. PROJECT AND VENDOR SECURITY

- How does the vendor ensure the security of buildings, networks, and other physical assets?
- Does the vendor have in place an adequate disaster recovery plan, including adequate back-up and restoration procedures and resources and alternate facilities?

- What measures has the vendor taken to ensure data security, both in terms of protections against external attacks (hackers, viruses, and the like) and in terms of secure data transmission?
- How will the vendor ensure the preservation and integrity of original media or records?
- What measures are in place to ensure the confidentiality of sensitive data and information?
- Is the vendor adequately insured?
 - are the vendor's employees bonded?
 - does the vendor have appropriate property damage coverage, including lost or corrupted data and documents for third-parties/customers?
 - does the vendor have general liability and errors and omissions coverage?

VII. PROJECT TERMINATION

- Under what circumstances can the contract be terminated?
 - material breach?
 - failure to meet scheduled deadlines or production benchmarks?
 - merger or consolidation?
 - pre-bankruptcy insolvency?
 - loss or change of key personnel?
 - non-payment or late payment?
- Is the vendor obligated to cooperate in project transfer to a replacement?
- Who owns the data and vendor work product upon termination?

- Can the client enforce the immediate release of both data and work product upon termination (even if there is a payment dispute)?
- Will there be data return charges, and if so, to what do they apply, how will they be calculated, and what is the rate structure?
- Can and should the vendor be required to waive any possessory lien rights over data or work product?
- How will confidential and/or other protected categories of data be handled at termination?
- Will there be a limitation of liability and/or indemnification provision?
- In the event of a dispute, do the parties wish to mandate confidential mediation and/or arbitration as a condition precedent to and/or in lieu of public litigation?
- Is provision made to escrow software code, manuals, technical information, etc. in case of contract termination or vendor failure?

SOURCES

1. John M. Barkett, *E-Discovery: Twenty Questions and Answers* (ABA Book Publishing 2008)
2. Sedona Conference, Working Group Series: *Best Practices for the Selection of Electronic Discovery Vendors* (June 2007)

APPENDIX

- I. Discovery Project Management Template
- II. Document Review Budget Estimate
- III. Model Vendor Agreement
- IV. Model Nondisclosure Agreement
- V. Representative Cases
 - A. *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Ins. Co.*, USDC, S.D.N.Y., No. 07-Civ-10639, Order (March 19, 2009)
 - B. *Bray & Gillespie Management LLC et al v. Lexington Insurance Company*, USDC, M.D. Fla. No. 6:07-cv-00222, R. Doc. 460, Order (March 4, 2009)
 - C. *Victor Stanley, Inc. v. Creative Pipe, Inc., et al*, USDC., D. Md., No. MJG-06-2662, Memorandum and Order (May 29, 2008)

ENDNOTES

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2. Mark is Of Counsel in Shook, Hardy & Bacon's Kansas City office, where he's a full-time member of the firm's eDiscovery, Data and Document Management team
3. Kent A. Lambert is a shareholder in the New Orleans office of Baker Donelson Bearman Caldwell & Berkowitz. Mr. Lambert's practice emphasizes trial and appellate work in complex litigation, including civil fraud, lender liability, unfair trade practices, and business torts. Mr. Lambert is a member of Baker Donelson's E-Discovery Task Force.
4. Browning Marean is a partner at DLA Piper (U.S.) LLP, in their San Diego office. A co-chair of DLA Piper's Electronic Discovery Readiness and Response Group, Mr. Marean concentrates his practice in the areas of business litigation, technology matter, professional responsibility, and knowledge management.
5. Michael Pontrelli is a Director and Corporate Discovery Specialist at LexisNexis Applied Discovery for the Western United States. Mr. Pontrelli consults with corporate legal departments and their outside law firms to navigate the entire electronic discovery process and assists with the development and implementation of repeatable, defensible, and cost-savings strategies.
6. See, e.g., *Bray & Gillespie Management LLC et al v. Lexington Insurance Company*, USDC, M.D. Fla. No. 6:07-cv-00222, Order [Doc. 460] (March 4, 2009), attached hereto at Appendix V-B.
7. See Appendix II.
8. For further guidance regarding the components of an appropriate review process, see *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-09-2662 (D. Md. May 29, 2008), attached hereto at Appendix V-C. See also generally, e.g., *Heriot v. Byrne*, 2009 WL 742769 (N.D. Ill. Mar. 20, 2009).
9. A model vendor agreement and non-disclosure agreement are included in the Appendix hereto as Items III and IV, respectively.

10. For a judicial “wake-up call” regarding search and quality testing in the context of e-discovery, see the opinion in *William A. Gross Construction Associates, Inc. v. American Manufacturers Mut. Ins. Co.*, No. 07-CA-10639 (S.D.N.Y. March 19, 2009), attached hereto at Appendix V-A.