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Is Your Outside Counsel Up to Snuff in eDiscovery? 5 Questions to Ask

Litigation and Dispute Resolution

CHEAT SHEET

- ***Credentials.*** Whether your outside counsel outsources or does the eDiscovery work in house, determine the credentials of the eDiscovery platform project manager.
- ***Pricing options.*** There are two basic pricing options for eDiscovery platforms: a per-service basis or flat-fee. When comparing options, counsel should consider the expected length and complexity of the case.
- ***Data collection.*** In-house counsel should ensure that outside counsel are knowledgeable about data privacy and cross-border data transfer laws internationally.
- ***Customization.*** As many eDiscovery platforms are customizable, in-house counsel should inquire about customizations that reduce cost and increase efficiency.

The amount of data in discovery* has increased dramatically in the internet era. The average employee sent or received around 125 emails per workday in 2015, which translates into more than 3,200,000 messages a year for an organization of 100 employees. The quality of eDiscovery tools to handle such a massive amount of data has improved greatly over the years, but use of these tools varies dramatically among litigators. While it is not necessary for every litigator to be an eDiscovery guru, it is increasingly necessary for a legal team to either include or consult with someone who is.

*Although this article focuses on litigation, the same principles apply to other large data collections for legal purposes, such as government investigations and compliance.

> The cost of eDiscovery, including attorney review time, is often the most expensive aspect of a legal matter.

Outside counsel's competence in the eDiscovery arena can have a remarkable impact on legal costs, quality of client service, and potentially the outcome of the matter. Most eDiscovery platforms are more than just web-based software for viewing and producing documents; if leveraged properly, they can provide powerful insight into the facts, risks, and opportunities of the case. To ensure counsel is working both efficiently for the company's bottom line and effectively for the benefit of the legal matter, discuss the following five questions with them, whether during the process of selecting counsel or in the midst of a matter with existing counsel:

1. What are the credentials of the project manager who will be managing the eDiscovery platform?

The skill of the project manager for your matter can make a critical difference to the effectiveness of the outside legal team. Practices vary regarding who that person should be. Some firms tap outside service providers. Others have an internal department to handle eDiscovery, including data analysts (to process the data) and project managers (to oversee and manage the case within the eDiscovery platform). One is not necessarily better than the other, but the choice may color the discussion regarding some of the questions below. Either way, eDiscovery costs are generally itemized, whether invoiced by a service provider or listed on a law firm's bill.

Important note: When eDiscovery work is handled by an outside service provider, but included on the law firm's bill, the law firm could be marking up the cost they are charged by the provider. In-house counsel should either insist on being billed directly by the service provider, or ensure they understand

the pricing provided by the provider, including any mark-ups. *Your company should not accept mark-ups on work that was performed by a third-party service provider.*

If the firm does not have an internal department and has not chosen a service provider, ask outside counsel to get quotes from multiple service providers, or do so independently. If the firm recommends only one service provider and the firm's preferred eDiscovery platform is not proprietary, locate a list of preferred providers from the creator of the platform for additional options.

Considering alternative platforms is not as straightforward as considering service providers that are not among those recommended by outside counsel. A platform that is new to outside counsel, or even disfavored, would likely require training and could result in underutilization of advanced (or even basic) features that provide the types of benefits discussed throughout this article. It is thus optimal for outside counsel to be on board before seeking quotes based on platforms unfamiliar to the legal team.

While many different eDiscovery platforms can satisfy clients' needs, the quality of the professionals managing the project is critical for success. Proprietary platforms likely do not have formal credentials for project managers, but service providers with proprietary platforms have a vested interest in making sure their project managers are proficient in that platform. A project manager's credentials are particularly important when the law firm has an internal eDiscovery department since firms do not have the same incentives as service providers to require certain credentials of project managers to be able to sell their services. For example, where Relativity is the eDiscovery platform, the most important credential is a Relativity Certified Administrator (RCA), which requires continued learning credits to maintain.

2. What are my options for eDiscovery pricing?

The cost of eDiscovery, including attorney review time, is often the most expensive aspect of a legal matter. There are two basic pricing options for eDiscovery platforms. Most service providers offer traditional à la carte pricing on a per-service basis. Some also, or alternatively, offer "all-in," or flat-fee, pricing. The former, per-service pricing, involves itemized costs on a per-gigabyte (GB) or per-page basis for activities like processing, identifying text (using Optical Character Recognition, or OCR), imaging, Bates-numbering, and other services required for production, email threading, and so on. In contrast, all-in pricing may appear to reflect a higher initial per-GB price point, but that price often includes basic services such as those necessary to create a production volume, as well as advanced data analytics features.

Both pricing models tend to include monthly recurring hosting charges, as well as separate hourly fees for technical and management personnel, since the demand for those resources is highly variable by case, procedural posture, and experience level of outside counsel. However, the all-in pricing model is more predictable than à la carte pricing, as the largest costs are incurred when documents are initially processed, rather than when outside counsel requests certain services. Keep in mind that future costs can be challenging to estimate with per-service pricing, and can easily exceed the cost of all-in pricing even if only a selection of the advanced features available are used. In comparing pricing structures, counsel should consider the nature of the case: Is it one that is likely to settle, or is the company planning to fight it out over a long period of time? Are the facts complex, with evidence fairly straightforward, or does the case require a significant number of documents?

Collections gone wrong

Collections are surprisingly easy to conduct improperly. For example, if files are copied (or dragged-and-dropped) from an employee's hard drive onto a USB drive, certain dates associated with the file can be automatically updated — even the "created" date. Opening certain types of files, such as database files, can automatically update the identity of the last author. If information is not properly preserved, courts can impose significant sanctions, including evidentiary sanctions. Where conduct is particularly egregious and information has been destroyed, or insufficient preservation efforts have resulted in the destruction of evidence that could show whether a certain fact is true or not, the court could instruct the jury to treat that fact as proven true.

How to handle large data sets

There are many ways to address data sets that are hundreds of gigabytes or even terabytes. First, it is not necessary to process all of the data. A simple list of the contents can be provided to determine what to process. Additionally, data that is a lower priority, or that will be subject to search terms, can be pulled into a culling database for search purposes (at a lower cost). After searching or reviewing the text within those documents, target documents can then be identified and pulled into a review database. Using this process can cut processing costs down from US$100,000 to US$10,000 or even less.

A notable difference between à la carte pricing and all-in pricing is whether using advanced data analytics features incurs additional costs. Data analytics includes features such as:

- Email threading, which organizes emails by conversation;
- A conceptual index, which allows documents to be searched by concepts instead of text;
- Grouping documents by conceptual similarity; and
- The ability to find documents that are similar to a document or paragraph of interest.

The types of data analytics features available vary not only by platform but also by the version of that platform used by the service provider or firm. If emails and other correspondence comprise a significant portion of the review set, all-in pricing is often worth the higher initial price tag because properly utilizing email threading can drastically reduce the number of documents that require review. Another factor that can increase the benefit of all-in pricing is whether the opposing party is providing metadata* — that is, information about the data, such as its size, date, and type. If they are not providing metadata, advanced data analytics features may be particularly helpful in reviewing a large number of documents in an efficient manner.

*Metadata is often referred to as "data about data." In this context, it is the data describing the non-content information about a given document or email, such as From/To/CC, Subject, Date Created, Date Last Modified, Author, etc. The impact of this factor varies across platforms as well as among service providers — advanced features in some platforms and third-party developments do not require metadata.

In-house counsel should also make sure that the service provider contact (or internal eDiscovery department contact) and the outside legal team are both aware of the pricing structure and the types of requests that would incur significant costs. Many in the eDiscovery community have more than one example of upset clients receiving surprisingly large eDiscovery bills. Something as simple as requesting PDF copies of a large number of pages could incur high costs, depending on the pricing structure. At a minimum, there should be a new estimate for every data collection, and in-house counsel should be given an opportunity to approve the estimate before costs are incurred.

3. Who will be handling data collection, and will it be done in a defensible manner?

The defensibility of data collection can have a dramatic impact on risks during a litigation matter. The importance of who handles data collection depends in part on a company's IT resources. In-house counsel should discuss the nature of the company's internal resources with outside counsel, who should be able to provide guidance as to the best path forward. Ideally, your company's IT personnel will have access to Microsoft Exchange Server (for collecting emails) or will know how to collect data using a write blocker — that is, a tool that permits read-only access to data without compromising the integrity of the data. In that case, the company need not depend wholly on outside counsel's performance. Of course, in-house counsel should still discuss with outside counsel potential downsides to using internal resources, such as having company employees called to testify regarding their collection process. If a company does not have personnel with those skills, in-house counsel should make sure the service provider or outside counsel does.

Although lawyers bear the ultimate responsibility to ensure that eDiscovery is performed properly, it is generally performed by specialized employees of a service provider or law firm. Most lawyers do not have the technical expertise to perform e-document collection in a defensible manner, such as using a write blocker. Incorrect preservation or collection can be sanctionable, including adverse evidentiary inferences, when the error cannot be rectified once discovered. It is critical to ensure that outside counsel have a plan to preserve and collect in a defensible manner.

If a company has an international presence, or if data collection involves citizens from another country, in-house counsel should also make sure that outside counsel are knowledgeable about data privacy and cross-border data transfer laws in other countries. If outside counsel do not have much experience in this area, request that they consult with someone who is knowledgeable as soon as a potential custodian is identified who may be protected by another country's data privacy laws, if not earlier.

Using data analytics in an offensive manner

Data analytics can be a powerful tool. For example, when a new production is received, outside counsel can use data analytics to identify documents that are similar to documents previously identified as "hot" documents. Because those features rely on a conceptual index, which allows documents to be searched by context rather than by simple text, the features can identify new hot documents even if the new documents do not use the same terminology as previous hot documents. As another example, data analytics can be used to efficiently cull through massive data dumps in advance of pending depositions. Putting key documents in front of a witness produced only a short time before can sometimes surprise the defending attorney as well as the witness.

4. What experience does the outside legal team have with eDiscovery?

The outside counsel's experience with eDiscovery may be the most important question to ask, as you can use the team's track record to get a sense of what to expect. If an outside legal team does not have much experience with data-intensive cases, in-house counsel should make sure that they have access to someone who can advise them as the case proceeds. It could be a member of the outside legal team, another lawyer in the firm, a lawyer in an eDiscovery practice group, a lawyer from the service provider, or even a lawyer from a different firm knowledgeable about data and eDiscovery issues. That advisor should be included in key parts of the discovery process, such as strategizing document preservation and collection, negotiating an eDiscovery agreement with opposing counsel, and strategizing document review. Retention of attorneys specializing in eDiscovery may be particularly useful for cases with complex eDiscovery issues, or when a particularly sticky issue arises. When that person is not part of the case team, outside counsel must understand when to consult the advisor. Merely having access to the right consultant does not mean that the consultant will be utilized properly, if at all.

Ideally, someone on the outside legal team will have eDiscovery experience. Speak with that person directly and ask for specific examples of how they have used eDiscovery tools to find key documents as efficiently as possible. Practitioners of eDiscovery should be able to demonstrate their knowledge and experience level, but in-house counsel should specifically look for responses that tie the practitioner's unique examples to concrete financial savings or case outcomes. For example, the practitioner could explain that he was able to selectively process several terabytes of data and thus avoid a large review team, or how she handled a 500 GB native document dump and still identified key documents in time for upcoming depositions. If the practitioner's response is not impressive, consider asking the team to seek an additional advisor on eDiscovery strategies.

If a suit will likely involve a large collection of documents (in the tens or hundreds of thousands), in-house counsel may also want to ask about the outside legal team's experience with managed document review. Broadly, a managed document review involves hiring contract attorneys at lower billable rates to review documents. Sometimes management of the review is handed over to a service provider or another third party. Otherwise, document review management is often handled by an associate on the case. However it is structured, the managing attorney of the document review should be intimately familiar with the legal and factual issues of the case, as well as the types of documents that will be reviewed. Although documents are most commonly reviewed by junior associates or contract attorneys, some case teams may ask clerks or paralegals to assist in that process. It is rare for partners to do first-level reviews, but a particular attorney's familiarity with the issues or facts (and resulting review speed) may justify a partner's involvement despite the higher billable rate. The structure of the review team itself is less important than knowing outside counsel's plan and reasoning.

In-house counsel may also want to ask about the case team's experience with predictive coding, or technology-assisted review (TAR). Broadly, TAR is used to predictively code documents. It must be "trained" with manual coding to learn how documents should be coded. Several platforms, including many versions of Relativity, require an iterative process with large review sets for TAR to be useful. For this more traditional style of TAR, it is generally advised to manually code around 10,000 to 20,000 documents with total review sets of at least 100,000 documents. However, some platforms, including recent versions of Relativity, use a form of TAR that updates on a continuous basis rather than an iterative process. This can be beneficial for data sets as small as a few hundred documents.

Importantly, almost all forms of TAR require some amount of human input, and a selection of documents is expected to remain that cannot be coded predictively — whether because they are images, are largely numeric (rather than textual), do not have enough text, have too much text, and so on.

Predictive coding is primarily useful to avoid manual review of every document that is produced to another party,* though that is not its only potential use. TAR can be used, for example, to increase the efficiency of manual reviews, as a quality control measure where there are multiple reviewers, or to target key documents from another party for strategic offensive use. One of the most valuable uses of predictive coding is review prioritization, which ranks the document set by the likelihood of relevance. It allows a team to see the most relevant documents first, and possibly avoid manual review of a significant portion of the set; for example, if the relevance rate drops below a certain threshold, it might be defensible to stop reviewing. The case team must understand the details of this process to advise in-house counsel properly as to whether TAR may be useful for a variety of purposes, as well as the cost.

*There is a great deal of commentary on predictive coding. A key strategic point is transparency with the other side regarding certain important decisions throughout the process, as highlighted by an often-cited early case that approved of predictive coding: Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182 (S.D.N.Y. 2012). That case is a good starting point, even if just to browse articles or other secondary materials that cite to this seminal case.

5. What eDiscovery features and customizations does the legal team use, or plan to use, for this case?

The tools provided by eDiscovery platforms are only beneficial if they are utilized. Many eDiscovery platforms are highly customizable. Whether customization is used depends on the preferences of the legal team. The usefulness of customizations also varies from case to case. The organization of documents is customizable in most platforms, but the optimal organization for a particular case may vary. Fields such as “Issues” are commonly customized, but unique fields and tags can also be created where appropriate. For example, customized fields can be used to track product numbers, patent numbers, financial account numbers, specialized document numbering systems (such as manuals), or witness depositions in which documents may be useful exhibits. If the legal team does not ask about the types of information that would be useful to track during review, in-house counsel could point out that type of information to them by listing topics and document attributes (i.e., metadata fields) that are important to track.

In-house counsel can also encourage the outside legal team to incorporate efficiencies in the processing stage, such as de-duping — that is, eliminating duplicate files — across email custodians, threading emails, excluding duplicative emails in a chain from a review set, and running other data analytics features that are not automatically updated. If the legal team does not already plan to use email threading, in-house counsel should request information regarding whether it is available and its costs. Unless cost-prohibitive, counsel should insist on use of this feature if there are more than a few hundred emails. Doing so can dramatically reduce the number of documents that require review, and the time required to do so. Email threading can significantly reduce review time, which is the most expensive part of the entire eDiscovery process.

Additional advanced features can also reduce cost and increase efficiency. For example, these features can be utilized to prioritize important documents, allow likely “hot” documents in the

opposing party's productions to be identified quickly, better screen for privilege concerns, and much more. Used properly, these eDiscovery features can be used not only as efficiency enhancers but as offensive weapons as well.

Conclusion

While some litigators perceive eDiscovery platforms as a necessary evil, or a mere translation of hard-copy document review to a digital format, eDiscovery platforms have evolved into powerful tools for litigators. Considering the high price tags that can come with those tools (and high legal bills for attorney review), clients should know whether the tools are being used effectively, and how to make that determination.

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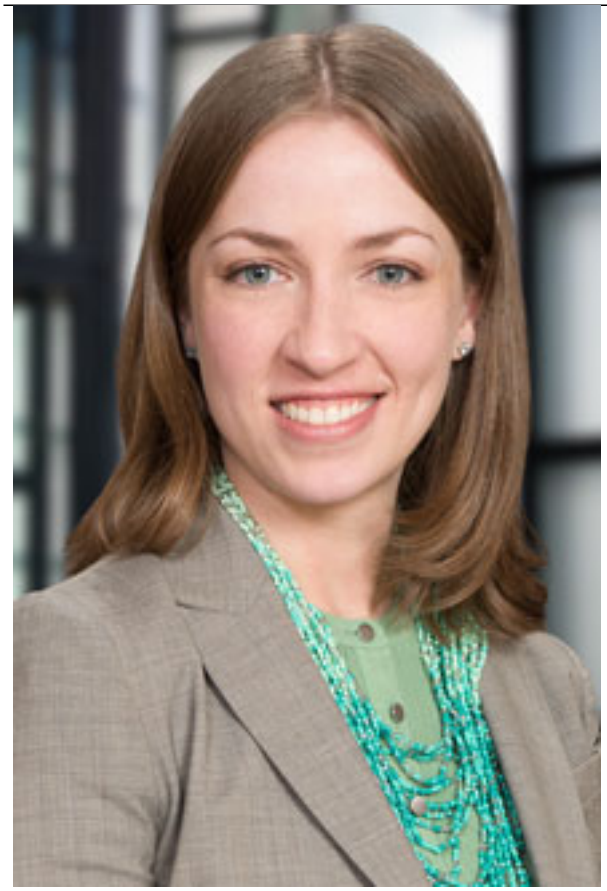

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