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Managing the Electronic Discovery Vendor Relationship

Scenario

A large international company has just entered into 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 Relationship with the Vendor Really Need to be Managed?

Even though you may have selected the best electronic discovery vendor for your case, it is critical to manage that relationship to ensure a positive outcome. At the outset of every case, expectations of costs, timelines and deliverables are set with your vendor. Unfortunately, litigants rarely know everything there is to know about the case at the beginning, and issues that arise throughout the matter must be addressed. Establishing a few key processes and procedures with an electronic discovery vendor will allow a company to manage the substantial costs and risks associated with the unpredictable issues that arise during discovery.

Create a Case Playbook – Documentation

Documentation of the steps taken in electronic discovery is an important component of managing the vendor relationship. Remember that several in-house departments may be involved, such as the IT team that was involved in collecting data and the human resources people who may play a role with managing a litigation hold notice. Counsel should document the processes performed by all employees, vendors, and outside counsel, as well as individuals within the corporation. Key aspects of case playbooks include:

- Documenting the decisions made about the case. Such documentation may be used to demonstrate to a court that the discovery conduct was reasonable, and should describe the decisions made from the onset of the case by the corporation, outside counsel and the electronic discovery vendor.
- Creating, following and documenting the steps taken to follow a discovery plan.
- Including a change control process in your plan to manage any unexpected issues that arise.
- Identifying whether data is "self-collected" or a vendor is hired to conduct a forensically-sound collection, creating documentation of process that maintains a defensible chain of custody.

Documentation will facilitate management of the process, thereby reducing the costs and risks associated

with electronic discovery. It will also help support an argument that any spoliation that may occur was the result of routine, good-faith operation of an information management plan for electronic data, which can provide some protections under the safe harbor clause of Rule 37(e).

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 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 others' roles and responsibilities; in particular, these documents should identify deliverables and performance guarantees.
- Communicating realistic expectations for meeting discovery obligations.
- Establishing a master team list with contact details that allows you to reach all parties on the team on a 24-7 basis. The master team list should include a pre-defined escalation plan of who will be contacted when issues arise.
- Understanding who is on the team and what must be achieved in order to reach the goals of an evolving discovery plan.
- Establishing a plan to manage various risks by enforcing compliance with service-level agreements that contain specific provisions that address the limitation of liability, indemnification, termination and restrictions on access to the case data.
- An increasingly important area for managing vendor relationships concerns insurance coverage. Clients should discuss coverage for electronic discovery costs with their insurance carriers early in the process. Vendors should understand how possible coverage limitations may impact the delivery of services. Law firms, as partners collaborating with clients to control costs, may strategically decide to litigate certain discovery issues that may lead to a more targeted discovery plan when insurance providers understand and support the plan.

Managing the Workflow by Staging the Discovery Process

Managing the workflow by staging the discovery process can 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 include:

- Defining the stages for processing the data and setting up the attorney review workflow. Doing so can prevent the wholesale processing of all client data upfront as well as starting the review without the benefits derived by data analytics. By loading data in a designated order and applying early case assessment (ECA) techniques, a party will 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, review strategy and 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 at the outset of the engagement and

- establishing clear lines of communication between the client, vendors and law firms.
- Establishing a daily meeting time that can be utilized as needed. 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.
 - Interviewing the vendor’s project managers and “hiring” the best candidates.
 - Providing vendors with clear guidance. The instructions should include guidance on:
 - The order for processing and filtering custodian data;
 - If applicable, the allotment of sufficient time for performing ECA and data analytics;
 - The preparation of a training program for responsiveness review;
 - Documentation of the process; and
 - Timelines.

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.

Managing and securing these protections require lawyers to actively participate in the process because many of the decisions made throughout the electronic discovery process amount to legal advice that, by law, non-lawyers are prohibited from dispensing. Consider, too, whether service providers will be called upon for expert testimony or to prepare an affidavit on some aspect of discovery. Have these discussions with providers and determine who is capable of providing testimony in defense of process, or can be relied upon for support when challenging the other side’s discovery. Confirm that these issues are adequately protected.

Importantly, while managing performance, take the opportunity to audit the data security and safeguards that were negotiated as part of the Services Agreement. Although a formal audit is sometimes needed, a thorough review of the evolving documentation surrounding the engagement generally can assure 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.

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