

SECOND LOOK

How To Select An e-Discovery Vendor

By: Pete Haskel, Executive Assistant City Attorney, Dallas, Texas

Ethical duties in choosing eDiscovery vendors

Due diligence in choosing an eDiscovery vendor is not just a prudent business practice, it is an ethical mandate. The ethical requirement stems from at least five separate duties under the ABA's Model Rules of Professional Conduct.[1]

Model Rule 1.1 mandates professional competence including, per Comment [8] to the rule, familiarity with technology developments and associated risks.

Model Rule 1.6 requires protection of client confidential information. Model Rule 1.7(a)(2) prohibits representing one client that has any interest directly adverse to another client. Although the conflict can be resolved under certain circumstances by an informed client's written consent. Rule 1.7(b)(1) – (4). A latent potential for conflict is often overlooked – if the eDiscovery vendor is a lawyer's agent and the vendor is working for a party adverse to the lawyer's client, is that conflict imputed to the lawyer? I think so at least sometimes, depending on the facts. My belief is supported by Model Rule Model Rule 5.3 (addressed below), which makes lawyers responsible for the conduct of retained non-lawyers who assist them in providing legal service. Therefore, my checklist includes conflicts of interests questions to the potential vendor.

Model Rule 1.5 requires care in the safekeeping of client property. Does this rule apply to intangible electronically stored information? I think so. So do the legal ethics committees in the 20 whose bars have issued ethics rules for the handling of client information in the cloud.[2] I see no meaningful distinction from a legal ethics perspective in the due diligence required before putting client information on cloud servers administered by a vendor and the diligence required before giving client information to an eDiscovery vendor (who may be using cloud storage for your client's data, or not – I do not see that as material). I think some of the cloud ethics rules are unduly burdensome and of questionable value. But a lawyer could not go far wrong in applying his or her state's cloud ethics rules when choosing an eDiscovery vendor.

Finally, Model Rule 5.3 makes lawyers responsible for the conduct of any "nonlawyer employed or retained by or associated with a lawyer." (Emphasis added). I think this responsibility extends to the selection and supervision of eDiscovery vendors, and imputes their conduct to the lawyer.

Does it extend to subcontractors – does the lawyer's due diligence also extend to questions about subcontractors? The lawyer should be careful not to impose duties or unnecessary limits on the vendor's selection of subcontractors (except prohibiting their use) to prevent the vendor losing its status as independent contractor.

The Checklist

Here are some suggested topics for discussion with vendors when selecting eDiscovery support services. The same topics might be incorporated into an RFP or other procurement instrument. eDiscovery in this context includes almost the full range of activities covered by such resources as EDRM[3], from information management through legal hold, collection, review, production, and presentation. My focus is on practical questions from a litigator's perspective that are relevant to the vendor's competence. I strongly recommend consulting with your technology staff to tailor these questions to your own technology architecture and to add specific technology questions on topics not covered here. Procuring eDiscovery support services must be a team effort. Neither the legal nor technology departments should act without the other in this effort. Each department, plus your procurement staff, will need help from the others in the procurement process.

I skip over some very fundamental issues in this list of questions. Before or while interviewing vendors, you may wish to revisit some basic issues: Should we do our own eDiscovery support without outside assistance? Do we need the assistance of a disinterested (not competing for your support business) outside consultant to help us interview the competing vendors? Is the occasion for eDiscovery support procurement a good time to review all software that we use for litigation (such as standalone applications for courtroom presentation, video recording, accident recreation, or internal document review)?

Basics

1. Alternative sources for the services? Can you, and if so should you, procure your eDiscovery support services through a federal, state or local government-consortium procurement process that may already have done much of your due diligence and negotiated good pricing? You should have investigated this possibility before your conversations with vendors, but ask them too – they may participate in programs for which you are eligible but that you might not have discovered.

2. Range of supported activities within EDRM eDiscovery model? Is the vendor offering a bundled all-in-one package or can buyer select among modules (*e.g.*, get collection and review modules but defer procuring legal hold module)? Are there some important functions that you need but that the vendor does not provide (*e.g.*, annotation of transcripts, associating transcript excerpts with exhibits, or perhaps courtroom presentation).

3. Protecting confidentiality.

a. Does the contract obligate vendor to protect your client's confidential information and to impose that duty on all employees and subcontractors?

Continued on page 29

to face meeting. When meeting face to face, body language comes into play. A chairman can use body language to gauge the mood in the room and adjust accordingly, if needed. A chairman can tell when a member wishes to speak, or when a member is irritated or distracted. It seems a good deal of the challenges fall upon the Mayor or Committee Chair. Some feel it is not worth the trouble, or even the risk.

Like many issues, individual jurisdictions probably need to look at this issue themselves and judge what is best for their own particular circumstances. Available technology, individual personalities and state legal frameworks such as Sunshine Laws all play a role in whether this is a good decision for your respective jurisdiction. There is no cookie cutter answer.

Another discussion which ended being steered to the Water Cooler involved a relatively new municipal challenge known as the "Hangover Bus." We learn from a contributor in Texas that a hangover bus is a vehicle, usually a "bus or RV/motor coach that parks in the bar district and provides IV's and other mystery fluids and elixirs to intoxicated individuals" with the advertised goal of "curing a hangover." Much more complicated than the tried and true Alka Seltzer, these buses are staffed with a medical professional and come with a price of up to $100 per rider.

Questions went up from the crowd immediately about permitting, zoning, business licensing, enforcement and what happens when the intoxicated persons are "discharged." Does liability arise for the medical staff on the bus if a person is "discharged" and then injures himself or gets in to an accident and injures others? Can the police hang out near the bus and nab unsuspecting "victims" and charge them with public drunkenness? Or, nail them for DUI when leaving the bus and proceeding to drive? Sure, the police can do the same thing for person coming and going from a pub. But, perhaps the bus seems to be like a lightning rod to an intoxicated person. "Look at me – I'm going in here so I must be drunk."

When the discussion steered "south," the proximity of these buses to munchies became important. Are the hangover buses adjacent to the food trucks? Do the hangover buses have nachos and cheese? How close will they be to the football stadium? Does all of this require a separate license? There was one comparison to mobile mammography buses or blood donation buses which are often owned or operated by well- known existing medical facilities. Would such a "sponsorship" lend more credibility to the idea?

Mobile hangover buses, virtual meetings and what to do about technology… Increased mobility and instant results… "The world went and got itself in a big damn hurry!" (To quote Brooks Hatlen in *The Shawshank Redemption*). We've developed so many ways to communicate that nobody knows how to talk anymore. I am reminded of these advances by the young girl in the tire shop who approached the TV and tried to change the channel by swiping her finger on the screen. Or the colleague whose daughter looked at the telephone (a landline) and wanted to know what it was. When told it was a telephone, she replied "but where is the keyboard? The camera? How do you text? You mean you can only use it to talk?"

Yes, for those of us leftover from the baby boomer generation, these things sometimes seem challenging. But for the newer generations who have never lived without the technological advances, virtual attendance and mobile medical treatment make perfect sense. As kids we used to cut out cardboard rectangles, draw numbers on them and pretend they were "mobile phones" we could carry around and talk to anyone we wanted. "Wouldn't that be great?" we thought. Now, such items are considered a necessity, and some folks can't even remember life without them. Each of our generations will cast aside older procedures, and accept the challenges of new ones. Maybe someday the bars will be mobile instead of the patrons?

From the humor corner, and relating to technology, does anyone use a phone book anymore? Probably very few. Why? Of course we have the Internet and Google. But, please be careful when googling people. A friend recently advised me that a Google search for my name reveals a novel called "Dead by Sunset," based upon a true story of a man named Brad Cunningham who is a convicted serial killer. It seems each of his wives (he was a serial groom too) had disappeared mysteriously and he had gotten away with it several times before someone put all the pieces together. Just to be clear, if any of you are looking me up on the "net," that is not me. Keep scrolling… The only thing I have killed is a pint at Murphy's….

The prosecution rests, your honor ML

Second Look Cont'd from page 22

b. Does the contract obligate vendor to notify you immediately of any breach?
c. What actual protections for confidentiality does the vendor use? Encryption? Firewalls? Anti-malware software? Other?
d. What training and qualifications do employees have as to confidentiality protection?

4. Will vendor negotiate modifications of its form contracts? If not, can you lawfully contract with the vendor--and even if you can, do you want to?

5. Basic platform information:
a. Cloud or Hardware?
b. Where will data reside? What laws will apply to data access depending on location and your contract(s)?
c. Can you get all data back and ensure destruction of any copies, duplicates, or images by whatever name?

6. Service level agreements:
a. What level of downtime or error percentage at each EFRM stage will constitute a breach of contract giving the lawyer remedies such as liquidated damages, specific performance at no additional costs, free expert testimony, etc.?

7. Compatibility with other software, cloud service, and hardware (including mobile devices) for each EDRM stage (each eDiscovery activity):

a. Compatible with other software or cloud services that you already use or are considering (i.e., can and should you try to mix and match from different vendors).
b. Compatible with other software, service & hardware that you are considering procuring.
c. Beware of compatibility claims. They often assume cumbersome and unstable workarounds. Test for true compatibility before buying.
d. Will the compatibility remain when vendors upgrade their products? The upgrade might be by the eDiscovery vendor being considered or the provider of another service for which you want to ensure continued compatibility with the new vendor's product.

Continued on page 30

Second Look Cont'd from page 29

Expert testimony: Will vendor at no additional charge (or at negotiated charge) provide expert affidavits and live testimony to explain their product & services and defend their methodology for discovery disputes, evidentiary arguments, and to convince jury that their results are credible?

a. Make the vendor explain its identification, collection, storage, processing, review, production, and presentation processes to you in plain English to test whether are satisfied that it can effectively defend its processes.

b. If the vendor will not do this for no charge, and you still want to use this vendor, negotiate witness rates and terms to include in the contract, or in a separate contract with an expert consultant that the vendor recommends and has certified for competence for the product you are considering.

The vendor's experience, track record and expertise:

a. How long has the company been working with eDiscovery?

b. Relevant experience

i. Local government clients?

ii. Other government clients?

iii. Law firms? (Use this topic both to obtain references and to explore potential conflicts. Do you want to risk using the same vendor used by a frequent opposing counsel? If so, what "Ethics Wall" arrangements can be implemented?)

iv. Does the vendor do work for a party adverse to the City in a pending case? This might be a deal-breaker unless the exceptions under Model Rule 1.7(b)(1) – (4) can be satisfied.

c. Specific functions for other clients? (Was their role limited to specific projects or functions? Were they consultants or did they or their product do the work?)

d. Cases in your locality?

e. Cases before a specific judge or of a specific case type or subject-matter? On what major cases has the vendor previously worked & how recently? What was their role in each case?

g. Vendor's experience with discovery, production, or presentation software commonly used not only by you, but by your frequent opposing counsel and by the local courts. Familiarity with the software used by opponents and the courts will important for being able to process incoming discovery production and for putting on a case.

h. Vendor's level of understanding of the litigation and eDiscovery process?

I. Vendor's familiarity with any rules, protocols or procedures unique to local government or local courts?

j. Do the vendor's employees have relevant certification or accreditation (you will need input from your technology staff to ask the right questions and to interpret the answers).

k. Does the vendor have legal professionals on staff or retained and will that staffing level and quality be substantially maintained?

10. The scope of the vendor's services:

a. What services does the vendor offer? Do these services meet your particular needs in this case?

What services, if any, does the vendor subcontract out to third parties? Who is the third party, and what are its credentials?

Does data ever leave the vendor's site or system? Where are vendor's servers located? Is there redundancy?

How will the vendor price the project? Is the vendor's pricing structure appropriate for the particular needs of your case? Is the pricing structure competitive? (Pricing is further discussed below)

If the scope of the case, the resources devoted by the lawyer to eDiscovery such as the number of "seats" using the product, or the scope of vendor work increases, can the vendor's product be scaled up efficiently and effectively? How will the added services affect pricing?

Will there be sufficient storage capacity for your project at the quoted price? What are prices for additional capacity if needed?

Can the vendor's products also be used for responding to open records requests in compliance with state law?

Can your work product and vendor's data be exported to different platforms if necessary? Production to adverse parties? Your decision to use different review platform? Archiving at close of case?

At the end of each project and at the end of the contract, will the lawyer get ALL data back in usable form (a definite obligation, data format(s), inclusion of all annotations and other input by client, and timing).

Any vestige of client data left on vendor's system should be wiped, including metadata, backups, etc.

11. Technical support:

a. Is the vendor using proprietary or off-the-shelf processing and review tools? If proprietary, what is the age of the product, and has it been reviewed? If off-the-shelf, is there a risk that the vendor will not be able to or will decide not to renew its license for the product? If off the shelf will the maker or seller provide technical support at no charge? Is there any EULA or manufacturer's warranty running to the retail buyer? Is the buyer obligated by the EULA to defend the maker from intellectual property challenges or other claims?

b. Does the vendor provide the technical assistance that you require in your specific case? (For example, does the vendor offer de-duplication, the generation of load files, smart searching, predictive coding or computer-assisted review, etc.?)

c. What is the database and document review infrastructure?

d. What software will the document review team require in order to search, review and manipulate the data?

e. Does the vendor have experience with any unique or uncommon types of ESI that may be applicable in your present case (e.g., architectural rendering software files, construction schedule support files, accounting and time-keeping program files, medical or other specialized computer programs software files)?

12. The vendor's customer service:

a. How are the cases managed and staffed?

b. Can the vendor accommodate the level of work intensity that you require? Do you expect your team to be working 24/7 and, if so, can the vendor support that level of work intensity?

c. How much lead time, if any, is required for collection, processing and production work?

d. How available are the vendor representatives during off-hours?

e. Is technical support free or, if not, are clear terms for technical support put into the contract.

f. Will the vendor provide training? Will the trainer be experienced and qualified? Will the manufacturer provide training for an off-the-shelf product? At what prices? Scope of training? Online tutorials and other training resources? For how long will training be provided (refresher training; training to use any upgrades or new versions; training for new attorneys and support staff during the term of the contract)?

g. Will there be a primary point of contact person?

13. The vendor's quality of services:

a. How does the vendor ensure speed and efficient performance? (see section on service level agreements below)

b. Does the vendor track mistakes and errors for future improvement?

c. Is the vendor a thought leader in the industry? Participation in EDRM, seminars, CLE programs, etc.

d. Is the vendor respected among other similar vendors?

e. Has the vendor ever been sued by customer? If so, details.

f. Has the vendor any of its customers been sanctioned for discovery abuse & if so to what extent might it have been the vendor' fault?

14. Pricing:

a. What are the costs for installation, testing, training, and related start-up costs? Pry for hidden charges & ensure all you need is within the start-up price.

b. What hardware or software or SaaS services is the lawyer supposed to procure for compatibility?

c. Price terms, conditions, and structure after initial installation and testing. Per seat? Based on data volume? Other pricing basis? Will lawyer have to pay for additional data storage capacity as volume grows?

d. Guaranteed pricing or future limits on price increases.

e. Pricing on future upgrades and versions – try to lock in.

f. Separate pricing for each module within a bundle?

Recommended Resources :

Matthew I. Cohen, *et al.*, Navigating the Vendor Proposal Process: Best Practices for the Selection of Electronic Discovery Vendors (June 2007) The Sedona Conference® (WG1 Working Group), https://thesedonaconference.org/publication/Best+Practices+for+the+Selection+of+Electronic+Discovery+Vendors (last accessed Feb. 5, 2015) [pdf download free with registration].

eDiscovery Vendor Viability: Considerations Beyond Technology and Talent | @ ComplexD, http://www.complexdiscovery.com/info/2013/05/13/ediscovery-vendor-viability-comparisons-beyond-technology-and-talent/ (last visited Feb. 6, 2015).

Gregory L. Fordham, Selecting an E-Discovery Vendor A Best Value Approach - e-discovery, computer forensics, damages quantification - Fordham Forensics, Atlanta Georgia (Updated Sept. 2014), http://www.fordhamforensics.com/publications/selecting-ediscovery-vendor.html (last visited Feb. 6, 2015).

Daniel B. Garrie, Top Ten Tips for Managing e-Discovery Vendors, ThompsonReuters (Apr. 3, 2013), http://www.acc.com/legalresources/publications/topten/tttfmev.cfm (last visited Feb. 6, 2015).

Maura R. Grossman, *et al.*, The Sedona Conference Commentary on Defense of Process Public Comment Version September 2016, https://thesedonaconference.org/download-pub/4815 (last accessed Sept.11,2016) [pdf download free with registration].

David Houlihan, Key Questions When Selecting E-Discovery Vendors - Law360 (Jan. 29, 2015), http://www.law360.com/articles/615180/key-questions-when-selecting-e-discovery-vendors (last visited Feb. 6, 2015). (subscription required unless it is in your WL package).

Judah Lifschitz, George Carry, Technology: 5 considerations when choosing an e-discovery vendor, Inside Counsel (July 6, 2012), http://www.insidecounsel.com/2012/07/06/technology-5-considerations-when-choosing-an-e-dis (last visited Sept. 12, 2016).

Andreas Mueller, Selecting eDiscovery Vendors | Modus eDiscovery (three parts): Part 1: Selecting an eDiscovery Vendor is like Buying the Right Car – But Don't Forget about the Dealership (Sept. 17, 2014), http://discovermodus.com/blog/ediscovery-vendor-selection-methodology/ (last visited Feb. 17, 2015); Part 2: Learning What You Want to Know (Oct. 13, 2014), http://discovermodus.com/blog/ediscovery-vendor-selection-2-rfi-rfp/ (last visited Feb. 17, 2015); Part 3: Making Your Choice (Nov. 10, 2014), http://discovermodus.com/blog/ediscovery-vendor-selection-part-3-making-your-choice/ (last visited Sept 21, 2016).

Mark Yacano, Vetting Your E-Discovery Vendor: The Lawyer's Perspective, ABA Law Practice Today (Mar. 2004 article date, Nov. 2005 publication date), http://apps.americanbar.org/lpm/lpt/articles/ftr07043.html (last visited Feb. 6, 2015).

Request for Proposal Forms :
(Caution: Some of the following were drafted, or at least customized, by vendors):

Alabama Attorney General, RFP-eDiscovery Solutions - 027-201401 - File-RFP-eDiscovery-Solutions-027-201401, http://www.ago.state.al.us/File-RFP-eDiscovery-Solutions-027-201401 (last visited Apr. 22, 2015).

Clearwell, Microsoft Word - Sample E-Discovery RFP.doc, http://www.lmgintl.com/downloads/whitepapers/clearwell/Sample_E-Discovery_RFP.pdf (last accessed Feb. 17, 2015).

City of Kirkland WA (April 30, 2012), http://www.kirklandwa.gov/Assets/RFP+for+Electronic+Discovery+Services+%28PDF%29.pdf (last accessed Feb. 17, 2015).

City of Seattle WA RFI (not RFP) (Aug. 23, 2013), www.seattle.gov/purchasing/docs/**bid**s/**RFI**FAS4387.doc (last accessed Feb. 17, 2015).

City of Memphis TN RFP (Sept. 9, 2014), http://www.memphistn.gov/Portals/0/pdf_forms/eDiscovery%20Solution%20RFP%20-%20Final.pdf (last accessed Feb. 17, 2015).

Notes

1. *See* Model Rules of Prof'l Conduct (2016) available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (last accessed Sept. 11, 2016).

2. Annotated links to these Rules are on the ABA Web site at https://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (as of Sept. 11, 2016). However, the ABA has been dilatory in keeping up with new ethics developments on some of its online charts, to there may be additional states not listed on this Web site.

3. EDRM is the eDiscovery Research Model organization, now acquired by Duke Law School. *See* .edrm.net for more information about the organization, its thoughtful and though-provoking work-flow models, and a rich trove of other eDiscovery resources.