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Litigation

Electronic Discovery Now: *Collaboration Changes Everything*

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While litigation is by definition an adversarial process, one result from the increasingly large and complicated discovery process is the increasing amount of contention between parties on the same side of the matter. While there are many causes for this, the result is additional risk and cost for the client, who is in need of both law firms and electronic discovery service providers, and a mode of management that will connect the two happily and productively.

This article discusses the advantages of a closer relationship between a law firm and e-discovery service providers, outlining the value of that link for clients and providing a road map for firms and providers to achieve a higher level of cooperation. A closer collaboration between firm and service providers will help clients save time and trouble, while the client receives a more comprehensive plan and higher grade of service.

REASONS FOR CONTENTION

The most obvious reason for contention among the parties: Widely varying overall objectives. Litigation is a cost center for corporations, and one of their main objectives is to reduce legal costs wherever appropriate. For law firms and service providers, on the other hand, litigation is a profit center. While firms and providers operate ethically, are client-service oriented and are not looking to price-gouge their clients — one goal is to



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make money from the project (at least, certainly not lose money).

This drive may manifest itself in a discussion where a firm or service provider may recommend and justify a costly procedure or analysis for sound legal reasons, but with the knowledge that it will improve their own bottom line in the short term. This is akin to companies such as Jiffy Lube recommending an oil change every 3,000 miles. While no one argues that frequent oil changes are marginally better for your engine, they are more than marginally better for Jiffy Lube's bottom line.

This particular issue is especially important for law firms, as the nature of their relationship with the courts puts them more at risk should questions arise as to the efficacy of the client's discovery efforts. Federal Rule of Civil Procedure 26(g) puts counsel squarely on the hook for clients' discovery missteps.

Federal Rule of Civil Procedure 26(g) requires that every discovery request, response or objection be signed by at least one attorney of record or by the party itself, thereby making law firms accountable on a level that service providers are not. With that signature, the attorney or party certifies that the discovery has been conducted in a reasonable manner and that the response is consistent with the rules of law, leaving the law firm to certify that proper protocols have been implemented by all service providers involved.

Rule 26(g) is designed to curb discovery abuse; should the rule be violated, the court will impose appropriate sanctions on the individual attorney. For example, in *Qualcomm Inc. v. Broadcom Corp.*, sanctions were issued against the corporation and its outside attorneys in association with discovery abuses. The Southern District of California ruled that "attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search" and that attorneys have a duty to answer discovery requests in good faith.

In *Mancia v. Mayflower Textile Servs. Co.*, the District of Maryland stated that Rule 26(g) requires a reasonable inquiry prior to objecting to an interrogatory or document request. In *Mancia*, the court pointed out that the required signature "certifies to the best of

the person's knowledge, information and belief formed after a reasonable inquiry" that the disclosure is complete and correct and that the request, response, or objection is not unreasonable, unduly burdensome or expensive.

Considering the amount of technical and legal compliance they are already accountable for, law firms may be uncomfortable with some new processes and strategies required of them by their clients and service providers. For example, a law firm might be reluctant to certify work done by contract attorneys who are not under its supervision, while a client might be reluctant to pay the firm for performing such supervision.

In fact, the use of contract attorneys is a source of much discussion and contention. In some cases, a law firm may or may not be expected to engage the contract attorneys, and may or may not be expected to house the contract attorneys if it was the one to engage them. If the firm engages the contract attorneys, it may insist on malpractice coverage and reimbursement for additional overhead. Questions then arise over who is responsible for providing supervision, training and that other overhead. And finally, who is responsible for paying all of the related expenses?

The management "food chain" is a major issue. Historically, clients retained law firms that in turn retained service providers. But service providers now interact more directly with clients, at least until there is a problem — at which point the client is most likely to look to its law firm, which will apply some pressure "downstream" to the service providers, which then point a finger back upstairs at their own risk.

Sometimes this finger pointing can get extremely contentious, as in 2007 when law firm Sullivan & Cromwell actually filed suit against service provider Electronic Evidence Discovery Inc. claiming it received "untimely and inaccurate" work from the provider, causing the firm to expend extra resources on discovery.

ADVERSE IMPACT FOR THE CLIENT

The most obvious result of dissension among the law firm/provider ranks is cost-related: duplication or even triplication of effort. For example, where a client retains contract attorneys for document review, their law firm will sometimes re-review much, if not all of the contract attorney work product.

Worse, however, is the risk involved with both data and discovery processes getting handed off between attorneys and technology professionals over and over again. Even the most pristine data may become corrupt or otherwise compromised as it goes from law firm to service provider to another service provider, and back. Not only might chain of custody be difficult to show, but it may

become impossible to find the source of problems if they do arise.

The inability to find the source of a problem points to the core issue of trust. The client needs to know who to call, who to trust, and who is the final owner of the problem. Someone needs to be the "general contractor" and end-point project manager, and increasingly that is the client itself. But it is difficult enough to serve as air traffic controller without having also to be a marriage counselor between law firm and service provider. Service providers and law firms must trust one another's method and judgement, and work well together.

WHAT SHOULD CLIENTS DO?

While the initial reaction might be to simply "let them fight it out," there are some steps that a client should take to ensure that its firm and service providers are collaborating to the client's benefit. First, the client should ask itself if it has the resources and people to provide active management for the entire life of the project. Litigation and discovery take a great deal of intensive care and feeding. If the client's legal department does not have the resources or wherewithal to manage all of the moving parts, it may make sense to hire a lead law firm or service provider to serve as general contractor.

One strategy that may seem to make sense is to go back to the "old days" of e-discovery (at least five years ago) and simply let the lead law firm hire all the experts and suppliers and manage all processes, legal and technical. There are a number of reasons, however, why this is not a sound strategy for any company with a significant litigation portfolio.

First, the more a company works with a service provider, the better they know one another — and, perhaps more importantly, the better the service provider knows the company's data. Having a regular and direct relationship with the service providers ultimately lowers e-discovery and data-management risks for the client.

A more direct relationship also reduces cost. Law firms are not incentivized to shave dollars off what will ultimately be passed-through invoices. Even if they are motivated, law firms do not perform the kind of sophisticated sourcing typically incumbent in corporations. Too often, law firm attorneys source providers by simply calling their friends, former partners, or the salesperson who took them to a Phillies game.

The first step a law department should take is to look at its portfolio. If it is substantial enough, a good strategy is to leverage that and develop, perhaps by RFP, long-term relationships with a small group of preferred law firms and providers that can gain a strong understanding of the client's needs and tolerances. By promising substantial work in

exchange for discounts and special attention, the client will gain trust in these firms and service providers. Then all sides will find their objectives more closely aligned.

One tip would be to look toward the new breed of providers that are equipped to implement an entire process, including document review, either on their own or within their existing relationships. When you buy a car, you buy it as an integrated whole; you wouldn't rely on a brake manufacturer to provide a whole car. Be sure to rely on companies that have the capability for producing the entire project within their core competencies.

Clients looking to build strong, direct relationships with law firms and service providers should also focus on the following:

- Have solutions in place for small, medium and large projects;
- Negotiate pricing;
- Understand the bandwidth of your providers, both technologically and in terms of their personnel;
- Test for financial stability;
- Look carefully into project managers, including quality credentials and experience — interview the project managers personally;
- Ask about staff turnover — the best project managers can do no good if they are apt to leave a project in progress;
- Check for experience in similar relationships and check client references; and
- Ask about the firms' expertise related to any special needs you may have, such as an uncommon e-mail system.

For firms and service providers, a good strategy is to collaborate with one another to build a uniform process that can be demonstrated to mutual clients. Some companies have developed "summits" wherein all preferred law firms and providers come together to make introductions and explain their processes and protocols. Obviously, companies should participate in such meetings — or any other opportunities to demonstrate its team's experience and capabilities — whenever possible.

CONCLUSION

Clients, law firms and service providers seem to have different "DNA" in their service orientation. Each has its specific objectives, expertise and perspectives. While all parties are out to achieve the best result for the client, these differing points of view can sometimes cause contention or worse. A closer collaboration between the three, however, promotes understanding and, ultimately, a better result for all. •