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BEST PRACTICES

Gareth Evans, litigation partner at Gibson Dunn, discusses developments in the eDiscovery vendor market and how today's legal environment is currently creating a "best of times, worst of times" dichotomy for ESI service providers and practitioners.

eDiscovery Vendor Developments: A Tale of Two Cities



BY GARETH EVANS

Developments in the eDiscovery service provider (aka vendor) market should be important to anyone dealing with litigation or governmental investigations, as virtually every matter will involve discovery of electronically stored information ("ESI"). In some circumstances, law firms and companies will handle electronic discovery tasks themselves. But, more often than not, companies and lawyers call upon eDiscovery service providers to handle many or all aspects of the eDiscovery process—for example, collection, culling, processing, hosting, project management, search, review and production of ESI.

Indeed, these eDiscovery vendors usually play a critical role. In large matters, their billings can on occasion

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approach or even exceed those of outside counsel. Most importantly, the service provider is a close partner with the client and counsel in fulfilling their obligations and achieving their goals in the litigation or investigation.

Looking at developments in the eDiscovery vendor landscape over the past year, it could be said, with a nod to Charles Dickens' *A Tale of Two Cities* (1859), that "it was the best of times, it was the worst of times."

The Best of Times

Why is it "the best of times?" Because we are seeing a number of very positive developments in the eDiscovery services market about which companies and law firms should be aware.

Technology, Service and Pricing. Most importantly, the best vendors are providing an array of powerful technologies—such as predictive coding, visual analytics and machine translation—along with high-quality professional services to ensure that these tools are used effectively and defensibly. The very best are able to provide high quality services consistently across matters and over time.

Some vendors are also beginning to provide more straightforward and simplified pricing, in lieu of the complex *à la carte* pricing of the past (which was often structured in a manner that made comparison with other vendors' pricing difficult).

Bundling. Until recently, vendors typically charged separately for the use of technologies such as predictive coding, analytics and even e-mail threading—often at expensive rates—making use of these technologies impractical.

We are now seeing some vendors, particularly those that have developed their own applications and therefore do not have to pass on licensing fees from separate software vendors (allowing them pricing flexibility),

more frequently bundling these technologies in a single technology fee.

When this bundling is priced reasonably, which we are also seeing, the use of predictive coding, analytics and other technologies that make search and review more efficient can more often be a viable option than in the past. Bundling into a single technology fee can also open up the full panoply of uses of these technologies—for example, using predictive coding to identify privileged documents or for deposition preparation, and analytics to fill gaps in search results—which would not have been practicable in the past due to the costs involved.

Better Pricing. Even more promising, we are beginning to see some flat-fee, “all-in” pricing including both technology and all professional services, including document review. Vendors may be willing to agree to such pricing in circumstances where the document population is fixed and the number of documents requiring review is ascertainable (*e.g.*, based upon sampling). Such flat-fee pricing provides the cost predictability that clients greatly need, but which has been largely unattainable in the eDiscovery services market.

Vertical Consolidation. Vertical consolidation has been, in our view, a good thing in the eDiscovery services market. There was a time, not long ago, when a company or law firm might need to retain separate vendors for collection, processing, hosting, project management, document review and foreign language translation. Particularly dismaying to both inside and outside counsel, they would be hit with sales pitches from numerous vendors handling narrow aspects of the eDiscovery process.

That level of fragmentation is rare now, with most vendors providing the full range of eDiscovery services and many also providing document review services. There are significant advantages to using vendors offering the full spectrum of services, including integrated project management and discounted pricing for bundled services.

Cross-Border Capabilities. Some of the market leaders are expanding their overseas operations, particularly in Europe and Asia. Doing so allows these providers to provide better services in cross-border litigation and investigations, as foreign data privacy laws often require local processing and review in the local jurisdiction. Although many vendors can provide remote “pop-up” data centers and review sites overseas, the logistics, lead time required, and costs of doing so can be considerable.

Investing in Education. Some vendors are investing considerable resources to educate their existing and potential clients about the eDiscovery process. These vendors are calculating, no doubt, that white papers, webinars, blogs and live programs will yield more sophisticated consumers and better partners in undertaking often complex eDiscovery related tasks.

Of course, your mileage may vary, as some materials and programs are more sales pitch than real education. But the better materials can add significant value. And if a vendor does not provide these resources, it could be a sign that it lacks depth and capabilities for strategic consulting—an often important aspect of the services an eDiscovery vendor should provide.

In sum, it’s the best of times because we are seeing, with some vendors, strong technology offerings coupled with substantially improved pricing schemes, vertical consolidation, bundled services, cross-border capabilities, and valuable educational resources about the eDiscovery process. Hopefully, these trends will continue and expand through the industry.

The Worst of Times

If it’s “the best of times” in the eDiscovery services market, why, then, is it also the “worst of times”? Unfortunately, a number of the problems of the past persist. Indeed, some—such as highly aggressive sales tactics—have worsened. And a troubling new issue has arisen.

Immature Market. The market for eDiscovery services remains immature. We continue to see a dizzying array of eDiscovery service providers vying for market share, and a market that often appears ill-equipped either to distinguish among them or to evaluate the quality of their services, technology or pricing. Although there has been a modicum of horizontal consolidation in the market, with some vendors growing through acquisitions of peers, for every vendor that is acquired, it seems that a new vendor enters the market.

Vendors that provide both cutting-edge technology and outstanding professional services appear to be a relatively rare find, as those that excel in one area too often fall short in the other. Consistency also remains an issue. Finding a vendor that consistently provides excellent service across matters and over time can seem like prospecting for gold: a lot of work and often disappointing results. This phenomenon may explain why many companies and lawyers, once they find a vendor that is good enough, keep going back—even if it means potentially overlooking other vendors with better capabilities and pricing.

Additionally, instability is a problem at many vendors. High turnover and group departures to existing and new competitors are common in the industry, which contributes to the problem of inconsistent performance.

Aggressive Sales Tactics. The barriers to entry for new vendors, at least in providing the most basic services, continue to be very low, and some new and fringe players appear ever more desperate to increase their market share.

Sales tactics in this environment have grown increasingly aggressive, with direct sales calls to individual (often inexperienced) lawyers at firms and companies; vendors using online content to trash competitors and others involved in the industry; and offering enticements such as a bottle of champagne for every attorney that attends a demo and another bottle for each demo referral made.

Proffered pricing is, more often than not, the complex *à la carte* pricing of the past, and it may be significantly higher than that which may be achieved through negotiation.

Commoditization. In the fog of this environment, some vendors with inferior technology and limited professional services are nevertheless able to demand premium pricing. eDiscovery services, in our view, are not yet a commodity, and may never be, because of the

critical role that professional services play. High quality project management, execution, reliability (error-free and on-time performance) and value-added strategic consulting are all key. See, e.g., David Carns, *The Commoditization of eDiscovery*, 15 *BNA Digital Discovery & e-Evidence* 94 (March 5, 2015).

Ironically, and leveraging off of a myth of commoditization, less well-equipped vendors are sometimes able to compete with and demand pricing comparable to stronger vendors. Moreover, in a market often uneducated about pricing, some clients may not realize that they are paying relatively high pricing for the services they are receiving. Others may not recognize or appreciate that the deals they have are fair, and may expend time and resources searching for a better deal that will either fail to materialize or will only do so at the cost of compromising the quality of services provided.

Depth. We continue to see some very small vendors, with only a handful of personnel, and limited hardware or cloud infrastructure, vying for and taking on some large and complex matters. Indeed, very small vendors appear to be the norm in some significant regional markets.

Of course, not every matter needs a big team or lots of infrastructure. But there are added risks, particularly in large or complex matters. Vendors that are thinly staffed with skilled and experienced personnel are more likely to run into problems during “crunch time” on a large matter or when other matters they are handling get busy. Systems that are overly taxed by large matters or more matters than they can efficiently handle can be unduly slow and generate an excessive number of technical errors.

Consumerization. We tend to think of new technologies as inevitably bringing progress, but not everything that is new is necessarily good. One of the more troubling new developments has been some vendors’ attempts to, in effect, “consumerize” eDiscovery—i.e., to sell eDiscovery software as a service (SaaS) directly to end users (e.g., individual lawyers) with little or no professional services component involved.

New entrants in the eDiscovery services market traditionally have needed to do little more than license software, rent storage from a cloud provider, hire a few project managers and technicians, and send a bunch of sales people into the field. With SaaS-only eDiscovery services, however, the bar is set even lower, as vendors can enter the market essentially without any client-facing professional services staff. Even sales staff can be “virtual,” largely plying their trade through online demos and social media.

Targets. The origins of the current attempts to consumerize eDiscovery may be traceable to some major vendors’ cloud-based eDiscovery offerings. The cloud offerings, however, target law firms and companies with professional litigation support staff to manage projects and execute tasks. They allow enterprises to handle eDiscovery services in-house without having to purchase and maintain the associated hardware and software.

The consumerization approach, by contrast, directly targets individual lawyers. The vendors’ sales pitch appears to be: “You collect and upload the data. We’ll process the data, host it, and provide you with the review

software. You do the rest.” The implication is that it’s easy. The problem is that it isn’t.

Problems with DIY eDiscovery. We understand the likely appeal of promised “do-it-yourself” eDiscovery to a new generation of lawyers accustomed to DIY when it comes to technology-related legal tasks—for example, word processing and legal research. And, some of the SaaS-only software applications appear to be quite appealing. But the problem with DIY in eDiscovery is that for most lawyers, doing “the rest” in all but the simplest matters will likely be complex and unfamiliar—and full of risk.

For example, properly filtering, culling and deduplicating the document population across multiple custodians and sources, developing and executing search and review strategies, and doing so in a defensible and cost-effective fashion, usually requires extensive knowledge and experience. And, the consequences of getting it wrong are considerable: for example, an expensive do-over, missed deadlines, monetary and even case-dispositive sanctions.

Vendor Selection Suggestions:

1) Consider vendors in addition to your usual one. Going back to a vendor that has performed well in the past is understandable, but it may not be the best fit for every matter. You may be missing out on better capabilities and pricing.

2) Technology is important, but it isn’t everything. Beware of vendors with limited or outdated software tools. But also be aware that vendors offering the latest “whiz bang” technology don’t necessarily provide the highest quality professional services (or any at all, in the case of some SaaS offerings).

3) Professional services are key. The biggest complaints about vendors are poorly performed work, missed deadlines, unavailability and slow response times. These are primarily human rather than technology issues.

4) Depth matters. Your matter is not the only one on a vendor’s plate. Even if your matter is relatively small, vendors that are thinly staffed with skilled and experienced personnel, and have limited technical infrastructure, are more likely to run into problems when multiple matters get busy.

5) Pricing is important, but it isn’t everything. Avoid paying too much, but be careful not to compromise quality in seeking discounted pricing. The costs of eDiscovery failures will be much greater than what you save.

6) Don’t forget about data security. Vendors host your most important documents. Make sure the one you select provides adequate protection against data breaches.

7) Get help in selecting a vendor. The assistance of a professional knowledgeable about the eDiscovery vendor market, the strengths and weaknesses of various vendors, and trends in the industry will ultimately save you money and heartache.

Perhaps recognizing the limitation of such a SaaS-only offering, a variation on the consumerization approach is for the vendor to partner with a separate professional services provider. This strategy may sound good in theory, but the professional services provider must be capable of providing the appropriate quality and depth of services.

In sum, while in some respects it is the best of times in the eDiscovery services market, in others it is the worst of times. Much of the market is immature, with a dizzying array of vendors and consumers not well equipped to distinguish among them. Aggressive sales tactics are becoming more common, and some vendors are taking advantage of perceived commoditization of services to obtain higher—not lower—pricing than they might otherwise be able to obtain. And attempts at consumerizing eDiscovery are a troubling new trend.

The Bottom Line

Of course, not every matter requires the most high-powered eDiscovery technology or professional services. The important thing is that the service provider's technology and professional services should be the right fit for the matter, and pricing should be commensurate with the quality and scale of those services.

The good news about there being an abundance of eDiscovery service providers is that among them is the right one for your matter. And the technologies, emerging pricing schemes, and quality of professional services can be better than they have ever been. The bad news, sadly, is that is often not the case.

In navigating this complex area, the assistance of experienced advisors with significant knowledge of the market and its players can be critical for making the right choice.