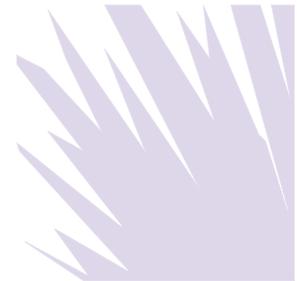


The Sedona Conference Guidance for the Selection of Electronic Discovery Providers

The Sedona Conference



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THE SEDONA CONFERENCE GUIDANCE FOR THE SELECTION OF ELECTRONIC DISCOVERY PROVIDERS*

*A Project of The Sedona Conference Working Group Series
Technology Resource Panel (TRP)*

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PREFACE

Welcome to the next publication in The Sedona Conference Working Group Series, *Guidance for the Selection of Electronic Discovery Providers*. The Sedona Conference is a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The mission of The Sedona Conference is to move the law forward in a reasoned and just way. This effort is an outgrowth of our Working Group on Electronic Document Retention & Production (WG1) and represents the work of the Technology Resource Panel (TRP). The TRP is comprised of “users” of eDiscovery services (from defense and plaintiff firms, corporate law departments, and consulting firms) with input from eDiscovery providers, who registered as TRP members to support this effort in response to an open invitation.

The purpose of the TRP and this paper, as its name implies, is to provide guidance for the selection of an eDiscovery provider that allows the “user” to compare apples to apples, to the extent feasible, which makes it easier for all parties to the process to better understand the nature, cost, and impact of the provider selection process. In the belief that an informed market will lead to reduced transaction costs, more predictable outcomes, and better business relationships, the TRP was formally launched on July 1, 2004, as the RFP+ Group; and its first work product, *Best Practices for the Selection of Electronic Discovery Vendors: Navigating the Vendor Proposal Process*, was originally published in 2005, and subsequently updated in 2007. This paper, *Guidance for the Selection of Electronic Discovery Providers*, supersedes the 2007 paper, as many significant changes have taken place in the eDiscovery marketplace throughout the years. One significant change is the continuing movement toward integration in the provider community offering integrated eDiscovery

services including overall project management, consulting services, data hosting, advanced technologies, and even document review. This paper has a much broader scope addressing all aspects of the eDiscovery lifecycle (as they relate to litigation and investigations). It also takes into account another significant change in the marketplace—the establishment of business relationships in a variety of manners, trending away from the traditional Requests for Proposal for discrete projects. We hope our efforts will be of immediate assistance to law firm attorneys, legal department attorneys, and litigation support professionals who are tasked with the challenge of finding an appropriate eDiscovery provider, as well as to the eDiscovery providers themselves. We continue to welcome comments for consideration for future updates at comments@sedonaconference.org.

On behalf of The Sedona Conference, I want to thank our eDiscovery provider members for their valuable input and financial support of the TRP efforts (*see* Appendix E and www.thesedonaconference.org for a current listing of the TRP members). The Sedona Conference also thanks the TRP User Group drafting team members for their hard work and dedication to this project including Lea Malani Bays, Megan Jones, Paul McVoy, and Scott Milner. Finally, we extend a special thanks to Sherry Harris who leads the TRP, and to Heather Kolasinsky for serving as the Drafting Team Leader.

Craig Weinlein
Executive Director
The Sedona Conference
April 2017

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I. INTRODUCTION

The purpose of this paper is to provide guidance to law firm attorneys, legal department attorneys, and litigation support professionals who are tasked with the challenge of finding an appropriate eDiscovery provider (Provider).¹ This guidance comes in the form of information, sample forms, and checklists designed to provoke thought and provide clarity around the considerations that should be taken into account when trying to identify the appropriate Provider and solution(s) for your specific circumstances. Although there is a trend toward industry consolidation amongst Providers, the overall number of Providers continues to increase. This is perhaps not surprising in light of the growing volume of electronically stored information (ESI), ever-evolving advancements in technology, increased emphasis on ESI in the rules of courts and case law, and the continuing increase in demand for a broader range of services. Among the ballooning number of Providers in the eDiscovery business, there are many that have arrived on the scene by way of expanding their original service offerings. Many Providers that initially focused on offerings such as software solutions, litigation support services, document management services, or forensic services, have widened their focus to include additional eDiscovery disciplines, which has resulted in Providers having considerably different strengths and weaknesses relevant to the project at hand. The need for a process that allows for accurate identification of these differences, and an assessment of the associated risks and rewards, has never been greater.

eDiscovery needs can span the spectrum of services from the anticipated processing, review, and production of two million documents, to data recovery from a recycled laptop or mobile

1. In this paper, Provider includes, but is not limited to, organizations who offer services, software, solutions, or a combination of all.

device, to consulting services for a broad discovery plan, to expert testimony on the accessibility of back-up tapes from 1985. These are a few among many situations that can arise. While the issues associated with individual client matters may seem similar when considered categorically, the circumstances of, and appropriate solutions for, each of those eDiscovery matters is quite different. eDiscovery, like most aspects of litigation, is not well-suited to a cookie-cutter approach. Accordingly, the information, sample forms, and checklists herein are provided for guidance only.

The scope of this paper is intended to address the selection of Providers throughout all phases of the eDiscovery process, whether through a formal request for proposal (RFP) process or by a more informal request for information (RFI) (both formal and informal processes are hereinafter referred to as “Information Request”). To select the “best” Provider—and realize the most value—the organization should fully understand the scope of its needs. We trust that the Provider evaluation process described in this paper will assist users in framing not only the process for selecting Providers, but also the process for defining the parameters of the eDiscovery process itself. The greater the degree of detail defined in advance with regard to the scope and requirements of the need, the easier the process. Determining specific needs may well save a lot of time and money in the long run—for both the Provider responding to the Information Request, as well as the person evaluating, reviewing, and normalizing the responses. Responding to an Information Request is a time-consuming and expensive process for Providers, and it is unreasonable to put Providers through the task of responding to an Information Request before determining that there are no legal or business conflicts that would preclude the Provider’s retention to provide the services described in the Information Request. This is also true for the party issuing an Information

Request (Requestor); the time it takes to evaluate, review, and normalize Information Request responses is substantial.

As Comment 6.e. of *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* notes, “[d]iscovery counsel, consultants, and vendors offer a variety of software and services to assist with the electronic discovery process and a party’s evaluation of software and services should include the defensibility of the process in the litigation context, the cost, and the experience of the discovery counsel, consultant or vendor, including its project management and process controls.”² Each of these issues must be evaluated thoroughly, and later weighed against each other in selecting a Provider that is appropriate for the defined need(s). It is also critical that the process employed throughout every phase of the eDiscovery process, including the selection of a Provider, will have well-defined due diligence and be well documented in order to be defensible in the event of a challenge.³

The guidance provided herein is intended to be scalable to assist all constituents, from solo practitioners, to attorneys and litigation support professionals in global law firms, to in-house attorneys, with scope extending to small projects, large projects, or portfolio-type engagements. Indeed, the volume of ESI will be very material and may drive much of the Provider evaluation and selection process. In addition to the volume of ESI, there are

2. THE SEDONA CONFERENCE (2017 Public Comment Version), <https://thesedonaconference.org/publication/The%20Sedona%20Principles>.

3. See generally *The Sedona Conference, Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process*, THE SEDONA CONFERENCE (2016 Public Comment Version), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Defense%20of%20Process> (providing an in depth discussion of defense of process).

many other issues to be considered when evaluating and selecting eDiscovery Providers, such as these:

- The type of the matter
 - Investigation: internal or government
 - Litigation: multidistrict litigation (MDL), class action, single plaintiff
 - Third-party subpoena
 - Second request under the Hart-Scott-Rodino Antitrust Improvements Act
- The type(s) and source(s) of ESI
 - Email
 - Microsoft Office application files; e.g., Word, Excel, PowerPoint
 - Portable Document Format (PDF)
 - Hypertext Markup Language (HTML)
 - Structured data; e.g., database ESI
 - Compressed files; e.g., .ZIP
 - Mobile device data; e.g., smartphone, tablet
 - Wearable device data; e.g., smart watch, wireless activity tracker
 - Social media or other cloud-based data sources
 - Audio or video files
 - Image files
 - Proprietary format files
- Proportionality analysis considerations
- International discovery considerations, such as data privacy, or foreign language review or translation issues
- Time constraints

The timing of the evaluation and selection process is very important. The phases of the eDiscovery process—identification, preservation, collection, culling, analysis, processing, review, and production—take time and are not necessarily linear. The time involved is often dependent on the volume of ESI. If a party delays engagement of a Provider, there is increased risk of missing deadlines or driving up costs to expedite any of the phases. Judges do not look kindly on parties who create delays in the eDiscovery process. For this reason, being proactive has its benefits. Consider whether entering into a preferred relationship with a Provider is the right option to give the Provider time to get familiar with the organization and types of data while you have time to get familiar with the Provider's services and capabilities. This expedites the "getting up to speed" phase for each matter.

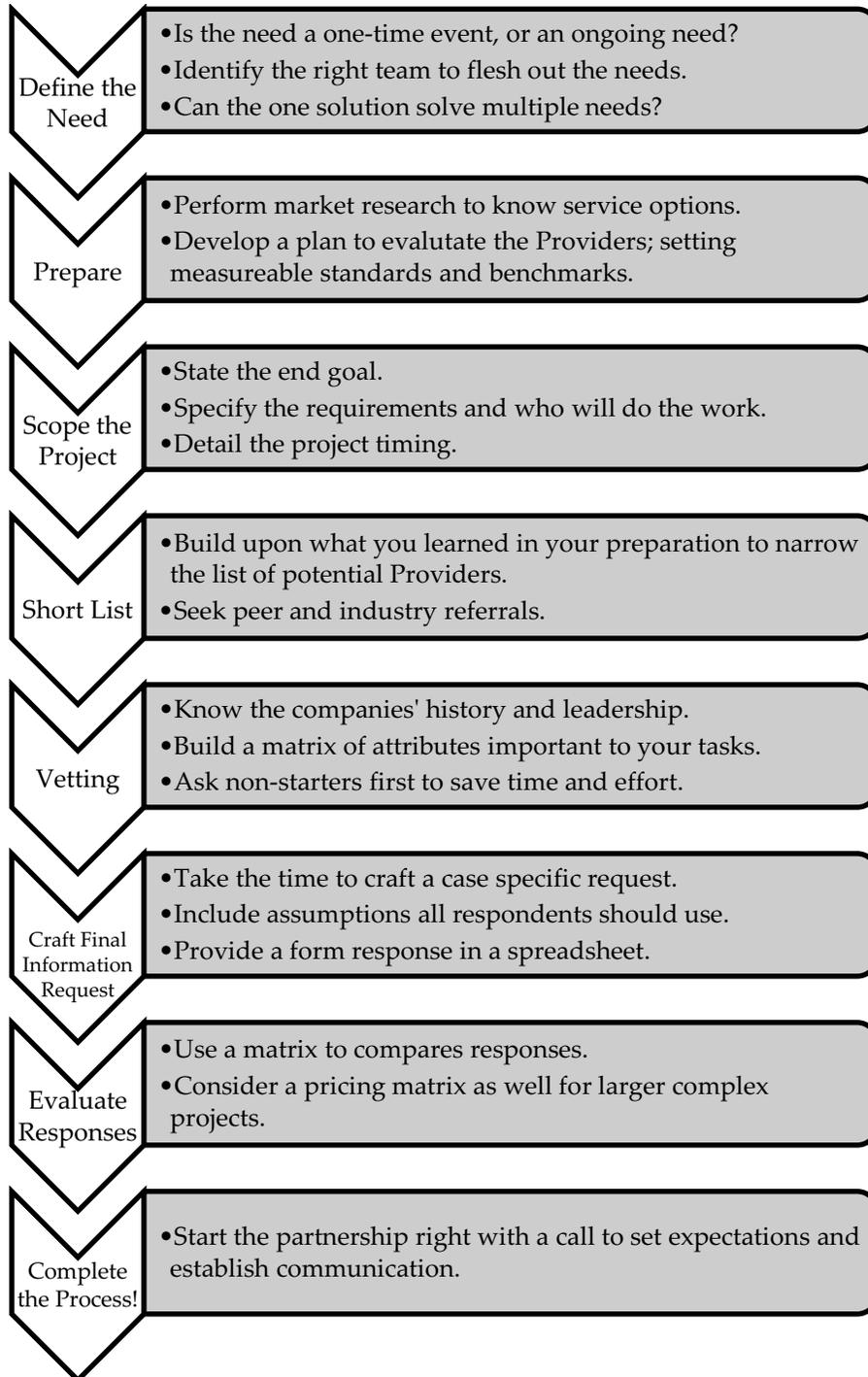
It is also highly advisable for those in positions of making decisions with regard to eDiscovery services and Providers to stay aware of the market and of emerging trends, whether there is an impending need or not. This will also help minimize the ramp-up time needed to identify potential Providers when matters do come up.

Providers, like law firms and corporations, run the gamut in terms of size and capabilities—from self-employed individuals who specialize in one particular area, such as computer forensics, to subsidiaries of publicly-traded corporations that handle many aspects of the eDiscovery process. The process of paring down the universe of possible Providers and comparing their services and software offerings can be overwhelming, especially if there is no systematic way to request, compare, and evaluate the information necessary to make a selection. Input from a consultant who has experience in the evaluation and selection of Providers may be needed to identify and engage an appropriate Provider, thereby streamlining and expediting the process.

This paper includes the processing of traditional paper-based documents in the evaluation process because it is inevitable that the discovery of paper-based documents will continue to be a part of the discovery process for some time. It is important that paper and ESI be treated in an integrated manner, to the extent possible. Recognizing that paper documents will be around for a while, many Providers incorporate features to support the review and production of paper-based documents into their tools.

It is also worth noting that the challenge of choosing among competing Providers in the eDiscovery arena is exacerbated by the lack of standards and uniform processes across the industry. In fact, many Providers consider their processes and methodologies to be proprietary and zealously guard them. The lack of transparency in these proprietary processes can make the “defense of process” prong of our analysis more difficult than it would be otherwise. However, because the party (whether plaintiff or defendant) will ultimately be responsible for the production of relevant information, it is critical that the processes employed be understood and defensible.

A flowchart is provided below to lead you through the primary steps of the process discussed in this paper.



II. DEFINING AND UNDERSTANDING THE NEED AND THE PROCESS

The search for a Provider begins with the identification of a need. The need can be a new matter (investigation or lawsuit), a desire to standardize an existing discovery workflow, or a desire to outsource the discovery process altogether. It should be determined whether the need being defined is for an ongoing partnership or limited to a specific project-level need. An initial search for Providers may not necessarily lead to the same short list every time, because the goal is to find the best fit—a Provider suited to both the organization and the particular need.

Potential categories in which the need may fall may include one or more of the following:

- A technology solution—licensing or acquisition of an appropriate software solution or eDiscovery tool or platform, including:
 - a solution that is hosted by the Provider, aka cloud solution, better known as a Software as a Service model (SaaS); or
 - a solution that is hosted by the Requestor/licensee on its own servers.
- Engagement of a Provider for transactional needs such as these:
 - Data preservation/collection
 - Data recovery/forensics
 - Data processing/hosting/production/delivery
 - Document review (law firms, staffing providers, managed review, legal process outsourcing (LPO))
 - Complex searching and tagging
 - Advanced analytics support

- Consulting/professional services/expert testimony
- Other eDiscovery services

The need should not be defined by a single individual or department, but rather by consensus of those with a vested interest in the process and outcome—all stakeholders to the process. For example, when an organization's law department is looking to license a technology solution, it would make sense for the law department to include internal stakeholders such as Information Technology (IT), Security, Compliance, and Procurement/Sourcing, and external stakeholders such as outside counsel. Another example would be when a law firm is looking for a data hosting solution, where it would make sense for the law firm to include internal stakeholders such as the law firm partner, associates, and/or staff who manage complex matters and eDiscovery projects; the firm's litigation support manager; and possibly the client. Defining the need can only be accomplished by having a thorough understanding of technology and the end-to-end discovery process. If those involved do not have a thorough understanding, they should engage someone, such as an independent, technology-neutral consultant, to assist in the process. Whether you hire a consultant or engage in a conversation with your peers, it is good practice to identify others who may have had the same need, and obtain their input, suggestions, and recommendations.

In addition, there have been several recent cases across jurisdictions,⁴ as well as secondary authority,⁵ that speak to attorney

4. See *HM Electronics, Inc. v. R.F. Technologies, Inc.*, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015); *FDIC v. Horn*, No. 12-CV-05958, 2015 WL 1529824 (E.D.N.Y. Mar. 31, 2015).

5. See Amendments to the ABA Model Rules, state bars issuing ethics opinions, and judges commentary in published interviews, as more thoroughly discussed in The Sedona Conference, *Commentary on Ethics &*

competency in the discovery process. Attorneys are expected to be, or work closely with those that are, knowledgeable of the discovery process, including the eDiscovery workflow. This includes the selection and management of Providers. Attorneys are not able to hide behind a veil of ignorance to shield themselves or their clients from mistakes committed by their Providers, but rather an obligation exists to be proactive and ask questions to better understand the process.

Finally, it is critical that the stakeholders to the process all have the same understanding of eDiscovery terminology in order to effectively define the need. *The Sedona Conference Glossary*⁶ will be most valuable in this regard.

Once the need is defined, prepare a concise and specific summary to provide to, and discuss with, potential Providers as they are identified.

Metadata, 14 SEDONA CONF. J. (2013), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Commentary%20on%20Ethics%20%2526%20Metadata>.

6. The Sedona Conference, *The Sedona Conference Glossary: E-Discovery & Digital Information Management, Fourth Ed.*, 15 SEDONA CONF. J. 305 (2014), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Glossary>.

III. PREPARING TO ENGAGE A PROVIDER

The Information Request can either be a formal RFP process, whereby a standard set of questions is sent to a list of potential Providers, or a more informal gathering of information. For whichever method is used, proper planning is important to the success of the selection effort.

Like many processes, there is no need to start from scratch each time; a useful strategy in the eDiscovery procurement process is developing a framework for procurement. An effective framework provides structure and ensures standardization around gathering and compiling Provider information, evaluating and selecting Providers, streamlining the contracting process, and managing the Provider engagement for the organization. Many large organizations or organizations that outsource many business functions often establish a procurement office to handle all aspects of procurement management. Although participation from a procurement office would be optimal, an organization does not need to have a formal office to establish a procurement framework, as the eDiscovery procurement framework can be narrowly tailored.

A. The Information Gathering Phase for Identifying Service Providers

The first step in establishing an eDiscovery procurement framework involves developing workflows and mechanisms to identify, gather, organize, and quickly retrieve information about Providers. The best framework has a filtering mechanism in place that allows the Requestor to quickly identify Providers based on the business requirements for which they are seeking services. A common best practice is establishing a Provider database that includes Providers' contact information, services, capabilities, and past experience. The database can be created by gathering information from Providers that solicit your business,

even before there is a need. Taking the time to evaluate the Providers in advance of a specific need will enable an organization to get to know the players in the space and get to know those that may be good partners at some point in the future. Having this mechanism and an organizational procedure in place to easily capture Provider information, outlined in more detail in Section V, will help you quickly build a short list of Providers from whom you can gather additional information.

B. The Evaluation Requirements Phase

The second step in developing a procurement framework is to identify the evaluation requirements for common eDiscovery services needed by your organization. There are many aspects of evaluation that can be established in advance of receiving proposals or even sending out a proposal request. The most successful eDiscovery proposal requests use established standards and criteria that are already in place within organizations, to the extent they exist. It is critical to use the same criteria for all Providers within the same categories. Having established repeatable processes for each phase of eDiscovery will help define consistent standards for choosing Providers for the desired category. The benefit of using criteria that are established by the organizational standard practices helps certify that the Provider is performing according to the organization's processes and standards. In addition, this approach provides an easy mechanism to compare Providers offering similar services for active projects. This is particularly important for law firm organizations who are soliciting Providers across clients and matters.

C. The Service Provider Onboarding Phase

The third step is to develop or, to the extent an organization already has a process, streamline the process for engaging and onboarding the Provider once chosen. In many cases, a contract process might already be established within the organization

outside of the eDiscovery or IT business unit. This process involves identifying the common contracting requirements and developing a workflow that pushes the contract through to internal stakeholders that must sign off on any Provider engagement. The most common requirements in eDiscovery are often related to risk management, such as having a standard nondisclosure agreement—sample provided at Appendix A, *infra*—and making sure that the Provider meets the organization's security, insurance, or malpractice insurance requirements. Establishing a workflow will help with role definition during the procurement phase and reduce the risk and wasted time finalizing the contract to begin work, which is critical in most eDiscovery projects.

D. The Monitor, Control, and Completion of Engagement Phase

The final step in establishing a procurement process is ensuring that you have standard processes in place to monitor, control, and finally close-out the Provider engagement. This is often an overlooked function within the eDiscovery procurement process, but it is important to certify that the Provider has met the business requirements outlined in the initial project requirements and established in the contract. The three critical factors in establishing a Provider management process are service-level agreements, key performance indicators (KPIs), and Provider knowledge management. Once a contract is established there should be a communication plan in place that includes regular and postmortem feedback to Providers providing the service or technology. Once a contract is closed, any information surrounding the solutions or services provided should be transferred to the appropriate knowledge management areas in order to manage risks as well as inform the Provider selection process for future engagements. Once you have a procurement process in place you should be able to effectively apply that process consistently to all requests for proposals, minimizing the time and

effort to complete any individual proposal requests, very often important to the eDiscovery process.

The procurement process might not always result in a contract or formal agreement. Regardless, there should be some written agreement as to the terms that have been agreed upon in the engagement process, which would include the topics outlined above.

IV. SCOPING THE PROJECT

A successful procurement of eDiscovery solutions is defined by matching the right services to the appropriate business need. The best way to ensure that the right information is being populated into the proposal request and ensure a successful evaluation and selection is to thoroughly scope the business requirements of the project, meaning that you clearly define the parameters for the work for which you are seeking a solution. Scoping a project answers the following high-level questions:

- What are the time constraints of the case/project?
- What is the expected outcome?
- What are the specific requirements for and constraints to getting it done?
- What does a finished project look like?
- How will it get done?
- Who will do it?
- When does it need to be done?

These are questions that should be reviewed in conjunction with other factors such as project size, types of services needed, time frames, and minimum requirements. In addition to answering these questions, another goal of scoping is getting the critical stakeholders to agree on the answers to these questions before the proposal request is developed.

A. Project Lead and Team

The first step in scoping an eDiscovery project is assigning a team lead or project manager and building a cross-functional project team. Services, technologies, and solutions within the eDiscovery industry are vast and constantly changing. The person managing the eDiscovery procurement process—as well as the overall project—should be an educated consumer of the services and have direct, timely access to the project sponsor, the

client, and/or any other decision makers. This person or group must be able to grasp the specific eDiscovery business needs, and be knowledgeable of solutions and services offered by the eDiscovery industry as a whole. The project may require knowledge of collection techniques, analytics, or assisted review, so be sure to choose a leader who has the necessary understanding of those tools. If that person does not already exist within the organization, consider: (a) retaining an eDiscovery expert or consultant that can help guide the entire eDiscovery process, including the procurement phase; or (b) networking with others in your field to learn from their successes or missteps. A knowledgeable project manager or consultant can act as the single point of contact and ask the correct questions of potential Providers to ensure the right tools will be available, utilized, and supported.

Equally important is developing the “right” project team—depending on your organization and project goals—comprised of a cross-functional team of stakeholders and decision makers that are responsible for the lifecycle of the eDiscovery project and the successful engagement of the eDiscovery technology or service. If in-house, consider including representatives from Legal, IT, Compliance, Risk Management, Procurement, and eDiscovery Support. For law firms, consider including representatives from your client, eDiscovery or Litigation Support Group, IT, and appropriate litigation attorneys and/or staff. These project teams help with business unit diversity to ensure that all business needs are met, but more importantly that all risk factors and constraints are considered. Services for a single matter will usually need fewer team members than an enterprise solution that will be used across many matters.

Often, soliciting existing Providers of some or all of the services currently being sought can be extremely valuable in crafting a proposal request. If applicable, existing Providers may

shed light on processes that exist, but are not represented or commonly known by stakeholders.

In those instances where an attorney is soliciting services on behalf of their client, it is often important to include a liaison from the client to ensure that the client is involved and their requirements are being met. Likewise, when an organization is seeking an enterprise solution, or a solution that has high cost or risk, it becomes necessary to the scoping process to have a C-level champion take on the role of project sponsor.

B. Clarifying Needs

The next step in scoping an eDiscovery project is defining the organization or project environment where it will be used and how to meet the organization's business needs. Is the solution needed for in-house counsel, a single practitioner, a law firm, or on behalf of a client? Is the solution to be used internally or externally? Is it a technology, a service, or a combination of both? Is the solution enterprise-wide or matter-centric? Keep in mind law firms and in-house counsel commonly seek enterprise or matter-centric solutions for their specific eDiscovery needs, but enterprise solution and matter-centric solutions differ within these organizational constructs. A law firm enterprise solution is often utilized with multiple clients across varying litigation profiles and business needs, while in-house counsel's enterprise solution is usually adopted to address a specific problem that is common across matters. Matter-centric solutions address the specific eDiscovery needs for a specific matter for both types of organizations. However, a law firm or a single practitioner soliciting the solution on behalf of the client for a specific matter requires an extra layer of communication and approval for each defined problem and solution. Any combination of organizational structures and categories of solutions informs

heavily and should be included as part of the business requirements for the proposal request.

C. Define Requirements

The third step in scoping the project is documenting the business problem and defining the requirements for the solution as well as any possible constraints. The problem to be solved by this procurement must be narrowly defined so that operating requirements and constraints can be defined and documented as specifically as possible in the proposal request. Often times organizations send out omnibus eDiscovery proposal requests that are either too broadly defined or try to cover every eventuality. Not only is it very difficult to respond to these requests, but it is also impractical to effectively evaluate responses. A better practice is to define the eDiscovery need(s) and send a request out for that specific function; sometimes this might require several requests for different phases of the eDiscovery process. The requirements for a solution that meet a business need are both functional and non-functional. The requirements may include the business process, level of service, performance, security, compliance, supportability, retention, disposition, and quality. When looking at the requirements for a proposed solution to the business problem, again, it is important to collaborate with the project team, sponsor, and client to determine the priority of the requirements and any project constraints related to budget, schedule, and available resources. When possible, clearly communicate constraints, such as timing and budget, in your proposal request to help minimize responses from Providers that cannot work within these constraints.

D. Define and Confirm Project Goals

The final step in scoping the project is getting agreement among the client, sponsor, and project manager on the project goal. Documentation regarding the goal not only includes the

vision of what the final product or service will accomplish, but also any identified criteria that can help measure the success of the eDiscovery project, technology, or solution. Here, be sure to list the items the solution must accomplish so that those can each be addressed. In addition to an agreement on goals and success criteria, the key stakeholders have to agree and ultimately approve the procurement. It is important to note that during the eDiscovery procurement process, there are often gaps in key information that may be needed to establish the business requirements. At this point, the project manager and project team must fill those gaps with informed assumptions. If making assumptions is necessary to identifying the business requirements, then the project manager must get buy-in from all stakeholders who must also agree on those assumptions. Defining the end goal of the project is not only key to the success of the project, it is key to successfully evaluating the proposal responses. Once you have clearly defined the business problem, project requirements, constraints, and success criteria, and these have been agreed to by the relevant stakeholders, the formal proposal request process itself can begin.

The best scoping process not only helps the project team prepare a proposal, but it is also extremely helpful to the Provider trying to respond to an Information Request. Providers will usually have a number of solutions and can tailor their suggested solutions better if they clearly understand what is being requested and why.

V. DEVELOPING THE SHORT LIST OF PROVIDERS

The identification of the right Provider for a specific job could begin long before the job has even been scoped. Taking the time to stay abreast of Providers, new tools, new workflow approaches, and technology will assist greatly when the need to find a specific solution for a project arises.

Once a project or need has been identified, how do you identify the “right” Providers to invite to this process? There are several ways to become generally educated and to begin collecting information⁷ about potential Providers who may be able to assist with a tool or service, so it does not need to be random. With all the available choices, merely requesting technical literature, case studies, and mission statements may not be enough to assist you in narrowing down the very large number of Providers out there. Determine if it makes sense to seek proposals in a multi-step process—such as starting with a brief, more general Information Request likely to result in a larger list of potential Providers to evaluate, followed by a more detailed Information Request to a smaller list. This multi-step process can significantly reduce the time required for both the Requestor and the Provider in the selection process.

Combining these techniques with the following recommended methods will go a long way toward refining the list of possible Providers to participate in the process:

- **Seek out referrals.** Whether you are in-house or at a law firm, “word of mouth” discussions are an invaluable resource. This can include:
 - talking with your litigation support, practice support, practice technology, IT, or procurement departments;

7. See *supra* Sect. III.A. (addressing establishment of a Provider database).

- discussions with your business partners;
 - engaging an independent consultant;
 - talking with your peers at other companies or law firms;
 - talking with existing Providers who may not provide the services for the particular problem or need; and
 - conducting a survey of your in-house or law firm colleagues or law firms (if you are in-house) to seek specific feedback on Providers—both positive and constructive.
- **Attend and participate in associations, seminars, conferences, and tradeshows.** There is often ample opportunity for face-to-face meetings with peers and Providers at these events. This is a great opportunity to benchmark, knowledge share, and have candid conversations about what Providers and technologies are hot or what emerging trends are out there. Your time with Providers may be an opportunity to start to forge relationships, meet people who may be your account managers or project management teams, and participate in live product demonstrations.
 - **Other resources.** There are many publicly available resources that contain an incredible amount of collected Provider information all in one place to help guide the selection process. These include industry websites, industry groups, industry news blogs, industry magazines (such as LegalTech News (LTN)), and industry surveys about Providers.

In short, just like there is no shortage of Providers, there is also no shortage of available information that can assist in the process of identifying the right potential tool or service/solution and Provider.

VI. VETTING SOLUTIONS AND PROVIDERS

A. *Making the Cut: How to Select Providers for the Short List*

The following Section contains suggested information to request from Providers during early discussions in order to identify a smaller group of strong candidates to focus your attention on when seeking more detailed information or going so far as crafting a more formal Information Request. The number of Providers selected to receive the final Information Request may vary greatly from project to project, but generally speaking, those selected to respond should all be viable contenders. This section outlines the information to consider requesting from each Provider, tailored and weighted according to the project at hand. See the Sample Information Request at Appendix B, *infra*, and the Sample Decision Matrix at Appendix D, *infra*.

Keep in mind that this is a time-consuming process for the Provider, and it is unreasonable to request a proposal from a Provider that is not truly in the running, not to mention time consuming for you to review responses that are not really needed. The use of a decision matrix or other scoring tool to evaluate preliminary Provider responses is helpful in identifying a list of qualified Providers to be included in the Information Request. The template at Appendix D should be customized for evaluating both preliminary and final responses to the proposal process.

It must also be noted that your Information Request, whether through dialogue or a formal process, should only seek answers to questions germane to the project that was scoped as outlined above. For example, if the matter does not deal with foreign language or data, you do not need to inquire about those qualifications, as negative answers to those questions may only cast misguided doubt as to a Provider's qualifications.

B. Provider Background

A responsibility exists to investigate the reputation and integrity of the Provider being considered and to ensure that they offer the kinds of products and services required. Presumably, those selected to receive a proposal request have been vetted for the basics prior to their inclusion in the list of possible Providers or they have been identified as a possible Provider based on factors as outlined in Section V. Seek and evaluate basic background information about the Provider, the personnel, and the product or service that they are offering. Consider requesting client references and contact them—both references identified by the Provider as well as those potentially identified by others that have used the Provider’s products or services.

1. About the Provider

Any potential Provider should be stable and known to provide quality service. These are not, on the whole, subjective qualities; it should not be difficult to determine a Provider’s reputation and viability. Nonetheless, it pays to ask for details and evidence, such as the following:

When was the Provider founded and by whom? Have they been around long enough or do they have the reputation of being able to deliver what you need? An older Provider may be more likely to be stable and established, but it is possible that a “younger” Provider may offer a solution unique to your problem. You may also ask about revenue for past consecutive years to determine financial stability.

To the extent a Provider cannot meet your needs, what is their policy on subcontracting and partnering? Who are their current partners and subcontractors? It is important to understand what services and products the Provider will handle directly, and what will be handled by another party. Use of third

parties can introduce new risks and costs which you will need to evaluate based on the circumstances.

How many staff members does the Provider have with expertise in your specific project area? Knowledgeable experts can ensure that the services and products are implemented in a way that is a best fit for your particular needs. Even if you do not require their assistance at the outset of a project, Provider experts may be valuable team members if issues later arise.

Do they have a track record for providing the specific product or service required? Age of the Provider alone may not be enough for you to determine how established a particular product or service is. In particular, you may wish to know how much experience the Provider has applying particular products and services to clients or cases similar to the Requestor's. Also know that many Providers that were scanning and coding operations yesterday claim to be experts in eDiscovery today; as with the selection of any expert, one must get behind the representations.

How big are they, both in dollar volume and personnel? How transparent is the pricing? How will pricing be affected if the matter changes in scope? In certain cases, a local Provider with the right expertise and/or product and a good track record may be just as appropriate as a larger Provider.

Ask for client references, and use them (nondisclosure agreements may prohibit disclosure of some references). Use research groups such as Gartner or Forrester for general information about market leaders. Where available, take a look at prior testimony and court opinions involving the Provider. Remember, it is possible the Provider may need to testify regarding the transparency, metrics, or methodologies of the process. As with law firms, remember that retention also involves retaining a specific person or team as well, not just the "company." (See About the Personnel below).

Find out about obligations, representations, and warranties to ensure that the Provider is qualified to do what they say they do and that they aren't doing the same job for an adversary, can guarantee confidentiality and the appropriate safeguards for information, and are reputable in pricing and bidding practices. The Provider should have an adequate process for determining conflicts of interest.

Where is the Provider located, and where are their products and services available? The physical location(s) of the Provider may or may not be an issue, depending upon the type of service they provide.

Can the data be handled without altering metadata? What technologies are used that will prevent spoliation of metadata? Are data and date fields normalized? Data integrity is a basic component of all e-discovery projects.

What safety and security measures does the Provider use to protect data? This is especially important for electronic data involved in litigation where chain-of-custody issues are a concern. Does the physical facility of the Provider provide the appropriate disaster recovery ability? Is there a fully-enabled back-up site? If the Provider is providing a website, is it sufficiently secure and safe from viruses and hackers? What certifications does the Provider have relating to data security? What is the Provider's data retention policy, and what measures does it use to delete data at completion of a project? Asking the Provider to describe in detail existing virtual and physical security capabilities in the proposal request will allow assessment of which Providers most closely conform to the solution requirements.

These are issues that each Provider should be asked to address in detail in a proposal request, and possibly more generally before being considered for a project.

2. About the Personnel

General background information about a Provider is one thing, but a background check should include, more specifically, information about the people who work there and those who may work on the project at hand or as part of your relationship engagement. What is the experience level of the personnel, both generally and specifically, with your requested service? Will the team assigned be dedicated to you and your project? Will they staff your matter with the appropriate skill set? Have personnel been appropriately screened for security? In some cases, a criminal record and background check for all Provider personnel may be necessary. Are security clearances required? If so, inquire plainly as to certified personnel, the levels of their certifications, and what role those individuals will fulfill for the project. Are personnel located in the United States or overseas? The data in some cases may be subject to certain security regulations and the transfer of that data outside the physical border may be prohibited. Do they have the collective expertise to handle and are they available for the project at hand? Sometimes a Provider's success can result in work overload that may impact delivery of the service. If time is of the essence for your project, ask pointed questions about delivery dates and whether the Provider is willing to guarantee such dates in writing. Will the Provider need to hire new, possibly inexperienced or temporary staff to handle the work? It is important to have the ability to approve personnel working on your project and the ability to retain the same personnel for the length of a project. Will they need to subcontract any part of the work? It is important to understand the current capacity and workload of the Provider, as well as personnel turnover, to help you evaluate the Provider's ability to meet agreed-upon service-level agreements and the consistency of the team assigned to you.

If your matter is going to require testimony from the Provider, it is best to determine if the Provider has personnel with that type of experience. What has been the outcome? Are there copies of the testimony or expert affidavits that can be shared?

3. About the Provider's Processes and Philosophy in Delivering Services

It is also important to know the project management approach (process) of a Provider. Although this may vary depending upon the type of product or service, project tracking and client communication is an important consideration. A dedicated project manager, or at the very least a single liaison or point of contact, should be available to manage and troubleshoot so that conflicting messages do not exacerbate existing problems and lead to deadline or quality issues. This also allows you to set up a communication plan that includes project milestones and progress reporting. It is important to have the right to request removal of personnel if they are not a proper fit for the project.

In addition, Providers may provide general support for their products and services, beyond a project manager. You should understand what support services are available, how they are staffed, when they are available, and what the cost will be for those services.

4. About the Product or Service

Notwithstanding the quality of the Provider and personnel, the Provider must also have the goods to provide and support the product or service they sell. Do they use their own software or resell or license software from a third party? Have the Provider's products and services been validated by a court? Not all products and services are created equal. You should not assume just because a Provider is using an "industry standard" product that they support it or set it up the same way; many products

allow for customization and it will be important to understand this from your Provider. Again, client references and Gartner or Forrester resources may shed valuable light on Provider product/service performance. Assuming the Provider's product or service can live up to their claims, how good are they at providing the appropriate level of quality assurance? Do software and systems need to be upgraded on a regular basis? Will the software be inaccessible during these upgrades, and when do they generally occur? Do the technologies they use have unanticipated dependencies that must be otherwise supplied, such as network, operating systems, capacity, or compatibility issues? Are there any refunds for a technology not meeting a certain up-time guarantee?

Up-front work in preparation of the proposal request should detail as many technical concerns and specifications as possible to give the Provider the opportunity to anticipate potential glitches. Remember that the proposal request is a two-way street—the request is just as important as the response. The more explicit and detailed the description of the project, the better the chance the Provider has to recognize and realistically address potential limitations. Mapping out the expected processes and workflow, and subsequently tracking changes, is recommended, particularly in the event testimony may be needed (it's always good to be able to demonstrate how hard you worked to do it right). Most Providers also welcome the establishment of a communications protocol, with scheduled progress reports containing specific metrics, together with a protocol for reporting and resolving unanticipated changes, delays, or other issues.

In addition to the basic information described above, eDiscovery projects pose additional areas of concern. It is important to request information to ensure understanding of the following about the potential Provider:

Maintenance of Document Integrity: This is an important evidentiary consideration. The Provider should describe what is done to ensure that: (a) a document has not been changed during processing; (b) steps are taken to normalize data and date fields; and (c) the “processed” document can later be compared to the original item received by the Provider. Again, a detailed description of the process can help track chain of custody and ensure preservation of content. The Provider should confirm as part of that process that a complete, exact copy of the data is securely stored, in case something does go wrong or is challenged.

Amenability to Escrow: For a large, long-term project, it may be important to escrow any software code, together with instruction manuals and other documentation, to guard against problems in the event the Provider becomes financially unstable or is purchased by another entity with which there may be a conflict of interest.

Expert Testimony Experience: In eDiscovery matters, the Provider may need to be a participant in the litigation. It is advisable to ensure that the Provider has a spokesperson with appropriate expertise who is comfortable on the witness stand to attest to the integrity and transparency of all processes and quality control. It may also be desirable to shield this potential testifier from attorney-client privileged or work-product protected information throughout the process to ensure that such information does not become discoverable by virtue of this expert testimony.

Subcontracting: It is important to understand that the Provider has both fiduciary and confidentiality obligations to the client, and, as such, it is important for the Provider to disclose all possible subcontracting relationships that may be planned or anticipated during the lifecycle of the project. It is important that

a process be established for disclosure and approval of any sub-contracting, and that all sub-contractors are named as additional insureds on any required insurance policies. In addition, the Provider and all subcontractors should be prepared to certify that they are free of conflicts. Requestors may wish to reserve the right not only to approve the use of subcontractors but also the right to terminate or replace a subcontractor. Requestors may also wish to reserve the right to dictate both billing and project management logistics, to the extent necessary. The quality of work performed by the subcontractor should be in keeping with industry standards. The criteria used in selecting primary Providers should be taken into consideration when vetting subcontractors as well, e.g., subcontractors should be held to the same security standards as the Provider and should be subjected to the same security vetting process as that used to vet primary Providers.

Provider Background: A List of Considerations Regarding Potential Providers

PROVIDER BACKGROUND		
ABOUT THE PROVIDER		
<i>Area of Concern</i>		<i>What to Ask About</i>
Provider Stability	<i>Where the Provider has been in business for more than one year, they should have proven experience providing the required services.</i>	<ul style="list-style-type: none"> ▪ Provider Age Information regarding the establishment of the Provider, as well as any mergers or consolidations, and number of years doing work similar to your project. ▪ Financials Taxpayer identification and financial statements for the last three years, as well as bank references. Also consider requesting information regarding any pending lawsuits against the Provider. These items may not necessarily be made available at the initial stages of the process and/or from privately held Providers depending on the parties and the situation. Bank references and client references are also helpful if financials are not available. ▪ Provider History and Performance Information A description of the Provider's background and expertise in the areas covered by the Information Request, including years of experience, past projects, and performance. Strategy and timeline for attaining or maintaining Provider's place in the future market space.

PROVIDER BACKGROUND		
ABOUT THE PROVIDER		
<i>Area of Concern</i>		<i>What to Ask About</i>
		<ul style="list-style-type: none"> ▪ Number of Salaried Personnel The number of salaried personnel (vs. hourly workers or subcontractors that are hired on a project-by-project basis) could be a good indicator of a Provider's financial health. What proportion of the sales, consulting, and development personnel are salaried vs. hourly? ▪ List of Key Clients Key clients of the Provider who represent over 10% of the Provider's revenue. Providers with only one disproportionately large client could present stability concerns should that client business be lost.
Provider Quality	<i>The Provider should be able to provide information that will show a proven track record of successful projects and satisfied clients.</i>	<ul style="list-style-type: none"> ▪ Client References Names of clients for whom the Provider has performed services similar to those required. (When requesting references, ask for a general description of the scope of the project and the value achieved by the client, as well as project timelines.) ▪ Past Performance Information Information about clients that were satisfied with the outcome of the project, project management, deadlines, fee arrangements, quality control, and perceived integrity. ▪ Client Retention Rate Percentage of clients that are retained year after year.

PROVIDER BACKGROUND		
ABOUT THE PROVIDER		
<i>Area of Concern</i>		<i>What to Ask About</i>
		<ul style="list-style-type: none"> ▪ Products and Services Offered List of all eDiscovery products and services offered by the Provider, and the percentage of Provider's revenue for each.
Provider Obligations, Representations, and Warranties	<i>The Provider should have sound business practices for their own and their clients' protection, and be willing to adhere to liability and confidentiality standards.</i>	<ul style="list-style-type: none"> ▪ Proof in Writing of the Existence of: ▪ Insurance and licenses ▪ Any potential privilege and/or conflicts issues ▪ Confidentiality guarantees ▪ Pricing methods ▪ Non-collusive bidding assurances ▪ Applicable policies such as Foreign Corrupt Practices Act (FCPA), Gramm-Leach-Bliley Act (GLB), Health Insurance Portability and Accountability Act (HIPAA)
Physical Plants	<i>The Provider should have secure and safe premises for conducting business and safeguarding any information and/or electronic data that may be provided by their clients.</i>	<ul style="list-style-type: none"> ▪ Physical Plant/Office Locations Address and contact information for all plant/office locations, domestic and international, for the Provider's company as well as any affiliated businesses or organizations. Location of data center(s), if applicable. The Provider should differentiate between third-party managed locations and locations owned and managed by the Provider. ▪ Safety Information pertaining to building or site disaster safeguards (fire, flood, etc.), especially if the Provider will be hosting data. Data center tier level (i.e., Tier 4 is

PROVIDER BACKGROUND	
ABOUT THE PROVIDER	
<i>Area of Concern</i>	<i>What to Ask About</i>
	<p>most robust and less likely to experience failures).</p> <ul style="list-style-type: none"> ▪ Security Information pertaining to building and data access, personnel screening, physical security methods (ID cards, etc.), hacker/virus protection, and industry certifications.

PROVIDER BACKGROUND	
ABOUT THE PERSONNEL	
<i>Area of Concern</i>	<i>What to Ask About</i>
<p>Quality of Personnel</p> <p><i>The Provider should employ an appropriately educated and dedicated staff.</i></p>	<ul style="list-style-type: none"> ▪ Rate of Personnel Turnover Information regarding length of time on the job for those involved in the potential project. ▪ Client References As with information regarding Provider quality, ascertain the level of satisfaction with personnel from other previous or current clients, including ease of communication, turnaround times, quality of work, etc.
<p>Experience</p> <p><i>Staff should have experience commensurate with their responsibility.</i></p>	<ul style="list-style-type: none"> ▪ Past Performance Success that personnel has had at completing the kind of tasks required for the particular product or service need. ▪ Testimony Prior experience in giving testimony related to product or service. ▪ Competitive Advantage What sets Provider apart from others in the marketplace?

PROVIDER BACKGROUND		
ABOUT THE PERSONNEL		
<i>Area of Concern</i>		<i>What to Ask About</i>
Staffing Capacity	<i>The Provider should advise in advance if any subcontracting or temporary staff will be utilized on the project.</i>	<ul style="list-style-type: none"> ▪ Personnel Data Information regarding the location and number of personnel, number of personnel that support specific products and services, staffing and workforce composition anticipated for the project, and their technical expertise and years of experience.
Project Management	<i>The Provider should have experienced management to oversee, troubleshoot, and communicate information about the job.</i>	<ul style="list-style-type: none"> ▪ Project Oversight Who will manage the project, product, or service, and the frequency of and methods for reporting progress. Where is the staff, expected to be assigned to the project, located? How many personnel are available to support the different products and services, and what are the hours of operation for the support staff?

PROVIDER BACKGROUND		
ABOUT THE PRODUCT/SERVICE		
<i>Area of Concern</i>		<i>What to Ask About</i>
Process and Infrastructure	<i>The Provider should have demonstrable safety measures in effect, as well as the appropriate infrastructure to meet the demands of the project.</i>	<ul style="list-style-type: none"> ▪ Maintenance Information regarding maintenance of the product /service such as: type, quality, and availability of technical support; procedural updates; product maintenance; upgrades; regularly scheduled periods of product or service unavailability; location of staff; any standard business hours; support process; and escalation procedures, etc. ▪ Disaster Recovery Information regarding standard backup plans, including disaster

PROVIDER BACKGROUND		
ABOUT THE PRODUCT/SERVICE		
<i>Area of Concern</i>		<i>What to Ask About</i>
		<p>recovery plans and facilities during the lifecycle of the project. (If implementation has not yet occurred, is the entire project lost in the event of a fire?)</p> <ul style="list-style-type: none"> ▪ Security A description of procedures for screening personnel and maintaining security on the premises of all business locations, such as requiring badges for entry. Request certifications held relating to security. ▪ Technology Infrastructure A description of redundancies, high availability/failover procedures uptime, scalability, infrastructure maintenance, geographic footprint of Provider, data throughput capabilities, Requestor-facing applications, resiliency, security, new hardware refresh cycle, and roadmap for equipment management. ▪ Support Industry benchmarking reports or expertise consulting which compares Providers using industry standards. Request any metrics used to track number, quality, and timeliness of service issues.
Quality of Work	<i>The Provider should have standard practices to validate and measure the</i>	<ul style="list-style-type: none"> ▪ Quality Assurance Procedures Documentation of steps taken to validate and verify the products/services. Ask for metrics: service-level agreements, credits or earn backs per year, and how

PROVIDER BACKGROUND	
ABOUT THE PRODUCT/SERVICE	
<i>Area of Concern</i>	<i>What to Ask About</i>
<i>quality of products, services, processes, and procedures.</i>	<p>Provider uses metrics to measure and demonstrate performance and quality.</p> <ul style="list-style-type: none"> ▪ Client References As with information regarding company and personnel quality, ascertain the level of satisfaction with the products/services from other Provider clients, including ease of use, stability, problem-solving, technical support, and documentation. ▪ Reporting Methods Ascertain the methods the Provider uses to present information to clients during the lifecycle of a project.

C. Short List of Nonstarters

1. Confidentiality

Entering into either a unilateral or bilateral confidentiality agreement is the first step for many prospective Requestors and Providers. A confidentiality agreement will allow the parties to exchange information in order to determine if the Provider has the correct tools, services, or availability to proceed with receiving or responding to the proposal request. Without a confidentiality agreement, it is unlikely that a meaningful dialogue can be initiated with potential Providers about the nature and scope of the project so they can provide “active” feedback. These agreements are often referred to as Nondisclosure Agreements (see sample at Appendix A, *infra*).

2. Provider Security

Engaging a Provider to process data or any kind of service related to eDiscovery requires the same attention to security risk that would apply to the Requestor seeking the service. There is every reason to expect the potential Provider to have physical and network security safeguards in place to protect confidentiality and Requestor assets. In addition, the Provider must be willing to guarantee agreed-upon courses of action should the Provider face financial hardship, gain a new conflicting client, be acquired by another company, or have their programming guru seek an island respite. Security issues should be considered for the Provider, the data, and the project itself.

(a) Physical Site & Personnel Security

Site security for the Provider and any third-party entity they might employ is crucial. A site visit to “kick the tires” is not a bad idea (at least at the final proposal request stage), and may provide a glimpse into the culture of the organization as well. The Provider should have obvious security measures in place such as access restriction to network hardware, telecommunications security, disaster recovery plans, back-up servers, and appropriate insurance.

Personnel security is just as important. What kind of security checks do they use to ensure the reliability of their own personnel, such as background and conflict checks? Are the personnel bonded? What procedures are in place when an employee leaves the Provider? Can they work for your client’s adversary?

(b) Data Security

Hardware and software security companies have essentially generated their own industry, and with good reason. Today, electronic information is recognized, as never before, as a valuable business asset and endangered data can be life threatening

to a business or the outcome of litigation. While it may be a reasonable assumption that Providers have the appropriate safeguards in place, the questions must still be asked. What are their back-up and disaster recovery procedures? Are their software systems sufficiently protected from intruders, hackers, and viruses? Is user access sufficiently secured by complex passwords and authentication processes to ensure only authorized access is allowed? How does data get from place to place, and is it encrypted before it goes anywhere? Do they keep their protections up-to-date? Deficiencies in this area are not worth the risk. A Provider's data security should meet the same security standards required by your organization and by the law.

(c) Project Security

If the Provider passes muster on Provider and data security measures, there is still the project to consider. What happens when the project is over (and what determines the end date)? What happens to electronic and hardcopy data, work-product, backups, etc.? What happens if personnel on your project leaves the Provider after the project? Is that work memorialized by the Provider if testimony is subsequently needed? What happens if the Provider has not met their obligation — is there an articulated method to handle disputes? One thing to keep in mind is that the dynamic electronic landscape is driving business mergers and acquisitions, not to mention failures. What happens if the Provider is acquired or files for bankruptcy? Will your client's data be involved in the mess? If you are well informed of the Provider's stability, it is possible to head such a problem off at the pass, and ensure that safeguards are in place in case of such business surprises. Specify what should be done with electronic and hard-copy data at the conclusion of the relationship, such as returning all original paper and media or shredding all copies, and certifying compliance with these procedures at the conclusion of the project.

PROVIDER SECURITY		
PHYSICAL SITE & PERSONNEL SECURITY		
<i>Area of Concern</i>		<i>What to Ask About</i>
Physical Site Security	<i>The Provider should demonstrate provision of appropriate physical and data security procedures.</i>	The Provider's physical sites should be as secure as the client's. Ask about: <ul style="list-style-type: none"> ▪ Building safety and security for each site (e.g., access, back-up, disaster recovery) ▪ Telecom (types and locations) ▪ Third-party outsourcing
Personnel Security	<i>The Provider should be accountable for the quality and reliability of all personnel or subcontractors under their auspices.</i>	Who works for the Provider, and how are they screened? Ask for information about: <ul style="list-style-type: none"> ▪ Background checks ▪ Conflicts checks turnover ▪ Drug testing ▪ Bonding ▪ Personnel exit process ▪ Security training

PROVIDER SECURITY		
DATA SECURITY		
<i>Area of Concern</i>		<i>What to Ask About</i>
Hardware Security	<i>The Provider should be able and willing to commit to prescribed procedures in the event of disruption or termination of the project.</i>	Description of what happens if the Provider cannot finish the job or has an unforeseen disruption of business. Ask about: <ul style="list-style-type: none"> ▪ Mirror site ▪ Server lock-downs ▪ Access restrictions ▪ Insurance ▪ Disposition of retired hardware ▪ Succession planning in the event of end of business
Software Security	<i>The Provider should demonstrate provision of appropriate physical</i>	Information related to: <ul style="list-style-type: none"> ▪ Third-party outsourcing ▪ Ability to guarantee data integrity ▪ Mirror site

PROVIDER SECURITY		
DATA SECURITY		
<i>Area of Concern</i>		<i>What to Ask About</i>
	<i>and data security procedures.</i>	<ul style="list-style-type: none"> ▪ Secure delivery of data
Network Security	<i>The Provider should have policies to prevent and monitor unauthorized access, misuse, modification, or denial of a computer network and network-accessible resources.</i>	Information related to: <ul style="list-style-type: none"> ▪ Multi-factor authentication ▪ Firewall ▪ Intrusion prevention system
Enterprise Vulnerability Management	<i>The Provider should have a practice of identifying, classifying, remediating, and mitigating vulnerabilities.</i>	Information related to: <ul style="list-style-type: none"> ▪ Vulnerability scanning, including practices and platforms used ▪ Tests and audits (e.g., ethical hack)
Web Services and Transmission Security	<i>The Provider should have security around web services and protection of transmissions from interception.</i>	Information related to: <ul style="list-style-type: none"> ▪ Transport-level security ▪ Application-level security

PROVIDER SECURITY		
PROJECT SECURITY		
<i>Area of Concern</i>		<i>What to Ask About</i>
Rights on Termination	<i>The Provider should be able and willing to commit to prescribed procedures in the event of disruption or</i>	Description of what happens if the Provider cannot finish the job or has an unforeseen disruption of business. Clarify the Provider's position on: <ul style="list-style-type: none"> ▪ Rights to data ▪ Contract disputes ▪ Business failure/acquisition

PROVIDER SECURITY		
PROJECT SECURITY		
<i>Area of Concern</i>		<i>What to Ask About</i>
	<i>termination of the project.</i>	<ul style="list-style-type: none"> ▪ Memorialization of work completed ▪ Data retention and deletion
Conflicts	<i>The Provider should investigate and fully disclose any potential conflicts with parties related to the client's business or litigation.</i>	Information related to: <ul style="list-style-type: none"> ▪ Procedures for checking for conflicts ▪ Agreements not to work with opposing parties without both party's consent ▪ Protocol if Provider is acquired by another company ▪ Any officer or family member with personnel, employer, or consulting relationship with Provider
Data Management	<i>The Provider should have established procedures for managing and logging project data.</i>	Information related to: <ul style="list-style-type: none"> ▪ Media handling/logging procedures including standard operating procedures for maintaining valid chain of custody ▪ How project data is handled upon project completion

D. Conflicts

The consideration of a Provider—or any other litigation support provider for that matter—in connection with any project, should always start with a conflicts check. While there may be situations in which a Provider is retained to perform ministerial or quasi-ministerial type services (equivalent to photocopying), there are others in which the Provider will be privy to confidential information about the client's information management systems and policies, as well as their litigation strategy. It is therefore imperative to ensure that there are no conflicts or potential conflicts at the outset. It is also imperative that a conflicts check

be performed by any entity that will be acting as a subcontractor to the Provider, and that any potential conflict is addressed prior to the engagement of the Provider that will be acting as the general contractor.

In situations where a formal Information Request will be issued, considerations regarding potential conflicts should always precede the issuance of the Information Request. In order to facilitate this process, we recommend that a nondisclosure agreement be executed prior to disclosing any confidential information. A sample nondisclosure agreement is provided at Appendix A, *infra*.

What constitutes a conflict? Before choosing a Provider, it is important to have an adequate understanding of the Provider's conflict check process and any related policies in order to ensure that potential conflicts are identified and disclosed. When providing purely technical services, conflict may be less significant; however, the Provider should at a minimum disclose any conflicts to their clients. Beyond legal conflicts, there may also be business conflicts that may impact the retention of a particular Provider under certain circumstances—for example, a Provider that is being considered by a party may have been previously retained by a competitor of the party and may be in possession of non-public information or trade secrets belonging to its first client. However, because parties may waive a conflict, Providers may be able to undertake engagements in situations where a party grants them a waiver notwithstanding the existence of a conflict. Parties, their attorneys, and Providers should engage in an open and frank discussion concerning conflicts and what steps can be taken to mitigate potential conflicts and protect against the disclosure of confidential information. Where appropriate, parties should consider the waiver of conflicts and allow Providers that are providing, or that have provided services to them, to also provide services to parties that are adverse

to them in situations where there will be no prejudice suffered as a result of having waived the conflict.

The fact that no two eDiscovery projects are the same complicates the conflict analysis, and makes it that much more difficult to draw bright lines. Every potential conflict must be examined in light of the circumstances of the matter at issue. There may be situations where past, existing, or prospective clients are not concerned about a potential conflict because the nature of the services rendered or to be rendered was or is such that there is no concern about the potential disclosure of information that could prejudice its position. Moreover, the explosive growth and consolidation of Providers in the eDiscovery marketplace further complicate the conflict analysis. When a Provider acquires or merges with another Provider, there is a possibility that the new entity could be doing work for two parties that are adverse. The growth in the marketplace has also resulted in a number of Providers being sold to investment groups and corporations that have not traditionally provided litigation support services, resulting in potential conflicts between the ultimate owners of the Provider and its clients. The only way to avoid these problems is to ensure that you understand, prior to engaging a Provider, who ultimately owns and controls it.

We recommend that any service agreement to be ultimately executed by the parties contain a clause memorializing the parties' agreement concerning conflicts. This is especially important in light of the fact that Providers are not bound to the rules of ethics that preclude attorneys from representing parties who are adverse to their clients.

E. Initial Information Exchange Meetings with Providers (do they have suggested information to include in the proposal request?)

Providers are the experts in their market space and know how they measure up to competitors. Providers have also received many past proposal requests from other prospective clients and have responded to those requests. Therefore, Providers are aware of what questions should be included and the manner in which the questions should be asked. If having a preliminary conversation with Providers, consider soliciting a few ideas for questions or topics from various Providers for inclusion in the proposal request; inquire whether they have suggestions for helpful information to include in the proposal request.

If looking at licensing a tool, hardware, or software, it may also be valuable to ask Providers to give acceptable ranges for certain technical or business requirements. This will allow confirmation that technical or business requirements do not exceed what is currently available in the marketplace. If requirements do exceed what is currently available in the marketplace, requirements may need to be reevaluated.

VII. CRAFTING THE FINAL INFORMATION REQUEST

A. *General Tips*

Crafting an Information Request is not a simple task, nor is the process of responding to such a request. An Information Request is not a form where a Provider simply fills in the blanks, and such a document should not be considered the definition of success when working through the process. No two projects are the same, and an Information Request must be tailored to the specific needs of each project or partnership need if meaningful responses are expected and if a Provider is to be specific in responding to needs.

Practice Pointer: Perhaps the biggest area of concern when drafting the document is assuming that a Provider's knowledge of the project is complete—such assumptions have been proven wrong in the past—thus it helps tremendously to engage potential Providers in a detailed dialogue to make certain they are aware of all project considerations.

Again, it is in the best interest of all parties to ensure that Providers who are not well suited to the project are not taking the time to respond to an Information Request, and that you are also not taking the time to analyze those responses. This can be accomplished by informal communications with responding Providers or a Q&A process that can be shared with all responding Providers. There are, of course, certain sections that are amenable to boilerplate language, such as confidentiality, rights of the parties, representations, and warranties. A sample "tailored" Information Request containing those sections is included in Appendix B, *infra*. Such Information Requests generally remain consistent from project to project, but as with everything, should still be reviewed each time to make sure they are appropriate for the matter at hand.

Practice Pointer: For example, if you have already worked with all of the responding Providers, consider whether there are certain questions that can be eliminated to focus on the variances of that specific project's needs.

In addition to general or boilerplate language, an Information Request should include and request information focused on getting you the information tailored to the specific product or service needed. For example, if known, identify any data types that are unique to the Provider or law firm in order to confirm that the Provider can handle the data types (e.g., GroupWise, iOS data, and text messages). Another example would be the need for collection services outside of the United States; list the countries at issue and request information about the Provider's previous experience in this area and ability to handle such requests including whether the Provider would need to subcontract those services. Identifying the components of a project where the Provider anticipates a need to subcontract work is an important detail that should not be overlooked. A subcontractor presents some process visibility concerns, as well as concerns about tracking and locating the subcontracted individual or group down the road if needed.

B. Project Specific Information Request

When drafting a project-specific Information Request, it is recommended that you include a project scenario, asking the Providers to answer and provide information using the same method. When possible, require prospective Providers to answer questions using a similar formula. The scenario-based Information Request is an example of this formulaic approach. Identifying a suitable method of questioning and providing clear instruction on the expected format of answers will allow you to better compare the Providers' answers.

Practice Pointer: Specifically, include the assumptions that the Providers should use when answering your questions, for example, the anticipated number of custodians, the collection size, how many documents in a gigabyte, how many pages in a document, anticipated timelines, or how many users will need access to the software if a hosting solution is being sought.

Providers often have their own general assumptions and it can be very difficult normalizing the responses to any fact-gathering exercise if you are forced to convert responses of a varying format to a common format.

However, in some instances you may consider allowing Providers to generate alternative proposals so that Providers can distinguish themselves based on the strength of their offerings. For example, the project scenario may contemplate one workflow, but with a Provider's proprietary workflow or customizable solutions, agreeing to allow an alternative answer format may more clearly highlight available solutions that you'll want to consider when making your selection.

C. Ongoing Partnership Information Request

If you are drafting an ongoing partnership Information Request, then consider providing exemplar matters for the Providers to review and provide analysis. Exemplar matters, in addition to estimated volume (monthly, yearly, or over multiple years) or number of times the data could be used for separate matters, may also assist at getting responses that provide volume-based or discounted enterprise-level pricing. Regardless of whether you are drafting a project- or partnership-based Information Request, it is important to detail to Providers the methodology for bid process evaluation so that Providers are aware of what you as the client view as most important in your selection process.

D. *Sample Answer Matrix*

In addition to providing the information discussed throughout this section, consider including an Excel or database tool for Providers to use when responding to the request. Attached at Appendix D, *infra*, is a sample answer matrix tool. The more “locked down” the request, the easier it will be to compare the responses, meaning that if all responding parties are required to use the same assumptions and have the same matrix with which to provide their answers, the easier it will be to compare and contrast the answers.

E. *Timeline*

In addition to where and whom the response should be submitted, the Information Request should also contain information about the applicable timeline, including, but not limited to: issue date, question and answer dates (if any), response due date, timeline for review, dates for presentations (if any), and date for ultimate determination and award under the Information Request.

F. *Information Request Sections to be Customized*

The Information Request sections that must be customized for a project include the following:

- a. Project Overview (Scope of Work (SOW)): As discussed, a thorough description of the project may be the most important element of an Information Request, and this description, together with the requirements list, should be discussed with all project team members to ensure as complete a description as is reasonably practicable. Indeed, this is where the problem is defined, specifying the number and type of information sources, the systems on which they

reside, timelines, scope of relevancy, and any applicable court orders. Also specify the services required and, if applicable, the expected format for review and production. This is an appropriate time to develop internal checklists regarding eDiscovery needs, etc.

- b. **Deadlines:** Describe any deadline or time line that is important to your workflow. Confirm that the Provider can meet the deadline, both in terms of capabilities and available resources.
- c. **Geographic Scope:** Describe the geographic scope of the work, particularly any potential for foreign, international, or cross border issues that may be encountered.
- d. **Management:** Describe the roles of client, counsel, and staff in the management of the work contemplated. Also spell out the expected lines of communication, metrics and measurements of success, and procedures and expectations for progress and status reporting.
- e. **Requirements Description:** In this section, describe for the Provider, to the extent known or reasonably anticipated, the technical requirements, specific services needed, the time constraints, the volume, the required output, and the required service and quality levels. If software or hardware is involved, also inquire regarding any implementation, training requirements, available technical support services, and associated costs. It is important to specify the goals and objectives of the project, as well as priorities. Ask for “what” is needed, and allow the Provider to describe “how” they will meet those needs.

- f. Definitions: *The Sedona Conference Glossary*⁸ defines terms frequently used in connection with eDiscovery matters. It is recommended to include in the Information Request all definitions that may apply to avoid future misunderstandings. The Sedona Conference Technology Resource Panel members have agreed to work within the framework of this Glossary.
- g. Provider Process and Infrastructure: Here the Provider is asked to describe, in detail, assumptions, processes, and infrastructure for getting the project done. Seek information regarding their internal reporting structure, and their process for “change control,” i.e., how unanticipated issues are handled. Remember, litigation often involves “surprises” as the norm.
- h. Quality Assurance: Following up on the initial proposal request questions and responses regarding quality assurance, this inquiry seeks to determine if the Provider will institute any additional quality assurance procedures in light of the nature and circumstances of the project.
- i. Processing Methods: Questions here are driven, of course, by the nature of the services requested. In the sample “tailored” Information Request (Appendix B), there is a list of suggested questions for a variety of fact patterns.

8. The Sedona Conference, *The Sedona Conference Glossary: E-Discovery & Digital Information Management, Fourth Ed.*, 15 SEDONA CONF. J. 305 (2014), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Glossary>.

- j. **Provider Recommendations:** The eDiscovery arena is very dynamic, with technological capabilities continuously changing. Asking for the Provider's recommendations will give the Provider an opportunity to describe new service offerings that may provide a better solution for the project, or guide away from outdated assumptions that may be embedded in service requests. As mentioned in "e" above, ask for "what" is needed, and allow the Provider to explain "how" those needs will be met.
- k. **Pricing Alternatives:** Specify the pricing model(s) preferred, so that meaningful comparisons of the Provider pricing responses can be made. Indicate the specific service, unit (i.e., gigabyte (GB), each unit, hourly, etc.), and volume (i.e., megabyte (MB), GB, etc.) type for consistent comparisons. Appendix C, *infra*, discusses various pricing models for various services. Be sure to ask the Providers to list all possible charges so there are no surprises. If time is of the essence for your project, consider building in adequate protection to ensure essential timelines are met (e.g., late penalties). If the Provider is using some form of "conversion" to respond in the pricing model requested, the "conversion" should be transparent and understood.
- l. **Provider Qualifications and References:** Be sure to check trade references, carefully read the Provider's website, and then follow-up with questions as to various representations made therein. It is also important to speak with references supplied by the Provider. While some of the Provider's clients may have insisted on confidentiality, be certain to speak with those familiar with the Provider's ability to perform, just as one would with any other Provider.

- m. **Follow-up Processes:** Set forth a procedure for handling questions that arise during the Information Request process, allowing each participant to weigh in. Crafting and responding to an Information Request is a complex process, and questions about language or meaning are bound to arise. Resolution of any ambiguities should be globally communicated among all prospective Providers and client stakeholders to ensure the resolution is accurate, complete, and fairly noticed.
- n. **Post-Information Request Briefings:** Let the potential Providers know when you will make a final decision. Once a decision has been reached, in addition to notifying the selected Provider, it is also a good practice to explain to those Providers that did not get the job the reason for the selection that was made. This preserves goodwill for the next project and helps improve the process overall by educating the competition.
- o. **Invoicing:** Often overlooked (and the missing link) is obtaining invoicing that captures billing categories in line with the ABA's Uniform Task-Based Management System: Litigation Code Set.⁹ Provide service Providers with your organization's invoicing requirements to be transmitted using information exchange standards (csv, xml, etc.). Leveraging the collective experience and information from eDiscovery projects for every matter across an organization can

9. See generally *Uniform Task-Based Management System Litigation Code Set*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/litigation/resources/uniform_task_based_management_system/litigation_code_set.html (last visited Mar. 31, 2017).

provide legal teams with meaningful historical project metrics on which to make more informed decisions on future projects. Receiving invoicing in standard information exchange formats, over time, will enable your technology departments to aggregate the information within spreadsheets and databases that can generate actionable eDiscovery business intelligence (BI).

- p. Training: Within eDiscovery, every role that interacts with ESI requires some measure of technical know-how. Describe for the Provider, if known, or request the type of training included for each job function (technical analyst, project managers, contract reviewers, attorneys, etc.) per matter. Inquire about continuing legal education (CLE) programs offered, by state. As with service Providers, it is important that law firm and corporate personnel are sufficiently familiar with the processes, workflows, and technology offered. The extent of training needed will depend on an employee's role. Taking advantage of programs to validate their knowledge and expertise will serve to streamline communication and overall eDiscovery processes.

VIII. SELECTION: EVALUATING RESPONSES TO THE INFORMATION REQUEST—THE DECISION MATRIX

As with analyzing responses to an initial proposal request, the beginning point for analyzing and comparing Provider responses is through the use of a scoring sheet or decision matrix. (See Appendix D, *infra*.) To complete this process, each item in the Information Request (hardware security, software security, etc.) is assigned a level of importance specific to the project at hand, and then each Provider response is given a 'grade' or number assessing the sufficiency of the response. The Providers are ranked by multiplying the importance level and the response grade, and then adding the results. Of course, a decision matrix cannot, and should not, replace the exercise of common sense and good judgment but will hopefully inform the exercise of that judgment, usually made in conjunction with the client.

On complex products, consider creating a pricing matrix to have Providers populate and return with their written responses. Each column should represent a key price term (e.g., per licensee charge, hourly rate of technicians, upload charge, etc.). This permits comparison of apples to apples when evaluating responses.

IX. AFTER SELECTION

A. Communicate Selection and Reasons (Feedback)

Once a selection is made, it is important to communicate to the selected Provider to inform them that they have been selected and confirm their interest and ability to perform the requested tasks as outlined in the Information Request. During that communication, it would be helpful to provide the selected Provider the reasons they were selected including any areas where their response did not fully meet expectations. This will provide the selected Provider an opportunity to focus their energy on those areas.

It is also important to communicate to the Provider participants that have not been selected that the project was awarded to another Provider and the reason(s) for that decision. Often the Providers not awarded the work will want feedback as to why they were not selected. This should be viewed as an opportunity to provide proactive and constructive feedback and information that may assist the Provider in responding to future Information Requests with your organization or other organizations. This generally happens via a phone call; however, some organizations allow Providers not selected to meet with the organization to discuss their response and the area(s) for which they did not meet the organization's selection criteria. Many of these Providers may be a fit for future work or projects and by giving the Providers feedback, the Providers have an opportunity, if they choose, to focus efforts in order to win a future project.

B. Contracting with the Selected Provider

After selection, the selected Provider and organization will enter into the contracting phase of the relationship—whether it is a full Master Services Agreement (MSA) or a SOW. Basic con-

tract provisions like liability, indemnity, confidentiality, insurance, and many other terms should be considered and agreed to by the parties. Depending on the scope of the work or the type of software licensed, it may also be appropriate in the contract to address who owns the data, what the service-level response times are for various types of errors or outages, location of the data and how data will be removed from any system or location at the end of the contract, what security will be in place around the data and systems, and what turn-around times will be for certain work. Organizations may want to work with their procurement department regarding appropriate terms and conditions.

C. Relationship Management and Escalation Process

The partnership between an organization and their Provider can be strengthened when there is a set relationship management plan. This may include regularly scheduled meetings between your organization and the Provider in order to discuss the relationship, what is working well, what can be improved, and strategies to expand the relationship. This is also an opportunity for a candid discussion on key data metrics, key performance indicators (KPI's), and continued process improvement opportunities.

In addition to relationship management, each relationship should have a clearly defined escalation process. Understanding and clearly defining the appropriate chain of command and escalation plan will allow for a quick remedy of potential problems or disputes.

X. TRENDS

Much of the discussion in this paper has focused on the importance of effectively defining the need prior to efforts to identify the proper solution(s) and Provider(s). With the landscape of the eDiscovery industry changing so rapidly, attorneys and litigation support professional are advised to stay abreast of new industry trends, developments in technology, and significant case law development. Knowledge of industry trends and developments can be very helpful when attempting to articulate a need and in recognizing the available solutions. This section contains some basic information on some of the more recent trends and developments to consider when crafting an Information Request.

A. Information Governance

While the field of information governance is not new, there has been a recent shift in focus from managing the costs of data storage to more effectively managing the overall amount of data being stored as a way of managing eDiscovery costs and risks. Tools and processes are being applied in new ways to minimize existing data stores that have become of little or no use to the business processes of a firm or company. One of the clearest manifestations of this trend is the use of the term big data (Big Data) to describe complex or massive, previously unmanageable data repositories that have historically been inaccessible for practical business uses. Managing Big Data and only keeping what is needed are areas that will continue to be explored as computing power and analytics advance. It will become im-

portant when drafting proposal requests to understand how potential Providers handle the volume and the collection of data from these resources.¹⁰

B. Technology-Assisted Review (TAR)

TAR is not new, but its acceptance and use is growing. As courts and judges have made it more clear that TAR is a reasonable option,¹¹ when combined with a well thought out workflow, process, and proper expertise, parties and corporations are beginning to realize the benefits of leveraging these tools to keep costs down, shorten timelines, and make document culling and review projects more manageable. A full exploration of the Provider's abilities, experience, and capabilities in the area of analytics should be included in any proposal request where these services may come into play. It is vital to a successful proposal request process that the evaluation of a TAR Provider includes the involvement of someone experienced in the practical application of TAR tools.

TAR is also being applied to new areas, like data collection or pre-collection data analysis. Using TAR in these areas helps to alleviate massive, costly collections that are more traditionally identified using text key term/phrase methodologies. TAR tools are also being leveraged in the areas of information gov-

10. See generally The Sedona Conference, *Commentary on Information Governance*, 15 SEDONA CONF. J. 125 (2014), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Commentary%20on%20Information%20Governance> (containing in-depth discussion of information governance).

11. See generally The Sedona Conference, *TAR Case Law Primer*, 18 SEDONA CONF. J. ____ (forthcoming 2017), available at <https://thesedonaconference.org/publication/TAR%20Case%20Law%20Primer> (containing discussion of TAR case law).

ernance and data disposition. Using an appropriate TAR workflow may provide insight and categorization of data subject to retention requirements and data not subject to retention requirements and, possibly, ready for disposal.

An offshoot of the application of TAR technology is in preserving the intellectual property gained during a document review project. Historically, once documents were coded for a specific project, it was difficult to carry that work to subsequent projects unless the work was done on exactly the same document corpus. Using TAR, however, allows for certain information gleaned during these reviews to be “learned” by the TAR tools and applied to new review sets. Specifically, tools are being developed that will learn what a privileged document is for an organization and can apply that logic to newly introduced documents. A number of Providers also enable data reuse on similar matters so the same information does not have to be collected and reviewed again.

C. Consolidation

The trend continues whereby eDiscovery companies continue to grow market share by merging with their competitors, if not via outright acquisitions. What is new is that large companies outside of the eDiscovery marketplace have now turned their attention to this market sector. It is unclear how the technologies will be applied. Whether the new technology will be kept as a stand-alone eDiscovery solution or whether the technology was purchased as a building block for an existing consumer solution that has nothing to do with eDiscovery, or some combination thereof, has yet to be revealed.

D. Mobile Computing

The shift to mobile computing is clearly making its way into the legal sector. Solutions range from being able to access, edit,

and file briefs via a mobile device, like a tablet or smart phone, to timekeeping so that timekeepers can use stopwatch-like apps to track their time on a matter in and out of the office. Other solutions allow users to check out batches of documents from data repositories to use at deposition and trial, and link those documents to their outline which has been written on the device. Additionally, there are applications that allow users to work collaboratively in the cloud with their co-counsel.

In order to keep up with this portability, hardware companies have developed accessories so that the attorney on-the-go can set up an office no matter where he or she lands. There are printers the size of a three-hole punch, projectors that are no bigger than a pack of playing cards, and battery packs that can recharge devices on the go allowing for longer times between the need for a wall jack.

The greatest strides in mobile computing, however, have to do with security. There is an increased focus on complex authentication and encryption to prevent data theft. Data can be erased remotely, allowing companies to ensure that their data's integrity is not compromised should a device be lost or stolen. Mobile devices can be tracked and usage can be limited to specific tasks as designated by an organization. Most proposal requests should deal with mobile computing in some form.

E. Cloud Computing

Many organizations have begun the shift to cloud computing. Cloud computing allows organizations to give up their reliance on internal hardware and software, while purchasing these resources over the internet. In the legal sector, we see a number of eDiscovery SaaS offerings, whereby the eDiscovery software normally installed inside a firm or company's firewall is now being hosted on a Provider's server farm. Users access their data via a secure connection on the internet. With respect

to the proposal request process, knowing where your data resides can be very important, especially in some business sectors. It should be clear to Providers when drafting a proposal request that details regarding cloud computing capabilities are necessary, especially if your organization is affected by data location regulations or sensitivities.

APPENDIX A: SAMPLE NONDISCLOSURE AGREEMENT

MUTUAL NONDISCLOSURE AGREEMENT

THIS MUTUAL NONDISCLOSURE AGREEMENT is made and entered into this ___ day of _____, 20___, between XYZ, Inc., a _____ Corporation, and ABC, Inc., a _____ Corporation.

1. Purpose. The parties wish to explore a business relationship of mutual interest and in connection with this opportunity, each party may disclose to the other certain confidential technical and business information which the disclosing party desires the receiving party to treat as confidential.

2. “Confidential Information” means any information relating to the business plans, financing, capital structure, proprietary processes, or technologies owned by, licensed to, developed by, and/or discussed by either party and any other information the parties should reasonably assume is confidential or proprietary to the disclosing party. Confidential Information shall not, however, include any information which (i) was publicly known and made generally available in the public domain prior to the time of disclosure by the disclosing party; (ii) becomes publicly known and made generally available after disclosure by the disclosing party to the receiving party through no action or inaction of the receiving party; (iii) is already in the possession of the receiving party at the time of disclosure by the disclosing party as shown by the receiving party’s files and records immediately prior to the time of disclosure; (iv) is independently developed by the receiving party without use of or reference to the disclosing party’s Confidential Information, as shown by documents and other competent evidence in the receiving party’s possession; or (v) is required by law to be disclosed by the receiving party, provided that the receiving party (a) gives the disclosing party

prompt written notice of such requirement prior to such disclosure, (b) provides a letter from counsel confirming that the Confidential Information is, in fact, required to be disclosed, and (c) provides assistance in obtaining an order protecting the information from public disclosure.

3. Non-use and Nondisclosure. Each party agrees not to use any Confidential Information of the other party for any purpose except to evaluate and engage in discussions concerning the business relationship between the parties. Each party agrees not to disclose any Confidential Information of the other party to third parties or to such party's employees, except to those employees of the receiving party who are required to have the information in order to engage in the business relationship between the parties.

4. Maintenance of Confidentiality. Each party agrees that it shall take reasonable measures to protect the secrecy of and avoid disclosure and unauthorized use of the Confidential Information of the other party. Without limiting the foregoing, each party shall take at least those measures that it takes to protect its own confidential information.

5. Return of Materials. All documents and other tangible objects containing or representing Confidential Information disclosed by either party to the other party, and all copies thereof in the possession of the other party, shall be and remain the property of the disclosing party, and shall be promptly returned to the disclosing party upon the disclosing party's written request.

6. No License. Nothing in this Agreement is intended to grant any rights to either party under any patent, mask work right, or copyright of the other party, nor shall this Agreement grant any party any rights in or to the Confidential Information of the other party except as expressly set forth herein.

7. Term. The obligations of each receiving party hereunder shall survive until such time as all Confidential Information of the other party disclosed hereunder becomes publicly known and made generally available through no action or inaction of the receiving party.

8. Remedies. Each party agrees that any violation or threatened violation of this Agreement may cause irreparable injury to the other party, entitling the other party to seek injunctive relief in addition to all legal remedies.

9. Miscellaneous. This Agreement shall bind and inure to the benefit of the parties hereto and their successors and assigns. This Agreement shall be governed by the laws of the State of _____, without reference to conflict of laws principles. This document contains the entire agreement between the parties with respect to the subject matter hereof, and neither party shall have any obligation, express or implied by law, with respect to trade secret or proprietary information of the other party except as set forth herein. Any failure to enforce any provision of this Agreement shall not constitute a waiver thereof or of any other provision. This Agreement may not be amended, nor any obligation waived, except by a writing signed by both parties hereto.

APPENDIX B: SAMPLE INFORMATION REQUEST

– MAKE BELIEVE V. COLD REALITY –

Confidential

[Date]

Any Electronic Evidence Provider
One Discovery Street
Hard Drive, Illinois 12345

Re: Information Request: Electronic Data
Preservation and Collection Services

Dear XXX:

The undersigned firm represents Cold Reality, Inc. with respect to the litigation brought by Make Believe Management, LLP, *Make Believe v. Cold Reality*, a fairly small matter in the Northern District of California in San Francisco. Your firm has been identified as a potential provider of litigation support, electronic evidence, and data hosting services for defense counsel in this litigation. We would appreciate your execution and return of the enclosed Nondisclosure Agreement (“NDA”) prior to submitting your responses to this Information Request. Please fax the executed NDA to _____ at _____, sending the original to us via first class mail.

Your response to this Information Request will be used to identify whether you are a candidate suitable for issuance of a request for proposal (RFP) containing specific inquiries as to how you propose to satisfy the preservation, collection, and production needs of this case. Accordingly, we appreciate detailed responses to this Information Request, and we welcome your suggestions and offerings of information that we have failed to ask about, but may nonetheless be helpful to our case. Please feel free to provide additional information on other services you feel would be of benefit or value to the firm or our client.

This litigation revolves around patent infringement issues with respect to the game shows “Sue Me” and “Court Fun,” produced by the parties and currently viewable on national television networks. The firm is looking for a full service provider capable of providing litigation preservation, collection, and production services for both electronic data and hardcopy, paper documents. In addition, the data and documents collected will need to be processed for hosting on an externally hosted site, securely accessible by our attorneys and client’s in-house counsel, that needs to be completed no later than {Date, Year}.

While we cannot guarantee that this case will not be resolved by motion practice or settlement, no dispositive motions are pending, and neither party has indicated an intention to resolve this dispute outside of court. Accordingly, this Information Request is issued with our full intent to retain an appropriate service provider.

Your complete response to this Information Request, which should be delivered to us in printed paper form and an electronically searchable PDF file, must be submitted within 7 days of receipt of this Information Request.

Please direct your responses to the undersigned with copies to John Dough and John Cash, at this firm, as well as Bud E Guy, Esq., in-house counsel at Cold Reality, Inc., 1313 Mockingbird Lane, Centerville, USA. Please do not hesitate to contact me at _____, or by email at _____ .com, if you have any questions, suggestions, or concerns.

Very truly yours,
Mr. John Lit Supp
Director of Litigation Support
Little, Firm, That, Could, LLP
One Defense Way
Struggle, Ohio

cc: J. Dough
J. Cash

INFORMATION REQUEST

Please provide us with information regarding your capabilities to provide the necessary support for the following:

- Length of engagement: Medium-term litigation (potentially 1–3 years).
- Number of documents: At least 100,000, although potentially more than 1,000,000, including documents in native format.
- Harvest of data from approximately 18 hard drives, 3 servers, and potentially other sources.
- Type of documents: Documents will be collected and produced in both paper and electronic format. Those documents not in “native format” will need to be scanned, bibliographically coded, and “OCR” processed, with an identified degree of OCR accuracy.
- Please describe your reporting and quality assurance procedures.
- What are your standard representations, warranties, and service-level guarantees?
- Document review and production database: Please identify your capabilities in the following areas:
 - o Ability to organize and segregate documents in a variety of manners (including by producing party)
 - o Ability to host all documents in a single uniform image format with the corresponding native format file linked with images
 - o Handling and preservation of all metadata captured and saved in situations where native files have been converted to images, including captured and searchable text
 - o Backup procedures and redundant layers of protection of the data

- o Security: Facility, server, database, and user security are all of great importance. Please describe your security protections, procedures, and audit procedures for same, as applied to both network and physical security.
 - o The provision of ASCII load files for in-house review tools
- Electronic File Processing: Please describe your capabilities in the following areas:
 - o The processing and chain of custody protocols and other measures used to avoid spoliation charges
 - o Your de-duplication methodologies and process and testing of same
 - o Identify artificial intelligence algorithms or other tools, if any, used to parse, categorize, segregate, or tag data, together with process for using and testing same.
- Document Review: Please advise as to your systems and processes for administering document review capabilities and support to the following specifications:
 - o Access to a document review database by 10 or more attorneys and/or paralegals (potentially in different parts of the country) at a given time through standard web browsers, from any internet-connected computer, with or without tokens for security. Documents should be available for review for 24 hours per day, with exception for normal database maintenance.
 - o Single web-based review tool for all databases. Please specify any required client software downloads or agents.
 - o Training: Please describe your processes, extent, and frequency of training.

- o Technical support: Set forth the extent and method used for providing technical support for issues relating to accessibility, functionality, and content management.
- o Printing: Please describe your print capabilities for batch printing provided at your facility, the facility of a provider of our choice, or to a local printer at the user's office.

PROVIDER BACKGROUND

Please supply a narrative description of your history, together with your contact information, proof of financial viability, and data regarding your corporate structure, number of salaried personnel, and other pertinent information regarding your business.

SECURITY

We would like to understand the measures undertaken by you to ensure the security and integrity of your networks and physical building.

SUBCONTRACTORS

Those responding to this Information Request should be aware that the law firm has confidentiality and fiduciary obligations to our clients, and, in fulfilling those obligations, we are mindful to avoid unnecessary costs and potential conflict situations.

Should you have need to subcontract any part of the work you are bidding for, please set forth those areas of work or process that you intend to subcontract, at any time during the engagement, together with the reasons for subcontracting this work. Please also state your willingness to aver that any such subcontractors will meet any agreed upon deadlines.

The firm reserves the right to approve the use of any subcontractor before they are engaged and it is expected the firm will pay nothing additional for the use of the subcontractor. It is expected the quality of work to be supplied by subcontractor be

high quality and in keeping with industry standards. It is also expected the firm will pay the lower rate, if subcontractor is lower in price than the quoted price in your response to the Information Request. The firm reserves the right to dictate billing and project management logistics in using a potential subcontractor and reserves the right to discontinue use of the subcontractor.

CONFIDENTIALITY

This matter, the participants, and any information disclosed during this Information Request process or (for the provider and any subcontractors selected) during the actual engagement is deemed confidential. In addition to the nondisclosure agreement submitted by you prior to responding to this Information Request, you and any subcontractors may be required to sign a confidentiality order imposed by the Court.

CONFLICTS

Prior to retention, provider and any approved subcontractor shall be required to perform a conflict check of its existing clients and its engagements to ascertain that conflicts do not exist with this case. This would include other engagements for actions our adversaries may be involved in.

APPENDIX C: PRICING MODELS

When evaluating proposals from multiple providers (Providers), one of the hardest areas to compare is the pricing for the proposed project. Because there are no standards governing the processing of electronic data (“e-data”), most Providers follow their own proprietary workflow, and base their pricing on that workflow. Even when looking at the pricing for discrete portions of an electronic discovery project, such as imaging a hard drive or processing a PST file, it is often difficult to compare multiple Provider proposals because some Providers bundle pricing for multiple steps, or approach steps in different manners.

The number of options for processing e-data for review and production also make it difficult to compare proposals from multiple Providers. While the vast majority of all e-data was traditionally converted (to TIFF, PDF, or HTML, for example) for review and production (either on paper or in load files), it is becoming much more prevalent for Providers to offer processes allowing the review to take place in “native” format. Because of the prior predominance of conversion to image, the vast majority of electronic discovery projects were priced on a per-page basis, and while the cost of conversion to image is not the only cost associated with processing e-data for review under the traditional model, it represents a significant portion of the overall cost of the process. However, as more and more e-data is reviewed in native format, the pricing of electronic discovery projects has moved towards volume or “gigabyte” based pricing, which, while not the only cost associated with processing e-data for review under this model, may still represent a significant portion of the overall cost of the project. Per-page quotes are often an almost meaningless benchmark.

A few observations are in order before delving into the nuts and bolts of pricing. Aside from the review costs, the cost to process e-data for review and production (whether to TIFF, PDF, native, or some other format) may be by far one of the most expensive and time-consuming components of the process. Therefore, any steps to reduce the amount of data to be processed, will almost certainly reduce both the time it takes to process the data for review as well as the overall cost of the project. As opposed to copying entire hard drives or network shares, the volume may be reduced in any number of ways, such as by eliminating non-relevant data by culling out system files, using date filters or keyword searches, or by identifying only targeted subsets of the preserved or collected data (i.e., folders, directories, or other specific areas) containing potentially relevant data. Using mutually-agreeable objective criteria, agreed upon by the parties, to remove clearly irrelevant data from the processing and review set will always be more efficient, and cost effective, than using human reviewers to eliminate this data. Critical to any process employed to narrow the data for processing and review is consistency and process documentation. This ensures a reasonable, defensible process as discovery proceeds.

Additionally, processes such as “concept” search engines and analytics bring with them their own set of pricing models. However, because the process itself is different from traditional processing, comparing proposals for these services with proposals for other methods of data reduction may have to be done at a higher level than the granular line-item comparison proposed in this paper. Maybe the only way to compare a proposal involving newer or different technologies with other proposals is to look at the total cost of the project, and in some instances the comparison may have to include the projected review costs because these newer or different processes involve different review strategies. Indeed, sometimes the “all-in” cost, or total cost, may really be the key metric to consider.

In order to fully understand the pricing of electronic discovery services, it is imperative to understand the process itself. To that end, the following is a representation of the electronic discovery process—starting with collection of e-data and concluding with production. We have broken down the process into broad steps, each of which is composed of multiple steps. Obviously, not every step described will be necessary in every project. As you would expect, Providers have different pricing models for each of the steps, or in some cases, for each of the sub-steps.

Harvesting/Collection

(forensic recovery or active data acquisition, restoration of back-up tapes)

Processing

(elimination of system files, de-duplication, culling by date ranges, keyword searching, identification of targeted subsets, extraction of metadata)

Conversion

(conversion to TIFF \ PDF \ HTML \ etc., or processing for native review)

Creation of Review Database

(loading, user fees, hosting)

Review

(technology-assisted review, manual human review)

Production

(endorsement—bates numbering, confidentiality logo, etc.—printing of production sets or creation of load files if producing electronically)

Creation of Production Database

(loading, user fees, hosting)

Another important, and often significant, component of the total cost of the process may be project management fees. Some Providers incorporate these costs into their overall price model; others charge a percentage of the total project cost, while others charge by the hour for project management. In addition, strategic partnerships are sometimes entered into, with totally unique pricing models.

Outside of the context of strategic partnerships or long-term relationships, most Providers use one of two general pricing models, albeit generally with their own twist. We will briefly examine these models, point out some of the issues associated with each of them, and then describe our proposed methodology to compare proposals from Providers using different models—although our hope is that Providers will respond to a request with pricing based upon the pricing model sought, or at least break down their pricing in such a way that it can be compared with other proposals. In any context, it may be prudent to request an example invoice from the Provider showing all potential line items that could appear to avoid unanticipated charges.

One common pricing model is based on a per-page fee, under which the Provider charges based upon the number of pages of images generated from the e-data. Given that at one time, almost 100% of e-data processed for review and production was converted to TIFF or PDF, many Providers, law firms, and clients were fairly comfortable with this model, primarily because, like photocopying, it provides objective criteria—the client pays for the number of TIFF or PDF pages that are generated from the data set. However, one of the principal disadvantages of this model is that it is difficult to accurately estimate the number of TIFF or PDF pages that will be generated from a data set prior to processing, thus making it difficult to estimate the cost. While some Providers include the cost of keyword searching, culling

(based upon file types and/or date ranges), and de-duplication in their per-page image conversion charge, others charge separately for each of these steps.

A more common pricing model used by Providers today is based upon the amount of data processed. Under this volume-based pricing model the Provider charges a set fee based upon the volume of data to be processed. Some Providers that use this model charge only for the data actually processed, after keyword searching, culling, and de-duplication, but charge separately for each of these steps; while other Providers charge based upon the size of the raw data set, before keyword searching, culling, and de-duplication, but bundle the cost of these steps into their processing charge. While this pricing model at least appears to make it easier to estimate the cost of processing e-data—if the cost per gigabyte is X and the data set consists of 100 gigabytes of data, one can quickly calculate the cost to process the data set—it may be unlikely that all 100 gigabytes of data will have to be processed. As with the per page pricing model, the raw data set will most likely be reduced by keyword searching, culling, and de-duplication, which will result in less than 100 gigabytes of data being processed. Any quote for volume-based pricing should clearly specify whether the quote is based on compressed or decompressed volume, as this can result in significant price differentials. Compressed volume would be the volume before expanding container files, such as email .pst files or .zip files; the decompressed volume is the volume of data after container files have been expanded.

Pricing models are as dynamic as the technology and processes used by Providers to process e-data. Therefore, it is imperative that the requesting party (Requestor) be able to break down the pricing contained in multiple proposals, regardless of the process used by the Provider. The Requestor should specify a pricing scenario in the request for proposals, and Providers

who use different pricing scenarios should provide a way for the Requestor to compare the pricing in their proposal to proposals in the requested format. For example, if the request calls for proposals based on a volume-based pricing model, Providers who use a page-based pricing model should include estimates of the number of pages per gigabyte, so that the Requestor can compare the proposal to proposals based on volume-based models.

Not surprisingly, pricing is an area of much innovation in the electronic discovery area. Fixed-price models, incentive-price models, project pricing, and strategic long-term relationships represent alternatives to the basic pricing approaches described above, and are just some of the innovations being requested today by major organizations.

APPENDIX D: SAMPLE DECISION MATRIX

INFORMATION REQUEST: DECISION MATRIX
SAMPLE ONLY – WEIGHTING IS KEY*As mentioned in text, this is only a beginning point.*

Score: 1–5

Weight: 1–3

		PROVIDER SCORES		
		Provider A	Provider B	Provider C
WEIGHT				
ABOUT THE PROVIDER				
Stability	2	3	3	4
Quality	2	3	3	5
Covenants*	2	4	3	5
Physical Plants	2	4	3	3
PERSONNEL				
Quality	3	3	3	3
Experience	3	3	3	3
Staffing Capacity	3	3	3	3
Project Management	3	3	3	5
ABOUT THE PRODUCT/SVC				
Process and Infrastructure	2	4	5	3
Quality of Work	2	4	5	3
PHYSICAL SITE & PERSONNEL SECURITY				
Physical Site Security	2	4	5	3
Personnel	2	4	5	3

		WEIGHT	PROVIDER SCORES		
			Provider A	Provider B	Provider C
DATA SECURITY					
Hardware Security	2		5	4	4
Software Security	2		5	4	3
Network Security	2		5	4	4
Enterprise Vulnerability Management	2		5	4	4
Web Services & Transmission Security	2		5	4	3
PROJECT SECURITY					
Rights on Termination	3		5	4	5
Conflicts	2		4	4	5
Data Management	3		5	4	4

RESULTS			
	Provider A	Provider B	Provider C
About the Provider	28	24	34
Personnel	36	36	42
About the Product/Svc	16	20	12
Physical Site & Personnel Security	16	20	12
Data Security	50	40	36
Project Security	38	32	37
TOTAL	184	172	173

* Includes: Obligations, Representations, Warranties, etc.

NOTE: Scores outside the range of 1-5 and weights outside the range of 1-3 will be highlighted in RED.

APPENDIX E: TECHNOLOGY RESOURCE PANEL

THE SEDONA CONFERENCE WORKING GROUP SERIES TECHNOLOGY
RESOURCE PANEL PROVIDER MEMBERS:
(as of April 2017)*

Alix Partners, LLP

Altep

Driven Inc.

H5

Ipro Tech, LLC

kCura Relativity

Meta-e Discovery, LLC

NightOwl Discovery, Inc.

Nuix

QuisLex

TCDI

* For a current listing of TRP members, *see* www.thesedonaconference.org.