

THE SEDONA CONFERENCE® WORKING GROUP SERIES

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# BEST PRACTICES FOR THE SELECTION OF ELECTRONIC DISCOVERY VENDORS:

## *Navigating the Vendor Proposal Process*

A Project of The Sedona Conference®  
Working Group on Best Practices for Electronic  
Document Retention and Production (WG1)  
RFP+ Group

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# NAVIGATING THE VENDOR PROPOSAL PROCESS

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# *Preface*

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## **Overview**

Welcome to the next publication in The Sedona Conference® Working Group Series (“WGS<sup>SM</sup>”), *Best Practices for the Selection of Electronic Discovery Vendors: Navigating the Vendor Proposal Process (June, 2007 Version)*. This effort is an outgrowth of our Working Group on Electronic Document Retention and Production (WG1), and represents the work of its RFP+ Group: “users” of electronic discovery vendor services (2 from defense firms, 2 from plaintiff firms, 1 from a corporate law department, and 1 consultant/attorney) with input from time to time provided by the RFP+ Vendor Panel, a group of over 35 electronic discovery vendors who signed up as members to support this effort in response to an open invitation and whose membership fees have financially supported the efforts of the Group (See Appendix F for a listing of the RFP+ Vendor Panel as of June, 2007; see [www.thesedonaconference.org](http://www.thesedonaconference.org) for a current listing of the RFP+ Vendor Panel).

The goal of the RFP+ Group and this paper is to outline an approach to the selection of an electronic discovery vendor 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 what is being discussed. In the belief that an informed market will lead to reduced transaction costs, more predictable outcomes, and better business relationships, the RFP+ Group was formally launched on July 1, 2004, and its first work product, along with its companion, *The Sedona Glossary*, was originally published in July 2005. That publication is updated with this 2007 version, which seeks to incorporate changes in the marketplace that have developed over the last two years. Perhaps the most significant change in the marketplace, which has just begun to emerge, is a movement toward integration in the vendor community – we are beginning to see vendors offering integrated electronic discovery services including overall project management and consulting services and in some cases, even document review. As a result of this trend, we anticipate that the next version of this paper will have a much broader scope and will address all aspects of the electronic discovery lifecycle (as they relate to litigation and investigations).

This version also seeks to further emphasize the importance of tailoring the sample forms, check lists and suggestions herein to the buyer’s specific and particularized electronic discovery need.

We have seen the use of non-tailored sample forms over the last year, and have concluded that we failed to sufficiently emphasize the importance of customizing your RFI and RFP to the project at hand. So, please be advised, if you simply copy and submit the sample forms and check lists herein, you will not obtain a meaningful or useful response to your RFI or RFP. It is extremely important that each RFI and RFP be specifically tailored to the facts and requirements of the project in order to specify the requirements of the buyer's need.

The Sedona Conference® is primarily known for its efforts as a law and policy think-tank and premium conference provider in the areas of antitrust, complex litigation and intellectual property rights, and our Working Groups are focused on these areas. Though the RFP+ project may seem more nuts and bolts than our others, it is one that we believe can be of benefit to all participants in the process, and that may contribute to one of the overall goals of our Working Group on Electronic Document Retention and Production — the prevention of the tail wagging the dog when it comes to discovery of electronic information in complex litigation. We hope our efforts have the intended effect. Please send all feedback to us at [tsc@sedona.net](mailto:tsc@sedona.net).

### **IMPORTANT CAVEAT RE: USAGE OF THESE GUIDELINES**

This paper, a guide through the RFP process in the selection of an electronic discovery vendor, must be placed in context to be used properly. There are three levels at which context is relevant: (1) information management; (2) business relationships with information management and electronic discovery vendors; and (3) the creation of a specific RFI and RFP for the selection of a vendor for a single piece (or related pieces) of litigation, investigation, or other electronic discovery projects. It is also important to understand the paper's scope, which does not include the review phase of the electronic discovery lifecycle. This version of the paper is intended to assist users in selecting vendors of collection, processing and hosting services – and does not address issues associated with the review phase. Finally, as with all such matters, good judgment must ultimately be the final arbiter.

#### **(1) Information Management**

Business today operates in an information-based economy, and the identification, selection, review, storage and retrieval of information critical to any particular enterprise is now getting

Board-level attention (or, at least, should be) simply to ensure that the business does not lose, or lose control of, any of its valuable information assets. The less attention an organization pays to effectively managing its information assets, the bigger the headache of electronic discovery in any particular litigation.

## **(2) Business Relationships With Vendors**

There are obvious transaction costs to either selecting or changing vendors. There are some who advocate going through the RFP (if not both the RFI and RFP) process for every project. There are others who espouse the benefits of long-term vendor or vendor-team relationships. As we emphasize, the selection choice is one based on the exercise of sound business judgment; this paper should prove a useful starting point regardless of the business model chosen for the vendor relationship, and is not intended to be read as endorsing either approach.<sup>3</sup>

## **(3) Creation of Specific RFI or RFP**

This paper is meant to ensure that all pertinent factors are considered in the creation of any specific RFI or RFP. The sample RFI (Appendix C-2) and RFP (Appendix C-3) based on a hypothetical case pattern (Appendix C-1) are meant to show how the long-list of considerations can be tailored to a specific project, as not all considerations are necessarily pertinent to each project, or vary in degree of importance depending on the litigation (see Decision Matrix, Appendix E). Hence, the sample RFI and RFP appendices are not meant to simply be copied and used, nor are the long lists of questions simply to be converted into a broad-form RFI and RFP. Similarly, the inclusion of a decision matrix is not meant to imply that the choice is mechanical. As mentioned throughout, going through all the considerations mentioned in this paper, including the Decision Matrix, are the foundation for an informed business judgment, not a substitute for it.

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<sup>3</sup> The current literature on supply chain management and the approach to quality through continuous improvement, as exemplified by TQM, CMM, Six Sigma or other standardized process improvement methodology, for example, suggests selecting very few supplier partners and working with them to improve process. See Zero Base Pricing (1990) and Out of the Crisis (1982). As noted in the text, above, however, this paper advocates neither approach in general - it is a business decision.

With that by way of prelude, I hope you find the following helpful in the event you find yourself in situations involving the need to select an electronic discovery, or information search and retrieval, vendor. As with all of our efforts, feedback and input from any interested party is encouraged.

Special thanks go to our “user group” for all their hard work on this project: Matthew Cohen (Skadden Arps, Slate, Meagher & Flom LLP); Conor Crowley (Labaton Sucharow & Rudoff LLP); Sherry Harris (Hunton & Williams LLP); Megan Jones (Cohen, Milstein, Hausfeld & Toll, PLLC); Anne Kershaw (A. Kershaw, PC//Attorneys & Consultants); and Mark Reichenbach (Merrill Lynch, Office of General Counsel ).<sup>4</sup>

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Executive Director  
June, 2007  
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<sup>4</sup> The WG1 RFP+ “User” Group also wishes to acknowledge the contributing efforts of Shelley Podolny, A. Kershaw, PC//Attorneys & Consultants.

## ***I. Introduction***

The purpose of this paper is to provide guidance to law firm and law department attorneys and litigation support professionals who must face the increasingly daunting challenge of finding the appropriate electronic discovery vendor. The proliferation of these vendors is not surprising in light of an increased demand for such a broad range of services—from collection, processing, review and production of electronic documents to strategic consulting in the creation of a discovery plan or even high-stakes forensics. Electronic discovery, like most aspects of litigation, is not susceptible to a cookie-cutter approach. Accordingly, the sample forms and check lists herein are provided for guidance only. The value of the RFI and RFP process can be obtained only through the tailored use of RFIs and RFPs that are customized to the needs of each specific project.

The scope of this, and prior versions of this paper is limited to the selection and retention of vendors to assist with the technical aspects of e-discovery projects, therefore, issues related to the selection of vendors to assist with the identification and preservation of potentially relevant electronically stored information (“ESI”) and to the review of such information, are not covered herein. However, in order to remain current with now emerging trends, we anticipate that the next version of this paper will have a much broader scope and will address all aspects of the e-discovery project lifecycle.

Determining the scope of the electronic discovery project must precede the vendor search, although we trust that the vendor evaluation process described in this paper will assist users in framing not only the process for selecting vendors, but also the process for defining the parameters of the electronic discovery process itself. The evaluation process starts with a request for information — RFI — designed to identify vendors with the capabilities for the prospective project, a request for proposal — RFP — designed to elicit proposals tailored to a specific project, and finally a decision matrix that is designed to help weigh and compare proposals and vendor capabilities. Samples of a tailored RFI and RFP are attached as appendices. It is critical to note, however, that these attachments are merely samples and that any RFI or RFP to be submitted to vendors must be tailored to the specifics of the project if it is to be useful in selecting a vendor. Broad imprecise requests will likely yield only broad imprecise responses.

Indeed, the greater the degree of detail as to the project and its requirements, the easier the process; determining the specific needs of your project may well save a lot of time and money in the long run.

As Comment 6.d. of The Sedona Principles for Electronic Document Production notes, “[c]onsiderations in evaluating vendor software and services include the defensibility of the process in the litigation context, the cost and experience of the vendor.” Each of these issues must be evaluated thoroughly, and later weighed against each other in selecting a vendor that is appropriate for the individual project. It is also critical that the process employed in the collection, processing and production of e-data be understood and defensible.

The process outlined herein is scalable. It is designed to assist counsel such as solo practitioners in relatively small projects as well as counsel or litigation support professionals at large law firms or corporations selecting vendors to assist with the preservation, harvesting, processing and production of terabytes of data. The nature of the matter will necessarily drive the scope of the electronic discovery to be conducted, which may well dictate the selection of the vendor, or perhaps a consultant specializing in vendor research and processes. Large projects or in-house counsel seeking across-the-board solutions may be well served by input from an experienced consultant, whose knowledge can streamline and expedite the process, providing the extra arms and legs needed to get the project done.

However, electronic discovery vendors, 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 every aspect of the electronic discovery process. New companies with great track records compete with large companies with no track record in this field, and vice versa. The process of paring down the universe of possible vendors and comparing their services can be daunting, especially if there is no systematic way to request, compare and evaluate the information necessary to select

the finalists. Enter the Request for Proposal (RFP) and its precursor, a Request for Information (RFI).<sup>5</sup>

Also included in this paper is a discussion concerning 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 an important part of the discovery process for some time, and because it is important that paper and electronic documents be treated in an integrated manner. Recognizing that paper documents will be around for a while, many vendors are incorporating features to support the review and production of paper-based documents into their electronic document review tools.

The challenge of choosing among competing vendors in the electronic discovery arena is exacerbated by the lack of standards and uniform processes across the industry. In fact, many vendors consider their processes and methodologies to be proprietary and jealously 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 otherwise be. However, because the party (whether plaintiff or defendant) will ultimately be responsible for the production of relevant information, it is critical that the process employed in the collection, processing and production of e-data be understood and defensible.

## ***II. Square One: Knowing What Before Who.***

The number of vendors in the electronic discovery business has ballooned in recent years, and there are now hundreds of companies offering electronic discovery services in one form or another. Many have come to the world of electronic discovery by way of expanding existing services, such as software vendors, litigation support providers, document management experts, or forensic specialists. As a result, these potential suppliers have different strengths (and weaknesses) relevant to the project at hand. Electronic discovery issues can span the spectrum from anticipated production of two million documents to recovering data from a recycled laptop

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<sup>5</sup> A **sample** RFI and RFP tailored to a hypothetical fact pattern are attached as Appendices C-1 through C-3.

to needing a vendor that can provide consulting services for a broad discovery plan, or an expert to testify that back-up tapes from 1985 are too old to read.

These are but a few among the many electronic discovery issues, but an initial search for vendors, either for a specific matter or as part of an ongoing litigation support effort, should not necessarily lead to the same short list every time. From among all of those who may be able to help with electronic discovery and evidentiary needs, the goal is to find the best fit—a vendor suited to both the organization and the particular project.

### ***III. Finding Out What to Find Out***

The most important thing to know about an RFI or RFP is that the one seeking the vendor (“requesting party”) bears a large part of the information burden. By nature, electronic information requires some kind of technology to be processed, complicating the life of the person who just wants to know what a document says. New technologies in electronic discovery can make life challenging for the person or group who may not understand the technology requirements for a particular project or know what solutions might be available to solve a problem. Nonetheless, it is squarely on the shoulders of the requesting party to take on the due diligence of defining the scope of a project, collecting and prioritizing requirements, and understanding and communicating the IT landscape to a potential supplier so that there will ultimately be the best possible match of problem and solution. This “pre-RFP” process, while demanding, is well worth the effort. Done properly, and where appropriate, it brings together business, legal and IT assets, helps establish objectives and clarify requirements (including budget and timeline), defines the parameters for success, and suggests the direction a vendor search should take. Plus, it serves to enlighten the participants, who may be direct stakeholders in the end result.<sup>6</sup>

Because the requesting party will ultimately need to evaluate the responses to the RFP, this up-front work, which ideally has fully informed the scope of the project, will expedite the evaluation process. A well-structured RFP provides a framework by which vendors can work from the

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<sup>6</sup> This process may also parallel what one would follow were one to tackle information management separate from any litigation need.

same set of rules and requirements to craft their proposals, enabling a comparison of apples to apples, thus making it easier to understand the similarities and differences among proposed solutions. The companion Sedona Glossary (see [www.thesedonaconference.org/publications](http://www.thesedonaconference.org/publications)), to which the RFP+ Vendor Panel Members have agreed, is meant to assist in the effectiveness of communication and to improve the ability to conduct an apples-to-apples comparison.

#### ***IV. Where to Look: Getting to the Short List with an RFI***

Once a project or need has been identified, there are several ways to become generally educated and to begin collecting information about potential vendors who may be able to assist with a product or service. One such way is to request technical literature, case studies and mission statements from vendors. Attending seminars and conferences, product demonstrations and trade shows or surfing the Internet can be very helpful, as can “word of mouth” speaking with procurement and IT departments within the business or other professionals who have tackled similar projects. There are also independent consultants who offer services in this area. These methods go a long way towards refining the list of possible suppliers as well as helping to create a more productive RFI.

Once familiar with the scope of your project and the basic vendor landscape, the next step is the RFI. An RFI, which is similar in form to an RFP, gives potential vendors an opportunity to provide information about their own products and services (including suggestions to help refine requirements and helpful insight with respect to the specific request, such as in the description of the project or feasibility of the task.) Perhaps there is no available technology that can accomplish, in a cost-effective way, the product or service as requested. Perhaps there are new technologies that will suggest re-evaluation of original requirements. Unlike an RFP, which implies a project green light, an RFI is primarily a fact-finding document. At this point in the process, the doors should be thrown open for any information that may be useful in narrowing the list of vendors and providing information that will assist in a clear definition of the project requirements for the RFP. It often helps if a dialogue is initiated with potential vendors about the nature and scope of the project so they can provide “active” feedback. (This should be undertaken only after an appropriate confidentiality agreement is in effect, and attention is paid to conflicts considerations. See § V.C., *infra*.)

The next section of this document sets forth the considerations that should help with the development of a meaningful RFI.

## ***V. What to Look For***

### **A. First Things First: Vendor Background**

As with any business entity being considered for a project, a responsibility exists to investigate the reputation and integrity of the firm in question and ensure that they offer the kinds of services required. (More on this later.) Presumably, those selected to respond to an RFI and/or RFP have been vetted for the basics prior to their inclusion in the list of possible responders. (See § IV above.) Seek and evaluate basic vendor background information about the company, the personnel, and the product or service that they are offering.

#### ***About the Company***

Any potential vendor should be stable and known to provide a reasonable quality of service. These are not, on the whole, subjective qualities; it should not be difficult to determine a company's reputation. Nonetheless, it pays to ask for details and evidence. When was the company founded and by whom? What is their policy on subcontracting and partnering? How many staff members do they have with expertise in your specific project area? Have they been around long enough for your needs? Do they have a track record providing the specific product or service required? How big are they, both in dollar volume and personnel? Does size matter?<sup>7</sup> A small-dollar vendor with the right expertise and/or product and a good track record may be better than a large one with more dispersed business resources bringing in dollars. Also know that many electronic discovery vendors that were scanning and coding operations yesterday claim to be experts in electronic discovery today; as with the selection of any expert, one must get behind the representations. Ask for client references, and use them (NDAs may prohibit disclosure of some references). Take a look at prior testimony and court opinions involving the

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<sup>7</sup> There is no intention to imply that start-ups not be considered, just that when dealing with a company that is not a start-up, the length of time the company has been in business is a valid consideration, and if dealing with a start-up, it should be knowingly. Similarly, if the vendor is privately held, certain types of information may be considered proprietary and not made available.

vendor where available. Remember, it is possible the vendor may need to provide testimony regarding the transparency 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 vendor is qualified to do what they say they do, 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 physical location(s) of the vendor may or may not be an issue, depending upon the type of service they provide, but safety and security are, especially for electronic data involved in litigation where chain of custody issues are a concern. Can the data be handled without altering metadata? Does the physical plant of the vendor provide the appropriate disaster recovery ability? Is there a fully-enabled back-up site? If the vendor is providing a website, is it sufficiently secure, safe from viruses and hackers? Asking the vendor to describe in detail existing security capabilities in the RFP will allow assessment of which vendors most closely conform to the requirements. These are issues that each vendor should be asked to address in an RFP before being considered for a project.

### ***About the Personnel***

General background information about a company 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. What is the experience level of the personnel, both generally and specifically, regarding your requested services? Do they employ and use lawyers? Have personnel been appropriately screened for security? In some cases, a criminal record and background check for all vendor employees may be necessary. Are they located in the United States or overseas? Do they have the collective expertise to handle and are they available for the project at hand? Sometimes a vendor's success results in a work overload that may impact delivery of the project. If time is of the essence for your project, ask pointed questions about delivery dates and whether the vendor is willing to guarantee in writing such dates. Will the

vendor need to hire new, possibly inexperienced or temporary staff to handle the work? Will they need to sub-contract any part of the work? It is important to understand the current capacity and workload of the vendor, as well as personnel turnover. To the extent possible, satisfied and content personnel should be working on any project.

If your matter is going to require testimony on the part of the electronic discovery vendor, it is best to determine if the vendor has had that type of experience. What has been the outcome? Are there copies of the testimony or expert affidavits that can be shared?

It is also important to know the project management approach (process) of a vendor. Although this may vary depending upon the type of product or service, project tracking and client communication are always an important part of the mix on both sides. 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 worse, quality problems.

### ***About the Product or Service***

Notwithstanding the quality of the company and personnel, the vendor must also have the goods to provide and support the product or service they sell. Again, client references can shed valuable light on vendor product/service performance. In addition, ask for the names and experience levels of the personnel who may be assigned to the project at the appropriate time (though this may not be known until job has been scoped and scheduled). Assuming the vendor's product or service can live up to their claims, how good are they at providing the appropriate level of quality assurance? What is their method of providing information to their client? What technical support is available, at what times, and by what methods? Do software or systems need to be upgraded on a regular basis? Do the technologies they use have unanticipated dependencies that must be otherwise supplied, such as network, operating systems, capacity, or compatibility issues?

Up-front work in preparation of the RFI should detail as many technical concerns as possible to give the vendor the opportunity to anticipate potential glitches. Remember that the RFI 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 vendor has to recognize and realistically address potential limitations.<sup>8</sup> Mapping out the expected processes and work flow, and subsequently tracking changes is recommended, particularly in the event testimony is needed down line (it’s always good to be able to demonstrate how hard you worked to do it right . . . ). Most vendors also welcome the establishment of a communications protocol, with scheduled progress reports, together with a protocol for reporting and resolving unexpected changes, delays, or other problems.

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

- *Maintenance of Document Integrity*: This is an important evidentiary consideration. The vendor should describe what is done to ensure that a document has not been changed during processing, and further, that the “processed” document can later be compared to the original item received by the vendor. Again, a detailed description of the process can help track chain of custody and ensure preservation of content. The vendor should confirm as part of that process that a complete, exact copy of the data is securely stored, in case something does go wrong.
- *Amenability to Escrow*: For any large, long-term project, it is important to escrow any software code, together with instruction manuals and other documentation, to guard against problems in the event the vendor becomes financially unstable or is purchased by another entity with whom there may be a conflict of interest.
- *Expert Testimony Experience*: In electronic discovery matters, the vendor may need to be a participant in the litigation. It is advisable to ensure that the vendor has a spokesperson with appropriate expertise and 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

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<sup>8</sup> Tables in Appendix A summarize the information to consider requesting from each vendor, tailored and weighted according to the project at hand. See Sample RFI (Appendix C-2), and the sample Decision Matrix (Appendix E).

potential testifier from attorney-client privileged or work-product protected information throughout the process.

- *Sub-Contracting*: It is important to understand that the vendor has both fiduciary and confidentiality obligations to the client and as such, it is important for the vendor to disclose all possible sub-contracting 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 be named as additional insureds on any required insurance policies. In addition, the vendor and all sub-contractors should be prepared to certify that they are free of conflicts. Drafters of RFP/RFIs may wish to reserve the right not only to approve the use of subcontractors but also the right to terminate or replace a subcontractor. Drafters of RFP/RFIs 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 vendors should also be taken into consideration when vetting sub contractors as well. Sub contractors should be held to the same security standards as the vendor, and should be subjected to the same security vetting process as that used to vet primary vendors.

**VENDOR BACKGROUND**

**A List of Considerations Regarding Potential Vendors**

**VENDOR BACKGROUND**

<b>ABOUT THE COMPANY</b>		
<i>Area of Concern</i>		<i>What to Ask About</i>
<b>Company Stability</b>	<i>Where the vendor 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"> <li>- <b>Company Age.</b> Information regarding the establishment of the company, as well as any mergers or consolidations.</li> <li>- <b>Financials.</b> Taxpayer identification and financial statements for the last two years, as well as bank references. Also consider requesting information regarding any pending lawsuits against the company. These items may not necessarily be made available at the initial stages of the process and/or from privately held companies depending on the parties and the situation. Bank references and client references are also helpful if financials are not available.</li> <li>- <b>Company History and Performance Information.</b> A description of the vendor’s background and expertise in the areas covered by the RFI, including years of experience, past projects and performance.</li> <li>- <b>Number of salaried employees.</b> The number of salaried employees (v. hourly workers or sub-contractors that are hired and then fired per project) could be a good indicator of a company’s financial health.</li> </ul>

**VENDOR BACKGROUND**

<b>ABOUT THE COMPANY</b>		
<i>Area of Concern</i>		<i>What to Ask About</i>
<b>Company Quality</b>	<i>The vendor should be able to provide information that will show a proven track record of successful projects and satisfied customers.</i>	<ul style="list-style-type: none"> <li>- <b>Client References.</b> Names of clients for whom the vendor 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 company, as well as timelines of deliveries.)</li> <li>- <b>Past Performance Information.</b> Follow-up to ensure that clients were satisfied with the outcome of the project, project management, deadlines, fee arrangements, quality control and perceived integrity.</li> </ul>
<b>Company Obligations, Representations and Warranties</b>	<i>The vendor should have sound business practices for their own and their clients' protection, and be willing to adhere to liability and confidentially standards.</i>	<ul style="list-style-type: none"> <li>- <b>Proof in writing of the existence of:</b> <ul style="list-style-type: none"> <li>- Insurance and licenses</li> <li>- Any potential privilege and/or conflicts issues</li> <li>- Confidentiality guarantees</li> <li>- Pricing methods</li> <li>- Non-collusive bidding assurances</li> </ul> </li> </ul>
<b>Physical Plants</b>	<i>The vendor 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"> <li>- <b>Physical plant/office locations.</b> Address and contact information for all plant/office locations, domestic and international for the vendor's company, as well as any affiliated businesses or organizations</li> <li>- <b>Safety</b> Information pertaining to building or site disaster safeguards (fire, flood, etc.), especially if the vendor will be hosting data</li> <li>- <b>Security</b> Information pertaining to building and data access, employee screening, security methods (ID cards, etc.), hacker/virus protection.</li> </ul>

**VENDOR BACKGROUND**

<b>ABOUT THE PERSONNEL</b>		
<i>Area of Concern</i>		<i>What to Ask About</i>
<b>Quality of Personnel</b>	<i>The vendor should employ an appropriately educated and dedicated staff.</i>	<ul style="list-style-type: none"> <li>- <b>Rate of employee turnover</b> Information regarding length of time on the job for those involved in the potential project</li> <li>- <b>Client References.</b> As with information regarding company quality, ascertain the level of satisfaction with personnel from other vendor clients, including ease of communication, turnaround times, quality of work, etc.</li> </ul>
<b>Experience</b>	<i>Staff should have experience commensurate with their responsibility.</i>	<ul style="list-style-type: none"> <li>- <b>Past Performance</b> Success that employees have had at completing the kind of tasks required for the particular product or service required.</li> <li>- <b>Testimony</b> Prior experience in giving testimony related to product or service</li> </ul>
<b>Staffing Capacity</b>	<i>The vendor should advise in advance if any subcontracting or temporary staff will be utilized on the project.</i>	<ul style="list-style-type: none"> <li>- <b>Employee Data.</b> Information regarding the location and number of employees, staffing and composition anticipated for the project, and their technical expertise and years of experience.</li> </ul>
<b>Project Management</b>	<i>The vendor should have experienced management to oversee, troubleshoot and communicate information about the job.</i>	<ul style="list-style-type: none"> <li>- <b>Project Oversight</b> Who will manage the project, product or service, and by what method and how frequently will the information be tracked and reported?</li> </ul>

**VENDOR BACKGROUND**

<b>ABOUT THE PRODUCT/SERVICE</b>		
<i>Area of Concern</i>		<i>What to Ask About</i>
<b>Quality of Work</b>	<i>The vendor should have standard practices to validate and measure the quality of products, services, processes and procedures.</i>	<ul style="list-style-type: none"> <li>- <b>Quality Assurance Procedures</b> Request documentation of steps taken to validate and verify the products/services the vendor provides.</li> <li>- <b>Client references</b> As with information regarding company and employee quality, ascertain the level of satisfaction with the products/services from other vendor clients, including ease of use, stability, problem-solving, technical support, documentation, and the like.</li> <li>- <b>Reporting Methods</b> Ascertain the methods the vendor uses to provide information to clients during the lifecycle of a project.</li> </ul>
<b>Process and Infrastructure</b>	<i>The vendor should have demonstrable safety measures in effect, as well as the appropriate infrastructure to meet demands of the project.</i>	<ul style="list-style-type: none"> <li>- <b>Maintenance and Support</b> Information regarding maintenance and support of the product /service, such as type, quality and availability of technical support, procedural updates, product maintenance, upgrades, etc.</li> <li>- <b>Disaster Recovery</b> Information regarding disaster 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?)</li> <li>- <b>Security</b> Request a description of procedures for screening employees and maintaining security on the premises, such as requiring badges for entry.</li> </ul>

**B. Is it Safe? Vendor Security**

Engaging a vendor to process data or engage in any kind of service related to electronic discovery requires the same attention to security risk that would apply to the company seeking the service. There is every reason to want and expect the potential vendor to have security



safeguards in place to protect all involved client's assets, both in terms of physical safety and confidentiality. In addition, the vendor must be willing to guarantee agreed-upon courses of action should their company 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 company, the data, and the project itself.

### ***Company Security***

Site security for the vendor 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 RFP stage, and may provide a glimpse into the culture of the organization as well. The company should have obvious security measures in place such as access restriction to network hardware, telecommunications security, as well as 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 employees? Background checks? Conflict checks? Are the employees bonded? What procedures are in place when an employee leaves the company? Can they work for your client's adversary?

### ***Data Security***

Hardware and software security have practically generated their own industry, and with good reason. Electronic information is recognized as a valuable business asset today as never before, and endangered data can be life threatening to a business or the outcome of litigation. While it may be a reasonable assumption that vendors 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? Are users screened and validated? 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.

### ***Project Security***

If the vendor passes muster on company 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, etc.? What happens if the employee on your project leaves the company after the project? Is that work memorialized by the company if testimony is subsequently needed? What happens if the vendor 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 vendor is acquired or files for bankruptcy? Will your client's data be involved in the mess? If homework is done regarding company stability, it is possible to head such a problem off at the pass, but ensure that safeguards are in place in case of such business surprises.

Also 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.

### **C. Conflicts**

The consideration of an electronic discovery vendor – or any other litigation support vendor for that matter – in connection with either pending or threatened litigation or an administrative proceeding, should always start with a conflicts check as the first step. While there may be situations in which a vendor is retained to perform ministerial or quasi-ministerial type services (equivalent to photocopying), there are others in which the vendor 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 sub-contractor to the vendor, and that any potential conflict be addressed prior to the engagement of the vendor that will be acting as the general contractor.

In situations where an RFP will be issued, considerations regarding potential conflicts should always precede the issuance of the RFP. Responding to an RFP is a time-consuming and expensive process for vendors, and it is unfair to put vendors through the task of responding to

an RFP before determining that there are no legal or business conflicts that would preclude the vendor's retention to provide the services described in the RFP. In order to facilitate this process, we recommend that a non-disclosure agreement be executed prior to disclosing to prospective vendors the name of the client and the nature of the case or proceeding for which vendor services are being sought. A sample non-disclosure agreement is contained in Appendix B.

What constitutes a conflict? Lawyers are constrained from taking on the representation of a party who is adverse to their other clients, and electronic discovery vendors, as well as all litigation support vendors, should follow the same conflicts rules that lawyers follow. While it is understood that adhering to the conflict rules followed by lawyers may result in vendors having to turn down certain engagements, this may be a cost of doing business that is necessary in order to protect parties during litigation and regulatory proceedings. Beyond legal conflicts, there may also be business conflicts that preclude the retention of a particular vendor under certain circumstances – for example, a vendor 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, vendors may be able to undertake engagements in situations where a party grants them a waiver notwithstanding the existence of a conflict. Parties, their lawyers and vendors should engage in an open and frank discussion concerning conflicts. Where appropriate, parties should consider the waiver of conflicts and allow vendors 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 electronic discovery 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 vendors in the electronic discovery marketplace further complicate

the conflict analysis. When a vendor acquires or merges with another vendor, 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 vendors 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 vendor and its clients. The only way to avoid these problems is to ensure that you understand, prior to engaging a vendor, who ultimately owns and controls it.

We recommend that any services 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 vendors are not bound to the rules of ethics that preclude lawyers from representing parties who are adverse to their other clients. The following sample provision strikes a good balance between protecting clients and maintaining a vendor's ability to undertake engagements. It is recommended that a provision offering the protections afforded by this sample language be included in every services agreement.

### **Sample Conflicts Provision for Engagement Agreement**

Vendor represents that it has conducted a conflict check prior to undertaking this engagement and that it has informed Client of every engagement in which it is currently involved [or has been involved over the course of the preceding \_\_ years] where the party to whom the Vendor is providing, or to whom it did provide services, is adverse to, or is a business competitor of, Client. A third-party shall be deemed to be "adverse" to Client if the third-party has any interest or involvement in any lawsuit or proceeding in which Client (or any subsidiary or affiliate) is a named party. For purposes of this clause only, those entities listed on exhibit \_\_ hereto shall be deemed to be business competitors of Client.

Vendor agrees that it will perform conflicts checks prior to undertaking services for new clients and that it will:

1. Not provide services to any third-party that is adverse to Client in a matter in which Vendor has provided, or is providing services to Client.
2. Not provide services to any third-party that is a business competitor of Client.

3. Not provide services to any third-party that it knows is adverse to Client on a matter in which it is not providing services to Client, without first obtaining written consent from Client. Client agrees that it will not unreasonably withhold consent for Vendor to provide services to third-parties under this provision provided that granting such consent will not adversely impact Client in any pending or future litigation or proceeding; and
4. Promptly inform Client if it learns that any third-party to whom it is providing services is adverse to, or a business competitor of Client.

Vendor agrees that it will follow the conflicts policy outlined above after the termination of the Engagement, pursuant to paragraph \_\_, for a period of \_\_ years.

<b>VENDOR SECURITY</b>		
<b>COMPANY SECURITY</b>		
<i>Area of Concern</i>		<i>What to Ask About</i>
<b>Physical Site Security</b>	<i>The vendor should demonstrate provision of appropriate physical and data security procedures.</i>	The vendor’s physical site should be as secure as the client’s. Ask about: <ul style="list-style-type: none"> <li>– Building safety and security (e.g., access, back-up, disaster recovery)</li> <li>– Telecom (types and locations)</li> <li>– Third Party Outsourcing</li> </ul>
<b>Employees</b>	<i>The vendor should be accountable for the quality and reliability of all employees or subcontractors under their auspices.</i>	Who works for the vendor, and how are they screened? Ask for information about: <ul style="list-style-type: none"> <li>– Employee exit process</li> <li>– Turnover</li> <li>– Conflicts</li> <li>– Background</li> <li>– Drug Testing</li> <li>– Bonding</li> </ul>
<b>DATA SECURITY</b>		
<b>Hardware Security</b>	<i>The vendor 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 vendor cannot finish the job or has an unforeseen disruption of business. Ask about: <ul style="list-style-type: none"> <li>– Mirror Site</li> <li>– Server lock-downs</li> <li>– Access Restrictions</li> <li>– Insurance</li> </ul>

<b>DATA SECURITY</b>		
<i>Area of Concern</i>		<i>What to Ask About</i>
<b>Software Security</b>	<i>The vendor should demonstrate provision of appropriate physical and data security procedures.</i>	Information related to: <ul style="list-style-type: none"> <li>– Building safety and security</li> <li>– Telecom</li> <li>– Third Party Outsourcing</li> <li>– Ability to guarantee data integrity</li> <li>– Mirror Site</li> <li>– Secure Delivery of Data</li> </ul>
<b>PROJECT SECURITY</b>		
<b>Rights on Termination</b>	<i>The vendor 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 vendor cannot finish the job or has an unforeseen disruption of business. Clarify the vendor’s position on: <ul style="list-style-type: none"> <li>– Rights to data</li> <li>– Contract disputes</li> <li>– Business failure/acquisition</li> <li>– Memorialization of work completed</li> </ul>
<b>Conflicts</b>	<i>The vendor 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"> <li>– Procedures for checking for conflicts</li> <li>– Agreements not to work with opposing parties</li> <li>– Protocol if vendor acquired by another company</li> </ul>

## ***VI. What’s for Sale: Electronic Discovery Services***

Section V above mainly addresses concerns that may be considered due diligence when contracting with any outside entity. Now the crux of the matter: assuming that the problem has been defined, the requirements collected, and the scope understood, what is the nature of the task and what kind of vendor is best suited for the job?

For purposes of this paper, the electronic discovery tasks that may be at issue can be described as generally falling into these five categories:

- 1) Consulting/Professional Services;
- 2) Data Collection/Processing;
- 3) Data Recovery/Forensics;
- 4) Hosting/Review/Production/Delivery; and
- 5) Other Litigation Support-Related Services.

The services that electronic discovery vendors offer become more robust every day as greater demands and innovation lead to new technologies. Generally speaking, there are three principal types of electronic discovery vendors available to address the tasks above, each of which requires certain expertise, hardware, software, and/or processing abilities. In light of increasing industry consolidation, one vendor may provide one or more of these three categories of services, in combination or otherwise:

- 1) *Vendors that process data*, whose activities are primarily volume-driven  
(**Examples:** Data collection, hosting, storage, review, litigation support services);
- 2) *Vendors that provide software solutions* and are thus driven by their intellectual property  
(**Examples:** Case management tool providers, document management and/or review, search/categorization/retrieval tools); and
- 3) *Vendors that consult*, with expertise in one or more specific areas  
(**Examples:** Forensics, Data Recovery, Discovery Strategy, Risk Management).

Vendor firms may provide solutions for any aspect of data collection, processing, hosting and production and although they may provide a combination of services (which is happening more

and more), they often play to one strength. This is an important factor to keep in mind when evaluating potential vendor offerings.

The following table describes the most common electronic discovery services currently offered:

Service Category	Type of Services Provided	Things to Consider
<b>Consulting / Professional Services</b>	<ul style="list-style-type: none"> <li>_ Testimony</li> <li>_ Analysis                             <ul style="list-style-type: none"> <li>o Assessment of IT Infrastructure</li> <li>o Assessment of preservation issues</li> <li>o Recommendations for discovery plan</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>_ Forensics 30(b)(6)</li> <li>_ Potential <i>Daubert</i>-type challenge</li> <li>_ Past experience/outcome</li> </ul>
<b>Data Collection /Processing</b>	<ul style="list-style-type: none"> <li>_ Data/file management</li> <li>_ Data harvesting</li> <li>_ Data filtering</li> <li>_ Data conversion/processing for review (to image or for native review)</li> <li>_ Email Processing</li> <li>_ Review services or software</li> <li>_ Redaction services</li> </ul>	<ul style="list-style-type: none"> <li>_ File types processed, especially email</li> <li>_ Preserving metadata</li> <li>_ Types of tools used</li> <li>_ Keyword/phrase taxonomy</li> <li>_ Search methods (context, concept, fuzzy, etc.)</li> <li>_ Custody</li> <li>_ Foreign language capability</li> <li>_ Document relationships</li> <li>_ De-dupe capabilities</li> <li>_ Email string processing</li> <li>_ RFC822<sup>9</sup> standards</li> </ul>

<sup>9</sup> RFC822 standards specify syntax for text messages within the framework of email.

Service Category	Type of Services Provided	Things to Consider
<b>Data Recovery/Forensics</b>	<ul style="list-style-type: none"> <li>_ Legacy data restoration</li> <li>_ Backup systems/enterprise backup</li> <li>_ Reverse engineering</li> <li>_ Corrupted/deleted/hidden/encrypted/temporary data</li> <li>_ Damaged media</li> <li>_ Password protected files</li> <li>_ Mirror hard drives</li> </ul>	<ul style="list-style-type: none"> <li>_ Experience</li> <li>_ Attest to methodology, procedure, fact regarding treatment and location of electronic information</li> <li>_ Avoiding alteration of source data</li> <li>_ May be called to testify</li> </ul>
<b>Hosting/Production/Review/Delivery</b>	<ul style="list-style-type: none"> <li>_ Data/ website hosting</li> <li>_ Review/support</li> <li>_ Production</li> </ul>	<ul style="list-style-type: none"> <li>_ Web capability</li> <li>_ Accessibility, FTP Site</li> <li>_ Export capabilities</li> <li>_ Capacity limitations</li> <li>_ CD/DVD or other storage media</li> <li>_ Data verification, MD5 or other hash coding</li> <li>_ Native format documents</li> <li>_ Image processing</li> <li>_ Training</li> <li>_ Online review capability</li> <li>_ Production media types (CD/Web, etc.)</li> <li>_ Make available capability</li> <li>_ Production number application tracking</li> <li>_ Reporting capabilities</li> <li>_ Custody</li> <li>_ Foreign capabilities</li> </ul>

Service Category	Type of Services Provided	Things to Consider
<b>Other Litigation Support-Related Services</b>	<ul style="list-style-type: none"> <li>_ Scanning/copying/OCRing</li> <li>_ Coding (objective/subjective)</li> <li>_ Conceptual organization</li> </ul>	<ul style="list-style-type: none"> <li>_ Facility</li> <li>_ Methodology</li> <li>_ Capacity</li> <li>_ Format</li> <li>_ Integration capability</li> <li>_ Export capability</li> <li>_ Quality assurance procedures</li> <li>_ Auto-coding vs. human coding</li> <li>_ On-shore vs. off-shore</li> <li>_ Accuracy statistics</li> <li>_ Coder expertise</li> <li>_ Quality assurance procedures</li> </ul>

***VII. Making the Cut: How to Select Vendors to be Included in the RFP***

Review of the vendor responses to an RFI or other investigation should lead to identification of a smaller group of vendors from which a request for project proposals through the RFP process will be made. The number of vendors selected for the RFP process may vary greatly from project to project, but generally speaking, those selected to respond to an RFP should all be viable contenders. Keep in mind that this is a time-consuming process for the vendor, and it is unfair to request a proposal from a company that is not truly in the running, not to mention the undue consumption of time in reviewing responses that are not really needed. The use of a decision matrix or other scoring tool to evaluate vendor responses is useful in arriving at a final list for submission of the RFP.

***VIII. Crafting the RFP***

An RFP is not a form for a vendor to “fill in the blanks.” Not all projects are the same, and the RFP must be tailored to specific needs if meaningful responses are expected and if a vendor is to be specific in responding to needs. Perhaps the biggest area of concern is assuming that a



vendor's knowledge of the project is complete – such assumptions have been proven wrong in the past -- thus, it helps tremendously to engage potential vendors in a dialogue to make certain they are aware of all project considerations. There are, of course, certain sections that are amenable to boilerplate language, such as confidentiality, rights of the parties and representations and warranties. A sample “tailored” RFP containing those sections is included in Appendix C. 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 to the matter at hand.

The RFP sections that must be customized for a project includes the following:

- A. **Project Overview (Scope of Work):** As discussed, a thorough description of the project may be the most important element of a RFP, and this description, together with the requirements list, should be discussed with all project team members to insure 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 the expected format for review and production. (A list of vendor services is set forth in Appendix A). This is an appropriate time to develop internal checklists regarding electronic discovery needs, etc.
- B. **Management:** Describe the roles of client, counsel, and staff in the management of the work contemplated. Also spell out the expected lines of communication, measurements of success, and procedures for status reporting.
- C. **Requirements Description:** In this section, describe for the vendor, 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 review software is involved, also inquire regarding any training requirements. It is important to specify the goals and objectives of

the project, as well as priorities. Ask for “what” is needed, and allow the vendor to describe “how” they will meet those needs.

- D. **Definitions:** The Sedona Glossary, published as an integral companion piece to this document, defines terms frequently used in connection with electronic discovery matters. Including in the RFP all definitions that may apply to avoid misunderstandings down line is recommended. RFP+ Vendor Panel members have agreed to work within the framework of this Glossary.
- E. **Vendor Process and Infrastructure:** Here the vendor is asked to describe, in detail, assumptions, processes and infrastructure for getting the project done. Seek their internal reporting structure, and their process for “change control,” i.e., how surprises are handled. Remember, litigation often involves “surprises” as the norm.
- F. **Quality Assurance:** Following up on the RFI question and responses regarding quality assurance, this inquiry seeks to determine if the vendor will institute any additional quality assurance procedures in light of the nature of the project.
- G. **Processing Methods:** Questions here are driven, of course, by the nature of the services requested. In the sample “tailored” RFP (Appendix C-3), a list of suggested questions is supplied for the various services offered in connection with a specific fact pattern. Note that any intention on the part of any vendor to sub-contract should be fully disclosed and understood.
- H. **Vendor Recommendations:** The electronic discovery arena is very dynamic, with technological capabilities changing daily. Asking for the vendor’s recommendations will give the vendor 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 services requests. As mentioned in “C” above, ask for “what” is needed, and allow the vendor to explain “how” they may meet those needs.

- I. Pricing Alternatives: Specify the pricing model(s) preferred, so that meaningful comparisons of the vendor pricing responses can be made. For example, if a project is scanning and objective coding, possibly specify a ‘per page’ or ‘per document’ price from the vendors. If seeking an on-line (ASP) document hosting and review service for a very large population, consider requesting pricing ‘per gigabyte’ (GB). Appendix D discusses various pricing models for various services. Be sure to ask the vendors 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 vendor is using some form of “conversion” to respond in the pricing model requested, the “conversion” should be transparent, and understood.
- J. Vendor Qualifications and References: Be sure to check trade references, carefully read the vendor’s web site, and then follow-up with questions as to various representations made therein. It is also important to speak with references provided by the vendor. While some of the vendor’s clients may have insisted on confidentiality, be certain to speak with those familiar with the vendor’s ability to perform just as one would any service provider.
- K. Follow-up Processes: Set forth a procedure for handling questions that arise during the RFP process, allowing each RFP participant to weigh in.
- L. Post-RFP Briefings: It is a good practice to explain to those vendors that did not get the job, the reason for the selection made. This preserves good-will for the next project, and helps improve the process overall by educating the competition.

### ***IX. Making the Selection: Evaluating RFP Responses — the Decision Matrix***

As with analyzing responses to a tailored RFI, the beginning point for analyzing and comparing vendor RFP responses is through the use of a scoring sheet or decision matrix (Appendix E). To complete this process, each item in the RFP (hardware security, software security, etc.) is assigned a level of importance (to the project) and then each vendor response is given a ‘grade’ or number assessing the sufficiency of the response. The vendors are ranked by multiplying the

importance level and the response grade, and then adding the results. (See Appendix E). 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.

## **X. Trends**

**A. Certification Programs:** Along with the development of the electronic discovery market, various electronic discovery “certification” programs are springing up. There is no process yet in place, however, for “certifying” the certification programs, and purchasers should be wary of relying on such programs for comprehensive knowledge. In addition, many of these certification programs are generally limited to a specific company or technology set. These are new and rapidly developing areas of the law and technology, with knowledge thresholds changing daily. Accordingly, whether or not the vendors being evaluated have such a program should have no bearing on selection. While independent certification courses offering true objective measures of certification will become available in the future (The Sedona Conference® RFP+ Group, itself, may begin a move in that direction), at this point it is important to make independent assessments of vendors and the technologies and services offered.

**B. Advanced Search and Retrieval Technology:** Technology is developing that will allow for electronic relevancy assessments and subject matter, or issue coding. These technologies have the potential to dramatically change the way electronic discovery is handled in litigation, and could save litigants millions of dollars in document review costs. Hand-in-hand with electronic relevancy assessment and issue coding, it is anticipated that advanced search and information retrieval technologies may allow for targeted collections and productions, thus reducing the volume of information involved in the discovery process. For further discussion, see The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery, currently scheduled for publication in Summer 2007.

**C. Online Document Repositories:**<sup>10</sup> Already in use in some larger, complex matters, online repositories, which store and make available electronic versions of all documents in the case via the Internet, can be useful when remote access from multiple geographic locations is required. Such repositories are becoming a more viable option, even for smaller cases, due to advances in technology and increased competition among vendors. What once required a significant up front capital investment for licensing fees, user fees and training, as well as the ongoing expense of supporting and maintaining the software in regards to technical and administrative personnel along with upgrade licensing and support fees, is now starting to decrease in cost and complication. Most vendors now permit counsel to simply pay a per page (or per gigabyte) data processing and load fee and then a monthly fee, based either the amount of data hosted or the number of users accessing the repositories.<sup>11</sup> Although functionality varies from vendor to vendor, most online repositories allow users to remotely search, review and tag or code documents in real time. A demonstration of the vendor's technology will allow users to evaluate whether the technology provides the level of functionality necessary for a particular matter. Key considerations include speed (how quickly searches are completed and documents are displayed), security (can access to specific documents and coding fields be controlled for individual users?), availability (how often is access unavailable due to scheduled maintenance?) and reliability (how often is the repository backed up? does the system have built-in redundancies to ensure access can be quickly restored if a catastrophic event causes the system to go offline?).

The use of online repositories shared by all parties in multiparty litigation is an emerging trend that presents complex questions of cost and security. If the parties agree to create a single repository for the case, appropriate time should be allotted in the discovery schedule, as counsel will need to conduct an iterative process to negotiate an agreement on the selection of a mutually acceptable vendor. Key considerations will include (1) the efficacy of record level access control to ensure that one party cannot view another's work product; (2) whether the vendor

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<sup>10</sup> Notwithstanding the efficiency of on-line repositories, in certain matters, strong arguments may be made that they are inappropriate due to the need to maintain strict confidentiality of certain information (trade secrets, personal information, etc.) and avoid the risks inherent in placing information on line. This paper takes no position with respect to those issues beyond acknowledging that they may be legitimate depending on the matter at hand.

<sup>11</sup> See discussion of pricing models in Section D, *supra*.

pricing model allows parties to allocate costs based on their negotiated agreement; and (3) the vendor's experience with simultaneously servicing the needs of adversarial parties. Finally, it is important to note that the use of a shared online repository does not affect either party's discovery obligations under the Federal Rules of Civil Procedure, with respect to cost shifting, form of production or the extent to which responsive documents must be produced.

**D. Mixed Media:** While we currently think of "Mixed Media" as various types of non-searchable data now residing in the in-box of an email system, consider Microsoft's release of its XP Multimedia Operating System for home entertainment. Though not ground-breaking technology, this quiet release to the home entertainment market and others that are similar could have a very real effect on the concept of where one should look for relevant data stores.

This release coupled with the currently available hardware (computers, TVs, phones, etc), the increased penetration of digital TV, digital phones and broadband cable Internet access into individual's homes may produce the following scenario. Executives sitting on their couch, checking their email on a 42" flat panel screen connected to a cable box that is really a computer. This executive will be reviewing faxes that have come to his inbox (business and personal), looking at video email sent to his inbox, listening to voicemail messages sent to his inbox and responding to all with ease. These communications and any attachments could possibly contain relevant information yet may or may not be fully searchable.

While there are 50 million or more homes in America that have the basic three or four necessary components (i.e., telephone, computer, cable box/TV, Playstation/Xbox), someday there may be only one component and that one component will handle the job of all of these and provide additional features in the works or yet to be dreamed up. The software, game, cable and consumer electronic industries are all actively working on such a device, all with a slant toward their particular industry. It will handle email, voice mail, faxes, documents, videos purchased, Websites visited, online purchases made, video recorded from TV, music listened to, games played, home movies and photo albums, to name only what is currently known. To paraphrase Oracle's CEO, "Privacy? What privacy?"

Convergence technology (integration of computing, communications and broadcasting systems) has made huge strides just since this paper was first published in July 2005. Consider, for example, current capabilities of VoIP, iPods (as data storage devices), smart phones, and the current capabilities of Blackberry and other PDA devices. These are definitely issues we will be facing in the electronic discovery area.

**E. Enterprise Records Management:** It has become increasingly clear that, for large electronic data producers, the most effective way to handle preservation, collection and production of electronic media begins with management of that media as it is created and stored. Accordingly, “Knowledge Management,” “Records Management,” and “Retention Policies” are likely to become the linchpins of defensible preservation and collections protocols, with the execution and criteria for those protocols built into software designed for the enterprise’s overall records and/or knowledge management. As this trend develops, it will become necessary to add elements to your RFI and RFP questions that will identify whether or not the vendor’s services will integrate with the enterprise’s records management system.

**F. Meet and Confer:** The amendments to the Federal Rules of Civil Procedure effective December 1, 2006, encourage the parties to litigation to discuss issues related to the discovery of ESI as early as possible in the litigation. Amended Rule 26(f) directs the parties to discuss ESI discovery during their discovery planning conference and to consider the following issues: the capabilities of the various computer systems used by the parties; the form or forms in which ESI could be produced; whether the information is reasonably accessible; the preservation of discoverable ESI; and, how claims of attorney-client privilege and work-product protection are to be addressed. The Advisory Committee on Civil Rules noted that identification and early discovery from individuals with special knowledge of a party’s computer system could be useful in identifying the various sources of information within a party’s control that should be searched for ESI. The clear implication is that the meet and confer should be attended by persons from the law firm, client or electronic discovery vendor (or all three) to ensure that the information necessary for the efficient and effective discovery of ESI is exchanged.

## *Appendices*

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- A. Summary Charts
  - Electronic Discovery RFP+ Overview
  - Introduction
  - Vendor Background
  - Security
  - Electronic Discovery Vendor Services
  - Conflicts
  - Trends
- B. Sample Non-Disclosure Agreement
- C. Sample Tailored RFI and RFP (with fact pattern)
- D. Pricing Models
- E. Decision Matrix
- F. RFP+ Vendor Panel List
- G. RFP+ User Group

# *Appendix A*

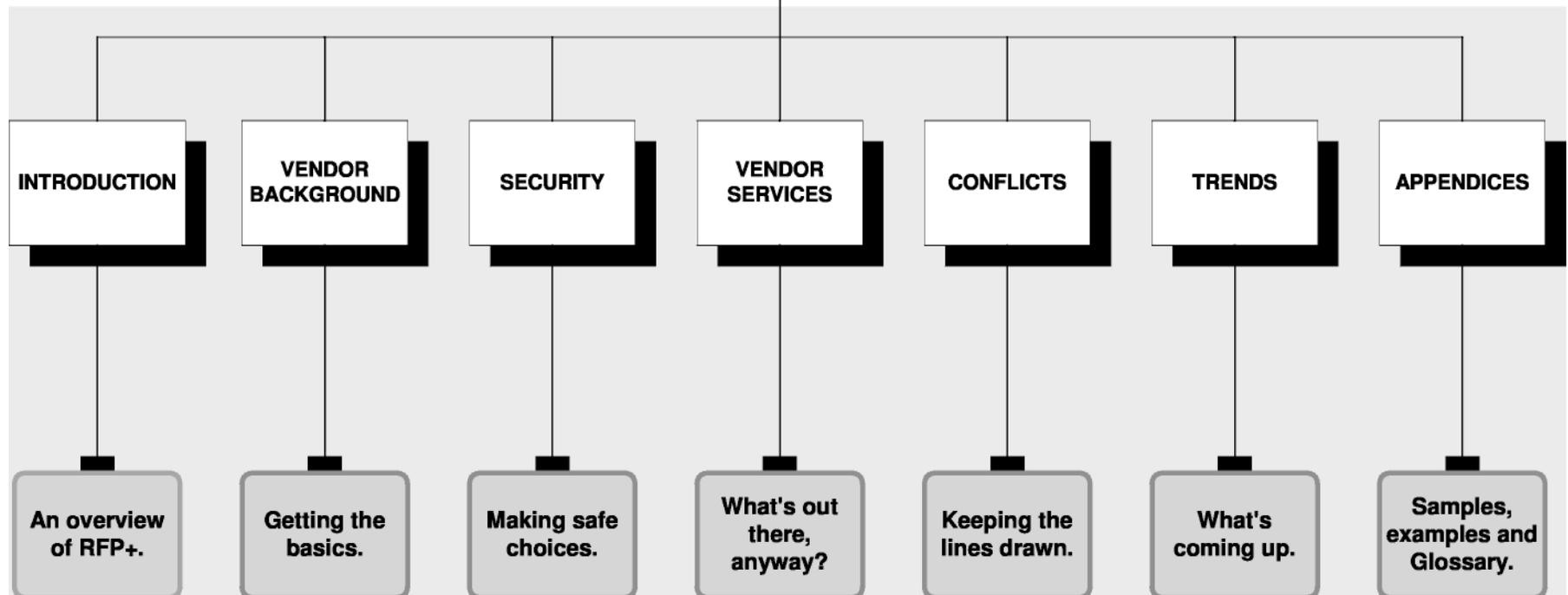
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## **RFP+ Group**

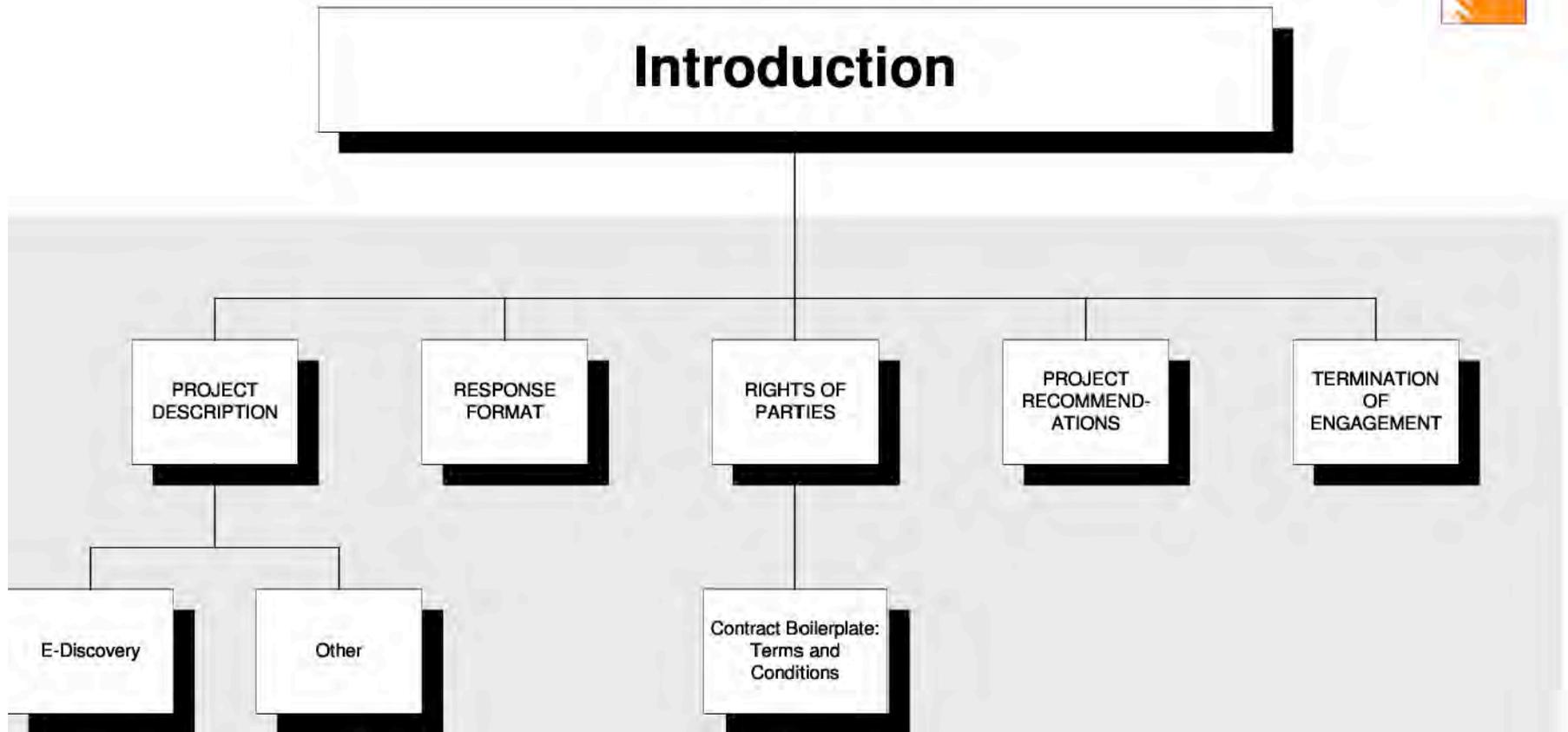
### **Selection of an Electronic Discovery Vendor Summary Charts**

Electronic Discovery RFP+ Overview.....	A-2
Introduction .....	A-3
Vendor Background.....	A-4
Security .....	A-5
Electronic Discovery Vendor Services (1 of 2).....	A-6
Electronic Discovery Vendor Services (2 of 2).....	A-7
Conflicts .....	A-8
Trends.....	A-9

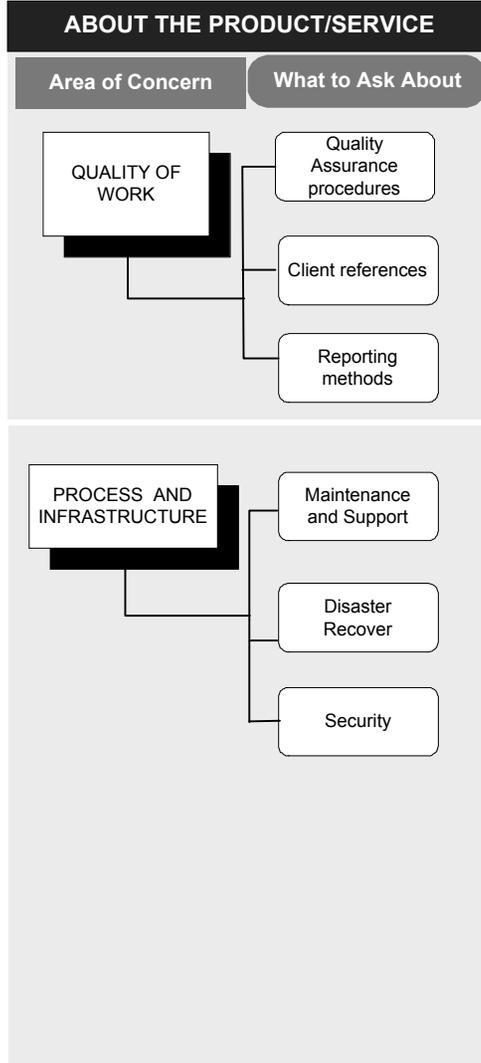
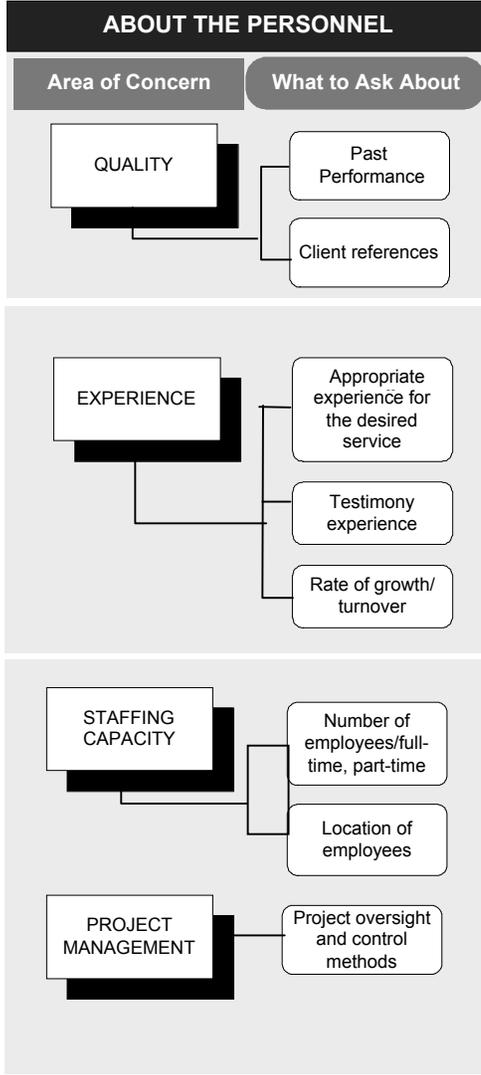
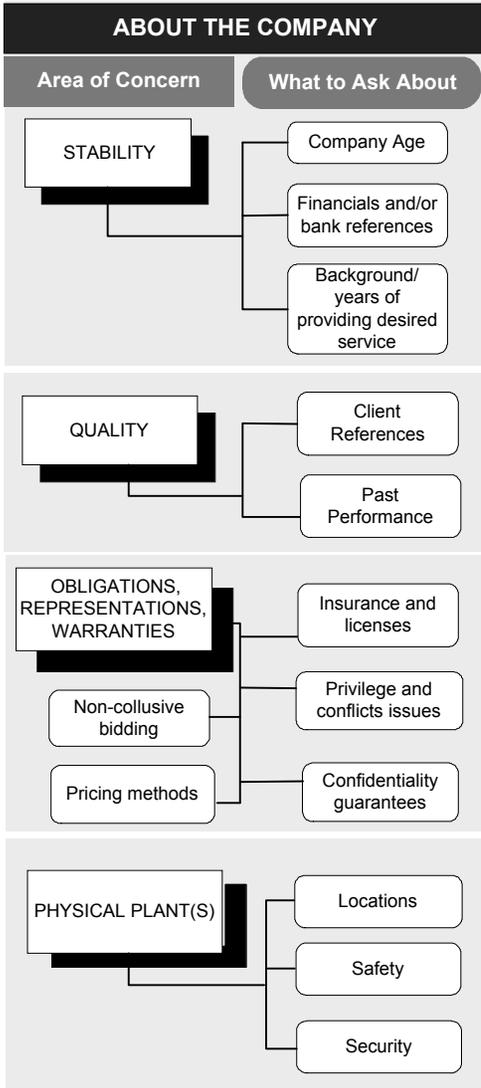
# E-Discovery RFP+ Overview



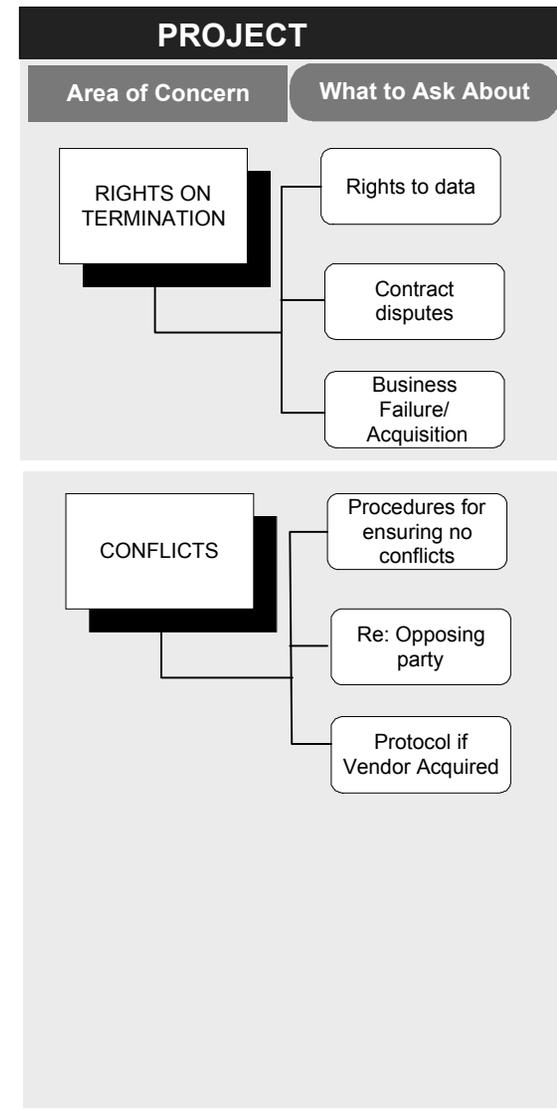
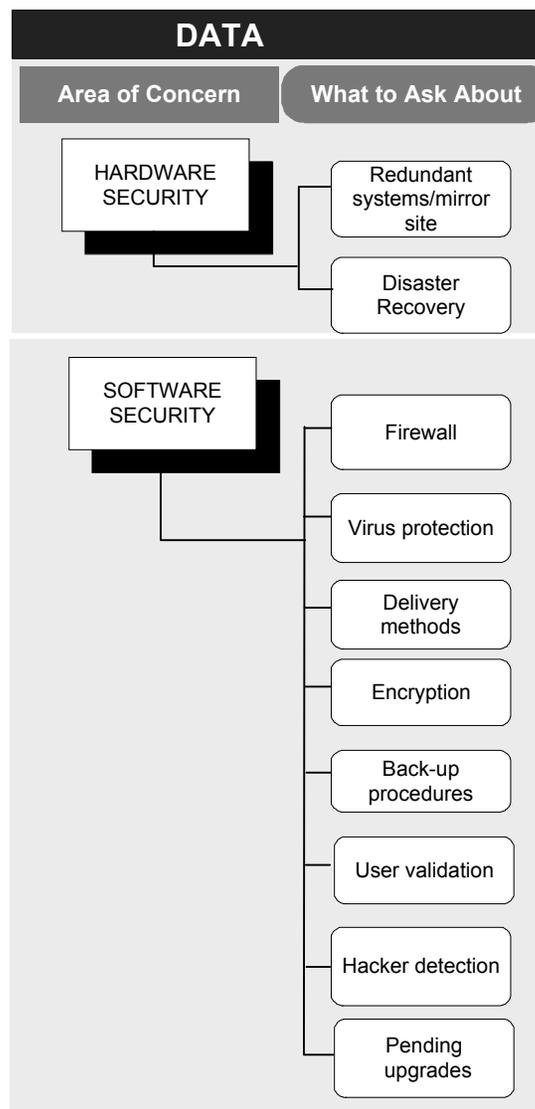
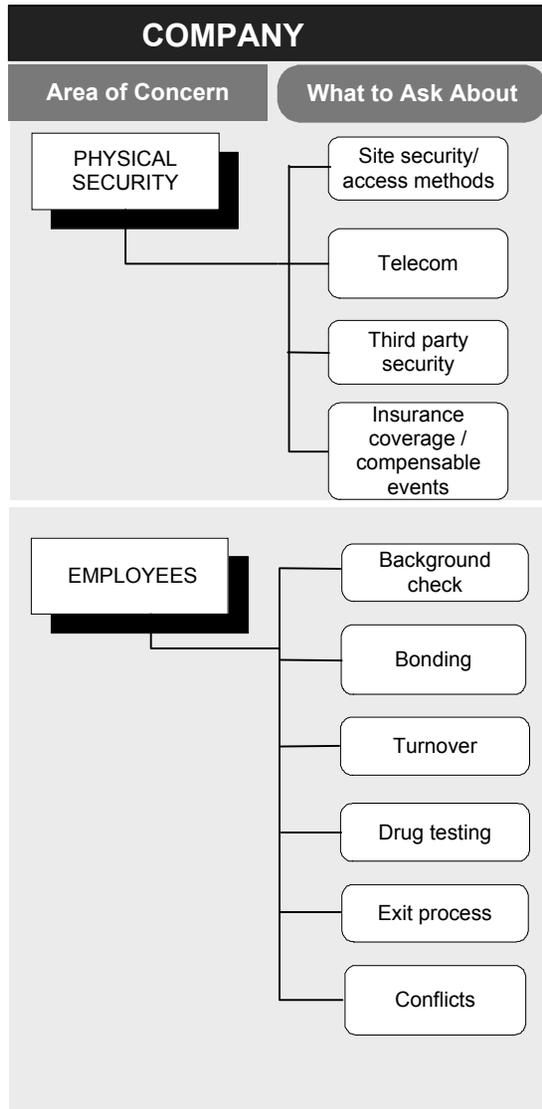
# Introduction



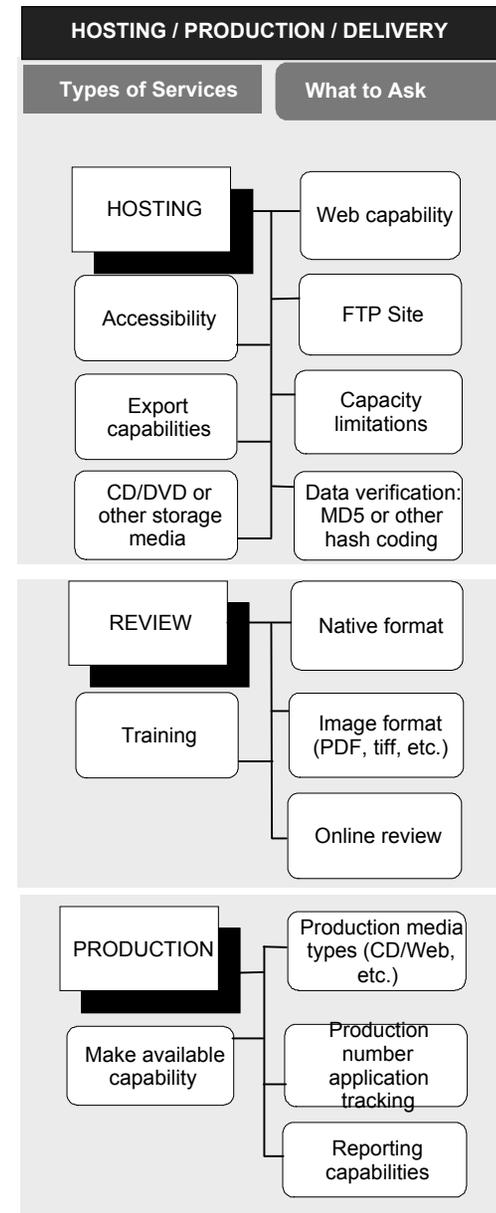
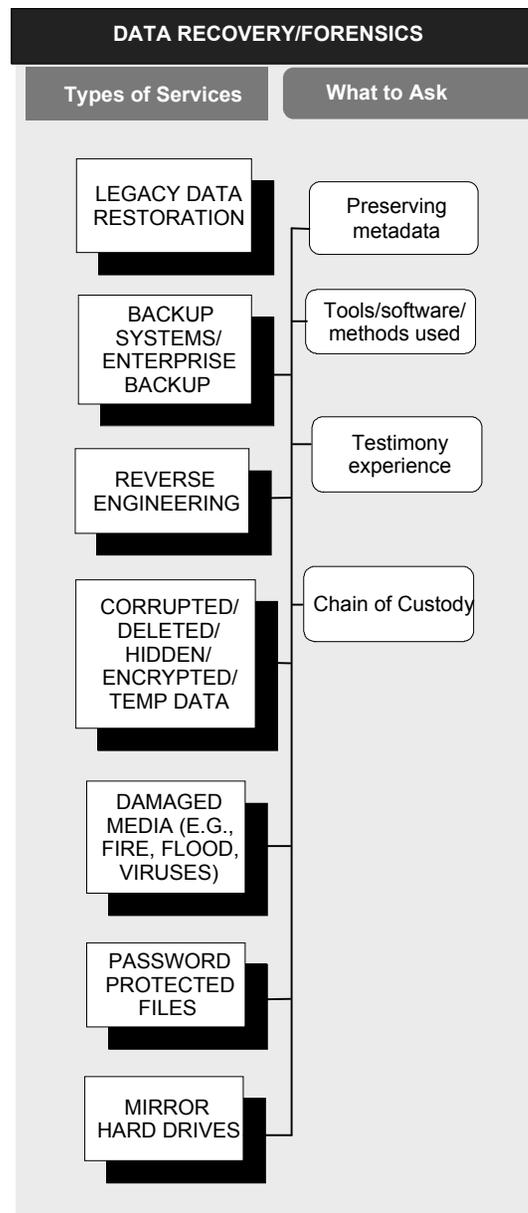
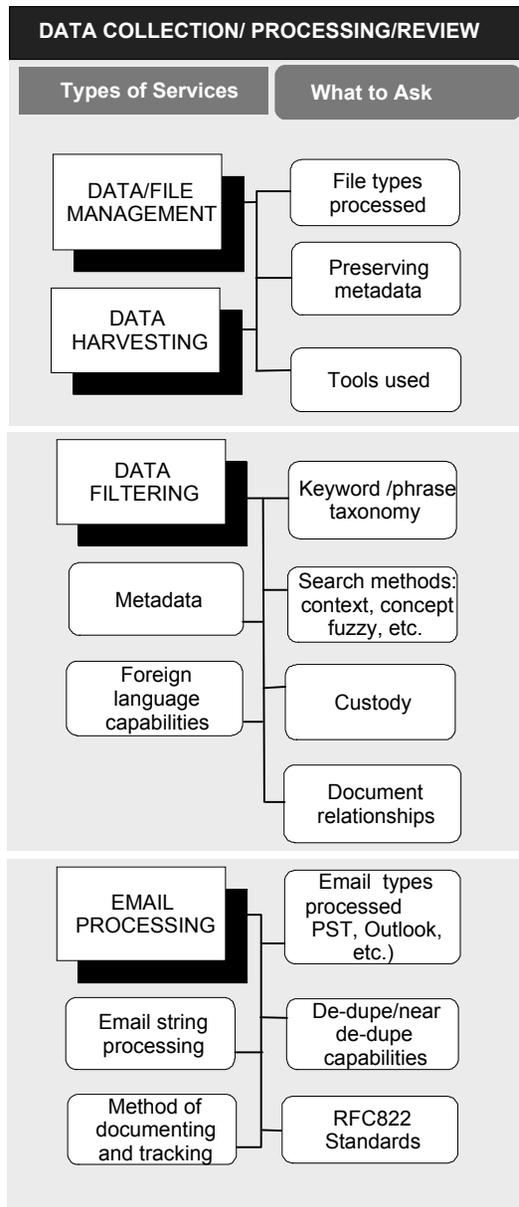
# Vendor Background



# Security

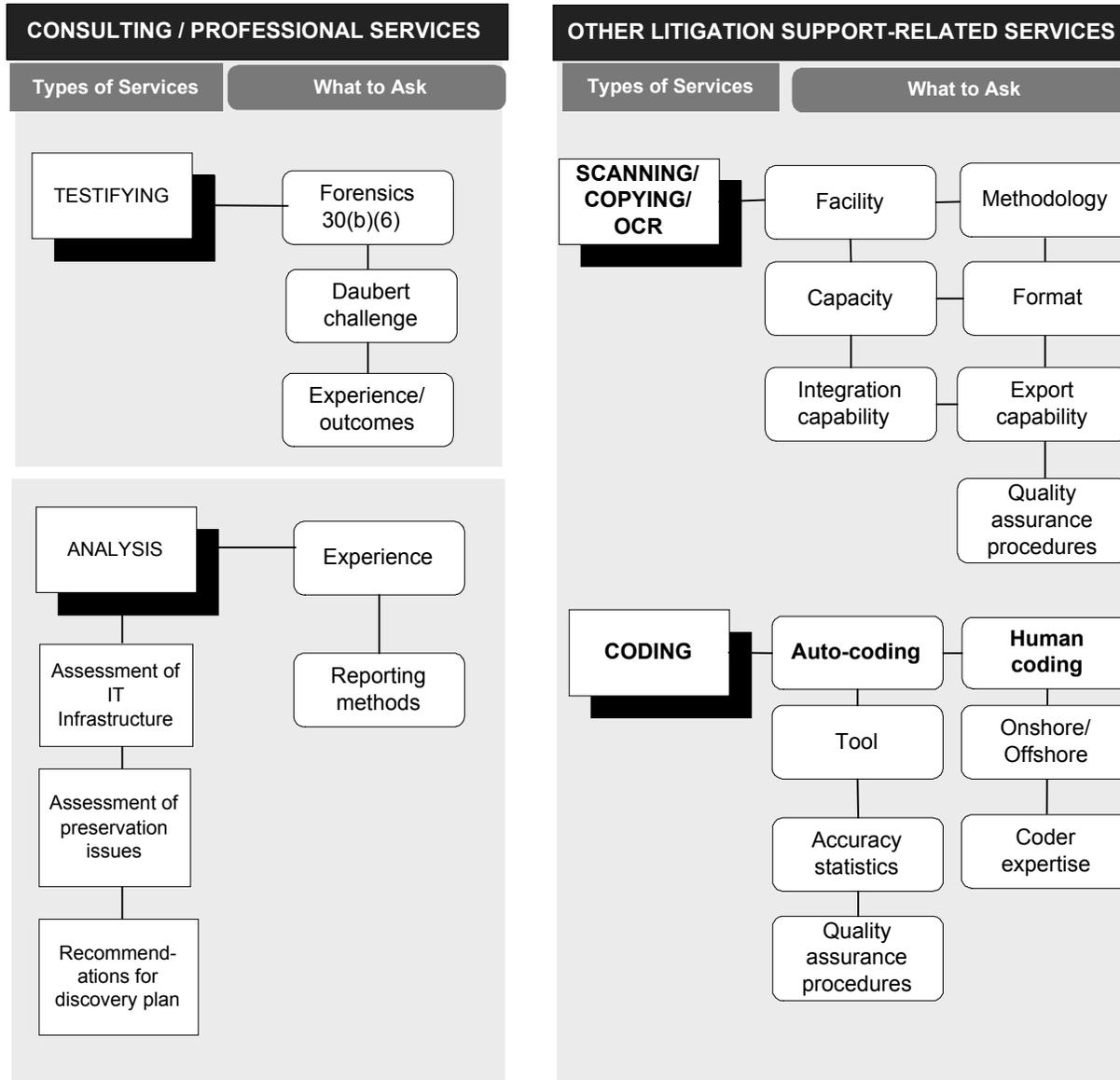


# E-Discovery Vendor Services (1 of 2)



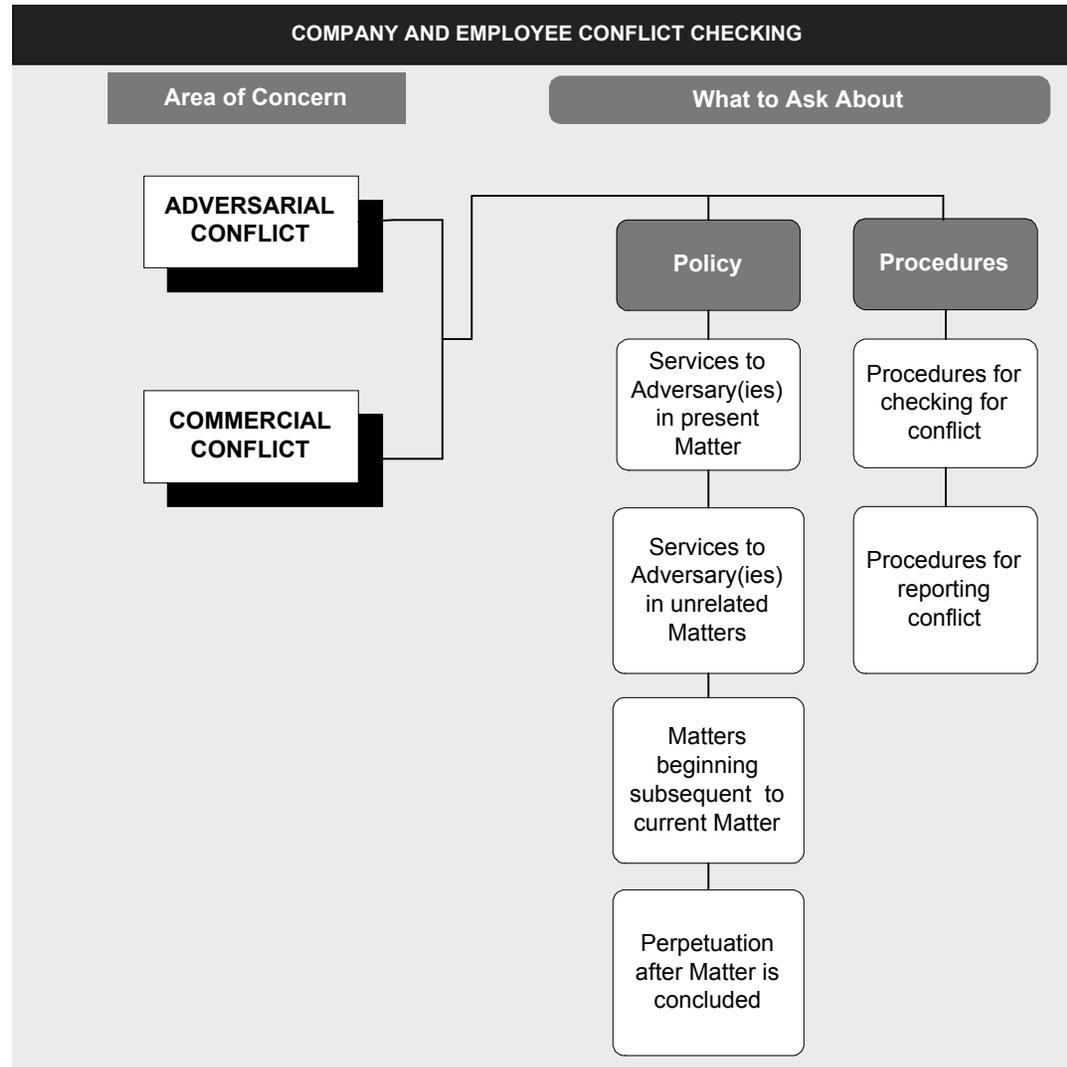
\*See The Sedona Conference Glossary for definition of terms and concepts.

# E-Discovery Vendor Services (2 of 2)

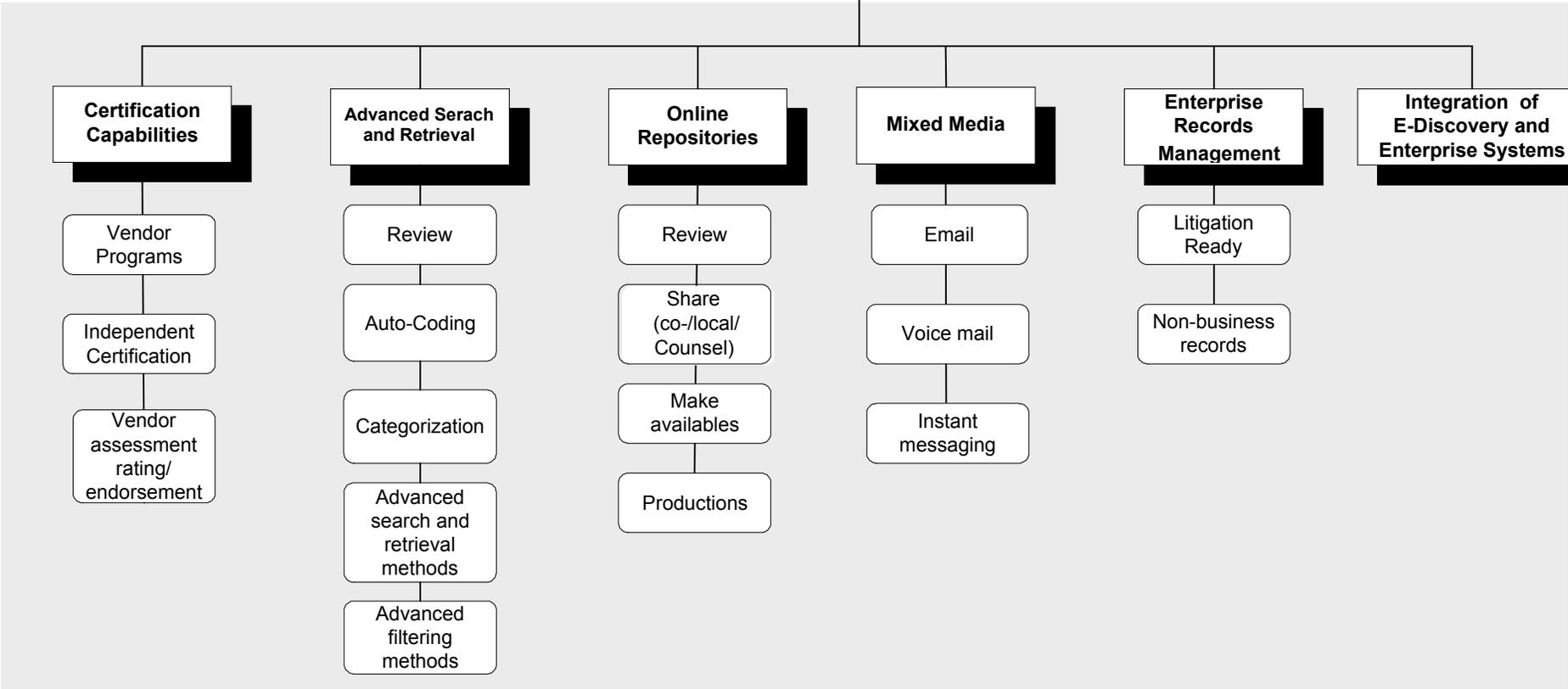


\*See The Sedona Conference Glossary for definition of terms and concepts.

# Conflicts



# Trends



## *Appendix B*

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### **Sample Non-Disclosure Agreement**

#### MUTUAL NONDISCLOSURE AGREEMENT

THIS MUTUAL NONDISCLOSURE AGREEMENT is made and entered into this \_\_\_ day of \_\_\_\_\_, 200\_, 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 Non-disclosure. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

XYZ, Inc.

ABC, Inc.

\_\_\_\_\_  
By Name / Title

\_\_\_\_\_  
Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

## ***Appendix C-1: Hypothetical for Sample RFI and RFP***

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### **Hypothetical Fact Pattern For “Sample” Tailored RFI (C-2) and RFP (C-3)**

#### **Introduction**

The legal and technical situations pertinent to each of our clients vary widely, and there is no ‘one size fits all’ form of RFI or RFP. There is a certain thought process, however, that walks through the considerations necessary for compiling a project-specific understanding of the requirements to be described in these documents. To frame this thought process, we set forth below a very simple hypothetical fact pattern to walk through the various considerations. We have opted to approach this from the producing party’s viewpoint, yet with sufficient information that should show how to “tailor” an RFI or RFP for your particular situation. It would be a mistake to simply copy these samples and submit them as your RFI or RFP and if you do so, the vendors will likely reject them.

#### **The Case**

As attorney for the defendant, you have just received a Summons and Complaint in a new matter wherein their main competitor, “Make Believe Management, LLP”, is suing your client, “Cold Reality Inc.”. Make Believe Management is claiming that Cold Reality is infringing its patent on a new video game show involving fictional lawsuits called “Sue Me.” The allegedly infringing show marketed by Cold Reality is called “Court Fun.” Aside from docketing the pleading in your office calendar and calling your client about this unfortunate turn of events, what do you do next? What should your immediate considerations be, specifically from the standpoint of determining what potential electronic information may exist and be relevant, and how to approach the issues?

#### **Case Assumptions / Understanding What Your Client Has**

The first thing you need to do is gain a thorough understanding of all of your client’s potential sources of relevant data and make sure that appropriate preservation orders are issued and followed up with appropriate contacts with pertinent individuals. This will require you to

meet with whoever is responsible for Cold Reality's Information Technology ("IT") infrastructure. The goal is to obtain a comprehensive list of all applications, databases, and web tools used by Cold Reality, an accurate map of their network (listing all networked computers), a list of all hardware issued to employees, a list of back-ups and legacy data, a copy of the Cold Reality's Policies and Procedures regarding internet and computer use, and copies of any organizational charts. Your investigation reveals that Cold Reality has the following:

1. A staff of fifteen (15) full-time employees and three (3) traveling sales persons.
2. Each full-time person has a desktop computer connected to Cold Reality's network.
3. Each sales person has a company provided desk-top computer at their residence and a company provided laptop computer to use while they are on-the-road.
4. Sales staff can remotely access the firm network via a Citrix server.
5. Cold Reality has a large sales and marketing database within which it tracks customers and sales efforts;
6. Cold Reality has a database of pending and current patents, and research regarding similar patent filings made by others;
7. Cold Reality's network consists of three (3) server computers. One (1) for email, which runs Microsoft Exchange; one (1) for document storage; and one (1) Citrix server for the sales staff remote access.
8. Cold Reality has a 30-day document retention policy that has been strictly adhered to.
9. Cold Reality backs-up its information systems every night of the work week, using 4 tapes, so that on any given day it has 20 back-up tapes. These tapes are rotated weekly.

**Preservation Notices [See The Sedona Guidelines, Best Practices for Managing Information in the Digital World, Principle No. 6]**

Once you have identified all of the data, files and other information sources that must be preserved, notices must be issued to all of the employees of Cold Reality that are responsible for or otherwise possess the data or files, or are responsible for the content of an information source such as a database or web site. If you suspect that relevant information that has been deleted from the company's computers may exist on back-up tapes, you must consider whether you need

to preserve the current back-up tapes by taking them out of the back-up rotation. The Preservation Notices should generally describe the nature of the lawsuit, and the relevant time periods (if known). However, it should specifically describe the subject matters of the documents, emails, files or other data that must be preserved. For example, in the case of Make Believe's lawsuit against Cold Reality, the Preservation Notice will instruct employees to save all documents concerning the development and marketing of the Sue Me game show and all documents concerning the Court Fun game show. In addition, the Preservation Notices should ask employees to immediately identify others in the company with knowledge of the issues raised by the lawsuit. The notices should be sent via email and hardcopy, with return receipts and follow-up telephone calls to confirm their receipt and understanding of the Notice. With the heightened attention being given to electronic discovery, it should also specifically address the intent to preserve potentially relevant electronic documents and data. This Notice could prevent costly and potentially case-dispositive spoliation. Follow-up to insure actual compliance with the Notice is essential, if not mandatory.

Regarding employees who have left the company, but who may have generated relevant information during their tenure, steps should be taken immediately to locate the hardware used by those employees, and if their machine and hard drive were wiped and recycled, the dates of those events should be documented. Inquire whether Cold Reality, Inc. has a policy about preserving outgoing employees' documents and data, as well as their equipment.

It is also important to review previous Preservation Notices issued by the company to determine if any covered subject matters similar to the subject matters covered by the current lawsuit. If any do, you will need to collect relevant documents from the document collections made in connection with those prior suits.

It is important to keep detailed records of when and to whom the preservation notices are issued, as well as any follow-up procedures. Given that Cold Reality is a fairly small organization, it probably makes sense to issue the preservation notices to all 18 employees.

## **Developing a Collection Protocol**

### **Estimate the Size of Cold Reality's Data Set**

How you collect the information for production is a function of: (1) the size of the case; (2) the amount of data expected; and (3) discussion with counsel for Make Believe as to how they want the information produced. Basically, the bigger the case, the bigger the data set, making expenditures on mining, searching and review technologies appropriate and welcome. Smaller cases with smaller data sets may require some combination of less sophisticated or expensive technologies. In either case, the analysis begins with estimating the size of the data sets, both electronic and hard copy, involved. Again, since Cold Reality has only eighteen (18) employees to collect from, it makes sense to meet with each of them to review their electronic and hard copy data sources. These meetings should be conducted by two (2) individuals and should include a form interview sheet that will record the fact of the meeting, the questions asked, and the answers given. One of the goals of the interviews should be to identify each and every possible location of relevant evidence, so as to avoid spoliation as well as to protect your client from an embarrassing depositions down the road. It is important to establish written collection procedures for each of the individuals and the types of information identified in the organization. The amount of data pertaining to these individuals can generally be gleaned directly from the server and employees hard drive. Once you have an understanding of the size of the data sets, you can begin the process of determining what technologies will best assist you in expediting the collection, review and production.

In the case of Cold Reality, because it is a small company, our interviews indicate that virtually everyone in the company was involved in the Sue Me product. In addition, it is clear that both the marketing and patent databases have relevant information. Because we are concerned that some employees may have deleted emails after receiving the Preservation Notices, we have decided to remove all the current back-up tapes from rotation and replace them with 20 new tapes. Also, during one of the interviews an employee located some legacy tapes in a closet that he had saved "just in case." These tapes contain data from the Company's old email system which ran Lotus Notes, as well as its legacy sales database.

## 1. Making a Plan

The final result of the ideal plan is a single fielded, relational database containing .pdf or .tiff images of all information collected, reviewed and produced; together with basic metadata and text for electronic documents, bibliographic coding, OCR text for hard copies, subjective coding, privilege assessments, confidentiality assessments, production history, and - ultimately - tracking as to exhibit use at depositions, trial and evidentiary rulings. In many cases it is also preferable to maintain the document database within your case management program, so that, for example, the pleadings and transcripts can be linked to the documents; and the documents can be used to develop timelines, chronologies, and demonstrative exhibits.

## 2. Identifying Needed Electronic Media Processing

A list of the various services provided by electronic discovery vendors is set forth in the accompanying white paper, titled “Best Practices for the Selection of Electronic Discovery Vendors: Navigating the Vendor Proposal Process.” See Chapter VI, What’s for Sale: Electronic Discovery Services. Use this list to develop a description or list of the services you need. You will use this list to ask various vendors receiving your RFI which of the services they provide. After you have narrowed the field of vendors to choose from with the RFI process, the same list will be used in the RFP to inquire as to vendors processes and pricing for each service needed.

In the case of Make Believe vs. Cold Reality, it appears that a complete set of vendor services will be necessary, including but not limited to:

- Harvesting files and data from servers, including email;
- Restoring current back-up tapes and harvesting the restored data;
- Restoring legacy back-up tapes and harvesting the restored data;
- Harvesting files from C drives and thumb drives;
- Harvesting relevant data from databases;
- Collecting, scanning and OCRing;
- De-duplicating all of the above;

- Processing all the electronic information collected so that metadata and text are fielded, and can be placed in an application for review, designation and redaction;
- Review - relevancy, privilege, etc. - creation of appropriate logs;
- Conversion for production (and/or prep for production in native format);
- Creation of production load files for production or for use in an in-house review tool.

## ***Appendix C-2: Sample Tailored RFI***

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### **SAMPLE REQUEST FOR INFORMATION (RFI)**

**- MAKE BELIEVE VS. COLD REALITY -**

**Confidential**

[Date]

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

Re: Request for Information ("RFI"): 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 Non-Disclosure Agreement ("NDA") prior to submitting your responses to this RFI. Please fax the executed NDA to \_\_\_\_\_ at \_\_\_\_\_, sending the original to us via first class mail.

Your response to this RFI will be used to identify whether you are a candidate suitable for issuance of a Request for Proposal 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 RFI 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 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



**SAMPLE REQUEST FOR INFORMATION (RFI)**

**- MAKE BELIEVE VS. COLD REALITY -**

resolve this dispute outside of court. Accordingly, this RFI is issued with our full intent to retain an appropriate service provider.

Your complete response to this Request for Information, 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 RFI.

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

**SAMPLE REQUEST FOR INFORMATION (RFI)****– MAKE BELIEVE VS. COLD REALITY -****REQUEST FOR INFORMATION**

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 and
  - o The provision of ASCII load files for in-house review tools.

## **SAMPLE REQUEST FOR INFORMATION (RFI)**

### **– MAKE BELIEVE VS. COLD REALITY -**

- 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; and
  - 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; and
  - o Printing: Please describe your print capabilities for batch printing provided at your facility, the facility of a vendor of our choice, or to a local printer at the user's office.

### VENDOR BACKGROUND

Please supply a narrative description of your history, together with your contact information, proof of financials viability, and data regarding your corporate structure, number of salaried employees, 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.

## **SAMPLE REQUEST FOR INFORMATION (RFI)**

### **- MAKE BELIEVE VS. COLD REALITY -**

#### SUB CONTRACTORS

Those responding to this RFI 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 sub-contract, at any time during the engagement, together with the reasons for sub-contracting this work. Please also state your willingness to aver that any such sub-contractors 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 RFI. 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 RFI process or (for the vendor and any subcontractors selected) during the actual engagement is deemed confidential. In addition to the non-disclosure agreement submitted by you prior to responding to this RFI, you and any subcontractors may be required to sign a confidentiality order imposed by the Court.

#### CONFLICTS

Prior to retention, vendor 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-3: Sample Tailored RFP

*Bid Number:xxxxxxxx*

**LITTLE FIRM THAT COULD, LLP  
ONE DEFENSE WAY  
STRUGGLE, OHIO 12345**

**REQUEST FOR PROPOSAL**

**[DATE]**

<p>Vendor Contact Vendor Name Vendor Address</p>
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You are invited to submit a proposal to provide services for electronic discovery services for Little Firm That Could, LLP

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**INSTRUCTIONS TO VENDOR**

The following is a Request for Proposal (RFP) that conforms to the model RFP developed by The Sedona Conference’s “RFP+ Working Group”. Your company was selected to receive this RFP due in part to your willingness to adhere to the parameters the working group set forth (with input by your company and other professionals in the field) and your firm’s professional capabilities. Please know that by responding to this RFP+, you are aiding in the fair and accurate interpretation of services and their pricing. By doing so, you are helping the consumer of these services reach their decision in a more timely and informed manner.

Responses to the proposal must be received by \_\_\_\_\_.

Base your proposals on the terms and conditions herein.

If you do not plan on bidding, please notify \_\_\_\_\_ as soon as possible.

Please review the RFP General Information, Contract Terms and Conditions. Please acknowledge your agreement to and understanding of these terms and conditions by signing on page 5 where indicated. Please return this part of the RFP with your proposal.



Information contained in this document is considered proprietary and confidential to Little Firm That Could, LLP, and you are subject to the terms and conditions of the non-disclosure agreement previously executed by you. Pursuant to the non-disclosure agreement, unauthorized disclosure of information contained herein may result in rejection of your proposal and legal action.

Sincerely,

---

Requestor Name and Title  
[Requestor contact information]

## GENERAL INFORMATION, CONTRACT TERMS AND CONDITIONS

### I. Definitions

The definitions set forth in the [Sedona Glossary] apply to the RFP and all related documentation, including your response to this RFP.

In addition, the following words shall have the following definition throughout this RFP:

*Agreement* and *contract* mean the final executed business arrangement between Little Firm That Could, LLP and the applicable Vendor, together with the constituent services, products, terms, conditions and costs of that relationship.

*Vendor, bidder, you* and *your firm* refer to the entities that will be submitting response(s) to this RFP.

*RFP* and *specifications* refer to each and every requirement stated in this document and all attachments hereto and any additional instructions that are developed and incorporated subsequent to the distribution of this document.

*Proposal, response* and *bid* refer to the complete product, service and price proposal submitted by the bidder as a result of this RFP.

### II. Rights of Little Firm That Could, LLP

Little Firm That Could, LLP reserves and may exercise, at any time, any of the following rights and options with respect to this RFP:

- \* To reject any and all bids without incurring any cost, to seek additional bids, to enter into negotiations with and subsequently contract with more than one bidder, and/or to award a contract on the basis of criteria other than price.
- \* To evaluate separately the individual component(s) of each bid, such as any proposed subsystem, product or services, and to contract with such vendors for any individual component(s).
- \* To cancel or withdraw this RFP with or without substitution, to alter the terms or conditions of this RFP and/or to alter, within reason, the proposed implementation schedule.
- \* To conduct investigations into the qualifications of any bidder prior to time of award.

### **III. Incorporation**

Your response to this RFP will constitute an offer to develop a contract based on the terms stated in this RFP, and in your Proposal. Little Firm That Could, LLP may, at its option, incorporate any or all parts of this RFP, and your Proposal into the contract.

### **IV. Proposal Validity**

All terms and quotations of each bid, including but not limited to Vendor's price quotations, shall be valid for a period of not less than 60 days following the date of submission.

### **V. Confidentiality and Use of Little Firm That Could, LLP Name**

The specifications and information verbally gathered contain confidential and proprietary information and are provided to you and your firm solely for the purpose of enabling you to prepare a proposal. It is not to be used for any other purpose or disclosed to any third party or to any of your employees, agents or representatives other than those who have a need to know such information in preparing the proposal. You agree not to disclose to any third party the existence of the RFP.

In connection with this RFP, bidders shall not use the name of Little Firm That Could, LLP or any of its subsidiaries or affiliates in any publication or public relations document without the written consent of Little Firm That Could, LLP prior to such publication or announcement. Little Firm That Could, LLP reserves the right to review and approve all press-related copy and may withhold consent for release of such copy, with or without cause.

### **VI. Completeness of Response**

By virtue of submitting a signed bid, a bidder warrants that the requirements of this RFP have been read and understood and represents that the delivery and implementation of the products and services specified in this RFP shall in no way obligate LITTLE FIRM THAT COULD, LLC to pay any additional costs to the Vendor for services or products other than those presented in the bid.

### **VII. Contract**

This RFP represents a definition of specific requirements. It is not an offer to contract. Only the execution of a written contract will obligate Little Firm That Could, LLP in accordance with the terms and conditions contained in such contract.

### **VIII. Bid Costs**

This RFP does not obligate Little Firm That Could, LLP to pay any costs that you incur in the preparation of your Proposal. All costs associated with the preparation of a



Proposal in response to this RFP will be borne solely by the vendor. Your Proposal shall become the property of Little Firm That Could, LLP.

**IX. Terms and Conditions**

It is expressly understood that the successful bidder and its representatives shall carry all necessary licenses, permits and insurance and successful bidder shall hold harmless and indemnify Little Firm That Could, LLP for any claims related to a service agreement with Little Firm That Could, LLP.

**X. Non-Collusive Bidding**

By submitting this bid, the Bidder certifies that:

- (a) the prices in this bid have been arrived at independently without collusion, consultation, communication or agreement for the purpose of restricting competition as to any matter relating to such prices with any other bidder, any competitor, or any Little Firm That Could, LLP employee or representative;
- (b) the prices quoted in this bid have not been, and will not be, knowingly disclosed, directly or indirectly, by Bidder to any other bidders, competitors or Little Firm That Could, LLP employee prior to the final date of submission of such bid;
- (c) no attempt has been made and none will be made by the Bidder to induce any other person, partnership or corporation to submit a bid (complimentary or otherwise) for the purpose of restricting competition.

**XI. BID PROPOSAL DUE DATE**

Proposals will be received at the address specified until the close of business on \_\_\_\_\_.

**XII. PROPOSALS**

All Proposals will become the property of LITTLE FIRM THAT COULD, LLP and will not be returned. Questions regarding the RFP should be in writing and directed to \_\_\_\_\_. These questions will be responded to as quickly as possible. Copies of questions and the answers may be provided to all Vendors without identifying the source of the question.

Please submit 4 copies of the proposal to:

\_\_\_\_\_  
 Requestor Title  
 LITTLE FIRM THAT COULD, LLP                      Phone:  
 ONE DEFENSE WAY                                      Fax:  
 STRUGGLE, OHIO 12345                                Email:



## **SCOPE OF WORK**

### **Preamble**

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 Federal Court, 9<sup>th</sup> Circuit, San Francisco, California. Your firm has been selected to receive this RFP based on your responses to a previously issued Request for Information (RFI)I as to providers of litigation support, electronic evidence and data hosting services for defense counsel in this litigation.

This litigation concerns 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 who will be capable of providing paper and electronic data preservation, collection and production services. In addition, the data will need to be collected, processed and made available on an externally hosted site, securely accessible by our attorneys and in-house counsel for Cold Reality, Inc.

As set forth in the RFI, this project requires the following general capabilities, expertise and commitments. You confirmed in your response to our RFI that your firm has the expertise and capabilities to meet all of these requirement, and Little Firm That Could, LLP has relied on the representations in your RFI responses in submitting to you this RFI. All of your responses to our RFI are incorporated herein by reference.

### **General Requirements:**

- 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 produced in both paper and electronic format. Those documents not in “native format” will need to be scanned, bibliographically coded, and “OCR” processed
- Database: The provider is responsible for administering the databases to the following specifications:
  - o Ability to organize and segregate documents in a variety of manners (including by producing party);

- o Documents should be hosted in a single uniform image format with the corresponding native format file linked. Other images should be in Group IV Tiff format, 300 dpi. OCR specs to be discussed;
  - o All Metadata captured and saved in situations where native files have been converted to images;
  - o Back-up: Proper backup procedures and redundant layers of protection of the data must be evidenced;
  - o Security: Facility, Server, Database and user security are all of great importance and the selected vendor will be required to demonstrate capability and auditing procedures; and
  - o Provider may also be required to provide ASCII load file for in-house review tools, as well.
- Electronic File Processing
    - o Court tested and established professional processing and chain of custody protocols must be demonstrated to avoid spoliation charges;
    - o De-duplication methodology and process must be demonstrated; and
    - o Artificial intelligence algorithms, if any used to parse data to review folders, must be tested and approved prior to engagement.
  - Review of documents: The provider is responsible for administering the document review capabilities to the following specifications:
    - o Access 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. We prefer that the review be available without client software download or agent;
    - o Training: End user training for those accessing the databases should be initially done in person several times, with subsequent training sessions via online methods;
    - o Technical support: All users accessing the databases will need to have live and easy access to tech support for issues relating to accessibility,

functionality and content management. Access to a project manager will be required during expanded business hours;

- o Printing: Users should have the ability to print either individually or in bulk to a printer at your facility, the facility of a vendor of our choice, or to a local printer at the user's office; and
- o Security: There must be configurable levels of security to allow partitioned access to all users and user groups maintainable by an administrator based at one of the client law firms.

### **Specific Requirements**

The requirements set forth below represent only those requirements currently known by Little Firm That Could, LLP and is in no way an exhaustive list. Little Firm That Could, LLP fully expects that the vendors responding to this RFP will recognize and specify any additional requirements necessary to satisfy the company's needs in connection with properly preserving, collecting and producing paper and electronic data, as well as requirements for establishing, maintaining and using an Electronic Document Database. The basic requirements are:

- I. Housing and maintenance of the Electronic Document Database in a secure environment for an indefinite period of time, with appropriate back-up and system recovery processes and support procedures. Please describe your recommended approach and the technical architecture for:
  - A. Storing and maintaining this repository of documents and the associated meta data, including the type of hardware utilized (optical or magnetic)
  - B. Will all data will be stored on line or does your solution differentiate between online and near line storage? If there is a differentiation please describe how this data will be made available when needed.
  - C. Will the data repository and associated applications be hosted on equipment dedicated to Little Firm That Could, LLP? If not please describe what components of this architecture are shared.
- II. Please provide a high level technical architecture of your proposed solution including application and data servers, security components, firewall/routers, and access points to and from the network.
  - A. Facilities: Please describe how your proposed solution will satisfy each of the following requirements:
    - 1. Backup power supplies for hosting facility

2. Hosting facility redundant power supply
  3. Dual power feeds to each cabinet in the hosting facility from two different power systems
  4. HVAC environmental control including air conditioning and humidity control
  5. Carbon dioxide and fire suppression and detection systems
  6. Geographical location to be within the United States
  7. Physical security of the facility
  8. Other relevant attributes of your facility that should be taken into consideration.
- B. Ongoing support and professional services: Please describe how your proposed solution will satisfy each of the following requirements:
1. Hours of help desk support for client based services and operational needs. Unlimited 24x7x365 helpdesk support is requested for operational needs. If client support is not 24x7x365 please describe the process and costs associated with obtaining additional support outside of normal service hours;
  2. Change & Configuration Management – documented procedures to support change management. This must include a cataloged inventory of change records monitored and managed by the vendor Project Manager, overseeing the day-to-day and the strategic direction of the environment;
  3. Server problem diagnosis and resolution --- System troubleshooting, diagnosis, problem resolution, reboots/restarts, rebuilds; and
  4. Problem Management – documented problem management procedures including escalation path. Please identify the anticipated point of escalation;
    - a) Hardware maintenance and component upgrades – replacement of failed components, scalability-on-demand;
    - b) Dedicated Vendor Project Manager - For transition and part of support team after “go live”;
    - c) Dedicated Technical Support Team;

- d) Process for reporting and responding to system outages, including time to respond and time for repair;
  - e) Identify standard rate for any T&E professional services that may be required for future upgrades or other services that might be outside of the scope of this RFP.
- C. Backup and Restore Services: Please describe how your proposed solution will satisfy each of the following requirements:
- 1. Daily backups of system, content and databases;
  - 2. Tape storage;
  - 3. Tape retention;
  - 4. Recovery procedures and costs for restoration/recovery; and
  - 5. Disaster Recovery plan, including estimated recovery time.
- D. Monitoring Services: Please describe how your proposed solution will satisfy each of the following requirements:
- 1. Real-time monitoring of the network, operating system, firewalls, web servers, database servers, network routers and switches;
  - 2. Proactive Server Fault Management / Monitoring – This must include regular testing to ensure infrastructure and applications are operating properly, documented results provided to Little Firm That Could, LLP;
  - 3. Predictive Server Fault Management / Monitoring;
  - 4. Basic Server Monitoring to include:
    - a) CPU
    - b) Disk Space
    - c) Memory
    - d) Ping
    - e) Operating System Services
  - 5. Database Monitors;

6. HTTP Port Monitor;
  7. SSL Port Monitor;
  8. URL Monitor;
  9. Content match monitor;
  10. Internet utilization monitor; and
  11. End-user performance monitoring (e.g., Keynote)
- E. Security Services: Please describe how your proposed solution will satisfy each of the following requirements:
1. Network Intrusion Detection System;
  2. Host Intrusion Detection System (optional);
  3. Incident Management (how are incidents handled, reported to customer and escalated?);
  4. Security Patch Deployment;
  5. Dedicated Redundant Firewalls;
  6. Virus scanning (optional); and
  7. Vulnerability scanning (optional).
- F. Performance Services: Please describe how your proposed solution will satisfy each of the following requirements:
1. Local load balancing (improved performance and high availability);
  2. Stress testing production environment.
- G. Service Level Agreements: Please describe how your proposed solution will satisfy each of the following requirements:
1. Provide the service level (i.e., 99.9% ) you will agree to for access to the environment and any exclusions Little Firm That Could, LLP would be expected to agree to for this calculation.
  2. Please describe the reporting that will be provided to Little Firm That Could, LLP

- a) Operational, utilization, and availability
    - b) Capacity and performance
  - 3. Please describe the process that will be used for supporting changes to the environment or support for special projects.
- III. Please define for Little Firm That Could, LLP how the metadata and the email and its contents will be stored within the repository. Please explain why you believe that your approach, native, PDF, TIF, database, etc. is the best approach based on Little Firm That Could, LLP requirements, given the other alternatives that may be proposed.
  - A. For the purpose of providing this metadata to the Vendor along with the email with its contents, please define the approach you prefer Little Firm That Could, LLP utilize to transfer this data to you for inclusion into the repository.
  - B. Analyze the impact on your proposal of whether or not Little Firm That Could, LLP transfers to the Vendor imaged documents (tiff or pdf) or documents in their native format.
  - C. Please describe the process that you recommend Little Firm That Could, LLP employ to securely transfer the collected documents to you, along with the process for validating the receipt of the data and its successful inclusion into the repository. Upon your notification of receipt Little Firm That Could, LLP plans to delete the associated media from our environment.
- IV. Software and training (for all users, including administrators, attorneys, and support personnel) for the secure web-based review of documents in the Electronic Document Database by company personnel and its outside counsel, with the following features: Please provide detailed descriptions and visuals as appropriate to help Little Firm That Could, LLP understand the functional capabilities available with your offering.
  - A. Centralized management of document review
  - B. Ability to designate documents, (individually and in batches, without opening each individual document), with customized designation categories
  - C. Redaction capabilities
  - D. Tracking capabilities; Text and field (metadata) searching capabilities; Please describe if the metadata can be used to selected a subset of

documents and/or based on searching capabilities if metadata can then be leveraged to further refine the search.

- E. Ability for reviewers to batch print selected documents locally
- V. Please provide an overview of the production services offered, the quality control processes that will be utilized and the costs associated with such services; on a case-by-case basis, provide printing, CDs with specified metadata and/or text, or web-based viewing limited to specified documents, text and/or metadata;
- VI. Ongoing support to Little Firm That Could, LLP regarding data transfer from Little Firm That Could, LLP's IS department to Vendor, attorney review support, and system administration support.
- VII. Ongoing legal education and consultation to Little Firm That Could, LLP attorneys as to legal developments in the area of electronic discovery.
- VIII. It is requested that the software capabilities described above be provided to Little Firm That Could, LLP and its client through a secured web site. It is expected that approximately 30 individuals will have access to this repository. These individuals will be located in a variety of different locations each employing different desktop and security requirements within their environment.
  - A. Please describe the process that will be used to provide access to the environment.
  - B. Please describe the security of the web site and any security components that are used for 2nd level of authentication.
  - C. Please describe the ability to provide authorization to individuals based on different levels of access that may be needed or restrictions to data based on either the Meta data or the users role in the review process.
  - D. Please describe any restrictions based on software, operating systems, network connections, etc., that will be required for operation of the web site.
  - E. Please define if any software or other components need to be loaded onto the client workstation for access to the web site;
  - F. What, if any, firewall ports need to be opened for access to this environment.

## ***Appendix D: Pricing Models***

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### **Pricing Models**

When evaluating proposals from multiple vendors, 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, most vendors 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 conversion to TIFF, it is often difficult to compare multiple vendor proposals because some vendors bundle the pricing for this step with other processing steps, or approach it in different manners, as discussed below.

The number of options for processing electronic data for review and production also make it difficult to compare proposals from multiple vendors. While the vast majority of all electronic 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 vendors 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 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 electronic discovery 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. (This can be accomplished during your meet and confer in a litigation matter; see page 31, supra.) 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, new processes, such as “concept” search engines, somewhat new technology to the electronic discovery world, bring with them their own set of pricing models, which tend to look somewhat like the pricing models for native review. However, because the process itself is different than 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. In fact, it may be that the only way to compare a proposal involving these new technologies with other proposals is to look at the total cost of the project, and in some instances, because these new processes involve different review strategies, the comparison may have to include the projected review costs. [Indeed, as noted by David Burt in connection with supply chain management, the “all-in” cost, or total cost, is 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 electronic data and concluding with the production of electronic data, either electronically, or on paper. We have broken down the process into 6 broad steps, each of which is composed of multiple steps. Obviously, not every step described below will be necessary in every project. As you would expect, vendors have different pricing models for each of the steps, or in some cases, for each of the sub-steps described below.

Harvesting

(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)

Conversion

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

Creation of Review Database

(loading, user fees, hosting)

Production

(endorsement – bates numbering, confidentiality logo, etc. – printing of production sets or creation of load files if documents are to be produced electronically)

Creation of Production Database

(loading, user fees, hosting)

Another important, and often significant, component of the total cost of the electronic discovery process may be project management fees. Some vendors 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 vendors 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 vendors using different models – although our hope is that vendors will respond to an RFP with pricing based upon the pricing model sought in the RFP – or at least breaking down their pricing in such a way that it can be compared with other proposals based upon the pricing format sought in the RFP. In any context, it may be prudent to request an example invoice from the vendor showing all potential line items that could appear to avoid unanticipated charges.

The most common pricing model in use today is based on a per-page fee, under which the vendor charges based upon the number of pages of images generated from the e-data in question.

Given that until fairly recently, almost 100 % of e-data processed for review and production was converted to TIFF or PDF, many vendors, law firms and clients are 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 to process the data set. While some vendors 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 second common pricing model used by vendors is based upon the amount of data processed. Under this volume-based pricing model, typically referred to as megabyte or gigabyte pricing, the vendor charges a set fee based upon the volume of data to be processed. Some vendors 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 vendors 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 vendors to process e-data. Therefore, it is imperative that the requesting party be able to break down the pricing contained in multiple proposals, regardless of the process used by the vendor. The

requesting party should specify a pricing scenario in the request for proposals, and vendors who use different pricing scenarios should provide a way for the requesting party 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, vendors who use a page-based pricing model should include estimates of the number of pages per gigabyte, so that the requesting party 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 tested today by major organizations.

# Appendix E: Decision Matrix

## Sample Decision Matrix\*

### REQUEST FOR PROPOSAL: DECISION MATRIX

Sample Only-Weighting is key

Score: 1-5  
Weight: 1-3

	Weight
<b>ABOUT THE COMPANY</b>	
Stability	2
Quality	2
Obligations, Representations, Warranties	2
Physical Plants	2
<b>PERSONNEL</b>	
Quality	3
Experience	3
Staffing Capacity	3
Project Management	3
<b>ABOUT THE PRODUCT/SERVICE</b>	
Quality of Work	2
Process and Infrastructure	2
<b>COMPANY SECURITY</b>	
Physical Site Security	2
Employees	2
<b>DATA SECURITY</b>	
Hardware Security	3
Software Security	3
<b>PROJECT SECURITY</b>	
Rights on Termination	3
Conflicts	2

VENDOR SCORES			
Vendor A	Vendor B	Vendor C	
3	3	5	
4	3	5	
4	3	3	
3	3	3	
3	3	3	
3	3	3	
3	3	5	
4	5	3	
4	5	3	
4	5	3	
4	5	3	
5	4	4	
5	4	3	
5	4	5	
4	4	5	

RESULTS			
	Vendor A	Vendor B	Vendor C
About the Company	22	18	26
Personnel	36	36	42
About the Product/Service	16	20	12
Company Security	16	20	12
Data Security	30	24	21
Project Security	23	20	25
<b>TOTAL</b>	<b>143</b>	<b>138</b>	<b>138</b>

NOTE: Numerical entries for Score which are outside the range of 1-5, and numerical entries for Weight which are outside the range of 1-3, will be highlighted in RED.

\*As mentioned in the text, only a beginning point.



## *Appendix F: RFP+ Vendor Panel*

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### **RFP+ Vendor Panel List**

(as of June, 2007)\*

ACT Litigation Services	Forensic Consulting Solutions, LLC
Applied Discovery	FTI Consulting, Inc.
Attenex Corporation	Guidance Software
Capital Legal Solutions	H5 Technologies, Inc.
CaseCentral	KPMG
CaseData	LECG
Cataphora, Inc.	Merrill LextraNet
The Common Source, Inc.	National Data Conversion
CompuLit	NTI
CT Summation	Orchestria
Daegis	PSS Systems
Daticon LLC	On-Site E-Discovery
Digital Mandate	Relevant Evidence, LLC
Discovery Mining, Inc.	Renew Data
Doculex	SPi Litigation Direct
Electronic Evidence Discovery, Inc.	Stratify, Inc.
eMag Solutions, LLC	TCDI
Encore Legal Solutions	TrialGraphix
Evault	Tusker Group, LP
Fios, Inc.	Zantaz, Inc.

\*See website ([www.thesedonaconference.org](http://www.thesedonaconference.org)) for the current listing of the RFP+ Vendor Panel.

## ***Appendix G: RFP+ “User” Group***

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### **RFP+ User Group**

Authors:

Matthew I. Cohen, Esq.<sup>12</sup>  
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<sup>12</sup> Subsequent to work on this version of the paper, Matthew Cohen joined AlixPartners LLP.

<sup>13</sup> Subsequent to work on this version of the paper, Conor Crowley joined Doar Litigation Consulting.