



The Secrets of E-Discovery Vendor Pricing

By Shawn Huston

The pricing of electronic discovery services is something that has confounded many legal professionals since its inception. Every E-Discovery service provider seems to have a different pricing model making comparing rates next to impossible. As experienced by the plaintiff in *Northstar Marine v. Huffman*, Case 1:13-cv-00037-WS-C (Ala. S.D., 08/27/13) who drew the ire of the court for being unable to identify a cost-effective solution, the pricing in the industry is a mysterious and often moving target.

It doesn't take much effort to find horror stories of dealings with service providers. In fact, even those of us on the vendor side of the industry have our war stories. For instance, the out of state vendor that invoiced for hourly services including the calls from the client to report errors in the data extraction. The vendor's time talking to support for the software company that provided the technology that caused the errors in the first place were even included on the invoice.

Stories aside, most providers of E-Discovery services really do operate in an ethical manner. Unfortunately the inconsistencies in pricing across the industry and a few disreputable bad apples have led to a cloud of mistrust across the entire vendor landscape. A lack of understanding of the numerous pricing models and services rendered only serves to fuel this suspicion. I hope that lifting the veil on pricing, helps to increase the transparency between service providers and the legal professionals we serve.

Hidden fees

When that vendor invoice comes in the mail it can feel like the famous saying from the movie *Forrest Gump*, "you never know what you're gonna get."

This unknown often comes from unexpected or hidden fees that appear on the invoice. Communication can often be to blame, but that breakdown may not be due to nefarious intentions. Even so, hidden fees are one of the biggest issues that I hear from clients causing rampant distrust of all vendors.

The most common fees that unexpectedly appear on invoices relate to ancillary services like technical labor, project management time and case termination. These services are, by nature, ambiguous leading to negative feelings when they appear on that invoice.

Whether technical labor is billable is often misunderstood even from within the vendor's own team. No two data sets are alike, blurring the lines between a task that is extraordinary and therefore billable, and those that are merely a part of the ordinary course of business. Make sure your vendor explicitly describes what may fall under the former category. Also, set the expectation that they should communicate immediately when data issues are identified that will incur additional cost.



Also billed on an hourly basis, project management time differs from technical labor. Project management generally refers to tasks related to the management of the discovery workflow or that is based on the content of the data itself. Data analysis, keyword testing, user facing software management and reporting are some of the items that may lead to these additional costs. If you expect to need a lot of assistance in this area it may be beneficial to work these services into the overall price of the data services.

Case termination fees are another item which characteristically avoids discussion until the services are actually needed, at the very end of the case. They also vary wildly from one vendor to the next with ranging from no-cost to tens of thousands or higher for large matters. Amy Bowser-Rollins, a veteran Litigation Support Manager and founder of Litigation Support Guru takes issue with this particular item, saying “The cost to take case data offline needs to be time-based and not unit-based. Our clients will not approve a huge cost at a point in the timeline where the case is winding down.”

Over the years I have heard occasions of intentional overbilling by vendors knowing that the client will negotiate the billable time downward. This is not a practice that is rampant in the industry, but it is another reason to take extra efforts to ensure the lines of communication are open and that both parties feel comfortable discussing the particular needs of the project.

Flat-fee arrangements

A relatively new option in vendor pricing, flat-fee arrangements are attractive in that they allow firms to more accurately estimate the total cost of E-Discovery technology services for a case. There is a misconception, however, that this also equates to lower overall cost. It is a very real possibility that you will actually wind up spending more when using flat fee services.

Flat-fee arrangements have a tendency to be fashioned to include every possible scenario that could arise in your case. This may include services that you may never want or need.

The reason for this is that service providers are attempting to calculate how to make a profit in the event you need an above average amount of services for your project. So, although you get the benefit of knowing what the general expenditure will be, you may actually be paying for unnecessary services.

Even if your primary concern is the predictability afforded by flat-fee arrangements, it may be beneficial to calculate the projected cost based on a la carte fees as a comparison. I’ve personally seen instances where clients had paid almost double with a flat-fee as they would have had they stuck with individually billed services, so it is beneficial to have all the facts to make an informed buying decision.



Per gigabyte pricing

The long term standard for pricing arrangements, per gigabyte pricing is still very popular among clients and vendors alike. Per gigabyte pricing generally falls under the heading of a la carte arrangements because it can also mean that other services like tiff conversion, OCR, bates numbering, and others are billed individually.

One benefit of a la carte pricing is the transparency that it provides. Each invoice provides an itemized list of the services rendered. As great as that sounds, however, this is also where hidden fees come into play. Sales representatives wary of scaring away a client can be hesitant rock the boat with a client by mentioning these fees leading to future disputes. Some on the vendor side justify this with the attitude that the landing the project justifies the initial misrepresentation. Unfortunately those that have adopted this approach contribute to the unusually high level of distrust that all service providers face.

To the benefit of attorneys and their clients, per gigabyte pricing has dropped significantly. Within the last ten years the cost of data processing itself has dropped roughly 90% from \$2500 per gigabyte unfortunately considering the increase in data volumes it may not seem like that large of a decrease. Even with a recent plateau in a la carte pricing, it's possible to achieve both transparency and savings by being a more informed consumer.

The Freemium Model

Everyone is bound to have heard the "free" marketing gimmick related to some product or service. It's become so popular in technology circles it has even led to a new term, "freemium". Recent years has seen a rise in this tactic in E-Discovery circles.

Rather than actually being free, these services merely become a loss leader allowing the vendor to charge more in other areas to ensure the revenue is still captured. In a competitive marketplace with varied pricing models it is not unusual to have clients ask for free services in one area or another based on advertised so-called free services offered by other providers. This model commonly consists of low or no cost data processing upon input followed by considerably higher costs upon export and production. Although that line item may not be on your invoice there is a good chance that you are paying for that service through increases in other line items, leading to little true savings.

Factors that increase cost

There is one often disregarded factor that serves to inflate the cost of E-Discovery services. This is the perpetual receivables issue faced in the E-Discovery service providers.

Although most engagements contain terms specifying payment with 30 days, it is not unusual to have firms in arrears for 60, 180 or even over 300 days. A large enough percentage of clients' are notoriously slow with payment that it has led to higher costs with companies being forced to factor the delays in to operating expenses. Proof of this is the ability by some companies to provide discounts for early or on-time payment. Even if you are paying your bills on time, your colleagues in the profession may be inflating the cost of your services through their untimely payment.



Conclusion

The challenges faced in the *Northstar* case aren't an isolated incident. With data volumes rising and being a part of more cases this issue isn't going away soon. However, when firms and service providers collaborate in a meaningful way, opportunities to reduce cost abound. As Amy Bowser-Rollins states, "From a law firm perspective, we need service providers to think outside the box on pricing so that it becomes a no brainer decision for our clients." Vendors are more willingly answer this call. As the industry awaits further cost reduction efforts, open communication and informed customers will aid in controlling costs and leading to better service.

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