No Fear . . . No Way: E-Discovery is a Complex Business - Proceed at Your Own Risk

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Embracing e-discovery technology and services carries tremendous risk. The challenge involves volumes of sensitive information, captured and stored on dozens of platforms, from a seemingly unknowable number of custodians, in every language and format on the planet. The truth is that discovery of electronically stored information (ESI) is an extremely complex process.

This process became critical following the adoption of the amendments to the Federal Rules of Civil Procedure in 2006 and became even more intense because of the downturn in the global economy and the continuous growth of data creation in multiple formats and platforms.

To rationalize the increasing cost of e-discovery, many corporations and law firms that engaged in discovery management believed that the collection, processing, analysis, and review of ESI was becoming a "commodity." The outcome was sometimes an attempt to handle massive, complex sets of disparate data formats with "off-the-shelf" software and by staff that had a minimal level of user expertise. Price was often the chief criterion for purchase, and work-product quality and defensible software/workflow was of little importance.

But are all off-the-shelf solutions as worry-free as many e-discovery service providers claim? Frequent releases of new application software and constant changes to current applications could make off-the-shelf e-discovery products, or "black boxes," (typically used by many law firms and corporations) obsolete at the time of release. Unfortunately, these often become "black hole" solutions. After the raw data is uploaded, it comes out formatted for search, leaving the user with little knowledge of how it was processed and whether it was done correctly and/or completely. Because the user does not often understand or even know what should happen inside the box, it creates the more urgent question of "defensibility" of the entire discovery process.

In January 2010, Judge Shira A. Scheindlin issued a decision in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, No. 05-cv-09016, 2010 BL 18377 (S.D.N.Y. Jan. 15, 2010) (Amended Order), that established professional standards for e-discovery and noted various types of

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possible sanctions for litigants who fall below the expected levels of competency. Judge Scheindlin's ruling should have been a stern warning to counsel that the entire discovery management process in a world of massive quantities and disparate creation platforms of ESI needs to be addressed in a systematic, controlled, defensible manner—and failure to do so will often lead to serious consequences.

We did not have to wait long to have these standards for professional levels of competency applied to the processing, hosting, and review of data in a litigation. In *Mt. Hawley Insurance Co. v. Felman Production, Inc.*, No. 09-cv-00481, 2010 BL 111159 (S.D. W. Va. May 18, 2010), U.S. Magistrate Judge Mary E. Stanley issued a ruling (which is currently under appeal) severely penalizing defendant Felman Production, Inc., for failure to take reasonable steps to prevent the production of privileged documents pursuant to Rule 502 of the Federal Rules of Evidence. In a case that should be garnering a lot of attention in the e-discovery world, the proverbial "tiff hit the fan." While it is unclear what caused the failure of counsel to identify the privileged emails before producing them, Judge Stanley addressed the lack of adequate quality control data sampling by counsel and the ESI vendor, and an unexplained "failure to build a complete index" somewhere in the vendor's workflow/methodology of processing, identifying, and indexing the privileged materials and then exporting the results to an online review system. As a result of the inadequate sampling and the "processing failure," and right before the parties were commencing a series of depositions, Felman was deemed by the Court to have waived privilege on key documents that were inadvertently produced. As with all privilege waivers, the Court noted that the "bell cannot be unrung," and Felman's position in the case was seriously compromised.

Based on the most recent line of cases, there also can be significant penalties for failing to properly preserve and produce electronic discovery at the outset of a litigation.[1] Law firms and corporations can end up with sanctions that can run the gamut from cost shifting, attorneys' fees, and negative inferences, all the way to directed verdicts.

It certainly appears that the judiciary is sending a very strong signal that there is growing lack of patience with substandard work product from both vendors and counsel within the discovery management process. Low price as a primary selection criterion for discovery support services may prove to be a Trojan Horse in light of the potential consequences. So, how do you protect yourself from unintended risk and consequences in your e-discovery? The following are some factors that legal professionals should consider when choosing a technology to manage this process:

- How many projects has the e-discovery services provider processed? Do they have experienced personnel (this means more than one person) to help provide timely service? Photocopy shops primarily perform photocopying, document review organizations primarily review documents, and law firms practice law. Most of these types of providers are not experienced ESI data processors. ESI processing is a task best undertaken by professionals whose focus is searching through and processing ESI.
- What types of protocols are in place for processing data? Does the provider maintain best practices and apply the proper chain of custody required? Look for a provider with highly experienced personnel that adhere strictly to a state-of-the-

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art defensible system that includes process auditing, quality control, analysis, validation, and chain of custody considerations.

Validation is the testing of results to ensure that appropriate high level processing and selection decisions have been made, and ensuring that ultimate results match the intent of the discovery team.

Quality Control (QC) involves testing to see that specific technical processes were performed as expected, regardless of what the results show.

Example: a QC task may check to see that a particular set of data was properly indexed for full text searching; that certain search terms were applied to those indices; and that resulting search hit items were identified. A validation process would check to see whether the search terms applied actually returned items that contained false hits, or, in the alternative, returned items which were relevant to the case based upon stated criteria (i.e., whether the results were over-inclusive or under-inclusive).

- How was the product developed? Will the company (if it is even able to) disclose the product's code, if required, to prove that the tool works effectively? A credible vendor provides highly experienced personnel to process ESI correctly and will have experts available to testify in court as to how the data was processed, what data was processed, what data was loaded into the Review Platform, and the methodologies utilized for quality control throughout the entire work flow.
- What types of data are not completely processed by the provider's e-discovery processing platform (e.g., does the solution handle partially encrypted/protected content within documents or image only information)? Does the e-discovery provider supply an exception report with a list of incompletely processed files? How are the incompletely processed files handled and reviewed? The provider should have a battle-tested workflow to handle incomplete file exceptions.
- What data types are not identified and what happens to those unknown file types? Are the unidentified files listed on an exception report or are they ignored? How are the unidentified files processed and reviewed? Again, the provider should have a proven workflow to handle unidentified file exceptions.
- What customization is required during a project for special processing? Does the vendor have dedicated developers that can handle customization of the data on the fly? Most ESI processing projects require some form of customization which typically does not fall under the feature set of the "off-the-shelf" software provider or "black box" approach, so it is important to know before a project is underway whether the software can be customized to handle special requirements.
- Will "the box" be able to testify on behalf of the legal professional using it? Aside from the practical problems (such as how can the licensor of the software know what work flow functions were performed by the licensee), most licensors pointedly disclaim any warranties for the results generated from their software. Will the company that developed the software provide its developers to testify in court?
- Attorneys should want to protect themselves and their clients. Be confident that the chosen vendor has the technological tools, knowledge, and expertise for your processing requirements. Be sure to use a vendor with a solid track record and strong reputation.

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- Does the provider have adequate security to handle data? Check to see that there is an audited security certification, such as:
  - SAS 70 Type II {Statement on Auditing Standards No. 70}
  - ISO/IEC 27001:2005 {International Organization for Standardization (ISO) International Electrotechnical Commission (IEC) – Information technology - Security techniques - Information security management systems – Requirements (27001: 2005)}
- How difficult is it to change e-discovery providers if things do not work out in the middle of a case? Make certain that a clear migration and termination strategy is in place prior to the final execution of a services agreement. There are many horror stories of e-discovery providers charging exorbitant fees for exporting the data to another provider. Also make certain that a reasonable schedule is in place for exporting the data in a timely manner.

There are many options for e-discovery, and a wrong decision on a provider could irreparably damage a case and tarnish a hard-earned reputation. Before selecting an ESI platform, take a hard look at the provider and their technologies, using the same due diligence that would be used in every other aspect of litigation. Get it right the first time by finding a vendor that specializes in customized ESI services and is well-versed in best practices, because the wrong decision could end up costing far more in the long run. What you don't know CAN hurt you!

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[1] See *Maggette v. BL Dev. Corp*, No. 07-cv-00181 (N.D. Miss. Nov. 24, 2009); *TR Investors LLC v. Genger*, C.A. No. 3994, 2009 BL 273340 (Del. Ch. Dec. 9, 2009); *Magana v. Hyundai Motor Am.*, 220 P.3d 191 (Wash. Nov. 25, 2009). While the court in *Maggette* declined to issue sanctions again the defendant, the court did order that the parties agree upon the identification of a neutral e-discovery expert to "determine whether the defendants have met the standards for preservation of electronic evidence and disclosed all relevant evidence." Because of the defendant's discovery lapses up to that point, the court ordered the entire cost of the expert to be paid by the defendants. In our opinion, this amounts to a type of "de facto" sanction. *Maggette*, No. 07-cv-00181.

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