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TECHNOLOGY FOR THE LITIGATOR

Newsletter Articles

Tips to Avoid Mistakes with ESI Vendors

By Michael D. Berman

The first step in addressing the use of electronic discovery vendors is whether to retain one. Authors have differed on whether to perform ESI services in-house or through outside vendors. The decision should be a reasoned one, considering the size and needs of the project, as well as the skill, training, and experience level of all involved persons. Just as a litigator may not be well-suited to drafting a will, some in-house IT professionals lack forensic skills. The *Intel Microprocessor Antitrust Litigation* [1] exemplifies the dangers of an in-house solution.

Next, it is critical to define the roles of counsel, IT professionals, other forensic experts, if any, and client substantive representatives. Georges Clemenceau said that war is too important to be left to generals. Complex e-discovery cannot be successfully handled by a single profession or person. Assemble a team and agree on areas of responsibility. Client representatives can assist in describing what has been created, saved, and purged, and by whom. IT professionals and experts can determine where the data was likely stored and how it can be preserved and harvested. Attorneys can act as guides and interpreters, and apply legal principles to direct and assist the other disciplines.

An ESI vendor is like any other expert in one way—the vendor may have a conflict of interest. Just as you would with any expert, address conflicts and confidentiality up front.

Preplanning is better than reactive crisis management. The Sedona Conference "Best Practices for the Selection of Electronic Discovery Vendors: Navigating the Discovery Process" [2] (June 2007) sets out a detailed plan for selecting an ESI vendor. The "best practices," however, cannot be followed in a day, and prior planning is essential.

Define the scope of work in collaboration with the team. Identify key persons, central issues, a methodology for developing keyword searches, and hardware/software issues, in light of the size, importance, and complexity of the case and the data. Although every case is important to the litigants, not every case can support unlimited e-discovery.

Consider the full life cycle of the project. Sandy Ringer wrote *If You Don't Know Where You're Going, How Will You Know When You Get There?* It does little good to preserve data in a manner that makes subsequent processing and review more costly. The goal is speedy and inexpensive production of admissible evidence, and all steps must be planned with that in mind. Will the preservation and processing vendor be able to provide load files that match the desired litigation support solution? Is metadata necessary for authentication? If a vendor uses proprietary software, does it fit your needs?

Understand the vendor pricing policy. ESI pricing can be trickier than the Rule Against Perpetuities. The Sedona Conference suggests reviewing a sample bill that contains every possible billable line item.

Enter into a written contract with the vendor. Address chain of custody and vendor security for sensitive ESI. Do you want the vendor to designate a key person? Is vendor size important, and does subcontracting present any problems? Recent substantive decisions raise questions about reliance on Boolean searches—can the vendor provide "concept" searching?

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ABOUT THE AUTHOR

Michael D. Berman is with Rifkin, Livingston, Levitan & Silver, LLC in Maryland.

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The sanctions landscape is littered with instances where a litigant had to present evidence through forensic ESI consultants. Consider whether, in addition to being technically qualified, the vendor will make a persuasive witness. Also consider whether any disclosures made to the vendor are privileged or protected work product. They likely are not. [3]

As The Sedona Conference noted "The goal is to find the best fit a vendor suited to both the organization and the particular project." When the work begins and the money starts to flow, be sure you know what was purchased and sold.

ENDNOTE

1. *In re Intel Corp. Microprocessor Antitrust Litigation*, 2008 WL 2310288 (D. Del. June 4, 2008).
2. The Sedona Conference, "Best Practices for the Selection of Electronic Discovery Vendors: Navigating the Discovery Process" (June 2007).
3. P. Grimm, et al., "Discovery About Discovery: Does the Attorney-Client Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?" 37 U. Balt. L. Rev. 413 (2008).

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