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What Your Outside Counsel Doesn't Know About E-Discovery

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Last summer, a federal decision ordered severe sanctions against a client because of its attorneys' e-discovery failures. HM Electronics Inc. v. R.F. Technologies Inc., No. 12-cv-2884-BAS-MDD, (S.D. Cal. Aug. 7, 2015).[1] The conduct of the attorney in that case is no outlier. Despite the prevalence of e-discovery issues in today's litigation, the fact is that most lawyers, even those at large firms, are not aware of the issues — or their obligations. See, e.g., Bray & Gillespie Management LLC v. Lexington Insurance Co., 259 F.R.D. 568, 570 (M.D. Fla. 2009) (sanctioning both outside and in-house counsel for discovery violations), quashed in part 2009 WL 5606058.

Consequently, corporate counsel needs to be aware of the questions to ask their outside counsel to vet their e-discovery knowledge, lest they suffer the same result as in HM Electronics. This article summarizes the HM Electronics case, and uses it and other similar decisions as an aid to teach corporate counsel what questions they need to ask their outside counsel to ensure they are maximizing the value of e-discovery, and so they do not find their companies on the receiving end of sanctions.

HM Electronics concerned a dispute between the maker of headsets used in drive-throughs, and a company that repaired the headsets for them. HM Electronics, at 2. The plaintiff alleged that the defendant had created false reports about the need for repairs and the lifetime cost of the headsets, then distributed those falsified reports to the plaintiff's competitors. Id.

The Parade of Horribles

Plaintiff-Served Discovery Requests — The court focused on several recurring problems with the defendant's responses, though each was a symptom of the same problem: The defense counsel did not know what he was doing, or what he was obligated to do. The result was deficient discovery responses, which came to light based on documents the plaintiff got from third parties which the defendant itself had not produced; and based on the paucity of the defendant's production itself. See, e.g., id. at 7, 11.

Several errors contributed to the deficient responses. One problem was that the defense counsel had not instructed its client to impose a litigation hold, and the defendant itself did not have a document retention policy. Id. at 9. Relevant information was lost as a result, leading the court to find that the defendant had engaged in spoliation. Id. at 22-24. The defense counsel compounded this problem in several ways. The search was already limited because of the data that had been lost, but then the defense counsel further limited the search by failing to include employees' alternate email addresses. Id. at 27. The defense counsel still further excluded relevant documents by failing to include obvious search terms. Id. The production got even smaller based on the methodology the defense counsel selected for the privilege review. The lawyer used a computer program to identify potentially privileged documents, but set it so that any document containing the word "confidential" — as exists in many email footers — were withheld as privileged. Id. at 9. No one ever did a quality control check to see if the privilege filter had worked appropriately to catch only privileged information. Id.

As if it could not get worse, the defense counsel's e-discovery vendor then had an error. One of the contractor's employees had unplugged a drive before the computer was finished downloading the production. Id. at 11. Unfortunately, no one ever asked about the disparity between the data provided to the vendor, and the data the vendor proposed to produce, until after the motion for sanctions was already pending. Id. That is when the defense counsel learned of the error. Id.

Then it got worse, still. With each explanation, the defense counsel dug his hole deeper. When questioned about the paucity of the collection of electronically stored information, the defense counsel admitted that he did not conduct the search, and so did not know the methodology used. Id. at 8, 22. All he could say was the client had been told to check its computers. Id. at 8. That, by itself, is an explanation that no lawyer familiar with e-discovery should give because of the mounting body of law holding that it is unreasonable to rely on clients to conduct a collection, particularly when it is the interested employees themselves collecting the documents.[2] When questioned about the withholding of nonprivileged documents, the lead defense counsel explained he had delegated that task to associates and the vendor. HM Electronics, at 24-25.

Notably, although the parties reported they had settled before the court ruled, the court still imposed harsh sanctions against the attorney, and it also attributed the attorney's errors to the client as one basis for its award of sanctions against the client itself. Id. at 12, 25. First, based on the pervasive discovery problems, it awarded the plaintiff all of the fees it had spent on discovery after a certain date. Id. at 31. It explained that the fees could not be easily allocated between the discovery work in general and that necessary to cure the defendant's failings, so the defendant should bear the risk that the award was too high.Id. Second, the court ordered that it would give an adverse inference instruction, stating that the defendant had destroyed relevant documents, and that the jury could presume that the lost material would have been favorable to plaintiff. Id. at 32-35. Third, and most importantly, the court imposed "issue sanctions," precluding the defense from litigating whether they had knowingly falsified reports that they had prepared and distributed, which harmed the plaintiffs. Id. at 32. The court ordered the last two sanctions even though the defendant had produced responsive documents by the time of the ruling, because the sanctionable conduct had threatened to interfere with the rightful decision of the case. Id. at 29.

The most notable part of the case, however, may be why the court imposed sanctions. It looked to, and adopted, a California ethics opinion on what basic skills attorneys must have to be competent in e-discovery. Id. at 21-22. Among the issues from the ethics opinion the court was focused on were the obligations to: (1) implement/cause to implement appropriate ESI preservation procedures; (2) analyze and understand a client's ESI systems and storage; (3) advise the client on available options for collection and preservation of ESI; (4) identify custodians of potentially relevant ESI; and (5) collect responsive ESI in a manner that preserves the integrity of the ESI. Id. at 21-22 (discussing California State Bar Formal Opn. No. 2015-193 at 3-4).

The court found that the defense counsel fell below this minimal standard of e-discovery competence in several ways. The defense counsel had not issued a litigation hold letter to its client, particularly one "tailored to the data and organization structures of this client" in part because the "lead counsel never learned the infrastructure of the [client's] ESI nor advised [the client] on the proper methodology for searching ESI ... " Id. at 22. After the documents were collected, the counsel simply took the client's word for it that all relevant information had been collected, rather than double checking by seeking production and confirmation from key employees beyond the client contact. Id. at 15. The attorney further failed to understand the client's ESI storage so that he could employ appropriate searches and search terms. Id. at 27-28. As to the documents that had been collected, the court rejected the lead counsel's efforts to blame others, reminding him of his duty to supervise other attorneys and vendors; and to quality-check their work. Id. at 24-26.

But the court did not just blame the lawyer. It also blamed the defendant itself — by attributing its lawyers' failings to the client as its own. Id. at 25.

Lest you think this sort of thing will not happen under the proposed revised version of Federal Rule of Civil Procedure 37, which recognizes that electronic discovery will be imperfect, the court stated that it would have imposed the same sanctions under that rule. Id. at 30.

Lessons to Be Learned from HM Electronics

The primary lesson from HM Electronics is the need to vet your counsel. You should have a conversation before retaining counsel for a matter about:

- What experience the lawyer has with ESI, including past cases in which he has needed to understand his client's use and storage of such information;
- Does the lawyer have experience in collecting ESI in such a way that metadata is not altered or lost;
- What experience the lawyer has in crafting collections based on the client's unique systems and data storage methods, culling relevant or privileged material from the data collected, and quality-checking and defending the methodology used;
- Whether the lawyer has the capability and capacity to handle ESI collection and production in-house, rather than forcing the client to incur the cost of hiring vendors to store and produce the data; and
- Whether the lawyer is familiar with getting ESI in to evidence, including the standards for doing so.[3]

Further, if counsel is not discussing the need to implement a litigation hold early on, it should be a red flag. Having a conversation about these topics is important not just to avoid sanctions, but to ensure your interests are being served. The same information gleaned from the questions above will also tell you whether your lawyer knows how and where to look for an opponent's ESI — and how to detect deficiencies as the plaintiff's counsel did in HM Electronics. Perhaps just as importantly, making sure your lawyer knows how to ask for the right ESI from an opponent will reduce your costs down the line, as getting the right ESI will make it easier for your lawyer to search for, identify and use relevant information.[4]

Another method many companies are employing to avoid the need to revisit these issues in every case is hiring coordinating e-discovery counsel. As the name suggests, this is outside counsel who manage the client's discovery needs. The benefit is that the client does not have to re-educate new counsel in each case — or incur the cost of doing so. Instead, the coordinating e-discovery counsel works with the merits counsel. This can lead to greater efficiency, as the coordinating counsel gains knowledge of the client's business and types of information generated, so they can more easily pinpoint and provide relevant information. Additionally, many coordinating e-discovery counsel have the in-house ability to handle data collection and processing tasks that previously would have required hiring a vendor, resulting in further cost savings.

But, suppose it is too late. What should your lawyer be doing if there has already been a discovery failure? The lesson from HM Electronics is reminiscent of the old adage: if you find yourself in a hole, stop digging. The court seemed particularly vexed that, rather than acknowledging and investigating the problem, and working to fix it, the defense counsel continued to stonewall. Id. at 10, 14. Four times in the decision, the court emphasized the need to collaborate with opposing counsel and the court to resolve e-discovery issues.

Again, the best advice on how to avoid these issues is to vet counsel in advance, and ensure that the lawyer is working collaboratively on a discovery plan at the outset. This article just scratches the surface of ESI issues, but our hope is that it will highlight the need to discuss it with your counsel.

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[1] The magistrate's order is currently the subject of an objection pending in the district court. Regardless of the outcome of that objection, however, the decision is indicative of the current judicial perspective on the e-discovery issues raised.

[2] The lawyer should have known better than to offer that explanation, because courts have ruled that "it is unreasonable to allow a party's interest employees to make the decision about the relevance" of documents, particularly because they "do not have enough knowledge of the applicable law to correctly recognize which documents are relevant to a lawsuit and which are not." Jones v. Bremen High School District 228, 7 (N.D. Ill. 2010); accord National Day Laborers v. ICE, 877 F. Supp. 2d 87, 108-09 (S.D.N.Y. 2012) ("most custodians cannot be 'trusted' to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA

contexts is not part of their daily responsibilities. Searching for an answer on Google (or Westlaw or Lexis) is very different from searching for all responsive documents in the FOIA or e-discovery context. Simple keyword searching is often not enough: Even in the simplest case requiring a search of on-line email, there is no guarantee that using keywords will always prove sufficient." (internal quotations omitted)).

[3] Lorraine v. Markel, 241 F.R.D.534, 537-38 (D. Md. 2007) (explaining that "counsel must be prepared to recognize and appropriately deal with the evidentiary issues associated with the admissibility of electronically generated and stored evidence" and that "it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence because the proponent cannot lay a sufficient foundation to get it admitted.").

[4] Fed. R. Civ. P. 34 allows parties to specify the form in which ESI is produced.
