

Magic or Science: You Be the Judge

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In-House EDD Processing: A Risky Business for Law Firms

In the wake of continued colossal e-discovery volume and associated costs, several highly respected law firms have seen fit to implement their own in-house Electronic Data Discovery (EDD) processing shops in an effort to control and reduce one of the highest e-discovery pain points for clients. Here a hodge-podge of IT professionals, attorneys, and paralegals conjure up a magical processing potion, engaging in various technical methodologies to process **ESI (Electronically Stored Information)** while extracting the metadata, frequently applying date and keyword search filtering and finally converting the resulting review set data into a hosted or in-house electronic document review tool or traditional litigation database format (i.e. Summation, Concordance or Ringtail) for ultimate review and production of documents during discovery, the sum total of this exercise commonly referred to as **EDD**, or **Electronic Data Discovery** processing.

After having worked in litigation support and technology in a myriad of roles for more than 15 years, it would be very easy for me to presume, like my indisputably talented colleagues, that my modicum of intelligence, active continuing e-discovery education efforts, and good faith intentions would be enough to carry the day when defending and assuring that my EDD processing methods were performed in that "forensically sound manner" only a Judge could love, or, at a minimum, that Judge Scheindlin, Judge Grimm or Judge Waxman would find acceptable and therefore deem our ESI evidence that I had processed admissible.

After all, aren't I asking all the right players all the right questions concerning the preservation and collection methods employed, determining the manner in which the various file types should be processed, including which file types should be excluded and how the extracted files should be rendered and oriented properly on the page? Of course. Am I a wizard at constructing accurate and exhaustive search logic that will yield the precise search results our legal team desires? (*Pay no attention to that man behind the curtain!*) Of course I am — just ask me! Have I engaged in preliminary search sampling? Yes, always. So far so good, but here comes the slippery slope: Am I technically trained or educated in computer science with a focus in search engines? Probably not. Have I studied for any period of time under NARA's and The Sedona Conference's resident guru, Jason R. Baron? Likely not. More importantly, do I want to be called on to testify and potentially cause immeasurable risk and liability to the firm I am very grateful to call home? Absolutely, indefatigably and most definitely not.

The playing field for self-made e-discovery experts is seemingly unlimited, driven by a genuine need for competent services and technologies in a complex and specialized market niche, in my opinion, just as much if not more than the desire to cash in on this bottomless pot of gold. Just when this rather insidious and increasingly prevalent mindset took hold is hard to pinpoint, but it's clearly been on the rise since 2007. Historically never one to be labeled conservative or cautious, I now find myself in the curious position of agreeing with the old-school scholars, industry experts and pundits alike on this issue, still sharing many of the same concerns as outlined in his oldie-but-a-goodie article, *In-House EDD: A Controversial Topic At Best*. Written long before the FRCP E-Discovery Amendments' passage in 2006, Jeff Beard pointedly asks the question of why a law firm would fail to use an expert in arguably the most controversial and often contested compliance obligation facing litigators today, while that same firm routinely and confidently relies on its experts to help construct many other important aspects of its cases, particularly in establishing the critical elements of proof.

Magic or Science: You Be the Judge (Continued)

For those of you still hoping the Force is With You and interested in developing your own in-house EDD processing workflows, Richard Davis's article In-House EDD: Pot of Gold or Can of Worms does a nice job of outlining the legal, technical and financial considerations and implications of each. Rob Robinson's recent blog entitled "Right Sourcing" Electronic Discovery also provides a thoughtful presentation and analysis of a balanced decision-making model to apply when deciding whether to in-source, out-source, or indeed, implement his hybrid model of both and "right-source." In their treatise entitled, "**eDiscovery for Corporate Counsel**", Mary Mack and David K. Isom recommend that, "it is important to know what level of risk can be tolerated with a cutting edge technology purchase," and conclude, "the important thing is to be confident that the changes are an improvement over your current evidence handling."

At the end of the day, as I leave behind my 4mm DAT tapes and 500 GB external hard-drives and ease into my fuzzy slippers with newspaper and piping hot tea in hand, it still seems to me that sometimes old-school science is just plain good, common sense in the ever-emergent world of e-discovery.