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BEST PRACTICES

Imagine there's no production disputes,
It's easy if you try,
No motions before us,
Above us only sky,
Imagine all the lawyers,
Litigating the merits today!

With all apologies to John Lennon, Jonathan Redgrave and Victoria Redgrave explain that a better production process is not the figment of a distant imagination but can be reality in 2010 and beyond for those parties daring to consider a new approach.

Rule 34 and the Internet: Innovative Solutions to Current Production Challenges

By JONATHAN REDGRAVE AND VICTORIA REDGRAVE

Can you imagine . . . document and ESI productions where there is no fight about the form of production, where both sides know the exact status of review and availability of information deemed responsive, and where privilege logs are created “on the fly” in response to any and every query posed?

The need to find a better way is not an academic pursuit. One recent survey of 2009 opinions addressing e-discovery issues noted that of 108 reported opinions identified as “significant,” 27 percent involved various production issues and disputes.

Stated otherwise, one out of four contentious e-discovery motions that resulted in reported opinions in the last year involved production disputes!

Lessons From the Bench. The recent case of *Cenveo Corp. v. S. Graphic Sys.*¹ is illustrative. In response to a Rule 34 request, plaintiff produced ESI in .pdf format despite defendants’ request for production in native format.

In the motion response, plaintiff argued the term “native format” was undefined. Not persuaded by that notion, the court found the term “native format” was unambiguous and granted defendants’ motion to compel the production (and re-production as was necessary) of electronically stored information (ESI) in native format.

¹ *Cenveo Corp. v. S. Graphic Sys.*, D. Minn., No. 08-5521 (JRT/AJB), 11/18/09 (see 10 DDEE 17, 1/1/10)

Although the argument is often made, litigants cannot credibly argue that “native production” is a “must have” for all cases. Indeed, the court in *Bellinger v. Astrue*,² recently refused to compel production of ESI in electronic form because existing hard copy was a reasonably usable format, because production in electronic format would be burdensome, and because plaintiff’s counsel was already familiar with the hard copy production, making production in electronic form “redundant and wasteful.”

Meet and Confer MIA? In both cases, where was the early meet and confer? Where was the sensibility for finding common ground? Discovery positions like those taken in *Cenveo* and *Bellinger* and the resulting motion practice are simply unnecessary and waste party and judicial resources.

Moreover, a party refusing to confer and negotiate a production resolution with the opposing party loses control of its “production destiny.” A common result is that a judicially-imposed resolution leaves the party in a far worse position than it could have reached on its own through negotiations.

A better production process is not the figment of a distant imagination but can be reality in 2010 and beyond for those parties daring to consider a new approach. The technology that enables such web-based productions has been around for more than a decade. What must catch up is the legal thinking, creativity, and execution.

The Platform. Practically any case of magnitude today involves the collection of paper document and ESI and the internal or external hosting of data on a computing platform that allows access (usually via secured internet access) for people to review, mark, organize, and code the information.

Despite this significant presence of the web as the glue that holds all of the processing, hosting, and review teams together, there are precious few reported cases where one side or both parties rely on an internet repository as the production tool.³

On the other hand, the majority of cases that have been cited regarding the use of internet repositories are the mass tort or multi-district litigation cases⁴ that conjure up the image of the “mega case” and likely leaves the impression that internet-based productions are only for the “bet the company” matters.

The reality is that technology exists today that allows for the hosting of imaged documents and native ESI for review and production purposes in a wide range of cases. And the technology is reliable and relatively affordable. The critical components you need to look for are:

1) Highly secure environments where multiple parties can load data to a common platform but no other persons or parties can access the data set (or any subset) unless and until such portions of the information are released for such viewing.

² *Bellinger v. Astrue*, 2009 WL 2496476 (E.D. N.Y. Aug. 14, 2009)

³ See *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp.2d 1 (D. D.C., 2006) (ordering continuation of internet document Websites for research and litigation); *In re Bridgestone/Firestone, Inc. ATX, ATX II*, 129 F. Supp. 2d 1207 (S.D. Ind., 2001) (discussing use of Internet for productions).

⁴ *Id.*

2) A proven technology platform that can handle the hosting of static objects with coded field information, OCR enabled images, and native files from most of the standard applications used in business (e-mail and office-type applications).

3) A technology capability that allows a requestor to search through a published production library to review search results to designate items for downloading or other production options (such as burning the data to a DVD).

4) A technology capability that allows a requestor to search the content of those documents/ESI that have been marked responsive yet potentially privileged in order to return a dynamic privilege log that provides the requestor with objective, non-privileged information regarding the withheld information, as well as any annotations related to the nature of the privilege(s) being claimed.

The Benefits. If the parties can agree on a common hosting, review and production platform, then there are a multitude of possible benefits.

First, there should be no dispute regarding the form of production. The vendor will render content viewable in the same manner for all parties to the dispute. The vendor will also have the same tools for downloading or printing for all parties. Everyone will be on the same playing field—which is exactly what the rules contem-

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plated. And the parties will preserve the relevant information in native format in case there is any dispute regarding provenance or metadata down the road.

Second, the platform will treat native files, scanned and coded documents, and OCR’d documents identically for all parties. If documents need to be redacted, the process would be uniform, as would be the display of images with redactions. Again, no difference/no dispute.

Third, the platform will allow for greater “transparency” as to the process, as all parties will have access to the facts and figures of the production, including the volume of data/objects being hosted as well as details regarding the number released for review (and those withheld as potentially privileged if the parties agree to have the vendor host that data as well). Ideally, the parties will also exchange information regarding the manner by which information was collected in the first place as well.

Fourth, if the parties are willing to agree to the searchability of potentially privileged documents (i.e., you can run searches against the contents but the display results will not show any contents but only the objective information that would typically be available in a privilege log), then there will be a greater ability to achieve the goals of 26(b)(5) (i.e., the requesting party will have a better idea of what is being withheld with-

out invading the privilege) and concurrently reduce the time and expense associated with traditional privilege logs.

Of course, an investment will still be required to flag such objects as potentially privileged with some measure of analysis to identify the applicable privileges, but the overall effort needed should be greatly reduced. The number of privilege assertions ultimately subject to challenge should also be reduced.

Fifth, the use of a common platform and vendor can help the parties and court better understand the costs of production and provide a means to allocate those costs equitably among the parties. This can also help reduce or eliminate satellite litigation regarding costs and cost-sharing.

Guidance From Sedona. Notably, in the fall of 2009, the Sedona Conference⁵, as part of its “Voices in the Desert Series,” held a webinar entitled “Risks, Rewards & Repositories: Addressing the Use of Joint Repositories in Discovery.”⁵ The panelists noted that the establishment of a joint repository can help the parties anticipate and constructively address a number of discovery issues, including form of production, confidentiality, cost sharing, and cost reduction.

They also noted that such an approach is part of a strategic embrace of The Sedona Conference[®] Cooperation Proclamation, which has been endorsed by numerous judges across the country.

For organizations facing serial litigation, the benefits of a uniform Internet depository approach to satisfy production obligations noted above start to multiply quickly.

The Process. For those parties and counsel with the foresight to venture into web-based productions, the process is relatively straight-forward.

First, explore the technical feasibility of placing your documents and information onto a web-based review and production platform. Ask detailed questions of vendors regarding capabilities and, especially, security. Ensure that the requisite level of confidentiality can be

⁵ <http://www.thesedonaconference.org/conferences/wgsa/20091021>

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maintained. Also assess the vendor’s track record in providing web-based productions.

Second, discuss with your client the relative risks, benefits and costs of a web-based production. Make sure that you explain how the data will be stored, managed and produced. Discuss how privileged documents will be identified and handled. Explain the risks of inadvertent productions and the steps that will be taken to avoid inadvertent productions as well as the measures that will be in place to address inadvertent productions.

Third, approach opposing counsel to agree upon a protocol for production via a mutual web-based platform. Go into the discussions with a specific proposal as to how the parties will collect information to be fed into the web-based repository. Address the knotty issues, such as how to handle redactions, privacy and privilege claims. You also need to include a discussion about, and agreement regarding, the confidentiality of communications with the vendor and the non-waiver of any privileges that may be associated with such discussions. If opposing counsel rebuffs the offer, consider whether you want to use the web as your production vehicle unilaterally. If all parties agree, document a specific protocol that will govern the use of the depository.

Fourth, involve the court early in the process—whether all parties are involved or you are going to go solo. Explain the benefits of your proposed production vehicle. Obtain a Fed. R. Evid. 502(d) order to protect against any claims of waiver resulting from inadvertent productions and to eliminate the need for any hearings to adjudicate “reasonable” protections that may otherwise be necessary if Rule 502(b) were the governing provision. Also obtain a strict confidentiality and access order that governs all aspects of the use of the depository site as well as information available on and derived from the site.

Fifth, gather your data, ensure that a copy of the original format (as collected) is preserved, and then load your data into the platform and let the reviews and productions begin.

E-Discovery Physics. One statement of Newton’s First Law of Motion is that a body at rest tends to stay at rest.⁶ So too in discovery it seems to be that many lawyers continue to fight discovery battles and resist change simply because that is the way it has always been done.

Yet, for those clients and counsel who are open to considering the use of technology to shift the paradigm to reduce disputes and costs associated with production, there may well be enough force of persuasion to usher in the use of internet-based productions.

This does not mean that all parties or cases will or should shift to a web-based production world. It just means that parties and counsel need to be educated about the possibility so that they can make educated judgments regarding the best approach in any given case.

⁶ The original Latin of Newton’s law is: *Corpus omne perseverare in statu suo quiescendi vel movendi uniformiter in directum, nisi quatenus a viribus impressis cogitur statum illum mutare.* Auctore Isaaco Newtono, *Philosophiæ Naturalis Principia Mathematica* (Londini: apud Guil. & Joh. Innys, Regiæ Societatis typographos, MDCCXXVI) available at <http://www.thelatinlibrary.com/newton.leges.html>.