

Litigation

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CORPORATIONS and individuals faced with actual or prospective litigation are often inclined to undertake the preservation and collection of their own electronically stored information (ESI). This is often referred to as “self-collection.” While on its face this may appear to be a feasible and cost-effective approach, “self-collection” can fall victim to the law of unintended consequences and bring about disastrous results.

With self-collection, the implementation and execution of a litigation hold falls upon an interested party that may, on top of that, not have the legal or technical competency to identify, preserve and collect documents potentially relevant to actual or prospective litigation.

Hiring outside e-discovery counsel can eliminate the dangers inherent in self-collection and mitigate the risks of a discovery tort. If counsel has been retained, excluding her from the process can be even more damaging for the client should anything go amiss. Because of lack of technical savvy or inclination, a lawyer may be tempted to accede or encourage her client's demands for self-collection. However, a lawyer must think twice before relinquishing supervision of the process; any attorney that does so may risk sanctions or worse.

The FRCP

Five years ago the Federal Rules of Civil Procedure (FRCP) were amended to address a morass of issues arising out of the existence of, and discovery obligations relating to, ESI. Notable amended rules include FRCP 16, 26, 33, 34, 37 and 45, as well as Form 35. A key component of the 2006 amendments is the focus on ESI early on.

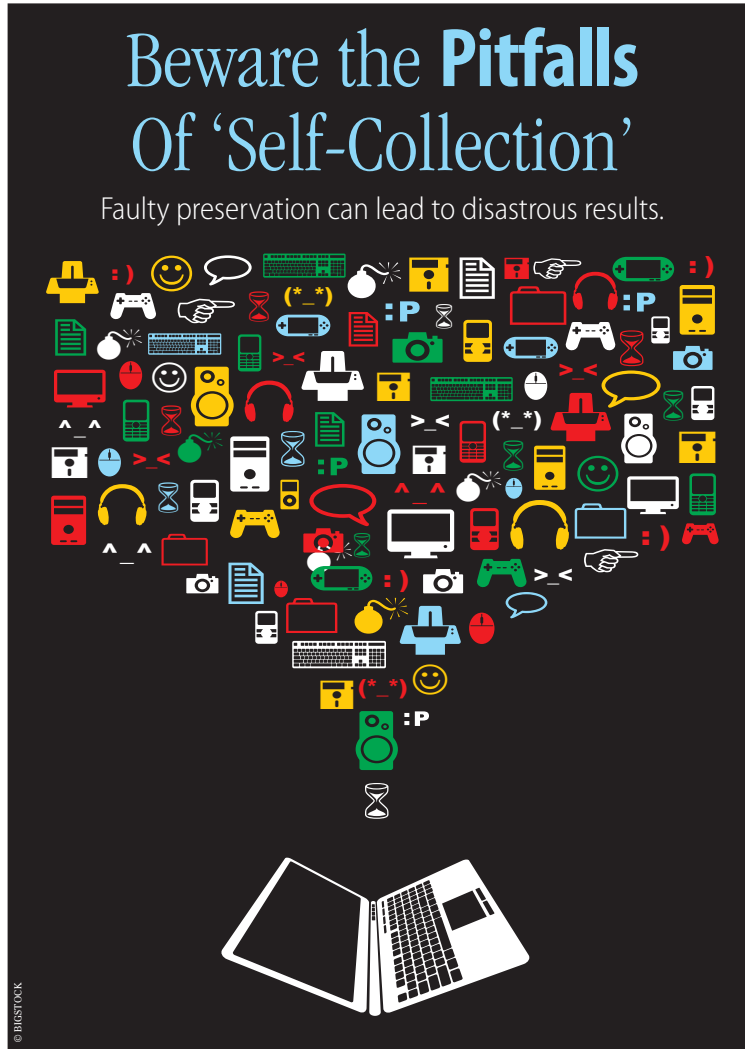
Namely, as part of the Initial Disclosures and

except as exempted by 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discov-

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Beware the Pitfalls Of ‘Self-Collection’

Faulty preservation can lead to disastrous results.



ery request, provide to the other parties: ...a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.

FRCP 26(a)(1)(A)(ii).

The parties must confer and discuss, among other things, any issues about disclosure or discovery of ESI. FRCP 26(f). Importantly, Rule 26(g) requires a “reasonable inquiry” before an attorney signs an initial disclosure: “By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry: with respect to a disclosure, it is complete and correct as of the

time it is made....” Reasonableness is for the court to decide based on the totality of the circumstances. FRCP 26 Advisory Committee Notes (1983 Amendment). If without substantial justification the certification violates the Rule, the court *must* impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both, and may include an award of reasonable attorney fees. FRCP 26(g)(3) (emphasis added).

FRCP Rule 16(b)(3) states that the scheduling order may provide for disclosure or discovery of ESI. A scheduling order should be issued “as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.” FRCP 16(b)(2). Therefore, under the FRCP, counsel

has a relatively short time frame to gain understanding of her client’s ESI, including the identification, preservation and collection processes. With these rules in mind, counsel and client alike must be wary of self-collection efforts, as representations on ESI must be made to opposing counsel and the court at the outset of litigation.

The reality is that, even prior to the 2006 amendments, courts have been suspicious of self-collection. In *Zubulake v. Warburg*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004), the court noted that:

[I]t is not sufficient to notify all employees of a legal hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.

Some courts have specifically addressed the risks associated with self-collection and found them unacceptable. In *Roffe v. Eagle Rock Energy GP*, C.A. No. 5258-VCL (Del. Ch. April 8, 2010), the court ruled that discovery requires the attorney to be physically present during the collection of ESI and that self-collection by the client is not permitted. The court held that self-collection is *always* insufficient and *all* collection must be completed under the direct supervision of outside counsel. The court stated: “[Y]ou do not rely on a defendant to search their own e-mail system... There needs to be a lawyer who goes and makes sure the collection is done properly... [W]e do not rely on people who are defendants to decide what documents are responsive.” *Id.* at 10.

Pension Committee of the University of Montreal v. Bank of America Sec., 685 F. Supp. 2d 456, 473 (S.D.N.Y. 2010), also addresses this topic, criticizing a preservation instruction that:

places total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from counsel... I note that not every employee will require hands-on supervision from an attorney. However, attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts is important. The adequacy of each search must be evaluated

on a case by case basis.

Id. at 473 n.68 (S.D.N.Y. 2010); *Samsung Electronics v. Rambus*, 439 F.Supp. 2d 524, 565 (E.D. VA 2006) (“It is not sufficient...for a company merely to tell employees to ‘save relevant documents’... This sort of token effort will hardly ever suffice.”); *Wachtel v. Health Net*, 239 F.R.D. 81, 92 (D.N.J. 2006) (“[P]rocess for responding to discovery requests was utterly inadequate... [Defendant] relied on specified business people within the company to search and turn over whatever documents they thought were responsive, without verifying that the searches were sufficient”).

The Model Rules

Under the Model Rules of Professional Conduct, an argument can be made that a lawyer must advise against unsupervised self-collection and, if retained after the fact, audit the undertaken process to ensure that it was a comprehensive endeavor. A lawyer must provide “competent representation,” meaning the lawyer must exhibit the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Rule 1.1. Thus, basic e-discovery competence should be exhibited in understanding: ESI in general; a client’s systems; the requirements under the FRCP as they relate to ESI; and the changes in technology and law. Also, Rule 3.4 provides that a lawyer shall not “fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” Arguably, failure to supervise from the get-go or failure to review and endorse (or review and fill the gaps) of the identification, preservation and collection of potentially relevant ESI, may open the door not only to malpractice suits in extreme cases but also to court-imposed sanctions against the lawyer.

In the much publicized *Qualcomm Inc. v. Broadcom Corp.*, 05cv1958-B (S.D. Ca.) (Order of Jan. 7, 2008), Magistrate Judge Barbara Lynn Major sanctioned Qualcomm and its attorneys for discovery misconduct, in particular the failure to produce 46,000 documents. Six lawyers were individually admonished and \$8.5 million in sanctions were imposed against Qualcomm. The court referenced the lawyers’ conduct, such as failure to:

- meet with the engineers with access to responsive information to outline appropriate document collection;
- obtain sufficient information about the computer systems;
- take supervisory responsibility to verify the collection was truly complete; and
- revisit the collection of ESI during trial when faced with evidence that

the collection was not complete. Id. at 23-31.

The judge wrote that counsel should have withdrawn from the case if they could not get Qualcomm to do a proper search. Id. at 27, n.10.

Upon review, in an April 2, 2010 Order, the court declined to impose the aforementioned sanctions against the attorneys, but not without once again enumerating the errors that gave rise to the discovery failures, such as:

- no attorneys ever met in person with the Qualcomm employees likely to be important witnesses;
- outside counsel did not make any attempts to understand how and where data was stored on Qualcomm’s computer network; and
- there was no single attorney responsible for discovery, etc. Id. at 4-8.

Ultimately, the Order holds that “the evidence presented during these remand proceedings has established that while significant errors were made by some of the Responding Attorneys, there is insufficient evidence to prove that any of the Responding Attorneys engaged in the requisite ‘bad faith’ or that Leung failed to make reasonable inquiry before certifying Qualcomm’s discovery responses.” Id. at 12. However, the damage done to the law firm and the attorneys involved and the costs to Qualcomm are undisputed and should give pause to all parties and attorneys handling ESI.

Issues to Consider

Negligence. Self-collection relies on custodians, most of whom lack the legal or technical expertise to make decisions about ESI. Courts will question whether such custodians are appropriate for the task, as they may negligently disregard litigation hold notices or overlook data. Recently, in *Naaco Materials Handling Group Inc. v. Lilly Co.*, 2011 WL 5986649, *9 (W.D. Tenn. Nov. 16, 2011), the court chastised the defendant in part because it “left collection efforts to its employees to search their own computers without supervision or oversight from management” and took no effort to follow up with its employees or to document any of its search and collection efforts.

Also, in *Northington v. H&M Int’l*, 2011 WL 663055, *21 (N.D.Ill. Jan. 12, 2011), the court sanctioned the defendant with fines and recommended a spoliation inference at trial because the preservation efforts were “reckless and grossly negligent.” “[M]ost non-lawyer employees, whether marketing consultants or high school deans, do not have enough knowledge of the applicable law to correctly recognize which documents are relevant to a lawsuit and which are not. Furthermore, employees are often reluctant to reveal their mistakes or misdeeds.”

Id. at 17. Note that in the Second Circuit, “[d]iscovery sanctions...may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence.” *Residential Funding v. DeGeorge Fin.*, 306 F.3d 99, 113 (2d Cir. 2002).

Inconsistency. Having various custodians making decisions will often lead to inconsistencies that will be difficult to explain. How will these custodians document and defend the specific searches, retrieval, and preservation efforts of their collection? Broadly speaking, a true “self-collection” effort is almost never defensible. E-discovery counsel can ensure that the collection decisions made are consistent among custodians and documented appropriately for later explanation.

Bias. Generally speaking, those with the highest stakes in the litigation should not be the ones collecting the documents. Beyond the risks of negligence or inconsistencies, custodians may intentionally destroy or cover up potentially damaging documents. The *Northington* court, in addressing this issue, stated “[i]t is unreasonable to allow a party’s interested employees to make the decision about the relevance of such documents, especially when those same employees have the ability to permanently delete unfavorable email from a party’s system. Furthermore, employees are often reluctant to reveal their mistakes or misdeeds.” 2011 WL 663055, at *17.

In *Green v. Blitz, U.S.A.*, 2011 WL 806011 (E.D. Tex. March 1, 2011), defendant placed an interested employee in control of preservation. This employee failed to adequately produce, preserve, and search for certain documents. He did not issue a litigation hold, conduct electronic word searches for e-mails, or discuss with the IT department how to search for electronic documents. Id. at 4. He even asked other employees to routinely delete electronic documents. Id. at 8. On top of significant monetary sanctions, the court ordered defendant to produce a copy of the sanctions memorandum to every plaintiff in every action it currently has or has had over the last two years and also with its first pleading or filing in every new lawsuit it participates as a party for the next five years. Id. at 10-11.

“Relevancy.” “Relevant evidence” is defined in the Federal Rules of Evidence (FRE) as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it could be without the evidence. FRE 401. The standard for discovery in civil litigation requires the parties to exchange information that is “reasonably calculated to lead to the discovery of admissible evidence.”

“Relevant documents” include any documents or tangible things as defined by FRCP 34(a) made by individuals “likely to have discoverable information that the disclosing party may use to support its claims or defenses.” It also includes documents prepared for those individuals, to the extent those documents can be readily identified, and extends to information that is relevant to the claims or defenses of any party, or which is “relevant to the subject matter involved in the action.” *Goodman v. Praxair Services*, 632 F.Supp.2d 494, 511-12 (D. Md. 2009) (quotes and footnotes omitted). Given the broad and legal significance of the term, direction of counsel is needed to ascertain what relevant or potentially relevant information needs to be preserved and collected.

Improper Methodologies. Metadata is now sought as a matter of course. Metadata could be invaluable as it describes, explains, locates, and otherwise provides relevant information about the document to which it is related. Without the know-how, a preservation effort may lead to the corruption of metadata, calling into question the completeness and accuracy of the document. Also, data produced in litigation must be authenticated, meaning it must be shown to be genuine and unaltered. Part of this burden is met through a chain of custody, which demonstrates where the evidence has been located and who had custody of it from the time it was collected until trial. Because self-collection does not generate an automated chain of custody, the methodology used may not be defensible.

Too Much or Too Little. Lack of technical expertise may also lead to over or under collection of ESI. A custodian may over-collect to be on the “safe side,” which can lead to added time and data indexing, processing, storage, and review costs. Under-collection can lead to sanctions or having to re-collect the data, effectively doubling the cost to the party.

Business Disruption. Self-collection presents many practical business concerns for a party, as the process itself is extremely intrusive and disruptive. Self-collection will lead to lost productivity in the process and expose custodians to depositions on their efforts, which can be both costly and risky.

Some will argue that avoiding self-collection at all costs is not an absolute and that proportionality and fact specific considerations should always be taken into account when deciding the right approach. However, the import of the rules and the cases is clear for clients and lawyers alike; those who rely on “self-collection” do so at their own peril.