

Risk Management And Quality Control Of E-Discovery Vendors

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To avoid the risk of adverse rulings in litigation, compromising a client's position or even unnecessary costs, attorneys should be fully engaged with their e-discovery vendors and learn what questions to ask and pitfalls to avoid. This begins when the vendor is initially retained. Inquire about how the vendor handles conflicts of interest. Determine whether the work or any portion of the work will be outsourced by the vendor to a third party, and if so, demand to be notified in advance to make certain that security and confidentiality remain intact. Provide detailed RFIs asking in-depth questions, including how the vendor will process data and ensure quality control. Inquire into what tools the vendor will use, and whether such tools are compatible with the attorney's technology. In *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-cv-657, 2007 U.S. Dist. LEXIS 66767, at *6-7, 36 (N.D.N.Y. Sept. 7, 2007), the plaintiff's vendor created an "email attachment fiasco" when many emails produced were no longer linked, or "married," to their respective attachments. After "[v]arious potential solutions" were grappled with, the court ordered reproduction at plaintiff's cost, which could reach an estimated \$206,000. *Id.* The "technical glitch" was allegedly caused by an incompatibility between plaintiff's and vendor's software when documents were placed into a reviewable and searchable format. *Id.*, at *6.

Regarding the vendor's storage of data, if possible, physically inspect the location where data is processed and hosted to determine whether it is truly secure (e.g., security at entry points, walls preventing wireless remote entry). Particularly if you are using a new vendor, request information about the vendor's hiring processes and whether background checks are performed. The vendor may become a witness, so it is important to run a search, check references and inquire about witness availability. Ask the vendor about employee certifications and licenses. See whether the vendor contracts out staff; those employees may end up working for the other side's vendor and may inadvertently disclose confidential information to your opponent. Determine also whether the vendor is an 8-5 shop, or available 24/7. Further, ask about disaster recovery plans. Identify what will happen if the vendor is sold or closes its doors (e.g., how data will be returned).

Once the vendor is retained, be sure to enter into the necessary agreements, including confidentiality agreements. Require that the vendor notify you of any changes in the agreed-upon procedures.

On an ongoing basis, the attorney and vendor should confirm that the product and services match or exceed what was promised in the RFI. In addition, because the vendor could be called as a witness, the attorney should ensure that the vendor is taking defensible steps in collecting, processing and producing data. To avoid adverse consequences, the attorney should also understand the effect of certain actions taken during the review and production

stages of discovery. To illustrate, in *Thorn-creek Apartments III, LLC v. Village of Park Forest*, Nos. 08-c-1225, 08-c-0869, 08-c-4303, 2011 U.S. Dist. LEXIS 88281, at *22 (N.D. Ill. Aug. 9, 2011), the defendant mistakenly believed that documents marked as "privileged" during its review of documents in the vendor database would be automatically withheld from the production database made available to the opposing party, which they were not. The court held that privilege was waived. *Id.*

Privilege may also be waived if vendors are not reasonably supervised. In *Ceglia v. Zuckerberg*, No. 10-cv-00569A, 2012 U.S.

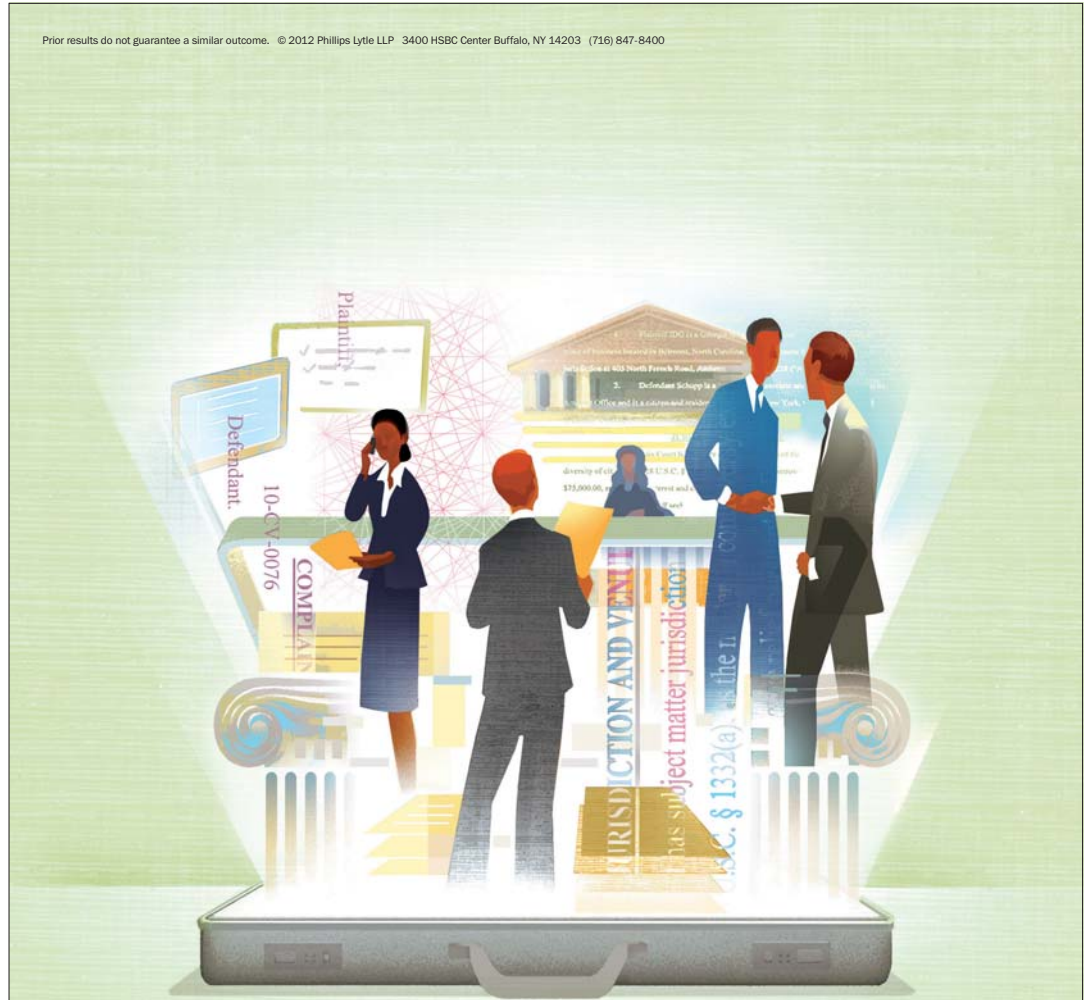
Dist. LEXIS 55367, at *21-26 (W.D.N.Y. Apr. 19, 2012), *aff'd*, 2012 U.S. Dist. LEXIS 115185 (W.D.N.Y. Aug. 15, 2012), plaintiff's attorney permitted the vendor to retrieve and produce documents to opposing counsel. Plaintiff's attorney did not, however, review the documents before production. Critical documents were produced. The court held that plaintiff waived privilege to the documents where he failed, *inter alia*, to take reasonable steps to oversee the vendor's activities. *Id.*

After a matter is concluded, make sure data is removed from the vendor, including all existing electronic copies.

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The consequences are steep for failing to be fully engaged with e-discovery vendors. In *J-M Mfg. Co., Inc. v. McDermott Will & Emery*, No. BC 462 832 (Cal. App. Dep't Super. Ct. L.A. Cnty. filed June 2, 2011), the defendant faced a legal malpractice suit when it allegedly did not carefully review the work of contract attorneys at an e-discovery vendor, resulting in the production of almost 4,000 privileged documents to the federal government in a whistleblower suit.

To summarize, in order to minimize exposure and risk, the attorney should ask a significant number of questions and actively participate in the e-discovery process.



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