CARLTON FIELDS

The Risk Created By E-Discovery Vendors

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Companies and law firms routinely rely upon third-party vendors to shepherd them through the technical aspects of complying with e-discovery obligations in litigation. Some companies see vendor services as a panacea to the burgeoning complexities of the e-discovery arena. After all, vendors can assist with identifying, processing, culling and producing data. While vendors can assist with some of the complicated, technical aspects of e-discovery review and production, over-reliance on vendors by companies and law firms can carry significant risks, including sanctions. This is especially true where there has not oversight of the vendor during the discovery process. Delegating important technical functions to an e-discovery vendor without any oversight may create a situation where a company and its law firm could be subject to sanctions. Developing case law suggests that a company and its counsel have an affirmative duty to ensure that a third-party vendor is properly executing the company's e-discovery duties. Simply shirking this duty and claiming that any problems are the fault of the vendor will not release a company or its law firm from liability for the vendor's unintentional mistakes or intentional malfeasance. In *Rosenthal Collins Group LLC v. Trading Technologies International Inc.*, the federal trial court found that the plaintiff and its counsel had an affirmative obligation to make sure its third-party consultant was executing his e-discovery functions properly and to ensure the preservation obligations were carried out appropriately.[1] In that case, the plaintiff filed a motion for summary judgment claiming that the defendant's patents were invalid as a matter of law because software had already anticipated the patents.[2] The plaintiff argued that software written in 1998-1999 was prior art that invalidated the defendant's patent applications.[3] To advance its argument, the plaintiff relied upon its retained consultant, a computer programmer.[4] The plaintiff also relied upon a series of removal computer zip disks which allegedly contained a backup copy of source code originally written by the consultant in 1998-1999.[5] The defendant deposed the consultant after the summary judgment motion was filed.[6] During his deposition, the consultant revealed that the software code containing the functionality at issue had not been written onto the exhibit disks in 1998-1999.[7] Instead, the consultant admitted that he added the functionality in 2005.[8] The consultant further testified that he went so far as to modify the source code to add similar functionality.[9] In response to the consultant's revelation, the court granted monetary sanctions to the defendant, struck the consultant's declaration, and struck the plaintiff's summary judgment motion.[10] The defendant also voiced its suspicion that it believed

that the last modified dates on the zip disks had been altered.[11] The court permitted additional discovery to take place to determine whether there had been any modification to the zip disks by the consultant.[12] In his second deposition, the consultant admitted that he had "turned back the clock" on his computer when he overwrote the source code on the zip disks with modified code to make it appear that the files on the zip disks had last modified dates in 1998 and 1999 when the last modified date should have been 2006.[13] Additional discovery revealed that various disks, USB drives and computers that the plaintiff had produced had been wiped.[14] All seven of the zip disks cited by the plaintiff in its summary judgment motion had been wiped.[15] In response to all of this evidence of spoliation, the defendant filed a motion for default judgment and for monetary sanctions.[16] The plaintiff and its counsel responded to the motion by arguing that they did not know of the consultant's actions.[17] The plaintiff company asserted that it should not be held liable for its consultant's actions because it had no idea what the consultant was doing.[18] Furthermore, the company had instructed the consultant to preserve all media.[19] Rejecting these arguments, the court found that the company was on notice as early as 2006 that the dates on the code had been changed.[20] The court found that the plaintiff company should have known that its consultant had altered the zip disks because a simple review of the file directories would have revealed the alteration.[21] Furthermore, the plaintiff and its counsel could have simply questioned the consultant to discover the changes made by the consultant to the last modified dates.[22] The court found that the plaintiff and its counsel "had an affirmative duty to make sure that the metadata was accurate in light of their reliance on the source code contained on the zip disks."[23] While the plaintiff claimed it had no reason to doubt its consultant's information because he was nonparty, the court stated that the imposition of sanctions does not require actual knowledge, only gross negligence or recklessness.[24] The court found that the plaintiff's conduct warranted the imposition of a default judgment and $1 million in monetary sanctions.[25] At a minimum, the court held that the plaintiff and its counsel had a duty to preserve evidence and this duty could have been met by taking physical possession of the evidence or obtaining a forensic image of the evidence.[26] While the plaintiff claimed that it told its consultant to preserve everything, the plaintiff did not take any other steps to collect evidence or ensure its preservation.[27] Counsel for the plaintiff should have understood that "preservation" may have a different meaning in litigation.[28] Simply informing the consultant to preserve evidence was not a reasonable means of ensuring preservation.[29] While the plaintiff attempted to disavow all of the consultant's actions, the court found that the consultant was an agent and was under the control of the plaintiff.[30] *Rosenthal Collins* raises a number of issues for companies and their counsel when utilizing outside vendors to handle e-discovery issues in litigation. First, the court in Rosenthal Collins emphasizes that the company and its counsel had an affirmative obligation to ensure that preservation of evidence took place. This is a task that cannot be delegated to a third party. Counsel and companies need to work together to ensure that preservation takes place appropriately in compliance with legal obligations. Preservation may mean one thing to a vendor and may mean something entirely different in the context of litigation obligations. Second, *Rosenthal Collins* demonstrates that blind reliance on vendors will not insulate a company or its counsel from sanctions. Third, *Rosenthal Collins* creates an affirmative obligation on companies and

their counsel to ensure that vendors are appropriately reviewing, culling, and producing electronically stored information. Companies and their counsel need to implement sound quality control techniques to ensure that the e-discovery process is sanction-proof. In the *Rosenthal Collins* case, quality control can be as simple as interacting with the vendor on a regular basis and asking appropriate questions. If counsel for the plaintiff had simply asked the consultant the right questions prior to filing the motion for summary judgment, then the sanctions issue may have been avoided entirely. Instead, counsel and the company blindly relied on the consultant's work without checking the veracity of the work. In the context of a case involving the collection and production of electronically stored information, quality control may require employing both an automated and a manual component. For example, an automated component could flag files that contain a high number of binary characters. Once the files are flagged, they could be visually inspected. A manual quality control component is important, especially in cases involving corrupted data that may not be reviewed automatically. Quality control also entails making sure that the format of the production is precisely what was agreed upon between the parties such as native format versus TIFF format. Statistical sampling, concept searching technologies, and other new technology tools can be utilized in order to quality check the review process and ensure that the process is defensible before a court. Amid the trend of outsourcing e-discovery, it is unclear how much a company and its counsel may need to supervise an outside vendor's work. Rosenthal Collins demonstrates that blind reliance on a vendor, even where the company and its counsel are not involved in malfeasance, can carry significant sanctions risks. Proper selection of a vendor at the beginning of the engagement and implementation of quality control measures throughout discovery can help control the risks that vendors may pose. The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice. This article was originally published in *Law360*, New York (July 22, 2011). [1] *Rosenthal Collins Group LLC v. Trading Technologies International Inc.*, No. 05-C-4088, 2011, at *12 (N.D. Ill. Feb. 23, 2011)

[2] Id. at *1.

[3] Id.

[4] Id.

[5] Id.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Id. at *2.

[11] Id.

[12] Id. at *3.

[13]Id.

[14] Id. at *4.

[15] Id.

[16] Id. at *5.

[17] Id.

[18] Id.

[19] Id.

[20] Id. at *8.

[21] Id.

[22] Id.

[23] Id.

[24] Id. at *11.

[25] Id. at *14.

[26] Id. at *12.

[27] Id.

[28] Id.

[29] Id.

[30] Id. All Content © 2003-2010, Portfolio Media, Inc.

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