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E-Discovery: Review through Production

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I. SCOPE NOTE

The technology used to process and review data in electronic discovery has changed significantly over the last ten years. Lawyers who are not frequently involved in large productions of electronically stored information or "ESI" often find it difficult to keep up. Also, document reviews are often outsourced, leading lawyers to believe that the review is being handled by a vendor and requires little involvement in the details on their part. Significant mistakes can occur, however, when the attorneys leading the case do not understand the technology or the impact of decisions made in the review. Also, costs to the client can increase substantially due to decisions made before and during the review. This article is intended to provide basic information about running an electronic document review and checklists of items counsel should consider when setting up a review.

II. PREPARING FOR THE REVIEW

Thoughtful preparation is the key to performing a successful document review. Lawyers cognizant of upcoming deadlines often rush into the review, only to find later that the documents must be re-reviewed one or more times because of issues they did not anticipate prior to the review. Counsel would be well advised to take time up front to consider the following issues:

- **Is a protective order needed and if so, will there be different levels of confidentiality in the Order?**

If the protective order provides that certain types of documents (such as proprietary documents) are to be marked Attorneys' Eyes Only and/or Confidential, the review guidelines need to specify which documents are to receive each designation and the reviewers must tag the doc-

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uments based on the level of confidentiality. This needs to be decided at the outset to avoid having to re-review the documents for that issue.

- **Will any confidential material need to be redacted?**

If, for example, the documents may contain confidential private financial records or social security numbers or health information protected by HIPPA, instructions will need to be included in the review guidelines to tag documents containing such confidential information and redact the information, where applicable.

- **Are there any outstanding questions about what documents the party is producing?**

To prepare the review guidelines, the producing party's lawyer will need to review the document requests and summarize what documents the party is agreeing to produce so that the reviewers can determine which documents are responsive to those requests. If the producing party is unsure whether it will refuse to provide certain categories of documents responsive to certain requests, it should resolve those issues before the review. Alternatively, tags can be used to identify issues that have not been resolved. For example, if a party has not decided whether it will produce Board of Director documents, an issue tag could be used to identify Board of Director documents and then the documents could be segregated later for production, if needed. Ideally, it is best to resolve those issues up front, however.

- **Is there a nonwaiver agreement or is nonwaiver language included in the Protective Order?**

In every case where there is a possibility of a large production of documents, the parties should agree that the production of privileged materials does not constitute a waiver of the privilege if: (1) the party producing the materials notifies the receiving party of the issue, and (2) in that circumstance, the documents will be returned. Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure provides that after being notified of the production of privileged materials, the receiving party must "promptly return, sequester, or destroy the specified information." However, that provision does not provide that such production will not *waive* the privilege. Further, while Rule 502(b) of the Federal Rules of Evidence provides that in federal proceedings, the inadvertent production of privilege material does not constitute a waiver, it requires that the disclosure be "inadvertent" and the holder of the privilege must have taken "reasonable steps to prevent the disclosure." Fed. R. Evid. 502(b)(1) and (2). This language may lead to a battle where the producing party has to provide evidence about the steps it took to protect against disclosure. *See, e.g., Williams v. District of Columbia*, Civ., 2011 U.S. Dist. LEXIS 91380 at *13 (D.D.C. Aug. 17, 2011)(holding that the District had failed to explain its methodology for review and production and its conclusory statement "is patently insufficient to establish that a party has discharged its duty of taking 'reasonable steps' to guard against the disclosure of privileged documents.")

If the parties agree to a Protective Order that provides that if privileged information is produced, it will be returned and such production will not constitute a waiver of the privilege, they will avoid an evidentiary battle about the circumstances of the review and production. It is important to have the nonwaiver language entered as an order rather than a simple agreement between the parties, because this will prevent another party from arguing waiver in another pro-

ceeding. *See* Fed. R. Evid. 502 (d))(stating that "[a] federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.") It is very common for parties to agree to nonwaiver language in the protective order and it prevents any issues later if a privileged document is produced. It is important that the language is as absolute as possible and ideally does not require "inadvertence" or that the party took "reasonable precautions" to avoid evidentiary battles on these issues.

- **Who is going to conduct the review and how will it be managed?**

For reviews over about 5000 documents, contract attorneys should generally be used, as they are more cost effective and can devote their entire work day to review, which helps speed the review and makes the review more consistent. Contract attorneys must be managed, however, and it is very important that an experienced e-discovery attorney manage the review closely. Some clients require the use of non-law firm vendors to perform the review. If that is the case, it is very important for someone on the merits team to understand the review platform and be heavily involved in the review to understand the QC procedures that the vendor is using. Merits counsel should be heavily involved in training and available for day-to-day questions. Weekly meetings between merits counsel and reviewers are also very helpful to resolve issues seen in the review. If reviewers misunderstand issues in the review, problems can compound quickly and impact thousands of documents, so it is important that merits counsel is heavily involved in the review and resolves questions quickly.

- **How will the documents be processed and what vendor will handle the processing and hosting?**

Before loading the documents to a database, the attorneys and client will have to make certain decisions about the data such as:

  - What time zone will the data be processed in? Time is determined by where a person is sitting at a given time and the settings they apply to their computer. When data is loaded to a database, it must be "normalized" and one time zone has to be applied to all data. Often, the time zone that the majority of the employees were likely to be sitting the majority of the time is the best time zone to use, but some lawyers prefer to use Greenwich Mean Time (GMT).

  - Should the data be deduplicated globally or by custodian? Custodian deduplication eliminates exact duplicates within a custodian's files. Global deduplication eliminates duplicates across multiple custodians files, so if the same e-mail is in one user's in box and another user's sent box, it will only be loaded once. Vendors can load a field to the database showing for each document which custodians' had the duplicate of the document but were not loaded. This is typically called a Duplicate Custodian field. Global deduplication is preferable because it substantially reduces the volume of data loaded. Note that with Global Deduplication, however, if the producing party wants to produce all of a certain custodian's documents first, it should use the custodian and duplicate custodian fields to find *all* of that custodian's documents.

- Ultimately, when the producing party images the data for production (for example, converts native files to TIFF), it will also have to apply certain TIFFing settings such as revealing PowerPoint notes pages and hidden columns in Excel. Typical settings are to reveal PowerPoint notes pages and hidden columns in Excel. Track changes for Word documents can either be set to be forced on or as the user last saved the document.

- **How will document "families" be treated?**

Counsel needs to determine in each case whether attachments to responsive documents will be produced even if all of the individual attachments are not responsive. In many cases, it is advisable to remove nonresponsive attachments. All of the responsive documents and their attachments ("family members") can be Bates numbered and then nonresponsive attachments can be removed so that it is clear that documents were removed. This is important because if later those attachments must be produced, if they are Bates numbered, it is easy to produce them. This process is also more transparent to the opposing party, and thus if there are disputes, the party removing the attachments will not be seen as hiding the issue. While some have argued that an e-mail and attachments are, in essence, one document and thus nonresponsive attachments cannot be removed, at least one court has rejected this argument. *See In Re: Zoloft Products Liability Litigation,* 2013 U.S. Dist. LEXIS 187691 at *9 (E.D. Pa. 2013) (noting that while this issue has been the subject of only a few judicial decisions, because PSC had not shown that there was a systematic failure by Pfizer to produce responsive attachments, the court would not require production of the withheld documents or require that they be produced after redaction.) As the court correctly noted in *Abu Dhabi Commercial Bank v. Morgan Stanley,*

> Conceptually, there is a good basis for considering each item (each e-mail and each attachment) separately. Relevance is the *sine qua non* of discovery. *See Fed. R. Civ. P. 26(b)(1).* If information is not relevant, it is not discoverable under plain text of the Rule. Thus, if an e-mail attaches three disparate items in one communication package, that does not mean that all three items relate to the same thing or would be equally relevant to a discovery request.

2011 U.S. Dist. LEXIS 95912 at *22.

- **In what format will the documents be produced?**

While the precise format of the production usually does not need to be decided in the beginning and can be decided later, it is important to begin discussions with opposing counsel early on this issue because opposing counsel may also have requests as to *processing* issues and many of those decisions cannot be undone later. For example, global or custodian deduplication is decided up front. The time zone chosen also cannot be undone. A standard production format for most cases, which is easily loaded to most e-discovery platforms, is single page TIFF with a delimited load file with certain fields to be agreed-upon by the parties. Typical fields are: Custodian, BegBates, EndBates, BegAttachment, EndAttachment, To, From, CC, BCC, Author, Sent Date, Last Modified Date, Created Date, FileName, Subject, MD5Hash. *See Nat'l Jewish Health v. WebMD Health Servs. Group.*, 2014 U.S. Dist. LEXIS 69669 at *16-17 (D. Colo. March 24, 2014)(noting that production of documents in a PDF or TIFF format accompanied by

a load file containing searchable text and selected metadata is a production in a usable form and WebMD's production, which included a load file with metadata fields complied with Rule 34(b)(2)(E)(ii)). Extracted text should be provided so searches can be run across the data. Certain documents that do not image well such as Excel spreadsheets and audio files are often produced in native format with a TIFF slipsheet identifying the Bates number and confidentiality stamping.

- **What documents should be included in the review notebook?**

  In most reviews, reviewers will need:

  - The complaint/subpoena.
  - A list of attorneys in-house and outside the company who represent the client or who have represented the client in the past. For large clients who have long lists of attorneys, a separate shorter attorney list may be created to show attorneys most likely to be involved in the issues at hand. In some platforms, the attorney names can be highlighted in the database and this is an important feature that should be used, as it enables reviewers to more easily spot privilege issues.
  - Description of search terms highlighting in documents
  - Summaries of interviews and other information known about the custodians whose data is being reviewed.
  - Review Guidelines (which also summarize the document requests to which the producing party is not objecting.)
  - Privilege Guidelines (often it is helpful to have a separate document that outlines the privilege rules in more detail.)
  - Sample documents and the tagging that should be applied to those documents.
  - Any other background documents that may be helpful such as definitions of commonly used terms or other documents specific to the matter.

It is important that sufficient time is given at the beginning of the reviewers for the reviewers to review the documents in their review notebooks. Reviewers should also be encouraged to re-read the guidelines at the beginning of each day and throughout the review to make sure they do not forget or miss anything.

III. PREPARING THE REVIEW GUIDELINES AND TAGGING STRUCTURE

The review guidelines will serve as the 'bible' for the document reviewers, so it is very important that the lawyer managing the review spends time thinking through the types of documents likely to be seen in the review and preparing clear review guidelines for the reviewers. The review guidelines should:

- Provide a background of what the case is about, the claims and defenses and sufficient information about the custodians the reviewers will be reviewing and their roles.

- Provide a clear, simple description of each tag with examples.

- Ideally, provide a decision tree for tagging that provides clear instructions on which tags must be used in certain circumstances. For example, "If you tag a document responsive, then go to step 3. Step 3: Evaluate the document for privilege and tag it as privileged or not privileged."

- Provide a clear summary of the categories of documents that are responsive (which should track the discovery requests) and provide examples of documents seen in the document set they will be reviewing.

- Provide a clear summary of nonresponsive documents they may see, with examples.

- Provide information on privileged documents they may see and clear rules on what is privileged and what is not privileged.

Attorneys have different preferences with regard to tag structure, but we prefer to have a tagging structure that, at a minimum, requires that every document that may be produced – whether it is a responsive document, or it qualifies as a responsive document because it is attached to something marked responsive (such as a cover e-mail showing to whom the document was sent), be marked privileged or not privileged.

Basic tags in a first pass review are:

- Responsiveness (choices are Responsive, Nonresponsive, Needs Further Review, Technical (meaning the document can't be opened and thus a decision can't be made))

- Privilege (Privileged, Not Privileged)

- Privilege Basis (Attorney-client, work product, [other privileges, where applicable])

- Issue Tags (used to designate issues in the cases)

- Important – often used to designate important documents.

Many other tags are used in the database to designate documents needing to be produced or that are in final production sets, QC steps applied to the documents and other issues, but the above are basic tags used during the review.

IV. CHOOSING A REVIEW PLATFORM

The choice of a review platform can substantially impact the speed at which reviewers review documents, the quality of review and cost of a review. Review platform options vary significantly, and when deciding which review platform counsel will use for a project, consideration should be given to the analytic features of the platform, the tagging and searching capabili-

ties of the platform, and the cost associated with the use of the platform. In addition to these factors, counsel should use a platform that they have extensively tested or used or one that they know has been used successfully by experienced individuals in the e-discovery industry. The following is a description of factors to consider when choosing a review platform.

- **Which analytic features are available on the platform?**

Analytic offerings on a review platform can include: predictive coding, clustering technology that groups similar documents based on concept, email threading, and near duplicate identification. Predictive coding has generated a lot of discussion and has been accepted as a search method. *See DaSilva Moore v. Publicis Groupe, et al*., 287 F.R.D. 182, 192 (S.D.N.Y. 2012) (court approved use of predictive coding to identify responsive documents.) Predictive coding can be extremely expensive if it is used as a culling method and often simpler methods, such as use of search terms, can be more cost effective and more easily negotiated. Predictive can be very useful, however, to prioritize review (even after search terms are used) or to "validate" search terms that are being tested on certain sample sets of unfiltered documents.

If using predictive coding, it is important to understand how the platform is gathering seed and training sets, what reporting functionality is available, and the number of documents that will need to be reviewed in order to reach an acceptable level of statistical accuracy. During the meet and confer process, counsel will have be provide some transparency regarding the predictive coding process utilized if it is being used to cull the documents, and understanding the predictive coding feature the platform offers is imperative. Courts encourage cooperation in discovery generally and especially when predictive coding is utilized. *See, e.g., In re: Biomet M2a Magnum Hip Implant Products Liability Litigation.* 2013 U.S. Dist. LEXIS 172570 at *6 (N.D. Ind. Aug 21. 2013) (while court did not require production of seed set utilized in predictive coding, it questioned the motivation behind the refusal to do so and encouraged the parties to cooperate and encouraged Biomet to "re-think its refusal" to provide documents in seed set). Use of predictive coding can result in a lot of negotiations between the parties regarding the seed set, increasing negotiating costs substantially. Thus, before deciding to use predictive coding as a culling method or proposing it to the other side, counsel should evaluate carefully whether it will really reduce costs overall. The best way to control costs, is to control the size of the *collection* and limit the time frame and number of people whose e-mails are collected rather than trying to push all the data through analytic filters.

In addition to predictive coding, analytic functionality also includes the ability to cluster documents based on concept, email threading and near duplicate identification. These analytic features can be used to significantly lower reviewer costs and improve review quality. Email threading capabilities allow for the segregation of emails that are inclusive of other emails in the review database. By reviewing only the emails in the review set which are inclusive of other emails and eliminating from review those emails that do not contain "new" content or unique attachments, the review population can be greatly reduced. Emailing threading can also be utilized in preparing the privilege log. Logging documents that contain the same email threads increases the speed at which documents and can be logged and increases the consistency of log entries.

Another method to eliminate review costs and improve accuracy is to use clustering technology to assign documents to reviewers by "concept." Assigning documents to a reviewer by "concept" allows reviewers to encounter the same types of documents over and over again in a given assignment. This repetition familiarizes a reviewer with the documents, allowing for a quicker and more accurate review. For example, if the underlying litigation is a contract dispute, and the reviewer is batched documents that are conceptually similar to a particular provision of the contract, the reviewer will become familiar with that provision and will quickly be able to assess whether the documents are key or not. Concept clustering and near duplicate identification are also highly effective in identifying errors in the review and are an important part of the quality control process.

- **What coding and searching capabilities does the platform offer?**

Most review platforms allow the user to create their own coding and tagging fields. In determining which platform to use, counsel should choose a platform that allows the application of certain tags to duplicates, such as responsiveness and privilege. When tags apply to duplicates, every duplicate in the database receives the same coding decision. Applying tags to duplicates increases review speeds, as most databases are highly duplicative, even after global deduplication[3]. Also, duplicate tagging ensures that consistent coding decisions are being made on exactly the same documents. Without duplicate functionality, a document could be coded as not privileged while its exact duplicate is coded as privileged.

"Mass tagging" of documents is also available on many review platforms. While mass tagging can be helpful in culling out "junk files" or segregating large sets of documents, it can also result in unintentionally mass "removing" tagging decisions. It is important that if a platform offers "mass tagging", that the functionality is limited to administrators or others who understand the database and are trained on the issue.

Searching capabilities vary by platform. Platforms typically offer proximity, fuzzy, and wildcard searches. When choosing a platform, counsel should request a copy of the searching guidelines to better understand the proper searching syntax. Counsel should also determine whether there are any limitations to the platform's search capability, which may hinder counsel's ability to find important documents. Search capabilities and syntax vary by platform, and counsel should refer to the platform's search protocols to ensure the searches are running correctly. It is also important to choose a platform that has the ability to "highlight" search terms in the documents and include key terms hitting in the document in a separate field reviewers can see. Highlighting certain key terms and privilege terms substantially increases the accuracy of the review.

- **What are the costs associated with the platform?**

When picking a platform, it is very important to understand all the fees associated with the platform. Some fees are "one time fees" and other fees will be charged on a month to month

[3] This is because the same documents are often attached to different e-mails, so the "family" of documents is different because the documents are attached to different cover e-mails, but the attachments are recognized on the platform as exact duplicates.

basis. Features like predictive coding and concept clustering are often an additional fee. However, the additional charge incurred for analytics features (particularly threading deduplication and concept clustering) often is well worth the cost, as it saves attorney time and speeds the review. Many vendors charge per gig fees but also charge hourly project management fees. These hourly fees can substantially increase the budget and should be avoided where possible. Fees related to archiving a database or exporting a set of documents from a platform also vary, so it is important for counsel to fully understand the costs. There may come a time where the case is in a holding pattern and the tagging needs to be preserved along with the data but the platform does not need to be accessed for some time. Thus, the vendor should offer reasonable "near line" reduced hosting fees and cost-effective options for copying the data to an offline storage device in a database archive. All charges are negotiable and counsel's ability to negotiate down the fees will depend on the size of the matter and size of the client or firm seeking the relationship with the vendor.

V. QUALITY CONTROL DURING AND AFTER THE REVIEW

The first step in establishing a sound quality control process is developing review guidelines that identify the categories of documents that are responsive and/or privileged. The review guidelines provide instructions regarding the coding of documents. The quality control procedures should be built around assessing whether the coding of documents is in compliance with the review guidelines. As noted previously in this paper, training of the review team should be conducted by an attorney on the litigation team. The training and guidelines provide the foundation for a successful review.

During and after the completion of the review, counsel should prepare **written** quality control procedures to ensure that the review team has accurately coded documents and that all documents that should be reviewed have in fact been reviewed. Generally, the quality control procedures should focus on the following areas:

- Ensuring that all documents that should have been reviewed have a Responsiveness tag and other appropriate tags
- Checking for over-marking responsive documents (i.e., mistakes where attorneys marked documents that were nonresponsive as responsive)
- Checking for under-marking responsive documents (i.e., mistakes where attorneys marked documents that were responsive as nonresponsive)
- Searching for missed privilege in responsive documents or other documents that are going to be produced
- Searching for incorrect confidentiality coding
- Searching for incorrect redactions or missing redactions
- Checking for failure to identify important documents
- Searching for incorrect tagging of litigation issue tags

If the platform has analytics enabled, using the analytic features as part of the quality control process will greatly improve counsel's ability to quickly identify potential errors. For example, to assist in finding incorrectly coded privileged documents, counsel can run a search for all documents coded privileged and include near duplicates. A review of the near duplicates

of privileged documents that are coded as "not privileged" will quickly isolate potential errors. Documents can also be reviewed in clusters and sorted to find errors. Creating quality control procedures that are a combination of analytics and targeted searches will allow counsel to utilize the platform features to identify any potential issues with reviewer coding and improve the quality control process.

The quality control process should be geared toward identifying issues with: (1) the quality of the individual reviewers, (2) finding inconsistent tagging and substantive mistakes; (3) identifying categories of documents seen in the review that may necessitate changes to the review guidelines; (3) finding important documents that may impact the litigation strategy or depositions; and (4) finding "holes" in the collection that may necessitate further collections. The process should also be heavily documented so that decisions made during the review and QC process are well documented. During the first days of the review, it is important to run searches and spot check the overall work product of the review team. This process will allow counsel managing the review to identify any reviewer who may have a fundamental misunderstanding regarding a given concept or determine if there are reviewers who need to be removed from the project given poor performance. A single reviewer can review thousands of documents in a given week, particularly where tags are applied to duplicates, thus, early analysis of work product is imperative.

Quality control searches during the review will also guide whether counsel should revise the review guidelines. Normally, review guidelines are drafted before a substantial number of documents have been reviewed. After the review of a few thousand documents, statements in the guidelines may no longer be accurate or sufficient to provide guidance on coding categories of documents. For example, the guidelines may state that a certain type of document should be coded as "important" based on the expectation that there are not thousands of documents that fall into that criteria. However, after a few days of the review, if thousands of documents have been identified as "important", counsel will likely want to revise the guidelines and instruct the team to limit the coding of those types of documents. By performing quality control during the review and updating the guidelines as needed, counsel can avoid hundreds of hours of attorney clean-up time at the end of the review and unnecessary re-review of categories of documents.

Continual quality control during the review will also help familiarize the litigation team with the documents and may alter the litigation plan. The review team may identify documents that change counsel's view of the value of the case or may shape the litigation strategy. By having an attorney on the litigation team actively performing quality control checks during the review, those documents will be elevated quickly.

The document review also may impact decisions made in the collection process. By analyzing the documents that will be produced and comparing that set to counsel's discovery responses, counsel will be able to determine if additional collection of data is needed in order to produce documents in response to particular requests. For example, if a document request seeks all financial information related to a particular transaction, and as counsel is performing quality control over the documents there are no responsive documents containing financial information from the custodian that counsel thought would have such information, additional collection or revision of discovery responses may be needed. It is imperative that counsel identify any "gaps"

in responsive categories as soon as possible, to allow for the time it will take to collect additional custodial data that may be needed or revise discovery responses.

Even if sound quality control procedures are employed, privileged documents may be accidentally produced. Counsel may need to show that an effective training and quality control process was employed to avoid waiver of the privilege.[4] *See Datel Holdings Ltd. v. Microsoft Corp.*, 2011 U.S. Dist. LEXIS 30872 at *16 (N.D. Cal .Mar. 11, 2011) (holding that the privilege was not waived based on the reasonable steps taken by Counsel, including quality control steps by litigation counsel).

If the review is being conducted by a vendor, it is extremely important to understand what QC procedures the vendor is running. The litigation team should run additional QC procedures to check for conflicting tags and important errors and review some of the documents after the vendor QC is complete to ensure that errors are fixed. Review vendors often do basic QC but may miss other conflicting tags or errors. There are many areas to check in QC and having a second set of eyes, particularly from the litigation team, is very important to avoid errors. When errors are found, feedback should be immediately given to the vendor and searches should be run to find similar errors to fix the issues. Many large clients who require the use of review vendors recognize that outside counsel needs to also review a subset of the documents and perform some of its own QC. It is important that litigation counsel be sensitive to the client's need to control costs and not duplicate vendor work, but at the same time do enough quality control to get familiar with the work of the vendor and identify issues.

VI. PREPARING THE PRODUCTION AND AUDITING THE DATABASE

Once counsel has completed the quality control process following review, the next step is to prepare the documents for production. Prior to preparing the production, counsel needs to reach agreement with opposing counsel on production format. Also, counsel must decide whether documents will be produced in complete families or not.

- **How does counsel identify the production set?**

The first step in preparing the production is gathering the documents that need to be included in the production. Preparing the production is not as easy as running a search for all documents coded responsive and not privileged. If counsel has agreed to produce documents in families, he or she will need to run a search for all documents coded responsive plus family members. Across the responsive plus family search, additional searches should be run to identify documents coded privileged in that set in order to remove the fully privileged documents from the production set. It is also best practice to run additional searches to ensure that all documents have been accurately coded. For example, counsel should check that all documents coded for redaction are redacted, the confidentiality designation is applied to all documents, documents that contain privilege terms have been through the quality control process, and all documents

[4] This is assuming a nonwaiver agreement that contains language different from Rule 502 has not been entered. As noted previously in this paper, an effective nonwaiver agreement that contains language stating that any production of privileged material is not a waiver will avoid evidentiary battles about whether a party took reasonable precautions.

have been reviewed and coded for responsiveness and privilege. Once the production set is gathered, the production should be tagged with a "final production" tag. By tagging the production, counsel will have a record of which documents were included in the production set.

- **What instructions should be given to the vendor who is creating the production?**

Once the production is tagged, clear instructions need to be provided to the vendor that is preparing the production (i.e., the vendor that is hosting the documents or if it is hosted by the firm in house, their practice support staff). The instructions should include the following details:

  - The name of the final production tag or a document link to the documents that should be included in the production.

  - If documents have been removed from families due to responsiveness and privilege, often a separate tag is used to designate the documents to be Bates numbered prior to removal for privilege and nonresponsive issues prior to production.

  - The number of documents that should be produced, along with the number of documents in that set that contain redactions.

  - The order in which the documents need to be sorted prior to Bates stamping (typically by custodian and then parent ID so that families go in order).

  - The Bates convention and next available Bates number, as well as the location of the Bates stamp.

  - Details regarding the confidentiality designation, specifically the tag that indicates the level of confidentiality for a given document, the confidential language that should appear on the document, and the location of the confidential branding.

  - The production format including, the fields that should be contained in the production, the format native documents will be produced, and whether text is to be provided for redacted documents.

  - When the completed production is needed, the number of copies needed, and the requested media (CD, FTP, Hard drive).

- **Should counsel look at the hard drive, disk or copy of the production that is provided on a secure site before sending it to the other side?**

Counsel should perform quality control steps across the final production disk or hard drive before sending it to the other side. In the old paper world, counsel would never hand a stack of documents to a copy vendor with tabs showing which documents should be produced and then have the copy vendor send the set that should be produced directly to the other side. Counsel would check the documents first. Counsel should similarly not send out a disk with a production of data on it without reviewing it. Reviewing data is different than small sets of hard copy documents, but basic checks can be performed to ensure the production is correct. Specifically, counsel can load the load file to an Excel spreadsheet (or there are other, more user friend-

ly tools available to check the production). Counsel should then confirm that the right fields are included in the production (they will show as columns in the Excel) and the number of documents in the production matches the number of documents designated for production in the database. Also, counsel can search for a document in the database tagged as redacted and easily find that TIFF image on the disk and confirm that it is redacted. Not all documents can be checked in most productions, but by checking a few, counsel can confirm that the redactions were burned into the documents. If the vendor mistakenly forgot to turn the redactions on, then none will be redacted. Also, the OCR provided for a redacted document should be checked to see if the redacted text was removed. Again, not all documents can be checked but by sampling one or two, counsel can get more comfort that the process was correctly followed. Also counsel can check some of the images to ensure that the right number of digits show in the Bates numbering and that the confidentiality stamping is correct. Counsel can also quickly tell whether the documents appear in the correct order by looking at a sample of document families produced together. Paralegals properly trained can also complete this process but it is important for counsel to understand the process and the format data is in when it goes out the door.

- **What are the remaining steps to ensure that the review is complete?**

After the review team has completed their review and the productions are complete, counsel should run searches across the entire database to ensure that all documents slated for review have in fact been reviewed (i.e., have a responsiveness tag). If only documents that are hitting on certain search terms and/or within a given time frame need to be reviewed, the search should be adapted to ensure that all of documents that hit on those terms and within the time frame have been reviewed. Additionally, counsel should run searches to confirm that all documents coded responsive and not fully privileged and documents that are responsive but have been redacted have been included in a production. Searches for documents coded privileged should be run as well to confirm that all responsive documents coded privileged are included on the privilege log, if a privilege log is being produced. Finally, it is prudent to contact the vendor who processed the data and receive written confirmation that all data that has been received has been processed and loaded to the review platform. The vendor should be able to provide a spreadsheet of all data processed, which can be cross checked with lists counsel has of documents that should have been collected.

VII. CONCLUSION

E-discovery technology is continuing to develop, although the pace of technology changes is slowing. It is very important that lawyers managing a large production get in the "weeds" and understand the technology and decisions made in the review to ensure that decisions made in the review are not inconsistent with the issues in the case. Preparation is key – if lawyers rush into a review, often mistakes are made and the documents have to be reviewed multiple times to fix the issues. Also, too many tasks are often outsourced to vendors without an understanding by counsel of the impact of those decisions. Ultimately the lawyers defending or prosecuting the case will be held responsible if documents are not produced that should have been produced or if privileged documents are produced. Thus, it is very important that counsel spend significant time before and during the review to understand the review process and not outsource all the tasks to others without an understanding of the process and involvement in the decisions made.