

NEWSLETTER

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Legal Strategies. Business Solutions.

### Meta-Discovery Presents Challenges for Producing Parties

by *Brent Green*

Rapidly changing technology has created opportunity for business in the 21st century and challenges for litigators along the way. Gone are the days when lawyers only collected paper documents from their clients' file cabinets and produced the relevant papers found within. Today, e-discovery lawyers also collect data from hard drives, data servers, hand-held devices, and other locations.

While document preservation, collection, review, and production often occur unbeknownst to the lawyers litigating the merits of the case, some lawyers are focusing their attention on the procedures and requirements that comprise the discovery process. Meta-discovery, or "discovery about discovery," is a growing trend in litigation -- both big and small -- and a new challenge for producing parties.

#### What is Meta-Discovery?

Simply stated, meta-discovery pertains to the producing party's efforts to respond to discovery requests and is not related to the actual issues in the case. While the motivation behind filing such discovery requests can vary, responding to meta-discovery requests can be time consuming and costly for the producing party.

There is little legal guidance available on whether meta-discovery should be allowed and, if so, whether the results are beneficial. Jurisdictions that have addressed whether to allow meta-discovery have not achieved a consensus, and many judges have not had an opportunity to rule on this issue.

#### What Can Producing Parties Do?

When faced with a meta-discovery request, it is important to remember

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#### Meet DSP

##### Bill Belt Pursues Passion to Enhance e-Discovery Capabilities

Bill Belt leads LeClairRyan's Discovery Solutions Practice (DSP) team and offers clients more than 20 years of experience in high-profile litigation and electronic discovery.

Bill has been recognized by the *National Law Journal*, the flagship publication of the Litigation Services Network, as defense counsel for one of the "Top 10 Defense Wins for 2002," and by the American Bar Association for his work on the Exxon Valdez litigation.

that many judges have not handled a meta-discovery request. Therefore, take the opportunity to educate the court about the issues related to meta-discovery from the beginning.

Focus on managing the expense of responding, as this is a primary concern for producing parties. In many cases, the party propounding meta-discovery requests does so in an attempt to raise the total price of discovery and thereby force an early settlement. However, if the producing party demonstrates that its discovery practices are sound without spending too much money in the process, then it may successfully thwart the requesting party's objective.

### **How Should Producing Parties Manage the Expense?**

The first step to managing the expense associated with meta-discovery is to define the scope of the meta-discovery in a way that limits the amount of time and money required to respond to the requests. If the court is not familiar with meta-discovery practice and case law, then the producing party must illustrate that such requests are outside the normal discovery scope work to limit this avenue of discovery.

Meet and confer to identify the specific areas of discovery that the opponent deems to be insufficient and work to narrow the scope of the inquiry. If the opponent has convincing concerns about spoliation, perhaps because of a particularly fragile or ephemeral data type, it may be in the producing party's best interest to outline the measures taken to preserve relevant data.

In addition, it may be necessary to involve e-discovery counsel to ensure that the processes and technologies used on the project are defensible and able to withstand scrutiny. An experienced e-discovery counsel has most likely encountered these types of challenges and can speak to what is defensible and what is not.

### **What about Privilege?**

Questions about privilege inevitably arise when dealing with meta-discovery. While the producing party's discovery practices may be entitled to protection under attorney-client privilege and work product doctrine, taking a pragmatic approach that focuses on managing expenses *may* be the best strategy. Invoking privilege protection may run up costs, and the producing party may still be required to answer meta-discovery requests after a drawn out and expensive privilege battle.

Work with your client to decide what information should be protected, how much it is willing to spend protecting it, and what information can be shared with opposing counsel. Articulate to the court and opposing

Prior to joining LeClairRyan, he worked with a team of attorneys as national coordinating trial counsel in EMF, latex medical glove, and MTBE litigation. He also built an electronic discovery practice focused on utilizing technology to manage large-scale discovery projects.

Conducting discovery in a digital world is no easy task. Bill has encountered the challenges of e-discovery first-hand, and he has dedicated his legal career to aligning with other professionals who share his passion to enhance the capabilities of e-discovery.

As a leader of the firm's DSP team, Bill continues to follow and apply technical advances, and he has again built a skilled discovery team of attorneys and technology specialists. He also frequently speaks and blogs on e-discovery issues. Please follow Bill's efforts to "make e-discovery a solution, not a problem" on Twitter at [@wwbelt](https://twitter.com/wwbelt) and read his blog articles at <http://e-discoverymyth.com/>.

[Learn more about DSP](#)

counsel that any privilege waiver is limited and intended for the express reason of efficiently putting to rest any issues related to discovery processes.

### **Stay Focused, Proceed with Skill**

As with any discovery issue, the art of negotiating with all the stakeholders is crucial when dealing with meta-discovery. The client, the court, and opposing counsel each have different interests that must be managed. Depending on their level of experience with meta-discovery, it may be necessary to inform these stakeholders that meta-discovery is generally limited by case law.

Discovery counsel for the producing party should try to protect its client from being drawn into a protracted discovery battle by being willing to meet and confer as needed. During these exchanges, focus on understanding the particular concern and limiting the discussion to that issue. Setting appropriate boundaries will save the producing party time and money and keep everyone's attention focused on the merits of the case.

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## **Foreign Language Document Reviews Require Careful Planning, Proactive Measures**

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Nothing causes a document review to come to a screeching halt like an unexpected trove of foreign language documents and having no one on hand to review them. Preparation for this contingency at the outset of every document review project will ensure production deadlines are met, review costs are controlled, and clients are happy. Below are five strategies to proactively prepare for a foreign language document review:

- **Select the right technology.** When selecting an e-discovery vendor, determine if the review platform has automated translation capabilities, what languages are supported, and whether foreign language search functionality is an option. Ask the vendor if its project managers have experience with foreign language reviews.
- **Know the data.** When collecting documents, ask custodians whether they are multilingual or have worked with foreign language documents. (Occasionally, a custodian will have

emailed translated versions of foreign language documents.) By becoming familiar with the data and identifying individuals who are familiar with the collection data, case managers will be equipped to properly staff the document review or, in the case of a small amount of data, address a handful of foreign language documents.

- **Select the right review team.** Many staffing agencies select foreign language document review candidates from a common pool and charge rates two to three times higher than English-speaking reviewer rates. Typically, the more obscure the language, the more time it will take to staff a project, and the more expensive it will be. Therefore, it is important to (1) allow adequate time to locate reviewers or staff the project where the reviewers can be found; (2) factor in the increased cost when budgeting for a foreign language review; and (3) manage the client's expectations accordingly.
- **Implement a defensible process.** If the population of foreign language documents contains key documents, automated translation may not suffice. Key documents may need to be translated by human reviewers who understand the nuances of the language. Workflow should be tiered so document translation, quality control, and privilege review are performed by senior reviewers or case managers who understand the language. The goal is to have the right documents reviewed by the right team and ensure consistent communication between all reviewers and managers.
- **Identify production format.** If foreign language documents will be produced, it is a good idea to discuss the production format with opposing counsel as part of the Rule 26(f) meet and confer conference. Taking this precautionary measure will reduce the risk of encountering objections from the opposing side after the production is substantially complete. Opposing counsel may be willing to accept the documents as they are or may request a corresponding translation. Either way, it is important to proactively consider relevant legal requirements and the burden of having to comply with a request to produce corresponding translations.

Foreign language documents will undoubtedly add time and cost to even the most skillfully managed e-discovery project. However, by marshaling the right people, processes and technology as well as appropriately managing the client's expectations, case managers can mitigate these risks through project completion.

Read more about conducting foreign language document reviews in Daryl Shetterly's blog entitled "[The World Is Flat: Handling Foreign Language Document in eDiscovery Projects.](#)"

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