

Electronic Discovery: Can A Litigation Tool Be Helpful To The Due Diligence Process?

The Editor interviews **David Thornquist**, General Counsel, SPI.

Editor: Would you tell our readers something about your professional experience and your company?

Thornquist: I began my legal career at Rogers & Wells – now Clifford Chance – in 1991. My focus there was on international securities and mergers and acquisitions. I later joined Prudential Financial in international real estate fund formation and investment, then counseled technology companies for a couple of years before landing at SPI in 2003. SPI is a global provider of business process outsourcing services and carries on activities in a number of areas, including medical transcription, revenue cycle management, and publishing and litigation support. In the litigation support space, SPI provides document coding, managed review and electronic data discovery, or EDD as it is commonly known. I first became involved in EDD at SPI, working alongside a couple of the industry's top vets.

Editor: Would you give us an overview of what is meant by EDD?

Thornquist: In very simple terms, EDD involves taking a body of data that may be potentially relevant and discoverable in litigation and winnowing it down to a subset that has a much greater likelihood of relevance. The intent is to reduce costs by reducing the amount of data to be reviewed by attorneys to a more manageable level. In light of the volume of data that companies accumulate, there can be a tremendous cost associated with this process. In litigation, the parties routinely focus on email, where people communicate without a filter, where they leave a trail of evidence. The duty to comb through all that data resulted in the birth of an industry. A host of tools and techniques, always evolving, is used to make it possible for litigants to get through all their data in a way that is defensible and sensible and cost-efficient.

Editor: Most of us think of EDD as a litigation tool. I understand that you advocate using EDD in the due diligence process in connection with acquiring companies.

Thornquist: Incorporating EDD techniques can be very useful in some, though hardly all, acquisitions. There are important questions to ask. Are there significant holes in the diligence that aren't being answered through reviewing the documents made available by questioning management or by using traditional diligence? Can a highly targeted search of the target's email or other data shed some light? Very importantly, is the target open to revealing potentially sensitive information? Does the buyer have the leverage and the deep suspicion to insist?

Needless to say, targets resist giving

access to their email server. They're worried about costs, delays, and allowing an investigation that is highly unusual. I understand the arguments against it. Cutting the other way is the fact that

the documents in the seller's data room are very highly vetted. Suppose you're acquiring a company in a distress sale. The seller puts a value on its assets, for example the value of its IP or its investments. If things don't add up, and if you're a buyer with leverage, don't you want to look at a highly targeted set of data, the emails where the seller's employees are discussing these assets? In light of the exposure to liability here – the duty imposed on lawyers of using reasonable care in conducting diligence – the acquirer may want to press for a deeper look. Many will resist this notion because it is not widespread. But only a few years ago, EDD was not widespread in litigation. I see it as only a matter of time before it becomes a component of diligence when things are murky. And think of this – if a deal goes badly after it closes, and litigation follows, the same email you decided not to look at during diligence will probably be at the heart of the ensuing litigation. People will want to know why this information was overlooked.

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Editor: You use the term “highly targeted search.” Can you give us some examples?

Thornquist: Data is vast, time and money to weigh the deal is limited, and the seller is not going to tolerate a fishing expedition. The scope of documents to be looked at needs to be as precise as possible. You have a red flag. Target the people who are likely to be involved, target the dates, and define the topic as narrowly as possible. This is not unlike EDD in litigation. However, in litigation you have to turn over everything that is relevant and discoverable. If you miss something, the sanctions can be devastating. Litigation requires looking through more data. On the other hand, in reviewing a target's data, the standard is different. Looking at a lot less data to satisfy your duty of due diligence is reasonable.

A related point, distinguishing using EDD tools in diligence as opposed to discovery, is that the focus on defensibility of the tools being used is minimal.



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EDD has developed a host of tools that allow viewing vast amounts of data in groups of related documents. Whether a tool does this accurately, whether it can be trusted or satisfactorily explained, may be hotly contested in litigation. In diligence, the parties just care about whether it helps them find what they're looking for, regardless of how it gets them there.

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Editor: You mentioned some practical limitations on using EDD in the M&A field.

Thornquist: In addition to the obvious pressures resulting from time and money constraints, sellers will resist on several points. In certain instances, for example a strategic acquisition by a competitor, the target is very unlikely to agree to it for fear of revealing trade secrets and other confidential information. If there are competing buyers, a seller is far less likely to agree. Again, it will come down to serious holes in the diligence and a tremendous amount of leverage to allow the buyer greater access. That doesn't mean the seller will always resist. If a seller is confident there's nothing to hide, the seller may want to clear the air. Or the seller may become convinced that a red flag needs to be looked at in order to avoid a post-closing indemnity obligation, or to fix a problem before selling, or to adjust the price to make the issue go away.

Editor: At the moment, however, in the midst of the financial markets crisis, there must be a push for less due diligence, lower deal costs, tighter deadlines, and general counsel telling outside counsel to get the deal done irrespective of the risks.

Thornquist: I think present circumstances make this a more likely environment for using EDD. Buyers have more leverage. Targets may be facing credit issues, ill-defined investments, questionable accounting. And with a focused approach, EDD doesn't have to add significant cost, especially relative to the size of a deal. You target specific persons, dates and keywords, and you use some well-tested EDD tools and see

what results. If you're a buyer with significant leverage, this added step may potentially more than pay for itself. Having EDD further reinforces the view that a bigger issue isn't present gives you peace of mind and keeps the deal on track. Correspondingly, finding a huge problem lets everyone walk from a bad deal. Somewhere in between these two outcomes, where EDD reveals deeper problems that can be measured and resolved, the deal is very likely to re-price. This efficiency is likely to move the price more than the cost of using the EDD tools.

Editor: Isn't it the case that the sheer volume of data being retained by companies today makes EDD a little less practical?

Thornquist: The volume of data that even modest enterprises retain is a big challenge. One way of looking at EDD, of course, is that it is a means of reducing that volume to something manageable. It brings a degree of refinement to the process of data review, both in the courtroom, and, as I have indicated, in other settings. The volume of data a company has is extraordinary, but the point is that almost all of it is irrelevant to the particular matter at issue, whether it's a transaction or a court action. What matters is getting to the data that is relevant. With good tools and focus, it is possible to sift through the data, discard what is irrelevant, and isolate and analyze what is relevant.

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Editor: Is there anything that you would like to add?

Thornquist: I think that due diligence practices are going to have to evolve in order to address the mounting liabilities associated with electronic data. Limiting review to looking in the data room, at the carefully selected and prepared documents, won't cut it when litigators are focusing on email. With the expected boom in litigation resulting from current economic conditions, I think circumstances are ripe for change. Five years ago, EDD was just taking off. Many avoided it. It was something few understood and fewer still believed was necessary. That has irreversibly changed. As email and other electronic data become even more essential to the way we do business, and as EDD becomes commonplace in large-scale litigation, so too does the way in which we have to analyze data in buying a company. EDD will have a growing presence, in and out of the courtroom.

Please email the interviewee at d.thornquist@spi-bpo.com with questions about this interview.