Comparing E-Discovery Vendor Bids? New Tool Available
Comparing bids from different e-discovery vendors can be difficult because of the unique pricing structures maintained by each vendor. However, a new calculator from Electronic Discovery Reference Model (EDRM) is now available to help simplify the process of comparing bids and identifying the low-cost vendor. The calculator, designed by Casey Flaherty, former counsel for Kia Motors and founder of corporate training firm Procertos, actually has three calculators. The Baseline Calculator sheet contains your own pricing model, while the Standard Calculator sheets compare vendors against one another and a baseline. Finally, the Proposed Calculator sheets enable you to track additional savings offered by vendors. Each spreadsheet contains sections for Collection, Processing, Review and Production, with Assumptions, Pricing and Alternative Pricing subsections for each. The calculator is completely customizable, especially if you are familiar with Excel. You may download the calculator at http://www.edrm.net/projects/metrics/budget-calculators.

Case Law: Cost of Technology Specialist Recoverable
In General Protecht Group, Inc. v. Leviton Manufacturing Co., 2015 U.S. Dist. LEXIS 109981 (D.N.M. Aug. 3, 2015), each party accused the other of infringing on its patents for ground fault circuit interruption products. In addition, General Protecht (“Protecht”) argued that Leviton Manufacturing’s (“Leviton’s”) claim was baseless because Levitron knew it did not have any established law regarding implied licenses to support its claim. The U.S. District Court for the District of New Mexico found Leviton’s claim was not baseless, as the standard for a baseless claim is when “no reasonable litigant could reasonably expect success on the merits.” The lower court ultimately found for Protecht, and Protecht then argued that the cost of recoverable attorneys’ fees should include paralegal and technology specialist fees involved in the case. The district court agreed, stating that “while technology specialists’ duties are not strictly legal in the traditional sense, the court believes that these technicians provide meaningful value to law firms and, ultimately, clients during litigation; therefore, those contributions should not go
overlooked. " The court therefore included reasonable specialists' fees pertaining to the case in the calculation of attorneys' fees. However, the court did not agree to adjust the lodestar fee amount in favor of Protecht as the court felt Protecht's success did not warrant an increase in award fees.

Free Webinar on Finding Holes in Productions
As document productions have ballooned in size, determining if a production is adequate and defensible becomes increasingly difficult. This on demand webinar, Finding Holes in Productions, addresses best practices in testing and reporting on ESI adequacy using analytics. It is sponsored by Lexbe. You can access the webinar at http://lexbe.com/webinar-finding-holes-in-productions/.

Case Law: Proper Proof Necessary for Motion for Sanctions
In Grove City Veterinary Service, LLC v. Charter Practices International, LLC, 2015 U.S. Dist. LEXIS 108491 (D. Or. Aug. 18, 2015), a breach of contract case between a veterinarian and a veterinary hospital, Grove City Veterinary Service ("Grove City") was required to search for and produce emails from a principal's email archive that were responsive to Charter Practices International's ("Charter's") request for production. Grove City tried to do so, but was unable to locate more than 100 folders of archived emails. Grove City contacted Charter's IT department for help in finding the "missing" emails. An IT member offered to assist, disclosing that he had sought the emails regarding a legal matter. However, because the Grove City request was in furtherance of a legal case, IT referred the request to Charter's legal department, which refused assistance and advised Grove City that Charter was not responsible for locating documents responsive to its own discovery requests. Based on the disclosure by Charter's IT member, Grove City moved for spoliation sanctions, and Charter responded by asking for attorneys' fees for an "unjustified" motion. The U.S. District Court for the District of Oregon noted that Grove City had not established the emails were willfully destroyed by Charter, or even that the emails were destroyed at all. Grove City was relying on its computer forensic analyst's report as proof of spoliation, but the court disputed the reliability of the report, noting it produced no evidence showing Charter's IT department remotely accessed a Grove City computer or tampered with archived emails. The court found the analyst failed to note that the activity log showed that the last time Charter's IT department remotely accessed a Grove City computer was well before Grove City had difficulty finding the emails. In addition, Charter produced evidence that the missing emails were accessible in Grove City's email archive, but they had been dragged and dropped into a folder
not typically associated with archived emails. The court denied the request for sanctions and the request for attorneys’ fees.

**Provider Develops E-Discovery Materials for Law Schools**
Although e-discovery is being a core competence for attorneys, only about 30 of the nation’s 205 law schools offer an e-discovery course. To help in remedying this, e-Discovery provider Catalyst has developed a free practicum, including training materials and videos, in addition to providing online access to data and technology where students can get hands-on experience in e-discovery fundamentals. The practicum was successfully implemented in an upper-level e-discovery course at the University of Florida Levin College of Law, and Catalyst is now offering it at no cost to any law school interested in providing e-discovery education. The practicum also includes search exercises for each video, written instructions on e-discovery search and a series of online assessments to test students at the conclusion of each set of videos and exercises.

**E-Lesson: Can a Party Refuse to Produce Archival Documents When the Opposing Party Cannot Produce Its Own Archival Documents Due to Lack of an Archive?**
Who said e-discovery obligations were equal? But that’s what Blue Coat Systems thought in *Finjan, Inc. v. Blue Coat Systems, Inc.*, 2014 U.S. Dist. LEXIS 148438 (N.D. Cal. Oct. 17, 2014). During discovery, Finjan sought email from eight custodians, and Blue Coat Systems (“Blue Coat”) did not object to having to perform this archival search on either a relevancy or technical basis. What Blue Coat did object to was having to perform the archival search when Finjan was unable to do the same because it did not have an archival system. Blue Coat refused to produce the emails, and Finjan moved to compel. The court ruled that when, as in the instant case, the requested documents are relevant to the case and the request was reasonable, Blue Coat could not use Finjan’s inabilities as justification for its refusal to produce.
Take-away: One party’s incapacity to produce certain documents is usually not enough on its own to justify another party’s refusal to produce documents above and beyond what their opponent is doing to prepare and produce discovery.

**Case Law: Non-Party Subpoenas and Business Records**
In *Intermarine, LLC v. Spliethoff Bevrachtingskantoor, B.V.*, 2015 U.S. Dist. LEXIS 112689 (N.D. Cal. Aug. 20, 2015), Dropbox, a non-party, was subpoenaed to provide a deposition witness to testify about its business practices and technology.
Dropbox moved to quash, arguing that the subpoena required them to testify about information that is available on their website; therefore a witness was not required. Further, the company added it could provide a declaration explaining the nature and format of its third-party production that would be admissible under the Federal Rules of Evidence. Intermarine, the demanding party, did not agree, arguing that four activity logs were created by Dropbox when Spliethoff Bevrachtingskantoor ("Spliethoff") uploaded files; therefore, Dropbox was required to produce a witness to explain those logs. The U.S. District Court for the Northern District of California granted the motion to quash, explaining the records were admissible as business records under FRE 902(11), noting:

"Dropbox attests the records were kept in the course of regularly conducted activity by Dropbox and were made in the course of regularly conducted activity as a regular practice... As Dropbox provided the required authentication, Intermarine’s request for further testimony is duplicative and unnecessarily burdensome. Although Intermarine argues Defendants may dispute the authenticity of the records at trial, they are admissible with or without Defendants’ cooperation."

As to the issue of the public information on Dropbox’s website on how files are stored and maintained, the Court stated, “Intermarine is not entitled to elicit expert testimony from Dropbox, particularly when it can retain its own expert witness to explain these issues.”

Ed. Note: Dropbox has more than 400 million users who save more than 1.2 billion files to Dropbox daily. It would be unreasonable if Dropbox or any other file-sharing site had to produce a deposition witness every time one of their users had to produce discovery. Many computer forensics providers have developed tools for capturing files uploaded to Dropbox and other such sites, and having a party’s expert testify about the process would probably be far more efficient than seeking discovery from Dropbox or another third party.

**The Big Data Problem of Little Mobile Devices**

This article in the Richmond Journal of Law and Technology discussed the impact of mobile device usage and the case law emphasizing the relevance of information stored on these devices in litigation. The authors, Michael Arnold and Dennis Kiker, conclude by outlining the various methods for collecting mobile data while staying within the reasonableness requirements, emphasizing that attorneys must be prepared to assess and evaluate new sources of information, from mobile
devices to wearable technology, in preparing a case. The article may be accessed at http://jolt.richmond.edu/v21i3/article10.pdf.

**Managing Digital Debris**

Nearly 70 percent of data generated by an organization has no legal or business value, according to a report published by EDRM. Therefore, it is critical for those organizations to understand what data needs to be kept and what data has no value, hence the name data debris. While the default method of keeping all data forever may ensure that an organization has all information required by regulation, this method is expensive and unwieldy, particularly as data continues to proliferate at stunning rates. *Information Governance: Managing Digital Debris*, an article published in the National Law Review, discusses how to determine to dispose of data debris. It may be accessed at http://www.natlawreview.com/article/information-governance-managing-digital-debris.

Hedda Litwin is the Editor of the E-Discovery Bulletin and may be reached at 202-326-6022. The E-Discovery Bulletin is a publication of the National Association of Attorneys General. Any use and/or copies of this newsletter in whole or part must include the customary bibliographic citation. NAAG retains copyright and all other intellectual property rights in the material presented in this publication.

NAAG, 2030 M Street, NW, Eighth Floor, Washington, DC 20036
(202) 326-6000 | http://www.naag.org/