Would you want to drink out of someone else's glass? Eat off of their plate? Wear their contact lenses?

Even if the other person has impeccable hygiene, there is a "yuck" factor involved with sharing some items.

This was the same reaction I had to a judge's recent ruling in the matter of EOHB, Inc. v. HOL Holdings, LLC.

The parties had a dispute involving discovery. No surprise there. But Vice Chancellor J. Travis Laster of the Delaware Chancery Court astounded everyone with his solution: he ordered both parties to employ technology-assisted review and he ordered counsel for both sides to use the same ediscovery vendor.

He did not simply make a suggestion. While ruling on a Motion for Summary Judgment, Vice Chancellor Laster directed, "This seems to me to be an ideal non-expedited case in which the parties would benefit from using predictive coding. I would like you all, if you do not want to use predictive coding, to show cause why this is not a case where predictive coding is the way to go. I would like you all to talk about a single discovery provider that could be used to warehouse both sides' documents to be your single vendor. Pick one of these wonderful discovery super powers that is able to maintain the integrity of both side's documents and insure that no one can access the other side's information. If you cannot agree on a suitable discovery vendor, you can submit names to me and I will pick one for you."[1]

I would no sooner allow a judge to select the custodian of my evidence than I would allow him or her to conduct my depositions.

Even the Sedona Conference, the font of all ediscovery wisdom, does not presume to tell attorneys how to conduct this aspect of their pre-trial duties. As outlined on their website, Sedona Principle 6 states in part, "[r]esponding parties are best situated to evaluate the procedures, methodologies, and techniques appropriate for preserving and producing their own electronically stored information."[2]

There are more issues of concern to me than who takes the blame if something goes wrong with some aspect of the discovery process. (Will the judge sanction himself, since he chose the vendor?)

My first concern would be the security of the data. I am acquainted with many sizeable document review firms and none of them have separate buildings in the same city which would allow counsel for both sides equal access to their data. Maybe document review vendors have facilities on multiple floors of a particular building; certainly they will facilities in different

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[1] EOHB, Inc. et al. v. HOL Holdings, LLC C.A. No. 7409-VCL (Del. Ch. Oct. 15, 2012).

[2] *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 193 (Fall 2007).

rooms on the same floor. But these arrangements don't give me confidence that my highly confidential information will remain unavailable to opposing counsel.

I am also not convinced that we have overcome the "black box" characterization of technology-assisted review. I do not believe that the use of TAR is so commonplace that it is the equivalent of compelling the production of esi in its native format or providing counsel with related metadata. Should we be compelled to employ technology we do not understand?

There is no word yet on counsels' response to this directive. But I hope that judicial discretion prevails and the Vice Chancellor allows counsel to use the ediscovery methods that they believe will work in their clients' best interests.