

MCC INTERVIEW: Martin Bonney & Jim Benko / Epiq Systems

Going Mobile

In-country review tames the “border” in cross-border FCPA Discovery

Martin Bonney and Jim Benko discuss the complexities of discovery within FCPA investigations and Epiq Systems’ unique approach to delivering results.

MCC: *The SEC and the DOJ have stepped up investigation and enforcement activities in connection with the Foreign Corrupt Practices Act (FCPA), imposing record-breaking penalties in a number of recent actions. From your perspective on the e-discovery front, what challenges do you encounter in cross-border FCPA matters?*

Bonney: We’re seeing more investigations, and the stakes are very high. Among the many challenges we face as a global service provider, cultural differences lie at the heart of cross-border matters. For example, in supporting the legal and investigatory team in places like Eastern Europe, where business is conducted at a personal level, we are dealing with behaviors that are often of a problematic nature when it comes to the FCPA. Challenges also arise from legal differences across borders. In our experience operating in many jurisdictions – across Europe, Asia and North America – we have found that cultural differences often mingle with legal differences.

U.S. attorneys are accustomed to discovery requirements within regulatory and enforcement actions, and U.S. parties are prepared to respond quickly to discovery requests. The same is true in many European countries. But in other countries, the expectations are very differ-

ent. In a classic example, one of my colleagues was working in Bahrain, and was tasked with collecting and searching data before sending it back to the UK for detailed review. In order to get access to the data, he had to pay numerous daily visits to the client’s headquarters and drink tea – essentially go through an elaborate ceremony to convince the client that he was serious about his task and prepared to do what’s necessary to move forward.

So lawyers, whether American or British, face significant discovery challenges across borders and can spend months garnering the necessary cooperation all while facing court deadlines.

MCC: *How do you manage deadlines when dealing with these kinds of roadblocks?*

Bonney: Early-stage communication is critical. We will speak with the client, law firms and other parties to help them understand the cultural divide and lay out expectations as to how matters will proceed in these locations. And it gets more complicated when you have issues around privacy, as many cases do.

However, there are pragmatic steps we can take to minimize privacy issues. For instance, if the subject communications are between parties in Eastern Europe and the U.S., then it may be reasonable to assume that a portion of that data is already located in the U.S., in which case and you can get a response, at least, to that part of what the court is requiring. Also, data that is not considered personal can be pinpointed and collected more quickly.

As with any regulatory or investigatory matter, it’s impor-



Collecting discovery across borders can take months – all while facing court deadlines.

–Martin Bonney

tant to show willingness and an effort to do what’s required. We know that U.S. investigators will not be sympathetic to simplistic responses from lawyers, such as claims that data is out of reach because it is located in Europe. As a service provider, we also know that it’s enormously helpful to give practical information as to what’s doable and what will be difficult and why, which enables legal teams to communicate appropriately.

MCC: *What is Epiq Systems’ answer to privacy challenges within cross-border discovery?*

Bonney: Privacy obligations have tightened significantly since 2010, and we have to do more work in-country. So, we’ve put together a mobile solution: a prebuilt carry case that is equipped with technologies like Nuix, Relativity and Equivio Relevance, and we can bring this solution onsite where it’s needed. Using the analytics tools within Relativity and Nuix, we can cover the preliminary steps without leaving the

Martin Bonney

Director of International Consulting Services at Epiq Systems.

mbonney@epiqsystems.co.uk

Jim Benko

Director of Global Legal Solutions at Epiq Systems.

jbenko@epiqsystems.com



home country. This involves ensuring that all data is collected as well as completing a granular analysis of keyword effectiveness. Equivio Relevance is our technology-assisted review tool of choice for prioritizing the review and unearthing documents that standard keyword searches might miss. The goal is to cull down to the important documents without wasting too much time looking at junk.

MCC: *Are there any particular nuances within discovery matters relating to FCPA actions?*

Bonney: In many ways, these matters involve a standard discovery exercise: collecting, indexing and filtering down to a relevant review set. FCPA cases are particularly challenging, however, because they often involve parallel investigations in numerous countries – all with slightly different rules and some involving organizations that have no experience with this kind of document review process.

As e-discovery experts, we play the role of interpreter between the IT department and the law firms, essentially closing a common, and potentially significant, gap between what counsel is asking for and what IT thinks it needs to deliver. We have to be diplomatic because there are bound to be differences, even competition, among the players within projects that involve many countries and multiple concurrent investigations. And when you add different languages and legal systems into the mix, that charge becomes even more complex. So our overarching job is project management, and our vast experience on the ground with FCPA matters enables us to make sure that diverse entities are communicating effectively and that projects run smoothly.

Benko: Practically speaking, in scoping a project, we ask a lot of front-end questions and then create a plan of action for each country. It's a repeatable process from country to country, which is a critical factor should anyone be called to testify later on as to the defensibility of our process and resulting plans.

MCC: *Epiq Systems' DocuMatrix Mobile™ has been deployed in more than 30 countries and uniquely enables in-country document review. I can see how a mobile solution might also be an important tool on*

the privacy front. Would you please expand on that?

Bonney: Having a mobile solution gives us a valuable option in delivering the custom solutions our clients need in cross-border matters. In all cases, however, we will secure the appropriate waivers and permissions from custodians, and in some cases, legal counsel and clients will successfully make the case that data should be released to the U.S., the UK or some other pragmatic location.

In the more sensitive countries, we gauge our approach accordingly, whether it involves a simpler process of indexing, running keywords and completing a data anonymization process or a more complex, deep-issue investigation in-country. We are seeing the latter more and more, in part due to increased sensitivity around privacy and the need to contain the investigation within one country. And clients really take comfort in knowing that we have a proven infrastructure that gives them control over how they execute these big e-discovery projects.

MCC: *Cross-border discovery implies the need to review documents in foreign languages. How do you ensure that translations are done with accuracy and without loss of data or meaning?*

Bonney: We frequently undertake multi-language reviews, and our London office draws on a pool of document reviewers for this purpose. Our people can review relevant subsets of documents in their native languages, which is a massive advantage on the ground when we are handling in-country projects. We also have the capability to deploy technical solutions as appropriate.

Given that it's relatively easy to find reviewers or auto-translation tools that can handle mainstream European and Asian languages, the real challenge is with documents in niche languages. We recently did a project in Romania and used Romanian reviewers to do the in-country exercise. But once we had the relevant documents in hand, we faced the issue of delivering them to U.S. attorneys for a deeper dive, and as you might imagine, there are very few FCPA experts in Romania to handle the required translations.

Translation software was not a viable option in this case as most run in the

cloud and don't resolve the related privacy issues. So, our solution was to completely anonymize the personal information within the thousands of responsive documents, and then transfer the resulting data to the U.S., where there is a larger pool of translators with the right language skills and substantive FCPA expertise. So in essence, these challenges are about thinking on your feet and coming up with workarounds that get the job done well and on time.

MCC: *Please tell us more about Epiq Systems' global reach and your collaborative approach. I understand you recently handled an FCPA case for an Asian client that really highlights the value you deliver.*

Benko: As one of the largest eDiscovery and document review providers in the world, Epiq has a global footprint that includes offices in the UK, Hong Kong, Japan and now Germany. Also, we've assembled an expert mobile unit team led by Martin, which is a true market differentiator. At the highest level, this capability allows us to assist clients with complex discovery matters by enabling meaningful discussions in their own surroundings. While we don't practice law, we bring an understanding of EU and other local laws that is based on vast experience working in-country, which allows us to be truly consultative in advising our clients on how to handle data quickly and efficiently.

The takeaways from the FCPA case you mentioned really come down to a solid client relationship and the all-important trust factor. Our work involved processing data across databases, geographies and time zones; managing a document review project in three languages; and conducting on-site sensitive data collection, processing and review in Shanghai and Japan. But the bigger story has to do with helping clients navigate high-profile matters in all their complexity, which includes the fact that many FCPA cases make front-page news and therefore present a heightened need to make sure that projects are handled in a smooth and transparent manner.

This particular client was so pleased with our results that they not only came back for another matter but also requested the same Epiq team for the repeat engagement. That's the real feather in our cap.