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Significant Problems Arising from Internal Document Collection and Particularly to E-Discovery

The period of litigation known as discovery can often fill clients and attorneys with a sense of dread. Mistakes made during discovery, even unintentional ones, have been known to derail cases, destroy important legal claims or defenses, cause judges to waive the attorney-client privilege and result in fines and sanctions approaching tens of millions of dollars. Those mistakes are often compounded by the extreme complexity of managing electronic discovery (or "e-discovery" for short). The relative ease of creating documents (think of how many emails one sends out on a daily basis) means that preserving, reviewing or producing documents is no longer as simple as going through clearly marked boxes of paper documents for relevance.

Today, most individuals and businesses operate entirely paper free. Therefore, discovery now focuses less on hard copy documents and more on electronic files saved in a bewildering number of file formats. Because of the relative ease in creating, modifying and deleting these electronic documents, a significant problem exists in discovering this type of data: it is simply more susceptible to unintentional destruction than hard copy documents. When one shreds or discards hard copy documents, one knows what is in their hands. Electronic data however, is often recycled or overwritten as part of normal business practices because a business cannot retain such large volumes of outdated information. But it is often that outdated information that opposing parties seek during the discovery process. Determining protocols to retain that data once litigation ensues is a significant challenge that both counsel and client face.

Given the impact that collection and production of documents can have on litigation and the relative complexity of electronic discovery, expert assistance during discovery should always be considered. Solely relying upon the skills of company personnel, including information technology personnel, in-house counsel and outside counsel presents serious worries that mistakes will be made. Simply put, none of those parties is individually equipped to handle the complex demands of both litigation and electronic record keeping.

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I. Examples

Consider the following examples where errors made during discovery resulted in significant sanctions:

- In January 2008, United States Magistrate Judge Barbara Major issues a strongly worded 42 page order sharply criticizing Qualcomm Inc. and its attorneys of "monumental discovery violations."[1] The attorneys "assisted Qualcomm in committing this incredible discovery violation by intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that Qualcomm's document search was inadequate, and blindly accepting Qualcomm's unsupported assurances that its document search was adequate."[2] Judge Major's sanctions required Qualcomm pay Broadcom's attorney's fees -- which most likely ended up exceeding $10,000,000. In addition, Judge Major referred six of Qualcomm's attorneys to the State Bar of California for disciplinary action. This followed a ruling by the trial judge in August 2007 in which a Federal Judge for the Southern District of California held that several Qualcomm patents should be rendered invalid based, in part, on the failure to produce about 200,000 pages of emails and other documents.

- One must be aware that even parties with the best of intentions can and will still be sanctioned should they make errors during e-discovery. In June 2004,[3] District Court Judge Scheindlin ordered an adverse jury instruction, required defendant pay the costs of any additional depositions required by the late production of evidence and required defendant pay the reasonable costs and attorneys fees of the sanctions motion. This case was significant for two reasons; first, it was not a complex case: in fact, it was a "relatively routine employment discrimination dispute." Second and perhaps most significant, the court imposed these sanctions despite the company's seemingly genuine efforts to honor its discovery obligations. Both outside and in-house counsel repeatedly instructed employees to preserve information. Those orders were nearly universally followed and yet sanctions were still ordered. Thus, parties must be aware that intentions are irrelevant; companies and their attorneys must develop protocols for reliably preserving and collecting electronic information and must rigorously follow those protocols.

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[1] *Qualcomm, Inc. v. Broadcom, Inc.*, 2008 WL 66932 (S.D.Cal. 2008).
[2] *Id.*
[3] *Zubulake v UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

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- In 2004, the Ninth Circuit upheld a massive award of sanctions against one defendant that included, among other things, payment of a co-defendant's trial costs (likely in excess of $5,000,000), disqualification of that defendant's expert witnesses, and stripped that defendant of its attorney-client privileges in relation to testimony prepared by that expert witness including any raw data used by the expert witness. In that case, sanctioned defendant's attorneys provided over 1,000,000 documents to co-defendant, but had not timely provided certain documents that were stored on personal laptops used by independent contractors. It is unclear whether those attorneys even knew of those documents prior to production.

- Not properly considering preservation obligations can have severe consequences. For example, in the case of *Danis v. USN Communications, Inc. et al.*[4] plaintiffs asked the court to impose sanctions on a defendant that plaintiffs alleged had failed to meet its preservation obligations. The court found that the management of the defendant corporation had failed to properly involve itself in oversight of the document preservation process and awarded sanctions. These included an instruction to the jury that defendants had failed to produce certain documents and a personal fine of $10,000 levied against the CEO of the defendant corporation.

- And in an even more egregious example of discovery sanctions, in July 2008, District Court Judge Janet Hall entered a default judgment against defendants. Sanctions were issued because Judge Hall concluded that defendants had lied about the existence of documents, erased computer records in bad faith and made statements denying custody and control of financial records. Judge Hall's order for sanctions resulted in more than $5,000,000 in damages and over $650,000 in legal fees paid to the opposing side.

II. Inexperience Leads to Minor Mistakes Which Lead to Major Sanctions

While the most significant discovery violations obviously occur in instances where client or counsel have committed or appear to have committed some intentional violation of the rules of discovery, the examples above make clear that even unintentional mistakes will give rise to serious penalties. Please be aware that the judges in some of the above examples found counsel and clients to have committed intentional wrongs, but it is extremely difficult to imagine that the actions of the litigators involved were truly intentional. Experienced litigators practicing at these highest of levels know and understand the grave consequences of intentionally making misleading statements. They risk serious claims of malpractice from their clients and potential disciplinary

[4] 53 Fed. R. Serv.3d 828 (N.D.Ill. 2000).

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proceedings from their state board of examiners. It simply strains the mind to think that senior counsel at mid and large-sized companies and senior partners at major law firms were brazen or stupid enough to make statements that could be so easily disproved.

Easier to believe is that these highly experienced attorneys made simple mistakes that, once discovered, were magnified under the harsh light of litigation. Attorneys enveloped in large cases involving large sums of money and even larger paper and electronic document trails working alongside clients unfamiliar with the intricacies of litigation likely can lead to errors. Not discovering those errors in due course could and will frequently result in opposing counsel or the court itself accusing counsel and client of malfeasance.

Such situations usually develop due to the extreme complexity of collecting and preserving electronic documents. Simply put: most clients and attorneys do not have the technological knowledge necessary to properly identify (and later preserve, review, and produce) electronic documents. Clients usually employ individuals with information technology experience in establishing their own internal document preservation protocols. While those individuals have intimate knowledge of the organization's computer systems and will be an invaluable source of information and assistance, those individuals cannot be relied upon for setting litigation protocol. These personnel lack knowledge of the demands of litigation and therefore are generally unable to address the unique problems that arise in the context of attempting to properly preserve, review, and produce documents in an adversarial proceeding. In addition, information technology personnel may not have available the time necessary to handle these duties.

Attorneys, on the other hand, are not equipped to handle document identification, preservation, review and production. Regardless of how familiar an attorney is with his or her client's document preservation protocols, attorney do not generally understand the complexity of internal computer systems or applications. Attorneys do not speak the same language of internal information technology personnel; those information technology personnel often impart technical definitions to words that have other meanings to persons not familiar with computer systems. E-discovery is made even more difficult because counsel is given no comprehensive set of guidelines. While the Federal Rules of Civil Procedure and case law set forth certain specific obligations concerning the identification, preservation, review, and production of documents, they provide less guidance on how attorneys may fully assist their clients in meeting their obligations. Whether a party has met its preservation and production obligations in a particular instance will be judged on a case-by-case basis. Therefore it behooves any attorney or their client to ensure that discovery is handled with the utmost care.

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III. The Solution: Expert Assistance

Given the lack of familiarity that attorneys and in-house information technology personnel have with either the technological or legal requirements of electronic document collection, it is important that counsel and client consider utilizing outside consultants to assist them in dealing with the client's electronic documents. Such consultants specialize in the intricacies of civil discovery and have developed specialized software and procedures that can expedite the identification, preservation, review and production of electronic documents. These consultants work within the client's systems and utilize the client's information technology personnel's familiarity with the specific's of the client's computer system.

Consultants implement document review processes using sophisticated algorithms that sort through every document to only produce those that are specifically relevant to a case. Such algorithms can reduce the document review time by hundreds of legal hours (and thousands of dollars.) Consultant's familiarity and experience with the search process allows them to perform quality control functions and provide the attorney with confidence that the search terms and keywords being employed will effectively sort the relevant documents from the irrelevant, and identify documents which are protected from disclosure under one or more theories of privilege. Moreover, unlike internal personnel, outside consultants are familiar with the specific legal requirements governing discovery and will keep those requirements in mind while producing relevant documentation.

IV. Conclusion

Should a client ignore the complexities of document identification, preservation and production, it is highly likely that errors can develop at the various stages of the discovery process. Ultimately, at any stage, while clients often feel the pinch of a litigation budget in even simple litigation, selecting the least costly option (which usually involves employing internal operators to perform such document collection) will often result in discovery not being managed appropriately and can bring about potential errors that will reverberate throughout litigation. If sanctions are ordered, these can range from a waiver of the attorney-client privilege to monetary sanctions and other judicially imposed penalties, and in the worst case, criminal or disciplinary proceedings. Therefore, managing discovery effectively and in compliance with all legal requirements is critical in avoiding costly sanctions and other court imposed penalties.

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