Third-party eDiscovery Providers = Insulation Against Cold, Harsh Sanctions?

Synopsis

The risk of sanctions resulting from 1) corporations doing self-collections of electronic evidence and 2) law firms internally processing a client's electronic evidence (creating sanction risk for BOTH the firm and its client) is greater than the risk of sanctions if corporations and law firms conduct eDiscovery by using qualified third-party vendors. If errors occur (e.g. failing to collect or produce relevant documents), lesser, or no sanctions are more likely to be applied to the law firm OR its client if defensible eDiscovery processes have been executed by qualified independent vendors rather than by the parties or their counsel.

You are the CEO of your company or Managing Partner or your firm because you are good at what you do. You are adept at handling the many and varied issues that must be handled to make your business or your firm profitable. You have learned the lesson that leaders aren't leaders because they can do everything, but because they recognize their limitations and understand the need to enlist, where and when necessary, skilled professional help to plug any gaps in their expertise or abilities.

So why, when your company is confronted with the sometimes all-consuming distraction of litigation, would you expect that your business' IT staff can instantly become experts (or even proficient) at managing the company's e-Discovery obligations? And why, if your law firm prides itself on its deep legal knowledge, experience and talent, does it make sense to assume that your legal professionals ought to be able to understand and competently handle the deeply technical and often arcane intricacies of electronic evidence as it relates to e-Discovery?

You manage costs by managing risk and its attendant expenses. The least costly risk is the risk that is avoided. Is there a way to not only reduce the risk that a company or law firm will violate a discovery order, but also provide an insulative layer of protection from the imposition of sanctions or other liability due to failure to comply with discovery orders and rules?

The legal boneyard is littered with the remains of presumably well-intentioned law firms who thought that what they were doing with regard to the mandates of the Federal Rules of Civil Procedure regarding discovery and production of electronically stored information ("ESI") was good enough. The *Qualcomm* case (*Qualcomm Inc. v. Broadcom Corp.*, 539 F. Supp. 2d 1214, 1245-46 (S.D. Cal. 2007), aff'd in part, vacated in part, 548 F.3d 1004 (Fed. Cir. 2008), **SANCTIONS = $8,568,633.24**), the *Metropolitan Opera* case (*Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees And Restaurant Employees International Union, et al.*, 212 F.R.D. 178; 2003 U.S. Dist. LEXIS 1077; 171 L.R.R.M. 2897, **SANCTIONS = Motion for judgment as to liability of defendants granted plus payment of plaintiff's attorneys' fees**) the *Zubulake* cases (*Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159, *Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536, etc., **SANCTIONS = $20,200,000 in punitive damages and an adverse inference jury instruction**) and *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, No. 05 Civ. 9016 (S.D.N.Y. Jan. 15, 2010) (**SANCTIONS = Adverse inference jury instruction and award of attorneys' fees and costs estimated to be more than $100,000**) have shown that an attorney's ignorance and/or ineptitude (even absent egregious conduct) in handling e-Discovery matters can result in embarrassing and costly sanctions for both the firm and the client represented.

Using Persons Inside the Firm or Company to Handle e-Discovery Compliance

While litigation has been a fact of life for companies and law firms in the United States for centuries, e-Discovery issues have come to the forefront of the CEO's or Managing Partner's consciousness only in the past few years.

A resource often considered as an in-house source of e-Discovery expertise is one or more non-attorney employees of the firm or company whose sole responsibility is to understand and manage the technical side of litigation support involving e-Discovery. The benefits of having your own in-house e-Discovery expertise seem obvious – ease of access, ease of supervision, ability to work with known and trusted personnel, common goals, etc. The effort to develop and maintain the now-considerable level of expertise needed to understand and manage the technical aspects of e-Discovery in-house may be possible (and seem an attractive way to save costs), but it presents a number of risks.

First, there is a non-productive use of employee or attorney time to obtain and maintain the necessary knowledge and expertise to be able to understand and manage e-Discovery technology. The more time an attorney is busy with litigation, the less time that attorney has available to devote to the study necessary to stay current with e-Discovery technology and practice (and *vice versa*).

Second, an attorney incurs the additional risk of professional sanctions based upon any violation of the ethical rules that govern his or her work as an e-Discovery expert:

> "Responsibilities Regarding Law-Related Services (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided: (1) by the lawyer in

> circumstances that are not distinct from the lawyer's provision of legal services to clients; or (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist. (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."
> ABA Model Rules of Professional Conduct, Law Firms And Associations, Rule 5.7.

Third, as demonstrated by the many recent cases imposing sanctions on attorneys who botch e-Discovery efforts and procedures (and who correspondingly bring down sanctions upon their clients), mistakes can be costly even if one's heart is pure. Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010); R.F.M.A.S., Inc. v. So, 271 F.R.D. 13 2010 U.S. Dist. LEXIS 83247 August 10, 2010.

Another important cost that must be weighed when considering the use of in-house expertise for e-Discovery compliance is the attendant liability for one's own failures, whether or not those failures were unintentional, negligent, or unforeseeable. If your company or firm takes on the burden of handling e-Discovery compliance, it also takes on the liability for ALL mistakes, tardiness and failures to comply with discovery rules and court orders.

As executives and attorneys are trained to do, the "worst-case" view of the world is usually that taken in assessing the risks of a given situation. When a company or a law firm determines that it will undertake the responsibility of processing ESI for itself or a client in the course of litigation, that decision alone creates additional risk for the company or the attorney and the firm, that, in a worst-case scenario, could be costly for the company or firm, jeopardize the outcome of the case, and even result in the commission of actionable malpractice.

Most executives and attorneys are not experts in the technology, protocols and techniques now required by the courts in responding to discovery orders involving ESI. Failures, negligent mistakes or intentional misconduct in responding to e-Discovery obligations have resulted in attorneys and law firms receiving sanctions that range from embarrassing comments in published opinions ("Any competent electronic discovery effort would have located this email." *Green v. Blitz U.S.A., Inc.*, No. 2:07-CV-372, 2011 U.S. Dist. LEXIS 20353 (E.D. Tex., Mar. 1, 2011)) to possible imprisonment for contempt of court, the imposition of a default judgment for the opposing party, and the award of attorney's fees and costs (all in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2010 U.S. Dist. LEXIS 93644 (D. Maryland 2010)). The fact that efforts to comply with a discovery order involving ESI were merely late (perhaps because of complicated searches and large amounts of ESI to be processed) rather than destructive of the evidence is not necessarily mitigative when it comes to sanctions. "When parties *and/or* their counsel fail in their duty to conduct proper searches of ESI, sanctions may be appropriate, even where the misconduct involves late disclosure, as opposed to spoliation." (Emphasis supplied.) *Nycomed US Inc. v. Glenmark Generics Ltd.*, 2010 U.S. Dist. LEXIS 82014. Citing *Design Strategy, Inc. v. Davis*, 469 F.3d 284; 2006 U.S. App. LEXIS 25889, the Nycomed court warned: "A showing of bad faith on the part of the offending party is not required [for the imposition of sanctions]

under Rule 37." Rule 37 (Fed. R. Civ. P. 37(b)(2)) mandates that the court "must order the disobedient party, the attorney advising that party, *or both* to pay the reasonable expenses, including attorney's fees, caused by the [violation of a discovery order], unless the failure was substantially justified or other circumstances make an award of expenses unjust." (Emphasis supplied.)

It is difficult to argue for the justification of failure or the existence of other circumstances that would make an award of sanctions unjust if your company or firm, faced with other (and in hindsight, much better) alternatives, decided that it was better to assume all control and risk in the management of e-Discovery compliance.

Use of Third Party Experts for e-Discovery Compliance

With the nominal value of "reducing client expenses," outsourcing has received tacit approval from various bar associations, within certain guidelines. Those guidelines seem to follow a common-sense approach that requires the same sort of diligence, control and oversight as if the firm's non-attorney in-house staff were doing the work.

> "There is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the 'legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,' as required by Rule 1.1 [of the ABA Model Rules of Professional Conduct]". ABA Standing Committee on Ethics and Professional Responsibility in Formal Opinion 08-451 (issued Aug. 5, 2008).

With the increasing costs of e-Discovery and the pressure on companies and law firms to reduce the cost of litigation, the trend to outsource e-Discovery collection and production work will certainly increase. This trend is not only a viable and reasonable option for companies, but is well within the rights and responsibilities of the law firm.

The use of third-party experts to provide e-Discovery services is typically the fastest and least risky approach to take in the course of discovery compliance in litigation. A well-qualified e-Discovery service provider has access to experts in the rapidly changing and developing technology that must be used to collect, process the virtual mountains of discoverable ESI, and produce a responsive subset of that ESI that can then be reviewed by legal experts for privilege or other protection from disclosure in the often short time frames that are imposed by our busy court systems. To presume that even a large or otherwise technically astute law firm can summon the same level and amount of technology and expertise as these e-Discovery service providers is a gamble that if lost, can result in the company, attorney or firm being another of the increasing number sanctioned entities (see, generally, *Sanctions for E-Discovery Violations: By the Numbers*, Duke Law Journal Vol. 60:789, 2010).

An added benefit of engaging a third-party to help the company or firm handle e-Discovery matters is the ability to produce a detailed and segregable bill for the costs of handling the e-Discovery matter. If those costs are awarded to your company or your client, there is a clear and documented accounting for these costs. The difficulty in documenting internal firm e-Discovery costs, and the risk that billing an associate's time as an attorney when that person was conducting non-attorney e-Discovery services could result in overbilling sanctions to the law firm under 28

U.S.C. Sec. 1927, are two more reasons why trying to handle e-Discovery in-house may not be such a great idea.

The choice of a third-party e-Discovery services provider (or providers) is one that should not be left until the last minute or to chance. Companies and law firms should seek and establish relationships with e-Discovery service providers based upon past experience with a service provider, direct recommendations of that service provider, the service provider's reputation within the industry, or a combination of these factors. A consulting services provider, who provides a variety of discovery and litigation support services, or who aggregates the services of individual e-Discovery service providers as subcontractors, may provide a reasonable and efficient approach to handling the company's or firm's e-Discovery compliance matters. For the company or law firm without adequate in-house expertise to understand and manage the numerous services and technologies that are available in the litigation support marketplace from numerous service providers, these consulting service providers can be the key to keeping litigation costs in check and to winning a case.

By interposing a competent, careful and respected third-party e-discovery expert between your company or firm and the possible sanctions that a court could impose upon your company or firm, you can achieve the desired outcome of compliance with the Federal Rules and any discovery orders while helping to insulate your company or firm from sanctions for noncompliance. Restatement 2d of Torts, §§ 409, 411.

Conclusion

The risks of handling technical, time-constrained or extensive e-Discovery tasks in-house are high, and present not only financial risks for the company, but also ethical risks for the law firm. The choice of a qualified, competent and careful third-party e-Discovery service provider to work with the company or law firm provides the most efficient, economical, and safest route through the tangled forest of e-Discovery compliance.

About the Author:

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