From Defense to Offense: How Taking Control of Discovery may be the Best Way to stay Focused on the Merits

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Most organizations face litigation discovery challenges, which can range from inequities in production burdens (as in almost every Human Resource case) to "mutually-assured destruction" production concerns in litigation between similarly-situated organizations. Each, in turn, creates the possibility of "litigation about litigation"—where an opponent may take a relatively weak case on the merits and try to create a strong case based on perceived production deficiencies. While clearly a diversionary tactic, this type of diversion can dramatically increase costs and impair the merits of the case if discovery issues are handled poorly from the onset, or even before litigation is contemplated.

Instead of reacting, an organization confident in its discovery practices can take a more aggressive posture in discovery—both defensively and affirmatively. Sometimes, *la meilleure défense, c'est l'attaque*,[2] and an organization is well-positioned to push forward on discovery issues once secure that its own execution is solid.[3]

The use of an affirmative strategy requires control of the case agenda, in terms of disclosures, transparency, and cooperation. It also means being prepared to ask probing discovery questions of your opponents as appropriate. In short, it requires a concerted effort to seize and hold the high ground of common sense. Although this approach involves a coordinated effort between in-house case teams and the organization's outside counsel that may take a little more strategic investment at the onset, it has the potential to create a significant reward: keeping the case on track for a resolution on the merits without any discovery-related detours.

Consider Early Case Evaluation

One available defense relies on an early evaluation of a given matter's merits to evaluate relative success. This evaluation is particularly key when the organization is the party contemplating filing a matter. Early evaluations consider the success of a matter based on the information collected—or the lack of available information available to press a claim. Consistent in-house procedures regarding proper preservation steps before filing an action are also key to this process, and an evaluation of collected information could provide enough information about the matter to

[2] Or, as Vince Lombardi said, "The best defense is a good offense."
[3] F. Pepper and M. Kahn, *Offensive E-Discovery Depositions: Is There a Defense?* Digital Discovery & e-Evidence, Vol. 7, No. 11, 11/01/2007, pp. 251-253. ("[The] best defense [to offensive e-discovery depositions] is making sure that your own e-discovery hands are clean.") (http://www.gibsondunn.com/publications/Documents/PepperKahn-OffensiveEDiscoveryDepos.pdf).

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determine whether filing litigation really is the best strategic step for the organization.[4] Of course, the same holds true for defending claims by determining the strength of potential defenses early on.

Strike First and Set the Discovery Stage

Another key discovery tactic is the "Day One" letter. This type of communication spells out the organization's positions on preservation and production of information, which may include the location of its documents and other information it deems relevant to the matter; which information sources it will and will not ordinarily preserve; the types of searches it will perform; and the production format it will employ. The language of the letter may be modified to fit any of the organization's matters, but its primary goal is to set forth the case's standard operating approach to discovery, in order to call-out any disagreements early and eliminate any last-minute discovery challenges. Tailoring an organization's Day One letter template to a Day One letter specific to the particular case also helps ensure that, even in wildly different cases, the organization's outside counsel are following a similar path.

In addition to the Day One letter clarifying the behavior of the organization issuing the letter, the letter also serves as a preview of expectations for the opposing party's production of information. This letter to opposing counsel can become a powerful exhibit in a discovery dispute before a court, as the organization's representative can state truthfully that the organization made no demands it was not prepared to execute on its own behalf. It can also determine a timeline for the exchange of information, and may serve as a guide for the court's own consideration regarding the proper timing of discovery. If the organization is able to nimbly deal with discovery, it may put the opponent in a position of catch-up through this part of litigation. The contents of the Day One letter can, and should, also be incorporated into the case protective order, as well as any pleadings and correspondence related to discovery.

[4] A. Watson, *The E-Discovery Playbook: A Proactive Tool For Winning Litigation*, FTI Consulting Technology 2010 ("[Organizations] that evaluate the merits of a case at the outset could save themselves substantial legal fees as well as internal resources and anxiety. This cannot be done without knowing what the data contains or conducting an early case assessment.") (http://www.ftitechnology.com/doc/White-Papers/whitepaper-ediscovery-playbook-2007.pdf).

Defend Against Proving a Negative

Another of the more challenging aspects of discovery practice in the United States is the difficulty of proving a negative. In many cases that involve discovery disputes, opposing counsel implies—or may even explicitly state—that the organization producing documents has held something back, either willfully or accidentally—or that the organization has destroyed otherwise-responsive documents. In response, an organization can only state whether or not it has produced a given piece of information; without evidence that something has been destroyed, there is no proof that a given, perfect piece of imaginary evidence ever existed.

A defense against alleged missing documents or files, or even a general anomia or inability to find information within an organization's legal department, is the implementation and consistent use of repeatable, internal processes. The organization must determine which specific processes associated with legal discovery should be done the same way each time. These processes should be clearly documented and vetted by the team responsible for executing them. Once those processes are defined and appropriate tasks are delegated, the responsible individuals should audit or track how well the current process steps are working. If there are issues, they must be redirected back to the team, rather than being changed for each case based on the intuition of an individual team member. A uniform, vetted, and documented process will ensure that the entirety of the organization's litigation discovery strategy is considered, as well as helping with the delegation of specific process components.

The use of consistent processes helps keep existing, relevant documents from disappearing, and can lead to strong and defensible testimony. This is not a benign concern—the advent of the new Federal Discovery Rules led to more and more organizations using "offensive e-discovery depositions"[5] that seek information regarding the explicit steps an opposing party took to comply with its discovery obligations. It is likely that someone from the organization will be called upon to testify on behalf of the organization's practices. In the case of a 30(b)(6) witness, one way to

[5] F. Pepper and M. Kahn, *Offensive E-Discovery Depositions: Is There a Defense?* Digital Discovery & e-Evidence, Vol. 7, No. 11, 11/01/2007, pp. 251-253. ("the so-called 'offensive e-discovery deposition' [is] named for its tactical nature rather than expressing a value judgment about its worth") (http://www.gibsondunn.com/publications/Documents/PepperKahn-OffensiveEDiscoveryDepos.pdf). Other materials advise practitioners to "identify the individual responsible for searching for, locating, and producing electronic evidence" in order to "[d]etermine what that individual did to comply with your opponent's discovery obligations." C. Kellner, *2 Massachusetts Discovery Practice* § 20.4.3 (2005).

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successfully defend against allegations, such as phantom documents or spoliation, is to demonstrate that the organization's policies and procedures are such that the individual knows what happens each time a circumstance occurs, and that policy and procedural consistency demonstrates against the likelihood of a given event.

Recognize the Tendencies of Opposing Parties and Their Counsel

In-house counsel and their retained outside counsel are not the only parties evaluating the organization's behavior. Opposing counsel familiar with an organization and its past discovery practices may know that organization's tendencies based on the organization's past representations and missteps. Inconsistency is a potential problem when an organization does not rely on set processes and procedures to avoid the specter of inconsistent behavior by two different in-house litigators with different-sized matters. An in-house repository of past discovery documents, including pleadings and correspondence relating to discovery, can also serve as a guide for new in-house litigators and their teams when they inherit legacy cases or dockets with years of prior history.

An organization should also consider more than just a given matter's discovery concerns, and include the opponent's personnel and processes in its consideration. Many organizations, fearing a similar review of their own Records and Information Management (RIM) policies and schedules—or their IT support when it comes to interactions with document production—do not initiate discussions on these subjects. If an organization has a reliable individual (or group of individuals) that can speak confidently to the organization's practices in a manner consistent with the organization's Day One letter representations and past behavior, the organization is well positioned to speak with their opponent's RIM specialists and IT representatives and use offensive e-discovery depositions to its own benefit.[6]

[6] *Id.*

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Present a Confident Front

Even if an organization does not want to engage in letter writing campaigns or deposition schedules regarding discovery, a demonstration that the organization is not afraid of these issues can stop discovery-related disputes before they begin. Confidence in internal processes and preparedness, when combined with even the appearance of aggressive discovery tactics, can help reduce discovery to its proper supporting role in a matter.

Conclusion

An organization's litigation discovery program is comprised of a myriad of moving parts; however, by investing in a discovery program that appropriately tasks the right personnel with proper, strategically defined responsibilities, an organization can reap the benefits of that investment. Those benefits include unassailable witnesses, improved internal efficiencies, decreased costs, and the ability to try a matter on its merits—not its discovery profile. Finally, if (and despite best efforts) a case devolves into an internecine conflict, a strategic-minded organization with its discovery in order can use discovery conflicts as offensive weapons, rather than simply reacting to opposing party allegations.