


A large shark is swimming in an aquarium tank, viewed from behind. In the foreground, a young child is seen from the back, reaching out with their hand towards the glass of the tank. The water is a deep blue-green color, and many smaller fish are visible in the background.

epiq security

Ethical Issues in Litigation
Discovery: Managing Risks,
Costs, and Data

Overview

A number of judicial decisions, including those issued in the Qualcomm v. Broadcom litigation, raise questions about the appropriate roles and responsibilities of in-house and outside counsel, and their ethical obligations to their clients and the court, in the conduct of electronic discovery. Other cases, including the Victor Stanley v. Creative Pipe discovery decision, raise issues about how to protect privilege in the face of ever-expanding quantities of data and accelerated timelines in which to produce it. This whitepaper addresses the potential conflicts, real or perceived, between ethical obligations to collaborate with opposing parties and counsel on electronic discovery matters, as contemplated by the amended Federal Rules of Civil Procedure and The Sedona Conference, and a lawyer's obligation to provide effective and zealous representation of his or her clients. In the current economic environment, when every law firm and corporate legal department is trying to cut costs, lawyers face special challenges in the conduct of efficient electronic discovery while meeting their ethical obligations.





eDiscovery in a challenging economic climate

In 2018, as the economy recovered from the most severe downturn since the Great Depression, nearly every legal department was under orders to cut costs. Many, if not most, legal departments received directives to cut outside vendor (including both law firm and service provider) spending by 10-20 percent or more. But the volume of litigation in many areas continued to increase. As a result of the impact of the economic downturn on the stock market, the amount of civil securities litigation and securities investigations by federal and state governmental authorities increased dramatically. Bankruptcy filings, and the litigation they spawn, were at an all-time high. Bankruptcies and declining corporate values often lead to merger and acquisition activity, and the litigation and governmental investigations that can surround such transactions. In addition, the Obama Administration initiated new and more aggressive approaches to antitrust and Foreign Corrupt Practices Act enforcement. As corporate values declined, companies found it more critical than ever to defend their core assets, including their intellectual property (IP), and as a consequence, IP litigation boomed. And not surprisingly, as companies announced more and more layoffs, employment-related litigation increased dramatically.

Despite the economic recovery, the pressure to reduce litigation-related costs has continued. And not only has the volume of litigation continued to grow, but the cost of litigation discovery is also increasing – driven in large part by the increasing

reliance of corporate America on electronically-stored information (ESI) and the associated increasing demands of parties to litigation for the review and production of that ESI.

In this challenging economic environment, corporate counsel and the outside counsel who support them need to manage and reduce electronic discovery costs more effectively; mitigate and reduce electronic discovery risks; and still fulfill their legal, regulatory and ethical discovery obligations.

Judicial decisions are raising the bar

The time when senior corporate and outside counsel could rely exclusively on the most junior (and tech-savvy) associates and legal assistants to handle the entire eDiscovery process, from drafting and issuing litigation hold notices through overseeing data collection, processing, review, and production, is over. Certainly the judgments against corporate defendants in two highly publicized cases driven in large part by eDiscovery missteps – \$29 million against UBS in the seminal Zubulake case, which started as a relatively routine employment discrimination matter, and \$1.45 billion in Ronald Perelman's lawsuit against Morgan Stanley in the Coleman case (later reversed for reasons unrelated to the eDiscovery issues) – are large enough to attract the attention of most counsel. In addition, more recent court decisions, holding senior in-house and outside counsel personally responsible for the proper execution of the e-discovery process, place a premium on the active management of the entire eDiscovery undertaking.

The Zubulake V decision

Even before the 2006 ESI-related amendments to the Federal Rules of Civil Procedure took effect, courts were sanctioning parties for electronic discovery shortcomings. In the seminal case in this area, *Zubulake v. UBS* (“Zubulake”), an employment discrimination matter, Judge Shira Scheindlin issued a series of discovery-related opinions, culminating in the so-called Zubulake V decision, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). In the Zubulake case, counsel for defendant UBS Warburg had issued a litigation hold after Laura Zubulake filed Equal Employment Opportunity Commission (EEOC) charges against the company, but never mentioned backup tapes in the hold instructions. Some employees deleted relevant emails in spite of the instructions, while others failed to provide all relevant information to counsel. As it turned out, the backup tapes, which had been overwritten, might have contained some of the deleted email. The consequence was the imposition of adverse inference instructions to the jury, which essentially ensured plaintiff’s victory in the case, and resulted in a \$29.3 million verdict –\$9.1 million in compensatory damages and \$20.2 million in punitive damages.

In her Zubulake V opinion, Judge Scheindlin outlined a list of responsibilities that counsel would be well-advised to follow. They include obligations to:

- Actively monitor compliance with a litigation hold, noting that it is insufficient to simply advise a client of the hold and then expect the client to retain, identify, and produce the relevant evidence;
- Become fully familiar with the client’s document retention policies, as well as the client’s data retention architecture and electronic systems, which will invariably involve speaking with the client’s information technology personnel;
- Communicate with all key players involved in the litigation, ascertaining how and where they store their information, and advising them of their retention obligations; and
- Ensure that relevant backup tapes or other backup media are retained.

Although these guidelines may be regarded as dicta in the Zubulake case, there is no question that subsequent court decisions have imposed an obligation on both corporate and outside counsel to know their clients’ IT systems well enough to be able to articulate how and where electronically stored information is backed up. This obligation was codified, to some extent, in FRCP Rule 26(b) (2) (b), as amended in 2006, which among other things requires the parties to identify sources of electronically stored information that support their case or defenses.

The Qualcomm decisions

In the case of *Qualcomm v. Broadcom*, 2008 WL 66932 (S.D. Cal. Jan. 8, 2008), Qualcomm had obtained patents related to the coding of electronic video files, and sought to enforce its patents against Broadcom. Broadcom won at trial, and then learned of the existence of relevant Qualcomm emails and other ESI that had not been produced during discovery, and filed a motion for sanctions. The court found that Qualcomm had produced “1.2 million marginally relevant documents while hiding 46,000 critically important ones.” In-house counsel should have been alerted “...that either the document search was inadequate or they were knowingly not producing tens of thousands of relevant and requested documents.” Outside counsel “chose not to look in the correct locations, accepted the unsubstantiated assurances of an important client, and/or ignored the warning signs.” Qualcomm was ordered to pay Broadcom’s attorneys’ fees in the amount of \$8.5 million (an amount that was not appealed), and was also required to create a case review and enforcement of discovery obligations (“CREDO”) program, subject to court review and approval. In addition, the court initiated state bar sanction proceedings against six outside counsel for Qualcomm. Although the court’s order was directed against Qualcomm’s outside counsel, it is probably no coincidence that Qualcomm’s general counsel resigned the week the court issued the order.



The sanctioned attorneys objected to the order, and on remand, the court permitted over a year of additional discovery and a three-day evidentiary hearing in which outside counsel were allowed to defend their conduct under the self-defense exception to the attorney-client privilege. In an order dated April 2, 2010, the court found that “although significant errors were made” by outside counsel, there was insufficient evidence to prove that they acted with the bad faith required to impose sanctions. Accordingly, the court dismissed the state bar referral sanction and also relieved Qualcomm of the CREDO burden, finding that the remand process had accomplished the desired objective of requiring the attorneys to review their actions and determine what should have been done to avoid the discovery failures. Unfortunately, by this time both of the law firms where the sanctioned attorneys had worked were out of business.

The Victor Stanley decision

In the 2008 *Victor Stanley v. Creative Pipe* case, the court found that defendants had waived privilege on 165 inadvertently produced documents because of failure to “take reasonable precautions” to ensure that privileged materials would be safeguarded from production. Defendants used inadequate key word searching to identify potentially privileged documents, and did not perform even the most basic spot-checking or other quality control procedures in order to guard against inadvertent disclosure. The court endorsed The Sedona Conference Best Practices for Search

and Information Retrieval as a valuable guide to identifying both potentially responsive and potentially privileged materials.

eDiscovery challenges

Although these cases indicate that counsel need to be intimately familiar with, and ultimately responsible for, the entire eDiscovery process, several aspects of that process – data preservation, data collection and the identification of relevant data for production – have been the particular focus of most of the recent case law, and therefore present the most challenge for in-house and outside counsel.

Once litigation (or a government investigation) has commenced, or is reasonably likely, the party to the litigation (or the target of the investigation) has an immediate duty to preserve information that may be relevant to the litigation or investigation, even in advance of a discovery request or subpoena. Failure to do so in a litigation context may result in the imposition of sanctions under FRCP Rule 37, up to and including exclusion of evidence in support of the party’s case, the issuance of “adverse inference” jury instructions, and the imposition of an obligation to pay the attorney’s fees of the requesting party. In the context of a governmental investigation, such failure is one of the factors to be taken into account in determining whether the Department of Justice will seek indictment of a corporation, and may also result in a criminal prosecution for obstruction of justice.

Once the relevant custodians and potentially relevant information have been identified and preserved, it is necessary to collect the information. The type of case may dictate the method of collection – in some very routine cases, employees may be relied upon to simply review desktop information and download relevant materials to a CD for transmittal to in-house or outside counsel, although that practice has come under attack in some recent court decisions. More contentious matters may call for collection by forensic experts, who can preserve all of the informational metadata (such as the time and date of creation and modification of the email or document) and can certify to the chain of custody of the evidence in case of challenges to its authenticity.

Of course the larger the matter, the more information that needs to be collected, and the more custodians at issue, the more likely it is that the use of a third-party eDiscovery vendor, with specialized expertise in the collection and management of large amounts of data, will be desirable. The risk of erring in the collection of this information – of failing to preserve necessary metadata, or destroying information in the process of collecting it – is that an adverse litigant may claim spoliation of evidence and seek – perhaps successfully – the sanctions outlined above.

Potential eDiscovery ethical issues

In the course of conducting electronic discovery, attorneys may encounter a number of ethical issues. The use of third-party service providers, including electronic discovery vendors for data collection, processing, review and production, may raise issues about the unauthorized practice of law and the duty of attorneys to supervise effectively those who assist them. As the amount of data, numbers of custodians and complexity of a case increase, it is increasingly difficult for attorneys to have confidence in the accuracy of their discovery completion certifications. The fundamental requirements of attorney competency and the duty to provide effective representation require attorneys to know not only the rules of discovery but also the electronic data and infrastructures of their clients.

And finally, attorneys have an overriding obligation to protect the confidences of their clients, including materials covered by attorney-client privilege and the attorney work product doctrine – protection that is increasingly difficult as the amount of data and the cost of reviewing that data increases.

Cooperation versus zealous representation

Under the American Bar Association (ABA) Model Rules of Professional Conduct (ABA Rules), Rule 3.2 provides that a “lawyer shall make reasonable efforts to expedite litigation, consistent with the interests of the client.” But the traditional, adversarial approach to litigation, involving one party serving increasingly burdensome discovery requests and the other party resisting those requests strenuously, with little discussion between the parties and an associated barrage of motions to compel and motions for protective orders, has proven particularly ill-suited for addressing the huge volumes of electronic data possessed and sought by litigants. In response, The Sedona Conference, the leading “think tank” for research on and the development of best practices in electronic discovery, issued a “Cooperation Proclamation” on July 8, 2008, calling on counsel to work together to reach agreement on reasonable approaches to the discovery of ESI, while still effectively and zealously representing the interests of their clients. The proclamation has now been endorsed by over 400 federal and state court judges, and cited in numerous discovery opinions. This is consistent with Federal Rules of Civil Procedure (“FRCP”) Rule 1, which states in part that the Federal Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” In the area of electronic discovery, only a cooperative approach is likely to permit the achievement of this objective.



Duty of Competence

Under ABA Rule 1.1, a “lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Under the guidelines outlined by Judge Scheindlin in her Zubulake opinions, the duty of competence requires attorneys to be familiar with the location and content of their clients’ data, to be able to issue and enforce a prompt and effective litigation hold, and to be able to identify and produce relevant and responsive information in an efficient and cost-effective manner. If attorneys are not themselves sufficiently informed to satisfy these requirements, they should help ensure compliance by working with those who are more skilled in this area, whether co-counsel, litigation support staff, or service providers.

In April 2014, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion Interim No. 11-0004, addressing the question of what an attorney’s ethical duties are in the handling of discovery of ESI. In its proposed opinion, the committee indicated that “competent” handling of eDiscovery has many dimensions, depending upon the complexity of eDiscovery in a particular case.

“The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues, if any, might arise during the litigation, including the likelihood that eDiscovery will or should be sought by either side.

If it is likely that e-discovery will be sought, the duty

of competence requires an attorney to assess his or her own eDiscovery skills and resources as part of the attorney’s duty to provide the client with competent representation.... [A]ttorneys handling eDiscovery should have the requisite level of familiarity and skill to, among other things, be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

1. initially assess eDiscovery needs and issues, if any;
2. implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence, like electronic information, potentially relevant to the issues in the litigation;
3. analyze and understand a client’s ESI systems and storage;
4. identify custodians of relevant ESI;
5. perform appropriate searches;
6. collect responsive ESI in a manner that preserves the integrity of that ESI;
7. advise the client as to available options for collection and preservation of ESI;
8. engage in competent and meaningful meet and confer with opposing counsel concerning an eDiscovery plan; and
9. produce responsive ESI in a recognized and appropriate manner.

See, e.g., Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC (S.D.N.Y. 2010) 685 F.Supp.2d 456, 462-465.”

The committee also suggested that in addition to the duty of competence, lack of competence in eDiscovery issues might also result, in certain circumstances, in ethical violations of an attorney's duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.

Duties of candor to the tribunal and fairness to opposing party and counsel

Under ABA Rule 3.3, a "lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer...." In several of the cases referenced above, particularly *Morgan Stanley and Qualcomm*, a good deal of the difficulty, and at least part of the basis for the sanctions, was the cumulative impression that the attorneys had been misleading the court.

The duty to be honest upfront, and to correct any representations as soon as subsequent information proves them to have been incorrect, is critical. This is closely related to the discovery certification required under FRCP 26(g), which states that "... by signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: (A) with respect to a disclosure, it is complete and correct as of the time it is made..." The certification that all of the required disclosure of relevant information has been completed is something that needs to be corrected immediately if additional relevant information is identified.

The real question is what constitutes the "reasonable inquiry" required of an attorney before making the FRCP Rule 26 certification. A number of recent cases have indicated that judges do not expect 100 percent perfection in finding every last relevant document out of the millions that may be stored electronically on a client's email or content management system

But judges are looking for a good faith effort, evidenced by a discovery plan or protocol, and involving the diligent identification of custodians with potentially relevant information, the effective

collection of that information, and the use of electronic tools and validated search methodologies, backed up by effective quality control measures, to produce responsive materials. The discovery process outlined by Judge Scheindlin in her *Zubulake V* opinion provides a good roadmap..

Of course the predicate to effective compliance in producing responsive materials is effective data preservation, as outlined in most of the spoliation opinions referenced above. The imposition of a prompt and effective litigation hold is critical to the conduct of any effective discovery process, but particularly so when dealing with huge volumes of ESI that can be deleted, destroyed or overwritten in the absence of affirmative preservation efforts. This falls under the ethical obligation to be fair to opposing parties and counsel. As set forth in ABA Rule 3.4, a "lawyer shall not (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

Duty to maintain client confidences

The maintenance of client confidences, including preservation of the attorney-client privilege and the attorney work product doctrine, is an important obligation of every attorney. Not only is it critical to ensure that clients have confidence that they can seek advice under the protection of the attorney-client privilege, but clients must also know that their attorneys' work product, including research and strategic advice relating to their matter, will not be disclosed.

Under ABA Rule 1.6, a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)", which contains a list of exceptions, including 1.6 (b) (6), "to comply with other law or a

court order.” In producing documents or other information, whether in electronic or hard copy format, pursuant to a discovery request, attorneys need to ensure that proprietary and confidential information is adequately protected, through such means as a protective order, “eyes-only” outside counsel review, and filings under seal. In addition, it is important to ensure that adequate precautions have been taken to protect against the inadvertent production of attorney-client privileged and attorney work product materials.

As the Victor Stanley decision illustrates, protecting confidential information can be a challenge given the large volumes of electronic data that must be reviewed, evaluated and produced. In response to conflicting case law concerning the protection of privileged material, and the treatment of inadvertently produced material, Federal Rule of Evidence (“FRE”) 502 was enacted and became effective on September 19, 2008. Among other things, it was intended to reduce litigation costs arising in the process of privilege review by establishing a presumption against subject matter waiver, providing for confidentiality orders and endorsing party agreements to the treatment of inadvertently produced privileged material. In particular, FRE 502(b) clarifies that inadvertent disclosure does not result in waiver when the holder of the privilege “took reasonable steps to prevent disclosure” and “promptly took reasonable steps to rectify the error.”

Much of the case law since FRE 502 was enacted has focused on what constitutes the “reasonable” steps required to qualify for the protection afforded under the rule. Although such determinations are necessarily specific to the facts and circumstances of each case, in general it seems that using an electronic screen combining names of known attorneys and/or law firms and commonly used terms denoting privilege or confidentiality, along with a quality control process involving sampling and spot checking to guard against inadvertent disclosure, will go a long way toward establishing that “reasonable steps” were taken. As a matter of good practice, entering into a clawback agreement, and having an agreed-upon process for the return of inadvertently-produced privileged material that is ratified in a judicial order, provides additional

protection. Needless to say, it is difficult to “put the genie back in the bottle” once privileged material has been disclosed, and so it is best to avoid such disclosure if at all possible. Even if its use is precluded in the current matter under the protection afforded by FRE 502, its disclosure may offer opposing parties or counsel opportunities to adversely affect the outcome of a matter. But by having a clawback agreement in place, embodying the parties’ agreement in a judicial order, and taking the referenced reasonable steps to avoid disclosure, waiver of privilege in other state or federal proceedings may also be avoided.

Conclusion

How can lawyers, whether serving as in-house or outside counsel, protect themselves against the risks outlined above? Perhaps the best way is by knowing (or finding out) where their clients' information is located and who is responsible for it, through the preparation of a targeted data map, and by having in place a well-documented, repeatable, consistent process for handling every e-discovery matter. A process that goes into effect immediately when litigation commences or is reasonably likely, that ensures the rapid identification of potentially relevant information sources, that ensures the preservation of potentially relevant information, and that provides for the collection of that information in a defensible manner, is the best insurance against claims of e-discovery abuse and the spoliation of evidence. It is also the most effective way for counsel to fulfill all of their ethical duties to their clients, opposing counsel, opposing parties and the court.

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