An In-House Review Of Outside Review

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In-house counsel cannot afford to take a hands-off posture to the discovery phase of litigation. Even though outside litigation counsel may be managing the process, the ultimate responsibility for a good-faith document production lies with the company's in-house legal team.

All readers should be familiar with *Qualcomm Inc. v. Broadcom Corp*.,[1] in which 14 attorneys faced harsh sanctions (up to loss of their law licenses) for not maintaining closer oversight over what in-house personnel were doing. However, other cases, such as *Louis Vuitton Malletier v. Dooney & Burke, Inc*.,[2] point up the hazards of leaving evidence production to unqualified in-house IT teams, without proper training or supervision.

With few exceptions (such as data being not reasonably accessible), a complete production requires *all* relevant documents to be retrieved for a thorough responsiveness and privilege review.

In-House Counsel Must Lead The Way

Good faith starts with the directions of in-house counsel. Those managing the litigation should become familiar enough with the company's data storage systems to be able to identify potential sources of ESI. A computer science degree is not required (although a member of the litigation team who has one would certainly be helpful); it should be sufficient for everyone to know what types of data are typically stored at each network location.

To avoid a *Qualcomm* scenario in your company, an organized plan for document collection is crucial. In-house and outside counsel should work together with the company's IT team to ensure that all of the correct storage locations are searched. This is no time to try to artificially trim the size of the collection by using unduly restrictive search terms. At least for the initial collection, over-inclusive searches are better than under-inclusive. (By using sampling techniques, as discussed in this space in the December 2008 issue,[3] the discovery team can then trim down the collection to a more manageable size – and, most importantly, can demonstrate good faith to the court in doing so.)

The importance of thorough collection cannot be overstated. In *Louis Vuitton* (LV),[4] the company's e-mails were stored in a Kana Oracle database. LV (a multi-billion dollar company) could have paid $15,000 to Kana and Oracle experts to search and extract the data. To save a few bucks, though, LV handed the project off to their in-house IT department, which claimed to find no relevant e-mails.

For the sake of that $15,000, LV was hit with an adverse inference sanction, as well as for fees and costs well in excess of $15K, and was harshly criticized by the magistrate:

> There is no question that LV has failed to comply with its discovery obligations, misled its adversary and the court, and flouted a court order.... That application triggered a representation by LV that it had undertaken an appropriate search for customer communications about S-lock products and had no such communications. It is evident that this representation was false, and in the absence of any explanation by LV for this misstatement, we have no reason to infer that it was other than knowingly false.[5]

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While no one likes to pay the costs associated with ESI collection, those costs pale in comparison to the potential sanctions (not to mention the resulting damage to one's case) that a court may levy for failure to completely and thoroughly locate potentially responsive documents. Collection is no place to cut corners. Plan to spend the money to locate *all* of the requested data, particularly when (as with LV) that sum is a miniscule part of the company's annual revenues.

Don't Scrimp On The Review

Document review is also no place to cut corners. "Good faith" requires a reasonable review of the document collection, as does protection under Federal Rule of Evidence 502(b) that preserves privilege for inadvertent production.[6] This means investing the time and resources in getting every collected document seen at least once, and preferably twice.[7]

One shortcut is to run search queries against the document corpus, culling the collection to documents most likely to be directly responsive to the discovery request. This is a valid methodology *if* the parties have agreed on search terms during their meet-and-confer session. However, some attorneys may be tempted to cull the collection using their own search terms, tweaking and amending the query until the number of documents returned "feels right." Their hope is that this collection will not only avoid sanctions, but will also save outside counsel and their corporate client a lot of money on document review.

It's hard to fault outside counsel for trying to save the client some money during the most expensive part of the discovery process, particularly in today's harsh economic climate. Indeed, outside counsel may be working at the direction of in-house counsel to slash discovery costs to the bare minimum. Unfortunately, judges generally do not have sympathy for the economic squeeze, and should a dispute arise over whether all responsive documents were produced, it falls to the producing party to prove good faith. As seen in *Louis Vuitton*, an attempt to cut corners early could result in substantial financial sanctions later (not to mention limiting sanctions that could affect the case presentation at trial).

Ideally, any attempts to cull the document collection should be made only after agreement with opposing counsel. (Although it's almost instinctive for litigation counsel to want to make discovery as burdensome for the other side as possible, your opponents will be facing the same production expenses that you will. You might be surprised how willing they will be to negotiate search queries with you in order to save money on their own discovery costs.)

It should be obvious that culling down a collection on your own will, by definition, will result in an incomplete document review. And if it's obvious to you, it's going to be *extremely* obvious to the court.

Use The Right Review Tool

Whereas the costs of harvesting and processing the document collection are generally predictable (based on the volume to be collected), the cost of the document review process is not. There is no way to reliably predict how many man-hours will be needed to complete a review, and each man-hour comes with a billable price tag. The Sedona Conference has estimated that a single gigabyte of data can reasonably take 150 hours to review.[8] Even at contract attorney hourly rates, the costs mount up quite rapidly.

Every second that can be shaved off the review time represents a tangible cost savings. Many review supervisors try to realize this savings by "cracking the whip" with hourly or daily quotas, and releasing reviewers who don't meet them. However, a much more effective way to speed up document review is simply to use the right review tool to begin with. If the format or system chosen for the review itself slows the process down, efficiency drops and costs rise.[9]

Where large document collections are at issue, an enterprise solution (where the document repository and database are hosted locally, and are accessible by multiple users on the local network at the same time) is the most practical – and also the most expensive to implement. Neither outside litigation counsel nor their client are likely to want to invest in the infrastructure and software required for an efficient document review. The trend is to host the data with an outside vendor, who can devote more resources to storage, technical support, and systems maintenance than the firm or the client usually can. Best of all, outside vendors already have their infrastructure in place, which means that document review can begin very quickly after processing is complete.

Although there are remote-access, virtual-desktop review solutions, another trend has been to move toward web-hosted, browser-based review solutions. This brings several advantages. All documents can be stored in a single central repository. Security can be customized so that reviewers have access only to their assigned documents. All review flags and notes are immediately saved in the master database, making them instantly accessible to others. Review attorneys could potentially work from anywhere that has an Internet connection (as opposed to being limited to the high-overhead, hard-wired review "bullpens" that many counsel currently favor). The system response speed tends to be limited only by the maximum speed of the Internet connection. Best of all, the same review tool can also be used by the trial team to organize and prepare their case.

Ask Questions, Save Money

There are a few questions in-house counsel should ask of the vendor. How many people can access the document repository at the same time? How quickly does the review tool advance to the next document, or to the next page? How quickly can a simple search be run across a massive document collection?

When a review flag is selected, how quickly does the system store the change and move on? (Without such a feature that instantly adds such updates to the search index, fields and tags may not be immediately available, and therefore may not appear in searches or data views until the data re-indexes according to its schedule. With instant index updates, both inside and outside counsel can be confident that all searches will be as accurate as possible, without the need to re-run those searches after re-indexing.)

Can multiple documents (such as child attachments to a responsive parent document) be flagged at the same time, trimming the review time further? (Allowing a first-pass reviewer the ability to flag multiple documents at once will move more documents through in less time. The second-pass reviewers can then examine specific categories of flags, such as privilege, more closely.)

How easy is it for the review supervisor to keep real-time track of everyone's productivity? (If reports are already constructed within the review system, the supervisor can check on review progress in real time throughout the day.)

Conclusion

You may hire outside counsel to litigate a case, but that does not mean that they should work without in-house cooperation and oversight. A company's failure to invest sufficient resources and money in the discovery process may not only limit the success that outside counsel will have, but may also result in harsh sanctions. Don't forget that, whether assessed against your company or against counsel, sanctions will end up submitted to the company for payment. In-house counsel can avoid a great deal of expense and discomfort simply by ensuring that the document collection and review is thorough and, above all, in good faith.

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[1] *2008 U.S. Dist. Lexis 911 (S.D. Cal. 2008)*, available at *http://www.klgates.com/files/upload/edat_qualcomm_8_13_07_show_cause_order.pdf.*

[2] *2006 U.S. Dist. LEXIS 87096 (S.D.N.Y. Nov. 30, 2006).*

[3] *Gary Wiener, "Breaking Through Babel Without Breaking The Bank",* Metropolitan Corp. Counsel *(Dec. 2008), p. 46.*

[4] *Note 2*, supra.

[5] *Quote from Ralph Losey's excellent blog entry on the matter*, available at http://ralphlosey.wordpress.com/2007/01/22/louis-vuitton-sanctioned-for-sand-bagging/. See also Google Inc. v. American Blind & Wallpaper Factory, Inc., *2007 U.S. Dist. LEXIS 48309 (N.D. Cal. June 27, 2007), in which similar sanctions were imposed for a failure to adequately search internal e-mail.*

[6] *Compare* Laethem Equip. Co. v. Deere and Co., *2008 WL 2997932 (E.D. Mich. 2008) (FRE 502 protected against privilege waiver where inadvertent disclosure and prompt steps to protect the privilege could be shown) and* Relion, Inc. v. Hydra Fuel Cell Corp., *209 WL 5122828 (D. Or. 2008) (careless privilege review resulted in waiver of the attorney-client privilege).*

[7] "*... [W]hether an attorney (or privilege holder)* reviews *produced materials* after production *to identify inadvertently produced privileged materials will bear on not just the FRE 502(b)(3) question (rectifying inadvertent disclosure), but also the FRE 502(b)(2) question of whether the privilege holder took reasonable steps to protect the privileged material"* (emphasis in original). *Lucius T. Outlaw III, "Oregon Federal Court Holds that Careless Privilege Review Constitutes Waiver under Amended FRE 502" (Dec. 17, 2008), available at http://www.mondaq.com/article.asp?articleid=71508.*

[8] See *note 3*, supra, citing *Jason R. Baron, Ed.,* "*Search and Information Retrieval Methods*", The Sedona Conference Journal *191, 192 (2007).*

[9] See generally *Linda G. Sharp and Joel J. Vogel, "Times Are Changing – The World of ESI,"* Metropolitan Corporate Counsel *(Dec. 2007), p. 54.*

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