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A Survey of Sanctions Awarded for E-Discovery Violations

By David A. Kotler

The last 25 years have witnessed an explosion in the growth of information technology that few could have possibly predicted. Today, over 210 billion emails are sent each day, text-messaging is de rigueur, and Internet-ready laptops and PDAs are ubiquitous. Unsurprisingly, the enormous amount of information generated and disseminated each day has caused a seismic shift in the landscape of litigation, most notably in the practice of discovery.

Where discovery once involved the tangible process of digging through boxes of paper and generally required only knowledge of case-specific facts and the rules of privilege and work-product doctrines, it is now conducted almost entirely electronically, and demands technological expertise. This new brand of discovery—termed “e-discovery”—quickly grew over the last decade, and is now the norm in litigation.

As litigators continue to polish their

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“Hands On” Evidence

By Kathleen M. Grover

We have all heard the saying “A picture is worth a thousand words.” During trial, however, the actual subject of the photograph is worth more than a thousand words when it can be entered into evidence. The question is which is more convincing for a client’s case: a picture of the smashed bicycle helmet or the actual helmet? A printout of the bank statement up on an electronic screen or an actual document in full color on the heavy paper issued by the bank? A picture of the wheeled stool or the actual stool? In each case, both the picture and the actual item contain the same information, but the physical item is three-dimensional and can be experienced by an

additional sense—touch. Because attorneys work primarily with documents and more and more in the electronic realm, we may forget or dismiss the importance of nonvisual experiences in making the case for our clients. Using the sense of touch can reinforce the information and can sometimes make the point more vividly than verbal testimony or an electronic image.

During a recent trial, I was once again reminded of the value of exhibits that can be physically experienced. This civil matter was tried in front of an experienced judge without the presence of a jury. One of the issues in the case was the plaintiff’s claim that she had no notice of a debt that she claimed was

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e-discovery skills, they would do well to note how courts are handling e-discovery issues and problems. This article offers some assistance to litigators by surveying some of the key opinions in which courts have imposed sanctions for e-discovery missteps and mistakes, and then by offering several practice pointers.

Attorneys Must Become Technical Experts

First, sanctions opinions make clear that courts will demand of attorneys' expertise, ingenuity, and discernment in e-discovery practice. In *Zubulake v. UBS Warburg*¹—notable as one of the first sets of opinions to deal with a variety of e-discovery issues—the court discussed at length counsel's obligation to oversee its client's e-discovery. The court was clear that, particularly where counsel is logistically unable to obtain complete information about the client's actual document retention practices, counsel must be "creative," running their own system-wide searches and conducting their own electronic investigation to ensure that document searches are comprehensive.²

In a more recent case, *Stanley, Inc., v. Creative Pipe, Inc.*,³ the court similarly demanded that attorneys be creative and sophisticated in their understanding of the technical aspects of e-discovery, and specifically of electronic privilege review. The court's conclusion that defense counsel failed to understand and account for the limits of keyword searching led to a harsh holding: The defense counsel's review for privilege was not reasonable, and the privilege was thus waived.

Both of these cases illustrate the need for attorneys to understand the technical, sometimes mundane, aspects of e-discovery. Without such understanding, attorneys will simply not meet courts' requirements for comprehensive and reasonable e-discovery practice, and will risk incurring sanctions as a result.

The oft-discussed *Qualcomm*⁴ opinion provides another warning in this regard: The courts' expectations for attorney e-discovery expertise and ability extend from the most junior to the most senior attorneys. In other words, neither lack of ultimate authority, nor lack of participation in the slog of discovery, will pardon counsel from e-discovery mistakes. In *Qualcomm*, the court would not excuse a junior lawyer for his missteps, stating that if he lacked authority or experience, a senior attorney should have provided supervision.⁵ At the same time, the court said that senior lawyers' claims that they did not review or comment on the faulty work of junior lawyers provided not an excuse, but rather evidence of willful ignorance.⁶

The opinions are clear—lawyers who participate in litigation, from the most junior to the

most senior, must take it upon themselves to learn the nuances of e-discovery, as the courts will not tolerate ignorance or inability, and will demand expertise.

Attorneys Must Understand Their Client's Infrastructure

Second, courts also expect attorneys to investigate and understand their clients' IT infrastructure, ensuring in doing so that document searches are effective and comprehensive, and that production is complete.

In *Zubulake*, the court made this expectation explicit. Discussing the need for counsel to make certain that the client appropriately identifies and places relevant information on a "litigation hold," the court said

[C]ounsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy.⁷

As the court made clear, attorneys must not only be familiar with their client's policies, but they must also be actively engaged in understanding both the technological structure of their clients' systems, as well as the clients' actual practice. Failure to engage in this way could result in sanctions not only of the client, but also of counsel.

The *Qualcomm* opinion echoes the sentiment of *Zubulake*:

For the current "good faith" discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records, and emails are maintained, and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.⁸

In this and other parts of the *Qualcomm* opinion, the court places the onus for comprehensive e-discovery not on the client, but on counsel. In doing so, the court explicitly and implicitly communicates the requirement that attorneys educate themselves on their clients' IT structure and document retention and production systems so that attorneys are in a position to properly evaluate whether their clients' production is proper.

Attorneys Must Beware of Prejudicial E-Discovery Mistakes

Finally, to avoid severe sanctions, attorneys must take care to avoid e-discovery mistakes that prejudice the opposing party. In an informative



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article that surveys e-discovery sanctions cases, U.S. District Judge Shira Scheindlin⁹ notes that “prejudice is a significant factor in assessing whether parties should be sanctioned for e-discovery violations—even where the spoliating party acted willfully or in bad faith.”¹⁰ In other words, e-discovery sanctions opinions indicate that even if an attorney or client acts in good faith, mistakes that prejudice the opposing party will be severely punished, and even if an attorney or client acts in bad faith, mistakes that do not prejudice the opposing party will often go unpunished.

For example, various courts have held that in the context of e-discovery sanctions, sanctions in the form of adverse inference instructions and even dismissal are appropriate even without a bad-faith finding when the blunders at issue are prejudicial to the opposing party.¹¹ The courts in these cases reason that regardless of the spoliating party’s intentions, when another party’s case is prejudiced, the court must act to cure that prejudice. As Judge Scheindlin puts it, “[t]o the party that cannot prosecute or defend its case, it does not matter if the producing party did not intend to delete relevant electronic data; the information is gone, and the party has been hurt by it.”¹²

At the same time, courts often decline to impose sanctions, even where e-discovery mistakes or violations were intentional, when the requesting party cannot prove that it has been prejudiced. In *YCA, LLC v. Berry*,¹³ for instance, the court decided not to grant the requested sanctions because the e-discovery abuses at issue did not result in prejudice to the opposing party.¹⁴

From the perspective of a judge, it is clear that prejudice to the opposing party is a key consideration in the decision to impose sanctions. Attorneys should be aware that, at the end of the day, regardless of intent or attempt, if an e-discovery mistake prejudices the opposing party’s case, it will almost certainly result in severe sanctions.

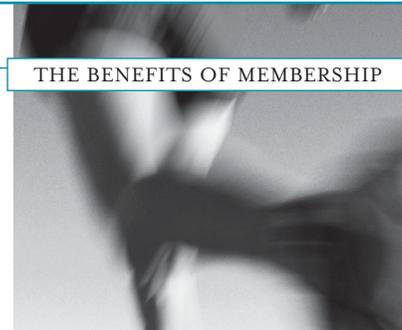
Conclusion

E-discovery is here to stay, and the e-discovery sanctions opinions that continue to come out sound a warning that litigators would do well to heed: Become an expert on the technical aspects of e-discovery, become an expert on your client’s IT infrastructure and document retention practices, and be careful not to make mistakes that will prejudice the opposing party. While there are other lessons that come out of these opinions, these three are the most challenging as well as the most crucial for not only avoiding sanctions, but also for fulfilling the obligation to be a zealous advocate for our clients. 

Endnotes

1. 217 F.R.D. 309 (S.D.N.Y. 2003); 220 F.R.D. 212 (S.D.N.Y. 2003); 229 F.R.D. 422 (S.D.N.Y. 2004).
2. 229 F.R.D. 422, 432 (S.D.N.Y. 2004).
3. 250 F.R.D. 251 (D. Md. 2008).
4. *Qualcomm, Inc., v. Broadcom, Corp.*, Slip Copy, 2008 WL 66932 (S.D. Cal., Jan. 7, 2008).
5. *Id.* at *14.
6. *Id.* at *15 n.13.
7. 229 F.R.D. 422, 432 (S.D.N.Y. 2004).
8. *Qualcomm, Inc.*, Slip Copy, 2008 WL 66932 at *9 (S.D. Cal. Jan. 7, 2008).
9. Judge Scheindlin wrote the famed *Zubulake* opinions and is widely considered an expert in e-discovery.
10. Shira Scheindlin, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. TECH. L. REV. 71, 84 (2004).
11. See, e.g., *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 750 (8th Cir. 2004) (“Sanctioning the ongoing destruction of records during litigation and discovery by imposing an adverse inference instruction is supported by either the court’s inherent power or Rule 37 of the Federal Rules of Civil Procedure, even absent an explicit bad faith finding. . . .”); *Young v. Gordon*, 330 F.3d 76, 82 (1st Cir. 2003) (“[A] finding of bad faith is not a condition precedent to imposing a sanction of dismissal.”); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002) (“In sum, we hold that . . . discovery sanctions [under Rule 37], including an adverse inference instruction, may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence.”).
12. Scheindlin at 84.
13. No. 03 C 3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004).
14. *Id.* at *7. See also Scheindlin at 83 (discussing YCA).

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