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Recent Court Decision Highlights Importance of Reasonable Inquiry

by J. Andrew Reynolds

In *Play Visions, Inc. v. Dollar Tree Stores,* Inc.[1], a recent decision out of the U.S. District Court for the Western District of Washington in Seattle, the court ordered Rule 26(g)(1) discovery sanctions against Play Visions' counsel for failing to make reasonable inquiry as to whether the client's discovery responses were adequate.

Play Visions' counsel committed a number of discovery blunders that led to sanctions, including turning over incomplete, inadequate and delayed document productions while certifying that productions were complete. Rule 26(g)(1) of the Federal Rules of Civil Procedure requires that discovery responses be signed by at least one attorney of record and that by signing the discovery response, counsel certifies that the information in the underlying response was formed after a reasonable inquiry.

The court's opinion lists the following examples of counsel's failure to make a reasonable inquiry:

- Counsel failed to familiarize himself with the client's document storage and retention systems
- Counsel did not take an active role in guiding the client in searching for records
- Counsel failed to make an independent inquiry into how documents were stored and how thoroughly they were searched for and produced
- Counsel had little to no involvement in the production of documents
- Counsel relied entirely on the client to provide discovery responses

This case highlights the need for outside counsel to work closely with the client and in-house counsel with regards to discovery. As emphasized in the often referenced *Qualcomm*[2] case, "attorneys and clients must work together to ensure that both understand how and

TABLE OF CONTENTS

Recent Court Decision Highlights Importance of Reasonable Inquiry

Strategically Mitigate the Risk of Inadvertent Privilege Disclosure

Meet DSP

Nina Rowland Reboots Legal Career, Embraces Modern Discovery

There's no substitute for experience, and Nina Rowland has a lot of that when it comes to discovery and litigation.

Nina remembers when discovery involved scouring through boxes of paper documents in dusty warehouses, computers were slowly making their way to attorneys' desks, email was in its infancy, and "networking" meant attending social functions with clients.

Now an associate in LeClairRyan's Discovery Solutions Practice, Nina brings with her a wealth of knowledge and a unique understanding of the evolution of the discovery process.

After graduating with a bachelor's

where electronic documents, records and emails are maintained."[3] The court in *Qualcomm* added additional incentive for communications and coordination between counsel and client by stating that outside counsel is responsible for ensuring that clients conduct a comprehensive and appropriate document search.[4]

What constitutes a "reasonable inquiry" in the world of electronically stored information? According to the court in *Play Visions*, at least some level of involvement by outside counsel in the identification and production of documents is required. The court suggests that counsel (1) become familiar with the client's document retention and storage systems, (2) guide the client through searches and (3) make an independent inquiry about how documents are stored, searched and produced. In *Qualcomm*, the court stated that a reasonable inquiry for that case would include identifying employees who are knowledgeable of the facts at issue and searching these employees' computers through the use of fundamental search terms. Certainly, the answer as to what constitutes a reasonable inquiry depends on the facts of each case. However, counsel can take the following preliminary actions to help ensure reasonable inquiry:

- **Identify the sources of responsive documents:** Work closely with in-house counsel and the client's IT department to identify all sources of potentially responsive documents and the location of those sources. Counsel may also identify the retention policies governing each source of relevant information.
- **Ensure document preservation:** Although not an issue in *Play Visions*, document preservation is a critical element of reasonable inquiries. Counsel should work with in-house counsel to prepare a legal hold notice and circulate it to relevant employees and managers of document sources to ensure that key documents are not destroyed.
- **Interview key employees:** Counsel should interview key employees to assess how and where they store electronic and paper documents. Counsel may also use these interviews to identify additional employees with responsive information and confirm they understand and comply with the legal hold.
- **Collect documents properly:** After counsel has identified (and preserved) sources of relevant documents, work with the relevant employees and IT department personnel to collect documents in an efficient and defensible manner.
- **Create a list of key search words:** Work closely with the client to create a list of key words to help identify likely responsive documents (and cull out non-responsive documents) prior to any document review.
- **Document processes followed:** Create and maintain documentation regarding each of the processes described

degree in criminal justice and a minor in sociology from the University of Delaware, Nina began her legal career as a paralegal with the Legal Assistance Association in Chester, Pennsylvania. Inspired by the dedication of her co-workers, she continued to work part-time while pursuing a law degree at the Temple University School of Law more than 20 years ago.

Upon earning her Juris Doctor, Nina dove right into her legal career and joined a large Philadelphia firm's labor and employment group, where she became fully immersed in all aspects of employment litigation, including preparing and answering discovery requests, taking depositions, drafting briefs, and arguing motions. At this time, facsimile machines and floppy discs were the latest technology, and discovery paled in comparison to the technologically advanced processes used today.

After five busy years working in Philadelphia, Nina and her husband relocated to Richmond, Virginia to raise a family. During this time, Nina took a hiatus to stay home with her two children until they were in elementary school. When this came to pass, she worked in the child support enforcement arena and practiced on her own until she came across an ad for full-time document review attorneys six years ago. She applied for the job and was hired – at LeClairRyan.

Working in this new capacity, Nina quickly learned that much had changed in discovery since those early days in Philadelphia when documents were produced on paper and mail always involved envelopes and stamps. She vividly remembers her first day reviewing documents, staring at a computer screen and asking herself, "Where are all the boxes of paper?"

above. Documentation plays a critical role if discovery responses are ever challenged.

While not exhaustive, nor necessarily required for every case, the processes listed above will help create a solid foundation for representing to a court that a reasonable inquiry was made. This in turn may help avoid a Rule 26(g)(1) sanction.

[1] *Play Visions, Inc. v. Dollar Tree Stores, Inc.*, No. C09-1769 MJP (W.D. Wash. June 8, 2011)

[2] *Qualcomm Incorporated v. Broadcomm Corporation*, Case No. 05-CV-1958-B (BLM) (S.D. Cal.)

[3] *Order Granting In Part And Denying In Part Defendant's Motion for Sanctions and Sanctioning Qualcomm, Incorporated and Individual Lawyers (January 7, 2008) ("Order") at 18*

[4] Order at 18.

back to top

Strategically Mitigate the Risk of Inadvertent Privilege Disclosure

Given the proliferation of electronic data and the vast amount of discoverable information in large matters, the inadvertent disclosure of privileged information is inevitable. This is true whether documents are coded by humans or through predictive coding technology.

However, there are ways to mitigate the risks associated with inadvertent privilege disclosure. The following strategies will help a discovery team respond quickly and efficiently when privileged information is mistakenly produced.

- **Establish a clawback agreement.** A clawback is an agreement between the parties, typically in the form of an agreed court order, in which the parties agree that, within some parameters, the inadvertent production of privileged information does not constitute a privilege waiver. There is typically a provision stating the parties will promptly return or destroy documents identified as privileged. In the absence of a clawback agreement, the parties rely solely on the court's application of Federal Rule of Evidence 502 as it relates to privilege disclosure. Federal Rule of Evidence 502 codified the rule that if counsel takes reasonable precautions against inadvertent disclosure, then they can request the return of the documents, either by the process set forth in the rules or by agreement.
- **Implement defensible processes.** When attempting to claw back documents, either under the terms of a clawback agreement or Federal Rule of Evidence 502, it is important

Since joining LeClairRyan in 2005, there's been no stopping Nina. She successfully rebooted her career, working her way up from a contract attorney to an associate and mastering the technology needed to navigate discovery and litigation in the digital age. Having been actively involved in all phases of discovery and spending much time in the courtroom, Nina understands the demands of litigation first-hand. Her practical skill set and understanding of the evolution of the litigation process make her an invaluable addition to DSP's team.

Outside the office, Nina enjoys spending time with her family and "chauffeuring" her two teenagers to and from their various sports and other activities. She serves as a member of her church's lay leadership and is actively involved in teaching Sunday school and planning fundraising events.

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to demonstrate that the production was, in fact, inadvertent. Being able to demonstrate that the team responsible for the production was operating according to best practices will go a long way toward proving the production was inadvertent.

- **Follow an inadvertent disclosure response plan.** Upon realizing that privilege has been produced, time is of the essence. Immediately inform individuals managing the case of the privilege disclosure. Inform the opposing party as outlined in the clawback agreement. If a clawback agreement does not exist, be mindful that a delay in notifying the opposing party may result in a privilege waiver under Federal Rule of Evidence 502.

There is no substitute for implementing and following best practices to ensure that privileged material is properly withheld during document productions. However, should a privilege disclosure occur, a timely and effective response will help mitigate associated risks. Put simply, prudence dictates preparedness.

back to top