POTENTIAL INCREASED USE OF SANCTIONS for E-DISCOVERY ABUSES AGAINST ATTORNEYS REPRESENTING ASIAN-BASED COMPANIES

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Despite amendments to the FRCP in 2006 that were intended to provide clarity on e-discovery processes and reduce the likelihood of sanctions, attorneys are requesting sanctions---and being sanctioned---at unprecedented rates. A recent King & Spalding survey of cases over the period 2008-2010 published by the Duke Law Journal suggests that attorneys and their clients can expect to face the threat of sanctions even more in the future.

A recent case, *Magana v. Hyundai Motor Am.*, 220 P.3d 191 Wash. S. Ct. (2009), in which Hyundai was sanctioned eight million dollars, one of the largest discovery sanctions ever against a company, especially reinforces the necessity for attorneys representing Asian-based clients to manage their e-discoveries with a high-degree of care and attention, or risk being sanctioned. A sampling of other related cases underscores the need for attorneys representing Asian-based clients to be especially vigilant in ensuring they comply with their obligations.

Attorneys representing Asian-based companies---often with offices located all across the globe---face language differences, schedule constraints, and the inherent challenges in communicating with overseas-based clients about what exactly needs to be produced, where searches need to be conducted, and when documents need to be produced. Attorneys are ultimately responsible for locating, reviewing, translating, and redacting documents if protected by attorney-client privilege, all often in a compressed period of time. Clearly, if attorneys do not adequately manage the legal and business complexities of Asian-language e-discovery---which are many---they will be even more vulnerable to sanctions in the future.

- **King & Spalding Survey Published by Duke Law Journal**

In the Duke Law Journal's article Sanctions for E-Discovery Violations: By the Numbers, the King & Spalding survey authors analyzed 401 federal cases prior to Jan. 1, 2010, in which e-discovery sanctions were requested, and 230 cases in which sanctions were awarded. Despite the 2006 FRCP amendments, discovery in the post-amendment world, according to the survey authors, is more expensive, more complicated, and more contentious than ever. As reported by Debra Cassens Weiss in "E-Discovery Sanctions Reach All-Time High for Litigants and Lawyers," in the ABA Journal article on January 13, 2011, the survey results paint a detailed picture of the increasing sanctions:

- The number of e-discovery sanction cases and the number of e-discovery sanction awards more than tripled between 2003 and 2004, from nine to twenty-nine sanction cases, and from six to twenty-one sanction awards. There were more e-discovery sanction cases (ninety-seven) and more e-discovery sanction awards (forty-six) in 2009 than in any prior year. In fact, there were more e-discovery sanction cases in 2009 than in all years prior to 2005 combined.

- Of the 230 cases in which sanctions were awarded, many involved severe sanctions of case dismissals, adverse jury instructions and significant money awards. Sanctions of

more than $5 million were ordered in five cases; sanctions of $1 million or more were awarded in four cases; sanctions over 250k in six cases; sanctions over 100k in over twenty-seven cases.

- Defendants were sanctioned for e-discovery violations nearly three times more often than plaintiffs. When sanctions were awarded, the most common misconduct was failure to preserve electronic evidence (90), followed by failure to produce (35) and delay in production (16).
- Lawyers were rarely sanctioned without their clients also getting sanctioned. Judges, it seems, often find fault in both clients and lawyers: clients for failing to turn over the goods, and lawyers for failing to provide proper oversight of the discovery process.

According to the survey authors, "Performing complicated tasks on a deadline creates the opportunity for incorrect or incomplete production, whether resulting from innocent inadvertence or intentional malfeasance." When e-discovery falls short, that can mean penalties for the producing party. "Some of the most severe cases…are towering reminders of the most severe sanctions—dismissals, multimillion dollar awards, and bar association referrals—that can be imposed for the most egregious misconduct." The survey authors say, however, that the greater concern for the average practitioner is the increasing willingness of courts to award sanctions "for e-discovery failings not rising to the level of intentional or willful conduct." In short, the more complicated e-discovery in a case---the greater likelihood that sanctions will be imposed, the more severe the penalty for violations, and the greater vulnerability attorneys face of being sanctioned.

- **Relevant Cases Involving Sanctions Against Asian-Based Clients**

Magana v. Hyundai

In *Magana v. Hyundai*, 220 P.3d 191 (2009), the Supreme Court of Washington affirmed the trial court's sanction award of $8,000,000 against the defendant, Hyundai, based on the plaintiff's injuries in an automobile accident that were allegedly caused by a defective seat design. The Court of Appeals of Washington had ordered a new trial due to issues relating to the expert testimony offered at the trial court. In the retrial, the plaintiff had requested that the defendant Hyundai update its prior discovery responses. In the earlier case Hyundai had represented that it had no similar claims of seat back failure for production and that the documents already produced were the only ones relevant to models with the same or substantially similar seat design. Forced to produce documents, however, in the retrial, Hyundai produced additional documents, including for the first time records from its consumer "hotline" database and nine reports of seat back failures involving other models with a similar seat design. The plaintiff moved for default judgment arguing that "it would be impossible to prepare a case with the other similar incidents just produced" and that certain evidence had been lost due to delay. In its defense, defendant claimed that it had been relieved of its obligation to produce other similar incidents of seatback failure because of a prior agreement and that any prejudice to the plaintiff was speculative.

In making its decision to affirm the trial court's sanctions award, the Washington Supreme Court's language is especially telling. Addressing the adequacy of Hyundai's search, the court stated:

> "A corporation must search all of its departments, not just its legal department, when a party requests information about other claims during discovery. Here Hyundai searched only its legal department. Hyundai's counsel told the trial court that in response to request for production 20…, Hyundai's search 'was limited to the records of the Hyundai legal department'; and that 'no effort was made to search beyond the legal department, as this would have taken an extensive computer search….' As the trial court correctly found, '[t]here is no legal basis for limiting a search for documents in response to a discovery request to those documents available in the corporate legal department.'"

The court also stated:

> "The trial court also found 'Hyundai had the obligation not only to diligently and in good faith respond to discovery efforts, but to maintain a document retrieval system that would enable the corporation to respond to plaintiff's requests. Hyundai is a sophisticated multinational corporation, experienced in litigation.' …Hyundai willfully and deliberately failed to comply with Magaña's discovery requests since Magaña's initial requests in 2000 and continued to do so."

This case is of special importance because it not only highlights the difficulties of e-discovery involving Asian-based clients but also represents one of the largest sanctions awards in the past few years---whether federal or state court. The challenges faced by Hyundai are the same challenges faced by every multinational company: where to store documents initially, how to retrieve documents, when to produce documents, and whether such documents, even when finally retrieved and produced, satisfy the court and requesting party's needs. Most tellingly, the language used in these cases is especially harsh---the sanctions were applied as much to punish the client in that particular case as it was to deter other multinational companies in future cases ("This result appropriately compensates the other party, punishes Hyundai, and hopefully educates and deters others so inclined.")

Juniper Networks

In *Juniper Networks, Inc. v. Toshiba Am., Inc.* No. 2:05-CV-479, 2007 WL 2021776, at 4 (E.D. Tex. July 11, 2007), the defendants, Toshiba, withheld source code as "unavailable" and indicated that it was in the possession of third parties, when in fact it had the source code and did not produce it because it believed it was not relevant. After examining the facts, the court found that the defendants willfully and intentionally violated the court's amended discovery order, and that their conduct constituted discovery abuse. As sanction for the defendants' conduct, the court awarded a variety of sanctions, including (1) limiting the defendants' time for voir dire to one-half of the amount of time that of the plaintiff; (2) Removing two juror strikes from the defendants, leaving them with a total of 2, while the plaintiff keeps four; (3) limiting the defendants' time for opening statements to one-half of the plaintiff's time; (4) limiting the defendants' time for closing statements to one-third of the plaintiff's time; (5) prohibited the

defendants from proffering any expert testimony or opinion from any source during trial regarding non-infringement, except through cross-examination of the plaintiff's expert witnesses; (6) Instructing the jury that the court found that the defendants intentionally withheld documents from the plaintiff in willful violation of a specific court order to the contrary, and that the jury is entitled to consider this fact when determining the credibility of any witness called to testify in this matter; and (7) Awarding attorneys fees and costs to the plaintiff that are attributable to the defendants discovery abuses.

Earlier Cases during the 1990's

During the 1990's, there were many cases in which sanctions against Asian-based companies were at issue, including *Malautea v. Suzuki Motor Co*., Ltd. 987 F. 2d 1536 (11th Cir. 1993) (affirming district court's judgment that the defendants continually and willfully resisted discovery, even deliberately withholding discoverable information that the judge had ordered them to produce, entering default judgment against defendants on issue of liability and awarding plaintiff's costs and attorney fees, fining each defendant $5,000 and each attorney $500); and *Japan Halon v.Great Lakes Chemical Corp.*, 155 F.R.D. 626, 627 (N.D. 1993) (Judge warned that "engaging in species of international hide and seek was unwise and could become very expensive, in light of the sanctions available under Rules 11, 16, and 37.") Although these cases were decided prior to e-discovery rules, they implicate many of the same issues as sanctions for e-discovery violations do, showing how easily sanctions can be imposed.

- **Challenges of Asian-language e-Discovery**

At a time when multinational companies conduct business across national boundaries and are subject to different laws in different jurisdictions, it is increasingly important for counsel, when advising overseas-based corporations, to consider a multitude of factors to ensure the best preparation for ongoing litigation or investigations. Challenges---such as meeting tight deadlines, understanding language differences, using hi-tech solutions, locating relevant evidence, and bridging cultural gaps---can quickly mushroom into larger challenges when the documents are located in multiple countries, written in multiple languages, and required to be turned over within a short time frame.

Attorneys advising their counsel need to ask a variety of questions and arrive at a variety of decisions that satisfy the court and opposing party's needs. It therefore behooves every attorney to be aware of the common pitfalls they may face and the immediate threat of sanctions in all aspects of e-discovery relating to Asian-based multinational companies---preserving evidence, producing it, and representing the completeness of that production to a judge or jury.

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