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The Importance of Being Prepared Before You Are Sued: Don't Let Broad Document Discovery Requests Take You By Surprise

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December 6, 2011

Scholar and author James P. Carse has written: "[t]o be prepared against surprise is to be trained.

To be prepared for surprise is to be educated." Although Carse's comment was in no way related to being a participant in a lawsuit, his words ring true for any business faced with litigation.

Whether a business is suing, or being sued, a key to keeping corporate sanity during the course of the lawsuit is both to be prepared against surprise and to be prepared for surprise as the lawsuit unfolds. This preparation should be part of everyday business activities. It should not wait until litigation is imminent. Knowing to expect surprises, and what surprises to expect, will help to minimize the impact of litigation on a business's day-to-day operations.

Many "surprises" in litigation occur during "discovery," the process by which the parties collect documents and information from one another to assist in preparing their presentation or defense of a claim. As part of this process, the parties exchange formal "document requests," asking for categories of "documents" in the possession, custody, or control of the opposing party.

One of the things litigants are least prepared for in discovery is the potentially overwhelming breadth of the other side's document requests. For example, in an action for breach of contract, many litigants might expect that the contract at issue and a few other documents concerning its negotiation might be the only documents relied on in the case. However, it is highly unlikely that the document requests will be so limited.

This article first discusses generally the breadth of discovery, and specifically document discovery, allowed and commonly utilized in litigation. It then focuses on a few specific types of documents to demonstrate the

potential for surprise and the importance of being prepared for it.

The Potentially Astounding Breadth of Document Discovery

There are two things about the court rules governing discovery in civil litigation ("Rules") that lead to surprisingly broad document requests. These are: (a) the generally broad scope of discovery permitted; and (b) the broad definition commonly utilized and accepted for the term "document."

First, a primary objective of the Rules governing discovery is to provide the parties to a lawsuit with ample opportunity to gather evidence to support their claims or defend their positions. To accomplish this result, the applicable Rules generally permit broad discovery.

In North Carolina, for example, the Rules of Civil Procedure provide that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…." This same Rule further provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence…." Thus, a party can request the production of documents even if they will not be admissible at trial.

The above standard places few limitations on the discovery a party may seek. Generally speaking, as long as documents relate to the claims or defenses in the case and are not protected by a privilege (such as the attorney-client privilege), a litigant should be prepared for a request from the opposing party seeking those documents.

Second, in addition to the expansive definition of what is "relevant" in discovery, the concept of "document" is defined to cover an array of items beyond those consisting of paper upon which text is written. For example, the Federal Rules of Civil Procedure provide that the term "document" can include:

> [A]ny designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form….

Thus, there are virtually no limitations on what types of information or items constitute "documents" that may be sought and, perhaps more importantly, the locations where those documents might exist. With advances in technology, businesses are constantly changing the way in which they communicate internally and externally. Each of these changes has the potential to create a new repository of discoverable documents. For this reason, discovery of electronically-stored documents (referred to as "e-discovery") is a common source of discovery shock even for those businesses experienced in litigation. Although e-discovery presents numerous issues beyond the scope of this article, broad discovery of electronic mail will be discussed briefly below.

To summarize, once litigation has begun, modern laws and the Rules grant (and subject) the parties to broad document requests. Under the Rules, the requests can and will be broad with respect to the subject matter about which they seek documents and with respect to the types of documents (papers, emails, text messages, spreadsheets, etc.) they seek. Finally, the requests will be broad with respect to the locations (e.g., any place where electronic information is stored) from which they seek documents.

Being Prepared for Broad Document Discovery

In light of the breadth of the document discovery permitted under the Rules, a business (and an individual, for that matter) that is prepared for wide-ranging discovery, and the inevitable surprises that will be a part of it, will be in a better position to present its case persuasively or defend itself vigorously if litigation rears its head. One aspect of being prepared means being aware, on an on-going basis, that almost all of the documents a business and its employees create may someday be sought by an opposing party in litigation. Another aspect of being prepared means making sure that the business preserves and organizes its documents and information so that it has access to that information once it is requested in litigation.

Below are a few examples of types or categories of information businesses may not anticipate producing in a lawsuit. These examples were selected to illustrate both the breadth of discoverable information and the importance of being prepared for broad discovery, even if litigation is not imminent.

Minutes of Board of Directors Meetings

One potentially surprising category of information frequently sought in discovery is minutes of board of directors meetings. As a general matter, subject to any applicable privilege, a board's minutes are discoverable under the Rules. A number of factors dictate what material is included in minutes and their level of detail. Their discoverability and the possibility that a judge or jury may be reading them one day are additional factors that should be considered.

For example, Company A is being sued by one of its former suppliers for improperly terminating the parties' contract. During a board meeting, Company A's board discussed the strategy surrounding the decision to switch suppliers. The former supplier has requested the minutes from that particular meeting.

In this hypothetical case, understanding that its board minutes might be subject to discovery can help Company A protect itself by knowing both what to include in the minutes and what not to include. If, for example, there was good cause to terminate the supplier's contract, Company A would know to document that good cause in the board's minutes, and the documentation can help Company A defend the claim by showing its good-faith reliance on the good cause. On the other hand, if Company A fails to document the good cause in its board's minutes, a judge or jury might find that Company A's argument that its termination of the contract was based on the good cause to not be credible. Worse still would be a scenario in which Company A's minutes failed to mention the good cause, but documented directors discussing unsubstantiated or improper reasons to terminate the contract. By not understanding that the minutes are discoverable and usable by the supplier, Company A might torpedo its own otherwise winning case.

Company Trade Secrets/Confidential Information

Most businesses today maintain confidential information, commonly called "trade secrets," that they consider valuable assets. Because they guard their trade secrets carefully, businesses are often both reluctant and surprised when this information is requested in discovery (especially when the lawsuit does not directly involve the trade secrets). However, trade secrets are generally discoverable.

Referring back to the lawsuit against Company A by its former supplier: The former supplier believes that price was the sole reason the contract was terminated and that it was not terminated for good cause, such as poor performance. Therefore, in addition to asking for minutes of board meetings, the former supplier also requests the pricing Company A is receiving from its new supplier.

However, Company A views this information as highly confidential due to its belief that the pricing formula used gives Company A a distinct advantage over its competitors. Company A is even more reluctant to disclose this information because the former supplier has just formed a joint venture with one of Company A's competitors.

Although Company A may attempt to keep this information from being discovered, it should be prepared in the event discovery is allowed. For example, Company A may need to be prepared to seek a protective order limiting disclosure of the pricing information only to the former supplier's attorneys and forbidding any further distribution.

Internal Emails

Although most businesses these days are aware that some level of email will be required to be produced in litigation, the surprise most litigants experience is the sheer quantity and scope of email that will be requested and required to be produced. Specifically, a business involved in litigation may be surprised by: (a) how many employees have email that can be "discovered" by the other side; and (b) how much "discoverable" email those individuals have generated.

In defending against the former supplier's lawsuit, for instance, Company A may be expecting that it will need to provide emails from those individuals who negotiated the contract with the supplier. However, the former supplier is likely to seek emails covering a number of other categories.

Furthermore, if Company A is claiming it terminated the contract due to the supplier's poor performance, the supplier may ask for any emails relating to customer complaints regarding the item that was being supplied. The former supplier may well also ask for emails that may disclose other reasons, apart from performance, that might have led to Company A's termination of the parties' contract including all intra-company emails that mention, in any way, the former supplier, the contract, or the supplier's products. In addition, the supplier also may seek emails regarding negotiations with the new supplier to determine whether price, as opposed to performance, could have been the determining factor.

The above examples demonstrate why being prepared for broad discovery requires a constant sensitivity to these issues, even when litigation is not imminent. Today, email communications are ubiquitous and often can win or lose a case. Employees should be routinely reminded that, in the event the business becomes involved in a lawsuit, their internal emails discussing a particular supplier, customer, competitor, or client are going to be scrutinized by the other side, the judge, and the jury and to exercise discretion and good business sense when drafting each and every email message.

Conclusion

One of the primary sources of aggravation for businesses involved in litigation is the extremely broad discovery provided for under modern laws and the Rules. This aggravation stems from both the increased costs and the interruption of day-to-day operations that occur when an opposing party is allowed to request voluminous documents as part of litigation. Worse yet, the documents discovered may unnecessarily harm a litigant's case if they are prepared without appropriate care.

Businesses that are aware of this process and possibility will be better prepared to deal with the inevitable

discovery surprises in the event they become a party to a lawsuit. And being prepared will be of great value in presenting the business's claim, or defending its positions.

For further information regarding the issues described above, please contact Joseph A. Schouten.

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