

# WHY YOUR COMPANY NEEDS A DISCOVERY COUNSEL

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This is the first in a three-part series of articles about the important role of discovery counsel on a successful litigation team. Part I provides an overview of the discovery counsel role, the qualifications of discovery counsel and the risks of entrusting the process to someone who isn’t properly qualified. Part II will evaluate the ethical standards emerging in discovery practice. Part III will conclude with several considerations to help clients maximize the value they obtain from their discovery counsel engagements.

**Introduction**

Saving money by adding a lawyer to your litigation team may seem counter-intuitive, but dedicated discovery counsel can help reduce costs and improve results. Whether you are a frequent litigant or facing a one-time dispute, dealing with multiple data custodians or just a few, there are several cost drivers and legal issues especially related to discovery that your trial attorneys may not be the most qualified to address.

The increasingly diverse and sophisticated technologies we use to generate and transfer data and the massive volumes of electronically stored information (“ESI”) we possess are creating multiple complications in civil discovery, resulting in a plethora of new case law. A well-qualified

discovery attorney understands these emerging technologies and the evolving jurisprudence in this increasingly specialized field.

Discovery counsel knows how to supervise the participants involved in discovery, how to apply advanced analytics (which can save tremendous amounts of money) and how to satisfy the increasingly precise quality-control standards by which discovery projects are judged. An experienced discovery attorney knows best practices and common pitfalls, and steers clear of unnecessary disputes. When deployed across multiple matters, discovery counsel can build institutional knowledge, repurpose valuable work product, enhance data security, insulate an organization’s litigation profile and become a resource for, rather than a drain on, the client’s IT department.

Simply put, discovery projects—especially the larger ones—should be overseen by dedicated discovery counsel, and not every litigator has this expertise. Many companies are bringing the role of discovery counsel in-house; others are engaging discovery counsel through outside law firms. One size certainly does not fit all, but pairing independent discovery counsel with strong trial teams has several distinct advantages that should not be overlooked.

### Qualifications of Discovery Counsel

“Discovery counsel” refers to an attorney whose legal practice focuses primarily on civil discovery and who routinely provides legal advice and supervision in this dynamic and technical field.

Qualified discovery counsel remain abreast of the rapidly evolving body of discovery-related case law, conversant with the data storage formats and information management systems encountered in typical corporate settings, and up to date on the latest tools and techniques available to facilitate discovery projects of all types. They are exposed to emerging trends and best practices as part of a community of practitioners and from serving different clients in a variety of settings. They understand how to quantify discovery burdens and to advocate for a proportional response.

Discovery counsel must be technically sophisticated enough to understand the practicalities of identifying, collecting, processing, filtering, reviewing and producing ESI. They must possess the project-management skills to establish and achieve budgets, deadlines and defensibility requirements. They must be cognizant of the main risks, cost drivers and economies involved in discovery undertakings, and must know how to control for them. They should be familiar with the fluid marketplace of discovery service providers and the contractual standards applicable to their services. They also should be capable of using statistical sampling and the metrics of precision and recall to evaluate the effectiveness of an information retrieval effort.

Finally, and perhaps most importantly, discovery counsel must be legally and ethically qualified to lead the

process—practicing, bar-admitted attorneys, senior enough to accept final responsibility for the results and able to supervise and validate the supply chain (of custody) that turns raw data into evidence before a tribunal.

### Responsibilities of Discovery Counsel

The main role of discovery counsel is to guide the minutia of discovery projects from beginning to end. This routinely involves engaging consultants and service providers, coordinating with client-side IT personnel and data custodians, identifying and securing their potentially relevant documents and data, and implementing a process to screen them for privacy, responsiveness and privilege. Ultimately, the discovery counsel is accountable for getting an end-product out the door—delivering a document production on-budget and on-time. Like a factory foreman or general contractor, the discovery counsel ensures that the necessary efforts and resources are planned, aligned and executed within applicable tolerances and limits.

Discovery counsel can support numerous case-related activities, such as:

- drafting litigation hold notices;
- scoping and documenting preservation activities;
- coordinating and overseeing data forensics;
- arranging pretrial conferences and negotiations;
- drafting document requests and objections;
- supervising keyword development and validation;
- reviewing team training, supervision and quality

control assessments;

- selecting and implementing technology assisted review and predictive coding tools;
- supervising discovery motion practice;
- overseeing vendor selections and contracts; and
- managing after-action reviews and feedback on lessons learned.

Additionally, a discovery counsel engaged for multiple cases can help clients develop defensible and consistent routines, and achieve continuous improvement in addressing the discovery needs of the organization.

### The Risks of Mismanagement

Historically, discovery has been handled by the lawyer or lawyers retained on the basis of their subject matter expertise to litigate a specific, substantive area of law. The intellectual property lawyer was hired for the patent infringement case, the tort lawyer for the slip-and-fall suit or the securities litigator for the IPO class action. Discovery was then folded into the general representation.

In practice, however, handing over discovery responsibilities to a senior trial attorney hired for a single case inevitably resulted in an *ad hoc* effort, and made a subject matter expert in an entirely different field (the one the case was about) responsible for a rigorous set of discovery tasks. What happened next often compounded this misstep.

Usually, a trial attorney retained to win a case would hand over the discovery responsibilities to a junior associate. Often this young attorney lacked experience and was not fully qualified to manage the wide range of responsibilities involved in these projects. The technical aspects of

discovery were outside the expertise of the senior litigators on the team, and the entire endeavor was often treated as an ancillary function and given too little high-level attention. The ethical requirement to competently supervise junior attorneys was frequently overlooked.

Another typical approach would be to engage a discovery consultant or expert of some type, or to entrust all or part of the discovery process to a vendor. This is especially problematic. These non-lawyer participants are not authorized to practice law. They cannot legally lead a discovery effort, and they cannot make important judgments impacting costs and results. Consequently, these participants have tended to approach projects conservatively, especially with no senior attorney available to ensure that their efforts were proportional or to advocate for a less costly approach. As with other projects delegated to junior attorneys, the ethical requirement to supervise non-lawyer participants was often overlooked, leading to cost overruns and a general lack of accountability.

The consequences of failing to have a qualified discovery attorney in charge of the effort can be disastrous. The well-known case of *Qualcomm Inc. v. Broadcom Corp.* provides an excellent example. There, Qualcomm's trial team failed to identify 300,000 relevant documents until after closing arguments. The company was hit with \$8.5 million in discovery sanctions, and the court referred Qualcomm's attorneys to the California State Bar for disciplinary proceeding.

Declarations filed by Qualcomm's attorneys in opposition to the sanctions reveal a fundamental staffing error. The lead trial attorney was a prestigious IP lawyer with 17 years of experience, but he admitted that he was "not involved in the details of day-to-day discovery." In fact, he did not sign any discovery responses and did not have "any role in collecting [responsive documents], in fashioning or implementing the investigation for such documents or in deciding where such documents would be sought and where such documents would not be sought." Even though he was the senior litigator and undeniably in charge of the case, he disclaimed all responsibility for discovery.

Until things went wrong, it seems nobody thought to ask whether the right person had been put in charge of this important part of the case. As it turns out, all of the "day to day discovery responsibilities" had been assigned to a mere fourth-year litigation associate. This young attorney, lacking competent oversight or support, was apparently left on his own to wrangle a massive discovery effort involving a complicated client with complex systems and archives and multiple data sources and custodians—a huge undertaking for any attorney, and one fraught with risk for the client and its law firm alike. It is not surprising that things went awry.

In the years since the *Qualcomm* decision, discovery has grown more complex, and discovery motions have become a weapon of choice for lawyers seeking to discredit their opponents.

Discovery projects remain fast-paced, they require careful coordination of client personnel, vendors, document reviewers and others, and notwithstanding some recent rulemaking at the federal level, the risk of sanctions and the distractions of discovery motion practice remain prevalent. In today's corporate lawsuits, discovery can quickly ramp up to terabytes of data and present serious complications for any practitioner, with ample room for error. Effective management of these projects is the critical to doing them right.

At the end of the day, the *Qualcomm* decision will be remembered for how the discovery process turned out, rather than the merits of the underlying case. Unfortunately, the company can expect its opponents to remind every judge how its discovery efforts once fell woefully short, and now warrant extra scrutiny. As a result, due to the bungling and mismanagement of this one case, Qualcomm now carries a tarnished litigation profile, which will impose indirect costs for years to come.

This was a hard lesson for a good company to learn, and it teaches that the discovery process is too costly, complex and risky to delegate to junior lawyers or unsupervised support staff. Such participants may have a role to play, but their efforts must be overseen by a senior attorney, who is authorized to practice law, competent in the type of discovery project involved, and to whom the authority to oversee the discovery effort has been clearly assigned.

