Workplace Data

Law and Litigation

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CHAPTER 9

WORKING WITH INFORMATION TECHNOLOGY EXPERTS*

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I. INTRODUCTION

This chapter examines the role of information technology (IT) experts in workplace-related disputes. A common theme throughout this chapter is that formulating and complying with electronic discovery (e-discovery) requests can be complex and highly technical—calling for the assistance of experts, and particularly early on in the process. This chapter explores fundamental issues associated with identifying specific types of experts needed and evaluating their credentials. While fundamental concepts discussed in this chapter can apply to any counsel involved in e-discovery, the vast majority of discoverable electronically stored information (ESI) often resides with the employer (who is usually the defendant in a workplace-related dispute). As such, much of the initial viewpoint of experts is from the employer counsel perspective. However, as noted elsewhere in this treatise,[1] individual (former) employee-plaintiffs can also generate a sizable amount of ESI in the form of personal communications via a variety of devices, such as smart phones and their own computers, as well as via online social media and e-mail accounts. Accordingly, this chapter also presents a discussion of experts from the plaintiff counsel perspective.

II. THE NEED FOR ELECTRONIC WORKPLACE DATA EXPERTS

Data in the workplace has changed drastically over the past 10 to 15 years. In order to understand the types of experts that you may need to retain to assist you with your data in the event of litigation, an investigation, or a regulatory matter, you need to first understand that times have changed; as a result, so too must attorneys, including those specializing in employment law.

[1] See Chapter 11.

Prior to the dawn of the technological era, data resided in paper form, with some information stored as microfiche or microfilm. The majority of such hardcopy records remained in the care, custody, and control of the company that created the data or its agents. Such records were maintained in boxes that were strategically labeled, shelved, and tagged for destruction based upon the company's "records retention" schedule.

The need for access to company information may have arisen around litigation or a regulatory investigation, theft of intellectual property by employees, wrongful termination claims, workplace injuries, and any other number of potential claims that may be lodged against a company. Once one of these triggering events occurred, it was customary to have individuals cull through their offices to search for responsive data, which may have rendered a small set of documents. This would be followed by a visit from outside counsel, who would personally inspect the offices, and if appropriate, company warehouses, to locate and retrieve additional relevant information.

From the inception of the discovery process, it has been well understood that information that was stored in paper form was discoverable. With the transition from paper to electronic documents, discussions and inconsistent case law arose concerning what electronic information must be produced, what capabilities were required for its production, the format in which such data must be produced, and the appropriate methods for collection, review, and production. As a result, the Federal Rules of Civil Procedure were amended to provide more clarity regarding the production of ESI as discoverable information.[2] Many states have followed the federal example and have either copied or in some way mirrored the federal rules to explicitly include ESI in the list of information that is discoverable during litigation. Additionally, many regulatory and investigatory bodies consider this type of information fair game and often seek it during the course of their investigations. However, the fundamental production duty placed on parties and their counsel has not changed under the amendments to the Federal Rules: if data exists, parties are

[2] In particular, see FED. R. CIV. P. 34(a).

required to identify, preserve, review, and produce those pieces of information that are relevant or responsive to discovery requests, absent a claim of privilege or other valid objection.

What has changed is the way in which corporate America, via its employees, creates data, and the kinds of data that exist. New technologies have drastically decreased the need for administrative and other clerical staff who once labeled and organized company records in compliance with corporate policies. Many attorneys and company executives no longer employ their own administrative assistants, or, oftentimes, the assistants who are employed are supporting multiple professionals. With the recession that hit in 2009, many companies were required to lay off large numbers of employees. This necessitated that the workforce that remained step up and take on new challenges and responsibilities. Thus, many workers are wearing far too many hats and working more overtime than ever before. This has resulted in far more clerical work being done by the professionals themselves than in years past. In the "old days," individuals used a Dictaphone machine and dictated their thoughts onto magnetic tape, which was then given to the clerical staff for typing and editing. Oftentimes, the document would be proofread and perhaps even rewritten before a final document was signed and distributed. In sharp contrast, employees today walk the streets, drive in their cars, or sit in coffee shops while preparing a business record typed with their thumbs on a PDA or tablet and summarily distributing the information via e-mail without a second thought, let alone a review by a second pair of eyes. However, these hastily written corporate communications are as much a business record as the twice-edited and rewritten documents of yesteryear and are often sought in the midst of litigation and regulatory investigations.

More recently, with the proliferation of electronic tablets and smart phones, companies have begun to adopt a "BYOD" (bring your own device) practice, wherein employees can bring their own devices to work and are allowed to use them to conduct business.[3] At first blush, this may seem like a great idea: the company can reduce its equipment costs and increase productivity. However,

[3] For a discussion of "bring your own device" (BYOD) practices, see Chapter 11, §VII.

further thought should be given to this practice, as it is fraught with such issues as:

(1) how records retention policies can be carried out;
(2) how to locate data on equipment to which the company has no legal right;
(3) how to secure intellectual property rights;
(4) how to retrieve and secure data from former employees; and
(5) the logistics of retrieving company data in the event of a regulatory investigation or litigation matter.

In addition to the differences between past and current practices regarding how thoughts are memorialized for communication, the manner in which they are maintained has also drastically changed. Records are no longer organized by color-coded, labeled folders; rather, business records are lumped in with the bits and bytes of communications stored on a computer operating system or computer network on any given day. One-size-fits-all retention schedules are impossible to establish for these "business records" that are composed of such disparate types of data. To understand the problems with evaluating these electronic "business records," you need merely look to your own e-mail inbox and note the volume of communications regarding the food left over after lunch in the conference room and those quick notes asking a loved one to pick up milk on the way home. These types of communications were not labeled business records 10 to 15 years ago because employees then relayed such informal, non-business communications by picking up a phone, and the companywide memoranda were filed in "file 13" and summarily destroyed. These changing practices have resulted in problems with today's "business records" that are twofold. First, there are far too many records. Second, many of the records contain information that, in fact, does not qualify as a business record.

Although workplace data has changed in many ways over the past 10 to 15 years, parties continue to be under a duty to preserve relevant information. As explained in the benchmark case *Zubulake v. UBS Warburg LLC*,[4] once a party reasonably

[4] 220 F.R.D. 212 (S.D.N.Y. 2003).

anticipates litigation, it must suspend its routine document retention and destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.[5] In other words, the duty to preserve ESI is triggered when a party reasonably anticipates being sued. Unfortunately, there is no bright-line rule regarding when a situation constitutes a credible threat of litigation so as to trigger the preservation duty. Instead, each instance must be evaluated on a case-by-case basis, taking into account the business's sophistication and previous experience with litigation.

An organization is expected to be prepared to produce responsive information when litigation or a regulatory investigation occurs. Knowing what must be produced and how to retain, preserve, and collect that information for production requires specialized legal and technical expertise. This chapter is intended as a guide for organizations, corporations, governmental agencies, and the attorneys representing them regarding how an expert can be utilized during each step of the process of working with electronic data to be prepared for litigation or an investigation. Thus, the information provided below is generally applicable regardless of the attorney's organization. Section III.A. discusses the kinds of experts that are needed during various stages of the process and the roles they fulfill. Sections III.B. through D. discuss considerations when experts work with IT personnel who can provide invaluable technical assistance in understanding data locations and collection. Section III.E. discusses expert credentials and considerations in choosing an expert. Sections III.F. and G. deal with the reuse and destruction of data, and how experts may be beneficial in dealing with these specific issues.

III. THE KINDS OF EXPERTS THAT ARE NEEDED

A. Data Retention Experts

In order to effectively handle workplace data, it is important to have a clear understanding of the task at hand and have a complete inventory of all the locations of relevant information.

[5] *Id.* at 218.

In an effort to meet regulatory and legislative requirements, many companies have become proactive in their electronic data management, and are beginning to gain an understanding of their corporate network infrastructures and how their business records are maintained. Creating an inventory, also sometimes called a data map, is a critical first step to being prepared for litigation or an investigation—whether internal or regulatory—involving the organization. It is impossible to create a comprehensive data retention policy without knowing what information must be dealt with. This important step requires retention of an experienced expert who has training in the particular areas that affect the organization.

ABA Model Rule of Professional Conduct 1.1 requires attorneys to provide competent representation to their clients. The rule defines competent representation as the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Very few lawyers would be deemed competent in issues of data location and collection; however, that is not required by the rule. What is required for adequate preparation is inclusion of someone who is an expert in the areas in which representation requires expertise.

Data retention experts look at the nature of the business, the business need for ongoing future access to the data, and the potential exposure to litigation on a proactive basis to ensure that business records are maintained in compliance with business needs. They also assist the organization in identifying legal and regulatory requirements surrounding the various data types. Many documents (such as filings with the Securities and Exchange Commission and documents that fall under the requirements of the Health Insurance Portability and Accountability Act) must be retained for a certain period of time by law. The statutory data retention requirements may vary by jurisdiction or for each company, depending upon the company's characteristics.

Various data types may require specific retention periods, depending on the "useful life" of the data type. Retention experts understand what constitutes the useful life of these data types; knowing the useful life of a record is important to making a reasonable decision as to how long the record should be retained, and thus establishing a reasonable and defensible data

retention schedule. For example, accounting records may have an eight-year retention schedule, customer service call logs and recordings may be kept for a five-year period, and e-mail may be retained for a 60-day period. Moreover, a company with many diverse business units may have different retention periods for each: retention experts look at all business types to determine the proper retention period for each particular business unit, given all the requirements and circumstances. To compound the difficulty of this initiative, the same document may have a different retention period for each business unit within the organization. For example, any given document may have a retention period of one year for the sales team, three years for the marketing team, and seven years for higher-level individuals who are analyzing business trends or legal issues. So how can this be carried out? Data retention experts are familiar with technologies that will allow a company to meet these diverse requirements.

Oftentimes, organizations, their attorneys, and even inexperienced retention experts who are tasked with developing a data retention schedule pay little or no attention to the IT infrastructure of the organization. Ignoring the IT infrastructure of the organization can be a behemoth blunder. Two issues often arise when a data retention expert ignores the IT infrastructure. First, the retention periods applied to paper documents may not correspond with the electronic data. In other words, simply relying on the business record type without taking into consideration the storage medium and its IT infrastructure support needs may result in determining an inappropriate retention schedule for the record type: one which may not hold up to judicial scrutiny for reasonableness. Second, the company's IT capabilities may not be able to meet retention requirements established by a reasonable retention schedule. In that case, a data retention expert may be able to help the organization explore its options to meet its retention obligations. One option is for the company to increase its IT capabilities or to outsource its IT responsibilities. Another option, in some circumstances, is to work with the retention expert to craft a data retention policy that allows the organization to meet its responsibilities in a manner that consumes fewer IT resources. For example, many companies run a "brick-layer" backup configuration where data from disparate functional groups are

backed up on the same backup tape; thus, e-mail, accounting, and customer service data may all reside on the same backup tape. If each type of data has a different retention period, all of the tapes must be maintained for the longest period of time required by the various retention schedules. Therefore, if e-mail is retained with accounting data, both will be maintained for eight years as opposed to 60 days. This unnecessarily ties up vast amounts of IT resources to retain e-mail for an unnecessarily long period of time. Many companies today are looking for solutions in the area of information governance and are identifying ways to take a more holistic approach to managing their information.

When determining whether to hire a data retention expert, consideration must be given to the expert's technical understanding of the company's network infrastructure. While a retention expert may make a recommendation as to optimal retention periods for various types of data, in practice, the final decisions are generally left up to the company itself, often to the decision makers in the IT department. Furthermore, the IT department will frequently also determine how the retention requirements will be implemented. Therefore, it is crucial that the retention expert work closely with the IT department in a cooperative fashion, so that IT personnel fully understand and are supportive of the retention policy crafted by the expert. Finally, it is extremely beneficial to also involve the legal department in crafting the policy and making data retention decisions to ensure compliance, and for executives to consider possible budget issues. Understanding how each stakeholder within the organization may need access to the information, and for what time period, will go a long way in ensuring a successful implementation.

B. Litigation Readiness Experts

The responsibilities of litigation readiness experts are a bit different from those of data retention experts. They may be the same individuals in a process that needs to be undertaken, or they may be more technical in nature. Keep in mind that retention experts are looking at the nature of the business, the types of documents that are being created, and the retention periods assigned to different document types. Litigation readiness experts

are used in the next step in the process. They look at the identified document types, compare them to defined retention schedules, and identify where the data are physically located and what it will take to get access to that data. They work with the IT department to determine what is required to meet the retention schedules, as well as to ensure that business records are being retained in a way that enables cost-effective recovery. With so many companies merging, downsizing, and growing, today's companies often have no idea where their data are located, which individuals' data are stored on which servers, or where the various servers are even located. Many organizations have outsourced both IT assistance and backup systems to third-party service providers, some of which may be located outside of the United States or in "the cloud." This complex business operational organization can easily lead to a system that has not been designed to deal with the production requirements of litigation or a regulatory investigation, making compliance with legal requirements difficult if not impossible.

Litigation readiness experts, although usually but not necessarily attorneys, are also called upon to:

(1) identify the likelihood that an organization will be named in a regulatory or litigation matter;
(2) create a data map detailing the disparate locations and types of data within the organization;
(3) determine which data will most likely be sought in the event of a regulatory or litigation matter;
(4) assist in implementing an e-discovery task force and the processes as discussed below in this section;
(5) identify software applications and customized databases;
(6) look at ways to modify the network environment to ensure that data are efficiently maintained when a litigation hold is implemented; and
(7) establish processes and protocols on how data will be handled, including:
    (a) litigation holds;
    (b) collection processes, including forensic imaging of data and ensuring that internal IT staff are properly trained;

(c) document review protocols;
(d) selection of a service provider for handling data in the event of litigation or a regulatory matter, including conducting security audits and negotiating contracts; and
(e) identifying which law firms and specific individuals within a firm are prepared to handle electronic information, keeping in mind that the firm that may have served the organization well for many years may not be the right firm to handle the technology of today.

There are many ways that a litigation readiness expert can assist in saving money on a proactive basis in the event that such data are needed. It is common in certain network environments to see 50,000 to 100,000 employee e-mails sitting in one e-mail environment. This configuration can increase the costs associated with e-discovery for many reasons. First, it is common for individuals to have personal, nonbusiness communications in their mailbox. Second, it is common for individuals to work on more than one project during the workday. Additionally, only a fraction of the group's data may be required to be preserved as part of a litigation hold. However, lumping all the data together on a single backup system requires preservation of it all. Today, newer, more advanced technology allows organizations to house the data in a central repository, yet provide immediate and searchable access to the information that is needed for any given matter.

As mentioned above, litigation readiness experts can also assist an organization in the creation and implementation of an e-discovery task force and can define its processes. The role of an e-discovery task force is forward-looking to ensure future, continuing compliance with data retention and preservation policies. Future compliance with policies can be accomplished by such processes as a system for monitoring compliance and a program of regular training for both new and current employees that educates the employees about data retention policies and procedures. This task force should be comprised of professionals from multiple departments (e.g., legal, IT, human resources, business line managers, etc.) who can work collaboratively with

key personnel in each department to ensure that relevant information is identified, preserved, and produced in the face of pending litigation or reporting requirements. The e-discovery task force should be authorized to quickly alter a document retention policy in the event of an emergency to ensure compliance with record preservation duties.

Litigation readiness experts proactively assist in determining ways to isolate key individuals' data or data types that are regularly sought in the event of litigation or a regulatory matter. They are generally hired on a proactive basis to implement processes to ensure that the company and its counsel can locate, preserve, and collect data in a timely, cost-effective manner. They can work with counsel and the IT department to get a clear understanding of how to best structure the IT environment, taking into consideration the type of organization and type of litigation or regulatory matter that commonly arises. For example, if it becomes clear that the data related to one group of individuals are commonly sought, perhaps that data should be hosted and backed up separately from data that are rarely sought.

C. Preservation and Collection Experts

Preservation and collection experts are usually sought once an organization is on notice that litigation or a regulatory matter is about to ensue. It is advisable to seek these types of experts early on as opposed to late in the process. This may be the same expert that assisted with the litigation readiness evaluations, but it need not be. Two common scenarios are discussed below.

1. Litigation Readiness Scenario

Some companies have done a great job of retaining a litigation readiness expert, implementing the processes identified, and maintaining the records in the fashion recommended. These organizations are in a far better position than those that merely spent the money to hire the expert but inadequately implemented the expert's recommendations. In this prepared environment, a data preservation expert should meet with the members of the e-discovery task force, the in-house counsel, and the outside counsel. Because of the advanced preparation, the preservation

expert can easily be handed the "road map" of the network environment.

The primary responsibilities of a data preservation and collection expert include:

(1) determining where the relevant data are located;
(2) determining the volume of data that is required;
(3) recommending a reasonable preservation hold; and
(4) when applicable, assisting counsel in creating an argument for a reduction in the amount of data to be preserved and collected.

As to this last responsibility, such arguments can be based on relevancy or undue burden or cost, and often require evaluation by an expert. For example, to be successful, an undue burden argument in federal court must show that data are not reasonably accessible: an expert is often needed to objectively and knowledgeably determine what is reasonably accessible in light of the expert's prior experience.

2. Lack of Litigation Readiness Scenario

Unfortunately, this is the scenario that occurs far too often. In an effort to reduce costs, the organization may have either established a process for litigation readiness but failed to maintain it or may have failed to establish a process at all. In this scenario, a data preservation expert may be retained to assist the client in understanding and implementing many of the data-related policies and procedures that a litigation readiness expert would have assisted the organization with previously. Had this been undertaken on a proactive basis, it could have been done during a time when individuals were under less stress, had fewer time constraints, and were better able to make sound decisions. Being in the midst of litigation or a regulatory investigation is not the ideal time to have to start identifying the disparate locations of corporate data; at this point, the expert should be assisting counsel in understanding what data should be preserved for the matter, not scrambling to make up for a failure to establish the groundwork for foreseeable needs for basic information stored within the corporate IT system.

When the work is done in the haste of responding to impending or ongoing litigation, the expert may recommend that a broader preservation hold be implemented rather than running the risk that relevant data might be overlooked. However, this situation is not ideal, and may cost the company in several ways. First, data may be lost in the normal course of business while the preservation hold is being issued. Second, an overly broad preservation hold may result in holding far too much data, which increases the costs of IT resources by creating and storing the additional backup tapes and increases the potential costs of searching those backup tapes for responsive data. Lastly, retention of too much data and the resultant additional time required on both sides of the litigation to deal with the overload may increase the likelihood of a spoliation sanction for late production, as the preservation expert is attempting to work with counsel under tight time constraints to understand the environment; identify and locate the relevant data; release irrelevant data; and determine the most cost-effective manner in which to collect, process, and produce the data. During this time of analysis, counsel may have made good-faith representations to the opposition, the court, or the investigative body that are impossible to carry out during the time agreed, if at all.

3. The Bottom Line

Every business is exposed to the possibility of a regulatory or litigation action, and acting proactively will save companies time and money in the long run. Regardless of the company's level of advance preparation, retention of a skilled data preservation expert once notice of litigation or a regulatory investigation is received is key. Companies and the attorneys representing them must make sure that the experts they have selected fully understand the matter, the network environment, and how to best help control costs without jeopardizing the end goal of retaining and preserving responsive data.

It is critical that companies and their attorneys have someone on their team who is adequately trained in the unique issues faced by organizations attempting to deal with data in an electronic format. Mistakes can happen: no system is perfect, and no person infallible. Discovery misconduct in dealing with

electronic data, even stemming from negligence, can lead to a variety of sanctions, including an adverse jury instruction, an adverse inference, monetary sanctions, and, in extreme cases, even default judgment. Since the Federal Rules of Civil Procedure amendments went into effect in December 2006, there have been numerous cases outlining the repercussions that affect legal teams that either are unprepared to deal with ESI or deal with it in an insufficient or inefficient manner. For example, the court in *In re September 11th Liability Insurance Coverage Case*[6] imposed a $1.25 million sanction for discovery violations related to the nonproduction of an essential document.

Some organizations may attempt to rely on the protections of what has been dubbed the "Safe Harbor" clause. Federal Rule of Civil Procedure 37(e) grants a limited amount of protection from sanctions in situations where destruction of information is caused by the routine, good-faith operation of an information management system. However, this provision fails to cast a large net, and most courts faced with inadvertent destruction impose sanctions based on the parties' failure to implement a litigation hold and suspend routine document destruction upon reasonable notice of litigation. For example, the court in *Doe v. Norwalk Community College*[7] refused to apply the Safe Harbor clause and issued an adverse jury instruction where the party failed to act affirmatively to prevent the operating system from destroying relevant information.

These cases outline the importance of being prepared for litigation or regulatory investigations in the new face of workplace data. It is not expected that every organization will have the knowledge to handle issues involving electronic data overnight, or on its own. However, it is important to be sure that someone on the team does have the requisite knowledge and is able to offer guidance that meets the business needs of the organization, while preparing the team for litigation, both existing and future. As previously mentioned, these experts can defend the reasonableness of the organization's preservation efforts against sanctions in court should relevant data inadvertently be destroyed.

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[6] 243 F.R.D. 114 (S.D.N.Y. 2007).
[7] 248 F.R.D. 372 (D. Conn. 2007).

D. Technical Assistance in Understanding Data Locations and Data Collections

The experts retained by an organization to guide it through the intricacies of handling workplace data at each stage of the process will need to work closely with the company's IT department. Established IT departments will already have a wealth of knowledge in dealing with an organization's electronic data and are an invaluable resource. They are often referred to as the "internal expert."

There are generally two types of IT departments: those that are internal to the organization and those that are outsourced. As noted earlier, in an effort to curtail administrative overhead, many corporations have outsourced their IT departments to one degree or another; again, this could mean as little has been outsourced as the backup environment or the help desk, or it could mean that the entire IT infrastructure has been outsourced.

It is important in any litigation or investigatory action to understand all of the locations of data, and this task can become very daunting if the company is unable to find the right people among its employees or consultants to provide that information. Outsourcing this work overseas creates additional difficulties with the differences in time zones, languages, and laws. The use of experts for each type of configuration are discussed separately below.

1. Internal IT Structure and the Internal Experts

For companies with an internal IT structure, the internal experts are critical to the company's ability to understand and identify locations of information; they are "the keepers of the key to the kingdom."

Some organizations retain qualified staff to handle data collection properly. In this situation, the attorney's job (regardless of the IT configuration of the company) is to understand the nature of the case, the locations of relevant data, and the types of data required, and then to work with the IT department to make sure that IT personnel can accurately collect the data. It is wise to personally meet with the IT representatives involved in the matter, since some of the biggest mistakes that can be

made in an e-discovery matter relate to improper identification and collection of data. Attorneys should also be working directly with their client's IT staff who are involved in collection. It is important to effectively communicate with IT personnel, using language and terminology that both types of professionals can understand and agree on, about the scope of and best practices to use during data collection. Partnering with a data preservation expert can help ensure proper preservation, collection, processing, and ultimately production of the data needed for the matter.

Attorneys have a tendency to say, "I want it all." This language, to an IT expert, may and can be taken literally. Chances are the attorney does not really want everything. What the attorney is really looking for is just that which may be potentially responsive to the matter. To IT personnel, however, all literally means *all*. Thus, it is extremely important that the attorney effectively communicate with IT staff to understand what they have, what data actually are needed, what is required for preservation, and the best process for collection.

It is important to make sure that IT personnel have identified all locations of data, including informal, individual-employee sources. It is only then that attorneys should look for problems or issues. For example, if the IT department indicates that there is an auto-delete policy for e-mail after 14 days, the attorney's next step would be to identify whether and how employees manipulate their inboxes to get around this policy. The attorney may find that one person prints out her information, another burns it to a CD, and yet a third may download the data to a USB device and take it home for safekeeping.

After data source identification, the next step is data collection. Part of the function of the IT department is to enable employees to perform their jobs by offering the best available technology. The IT department's responsibilities include maintaining the network, loading updates on desktops and servers, and properly backing up the environment to ensure preparation for potential disaster. Most individuals are not trained on collecting electronic information for litigation or a regulatory matter. Likewise, most IT infrastructures are not equipped to absorb the time that will be needed to assist in the data collection. IT staff have regular, full-time jobs. The IT department may already be

understaffed, and litigation or a regulatory issue only adds to their workload. Oftentimes, corporate executives have come to rely on these individuals, erroneously believing that they can do anything. Attorneys need to make sure to inquire into the skill set of the IT staff and their time available to assist in data collection, based on a careful estimate of the likely time commitment required for anticipated tasks likely to be involved in dealing with the matter.

When it comes to data collection, attorneys should also be sure to inquire into the specifics, rather than assuming that the IT staff knows how to properly collect data. It is very important to walk through the entire data collection process with the staff. If the attorney is not fully educated in adequate data collection procedures, he or she should bring along a data preservation and collection expert to this meeting to ensure that the process meets industry standards. This is one area in which huge mistakes can be made. Attorneys must constantly remember that electronic workplace data are fundamentally different from the paper data of yesteryear, and require special expertise to properly collect without risk of inadvertent destruction. If the data are improperly collected, an attorney may not be able to use the data in a matter, or may be able to do so only at a huge additional cost. All too often there is no going back, as was possible in the days of paper records if a scanning job went poorly.

After the attorney has identified the process that will be used to collect the data, it is important to also audit the process itself. For example, if the IT department has identified a process whereby individuals do a "self-pull" of data and transmit that data to the server, after which the IT department collects the data from the server, what process is going to be used to ensure that metadata is not changed? Additionally, how does the IT department plan to organize this data? Is it going to lump all the data together, or provide each individual with his or her own "bucket" for the information? How is the attorney going to make sure that the individual actually pulled all of the data that was relevant? When collection is done in an ad hoc fashion without a distinct and established process for every custodian to uniformly follow, there is an increased likelihood that future review of the production set will not include all responsive data as required by the

preservation duty. Each of these elements needs to be considered to effectuate an efficient and accurate collection.

2. External IT Structure and the External Experts

As discussed above, in an attempt to reduce costs, many organizations have outsourced some degree of their IT resources, from just the backup environment to the entire IT environment. This adds a huge wrinkle to the task of not only identifying locations of information but also getting the data collected. The same obstacles discussed above for the internal expert also apply to the external expert. However, depending on what exactly is outsourced and where, the outsourcing can create additional major issues that require expert consideration. For example, when IT functions are outsourced, who is going to testify as to the manner in which data were stored and preserved and the processes used to collect that data?

The outsourcing scenario is an area where data are often improperly handled. Sources of data can easily be overlooked, and miscommunication may thwart understanding of the collection process. Outsourcing IT functionality does not release the organization from its duties to properly identify, preserve, and collect relevant information. In this instance, it may be even more important than ever to engage a data preservation expert to ensure that the manner in which data are being collected meets the needs of the matter.

3. International Data

The laws overseas regarding handling of data are very different from those in the United States. Part V of this treatise provides brief summaries of many countries' requirements. For example, many countries in the European Union and Asia have strict data privacy laws. These foreign laws must be considered when a matter involves the collection and review of data that are not located within the United States. In the international context, it is important to identify whether the law firm and the service provider even have the legal authority to collect and review the data. Attorneys should also consider whether the circumstances require a release to be signed by the individuals whom the data

concerns, as required by many countries' privacy laws, and if so, whether that release is sufficient to extend to the service provider. For example, the Safe Harbor agreement between the United States and the European Union allows for the transfer of data in certain circumstances where private data might otherwise be non-transferrable. However, before rushing off to Europe to collect data, it is important to retain an expert that is well versed in the intricacies of the Safe Harbor agreement and is fully able to advise the organization on its particular issues.

E. Selecting Experts

1. Credentials of Experts

Another major obstacle that an attorney faces is ensuring that he or she has selected the right expert for the job. In balancing due diligence in representing a client with the "cost consciousness" of clients, mistakes can be made. Unfortunately, there is not a standard credential or degree that an expert must possess in the areas identified above, although such a credentialing system may be on the horizon as the data preservation and collection industry fully matures. Because there is not currently a uniform credentialing system, it is critically important for attorneys to talk to other attorneys in the industry, do their own research, and educate themselves on the reputation and experience of available experts to ensure that they are not selecting an inadequate expert based on poor information.[8]

When a new individual has to be hired, attorneys, needless to say, must interview the experts that they are considering. The following are some selection-process considerations based on the type of expert one is dealing with.

2. Selection Process Considerations by Type of Expert

a. Data Retention Experts

Make sure that the data retention expert candidates are experts in the area of the client's business. This cannot be a

[8] *See* ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW & PRACTICE ch. 43 (2d ed. 2012).

one-size-fits-all policy. Are they accustomed to interviewing employees to identify problems in the existing processes? Do they identify what employees are actually doing with their data? What are the workflow processes? How do they plan on differentiating between paper and electronic data types? Can the organization implement the processes that they recommend? Do they have references from companies that are similar to the size of the client's organization and in a similar industry?

Keep in mind that the retention expert may not be the person that is going to be working through the issues of preservation and/or collection and processing information with the company and attorney. And as discussed in Section III.A. above, the expert may recommend establishing policies that the company will ultimately choose not to follow or that simply do not turn out to be workable given the IT environment. Thus, not only is choice important, but so is ongoing monitoring and coordination following the hire, to deal with such issues proactively.

b. Litigation Readiness Experts

When choosing a litigation readiness expert, consider former testifying experience in this area of practice, familiarity with the time constraints of litigation or a regulatory matter, how well versed candidates are in a technical understanding of not only the client's environment but also the standards in the industry for the collection and processing of electronic information.

c. Preservation and Collection Experts

Many of the same considerations listed above need to be considered when selecting preservation and collection experts. The primary difference is that these are the individuals who need to take all of the processes that the others have implemented and make sure that the data needed for a particular matter are preserved and collected in a sound, defensible manner. They must have a clear "big picture" understanding of such issues as chain of custody, proper collection techniques (from the IT perspective, e.g., preserving metadata), spoliation, protection of privileged information, etc. Thus, attorneys should interview these individuals very carefully. They may be the most important persons retained in a matter.

F. Reuse of Information

A critical item to consider in the handling of workplace data and determining whether it is necessary to retain an expert is the likelihood that the organization will be called upon to reuse such information. Selection of an expert may depend in part upon their experience and ability in retaining data so that it can be utilized in the future. For example, in a regulatory investigation of a publicly traded company, what amount of data will need to be reused in the event that a shareholder action later ensues? Will a different law firm be selected for such a future event? Will different experts be selected? How can the company leverage the same work product from one matter to another?

Where there is a likelihood that data will need to be reused, an expert should be reviewing with the company and its attorneys the options available to make sure that reuse of the data in future matters is provided for, and as economically as possible. Some items to consider are (1) whether a broader preservation hold and/or collection should be instituted in order to collect all data that might be needed in future matters, and (2) the possibility of using broader filtering criteria that will result in more information being processed in the first instance to reduce the costs associated with refiltering the data in a later instance. The expert should be working with the company and its attorney to develop a sound strategy that considers future use of the data.

Data reuse is a particularly important consideration for companies that have certain individuals or data types for which information is sought on a regular basis, for instance, insurance companies. In such situations in particular, the establishment of a database of information that can be monitored and tracked from one matter to another may be useful to the client. For example, a manual titled the "Adjusters Guideline for Payment of Claims" or other training documents for the payment of claims could—and probably would—be sought in most cases of failure to pay claims that may arise. A centralized database of this information and any changes to it over time will streamline data production and reduce costs associated with preservation, collection, handling, and reviewing of such data. Experts in this area can assist the attorney and client to work though the logistics in handling data that are needed on a repetitive basis.

G. Destruction of Data

Oftentimes, even after a preservation hold has been released, the data continue to be preserved. This may cause issues later when such information is sought and still exists despite a destruction policy, causing havoc in the middle of a matter. This usually occurs well after assurances have been made that such data do not exist. An expert can assist with establishing a process by which all data sources are verified, business needs for retention and destruction of certain types of information are considered, a process for preservation is implemented, and the data are eventually destroyed in compliance with the retention schedules that are implemented.

In such situations it is important to consider all possible locations of data in addition to that maintained by the organization, such as prior law firms, service providers, and former employees. As a side note, it is a good idea to review an organization's data retention policy for departing employees. Experts can assist in determining the best manner in which to establish processes that ensure that data that are no longer needed are not left hanging around.

Another issue that may arise for companies that have multiple ongoing litigations is that they seem to keep everything. Does anyone really need to keep everything? It is extremely doubtful that everything will be relevant to any future matters.

Working with the expert to identify the varying data types can go a long way in determining its probative value for future matters. For example, the e-mail telling a loved one to pick up milk is most likely not a business record and is never going to be sought. Thus, an expert can assist the client in implementing strategies to systematically remove or delete information on a regular basis that is not a business record. This requires an evaluation of the organization and an understanding of what constitutes a business record for the particular organization. By utilizing experts to proactively assist in establishing processes that are followed, the client will reduce the volume of data that has to be preserved, collected, processed, reviewed, and ultimately produced, thereby reducing the overall costs of litigation.

Finally, organizations that are looking at ways to eliminate data that is past its useful corporate life—as well as data that

was never corporate information—should take into consideration the potential for loss of "Corporate eMemory," that institutional knowledge that is gained by individuals as they conduct themselves on behalf of the organization. With today's technologies for eliminating information, consideration needs to be given to the corporate benefit of finding and learning from corporate data. Imagine a company with multiple divisions. Perhaps a study done by one division could benefit another. The ability to search across all of a company's data could be valuable.

IV. PLAINTIFF COUNSEL'S USE OF EXPERTS

Unlike the scenarios outlined above, the typical plaintiff counsel in an employment law case is not dealing with years of stored data and elaborate and varied networks that are accessible by others who have the potential to destroy information, whether inadvertently or not, and harm the case through loss of critical information and/or open the client, and perhaps counsel as well, to a spoliation charge or sanction. Primarily, the plaintiff is working from a much more basic need to get information from and understand the information provided by the employer, who typically has most if not all of the ESI in any given case. It should be noted, however, that, as discussed in Chapter 11, plaintiffs' electronic footprints are expanding both personally and professionally with social media, smart phones, and the like, and an expert may be useful in helping counsel to understand all of the areas and devices to explore with a client when seeking to review and produce documents in response to a defendant's discovery request.

Should an IT expert be needed, it is necessary to have someone who is a creative thinker who can assist in developing discovery questions, search protocols and/or methodology, production formats, and search terms, as well as who can walk plaintiff counsel linearly through the systems that are being mined for this data. The use of such an expert early can keep costs and time of discovery down in the long run, as noted below, and can be a solid "arrow in the quiver" should plaintiff counsel wind up in discovery battles.

A. The Value of Early Use of Experts

One of the first considerations from the plaintiff counsel's perspective will generally be the cost of the discovery process and the expert. Often plaintiff counsel cannot truly answer the first without the second. This means that it is usually a good use of time and resources to consult a potential expert "up front" in order to get some understanding as to what the case or potential case may require, and the expense that those needs are likely to generate. To that end, a trustworthy, well-schooled, and well-tested expert is an invaluable resource to have at the ready from the beginning of a case through to trial.

Early use of experts in cases can begin with gathering information about the potential defendant's internal systems and policies that will allow plaintiff counsel to better understand where the real "goldmine" of information lies in the case and what the approximate cost might be to retrieve it. In line with this early use of experts is the benefit of using them during or to prepare for Rule 26 meet-and-confer conferences.[9] This practice generally assists both sides in figuring out the playing field of e-discovery and ESI at issue in a case, as well as the potential cost, difficulty of accessing the materials, search format or methodology, and production formats. It also helps plaintiff counsel to avoid agreeing in discovery to protocols or production formats that will not necessarily provide "full" information—i.e., PDF or TIFF files versus native file formats—in situations where a defendant may have the use of an in-house expert to assist it in offering a discovery plan that may be more to the benefit of the defendant than the plaintiff.

This early use of experts can also be leveraged in Rule 16 conferences with the court where the parties will have used experts to identify the ESI that exists in an employment dispute, where that ESI is located, the burden and cost of accessing the ESI, and whether the parties are complying with their preservation obligations. This early use of experts will allow the parties and the court to be very focused on the discovery timeline and

[9] See Chapter 3, §III.C.

to identify and deal with any issues up front to avoid delays and unnecessary discovery fights later in the case. This will also allow plaintiff counsel to craft focused and measured discovery that will maximize the return of relevant and useful documents while also avoiding being buried in an avalanche of production from overbroad requests or, at the other extreme, receiving no production of data and multiple objections and needing to file motions to compel to get even basic discovery responses.

Often neither party engages an expert early in a matter for any number of reasons, including expense and lack of knowledge about e-discovery and/or about the ESI truly at issue in the case. Therefore, far too often parties find themselves in discovery fights partly as a result of lack of knowledge and planning. A key focus of these fights has been and continues to be the cost and burden of production of ESI. This is an area where expert input has become necessary to help clarify what the parties are truly asking for, where it exists, and the methods and cost of retrieval and production.

B. Use of Experts for Search and Review of ESI

Another area where plaintiff counsel would be well served in having an expert is in the search and review of forensic matters. Unfortunately, one of the more common uses of and needs for experts by plaintiff counsel is for forensic analysis of devices and systems where there is a possibility that evidence has been tampered with and/or destroyed. This realization often comes where plaintiff counsel's client possesses or has knowledge of a document that either is not produced by a defendant or is markedly different from the document produced by the defendant. Here it is necessary to engage an expert that not only is knowledgeable and practiced in performing forensic searches, but also has an impeccable record demonstrating he or she can be trusted with access to and handling of both information and systems of both parties.

It can also be very important to have an expert who can engage in a dialogue with plaintiff counsel and talk in plain-English terms about the ESI, systems, and information formats, so that anyone to whom plaintiff counsel in turn presents the

information can understand it as well. This understanding also allows the requests by plaintiff counsel for searches that defendants often feel are intrusive and unnecessary to be characterized in a way that will put the parties at ease and limit the need for further motions.

C. Use of Experts for Trial Presentation

One final area in which it may be useful to have an expert is less specific to the subject matter at issue in discovery: presentation at trial. Technology can be a huge asset to counsel; however, if improperly used and presented, it can be a huge distraction, at the least, or a case killer, at the worst. Experts can assist counsel both in preparing the evidence and in its presentation to the judge and/or jury. There are many services out there that can assist with the right technology and its use to present a winning case. Here too, these experts can be worth their weight in gold.

PILOT PROJECT REGARDING
INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

November 2011

The Federal Judicial Center is making this document available at the request of the Advisory Committee on Civil Rules, in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the contents as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

TABLE OF CONTENTS

Page

INTRODUCTION

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action provide a new pretrial procedure for certain types of federal employment cases. As described in the Protocols, their intent is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery." Individual judges throughout the United States District Courts will pilot test the Protocols and the Federal Judicial Center will evaluate their effects.

This project grew out of the 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rules for the purpose of re-examining civil procedures and collecting recommendations for their improvement. During the conference, a wide range of attendees expressed support for the idea of case-type-specific "pattern discovery" as a possible solution to the problems of unnecessary cost and delay in the litigation process. They also arrived at a consensus that employment cases, "regularly litigated and [presenting] recurring issues,"[1] would be a good area for experimentation with the concept.

Following the conference, Judge Lee Rosenthal convened a nationwide committee of attorneys, highly experienced in employment matters, to develop a pilot project in this area. Judge John Koeltl volunteered to lead this committee. By design, the committee had a balance of plaintiff and defense attorneys. Joseph Garrison[2] (New Haven, Connecticut) chaired a plaintiff subcommittee, and Chris Kitchel[3] (Portland, Oregon) chaired a defense subcommittee. The committee invited the Institute for the Advancement of the American Legal System at the University of Denver (IAALS) to facilitate the process.

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[1] Civil Rules Advisory Committee, *Report to the Standing Committee*, 10 (May 17, 2010).

[2] Mr. Garrison was a panelist at the Duke Conference. He also wrote and submitted a conference paper, entitled *A Proposal to Implement a Cost-Effective and Efficient Procedural Tool Into Federal Litigation Practice*, which advocated for the adoption of model or pattern discovery tools for "categories of cases which routinely appear in the federal courts" and suggested the appointment of a task force to bring the idea to fruition.

[3] Ms. Kitchel serves on the American College of Trial Lawyers Task Force on Discovery and Civil Justice, which produced the *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, 268 F.R.D. 407 (2009). As a result of her role on the ACTL Task Force, Ms. Kitchel had already begun discussing possibilities for improving employment litigation with Judge Rosenthal when she attended the Duke Conference.

The group worked diligently over the course of one year. Committee members met at IAALS for valuable in-person discussions in March and July of 2011. Judge Koeltl was in attendance as well, to oversee the process and assist in achieving workable consensus. In addition, committee members exchanged hundreds of emails, held frequent telephone conferences, and prepared numerous drafts. The committee's final product is the result of rigorous debate and compromise on both sides, undertaken in the spirit of making constructive and even-handed improvements to the pretrial process.

The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use a basis for discussion.

The Federal Judicial Center will establish a framework for effectively measuring the results of this pilot project.[4] If the new process ultimately benefits litigants, it is a model that can be used to develop protocols for other types of cases. **Please note:** Judges adopting the protocols for use in cases before them should inform FJC senior researcher Emery Lee, elee@fjc.gov, so that their cases may be included in the evaluation.

[4] Civil Rules Advisory Committee, *Draft Minutes of April 2011 Meeting*, 43 (June 8, 2011).

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INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

a. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action is a proposal designed to be implemented as a pilot project by individual judges throughout the United States District Courts. The project and the product are endorsed by the Civil Rules Advisory Committee.

b. In participating courts, the Initial Discovery Protocols will be implemented by standing order and will apply to all employment cases that challenge one or more actions alleged to be adverse, except:
   i. Class actions;
   ii. Cases in which the allegations involve only the following:
      1. Discrimination in hiring;
      2. Harassment/hostile work environment;
      3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
      4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
      5. Violations of the Family Medical Leave Act (FMLA);
      6. Violations of the Employee Retirement Income Security Act (ERISA).

   If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from this pilot program, that party may raise such reason with the Court.

c. The Initial Discovery Protocols are not intended to preclude or to modify the rights of any party for discovery as provided by the Federal Rules of Civil Procedure (F.R.C.P.) and other applicable local rules, but they are intended to supersede the parties' obligations to make initial disclosures pursuant to F.R.C.P. 26(a)(1). The purpose of the pilot project is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.

d. The Initial Discovery Protocols were prepared by a group of highly experienced attorneys from across the country who regularly represent plaintiffs and/or defendants in employment matters. The information and documents identified are those most likely to be requested automatically by experienced counsel in any similar case. They are unlike initial disclosures pursuant to F.R.C.P. 26(a)(1) because they focus on the type of information most likely to be useful in narrowing the issues for employment discrimination cases.

(2) Definitions. The following definitions apply to cases proceeding under the Initial Discovery Protocols.

a. ***Concerning*.** The term "concerning" means referring to, describing, evidencing, or constituting.

b. ***Document.*** The terms "document" and "documents" are defined to be synonymous in meaning and equal in scope to the terms "documents" and "electronically stored information" as used in F.R.C.P. 34(a).

c. ***Identify (Documents).*** When referring to documents, to "identify" means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent; or, alternatively, to produce the document.

d. ***Identify (Persons).*** When referring to natural persons, to "identify" means to give the person's: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(3) Instructions.

a. For this Initial Discovery, the relevant time period begins three years before the date of the adverse action, unless otherwise specified.

b. This Initial Discovery is not subject to objections except upon the grounds set

forth in F.R.C.P. 26(b)(2)(B).

c. If a partial or incomplete answer or production is provided, the responding party shall state the reason that the answer or production is partial or incomplete.

d. This Initial Discovery is subject to F.R.C.P. 26(e) regarding supplementation and F.R.C.P. 26(g) regarding certification of responses.

e. This Initial Discovery is subject to F.R.C.P. 34(b)(2)(E) regarding form of production.

PART 2: PRODUCTION BY PLAINTIFF.

(1) Timing.

a. The plaintiff's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Plaintiff must produce to Defendant.

a. All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant.

b. Claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. Documents concerning the terms and conditions of the employment relationship at issue in this lawsuit.

e. Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit.

f. The plaintiff's current resume(s).

g. Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law.

h. Documents concerning: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income

and benefits of subsequent employment. The defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

i. Documents concerning the termination of any subsequent employment.

j. Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

(3) Information that Plaintiff must produce to Defendant.

a. Identify persons the plaintiff believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

b. Describe the categories of damages the plaintiff claims.

c. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any. Identify any document concerning any such application.

PART 3: PRODUCTION BY DEFENDANT.

(1) Timing.

a. The defendant's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Defendant must produce to Plaintiff.

a. All communications concerning the factual allegations or claims at issue in this lawsuit among or between:
   i. The plaintiff and the defendant;
   ii. The plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s).

b. Responses to claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s), or the defendant's human resources representative(s), irrespective of the relevant time period.

e. The plaintiff's performance evaluations and formal discipline.

f. Documents relied upon to make the employment decision(s) at issue in this lawsuit.

g. Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
    i. Discipline;
    ii. Termination of employment;
    iii. Promotion;
    iv. Discrimination;
    v. Performance reviews or evaluations;
    vi. Misconduct;
    vii. Retaliation; and
    viii. Nature of the employment relationship.

h. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.

i. Job description(s) for the position(s) that the plaintiff held.

j. Documents showing the plaintiff's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.

k. Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.

l. Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.

m. Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.

n. Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action.

(3) Information that Defendant must produce to Plaintiff.

a. Identify the plaintiff's supervisor(s) and/or manager(s).

b. Identify person(s) presently known to the defendant who were involved in making the decision to take the adverse action.

c. Identify persons the defendant believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

d. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action. State whether the defendant has provided information to any third party concerning the application(s). Identify any documents concerning any such application or any such information provided to a third party.

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____
_____ DIVISION

_____,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. _____
	)	
_____,	)	Judge _____
	)	
Defendant.	)	

STANDING ORDER FOR CERTAIN EMPLOYMENT CASES

This Court is participating in a Pilot Program for **INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION,** initiated by the Advisory Committee on Federal Rules of Civil Procedure (see "Discovery protocol for employment cases," under "Educational programs and materials," at www.fjc.gov).

The Initial Discovery Protocols will apply to all employment cases pending in this court that challenge one or more actions alleged to be adverse, except:

i. Class actions;
ii. Cases in which the allegations involve only the following:
    1. Discrimination in hiring;
    2. Harassment/hostile work environment;
    3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
    4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
    5. Violations of the Family Medical Leave Act (FMLA);

6. Violations of the Employee Retirement Income Security Act (ERISA).

Parties and counsel in the Pilot Program shall comply with the Initial Discovery Protocols, attached to this Order. If any party believes that there is good cause why a particular case should be exempted from the Initial Discovery Protocols, in whole or in part, that party may raise the issue with the Court.

Within 30 days following the defendant's submission of a responsive pleading or motion, the parties shall provide to one another the documents and information described in the Initial Discovery Protocols for the relevant time period. This obligation supersedes the parties' obligations to provide initial disclosures pursuant to F.R.C.P. 26(a)(1). The parties shall use the documents and information exchanged in accordance with the Initial Discovery Protocols to prepare the F.R.C.P. 26(f) discovery plan.

The parties' responses to the Initial Discovery Protocols shall comply with the F.R.C.P. obligations to certify and supplement discovery responses, as well as the form of production standards for documents and electronically stored information. As set forth in the Protocols, this Initial Discovery is not subject to objections, except upon the grounds set forth in F.R.C.P. 26(b)(2)(B).

ENTER:

Dated:_____ _____

[Name]

United States [District/Magistrate] Judge

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action are designed to achieve the goal of more efficient and targeted discovery. If a protective order will be entered in a case to which the Initial Discovery Protocols applies, immediate entry of the order will allow the parties to commence discovery without delay. In furtherance of that goal, the Employment Protocols Committee offers the following Model Protective Order. Recognizing that the decision to enter a protective order, as well as the parameters of any such order, rests within the Court's sound discretion and is subject to local practice, the following provisions are options from which the Court might select.

MODEL PROTECTIVE ORDER

It is hereby ordered by the Court that the following restrictions and procedures shall apply to certain information, documents and excerpts from documents supplied by the parties to each other in response to discovery requests:

1. ☐ Counsel for any party may designate any document, information contained in a document, information revealed in an interrogatory response or information revealed during a deposition as confidential if counsel determines, in good faith, that such designation is necessary to protect the interests of the client. Information and documents designated by a party as confidential will be stamped "CONFIDENTIAL." "Confidential" information or documents may be referred to collectively as "confidential information."

2. ☐ Unless ordered by the Court, or otherwise provided for herein, the Confidential Information disclosed will be held and used by the person receiving such information solely for use in connection with the above-captioned action.

3. ☐ In the event a party challenges another party's confidential designation, counsel shall make a good faith effort to resolve the dispute, and in the absence of a resolution, the challenging party may thereafter seek resolution by the Court. Nothing in this Protective Order constitutes an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party specifically reserves the right to object to the use or admissibility of all Confidential Information disclosed, in accordance with applicable law and Court rules.

4. ☐ Information or documents designated as "confidential" shall not be disclosed to any person, except:

    a. ☐ The requesting party and counsel, including in-house counsel;

b. ☐ Employees of such counsel assigned to and necessary to assist in the litigation;

c. ☐ Consultants or experts assisting in the prosecution or defense of the matter, to the extent deemed necessary by counsel;

d. ☐ Any person from whom testimony is taken or is to be taken in these actions, except that such a person may only be shown that Confidential Information during and in preparation for his/her testimony and may not retain the Confidential Information; and

e. ☐ The Court (including any clerk, stenographer, or other person having access to any Confidential Information by virtue of his or her position with the Court) or the jury at trial or as exhibits to motions.

5. ☐ Prior to disclosing or displaying the Confidential Information to any person, counsel shall:

a. ☐ inform the person of the confidential nature of the information or documents; and

b. ☐ inform the person that this Court has enjoined the use of the information or documents by him/her for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.

6. ☐ The Confidential Information may be displayed to and discussed with the persons identified in Paragraphs 4(c) and (d) only on the condition that prior to any such display or discussion, each such person shall be asked to sign an agreement to be bound by this Order in the form attached hereto as Exhibit A. In the event such person refuses to sign an agreement in the form attached as Exhibit A, the party desiring to disclose the Confidential Information may seek appropriate relief from the Court.

7. ☐ The disclosure of a document or information without designating it as "confidential" shall not constitute a waiver of the right to designate such document or information as Confidential Information provided that the material is designated pursuant to the procedures set forth herein no later than that latter of fourteen (14) days after the close of discovery or fourteen (14) days after the document or information's production. If so designated, the document or information shall thenceforth be treated as Confidential Information subject to all the terms of this Stipulation and Order.

8. ☐ All information subject to confidential treatment in accordance with the terms of this Stipulation and Order that is filed with the Court, and any pleadings, motions or other papers filed with the Court disclosing any Confidential Information, shall be filed under seal to the extent permitted by law (including without limitation any applicable rules of court) and kept under seal until further order of the Court. To the extent the Court requires any further act by the parties as a precondition to the filing of documents under seal (beyond the submission of this Stipulation and Order Regarding Confidential Information), it shall be the obligation of the producing party of the documents to be filed with the Court to satisfy any such precondition. Where possible, only confidential portions of filings with the Court shall be filed under seal.

9. ☐ At the conclusion of litigation, the Confidential Information and any copies thereof shall be promptly (and in no event later than thirty (30) days after entry of final judgment no longer subject to further appeal) returned to the producing party or certified as destroyed, except that the parties' counsel shall be permitted to retain their working files on the condition that those files will remain confidential.

The foregoing is entirely without prejudice to the right of any party to apply to the Court for any further Protective Order relating to confidential information; or to object to the production of documents or information; or to apply to the Court for an order compelling production of documents or information; or for modification of this Order. This Order may be enforced by either party and any violation may result in the imposition of sanctions by the Court.

EXHIBIT A

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled _____ have been designated as confidential. I have been informed that any such documents or information labeled "CONFIDENTIAL – PRODUCED PURSUANT TO PROTECTIVE ORDER" are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

_____ DATED:

Signed in the presence of:

_____

(Attorney)

APB to Requesting Parties: Prepare for Proportionality

The most recent amendments to the Federal Rules of Civil Procedure (FRCP) follow a lengthy and contentious debate, particularly on the appropriate scope of discovery. While the renewed focus on proportionality might seem unruly and even unfair for requesting parties, counsel can navigate the revised rules successfully and help shape decisional authority by being well prepared, strategic, and agile.

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Ariana is Chair of the firm's E-Discovery Practice Group. She served as Chair of the Steering Committee for the Sedona Working Group I on Electronic Document Retention and Production for five years and is now Chair Emeritus. Ariana also is on the Advisory Board of Georgetown University Law Center's Advanced E-Discovery Institute and Executive Director of the Advisory Board for Cardozo Law School's Data Law Initiative. She is a Principal in a newly founded data hosting and management company, Meta-e Discovery LLC, which is a spin-off of the firm's litigation support and data hosting group.

The explosive growth of electronically stored information (ESI) has permanently changed the discovery landscape, with the concept of proportionality now taking center stage. The amendments to the FRCP, which take effect on December 1, 2015, include changes that transfer the proportionality factors previously found in Rule 26(b)(2)(C)(iii) to the scope of discovery in Rule 26(b)(1) with some modifications.

Many advocates, particularly those who represent plaintiffs, argue that these rule changes favor corporate defendants, by restricting the scope of discovery to alleviate the purported skyrocketing costs and burdens associated with preserving and producing ESI at the expense of achieving justice. Evidence of these alleged increasing costs, at least to the extent they pertain exclusively to discovery, is questionable.

Indeed, one study, conducted by the Federal Judicial Center and completed shortly before the most recent amendment process began, found that discovery worked well and at a modest cost

#NELA16 132

in most federal cases. (*Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules, 27-31 (2009)*; see also *Patricia W. Hatamyar Moore, The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees, 83 U. Cin. L. Rev. 1083, 1085 (2015)*; *Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. Rev. 286, 363 (2013)*.)

Rather than fixating on the inadequacies or unnecessary breadth of the amendments, or the frustrations surrounding the rulemaking process, counsel should arm themselves for the future by preparing thoughtfully and strategically for the imminent implementation of the revised rules. This article explores:

- The redefined scope of discovery under amended Rule 26(b)(1).
- Emerging efforts to influence how proportionality is interpreted, which generally reflect a defense perspective.
- Tactical tips for requesting parties and their counsel navigating the new discovery landscape.

REDEFINED SCOPE OF DISCOVERY

While counsel should carefully review the entire rules package, requesting parties in particular should pay immediate attention to the modified scope of discovery under amended Rule 26(b)(1). The revised rule permits only discovery that is "relevant to any party's claim or defense and proportional to the needs of the case."

The concept of proportionality in discovery is not new, and has been included in the FRCP since 1983, but it is more prominent under the recent amendments. Former Rule 26(b)(2)(C) permitted a court issuing a protective order to limit the frequency or extent of discovery based on certain proportionality factors that are now incorporated in amended Rule 26(b)(1). These factors are:

- The importance of the issues at stake in the case.
- The amount in controversy.
- The parties' relative access to relevant information.
- The parties' resources.
- The importance of the discovery in resolving the case.
- Whether the burden or expense of the discovery outweighs its likely benefit.

(*FRCP 26(b)(1)* (adding the factor requiring courts to consider the parties' relative access to information, and reordering the factors to list the importance of the issues at stake in an action first).)

The advisory committee note cautions that moving and reordering the proportionality factors "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations" (*2015 Advisory Committee Note to FRCP 26(b)(1)*).

By moving the proportionality factors into Rule 26(b)(1), the court and counsel must consider these issues at the outset of a case, as they focus on the scope of preservation and production, rather than simply in connection with a motion for a protective order. Further, the changes reinforce the parties' Rule 26(g) obligation to consider the proportionality factors in propounding discovery requests, responses, or objections.

UNBALANCED GUIDANCE

Some practitioners who had strong views throughout the amendment process and were not satisfied with the extent of the rule changes have continued their efforts to construct a new paradigm with a narrower scope of discovery. For example, some commentators have suggested that amended Rule 26(b)(1) provides courts with more ammunition to rein in overly broad discovery requests and to address the "misconception within the legal community that the rules allow for broad (and sometimes seemingly limitless) discovery." (*Brian K. Cifuentes, Proportionality: The Continuing Effort to Limit the Scope of Discovery, Metropolitan Corp. Couns., 17:21 (Mar. 2015)*; see also *Martha J. Dawson & Bree Kelly, The Next Generation: Upgrading Proportionality for A New Paradigm, 82 Def. Couns. J. 434 (2015)*.)

Others have gone further, suggesting that proportionality supports a cost-shifting rule that requires "a requester to pay some or all of the expenses resulting from its requests." These commentators have advised that this type of cost allocation "would also encourage practical cooperation among the parties." (*John J. Jablonski & Alexander R. Dahl, The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation, 82 Def. Couns. J. 411, 422 (2015)*.) The general rule that the producing party pays remains intact, at least for now (but see *FRCP 26(c)(1)(B)* (a protective order may allow for expenses to be allocated)).

It is similarly unsurprising that articles and seminars detailing best practices and proposed guidelines have emerged in attempts to influence how proportionality is interpreted. Most recently, the Duke Law Center for Judicial Studies released guidelines (Proportionality Guidelines) intended to foster proportional discovery (see *Duke Law Center for Judicial Studies, Discovery Proportionality Guidelines & Practices, 99 Judicature No. 3, 47-60 (Winter 2015)*). Working in tandem with the American Bar Association (ABA), the Duke Law Center for Judicial Studies embarked on a multi-city roadshow to discuss some of the new discovery rules, and specifically Rule 26(b)(1), and introduce the Proportionality Guidelines before the rules even became effective.

The Proportionality Guidelines were the result of a year-long drafting process that inspired tenacious advocacy by all sides. Notably, few, if any, of the roadshow panelists participated in the drafting process. Therefore, they lack the context necessary to educate courts and counsel on the most contentious aspects of the Proportionality Guidelines and the extent to which certain recommendations and best practices reflect compromises reached after vigorous debate.

For example, after much persistence by the plaintiffs' lawyers involved in the drafting process, the Proportionality Guidelines state the Rule 26(b)(1) amendments "do not alter the parties'

existing discovery obligations or create new burdens," including on the issue of cost-shifting (*Proportionality Guidelines, at 51, 54, 60*). However, the ABA's promotional materials for the roadshow declare that the amendments usher in "the most significant changes to discovery and case management practices in more than a decade" (see *americanbar.org*; see also *Andrew J. Kennedy, Significant Changes to Discovery and Case Management Practices, ABA Litigation News (Oct. 14, 2015)* (describing the new amendments as "the most significant change to federal civil practice in the last decade" and suggesting that proportionality "signals a sea change in the scope of discovery")).

If roadshow presenters seek to weaponize the Proportionality Guidelines to advocate for even greater restrictions than those proffered by the actual rule, they could undermine the collaborative and neutral advice that the Proportionality Guidelines purport to provide and thus limit their usefulness. In any event, the rule amendments and corresponding committee notes are the best and most reliable resources at this stage.

BEST PRACTICES FOR REQUESTING PARTIES

As one prominent magistrate judge advises, proportionality does not automatically preclude discovery. Instead, the proportionality factors "require lawyers and judges to approach the discovery process more thoughtfully." That means developing a discovery strategy that reduces the potential for successful proportionality objections. (*Hon. Craig B. Shaffer, The "Burdens" of Applying Proportionality, 16 Sedona Conf. J. __, 4 (forthcoming 2015)*.)

In other words, it is best to formulate a plan early. Requesting parties must develop strategies to ensure they can access the information they need and generate evidence to prove their case, while also complying with the proportionality factors. In particular, requesting parties' counsel should:

- Read the rules and the corresponding committee notes.
- Propose specific, targeted discovery requests.
- Guard against boilerplate objections.
- Discuss discovery scope and objections at the Rule 26(f) meet and confer to develop a proper discovery plan.
- Review guidance from the court.
- Seek assistance from more experienced counsel, if necessary.

READ THE RULES AND NOTES

Too often, lawyers (and even some judges) fail to read a rule's corresponding committee note. Instead, they focus on the text of the rule in isolation in an effort to influence decisional authority. The advisory committee spent many months refining amended Rule 26(b)(1) and drafting a note to provide guidance to counsel and the court on the intent and scope of the rule. Rule 26(b)(1) and its note should be read in conjunction with the other discovery rules and their notes, including, in particular, Rule 26(g).

TARGET SPECIFIC INFORMATION

Counsel must retire discovery requests that call for "all documents concerning, relating, referring, or corresponding to" a subject. These requests are certain to prompt a proportionality challenge and likely do not conform to required standards, including Rule 26(g) (see *Shaffer, The "Burdens" of Applying Proportionality, at 15, 32* ("counsel should avoid pattern or stock discovery requests recycled from past lawsuits even if that approach seems to hold false promises of cost-savings")).

Instead, counsel should:

- **Draft pointed and strategic requests.** Counsel should consider the types of information needed to prove the party's case and use clearly defined terms and detailed, targeted language when requesting that information. Counsel also should be prepared to articulate why that information is needed.
- **Specify the form of production.** Document requests should include clear definitions and technical specifications as to the form in which the information should be produced.
- **Deliver discovery requests as soon as permissible.** Under amended Rule 26(d)(2), parties may deliver Rule 34 document requests before the Rule 26(f) conference with opposing counsel. These early document requests place opposing counsel on notice of the types of information the requesting party will be seeking and should facilitate a cooperative dialogue to discern the extent of any objections.

REJECT BOILERPLATE OBJECTIONS

Amended Rules 26(b)(1), 26(g), and 34(b)(2)(C) make clear that parties may not make boilerplate objections stating that discovery requests are not proportional (see *FRCP 26(g); 2015 Advisory Committee Notes to FRCP 26(b)(1), 34(b)(2)(C)* (an objection must be stated with specificity)). Counsel must therefore read an adversary's responses and objections to discovery requests with a keen eye, and analyze her own requests with the same scrutiny.

When counsel receives boilerplate objections, she should promptly send a letter identifying any and all portions of the responses and objections that are noncompliant, and demand a revised set by a specified date. If opposing counsel does not comply, counsel should prepare to approach the court to resolve the matter. Counsel is best positioned to approach the court when she has a concrete record showing she has been proactive, engaged opposing counsel in a dialogue, and demonstrated a willingness to be flexible.

PREPARE FOR RULE 26(f) CONFERENCES

While additional guidance on applying the individual proportionality factors is anticipated, it is important for counsel to bear in mind that the factors will be applied differently across cases and, depending on the facts of a case, different factors might bear different weight. For example, a civil rights case may lend itself to a different analysis than a product liability case. Therefore, when preparing for a Rule 26(f) conference and formulating a discovery plan, counsel should think strategically about how each of the factors might affect the proportionality analysis. Counsel also should remember that amended Rule 26(b)(1) neither shifts the proportionality burden to the requesting party, nor directs that the burden resides exclusively with the producing party.

#NELA16 134

Counsel should come to the initial Rule 26(f) conference prepared to address what her client is seeking and why, or to elicit answers and information that will enable counsel to articulate those points in a discovery plan or during a court appearance.

When addressing the scope of discovery during the Rule 26(f) conference, counsel should:

- **Discuss objections based on burden and expense in detail.** If an adversary objects to the breadth or scope of counsel's discovery requests, counsel should use the Rule 26(f) conference as an opportunity to tease out the specific basis for the objections. Responding parties often have better information (and sometimes the only information) to support claims of undue burden or expense. Conversely, requesting parties are better positioned to explain why a request is important to resolve the issues and the ways in which the underlying information bears on those issues. (See *2015 Advisory Committee Note to FRCP 26*.)
- **Be wary of attempts to limit discovery to overly restrictive "core" issues.** Counsel should prioritize discovery requests to highlight information needed to prove her client's case, but should not, without experience and strategic purpose, agree to limit discovery to core issues. (Perhaps, in time, protocols for certain early core discovery, such as those used in employment cases, will become the norm. In most types of cases, however, these consensus-driven protocols do not currently exist.) While some phased or tiered discovery might be reasonable and acceptable in certain cases, core discovery might be an adversary's disguised attempt to impose additional restrictions on discovery that are not contemplated by amended Rule 26(b)(1).
- **Discuss preservation.** Rule 26(f) conferences should be iterative throughout the course of a litigation, and counsel should expect to address discovery issues on multiple occasions. However, counsel should vet any issues pertaining to preservation and production at the initial Rule 26(f) conference to prepare the discovery plan and avoid potential spoliation. Indeed, before the Rule 26(f) conference, counsel should identify issues warranting a discussion about preservation.
- **Document cooperative efforts.** Amended Rule 1 and the corresponding committee note contemplate cooperation among parties. Being cooperative from the outset can only serve counsel well. Counsel should document the steps taken to cooperate to assist a court, when reviewing the discovery plan or a discovery dispute, with evaluating the history of discussions among counsel in a way that pure argument might not show.
- **Consider strategic compromises.** Counsel should determine the extent to which she would modify requests, while reserving all rights, to demonstrate a willingness to cooperate (see, for example, *Hon. Elizabeth D. LaPorte & Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26, 9 Fed. Cts. L. Rev. 20, 68 (2015)* ("The party that can best support its position, and can offer the alternative that produces key information most cost-effectively, likely will prevail.")). This might involve offering alternatives, such as:
  - summary information with the right to seek greater detail or the underlying documents;
  - excerpts from a database or the creation of a report with certain data points, in contrast to all data points; or
  - a reduced number of custodians based on a transparent exchange of information on those custodians' knowledge and actions, with the right to expand the number.

In most cases, a discussion or dispute about proportionality should be the exception, not the norm.

REVIEW JUDICIAL GUIDANCE

Many courts and individual judges are attuned to the issues relating to proportionality. Some judges have established guidelines or best practices, and some have even opined on the application of proportionality (see, for example, *Shaffer, The "Burdens" of Applying Proportionality*; *LaPorte & Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*; *Hon. Paul W. Grimm et al., Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions, 37 U. Balt. L. Rev. 381, 383 (2008)*).

Counsel should become familiar with these resources and refer to them when conferring with adversaries and before approaching the court.

SEEK ASSISTANCE

A lawyer must recognize when she needs assistance and seek out seasoned advisors who are well-equipped to litigate proportionality disputes based on their experience with the rulemaking process or otherwise. When counsel is unprepared, inexperienced, or uninformed, there can be consequences beyond the immediate client or case. Counsel's missteps might inadvertently create bad law in the developing area of proportionality.

By enlisting the services of a more knowledgeable lawyer who has credibility in the field of discovery (including among adversaries and judges) and can help craft practical arguments, counsel can help to shape the law in a fair and reasoned way.

The views expressed in this article are those of the author and not necessarily those of Milberg LLP or its clients.

#NELA16 135

By || Ariana J. Tadler and Henry J. Kelston

What You Need to Know About the New Rule 37(e)

As the new federal rule on electronically stored information takes effect, plaintiff attorneys should pay careful attention to the text and the accompanying committee note to understand how the rule will affect their practices.

The proposal was reduced to a simpler and less ambitious rule designed to resolve a split among the federal circuits about the level of culpability required for sanctions for ESI spoliation.

The Federal Rules of Civil Procedure amendments, which went into effect on Dec. 1, 2015, include a new version of Rule 37(e) that sets out standards for imposing curative measures and sanctions for the loss or destruction of electronically stored information (ESI). The new rule emerged from a four-year process of discussion, drafting, public comment, and redrafting by the Advisory Committee on Civil Rules and its Discovery Subcommittee, beginning shortly after the Duke Conference on Civil Litigation in 2010. The rule was initially envisioned as a comprehensive framework, codifying the duty to preserve in litigation and the consequences for failing to do so. But obstacles, including the Rules Enabling Act, prevented this.

Even though many in-house and outside counsel had clamored for more substantial guidance on preservation, the proposal was reduced to a simpler and less ambitious rule designed to resolve a split among the federal circuits about the level of culpability required for sanctions for ESI spoliation. The new rule will likely affect few cases, and, in some, may lead to more onerous consequences for the spoliating party. Unlike earlier drafts that were considered and rejected, the final version of Rule 37(e) is only a modest adjustment in the developing law of preservation and spoliation.

The Rule's Evolution

According to the Advisory Committee's Report on the Duke Conference, "there was significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so."[1] A dominant theme at the Duke Conference was resolving a split among the federal circuits regarding the use of the most severe sanctions: Some courts authorized case-terminating sanctions or an adverse inference (a presumption that missing information would have been unfavorable to the party responsible for its loss) on a finding of bad faith, while others allowed adverse inferences based on negligent or grossly negligent conduct. Representatives of large corporations claimed that this split caused them to engage in expensive "over-preservation" to avoid the risk of severe sanctions—even for a mere negligent failure to preserve information.[2]

Based on input from the Duke Conference, the Discovery Subcommittee attempted to provide specific guidance on a broad range of preservation-related issues, such as when the duty to preserve arises, the scope of the duty, and the number of custodians who should be subject to a "litigation hold."[3] However, after two years of meetings, discussion, and many preliminary drafts, the subcommittee concluded that it faced insurmountable obstacles—including the Rules Enabling Act—in drafting such a comprehensive rule.[4] Instead, the subcommittee decided to draft a "consequences-only" rule limited to guidance for court action for failures to preserve ESI under the existing law.[5]

In August 2013, the Advisory Committee published a draft rule for public comment that was not well received—the proposed standards were criticized for being both too high and too low, and likely to create confusion. The draft rule distinguished between "curative measures" and "sanctions." If information that should have been preserved was lost, curative measures, such as ordering a party that lost information to obtain or develop substitute information, could be ordered. Sanctions could be imposed only if the information loss caused "substantial prejudice" *and* resulted from "willful" or "bad faith" actions, or if the loss "irreparably deprived a party of a meaningful opportunity" to present its claims or defenses.

Public comments highlighted that "the published proposal's approach of limiting virtually all forms of 'sanctions' to a showing of both substantial prejudice and willfulness or bad faith was too restrictive,"[6] unduly limiting district court judges' discretion to address the varied factual situations in which spoliation claims arise. After the public comment period closed in February 2014, the

PATRICK GEORGE/GETTY IMAGES

The New Rule 37(e): Failure to Preserve Electronically Stored Information

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Discovery Subcommittee concluded that the published draft rule needed an overhaul. It set about reshaping the proposal to resolve the circuit split while restoring the courts' flexibility to use other measures.[7]

Under pressure to produce a new draft for the next meeting, the subcommittee published a heavily revised proposal in the Agenda Book for the April 2014 meeting (the Agenda Book proposal). The Agenda Book proposal eliminated all references to sanctions and jettisoned the "willful or in bad faith" standard and the "irreparably deprived" provision.[8] The curative measures/sanctions duality was replaced with a three-level hierarchy for remedying a loss, with the type of loss dictating the remedy's severity.

In response to the earlier criticism that it had unwisely restricted judges' discretion, the subcommittee made significant additions to the committee note regarding the court's broad authority to act once a finding of prejudice is made. That note was included, with some alterations, in the final version.

The written comments criticizing the Agenda Book proposal focused on the absence of a clear culpability requirement for measures to cure information loss or to cure prejudice. The subcommittee again made substantial revisions between Apr. 10 and Apr. 11, and distributed by hand the new version to the Advisory Committee and present observers (including the authors of this article) just minutes before the Advisory Committee convened to consider the proposal. The committee note had not yet been revised to reflect these changes. The Advisory Committee unanimously adopted the proposal and decided against republishing the revised rule for public comment.[9]

Understanding the New Rule

The preamble section of the final rule includes three prerequisites before a court can take any action to address a preservation failure. The rule applies only when ESI that "should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." These provisions are significant changes from earlier drafts of the rule, but they do not represent substantial changes in the law. Spoliation is, by definition, the loss of information that should have been preserved.[10] Courts have long held that reasonableness is the standard against which efforts to preserve ESI are judged; perfect preservation is neither expected nor required.[11] If lost ESI can be restored or replaced through additional discovery, the court has the authority to order such discovery under Rules 16 and 26 and, thus, has no need to invoke Rule 37(e).[12] All three predicate conditions must be met; only then does the rule specify what the court *may* do.

In addition to satisfying the elements of the preamble, "prejudice" is required to obtain remedial or curative relief under Rule 37(e)(1). In contrast, under Rule 37(e)(2), which allows for the worst consequences for spoliation that are more akin to the formidable "sanctions" of the past, a showing of

Despite the brevity and simplicity of Rule 37(e) on its face—particularly compared with earlier versions—there will be no shortage of motion practice over its application.

"intent to deprive" is now required. The committee note explains that 37(e)(2) is designed to resolve the circuit split—it rejects the line of cases that allow adverse inference instructions for negligence or gross negligence.[13] This note is key to understanding 37(e)(1) and the extent to which, even under this prong, certain consequences might result:

> In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.

The note also explains that subdivision (e)(2), requiring the "intent to deprive" finding, applies to

> any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. *For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision.* These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice (emphasis added).

In other words, it is possible that if a party satisfies the preamble and can show prejudice, the jury might make an adverse inference on its own, based on the arguments and evidence presented.

The bifurcation of available relief and the requisite showings under Rule 37(e)(1) and (2) raise intriguing possible outcomes. For example, it appears that if Party A is prejudiced by Party B's loss of ESI, but is unable to persuade the court that Party B acted with the intent to deprive Party A of the information's use in the litigation, Party A has at least

For those looking only at the final version of the new rule, the long and difficult drafting process may appear to have been much ado about little; in reality, the full story is that of a potentially disastrous amendment averted.

two alternate routes that may result in an adverse inference drawn *by the jury*.[14]

Under 37(e)(1), if prejudice has been shown, both sides may present evidence and arguments to the jury about the information loss. The court may instruct the jury to evaluate the loss in light of the evidence and arguments. Alternatively, Party A may persuade the judge that the jury should decide whether Party B acted with an "intent to deprive" pursuant to 37(e)(2)—Party A need not show prejudice—in which case the jury will hear evidence from both sides about the information loss. The judge will instruct the jury that, if it finds that Party B acted with the intent to deprive, the jury may presume that the information was unfavorable to Party B. Regardless of whether the jury makes the inference, it will still have heard damaging evidence and arguments about the circumstances that caused the information loss.[15]

Open Questions

Despite the brevity and simplicity of Rule 37(e) on its face—particularly compared with earlier versions—there will be no shortage of motion practice over its application. Some of the issues are likely to include:

- What instructions may be given to a jury to "assist in its evaluation" of evidence and argument regarding the loss of information under 37(e)(1), such as when an "intent to deprive" finding has not been made? The committee note distinguishes between an inference based solely on the loss of information and an inference based on evidence about the loss of information. Is there necessarily a real distinction? How could a jury decide whether to draw an adverse inference without hearing evidence about the circumstances of the loss?[16]
- The committee note instructs that, under 37(e)(2), the court may permit the jury to decide, based on the evidence, whether a party acted with an "intent to deprive" and, if it makes that finding, the jury may "infer from the loss of the information that it was unfavorable to the party that lost it." In contrast, it appears that under 37(e)(1), the court may permit the jury to make any inference it finds appropriate based on the evidence without needing to first find an "intent to deprive," so long as there is a finding of prejudice and the court does not use the specific words of an adverse inference instruction. What is the substantive difference between these scenarios?
- What facts will courts find sufficient to infer an "intent to deprive," which often cannot be proved by direct evidence? The committee has said the intent requirement is "akin to bad faith, but is defined even more precisely."[17]
- If knowledge of litigation is restricted to management, while lower-level employees destroy ESI, can the "intent to deprive" showing be made?[18] Conversely, if a low-level employee acts with an intent to deprive, can that intent be imputed to the corporation?

Although the Advisory Committee intended to resolve the circuit split on applying the most severe sanctions, Rule 37(e) likely will have little effect on the preservation practices or expenses of large corporations. The notion that the circuit split forced over-preservation was dubious from the start, as it postulated that corporate counsel base preservation decisions on the possible severity of an unlikely sanction.

As Magistrate Judge James Francis IV observed in his written submission to the Advisory Committee: "The implicit assumption underlying the proposed rule—indeed, the rationale upon which it depends—is that lawyers think like criminals: they would adjust their behavior based on the penalty they might face for violating an obligation rather than on the obligation itself, so that a reduction in sanctions would, by itself, yield a reduction in preservation. This is a dim view of attorneys, and one for which there is no empirical evidence."[19]

Several corporate witnesses who testified before the committee said, with regard to preservation, that "they would actually not do anything different if the new rule were in effect."[20] In its final report on the proposed amendments, the Advisory Committee noted: "Given the many other influences that bear on

the preservation of ESI, however, it is not clear that a rule revision can provide complete relief on this front. . . . [T]he savings to be achieved from reducing over-preservation are quite uncertain. Many who commented noted their high costs of preservation, but none was able to provide any precise prediction of the amount that would be saved by reducing the fear of sanctions."[21]

The question remains, then, whether the claim that Rule 37(e) needed to be revised to solve the problem of over-preservation might have been a pretext to amend the rule to limit the duty to preserve and to insulate spoliating parties from just consequences for their actions. For those looking only at the final version of the new rule, the long and difficult drafting process may appear to have been much ado about little; in reality, the full story is that of a potentially disastrous amendment averted.


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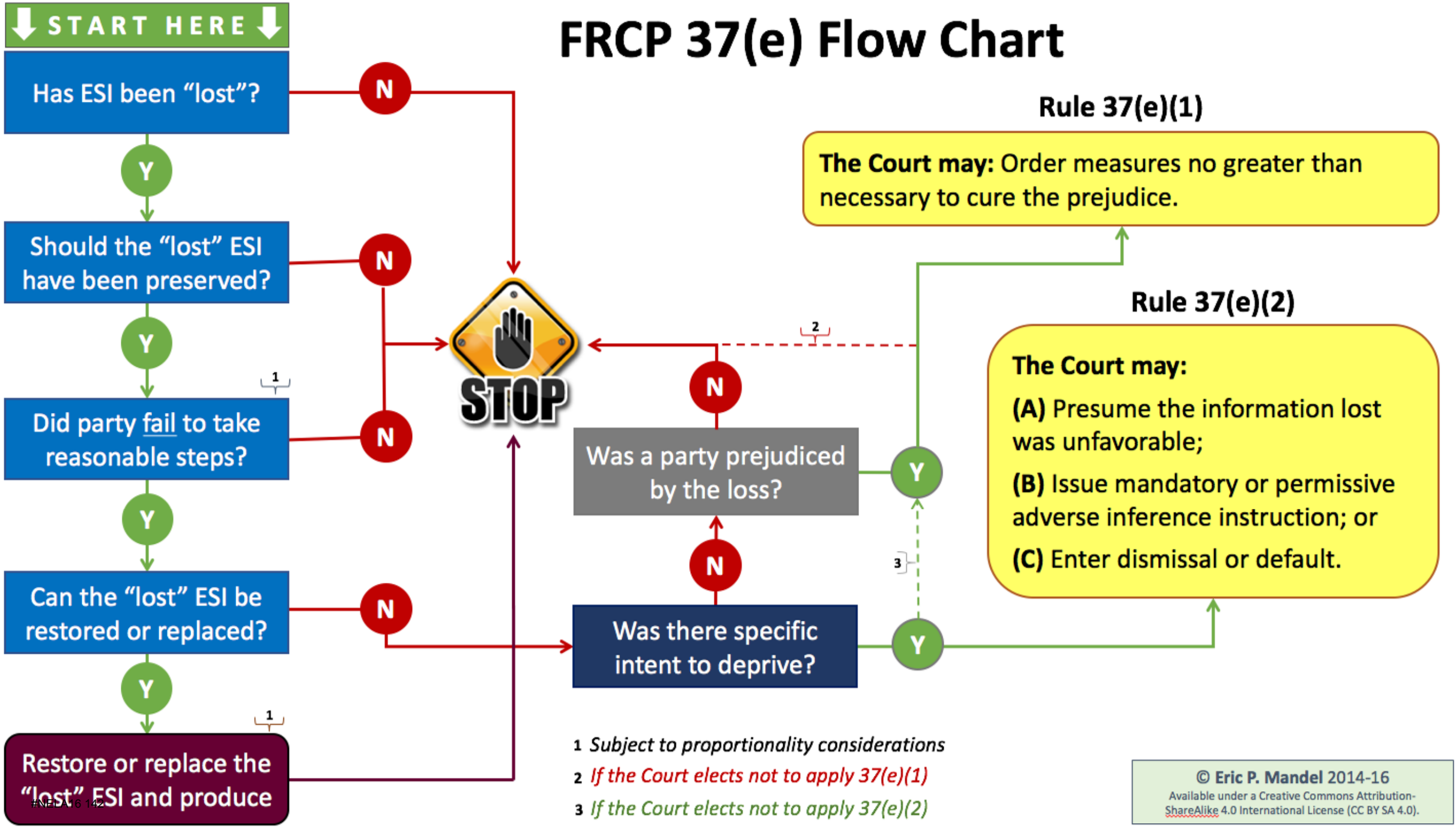
Notes

1. Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation* 8 (hosted at Duke U. Law School, May 10–11, 2010), www.uscourts.gov/file/reporttothechiefjusticepdf. To access reports and other documents from the Rules Committee, visit http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees.
2. As discussed below, claims that the cost of document preservation can be significantly reduced by amending the Federal Rules have been strongly disputed.
3. *Advisory Committee on Civil Rules* (Agenda Book) 370–73 (Apr. 10–11, 2014).
4. The Rules Enabling Act, passed by Congress in 1934, gives the Supreme Court the power to make rules of practice and procedure for U.S. courts provided they do not "abridge, enlarge, or modify any substantive right." A more comprehensive Rule 37(e)—to the extent it would have included pre-litigation preservation—would have exceeded the Act's parameters.
5. *Advisory Committee on Civil Rules*, *supra* note 3, at 371–72.
6. Memorandum Report of the Advisory Committee on Civil Rules from David G. Campbell, Advisory Committee on Civil Rules, to Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure 249 (May 2, 2014).
7. *Advisory Committee on Civil Rules* (Agenda Book), at 371; "It would be good to deal with the circuit disagreements, even if nothing else can be accomplished." Mar. 12, 2014, Subcommittee Call.
8. Many big data commenters stressed the purportedly undeserved and prejudicial "branding" that follows once a data producer is sanctioned for failure to preserve, which they claimed could affect future litigation.
9. The authors, who had been active observers and commenters throughout the process, shared the opinion that given the substantial changes to the rule and the yet-to-be-confirmed Committee Note, a new round of public comment should have been conducted.
10. "Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. GMC*, 271 F.3d 583, 590 (4th Cir. 2001).
11. "Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*." *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010); "Courts cannot and do not expect that any party can meet a standard of perfection." *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 716 F. Supp. 2d 236 (S.D.N.Y. Jan. 15, 2010).
12. *See, e.g.,* Fed. R. Civ. P. 16(c)(2)(F) (authorizing the court to take actions "controlling and scheduling discovery"); Fed. R. Civ. P. 26(b)(2)(A) (authorizing the court to permit additional depositions or interrogatories).
13. This standard is exemplified by *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002).
14. In addition, the Committee Note says 37(e)(2) "does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial."
15. *See generally* Thomas Y. Allman, *The Civil Rules Package as Approved by the Judicial Conference (Sept. 2014)*, Dec. 22, 2014 (quoting Jamie S. Gorelick et al., *Destruction of Evidence* §2.4 (Wolters Kluwer 2014) ("[A]s noted, after Subdivision (e)(2) goes into effect, adverse inferences will not be available to courts unless the heightened level of culpability is affirmatively shown. . . . However, this intended effect many be undermined if Subdivision (e)(1) is routinely invoked to authorize a jury to consider evidence of spoliation in the absence of such intent. 'Once a jury is informed that evidence has been destroyed, the jury's perception of the spoliator may be unalterably changed.'")).
16. The Second Circuit has held that certain forms of adverse inference instructions are not sanctions at all; they "simply explain to the jurors inferences they are free to draw in considering circumstantial evidence" and may be given in the absence of the predicate findings required for sanctions. *Mali v. Fed. Ins. Co.*, 720 F.3d 387, 394 (2d Cir. 2013). A *Mali*-type instruction may be available under 37(e)(1) without an "intent to deprive" finding, so long as all fact-finding is left to the jury. *See* Shira A. Sheindlin & Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 Fordham L. Rev. 1299 (2014), ir.lawnet.fordham.edu/flr/vol83/iss3/5.
17. Memorandum Report of the Advisory Committee on Civil Rules, *supra* note 6, at 253.
18. *See Wiginton v. Ellis*, 2003 WL 22439865 at *7 (N.D. Ill. Oct. 27, 2003) (holding that documents were destroyed "in bad faith" where company failed to inform those in charge of document retention that litigation was anticipated).
19. Ltr. from James C. Francis IV, to Committee on Rules of Practice and Procedure 4 (Jan. 10, 2014), tinyurl.com/oebnoz7; *see Advisory Committee on Civil Rules*, *supra* note 3, at 424 ("We should downplay any strong justification in terms of reducing over-preservation. Now we see that our rule will not much affect that behavior, so the tradeoff in lost judicial latitude is too costly.") (notes of Feb. 20, 2014, Discovery Subcommittee Conference Call).
20. *Advisory Committee on Civil Rules*, *supra* note 3, at 409 (notes of Feb. 8, 2014, Subcommittee Meeting).
21. Memorandum Report of the Advisory Committee on Civil Rules, *supra* note 6, at 247, 249.

FRCP 37(e) Flow Chart



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THE SEDONA CONFERENCE "JUMPSTART OUTLINE":

Questions to Ask Your Client & Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences & Requests for Production

MARCH 2016 VERSION

This paper was originally presented at The 10th Annual Sedona Conference Institute Program on eDiscovery *Staying Ahead of the eDiscovery Curve: Retooling Your Practice Under the New Federal Rules*, held on March 17- 18, 2016, at Rancho Bernardo Inn in San Diego, CA.

* The authors wish to thank members of The Sedona Conference Working Group 1 Steering Committee for their comments on this Outline. However, this Outline is the work of the three individual authors, and does not necessary represent the views of their respective employers, clients, or of Working Group 1. If you have any comments or suggestions for this Outline, please address them to comments@sedonaconference.org.

Introduction

This Jumpstart Outline sets forth, by way of example only, a series of topics and questions to consider asking yourself, your client, and your adversary (or opposing counsel) with respect to discovery obligations in litigation. Specifically, the answers to these questions should help guide you in (i) making the efforts necessary to comply with rules governing discovery, including the most recent December 1, 2015, amendments to the Federal Rules of Civil Procedure (the "Rules"); (ii) facilitating constructive discussions between outside and in-house counsel, record owners, and others who will be involved in satisfying preservation and production obligations; (iii) understanding the systems and preservation efforts of parties in the case; (iv) crafting a discovery plan; and (v) issuing and responding to requests for production, defending discovery decisions, and resolving or litigating discovery disputes. This is a simplified outline to assist, in particular, those people who have had only limited experience in dealing with electronic discovery. The process of questioning and even the questions themselves are iterative in scope. With each answer you elicit, additional questions may be warranted, and in some instances must be asked to best formulate a discovery process. Hopefully, having an outline like this within easy reach will serve as a "jumpstart" to encourage effective and efficient discovery, as well as cooperation, transparency, and dialogue in the discovery process, as contemplated by the Rules and The Sedona Conference *Cooperation Proclamation*.

Overview of Key Federal Rules

While this outline is not intended to be a primer on the Federal Rules of Civil Procedure,[1] the following provisions provide the backdrop and context for the outline:

- Discovery must be relevant to the claims or defenses and proportionate to the needs of the case. [FRCP 26(b)(1).]

- "Proportionate to the needs of the case" means that counsel and their client(s) should consider, from the outset of the case, what discovery is appropriate considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

- The moving and reordering of the proportionality factors from Rule 26(b)(2)(C)(iii) "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." [2015 Advisory Committee Note to FRCP 26(b)(1).] However, the moving and reordering of the factors are intended to encourage parties to consider those factors that do apply and to determine how to formulate an efficient

[1] This document principally focuses on the application of the Federal Rules of Civil Procedure. Of course, lawyers must familiarize themselves with all applicable rules to ensure full compliance, including but not limited to local court and state court rules and practices, some of which may warrant a modified approach to the outline here.

and effective discovery plan that properly allows for the resolution of the parties' claims and defenses.

- References to discovery of "subject matter" and information "reasonably calculated to lead to the discovery of admissible evidence" have been deleted. A party may "deliver" requests for production of documents in advance of the Rule 26(f) conference, but responses are not due until 30 days after the Rule 26(f) conference. [FRCP 26(d)(2).] Requests so "delivered" are considered to have been served at the first Rule 26(f) conference. [FRCP 26(d)(2)(B).]
    - Parties should consider sending a letter or list to adversaries identifying specific topics/questions in advance of the Rule 26(f) conference.

- The parties must discuss any issues about preserving discoverable information. [FRCP 26(f)(2).] To facilitate this discussion, the parties should discuss the steps the parties took to identify and preserve evidence.

- Disputes regarding preservation, the scope of discovery, and any other matter contained in Rule 26(f) may be brought to the attention of the court in advance of the Rule 16 conference.

- The responding party is now required to either produce documents on the date specified in the requests or provide a specific date for when documents will be produced. If you intend to make a rolling production, you must state the dates on which the production will begin and end. [FRCP 34(b)(2)(B); 2015 Committee Notes.]

- If you make an objection, you must state specifically what you are withholding on the basis of that objection. You may satisfy this requirement by describing the search you will conduct. [FRCP 34(b)(2)(B) and (C); 2015 Committee Notes.]

- Rule 34(b)(1) still requires that a request describe with reasonable particularity each item or category of items to be inspected. [FRCP 34(b)(1)(A); 2015 Committee Notes].

- Parties may, and are encouraged to, identify the form or forms in which ESI is to be produced to facilitate an efficient discovery process. [FRCP 34(b)(1)(C).]

- Rule 34(b)(2)(B) now explicitly requires that for each item or category requested, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The December 1, 2015, amendment "eliminates any doubt that less specific objections might be suitable under Rule 34." [FRCP 34(b)(2)(B); 2015 Committee Notes.]

Overview of Key Discovery Questions

In light of these requirements, litigants will normally want to have answers to at least the following basic questions:

- What written or unwritten information-related policies or practices are and/or were historically in place that might impact what relevant ESI is available, where that ESI is, and how that ESI had been/is best preserved and collected?

- What record owners are reasonably likely to have relevant ESI?

- Where is relevant ESI likely to reside?

- How will you meet the ethical obligations of competence regarding discovery?

- In the case of individual litigants and relevant custodians, what habits do they have that may impact the preservation of data (e.g., deleting a text message immediately after they send or read it, or posting, modifying, or deleting information from social media sites)?

- Who are the key custodians for each party, what are their roles, what relevant ESI are they expected to have, and what is the most effective and efficient method to ensure preservation of that relevant ESI?

    - Develop a list of key custodians for your client, as well as a list of those your client believes might be key custodians for the adversary, if possible.

    - Consider providing a list of key custodians to opposing counsel.

- What is/are the principal form(s) of communication utilized by the key custodians?

    - What system(s) or device(s) is/are used for relevant communications?

- What, if any, systems of reporting are utilized within the organization that would contain relevant information?

    - To what extent are reports generated by such systems?

    - To what extent can reports be generated by such systems?

- What reporting is utilized by an individual that would contain relevant information?

    - To what extent are reports routinely generated by such systems?

    - To what extent can reports be generated by such systems?

- What are the primary sources of relevant ESI that will assist in the resolution of the claims and defenses in the case, and who is the best person to advise and assist with preserving and/or collecting it?

    - How is data to be preserved/accessed/collected within an organization?

- What third parties (e.g., vendors or contractors) may have relevant information, and what is the best way to ensure that information is preserved and collected?

    i. Consider the extent to which the party or the third party maintains possession, custody, and/or control of the data?

- If you represent an individual, how is data to be preserved/accessed/collected from sources the individual uses and controls, and what, if any, specific steps must be taken to preserve relevant information in the litigation?

- Do you need a vendor or expert to assist in preserving/accessing/collecting relevant data?

    ii. NOTE: Appropriate methods of preservation/collection may differ depending on the types of metadata relevant to the claims and defenses in the case.

- What factual issues are undisputed and not necessary for discovery?

- What are the challenging places where relevant information might reside, such as structured databases, applications, proprietary platforms, or third-party ISPs or other cloud providers?

- Are there sources of relevant ESI that are likely to be lost (e.g., automatic deletion of email) if prompt steps are not taken to preserve them?

1. Information Governance

1.1. Written policies: Are there written policies that affect the creation, control, and retention of information in a way that might impact preservation or collection of relevant information? Depending on the issues in the matter, the following types of policies may be important:

- records retention/destruction schedules and policies
- computer usage policy
- electronic communications policy
- mobile/tablet policy and/or bring-your-own-device ("BYOD") program
- social media policy
- information security policy
- privacy policy
- backup tape storage/rotation policies
- accessing data outside an organization
- offboarding employee policies (e.g., policies that govern the disposition of documents/data of departing employees)
- Health Insurance Portability and Accountability Act (HIPAA) policy

1.1.1. If yes for the relevant policies, when were they implemented? What changes, if any, occurred during the relevant time period? [NOTE: Attorneys should request that clients provide the policies in effect at all relevant times in the matter. Although it may be determined by the parties or the court that the policies need not be produced in the litigation, the information they reflect could help guide discussions with key custodians and the adversary.]

1.1.2. How is compliance with each policy monitored, audited, and enforced? By whom?

1.2. Unwritten procedures: Are there other practices or procedures at the company that affect the way information is maintained and accessed? Examples might include:

- Automatic deletion of email by age or size of mailbox
- Archiving of email

1.3. To facilitate the required discussion about preservation, consider whether it is appropriate to ask your adversary at the Rule 26(f) conference about information-related policies that his or her client may have.

2. Custodians Most Likely to Possess Relevant Information

2.1. Given the facts of the case and the scope of the information that will be relevant to the claims or defenses, who are the custodians most likely to possess relevant information? Prioritize by importance. Key custodians are those with the more relevant information, while secondary and tertiary custodians may have limited or redundant information or information that relates to narrow topics.

2.2. How do/did these custodians create and store documents and/or this information?

2.2.1. Consider how you will obtain the answer to this question: including a questionnaire with the litigation hold? Conducting in-depth interviews with some or all custodians? Discussions with records managers?

2.3. When did the duty to preserve relevant ESI arise? To what extent has relevant information in the possession, custody, or control of custodians been preserved?

2.3.1. Determine as early as possible if any relevant information has been or is at risk of being lost, and if so, how to proceed.

2.3.2. When conferring internally or with your client, address preservation efforts to date and further efforts that need to be made.

2.3.3. When conferring with opposing counsel, discuss preservation efforts to date and, if insufficient, request that further efforts be made if appropriate.

2.4. Disclosure of identities of key custodians

2.4.1. In representing your client, consider disclosing to your adversary the identities of the key custodians for whom information has been/will be preserved.

2.4.1.1. Some names will be on your Rule 26(a)(1) disclosures, but some – such as secondary or tertiary custodians – may not be.

2.4.1.2. By voluntarily and cooperatively disclosing the identity of key custodians to facilitate ESI discussions, you need not concede they are automatically relevant for purposes of Rule 26(a)(1) disclosures.[2]

2.4.2. Consider identifying those people at the opposing party you believe are key custodians in order to memorialize your request for preservation of their information.

2.5. Third Parties

2.5.1. Are there third parties who have unique relevant ESI (i.e., non-duplicative information different from that maintained by the party)?

2.5.1.1. Could your adversary argue that your client was required to direct the third party to preserve information (for example, if the client outsourced a key area of business to the third party; the third party's documents are within the possession, custody, or control of the client; or an individual has an account with an ISP for email)?

2.5.1.2. If not, is there a reason or legal basis to direct a third party to preserve documents?

2.5.1.3. If not, is there a practical reason why you *want* the third party to preserve the relevant information?

2.5.1.4. Understand the contractual terms between your client and third parties that may impact preservation and potential access to information for discovery purposes (e.g., service level agreements ["SLAs"] related to data export).

2.5.2. To what extent has information in the possession, custody, or control of third parties been preserved?

2.5.2.1. When conferring with your client, address efforts made to date and further efforts that need to be made with respect to third parties.

[2] Initial disclosures, for example, pursuant to FRCP 26(a), often are limited to individuals that a party "may use to support its claims or defenses." Disclosure of other key custodians can facilitate efficient and effective discovery and may facilitate discussions relating to proportionality.

2.5.2.2. When conferring with your adversary, discuss efforts made to date, and if they are insufficient, request that further efforts be made if appropriate.

2.5.2.3. In representing your client, consider disclosing to your adversary the identities of the third parties for whom information has been/will be preserved or third parties for whom your client does not have "possession, custody, or control" of relevant data so that your adversary can take steps to preserve such data if the adversary believes the data is relevant to the case.

2.5.3. If you are a requesting party, consider identifying those people you believe are third parties who may have relevant data in order to memorialize your request for preservation of their information.

2.5.3.1. If you are a responding party and do not have Rule 34 "possession, custody, or control" over the third-party data or people identified, consider alerting your adversary so your adversary can take steps to preserve such third-party data if the adversary believes the data is relevant to the case.

NOTE: This is an iterative process. You should plan to confer with your adversary on a recurring basis so that you can continue to update your adversary on any additional key custodians.

3. Data Sources

Listed below are examples of "common" data sources for companies and individuals. This list should not be viewed as static, as new technologies are adopted continuously and each party has its own mix of data sources. In addition, even though a data source might exist, it is important to be thoughtful about whether information from the source is relevant to the claims or defenses and proportionate to the needs of the case. For example, collection from a smartphone may be critical in a sexual harassment case where it is alleged that the phone was used for the harassment, but it may not be relevant in a contract dispute.

A. Companies

3.1. For each data source, identify:

3.1.1. The individual(s) who could best provide detail regarding the use, preservation, and collection from the source

3.1.2. How the data exists as well as how it is backed up or archived (*see* Backup and Disaster Recovery in Section 4)

3.1.3. Whether the data stored is housed internally or storage and access are provided as a cloud solution

3.1.4. The date ranges of the data in the source

3.1.5. The manner used/needed to search, collect, and produce the data in a usable format

3.1.6. Any potential problems or limitations on production in discovery (e.g., data cannot be exported and viewed without a software license or proprietary software) and what, if any, alternatives exist to resolve such potential problems or limitations

3.2. File Servers (exclusive of supporting the data sources below)

3.2.1. Determine the use and organization of any file servers, including allocation for use by individuals or departments or segmentation by topic or geography.

3.3. Messaging

3.3.1. Identify each application used for internal and external messaging communications (e.g., email, instant messaging, mobile application messaging).

3.3.2. For each application/archive, identify the potential export formats of the message content.

3.3.3. For each application/archive, identify whether the data can be associated with a custodian and whether any organizational structure can be maintained upon export.

3.3.4. Determine the extent to which custodians use personal email or PDAs to communicate and/or store information and the extent to which such information can be collected and how it will be collected.

3.4. Collaborative applications

3.4.1. Identify each application used as a collaboration platform (e.g., SharePoint, company intranet).

3.5. Mobile devices

3.5.1. Determine whether access is permitted to company information through the use of mobile devices (i.e., any portable device generally not defined as a laptop or a desktop computer). If so, what systems and information may be accessed by the mobile device?

3.5.2. Does the company provide mobile devices for use by employees/contractors, or does it engage in a BYOD program?

3.5.2.1. If BYOD, what agreements or practices, if any, have been put in place to allow the company access to the mobile device in the event of litigation, investigation, or other event?

3.5.3. What steps does the company take to limit, control, and/or monitor the downloading and/or storage of company information on the mobile device (e.g., through the use of a mobile device management application)?

3.6. Structured databases

3.6.1. What investigation, if any, has occurred to identify relevant information that may exist in group/department or enterprise-level structured database systems?

3.6.2. Have subject matter experts been identified who can speak to the business and technical processes related to the databases?

3.6.3. What is the general process for extracting relevant information from the databases, and what are the available formats of any exports?

3.7. Workstations (i.e., laptop/desktop computers)

3.7.1. In general, what operating system(s) were utilized during the relevant period?

3.7.2. To the extent not specifically identified in the Information Governance section, identify and describe company policy directives that pertain to the storage of information on workstations during the relevant time period.

3.7.3. Does the company provide workstations for use by employees/contractors, or does it engage in a BYOD program?

3.7.3.1. If BYOD, what agreements or practices, if any, have been put in place to allow the company to access the workstation in the event of litigation, investigation, or other event?

3.7.4. Identify any technical controls in place during the relevant time period that limit or prevent information from being locally saved, including a user's ability to override such controls.

3.7.5. Does the company have an asset management program that can associate workstations with employees or contractors during the relevant time period?

3.7.6. During the relevant time period, what has been the process for decommissioning, upgrading, reformatting, or otherwise destroying/recycling workstation hard drives?

3.8. Portable storage

3.8.1. Are portable storage devices (i.e., removable independent devices) such as USB drives and SD cards permitted by policy? What is the policy? If no policy exists, are there any technical controls that preclude the use of such devices (such as lack of USB or SD ports on the computer)?

3.8.1.1. The fact that a policy does not exist does not necessarily mean that the use of such devices is prohibited. Inquire about the practice.

3.8.2. Does the company have an asset management program that can associate these devices with employees or contractors during the relevant time period?

3.9. Social media

3.9.1. Does the company maintain any type of social media presence?

3.9.2. If so, identify the platform(s), and for each:

3.9.2.1. Identify the period of use.

3.9.2.2. Identify the applicable information retention plan.

3.9.2.3. Identify whether the content is hosted internally or through an external platform.

3.9.2.4. Identify the department and personnel responsible for maintaining the presence and the content.

3.9.2.5. Assess the extent to which individuals use or are permitted or encouraged to use social media on behalf of or for the benefit of an organization.

3.10. Non-company computers (independent of section 3.7)

3.10.1. Does firm policy permit, prohibit, or otherwise address employee use of computers not owned or controlled by the company to create, receive, store, or send work-related documents or communications?

3.10.1.1. If so, what is that policy?

3.10.2. Are there any technical controls to limit employee/contractor use of computers not owned or controlled by the company to create, receive, store, or send work-related documents or communications?

3.10.3. To what extent has information been preserved or collected in the context of other litigation or litigation holds?

B. Individuals

3.11. For each data source, identify:

3.11.1. The individual(s) who could best provide detail regarding the use, preservation, and collection from the source

3.11.2. How relevant data exists as well as how it is backed up or archived (*see* Backup and Disaster Recovery in Section 4)

3.11.3. Whether relevant stored data is housed by the individual or storage and access are provided as a cloud solution

3.11.4. The date ranges of relevant data in a particular source

3.11.5. The manner used/needed to search, collect, and produce relevant data in a usable format

3.11.6. Any potential problems or limitations on production in discovery and what, if any, alternatives exist to resolve such potential problems or limitations

3.12. Depending on the type of matter, the following are potential sources of relevant data (if established, maintained, or used during the relevant time period):

3.12.1. Personal devices used for sending or receiving emails or managing ESI, including personal computers, smartphones, and tablets; a listing of when such devices were purchased and utilized; the current location of same; and if they were disposed of, how and when

3.12.2. Social media and networking accounts (include accounts where data is designated as "private)

3.12.3. Photo- and video-sharing sites established

3.12.4. Device(s) that tracked and stored location data (like GPS data)

3.12.5. Devices maintained or used for sending or receiving text messages

3.12.6. Blogs or other online discussion forums

3.12.7. Internet- or "cloud"-based services if used to store or back up relevant documents and data during the relevant time period

3.12.8. Other stand-alone media capable of storing relevant ESI (i.e., thumb drives, CD-ROMs, DVDs, stand-alone hard drives, etc.)

NOTE: The above list of potential sources are examples of where relevant data might reside. Not all of these sources will be applicable in every case, therefore a specific inquiry should be made in each case.

4. Backup and Disaster Recovery

Depending on the circumstances, backup and disaster recovery systems may be sources of relevant data to be preserved, collected, and produced. Whether this is so must be determined in the context of an assessment of reasonably accessible versus not reasonably accessible data and the rules that govern each category in a particular case. The questions below apply individually and collectively to each data source identified as containing relevant information. Keep in mind that the terms "backup" and "disaster recovery" may not be synonymous within an organization. Some systems have data backed up exclusively for the purpose of recovering from a full system failure or true disaster. Others have data backed up for short- or long-term archiving, system performance and diagnostics, or other reasons. The business purpose often drives the backup protocol and architecture, which in turn informs potential burdens. Individuals also may back up data, including for their own "disaster recovery purposes," some using systems that are specifically designed for

backup or copying data to another source (e.g., a thumb drive). Do you have a system that backs up information managed and/or stored by any of the data sources identified as containing potentially responsive information?

4.1.1. For each identified data source, what is the protocol for backing up the information?

4.1.1.1. Schedule – daily, weekly, monthly, etc., including retention

4.1.1.2. Type – full, incremental, differential

4.1.1.3. Media – physical/virtual tape, disk, cloud

4.1.1.4. What backups are available for the relevant time period?

4.1.2. Under what circumstances have you restored or do you restore information from backups?

4.1.3. For each identified data source, are there any gaps or exceptions in your normal backup retention?

4.1.4. What steps, if any, have you taken to suspend normal backup retention procedures?

4.1.5. Do any of the backup systems or processes store data in the cloud?

4.2. Can specific files/content contained on backups be selectively restored? Have you done this before, and if so, for what purpose?

4.3. As a matter of firm policy, do you overwrite, reformat, erase, or otherwise destroy the content of backups on a periodic basis?

4.3.1. If so, what is the protocol, and has this changed since the relevant time period (include the nature of any changes)?

5. Ethical Obligations to Be Considered

In August 2012, the American Bar Association amended the comments to Rule 1.1 of the Model Rules of Professional Conduct to emphasize that to be competent, lawyers must "keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology …"[3] (Lawyers include both in-house and outside counsel.) A number of states have amended their rules of professional conduct to follow the changes announced by the ABA in August 2012, and one state even has issued an ethics opinion regarding steps lawyers should take in handling e-discovery.[4]

[3] ABA Model Rules of Professional Conduct Rule 1.1 cmt [8] (2013).

[4] For example, on June 30, 2015, the State of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion No. 2015-193 ("CA Formal Opinion No. 2015-193"), which addressed a number of issues regarding an attorney's ethical duties in the handling of discovery of ESI.

5.1 For purposes of the Jumpstart Outline, you should assess whether you have the requisite skill and knowledge, including *understanding the benefits and risks of the technology involved*, to perform the following tasks (either by yourself or in collaboration with an experienced counsel or consultant):

- assess e-discovery needs of the case in terms of your client's claims and the adversary's defenses.
- analyze and understand your client's ESI record retention policies, systems, and storage.
- advise your client on available options for identification, preservation, collection, and production of ESI.
- assist your client in identifying sources (including custodians) of relevant ESI.
- engage in meaningful meet and confer sessions with opposing counsel concerning an e-discovery plan.
- advise your client about the proper method to collect responsive ESI in a manner that preserves the integrity of that ESI for evidentiary purposes.

5.2 In certain situations, it also may be advisable to associate with or consult technical consultants, experts, or counsel who specialize in e-discovery issues or particular technologies.[5]

[5] *See* CA Formal Opinion No. 2015-193. *See also*, fn. 3, *supra*.