Key Discovery Battles in Employment Law Litigation

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By James H. Kaster

I. Introduction

This paper addresses the subject we love to hate: discovery. While many of us have heard horror stories about the "new" proportionality requirements under the 2015 Amendments to FRCP 26, a closer examination illustrates not much change. This paper also takes a brief look at the 2000 and 2006 amendments, and, in particular, the prominence of electronic discovery and the part it now plays in our lives.

Finally, this paper will address some of the other, non-traditional methods of obtaining discovery that should be examined for use in every case. This includes tools available under the Rules of Civil Procedure, as well as tools readily available to anyone in the modern world of ready access to information.

II. Maximizing the Rules of Civil Procedure

a. The 2015 Amendments to Rule 26. Under the 2015 amendments, Rule 26(b)(1) has changed in several ways, as the comments make clear. Though much has been discussed about the Rule, and specifically the proportionality requirement, "[m]ost of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983." In fact, it was the 1983 amendments that dealt with the problem of "over discovery." Thus, much of the caution about the breadth of discovery was already a part of existing Rules.

Later, in 1993, the amendments added two more factors that bear on limiting discovery, first, whether the burden or expense of proposed discovery

outweighed its likely benefit, and second, the importance of the proposed discovery in resolving the issues. While the 2015 amendments elevate the proportionality considerations, see *Hunter v. Corrections Corporation of America*, 2016 WL 943752 at n. 1 (S.D. Ga. 2016), it is clear nonetheless, "[t]he Federal Rules of Civil Procedure strongly favor full discover whenever possible." Id., citing *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1189 (11th Cir. 2013).

The effective date of the 2015 amendments is subject to interpretation. This is demonstrated by a recent case where one party to a discovery dispute waited until December 2, 2015, one day after the new Rule was supposed to be effective, to file its motion for protection, apparently with the strategic intent of taking advantage of what it regarded as a Rule allowing more protection against broad discovery. See *Gowan v. Mid Century Insurance Co.*, 2016 WL 126746 (D.S.D. 2016). The court then does a side-by-side comparison of new Rule 26, compared to old Rule 26, concluding that the amendments make little difference in most instances:

> Although Mid Century seizes on the "proportional to the needs of the case" language in the amended version of Rule 26(b)(1) as a requirement new to discovery in federal court, as can be seen by comparing the highlighted portions of both rules above, the proportional requirement was already a part of Rule 26, it was just codified previously in subsection (c). Most of what appeared in subsection (b)(2)(C) of old Rule 26 has been in effect for the last 32 years, since 1983, so it is hardly new. See FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment. Thus, as to this particular change, the only change rendered by the amendment was to move the proportional requirement from subsection (b)(2)(C) up to subsection (b)(1). The amended rule also specifies

> one additional factor to be considered in determining proportionality: the parties' access to relevant information.[1]

Id. at 5.

This last point, the addition of a factor related to the parties' access to relevant information, is one change that is noteworthy. The Advisory Committee Notes to the Rule state: "One party – often an individual plaintiff - may have little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has the more information, and properly so." Plaintiff's counsel must keep this strongly in mind during any discovery battle.

Following this logic, cases addressing the 2015 amendments echo the continuing broad scope of permissible discovery. In *State Farm v. Fayda*, 2015 WL 7871037 (S.D.N.Y. 2015), for example, the court made clear that through relevance has changed from the term "subject matter" to any "party's claim or defense," it is still to be ""construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on" any party's claim or defense. Moreover, as under previous iterations of the Rule, a party resisting discovery has the burden of showing undue burden or expense. Despite jettisoning the classic language about proper discovery being "reasonably

[1] The litigants in South Dakota were apparently attempting to take advantage of the effective date of the 2015 amendments which were designed to ""govern in all proceedings in civil cases" commenced after December 1, 2015, and "insofar as just and practicable all proceedings [ ] pending on that date."" *See Lightsquared, Inc. v. Deere & Company*, 2015 WL 8675377 (S.D.N.Y. 2015).

calculated to lead to admissible discoverable evidence", information still "need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1). Even more significant, discovery that is relevant to the parties claims or defenses may also "support amendment of the pleadings to add a new claim or defense that affects the scope of discovery." See *In re: Blue Cross Blue Shield Antitrust Litigation*, 2015 WL 9694792 (N.D. Ala. 2015).

Another District Court saw the 2015 Amendments in a similar light. In *Carr v. State Farm Mutual Automobile Insurance Co.*, 312 F.R.D. 459 (N.D. Tex. 2015), the court reasoned that under the amendments a party resisting discovery must show how the requested discovery was overly broad, burdensome, or oppressive, by submitting affidavits or offering evidence revealing the exact nature of the burden, and that same party must have a valid objection to each discovery request in order to avoid responding. Id. at 463. The court also found little change in the 2015 amendments, suggesting that most of what appears "now in Rule 26(b)(2)(C)(iii) "was first adopted in 1983." Id. at 466. Finally, the *Carr* court recognized that many subject areas may "involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values." Id. at 468. This is, as the court recognizes, a valid part of the balancing under any proportionality test.[2]

[2] Other recent authorities to review on the topic of the 2015 amendments include: *Orchestratehr, Inc., v. Trombetta*, 2016 WL 1555784, (N.D. Tex. April 18, 2016); *Board of Commissioners v. Daimler Trucks*, 2015 WL 8664202 (D. Kan. Dec. 11, 2015); *State Farm Fire and Casualty Co. v. Gates, Shields & Ferguson, P.A.*, No. 14-2392, 2015 WL 8492030; *Siriano v. Goodman Mfg,*, 2015 WL 8259548 (S.D. Ohio. Dec. 9, 2015); *Wertz v. GEA*, 2015 WL 8959409 (M.D. Pa. Dec. 16, 2015); *Green v. Cosby*, 2015 WL 9594287 (D.Mass. Dec. 31, 2015); and *Herrera v. Plantation Sweets*, 2016 WL 182058 (S.D.Ga. Jan. 14, 2016). Another source to review is the

b. Superior access. As noted above, the new text of Rule 26(b)(2)(C)(iii) directs us to what is often referred to as information asymmetry. One party, more often an individual plaintiff, has very little discoverable information. The other party has access to vast amounts of information including, information that can be readily retrieved. In employment circumstances, this is often true. See Advisory Committee Note, Rule 26, Federal Rules of Civil Procedure.

In one recent decision, this far superior access to the information justified the compelled production of documents and information from the defendant, Trustees of Boston College, concerning prior sexual assault cases or charges brought by non-party students or former students, for a period of ten years. See *Doe v. Trustees of Boston College*, 2015 WL 9048225 (D. Mass. 2015). Despite the fact that there were obviously compelling confidentiality and privacy interests at stake, documents and information regarding prior sexual assaults were ordered produced pursuant to a protective order.

In the balancing, the court considered that this gender-bias claim under Title IX implicated "vitally important personal or public values." This importance was weighed in the balancing test, and that, coupled with the College's superior access, was recognized as a factor compelling discovery. Id.

c. The 2006 Amendments: Electronic Discovery. The 2006 Amendments to FRCP 26 addressed the rapidly changing world of technology. Rule 26(a)(1)(B) was amended to parallel Rule 34(a) by recognizing that a party must disclose electronically-stored information as well as documents that it may use to support

its claims or defenses. The Advisory Committee Notes suggest that the term electronically stored information "has the same broad meaning in Rule 26(a)(1) as in Rule 34(a)." See Comments, Fed. R. Civ. P. 26. The comments also address (b)(2) of Rule 26 and state: "[e]lectronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible."

Under the Rule, "a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. If the parties cannot agree "whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by motion to compel discovery or by a motion for a protective order." The Advisory Committee Notes also support that "[t]he responding party has the burden as to one aspect of the inquiry – whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found." See Fed. R. Civ. P. 26, comment to Subd. (b)(2).

The electronic discovery provisions of the Rule are in some way life altering for lawyers. In fact, ten years later, the courts and lawyers are still adjusting. As one court described the changes and their impact:

> "By the year 2006, technology had brought the world so far from chisels, styli, tablets, scrolls, paper, books, and filing cabinets that the standing committee charged with maintaining the Federal Rules of Civil Procedure felt it necessary to "address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information." *Bagley v. Yale University*, 307 F.R.D. 59, 60 (2015).

The court in *Bagley* then outlined the normal process for addressing discovery of electronically stored information, commonly called ESI. The party requesting discovery of ESI begins the process by "identifying certain "custodians" who are thought to possess or control documents containing certain designated "search terms." In the vernacular, the first of these exercises answers the question "Who's probably got the stuff I want?" and then the second answers the question "What stuff do I want?"" Id. at 60-61.

A recipe for a massive and contentious adventure in ESI discovery might, according to the court, be read as follows:

> "Select a large and complex institution which generates vast quantities of documents, blends as many custodians as come to mind with a full page of search terms; flavor with animosity, resentment, suspicion and ill will; add a sauce of skillful advocacy; stir, cover, set over high heat and bring to boil. Serve the district court 2-6 motions to compel discovery or for protection from it." Id. at 61.

Of course, as many others have suggested, the *Bagley* court repeats the obvious: the best solution in the entire area of electronic discovery is cooperation among counsel. Id. at 62, citing *William A Gross Constr. Assocs, Inc. v. Am. Mfrs. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009). In the best case scenario, this cooperation takes the form of one knowledgeable and cooperative person

from Firm A discussing the responses with a knowledgeable and cooperative person from Firm B.

Nevertheless, it is obvious that such a conversation, and that kind of communication, is often impractical or impossible. Plaintiffs are often represented by solo practitioners, or people without great resources. The plaintiffs themselves are in the same position, without resources or access to the information to prove their claims.

Turning back to the *Bagley* case, the Judge noted that the allegations involved violations of federal anti-discrimination statutes, as well as principals of state and common law. In turn, the court recognized that these claims are "provable and often proved by circumstantial evidence, giving rise to a legitimate need for relatively wide-ranging and nuanced discovery." Id. at 66. Commenting on a possible knee-jerk reaction to such "wide ranging discovery," the court reasoned:

> The sense of irritated resignation conveyed by the familiar aphorism-"it's like looking for a needle in a haystack"-does not exclude the possibility that there may actually be a needle (or two or three) somewhere in the haystack, and sharp needles at that. Plaintiff is presumptively entitled to search for them." Id.

In the end, the trial court had an easy time ordering production of search terms contained on a one-page document, with ten custodians listed as the persons whose electronically stored information systems should be searched. Yale's arguments that the information was not reasonably accessible because of undue cost was easily overruled. The claims of gender discrimination were entitled to significant weight and proportionality under the new Rule.

Further, the court recognized that it was Yale who had access to the information necessary to prove plaintiffs' nuanced claims, and Yale never met its burden to show that each discovery request it objected to was overly burdensome.[3]

As for the means of production, Fed. R. Civ. P. 34(b)(2)(E) provides a method for producing documents or electronically stored information, unless otherwise stipulated, or ordered by the court. The Rule states: "[a] party must produce documents as they are kept in the usual course of business or must organize them to correspond to the categories in the request; (ii) [i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably useable for or forms;" See *Mckinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Ins., Co*., 2016 WL 98603 at 98609 (N.D. Tex. 2016). The Rule "forbids "dump truck" discovery tactics, where a party delivers voluminous and poorly organized documents to his adversary, who is forced to rummage through piles of paper in search of what is relevant. Id. To comply with the Rule, a party must rationally organize [ ] its productions, so that the requesting party may readily identify documents, including ESI, that are responsive to [the]

[3] As the Advisory Committee Notes recognize, it is not simply money that is at stake in the balancing. The Rule "recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." See Advisory Committee Note.

production requests." Id. at 98610 citing *Teledyne Instruments, Inc. v. Carins*, 2013 WL 5781274 (M.D. Fla. Oct. 25, 2013).[4]

The court in *McKinney, supra*, also reviewed the changes to the 2015 amendments, and scolded the defendants for failing to produce discoverable metadata and many documents in their native format. In the ordinary course of business, electronic documents are required to be produced in the format in which

[4] A recipe for proper production and/or receipt of ESI discovery can be practically summarized in the following simple steps:

A. Early Case Assessment

Once a triggering event occurs, begin by assessing the case. This information serves as a foundation for developing overall case strategies as well as early data assessment. Below is a checklist of items to consider during early case assessment.

- Type of triggering event – are there proper legal holds in place, are records being preserved, has client acknowledged preservation responsibilities – important for both sides.
- Facts of case – what kind of documents are we looking for – transparency is best
- Search terms:
    - Date range
    - Key words
- Key departments/custodians including former employees – can we identify specific custodians
- Case merit, risk analysis – self collections versus forensic collection – another look at proportionality
- Legal hold requirements
- Both sides should have a knowledgeable attorney or eDiscovery person to facilitate technical conversations.

B. Early Data Assessment

Early data assessment should provide counsel with the information necessary to understand the types of relevant data and where it is located. Additionally it should cover any policies related to the retention or destruction of relevant data so appropriate steps can be taken to preserve relevant data and avoid spoliation.

they are kept on the user's hard drive or other storage device. "A file that is converted to another format solely for production, or for which the application metadata has been scrubbed or altered, is not produced as kept in the ordinary course of business." Id. at 98611. Production and format is important "because conversion from native format may eliminate or degrade search and other information processing features (e.g. copy, paste, and sort). Such features may allow a user to identify relevant information in a document much more quickly, which would significantly enhance the value of a document to a business." Id.

In addition, the producing party must provide information about where the documents are kept and how they are organized, and for documents stored on a computer or external storage device, "this means providing system metadata indicating at least the file name and path for produced files. The files and system metadata, must be organized in a manner that permits systemized retrieval of files based on the metadata. In other words, the requesting party must be able to search for readily access files with particular characteristics." Id.

These changes continue, ten years later, to confound courts and litigants.[5]

d. The 2000 Amendments to Rule 26. Before leaving the subject of Rule 26, it is worthwhile to visit briefly the history behind the expansion of Rule 26 in 1993, and its subsequent retraction in 2000, to see, once again, that the basic ground rules of discovery seem intractable. The original intent of the expansion of Section (1) through (4) of Rule 26 was to force the early exchange of information

[5] [5] Standards have been adopted regarding the preparation and production of ESI in a usable format. These standards for production for plaintiffs and defendants are available online. See http://www.edrm.net/edrm-stages-standards/production and http://www.edrm.net/resources/guides/edrm-framework-guides/production.

regarding potential witnesses and documentary evidence without the necessity for formal discovery. The idea behind this exchange was to eliminate the need for requesting information and for unnecessary paperwork. This presented an affirmative duty of disclosure, including the duty to disclose information not supportive of the position of the disclosing party. See Advisory Committee Notes to Rule 26 (1993 amendments). It wasn't long, however, for that affirmative duty to be modified.

In response to questions regarding national uniformity and concerns that Rule 26(a)(1) would require a party to volunteer harmful information without a discovery request, the advisory committee amended Rule 26(a)(1) in 2000.

After December 1, 2000, there was no longer an obligation to disclose anything that the disclosing party will not use such as information harmful to its position. Advisory committee's note, 192 F.R.D. at 385 (a party is no longer obligated to disclose witnesses or documents whether favorable or unfavorable, that it does not intend to use). Moreover, there were eight different categories of proceedings that are exempted from initial disclosures, including an action for an administrative record, *habeas corpus* proceedings, an action to enforce or quash an administrative summons or subpoena, or an action to enforce an arbitration award, among others, Advisory committee's note, 192 F.R.D. at 382-83 (2000).

The Rule continued to require initial disclosures within 14 days of the parties Rule 26(f) Conference, unless a party objects during the conference that initial disclosures are not appropriate in the action and states the objection in the proposed discovery plan. In addition, sanctions were maintained for failure to

provide adequate Rule 26(a) Disclosures. Initial disclosure requirements under Rule 26(a)(1) are directly linked to the exclusion provisions in Rule 37(c). The most likely sanction for failing to make the disclosures within 14 days of the Rule 26(f) Conference or failing to supplement at a later stage as required by Rule 26(e) is to deny the use of the information by the party that failed to provide the disclosure. The sanction is described as automatic and self-executing. See Advisory committee's note, 146 F.R.D. 401, 691 (1993). *Yeti by Molly, Ltd. V. Deckers Outdoor Corp.*, 259 F.3d. 1101, 1106 (9th Cir. 2001). These sanctions can be used to exclude affirmative testimony from undisclosed witnesses.

A party could nonetheless avoid exclusion of undisclosed witnesses or documents if the parties' failure to disclosure was substantially justified or harmless. See Fed. R. Civ. P. 37(c). See also *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999); see also *MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1357 (Fed. Cir. 2005) (applying a similar five-factor test); *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003) (applying a similar four-factor test); *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003) (same); *Neupak, Inc. v. Ideal Mfg., Sales Corp.*, 168 F. Supp. 2d 1012, 1016 (D. Minn. 2001) (same); *Transclean Corp. v. Bridgewood Servs., Inc.*, 101 F. Supp. 2d 788, 795-96 (D. Minn. 2000) (same).

e. Other strategies to consider in obtaining discovery.

(i) Rule 30(b)(1) Depositions:

> **Rule 30(b)(1)** ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to

every other party. The notice must state the time and place of the deposition, and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

The Rule allows you to identify corporate individuals by description and not by name. For example, if you do not know the identity of the deponent, you can identify the deponent by title, *e.g*. chief information officer, or description, the person who made the decision to . . .

(ii) Rule 30(b)(6) Depositions:

Rule 30(b)(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonable available to the organization. . . .

1. This is a provision where by a party may name a corporation, partnership, association or governmental entity as the deponent and designate the matters on which he requests examination and the organization shall then name one or more of its officers, directors, or managing agents or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization.
2. Required knowledge of the corporation for the purpose of testifying:

a. When a party seeking to depose a corporation under Rule 30(b)(6) sets forth the subject matter of the proposed deposition, the corporation must produce someone familiar with that subject. *Reilly v. NatWest Market Groups, Inc.*, 181 F.3d 253, 268 (2nd Cir. 1999).

b. To satisfy Rule 30(b)(6) the corporate deponent has an affirmative duty to make available such number of persons as will be able to give complete, knowledgeable and binding answers on its behalf. The effectiveness of the Rule bears heavily on the parties reciprocal obligations, the noticing party's duty to provide clear notice, and the responding party's duty to provide a knowledgeable witness. *Dwelly v. Yamaha Motor Corp.*, 214 F.R.D. 537, 539-540 (D. Minn. 2003).

c. The duty to provide a knowledgeable witness may require that a Rule 30(b)(6) deponent testify regarding facts that the witness has learned from counsel or from his or her review of work-product. *Oklahoma v. Tyson Foods, Inc.*, 62 F.R.D. 617 (N.D. Okla. 2009).

d. Rule 37 sanctions are available for failing to provide a knowledgeable witness in response to a proper notice. *Martinez v. Majestic Farms, Inc.*, 2008 WL 329164 (S.D. Fla. 2008).

III. EEO-1 Data Requests

a. EEO-1 Data

(i) All employers who have 100 or more employees are required to submit a EEO-1 report to the EEOC every year. The report lists each employee's job category, race/ethnicity and gender. The EEOC will only provide aggregated data. This means data where enough employers are included that the requester will not be able to identify which data is attributable to a certain employer.

b. EEO-1 Sample Request.

(i) If you have filed a case against a qualifying company, you can make a FOIA request for the defendant's EEO-1 report. The information you receive should be useful in individual and class cases involving allegations of discrimination.

(ii) 29 C.F.R. 1610.17(e): "Each executed statistical reporting form required under part 1602 of this chapter, such as Employer Information Report EEO–1, etc., relating to a particular employer is exempt from disclosure to the public prior to the institution of a proceeding under title VII involving information from such form."

(iii) A request for EEO-1 data for a particular employer must be accompanied by a copy of a court complaint stamped "filed" indicating that the charging party has filed suit under Title VII against the named respondent.

IV. Investigatory Search Tools

a. Free internet tools. Whether looking for a lost client or an absent witness, it is sometimes possible to find updated information by performing a Google search, or through other free investigatory tools like yellowpages.com, whitepages.com, dexonline.com or facebook.com. A recent development within the Department of Labor allows you to send for recent government investigations against the company involved in a suit with your client.

b. Fee-based software. Accurint can instantly find people as well as their phone number and address information.

    (i) Accurint describes itself as the most widely accepted locate and research tool available to government, law enforcement and commercial customers.

    (ii) Features:

        1. Key features include "people search" which locates neighbors, associates and possible records;
        2. Phone plus tracks down phone numbers not typically available;
        3. "People at work" links more than 287,000 individuals to businesses and includes information such as business address, phone number and possible dates of employment;
        4. "Relevant" visually links individuals with businesses, addresses, relatives and vehicles;
        5. "Advanced people search" helps find individuals when only old or fragmented information is available;

6. "Public records people finder database" has a public records tab which allows you to potentially find new contact information on an individual. This is particularly helpful if you have a social security number for the person.

V. Freedom of Information Act (FOIA)

a. The Freedom of Information Act covers documents created by an agency and documents submitted to an agency for use in carrying out its duties. *General Electric Company v. United States Nuclear Regulatory Commission*, 750 F.2d 1394 (7th Cir. 1984).

b. The purpose of the Act is to give the public access to information on which the government bases action. See *e.g. N.L.R.B v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

c. The Freedom of Information Act 5 U.S.C. § 552, requires that the Federal Government information, including agency records, be made available to the public. *State of Missouri, ex rel. Garstang v. U.S. Dept. of Interior*, 297 F.3d. 745, 749 (8th Cir. 2002).

d. Examples of the application of the Act include FOIA requests submitted to the Department of Labor for information regarding given companies.

VI. Conclusion.

The more things change the more they remain the same. The new 2015 amendments on proportionality are not really new, and at the end of the day, don't really alter the scope of discovery. Rule 26 disclosures, while meaningful, don't really constitute the dramatic change they were designed to be.

The real change is electronic discovery, both formal and informal, which affects the legal profession as technology has affected the world. Our task is to try to keep up.