THE CONSTRUCTION LAWYER

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THE FUTURE OF CONSTRUCTION LAW

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Contents

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NOTES FROM THE EDITOR

Editor's Column

By Lauren Catoe

This issue of *The Construction Lawyer* looks toward the future of construction law. The first article, "The Revolution and Evolution of Discovery Disputes in the Digital Era," takes on a topic that I find to be overwhelming: electronic discovery. Most of our clients electronically store a significant amount of data in connection with any given construction project on which they are participants. In the event a dispute arises and litigation or arbitration commences in connection with a project, electronic discovery typically is a key issue from the get-go, and it can result in the expenditure of a lot of time, effort, and money. Perhaps because of that, as the scope of electronic discovery has expanded, the frequency of discovery disputes has increased. In this article, with a focus on electronic discovery, authors Andrew P. Atkins and Caragh McGovern Landry begin by reminding us of the purpose of discovery and outlining common disputes regarding the same. Following that discussion, they suggest best practices and proactive tips for reducing the likelihood of electronic discovery disputes in future matters.

In "Trends in Design Assist and Design Delegation," Richard W. Foltz, Jr., Jennifer Flynn, Robert C. McCue, P.E., and Joy Spillis Lundeen address how the concepts of design assist and design delegation have evolved as technology and project delivery methods have expanded in the construction industry and construction projects have become more complex. They discuss the current treatment of those concepts in various jurisdictions and in industry contract forms. The authors strongly recommend expanding the general framework set forth in industry contract forms for design assist or delegated design by including cautionary caselaw examples that outline "the importance of clearly defining the roles and responsibilities of the parties in the contract." Contracting parties must communicate their specific intent when it comes to design assist or delegated design. If they fail to do so, costly disputes or other unintended and undesirable consequences may be in their future.

The final article of this issue, "Picking Up the Pieces: A Call for Federal Structural Inspection Laws in the Aftermath of the Surfside Condominium Collapse," was written by Spencer L. Woods and is the winning article of the ABA Forum on Construction Law's 2023 Student Writing Competition. In his article, Spencer discusses critical events and decisions before and after the 2021 collapse of the Champlain Towers South condominium building in Surfside, Florida He includes an overview of periodic structural inspection requirements for condominium and other community housing settings in different jurisdictions, noting pros, cons, and differences among them. Spencer concludes his article by proposing federal action to help establish minimal structural inspection requirements that would apply across the United States to condominium and community housing settings, with the goal of such action to avoid future tragedies similar to the Champlain Towers South collapse. Spencer is a 2024 graduate of Hofstra University Maurice A. Deane School of Law, and he plans to continue his participation in the Forum. I am confident that he has a bright future ahead of him. Congratulations, Spencer!

COMMENTS FROM THE CHAIR

Chair's Column

By John Marshall Cook

This is my second-to-last message to you as the Chair of the Forum. Traditionally, the Chair saves the final message for thanks to those who supported his or her journey. While I still intend to honor that tradition, I am starting early.

First, a big thank you to all of the people (and there were a lot of them) who attended my first national meeting in Washington, DC, to hear about Government Construction Contracting. Second, a heartfelt thanks to the masses of people who showed up for the regional programs in Philadelphia, Atlanta, St. Louis, and San Francisco. Third, I want to express my gratitude for all those who learned about power projects with us at the Midwinter meeting in Las Vegas. Finally, many thanks to the 715 of you (not a typo; it was an incredible 715 attendees) who joined us in New Orleans (despite some challenging travel) to hear from the experts on construction litigation.

The reason I am calling out the people who filled these meetings is that the great attendance we had at all of the meetings this bar year allowed us to make good on a promise I made when I became Chair of the Forum. The promise was to reverse course on a particular cost-cutting measure instituted in response to the Forum's pandemic-induced financial malaise. While I agreed with many of the cost-cutting measures we took, there was one that I fought—unsuccessfully. As part of our austerity measures, we reduced the diversity fellowship program from six to four awardees annually and reduced the meeting scholarships from four to two.

When I became Chair, I committed to providing great content in exciting locations so that we could enhance attendance. My purpose was to have enough financial success to restore the scholarship and fellowship programs to their previous levels. And we did it. More appropriately, you did it by showing up in huge numbers for the national and regional programs. Thank you!

I am proud to report that the Forum is returning to our full complement of four Diversity Scholarships per meeting (including national meetings, regional programs, and the Trial Academy) and six Diversity Fellowships per year. The Forum's Governing Committee voted to approve this change on the Wednesday of the Annual meeting. I found it particularly meaningful to announce the restoration of the Scholarships and Fellowships at the very same Annual Business meeting where we voted in as our Chair-Elect a product of the Fellowship program, Tracy James. Beyond Tracy, these programs routinely produce an outsized portion of the Forum leadership. These initiatives bring people into the Forum and show them a path to meaningful involvement. From there, it is the power of the Forum that keeps them engaged.

Investing in the future of the Forum with programs of this sort is imperative for the ongoing success of the organization—and I use the term "investing" with purpose. When I asked for a show of hands at the Annual Business meeting of people who were or had been Scholars or Fellows, the response was striking. After Fellows are set on the path, they often return for years to come.

Once people get a taste of what the Forum has to offer, many stay for a career—I count myself among

them. A few years or even a few days of investment can result in decades of returns.

The Forum's mission is "Building the Best Construction Lawyers." To accomplish that mission, we must have a vibrant organization with opportunities for all of its members. Whether it is the Diversity Fellows program, the In-House Fellows program, or the Guide/Explorer program, the objective is to open the door and let people in. In the world of tightening legal marketing budgets (yet another bad remnant of the pandemic), I urge the Forum leadership moving forward to further expand opportunities for a structured introduction to our great organization.

To fulfill the Forum's potential, it is incumbent upon all of us to help all newcomers (and the journeymen members who have not yet found their path) feel comfortable and confident in making their way into the Forum. Whether that is as simple as inviting them to join your table at a meeting, encouraging them to join your division, or inviting them to join you as you walk around the French Quarter Festival, we all play a role in maximizing our pipeline of talent. When we fill seats with active, welcoming, and diverse attendees at every meeting, as we did this year, we build the future of the Forum. I hope you will do your part. I certainly appreciate those who opened the Forum doors for me . . . more to come on that topic in my last column.

The Revolution and Evolution of Discovery Disputes in the Digital Age

By Andrew P. Atkins and Caragh McGovern Landry

Andrew P. Atkins is an attorney with Smith, Anderson, Blount, Dorsett, Mitchell, & Jernigan, LLP, in Raleigh, North Carolina. He has volunteered for the Forum on Construction Law since 2019 and is vice chair of the Construction Forum of the North Carolina Association of Defense Attorneys. Caragh McGovern Landry is chief legal process officer for Technology Concepts and Design Inc. and is based in Weston, Connecticut, where she specializes in workflow design and continuous improvement programs.

Electronic Discovery Is Here

This article explores the evolution of discovery disputes in the digital age. While attorneys have been making discovery objections for years, the increasing prevalence of electronic discovery (also referred to as eDiscovery) and the sheer volume of data resulting from electronic records have created challenges for practitioners. Discovery disputes increasingly center on the scope of discovery of electronically stored information and courts have begun to adjust to address this emerging and constantly developing issue. Practitioners can expect courts to continue to make adjustments in the coming years as electronic discovery becomes even more of the norm. Because construction disputes often concern multiple years' worth of documents and data, the development of electronic discovery best practices is of utmost importance to the industry.

This article first addresses the purpose of discovery and common disputes; it then explores in detail new issues and best practices for engaging in electronic discovery. While this article generally covers issues and disputes in the context of litigation, the issues often equally apply in the context of arbitration.

The Purpose of Discovery

Rule 26 Outlines What Is Discoverable

When approaching discovery and discovery disputes, it is often valuable for practitioners to "return to basics" and remember the underlying purpose of discovery. That purpose, as generally set forth in Rule 26 of the Federal Rules of Civil Procedure (FRCP), is to "obtain [information] regarding any nonprivileged matter that is relevant to any party's claim or defense."[1] In the age of electronic discovery, the concept of proportionality has emerged as a crucial consideration when proposing discovery scope.[2] Proportionality continues to be an important part of discovery disputes and a limit on "overdiscovery."[3] Especially in construction cases, with large volumes of potentially relevant documents, discovery can easily account for a significant portion of litigation costs and, if left unchecked, could easily exceed the value of relatively modest claims. Thus, parties and the courts are left to grapple with how best "to secure the just, speedy, and inexpensive determination of every action and proceeding."[4] Of course, cooperation of counsel is paramount to efficient discovery and avoiding discovery disputes, which may transform into a "metaphysical exercise."[5]

The Proportionality Standard

The FRCP limits discovery to matters that are proportional to the needs of the case.[6] In analyzing this

concept, courts consider "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."[7] Many state court procedural rules have similar analogues.[8] But while the proportionality standard is an important tool to ensure that the value of a claim is not engulfed by the costs of discovery, it is also is a frequent culprit for disputes regarding the limits of discovery.

Gathering, storing, and producing electronically stored information (ESI) can be expensive.[9] ESI must be electronically stored and is often hosted on an eDiscovery platform to facilitate reviewing, analyzing, searching, and producing. However, hosting can become an expensive exercise and, in larger cases, can account for significant monthly costs. Nonetheless, "parties are expected to bear the expense of producing" ESI.[10] Courts are unlikely to give parties "a free pass" because electronic discovery is difficult or costly.[11] But even though courts expect parties to bear the costs for electronic discovery, courts have recognized that document productions "need not be perfect."[12] Accordingly, parties typically gather and then produce large document sets using search terms.[13] Attorneys are also increasingly using technology-assisted review (TAR) to identify responsive documents without the need for manual review.[14] It, of course, will be interesting to see how the evolving advanced artificial intelligence akin to ChatGPT changes the space; many eDiscovery platforms are already adopting this type of technology.

As eDiscovery becomes more common and tools exist to effectively manage large document sets, the question of proportionality becomes front and center. Attorneys have an ethical duty to be competent in the area of law in which they practice—and eDiscovery is no different.[15]

Unfortunately, disputes regarding proportionality often arise because of a lack of cooperation among the parties and/or counsel. Regrettably, these disputes often arise *after* significant work has already been done to generate a production. One way to avoid disputes after generating a production is to cooperate with the other party and be candid about how one intends to fulfill its discovery-related responsibilities. For instance, if one intends to use search terms in determining which documents to produce, the best practice is to propose terms to the opposing party, receive potential feedback on the terms, and ultimately reach an agreement on the terms that will be employed.[16] Reaching an agreement on the front end for both search terms and the mechanics of how documents will be produced reduces the likelihood of discovery disputes and avoids the circumstance where one could be on the losing end of a dispute and then need to repeat/redo certain discovery tasks that were already underway.[17] For instance, where parties can agree at the outset on the form of production of ESI (i.e., whether documents should be produced in native, .pdf, TIFF, or some other form), there should be limited disputes on the production format as discovery progresses.[18]

Parties requesting discovery can also be proactive to reduce the likelihood of eDiscovery disputes. For instance, a narrowly tailored document request is likely to stand the proportionality test. Construction attorneys are all-too familiar with the request for the "entire project file." In present times, where the "project file" could arguably consist of a near incalculable number of documents, such a request is not proportional where cases typically concern specific issues in dispute. While such a request could be more proportional for a dispute involving a years-long delay and disruption claim worth millions of dollars, even there it is likely that parties can better tailor such a request to focus on documents/issues likely to yield meaningful information. Courts are likely to consider the specific nature/scope of a dispute in making determinations on the reasonableness of requests: "Reasonableness and its bedfellow, proportionality, require a case-by-case balancing of jurisprudential considerations, which is informed by factors the discovery rules identify as limiting the scope of discovery . . . ."[19]

A Comparison—Discovery Differences Between the United States and Canada

While this article focuses primarily on discovery expectations in the United States, it is often valuable to understand how other countries' legal systems approach discovery. While US and Canadian litigation processes are very similar, there are some notable differences that impact the discovery phase; some of these key differences include the scope of discovery, recovery of costs, data privacy, and privilege. Practitioners are encouraged to consider how adoption of some of these different approaches could improve the discovery process.

Scope of Pre-Trial Discovery

An important difference between litigation in Canada and the United States happens during the pre-trial discovery phase. In Canada, parties are obligated to produce relevant documents and are afforded the opportunity only to depose specific custodians or a single corporate representative of a corporation or organization. By contrast, in the United States, pre-trial discovery can involve depositions of many witnesses. Because of this, pre-trial discovery in the United States is often significantly more time consuming and costly than in Canada.

Recovery of Costs

In Canada, the default rule in litigation is that the prevailing party is entitled to recovery of its costs. This default position can have a significant influence on parties' decisions during the discovery phase, with parties potentially becoming more reticent to adopt a scorched-earth discovery approach knowing that it could become liable for costs incurred not only by itself, but also by the opposing party. Many of the common ESI disputes in the United States involve voluminous collection, review, and production of documents, and disputes over proportionality in general. The frequency of these disputes is less in Canada due to the cost recovery mandates, as parties are loathe to be left holding a hefty bill it effectively created by arguing for more data in discovery.

Data Privacy

Data privacy varies greatly depending on the nature of the data being stored and the jurisdiction in which the data are being collected. In the United States, there is no unifying law governing data privacy generally across the country. Canada, however, has both federal and provincial laws addressing privacy. The Personal Information Protection and Electronic Documents Act (PIPEDA) is a unified approach that makes it somewhat easier for businesses to identify which regulations apply and how to comply with production obligations, especially when dealing with interprovincial and international trade matters.

Much like the General Data Protection Regulation in the European Union, data use obligations in Canada are well defined and do not change regularly. This permits companies to standardize protection and storage of personal data and simplifies the handling of personally identifiable information (PII), protected health information (PHI), and payment card information (PCI) in eDiscovery hosting, document review, and production.

Privilege

Typical privilege claims in the United States involve attorney-client communications and work product protection. These claims permit parties to withhold and/or redact communications with attorneys seeking or providing legal advice; the work product protection extends to documents created in anticipation of future litigation. During electronic review, documents are typically "tagged" for these two privilege claims; at the conclusion of the review and production process, a log is typically created that identifies the categories or specific documents that are being withheld or redacted for privilege reasons.

The Canadian system recognizes four standard privilege claims: (1) Solicitor-Client Communication,

(2) Litigation Privilege, (3) Settlement Privilege, and (4) Common Interest Privilege. Solicitor-Client Communication privilege is similar to the attorney-client privilege in the United States, and Litigation Privilege is similar to the work product claim. The Settlement Privilege relates to documents surrounding a settlement of a matter, while Common Interest Privilege is an anti-waiver privilege that allows multiple parties, and their counsel, to share privilege documents without waiving privilege, if the parties share a common interest in the successful completion of a transaction or the outcome of a litigation. These four Canadian categories permit withholding of more documents compared to the United States, and often a privilege log is not expected to be produced with production sets. This reduces the time and cost of production because the creation of a privilege log can be very costly; moreover, the expectation that a larger number of documents may be withheld from production and lack of a log reduces contention over privilege claims.

Common Discovery Objections

Some of the most comment discovery objections are that the requests promulgated are vague, ambiguous, overbroad, and unduly burdensome, and/or seek production of privileged information. When asserting objections to discovery, however, parties are cautioned that boilerplate objections often will not be afforded meaningful consideration by courts; rather, an objecting party is much better positioned where it explains its objection with particularity.[20]

As a general matter, courts dislike being involved in discovery disputes and view them as a waste of judicial resources.[21] Accordingly, parties are wise to reflect on the scope and purpose of discovery and how a request for documents, interrogatory, request for admission, or deposition may impose an unreasonable burden on the receiving party. Parties seeking productions should determine whether alternative methods of discovery are more appropriate to obtain the information sought to resolve such disputes without judicial intervention.[22]

Vague and Ambiguous

One of the most common discovery objections is that a request is vague or ambiguous. However, it is uncommon that a responding party describes the specific reason why the objection is made or what portion of the request is vague or ambiguous; this conflicts with courts' expectations that a "'party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity'; [and] that '[a] party objecting on these grounds must explain the specific and particular way in which a request is vague.'"[23] Instead of reflexively stating that a request is vague or ambiguous, a "party should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories. . . ."[24] In the event that there is some confusion about the request, a responding party is also required to attempt to clarify any vagueness or ambiguity by conferring with the requesting party.[25]

Courts are unlikely to sustain objections for vagueness and ambiguity when the "exercise of reason and common sense" would allow a party to formulate a response or understand a request to produce documents.[26] However, courts may sustain an objection when it is truly unclear how a party would or should respond. For example, one court sustained such an objection when an interrogatory requested that a party "describe" a statement. The court noted that "[i]t is unclear to the Court how Plaintiff would 'describe' a statement. It is also unclear what type of 'statement' Defendant is referring to. . . ."[27] Courts have also sustained objections for vagueness and ambiguity when the propounding party did not provide access to documents that were necessary to respond to an interrogatory.[28] A request may also be deemed vague and ambiguous when it lacks any reference to time.[29] In general, whether an objection based on vagueness and ambiguity is going to be sustained will depend on the nature of the request and the context in which it is made. Accordingly, this analysis tends to be fairly fact specific.

A propounding party can take affirmative steps to avoid objections based on vagueness and ambiguity. While a responding party is required to use commonly understood definitions of terms when responding, not all words are self-defining. Accordingly, parties can avoid objections on the basis that a term is vague and ambiguous by defining such a term. A propounding party can also avoid objections by being as specific as possible with respect to time and place. While absolute specificity may not be possible, it is critical that the propounding party provide sufficient details to enable a responding party to understand what information the party is seeking. If each request is approached with this concept in mind, a party can more carefully craft its requests to target the information it is actually seeking.

Overbroad and Unduly Burdensome

Objections based on a discovery request being overbroad and unduly burdensome are exceedingly common. These objections are frequently made to requests for production of documents—particularly with respect to the collection and production of vast amounts of ESI. However, such an objection could also be made with respect to deposition topics for a corporate representative under Federal Rule of Civil Procedure 30(b)(6). When evaluating an objection on the basis that a request is overbroad and unduly burdensome, and "assessing the proper scope of discovery, the court looks to the underlying claims and defenses."[30] A court will balance whether the "burden or expense" of the discovery sought "outweighs its likely benefit."[31]

While parties often object on the basis of overbreadth or that a request imposes an undue burden, a responding party should be aware that making such an objection does not relieve the receiving party from responding.[32] Rather, "[i]t is well settled that a responding party has the duty to answer an overly broad or unduly burdensome interrogatory to the extent it is not objectionable."[33]

Discovery requests often use the terms "all" or "every" when requesting information. For example, an interrogatory may request "all facts" or a request for documents may request "all documents." Such a request may likely be determined to be overbroad and unduly burdensome in many contexts.[34] Instead, propounding parties should limit their requests to seek material or principal facts in an effort to reasonably limit the scope of a request.[35] For example, rather than requesting the production of "all" documents related to the electrical work on a project, a request can be made for the production of all documents related to the in-slab conduit at issue in the litigation. Courts have also looked at the type of information being requested when ruling on an overbroad or unduly burdensome objection. For example, one court has sustained an objection when "[t]here is no specificity to the requests and no effort to limit these requests to any relevant acts alleged in this action."[36] Additionally, courts may be inclined to limit the scope of discovery requests that have no defined time limits as a means to reduce the burden of a particular request.[37] With respect to document requests, a court is likely to look at the costs of collection and production.[38]

Disputes regarding overbreadth and undue burden are particularly likely to arise with respect to ESI. As one court put it, some matters may result in a "discovery war" rather than a discovery dispute.[39] Resolution of discovery disputes regarding the production of ESI necessarily requires parties to cooperate because courts are not positioned to craft search terms or other processes for collection.[40]

With respect to ESI, a useful tool to limit the overall volume of production is for the parties to identify the project persons that are likely to have the majority of relevant information and search against those persons' mailboxes. And, importantly, if disputes arise, parties are best served by cooperating to limit the scope of requests to the information actually needed and to minimize the burden of responding to a particular request.

Privilege

While the scope of the attorney-client privilege and the work product doctrine are beyond the scope of this article, some points are worth noting. While objections to production on the basis of attorney-client privilege or the work product doctrine are common, not all communications between attorneys and their clients are privileged.[41] Rather, to be privileged, a communication "must be (1) a communication (2) made between privileged persons (3) in confidence and (4) for the purpose of obtaining or providing legal assistance for the client."[42] In addition, the work product doctrine separately protects materials created in anticipation of litigation, whether created by attorneys or those assisting them.[43] Discovery disputes related to privilege often center around these issues and are resolved by *in camera* review.

It is important to timely raise an objection on the basis of privilege because failure to do so could result in a waiver of the right to assert the objection and withhold information as a result.[44] While there may be some instances in which the breadth of a request excuses a failure to timely raise an objection,[45] it is best not to rely on the mercy of the court.

While parties may be tempted to craft discovery requests in a way to avoid the scope of the request to include privileged or otherwise protected information, doing so is not without risks. Federal Rule of Civil Procedure 26 requires a party to expressly state when information is withheld on the basis of privilege or that it is otherwise protected and provide sufficient information to allow the requesting party to assess the claim.[46] However, if the request is defined in a way that privileged documents are not responsive, the information arguably falls outside the scope of the request and, as a result, may never be placed on a privilege log.[47]

Common Discovery Disputes

Discovery disputes can be challenging to handle, but understanding the core issues and common options and solutions can help attorneys navigate through the discovery process. This article section discusses various aspects of discovery disputes, common reasons disputes arise, and best practices for avoiding or resolving them.

ESI Protocols and Early ESI Disputes

An ESI protocol is an agreement between parties that covers the parameters for electronic discovery in a matter. Via meeting and conferring, parties should discuss, through the creation and negotiation of the ESI protocol, (i) industry standards for data accessibility and production; (ii) scopes of collection, review, and production; and (iii) ideas to resolve any potential discovery disputes without court intervention.[48] Partnering with an eDiscovery vendor is crucial at this early stage because vendors are most well-versed with the technical aspects of the data and practitioners can leverage vendors' experience to understand common issues and the likely expense of what is being discussed.

The ESI protocol should be viewed as not only an agreement, but also as a how-to guide for preservation, collection, processing, reviewing, and production of discovery. While ESI protocols are customizable, it is recommended that they should include the following basic information: scope, preservation, collection, processing, production, and privilege.

Scope

This section of the protocol should cover the who, what, and when of the discovery process. The identification efforts more relevant for scope include the selection of custodians most likely to have relevant information, what type of documents they may have, all sources that may hold relevant data (servers, hard drives, laptops, hard copy, cell phones, websites, share drives, third parties, etc.), and a date frame or other temporal parameter that will be applied to the collection, review, and production of

discovery material. This section can also identify inaccessible or difficult-to-obtain data that will not be collected or produced.

Preservation

A protocol agreement should define which data will be preserved and for how long. To the extent that legal hold notices have not already been issued by one or more parties, the protocol document can include retention periods and similar expectations. These steps help ensure that data are not accidentally deleted or destroyed in the normal course of a party's IT management. However, agreeing to preservation and legal hold parameters does mean that both parties have to uphold the terms of the agreement. Any unexplainable or avoidable deletion of data can lead to spoliation claims, which are discussed below.

This protocol section also may include language detailing what data do not have to be preserved. Some examples of data that may be identified as outside the scope of data preservation include backup data, deleted or slack space data, temporary internet data (like cookies or history information), system logs, and metadata that is often updated through daily use, like last modified or accessed information.

Collection

A useful protocol will include parties' agreement on what data will be collected from each identified custodian and noncustodial locations. Ranging from corporate share drives, to email, to cell phone text messages, to backup and HR systems, defining where data exist and where data will be collected from helps anticipate the volume, cost, and timing of the discovery phase. Partnering with an eDiscovery vendor is crucial to make sure what is being agreed to is technically feasible and will not result in unexpected expense. Prioritization or phasing of collection, if appropriate, will be defined here, as well as any issues present with the collection of any sources (location, potential inaccessibility, cost, etc.). Any limitations to the collection of materials must be identified and agreed to or an alternative method agreed to by both parties.

Processing

Once data are collected, how the data are processed, extracted, made viewable or accessible, and presented in production should be addressed as part of a protocol. Processing topics to be addressed in the ESI protocol include search terms, file types, time zones, metadata, deduplication, and TAR tools and processes. Foreign language documents and system data may also be included in this section. For example, software like AutoCAD is often used in the contractor's or designer's course of business and may contain relevant information. There are many ways to process an AutoCAD file, and defining the relevant data at this stage will inform how the files are processed for review and production. Again, partnering with an eDiscovery vendor can be helpful in negotiating this section, particularly when the terminology tends to be highly technical.

Deduplicating data and utilizing search terms are useful ways to achieve proportionality as well as to reduce costs to all parties. Once data are processed and files are cracked open to their single-state status (all emails and attachments are mined from a PST or all files are extracted from a ZIP or other container file), agreeing to "dedupe" documents within or across custodians will lessen the noise of large data volumes and refine the document population to streamline review and ingestion of information. Likewise, agreeing to search terms and date limiters will also refine the document population and narrow down the scope of the collected documents. eDiscovery partners can provide valuable insight from a data perspective at this point—among other things, how many documents are hitting on each search term, which terms are likely too broad, which terms may be too narrow, and which terms can be excluded.

An additional method to refine the document population during processing is to agree to run email

threading across the documents to collapse email chains down to the most inclusive email (usually the last in a conversation) that contains all the back-and-forth individual emails. This saves time and cost in the review of email for production as well as in the review of the inbound produced set.

While not technically a traditional eDiscovery processing step, document review is another cost factor for both parties when producing documents in the discovery phase. TAR tools and processes of Predictive Coding and Continuous Active Learning (CAL) can also reduce the time and cost of review, as well as aid with consistency and expediency in production. Agreements to use TAR tools and processes have become more frequent over the last 10 years, but the next major development in document review will almost certainly be adoption of more advanced forms of artificial intelligence. In ideal cases, ESI protocols will detail the tools and review processes that will be employed, as well as any metrics or reporting that will be shared or agreement on achievement data points such as Precision and Recall rates, which are measurements of how well the technology (and/or humans) performed in finding the necessary responsive documents agreed to for production.

Production

Agreements on how documents will be produced to other parties inform collection, processing, and review—so the technical parameters for production sets are an essential element of a good ESI protocol.

Agreeing to a production methodology includes defining the format of produced data (TIFF, PDF, Native Format, mix), load file requirements, and metadata requirements, as well as how productions will be shared (SFTP, hard drive, database, etc.). This protocol section will also include timing for delivery (rolling, substantially complete, complete by dates), as well as note any exceptions to the format or schedule, such as certain file types being produced in native format or documents requiring redactions following agreed-upon production dates.

Privilege

FRCP Rule 26(b)(5) provides the legal basis to protect privileged information. If a party denies production of discoverable information on the basis that it is privileged, the party must provide a description of the withheld document (with sufficient detail but that does not undo the purpose of the privilege right). In the ESI protocol, parties should agree on acceptable methods of identification and redaction for privileged materials. A definition of what constitutes a privilege claim is sometimes included, and parties can agree to whether or not logs are required for all documents or just specific sets of documents, a format for the log if required, and redaction standards. Timing for delivery of any required logs also should be stated in this section.

Inadvertent production and claw-back agreements are also commonly included in ESI protocols. Through adherence to Rule 26(b)(5) and Federal Rule of Evidence (FRE) 502(e) (and/or applicable local rules), parties are encouraged to reach agreement on methods that can reduce costly disputes over privilege.

In addition to the above-described sections, reliable ESI protocol also typically includes sections relating to (i) meet and confer conferences to discuss and define the ESI protocol and/or to resolve disputes short of judicial intervention; (ii) where parties are unable to resolve disputes between them, a process for resolution via intervention (whether judicial or via an eDiscovery liaison/master; (iii) an agreed statement on the further achievement of proportionality; (iv) a glossary of key terms (like metadata, load file, email threading, etc.); and (v) an agreed procedure for modifications to the ESI protocol after initial agreement.

During the development of the ESI protocol, common arguments at this stage include the scope of discovery (custodians, systems, platforms, etc.), search terms to capture discoverable material, and

the format of production. Including a meet-and-confer section and creating and agreeing to an ESI protocol containing the elements listed here should reduce the number of eDiscovery disputes during the production period.

Spoliation

Spoliation of evidence happens when a potentially discoverable document is destroyed or altered significantly. Whether this is done negligently or intentionally, destruction of discoverable material is prohibited by FRCP Rule 37 and by Rule 3.4 of the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules).

FRCP Rule 37(e) states that "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."[49] This rule also provides for sanctions to be levied against the offending party as the court deems appropriate.

ABA Model Rule 3.4 states that "a lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."[50]

Spoliation can be avoided through thorough and managed implementation of a legal hold process when litigation is anticipated or actioned and through education and communication within the company on duty to preserve. Additionally, using partners with good reputations for the collection and processing of data is important so no key information is left behind or altered in any unacceptable manner. Whether spoliation occurs through negligence or intentional action, failure to preserve discoverable information is often punished with heavy and impactful sanctions. Courts typically do not look favorably upon those who seek to obviate the discovery of evidence, as evidenced by the below two cases.

Mosaid Technologies v. Samsung Electronics *(2004)*[51]

In September 2001, Samsung received notice of litigation against it by Mosaid Technologies. For reasons unknown, Samsung did not implement a litigation hold process or alter its email document retention policy, which was set to delete emails on a rolling basis with automatic retention rules in place. Because of this, Samsung was unable to produce any emails in discovery related to the litigation because none had been preserved. Samsung claimed that Mosaid did not expressly request email in its discovery request and therefore the failure to preserve email was not sanctionable.

The court, however, ruled that Samsung was responsible for spoliation and issued a spoliation adverse inference, instructing the jury that it could choose to infer the destruction of evidence demonstrated guilt on the part of Samsung. Sanctions were also issued for attorney fees in the amount of approximately $566,000.00. The court also held that because Samsung had notice that this litigation had begun with the filing of the Mosaid complaint in September 2001, Samsung had an affirmative obligation to preserve potentially relevant evidence, including e-mails, and that Samsung's position that Mosaid did not specifically request email productions was made in bad faith. While it was accurate that Mosaid did not specifically use the term "email" in its request, Mosaid did define the term "document" to include, among other things, letters, correspondence, statements, and interoffice communications; the court determined

that email should have been reasonably inferred to be included within such a request. Moreover, the court noted that Samsung itself included email in its own discovery request to Mosaid. The judge determined that such request established that Samsung knew email was discoverable and, therefore, should have been preserved by Samsung itself.

FTC v. Noland *(2021)*[52]
In April 2019, the Federal Trade Commission (FTC) issued a subpoena to Wells Fargo asking for financial data related to James Noland and Success By Health (SBH). In May 2019, Wells Fargo inadvertently disclosed the subpoena to Noland himself. When the FTC found out that Noland knew he and SBH were being investigated, the FTC reached out to Noland and SBH directly and instructed them to preserve relevant documents.

Instead of preserving evidence as requested, however, Noland coordinated with other senior members of his team to move all communications into two encrypted email systems to obscure and hide information from the FTC. In 2020, the FTC sought a temporary restraining order against Noland, which request included instructions to preserve relevant documents and to turn over cell phone and mobile devices in discovery. Again, Noland coordinated efforts with his team to use the auto-delete function on the two encrypted email systems and had his team delete the applications on their mobile devices prior to turning them over to the FTC. The court awarded an adverse inference instruction due to Noland's intent to deprive the FTC of email evidence.

Collection
A data map is the best eDiscovery tool for disputes related to collection items—it describes or visualizes the various sources and formats of data, where data are stored, and how such data can be retrieved. Data maps can assist in avoiding or resolving common disputes such as the proper number and form of noncustodial data sources; search terms to be employed during collection and self-collection strategies; and nonstandard data types like text/chat messages and social media.

Custodians
Every custodian can be assigned a total cost in the discovery process, and every custodian added increases the cost for collection, processing, document review, and production. A party who has a handle on its data volumes and known sources of storage should be prepared to negotiate custodians during creation of the ESI protocol. For collection volumes per custodian, a simple calculation should be done prior to the meet-and-confer meeting. A reliable starting point is to request a client's IT department provide a quick map of where data are located and volumes for the top three custodians, a middle importance custodian, and a low importance custodian. At minimum, practitioners should look for active email sizes, archive sizes, shared drives or server volumes per quick search of custodian name, cell phone size (if applicable), and chat search size (if applicable). Providing these numbers to a trusted eDiscovery provider will allow the provider to issue a time and cost estimate for collection, general processing prices, and a document review quote (usually based on 4,000 documents per gigabyte with a 50 percent deduplication rate). With these starting volumes, if opposing counsel is insistent upon adding data from even more custodians, counsel can use these numbers and estimates to extrapolate cost and argue against broadening the scope.

Search Terms and Self Collection
Once data sets from custodians are collected, search terms are the next steps in the process. Search terms that are too broad can return many false positives, but eDiscovery vendors are able to provide a report of search terms hits (total) and identify those that are unique (no other document would be brought in if this term was removed), stand-alone (hit document only), and with family members (the hit document plus any attachments). With this report, it is possible to estimate the cost to review those documents using a

per document fee estimate. This information can be used to negotiate including or excluding search terms during the planning phase. Narrowing or removing search terms can be an effective way of reducing time and costs on a matter, and employing the data and insights provided by an eDiscovery vendor can be persuasive when resolving discovery disputes.

For non-email data, self-collection or identification of related documents, rather than employing search terms, can reduce the volume of data per custodian. Self-collection, however, is prone to human error and is most appropriate where the custodian was diligent with where and how they saved project or topic materials. In contrast to search terms being overly broad, self-collection can be too narrow and documents can be at risk of being missed due to aforementioned human error. If this method of self-collection is employed, counsel should be prepared to argue or defend how data were managed by the custodian.

Costs

The most common eDiscovery disputes center around cost. Practitioners frequently argue against collection of certain custodians or sources or for inclusion of certain search terms or data types due to the burden of cost associated with them. If one is working with a data map and/or has done the work to create the calculator by custodian or source, or if one is armed with a search term report, the argument associated with overbroad collection and associated cost can be compelling. Without such hard data sets, merely complaining about cost more conceptually is more challenging.

Noncustodial and Nontraditional Data Types

Most companies utilize shared drives, intranet sites, or internal-facing databases and software programs where employees can create and store data. Sharepoint, Confluence, document repositories, chat and texting tools, HR systems, timekeeping platforms, and design databases are all examples of locations that may contain potentially discoverable information that is not tied directly to a single custodian. Identifying these platforms and systems and understanding what data are created and stored are important for negotiations of an ESI protocol. Because requesting parties can often be overinclusive in their requests for production, practitioners are advised to have a firm knowledge base of the nature and location of precise data sets that are most relevant to the issues in dispute.

Collecting noncustodial and nontraditional data types often requires tools designed to specifically collect that type of data and can result in overcollection and unnecessary additional costs. By way of an example, if counsel agrees to produce mobile phone text messages, phones will have to be collected and the text messages extracted. Mobile device collection can incur a per device fee of $500 or more, may entail travel or shipping costs, and will include processing of all data collected from that phone to get to the text messages. This can add thousands of dollars, per mobile device, to the overall cost of discovery. If collection is required from 20 people, it can significantly add to the overall cost of discovery. Knowing this, negotiating scope and need with the opposing party regarding whether all 20 individuals' devices are necessary can be an important step towards cost management.

Text and chat messages also can be problematic for processing, review, and production. Text and chat present themselves differently than other methods of correspondence and are more in line with spoken, rather than written, language. With this means of communication, data are extracted differently in processing, so various tools, quality control steps, and processes need to be implemented to present the documents clearly for review and production. A chat room export document can be a great deal lengthier than an email communication and can contain more active participants; this can up the costs of review due to the complexities of this form of communication. Emojis, short-cut language, code words, acronyms, and varying phrasing are also more prevalent in chat communications, which increases the degree of difficulty for reader review (which itself can then lead to higher costs). Seasoned practitioners

can often reach agreements regarding the extent (or even whether) such data will be subject to collection and production.

Production

As referenced above, reaching agreements on the format of electronic production is crucial for dispute avoidance, but also for ease of review after production and use of the produced document sets throughout the litigation.

The Meet-and-Confer Requirement

In the event the hard work developing the ESI protocol did not fend off discovery disputes or the ESI protocol is not followed by the opposing party, discovery disputes are governed by FRCP Rule 37. Rule 37(a) requires a party moving to compel discovery to "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."[53] The initial step in complying with the obligation to meet and confer is often a letter from the requesting party explaining the dispute.

However, a meet-and-confer letter should not be the end to the parties' efforts to reach agreement. "Discovery is supposed to proceed with minimal involvement of the Court."[54] Accordingly, a meet-and-confer conference should be scheduled between the parties to discuss each disputed request.[55] "Simply corresponding with opposing counsel is not considered a good-faith attempt to confer or have a conference to resolve discovery disputes."[56] The intent of the meet-and-confer conference, and the meet-and-confer requirement more generally, is to facilitate "fulsome discussion of the issues in dispute" between the parties and, hopefully, meaningfully allow for the parties to resolve the disputed requests.[57] As such, courts have held that an actual meeting is required and that solely leaving a voicemail or sending a meet-and-confer letter is insufficient.[58] Simply put, the meet-and-confer requirement forces parties to "converse, confer, compare views, consult and deliberate," such that the dispute can be resolved without judicial involvement.[59] Because the courts view the meet-and-confer requirement to be more than a technical one, many local rules require the Rule 37(a) certification to contain detailed information about the meet-and-confer efforts.[60] Creating a meet-and-confer agenda can assist the parties in ensuring meaningful discussion is had about each request in dispute. Ultimately, resolving discovery disputes without judicial intervention when possible is in the parties' best interest. Thus, fulsome efforts should be made to see what, if any, resolution can be reached based upon the parties' cooperation.

Conclusion

Discovery disputes have been a significant component of litigation for decades; but as the scope of electronic discovery has increased, the frequency of disputes has followed suit. Recognizing this trend, proactive counsel are encouraged to take steps to decrease the likelihood of discovery disputes developing in their cases and increase the likelihood of prevailing on such disputes when they cannot be avoided. Counsel should be aware that they are unlikely to be the subject matter experts for eDiscovery—even if they have significant experience in the field. Thus, cooperation and collaboration with eDiscovery vendors is of paramount importance as counsel seek to navigate electronic discovery issues and, hopefully, resolve discovery disputes with minimal judicial intervention. There is little doubt that eDiscovery techniques, processes, and related support products and services will continue to advance and grow in importance as advances continue in technology, computing, and artificial intelligence. Litigation counsel should make best efforts to keep up with these advances and adopt evolving best practices. Working closely with your eDiscovery vendors can ensure that you are an early adopter of technologies that will result in tremendous cost savings for clients.

Endnotes

1. Fed. R. Civ. P. 26(b)(1).
2. Fed. R. Civ. P. 26 (Committee notes on Rules—2015 Amendment).
3. *See id*.
4. Fed. R. Civ. P. 1.
5. Covad Commc'ns Co. v. Revonet, Inc., 254 F.R.D. 147, 150 (D.D.C. 2008) ("While I have considered a similar provision in depth once before, I see no need to repeat that metaphysical exercise here because it is a waste of judicial resources to continue to split hairs on an issue that should disappear when lawyers start abiding by their obligations under the amended Federal Rules and talk to each other about the form of production.").
6. Fed. R. Civ. P. 26(b)(1).
7. *Id*.
8. *See, e.g.,* Ala. R. Civ. P. 26(b)(1).
9. Waskul v. Washtenaw Cnty. Cmty. Mental Health, 569 F. Supp. 3d 626, 634 (E.D. Mich. 2021).
10. *Id*.
11. *Id*. at 635.
12. City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489, 492 (N.D. Ill. 2018).
13. *Id*.
14. *Id*. at 493.
15. *Waskul*, 569 F. Supp. 3d at 635.
16. *City of Rockford*, 326 F.R.D. at 492.
17. *See* Covad Commc'ns Co. v. Revonet, Inc., 254 F.R.D. 147, 150 (D.D.C. 2008) ("Moreover, by converting the data from its native format to TIFF and producing it in hard copy Revonet ran the risk of what has now come to pass—that it would nevertheless have to produce the data in its native format.").
18. *See, e.g., In re* State Farm Lloyds, 520 S.W.3d 595 (Tex. 2017).
19. *Id* at 599.
20. *See* Fed. R. Civ. P. 34(b)(4); Guzman v. Irmadan, Inc., 249 F.R.D. 399, 400 (S.D. Fla. 2008).
21. *See* Plain v. Murphy Farms, Inc., No. CIV-00-770-A, 2001 WL 36399997, at *1 (W.D. Okla. Feb. 6, 2001).
22. *See* Miller v. York Risk Servs. Grp., No. CV-13-01419-PHX-JWS, 2014 WL 11514555, at *2 (D. Ariz. July 7, 2014) ("Regardless of the potential merit or lack of merit of Plaintiffs' motions, the parties' failure to fully attempt to resolve discovery disputes prior to approaching the Court is in derogation of the efficient utilization of judicial resources and the continued failure to comply with these rules will, in the future, result in the imposition of sanctions.").
23. Lopez v. Don Herring Ltd., 327 F.R.D. 567, 580 (N.D. Tex. 2018).
24. *Id*.
25. *Id*.
26. *See* Anderson v. United Parcel Serv., Inc., No. CIV.A. 09-2526-KHV, 2010 WL 4822564, at *5 (D. Kan. Nov. 22, 2010).
27. *Id*.
28. Stern v. Weinstein, No. CV091986DMGPLAX, 2010 WL 11459354, at *2 (C.D. Cal. Aug. 19, 2010).
29. Sterling Jewelers Inc. v. Alex & Ani, LLC, No. 5:17-CV-2540, 2018 WL 6064868, at *5 (N.D. Ohio Nov. 20, 2018).
30. Goree v. United Parcel Serv., Inc., No. 14-CV-2505-SHL-TMP, 2015 WL 11120571, at *5 (W.D. Tenn. Sept. 29, 2015).
31. Surles *ex rel.* Johnson v. Greyhound Lines, Inc., 474 F.3d 288, 305 (6th Cir. 2007).
32. *Anderson*, 2010 WL 4822564, at *3.
33. *Id*.
34. *Id* at *6.
35. *Id*.
36. Kennedy v. Cont. Pharmacal Corp., No. CV 12-2664 JFB ETB, 2013 WL 1966219, at *2 (E.D.N.Y. May 13,

2013).

37. *See Johnson*, 474 F.3d at 305–06.

38. *Id*.

39. Goree v. United Parcel Serv., Inc., No. 14-CV-2505-SHL-DKV, 2015 WL 11120572, at *3 (W.D. Tenn. Oct. 30, 2015).

40. *See id* at *4.

41. Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., No. SACV080367AHSRNBX, 2011 WL 13185835, at *2 (C.D. Cal. Jan. 26, 2011).

42. *In re* Zostavax (Zoster Vaccine Live) Prod. Liab. Litig., No. CV 18-MD-2848, 2021 WL 1181187, at *1 (E.D. Pa. Mar. 19, 2021), *report and recommendation adopted*, No. CV 18-MD-2848, 2021 WL 1181188 (E.D. Pa. Mar. 29, 2021).

43. *Id* at *2.

44. Robinson v. City of Arkansas City, Kan., No. 10-1431-JAR-GLR, 2012 WL 603576, at *12 (D. Kan. Feb. 24, 2012).

45. *Id* at *11; Katz v. Liberty Power Corp., LLC, No. 118CV10506ADBDLC, 2021 WL 3616073 (D. Mass. Mar. 29, 2021).

46. Fed. R. Civ. P. 26(b)(5).

47. *See* Homes v. Lexington Ins. Co., No. 3:13-CV-719-BN, 2014 WL 11515382, at *1 (N.D. Tex. June 4, 2014).

48. ESI Protocol, Defender Serv. Off., Training Div., https://www.fd.org/litigation-support/Joint-Electronic-Technology-Working-Group/esi-protocol.

49. Fed. R. Civ. P. 37(e).

50. Rule 3.4: Fairness to Opposing Party & Counsel, Am. Bar Ass'n (Apr. 17, 2019), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel/.

51. Mosaid Tech. Inc. v. Samsung Elec. Co., Ltd., 348 F. Supp. 2d 332 (D. N.J. 2004).

52. *Fed. Trade Comm'n v. Noland*, No. CV-20-00047-PHX-DWL, 2021 WL 3857413, at *1 (D. Ariz. Aug. 30, 2021).

53. Fed. R. Civ. P. 37(a)(1).

54. FDIC v. Butcher, 116 F.R.D. 196, 203 (E.D. Tenn. 1986), *aff'd*, 116 F.R.D. 203 (E.D. Tenn. 1987).

55. V5 Techs. v. Switch, Ltd., 334 F.R.D. 297, 301 (D. Nev. 2019).

56. Harris v. Target Corp., No. CA 17-0569-CG-MU, 2018 WL 6220109, at *1 (S.D. Ala. Aug. 30, 2018).

57. *V5 Techs*., 334 F.R.D. at 301.

58. *Harris*, 2018 WL 6220109, at *1.

59. Cotracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 456, 459 (D. Kan. 1999).

60. Bliss v. CoreCivic, Inc., No. 218CV01280JADEJY, 2022 WL 2498997, at *1 (D. Nev. June 2, 2022).