



A Litigator's Pragmatic Approach to Avoiding Discovery Disasters

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Discovery is a messy proposition. When in the throes of bit-to-byte battle, litigators make reasonable and good-faith judgments on preservation triggers, scope evaluation, and the selection of document categorization tools, only to have those decisions analyzed and reevaluated with the precision of adversarial, years-after hindsight by an opponent who will scrutinize processes and convey to the court that they could have done better.

Now consider electronically stored information (ESI) and the problem becomes even more complex. ESI can multiply like a gremlin and disappear like Casper—all at the stroke of a few keys. The nebulous and imprecise characteristics of ESI lay the groundwork for what can develop into litigating about litigation (or litigation about litigating)—a wasteful proposition, but one that has turned into a multibillion-dollar industry of lawyers, consultants, data services companies, and, yes, old-fashioned scanning and copy vendors, all discovering more about discovery.

So you say you're a litigator and you have "people" who take care of ESI for you—according to the State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion 2015-193, you better have co-counsel or an ESI consultant to act as your Rosetta stone. If you haven't heard Judge Peck's "wake-up calls," we are here to tell

you that ESI issues are front and center in litigation. *See, e.g., Fischer v. Forrest*, No. 14 Civ. 1304 (PAE) (AJP), 2017 U.S. Dist. LEXIS 28102, at *1 (S.D.N.Y. Feb. 28, 2017) ("It is time, once again, to issue a discovery wake-up call to the Bar in this District: the Federal Rules of Civil Procedure were amended effective December 1, 2015, and one change that affects the daily work of every litigator is to Rule 34."). It's 2018 and discovery *is* litigation. Cases are won (and lost) on data.

- If you (or your co-counsel) can't explain ESI issues in simple plain-English sound bites, you and your client may be at a disadvantage.
- A poorly negotiated pretrial order or a less-than-average e-discovery or document review vendor may place your client at a disadvantage.
- The inadvertent production of information that includes privileged information will place you and your client at a disadvantage.

Luckily, litigators can likely avoid and manage most discovery disasters and ESI shortcomings. This article aims to provide every legal professional with "war tested" tips on how to successfully avoid those "Oh muck!" moments of e-discovery.

Illustration by Doug Thompson

Know the Rules

By now, you should understand and acknowledge that the Federal Rules of Civil Procedure were amended and adopted on December 1, 2015. Yet, while most practitioners have *heard* about the changes to the rules, many still struggle to advocate strong positions. Counsel must know the rules and work to educate the entire court system to avoid meaningless pre-2015 citations to old rules and outdated case law.

The changes are so important that Chief Justice Roberts highlighted them in his 2015 year end report:

The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—“the just, speedy, and inexpensive determination of every action and proceeding”—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.

CHIEF JUSTICE JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

Litigators should heed the Court’s guidance and adopt plans for deploying these tools on matters. They are designed to make the process more efficient.

Litigants should quickly point to the death of the “reasonably calculated” language and strike at misguided citations to *Oppenheimer Fund, Inc. v. Sanders*, when an adversary attempts to go fishing in a producing party’s ESI lake. Remember this equation: Discovery = relevant to claim or defense + proportional to the needs of the case. Even with the shift in discovery’s scope, requesting parties continue to cite the Supreme Court case of *Oppenheimer Fund, Inc. v. Sanders*, in misguided attempts to open back up the scope of discovery to the now defunct standard. While the *Oppenheimer* Court may have cited the “reasonably calculated” standard, the Court ruled that the discovery sought in the case (the names of potential class members) was outside the scope of discovery under Rule 26(b)(1) and better placed within the scope of Rule 23(d)—the class action rule. The Court ordered the requesting party to pay for the requested discovery. Thus, a strange case for requesting parties to cite to hark back to days prior to the 2015 amendments.

After the 2015 amendments, the scope of discovery is neither liberal nor broad, but Rule 26(b)(1) requires that discovery be proportional. Defining the scope of discovery as anything other than proportional is contrary to the unambiguous language of Rule 26(b)(1), the supporting advisory committee notes, and Chief Justice Roberts’s *2015 Year-End Report on the Federal Judiciary*. Rule 26(b)(1) makes explicit that “Parties may obtain discovery . . . that is relevant to any party’s claim or defense and proportional

to the needs of the case. . . .” Therefore, parties must now deploy a two-part “relevant and proportional” analysis to identify the permissible scope.

When faced with old cites, producing parties should be quick to point out that Rule 26(b)(1)’s emphasis on proportionality is so important that courts are sanctioning attorneys for referencing the outdated “reasonably calculated” language, such as in *Fulton v. Livingston Financial LLC*, No. C15-0574JLR, 2016 U.S. Dist. LEXIS 96825, at *7 (W.D. Wash. July 25, 2016).

Discovery on discovery is rarely appropriate. Only upon specific evidence of a deficiency should courts consider unduly burdensome discovery on discovery. “Discovery on discovery” is the broad range of discovery tactics requesting parties deploy, designed to deflect from merits-focused litigation and onto ESI production issues. Questions about legal holds, servers, systems, document review protocols, and departed employees, and depositions about discovery practice all fit into this category.

To avoid discovery-on-discovery gamesmanship, counsel should consider precocious navigation of ESI protocols and in-depth protective and standing orders while focusing on meeting discovery obligations with lines in the sand drawn based on proportionality arguments. Counsel should also point out to courts that jurisprudence has never permitted a requesting party to conduct an over-the-shoulder spot check of a producing attorney’s work product. The civil litigation system is based on counsel conducting a “reasonable inquiry” under Rule 26(g)—not perfection and not a system in which a producing party is required to open its doors for unfettered access to its files and systems.

While Rule 26(b)(1) states the scope of discovery, Rule 26(g) mandates that counsel must adhere to the principles of reasonableness and proportionality—and certify they are doing so. Rule 26(g) sets the stage for counsel’s interaction with the court and litigation adversaries. While requesting parties often use broad, sweeping words like “any,” “every,” and “all” in ESI search mandates, the true requirement under Rule 26(g) is that counsel conduct a “reasonable inquiry”—not a scorched-earth, perfect production. The sanctions mandate of Rule 26(g) adds a proportionality bite to Rule 26(b)(1)’s bark. Therefore, counsel should use Rule 26(g) to set the standard of care for parties when both requesting and producing information.

Rule 26(g)(1)(B) requires the parties to certify that discovery is “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. . . .” Courts are specifically instructed to reject discovery that is “unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”

Rule 26(g)(3) requires courts to enforce these needlessness and disproportionality prohibitions with an “appropriate sanction.” In 2000, the U.S. District Court for the District of Maryland

ruled that “Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions.” *Poole ex rel. Elliot v. Textron, Inc.*, 192 F.R.D. 494, 505 (D. Md. 2000). Accordingly, a court must impose sanctions against a requesting party that propounds unreasonable requests.

Get Involved Early

Litigators often find themselves between the devil and the deep blue sea when walking into discovery spoliation claims, mishaps, missteps, and mistakes—requiring the defense of discovery choices made by non-lawyers, predecessors, and co-counsel. A less reactive and more cost-effective approach involves working with an organization on how to properly manage e-discovery as soon as the organization becomes aware of potential litigation. Developing a discovery plan early can later provide the process road map that will be needed to reconnect the dots.

Failure to research the provider can and will most likely lead to a host of issues.

Litigants should work with an organization to familiarize themselves with the organization’s data structure (and the location of relevant systems), data retention policies (including automatic deletion policies), and key custodians (who are most knowledgeable about the litigation issues). Once familiar with these systems, standard operating procedures, and processes, it is much easier to adjust e-discovery parameters so they are less costly and burdensome going forward.

Interview and Question the Selected Vendor

With more than 600 e-discovery vendors in the United States alone, trying to find the right vendor to meet and fulfill the organization’s requirements is extremely difficult. Some vendors use their own technologies, others use off-the-shelf products, and a few outliers provide traditional (i.e., from the paper world) processing and hosting services. Who the organization ultimately chooses can actually make or break the litigation. Having to revisit battles already won for no other reason than a vendor’s mistake can cost valuable credibility with your adversaries—or worse, with the court.

While certain organizations have long-standing relationships with specific vendors, it is your job as counsel to research the provider. A stress test might be required to determine if the provider can meet a demanding discovery schedule. What kind of resources can the provider draw on? How big is its staff? When are its hours of operation? Is it a West Coast provider for an East Coast client? How many other organizations is the provider working with? Failure to research the provider can and will most likely lead to a host of issues with the vendor and ultimately opposing counsel and the court.

Missed deadlines, due to the vendor’s or the firm’s inability to meet a scheduling order, frustrates opposing counsel and ruins credibility with the court. In large rocket-docket intellectual property matters or mass tort class actions, it is not uncommon for the court to set an expedited discovery schedule. While this may lead to quick rulings, service providers or even outside law firms without the appropriate resources to scale up to the speed and complexity of the litigation can lead to difficult situations. A single blown deadline or technical issue is likely not going to make or break the case, nor will it upset reasonable opposing counsel or the judge. However, continually missing production deadlines will not only frustrate opposing counsel but will also ruin your credibility with the court. “It’s not us; it’s the vendor” is not an appropriate response.

Production of privileged information happens more often than you might think—use Federal Rule of Evidence 502(d) to protect against it. Legal professionals should be well enough versed in the law of privilege to identify a communication that might be protected by the attorney-client privilege or what type of work product is protected by the attorney work-product protection, but even after eight or more years in action, very few practitioners have a good grasp of how to effectively use a Federal Rule of Evidence 502(d) order in federal court to protect against waiver. A Rule 502(d) order will prevent waiver of a privileged document in a federal proceeding.

Depending on the attorney ethics rules in play, the receiving party may contact a producing party to provide notice of an inadvertently produced privileged document upon reading it, and the producing party can thereby execute the clawback. Alternatively, upon noticing the error, a producing party can claw back the document on its own. A Rule 502(d) order will not prevent your adversary from knowing what you produce if he or she reads it (e.g., you can’t put the toothpaste back in the tube), so proper privilege review screening is crucial—even with the protection of the rule. Regardless, a Rule 502(d) order will prevent privilege waiver.

Get Your Documents in Order: The ESI Protocol and Protective Order

Under Federal Rule of Civil Procedure 26(f), parties are required to meet and confer early on in a case to discuss, in part, any issues about preserving discoverable information and thereafter develop a proposed discovery plan. Although Rule 26(f) does not

require formal documentation, many local rules dictate that the parties cooperate to develop a formal, written ESI protocol to control the conduct of e-discovery in the case and to ultimately avoid discovery-on-discovery gamesmanship down the road.

An example of a recently negotiated ESI protocol developed by the parties in a large federal multidistrict litigation is Pretrial Order No. 49 in *In re Taxotere (Docetaxel) Products Liability Litigation*, http://www.laed.uscourts.gov/sites/default/files/taxotere/Taxotere.MDL_2740.PTO_No_49.Governing.ESI_Protocol.Mag_North.Doc_611.7-5-17_0.pdf.

As another example, courts in the Northern District of California regularly order the parties to meet and agree to develop an ESI protocol that addresses the formats in which various forms of ESI would be produced. *See, e.g., In re Facebook PPC Advert. Litig.*, U.S. Dist. LEXIS 39830 (N.D. Cal. Apr. 6, 2011). To do so requires significant preparation as to the topics discussed below (and others), which generally arise in nearly every ESI protocol.

E-discovery liaison. To promote communication and cooperation between the parties, it is advisable that each party designate an individual through whom all e-discovery requests and responses are coordinated. Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), a third-party consultant, or an employee of the party, he or she must be (a) familiar with the party's electronic systems and capabilities in order to explain these systems and answer relevant questions; (b) knowledgeable about the technical aspects of e-discovery, among them electronic document storage, organization, and format issues; (c) prepared to participate in e-discovery dispute resolutions; and (d) responsible for organizing the party's e-discovery efforts to ensure consistency and thoroughness.

Some courts, like the U.S. District Court for the Northern District of California and those within the Seventh Circuit, expressly encourage the designation of an e-discovery liaison. The U.S. District Court for the Northern District of California recommends that, "[f]or complex ESI productions, each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery." N.D. Cal., *Electronic Discovery Protocol*, <http://www.cand.uscourts.gov/cja/e-discovery>. The court goes on to state that "[l]awyers have a responsibility to have an adequate understanding of electronic discovery." *Id.* Meanwhile, the Seventh Circuit Court of Appeals has concluded that "the meet and confer process will be aided by participation of one or more e-discovery liaison(s)." 7th Cir., *Principles Relating to the Discovery of Electronically Stored Information*, Principle 2.02 (7th Cir. pilot program), <https://www.discoverypilot.com/sites/default/files/7thCircuitESIPilotProgramPrinciplesSecondEdition2018.pdf>.

Scope of ESI. As stated, it is imperative that the ESI protocol be consistent with Rule 26(b)(1) and therefore limit the scope of

discovery to discovery regarding any non-privileged information that is relevant to any party's claim or defense and proportional to the needs of the case, 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.

One aspect that is important in accomplishing this is the identification of ESI that is not reasonably accessible, such as the following:

- orphaned data (e.g., archives created for backup or disaster recovery purposes)
- information deemed as junk or irrelevant ESI outside the scope of permissible discovery
- server, system, or network logs, or electronic data temporarily stored by scientific equipment
- documents collected from custodians that cannot be processed with known or available tools
- ESI sent to or from mobile devices, provided a copy of that data is routinely saved elsewhere
- data stored on photocopiers, scanners, and fax machines

Format of production. Most ESI produced consists of email (e.g., Outlook or Exchange messages) and loose, stand-alone documents like word-processing files (e.g., Word), presentations (e.g., PowerPoint), and spreadsheets (e.g., Excel). For these files, the biggest production format conflict between parties is whether they should be produced in native format (the unaltered, default format of how information is kept in the normal course of business) or tagged image file format (TIFF) (a static image file, with extracted text and metadata). Federal Rule of Civil Procedure 34 provides that ESI is to be produced, absent agreement or court order, "in a form or forms in which it is ordinarily maintained or in a *reasonably usable form or forms.*" However, local rules and guidelines favor the use of text-searchable imaged formats, such as TIFF files for production of email and other document-like images.

The U.S. District Court for the District of Delaware mandates that "ESI and non-ESI shall be produced to the requesting party as text searchable image files (e.g., PDF or TIFF)." D. Del., *Default Standard for Discovery, Including Discovery of Electronically Stored Information*, <http://www.ded.uscourts.gov/sites/default/files/pages/Electronic%20Discovery%20Default%20Standard.pdf>. Meanwhile, the U.S. District Court for the Western District of Washington has advised counsel that acceptable formats include, but are not limited to, native files, multi-age TIFFs, single-page TIFFs, and searchable PDF files. W.D. Wash., *Model Agreement Regarding Discovery of Electronically Stored Information and Proposed Order*, <http://www.wawd.uscourts.gov/sites/wawd/files/ModelESIAgreement.pdf>.

Native production, as the U.S. District Court for the Western District of Washington has previously explained, is generally reserved for files “not easily converted to image format, such as Excel, Access files, and drawing files.” *Id.*

Use Logs, Charts, and Forms

Data collection is a dynamic and multifaceted process that can ultimately be extremely burdensome, depending on the size and structure of an organization. But absent a legitimate argument that all relevant documents—within the scope of discovery—have been produced to opposing counsel, counsel’s best defense against a motion to compel or notice of a 30(b)(6) deposition is a transparent road map documenting and illustrating the reasonableness of the strategic decisions made in discovery. *See, e.g., Victor Stanley v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261 (D. Md. 2008) (parties need to be prepared to back up their positions with reliable information “from someone with the qualifications to produce helpful opinions, not conclusory argument by counsel”).

Counsel’s failure to create “logs, charts, and forms”—while adding an additional burden to data collection—provides opposing counsel and the court with no understanding of counsel’s efforts and only leaves additional justification for the court to grant discovery on discovery.

Logs, charts, and forms should be used to document the following:

Witness interviews: where the custodian has relevant data stored, and what might have been previously deleted. The way an organization’s employees create, share, and store data varies across departments (or business units). Therefore, it is imperative that you work with each relevant employee during the witness interviews to appropriately document the location of relevant information and documents—thereafter avoiding the problems generated by missing a goldmine of relevant information and documents.

The following are important to this task:

- Understanding how employees are communicating in their department. In today’s age, all employees use email, but have you confirmed that they have followed the company’s acceptable use policy—e.g., not using their personal accounts for business purposes? Have you asked them if they use Facebook, Twitter, LinkedIn, Skype, etc., to discuss work projects?
- Trying not to take the employee’s word for it. Ask employees to see the data in its native environment or for a live demonstration of the system over a web meeting screenshare. “I store the emails in my archive” or “My folders are kept in the T: drive” can mean two entirely different things to two different employees. It is imperative that you (or someone on your

legal team) are given a demonstration, not only to document the process but also to be able to explain to opposing counsel and the court why or why not a particular system is relevant.

- Identifying code words, acronyms, abbreviations, nicknames, etc., for documents, projects, and people. The last thing you want to do is represent to opposing counsel and the court that requested information and documents do not exist, only to find out months later that they do in fact exist under a different name. This not only creates an additional obligation to collect, review, and produce the relevant information and documents, but it also raises opposing counsel’s eyebrows as to whether or not your information and document collection is deficient.

Production of privileged information happens more often than you might think—use Federal Rule of Evidence 502(d) to protect against it.

Requests by opposing counsel: when the request was made, whether you responded (and on what date), and how you responded or remedied the request. Throughout discovery in any litigation—big or small—you may receive emails, letters, phone calls, or other communications from opposing counsel explaining the need for a particular document or citing a specific production set that has technical issues. And, sure, not every one of opposing counsel’s requests requires a letter-writing campaign. In fact, most requests can be resolved in a quick telephone call or email. However, upon initiating the process of “resolving” opposing counsel’s request, you should document all steps (either formally or informally) and store the information in an easy-to-access and easy-to-use format.

For example, a “Request Tracker” can be easily made in an Excel spreadsheet to include the following sections:

- source of the request
- date of the request
- description of the request

- steps required for resolution
- anticipated date of resolution
- notes or comments

Doing so not only ensures that you are diligently keeping track of and pursuing reasonable resolutions to opposing counsel's requests; it also creates a paper trail in the event that opposing counsel claims a lack of attention to or mishandling of a request, or makes any other form of accusation that may eventually require the court's intervention and guidance.

Understand that 30(b)(6) Depositions Are Rough Justice—Imprecise and Expensive

The general purpose of a Federal Rule of Civil Procedure 30(b)(6) deposition is to permit the examining party to discover the organization's position through a witness designated by the corporation to testify on its behalf. *Rosenruist-Gestao E. Servicos LDA v. Virgin Enters., Ltd.*, 511 F.3d 437, 441 n.2 (4th Cir. 2007).

Once noticed, the organization is required to designate and produce at the deposition one or more "officers, directors, or managing agents, or other persons who consent to testify" and who possess sufficient knowledge to testify as to the matters listed for examination.

To satisfy such an obligation, the organization must work with counsel to somehow ascertain the knowledge necessary to respond to the topics for examination *and* teach that knowledge to an individual. Ultimately, the burden to produce a 30(b)(6) deponent is onerous, as counsel must spend extraordinary amounts of time and effort to diligently prepare an individual, which creates even further legal expense for the organization.

The organization then becomes legally bound by the testimony—which often amounts to merely what the witness can recall from his or her countless hours of classroom-like preparation with counsel. This is contrary to the rule's goal of operating "as a vehicle for streamlining the discovery process." *Hooker v. Norfolk S. Ry. Co.*, 204 F.R.D. 124, 126 (S.D. Ind. 2001).

Therefore, litigants should avoid 30(b)(6) depositions on ESI because of the burden and cost associated with stacking the knowledge of many systems and procedures into a single deponent. Written discovery—whether interrogatories or informal requests—that seeks the same information (and is arguably more accurate) is a viable alternative that promotes meaningful cooperation.

Work with Opposing Counsel

As counsel for an organization, you are hired to zealously advocate on behalf of the organization. However, to accomplish this, counsel should "fight the fights that matter." Responding to

what you considered to be an unreasonable proposal by opposing counsel with an equally unreasonable proposal is a surefire way to anger the court and destroy any hope of meaningful cooperation when needed most in a case.

One need look no further than Federal Rule of Civil Procedure 1 (and similar state rules) to find support for meaningful cooperation, as the rule states that the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Chief Justice John Roberts addressed this very idea in his *2015 Year-End Report on the Federal Judiciary* and noted that "lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes."

It is safe to say that judges in lower courts are on the same page with Chief Justice Roberts. For example, in *Pyle v. Selective Insurance Co.*, the plaintiff argued that it did not have to cooperate because its opponent cited no authority obligating it to do so. No. 2:16-CV-335, 2016 U.S. Dist. LEXIS 140789, at *2 (W.D. Pa. Sept. 30, 2016). As one would expect, the judge did not take kindly to the plaintiff's argument and went on to state:

Plaintiff's argument totally misses the mark; in fact, it borders on being incomprehensible. Far from being baseless, Defendant's request is entirely consistent with both the letter and spirit of the Federal Rules of Civil Procedure regarding the discovery of electronically stored information and this Court's Local Rules. It is well settled by now that "electronic discovery should be a party-driven process."

Id.

Therefore, negotiating and having regularly scheduled meet-and-confers with opposing counsel can minimize costs "because if the method is approved, there will be no dispute regarding sufficiency, and doing it right the first time is always cheaper than doing it over if ordered to do so by the court." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261 (D. Md. 2008).

Conclusion

While many of these quick tips might seem like common sense to a seasoned practitioner, a rookie ESI litigator can deploy these strategies to make discovery more efficient, avoid discovery disputes, and better protect a client's ESI sources. In sum, knowing the rules, assigning the proper resources, documenting processes, and checking your work will place any practitioner on the path to proportional discovery. ■