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Let's Talk: Cooperation With Opposing Counsel Can Contain Discovery Costs

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At one time or another during a protracted and contentious discovery battle, we have all argued, somewhat sarcastically, that "what's good for the goose is good for the gander." Now that we and, more importantly, our clients, have had ample time to experience the ever-increasing frustrations and costs associated with e-discovery, the goose and the gander should (finally) be able to agree on at least one thing: E-discovery can be incredibly burdensome, expensive, and a huge drain on resources regardless of which side of the proverbial "v." you are on. (In fact, the authors are offering their conclusions and recommendations based in part on their experiences responding to e-discovery requests and (mostly) working out disputes as each other's adversary in a large commercial litigation.)

Parties thus have a real incentive to cooperate during discovery, and doing so can reduce all parties' workloads and costs, thereby allowing the parties to save money for their respective clients and to focus their resources on substantive disputes. If that is not enough incentive, the courts have repeatedly made clear that they expect the parties to work together and to cooperate. Parties have been chastised, and, even worse, sanctioned, for failing to cooperate and consequently making discovery more costly and otherwise burdensome for their adversaries. Cooperating with opposing counsel therefore also allows the parties to reduce the likelihood that they will incur the wrath of judges and magistrates.

In this vein, more and more judges and magistrates have expressed their frustration with being asked to waste scarce judicial resources addressing disputes that easily could have—and, in their view, should have—been resolved through conferences and cooperation between counsel. For example, in *Covad Communications v. Revonet*, Civ. No. 06-1892, 2008 WL 5377698 (D.D.C. Dec. 24, 2008), D.C. District Court Magistrate Judge John Facciola addressed a dispute over the production format of email where the parties never discussed form of production. He observed that the whole dispute could have been avoided had the parties complied with their obligation, under Rule 26(f), to meet and confer regarding, among other things, form of production issues. He required the parties to split the estimated cost ($4,000) of doing a privilege review on a native production.

This frustration has been echoed by many other magistrates and judges. In another case, the magistrate judge explained that the discovery rules require "cooperation rather than contrariety, communication rather than confrontation." *Mancia v. Mayflower Textile Servs.*, 253 F.R.D. 354, 358 (D. Md. 2008). In *Mancia*, the magistrate judge found that had the parties' attorneys cooperated and communicated at the start of discovery, "most, if not all, of the disputes could have been resolved without involving the court." Id. at 365.

Federal Rules Requirements

Litigators generally are familiar with the specific Federal Rules of Civil Procedure that govern parties' discovery obligations. However, many attorneys' eyes appear to overlook or gloss over the provisions that call for cooperation among counsel. A brief overview of some of these rules is set forth below.

Rule 16—Reach agreements on a schedule. Rule 16, among other things, contemplates the issuance of a scheduling order "as soon as practicable," but no later than "the earlier of 120 days after any defendant has been served with the complaint" or 90 days after the appearance of any defendant. Parties should discuss and cooperate in an effort to reach agreements regarding, among other things:

- Modifications to the extent of discovery (per Rule 16(b)(3)(B)(ii));
- Reasonable and realistic discovery and other pertinent case deadlines (per Rule 16(b)(3)(A) and (B)(v));
- E-discovery (per Rule 16(b)(3)(B)(iii)); and
- Clawing back documents or otherwise addressing claims of privilege or work product after such documents/information have been produced.

Practice Tips: When setting dates for production, consider building in the concept of allowing rolling productions. This will allow "paper" discovery to begin at an earlier date.

Try to agree before productions start whether or not all responsive documents will be Bates-stamped first before privileged

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documents are pulled out of the production.

Rule 26(f)—Confer, Confer, Confer! This rule requires the parties to meet and confer "as soon as practicable," and "at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." At a minimum, during the conference, counsel must:

• Make or arrange to make Rule 26(a)(1) initial disclosures;

• Discuss issues concerning the preservation of discoverable information; and

• Develop a proposed discovery plan. The specific requirements for a discovery plan are set forth in Rule 26(f)(3), and include (1) disclosure or discovery of electronically stored information (ESI), including the form of production thereof; (2) privilege and claw-back issues; and (3) protective orders under Rule 26(c).

Practice Tip: At times, it is very helpful to have the IT folks / vendors for the respective parties speak with each other and coordinate. Many technical issues and bugs in productions can be worked out quickly if there is direct contact.

Large Cost Drivers

As we all know all too well, discovery can be expensive. In some cases, it is disproportionately expensive. Everyone benefits from reducing these costs. A few items that tend to be large cost drivers are (1) e-discovery productions and reviews, and (2) privilege reviews and privilege logs. These aspects of discovery greatly impact overall discovery costs for both the propounding and the receiving parties.

E-discovery Productions. Electronic data tends to be extremely voluminous. As technology continues to march ahead at an increasingly rapid pace, the potential sources and volumes of ESI continue to expand at a commensurate pace. The amount of ESI a party arguably must review and produce can seem to be endless when all the possible sources of electronic data that exist are considered, including, but certainly not limited to, centralized servers and databases; e-mail servers; individual custodians' computers, hard drives and thumb drives; and backup tapes.

Broad requests for e-discovery are burdensome for all parties—the more data that is requested and produced, the more resources both sides will need to devote to completing the necessary reviews of the data. In today's technological environment, it is not uncommon for potential electronic databases to be measured in terabytes instead of the more familiar megabytes.

Practice Tip: Try to decide early on if archived data (i.e., backup tapes and legacy systems) are at issue. If so, see if an agreement can be reached to preserve this data and then address it at a later date after active data has been produced and reviewed. It is possible that the archive data may not be necessary.

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Privilege Reviews and Privilege Logs. The broader the universe of responsive data, the more documents that potentially will be deemed privileged and thus will need to be logged on a privilege log. In large cases, it is not uncommon for parties to spend hundreds of hours preparing privilege logs. Disputes over the format of and particular entries on privilege logs also can be time- and resource-intensive.

In the following sections, we provide some practical advice for working with opposing counsel to reach agreements that are likely to help both sides streamline the costs associated with these aspects of e-discovery.

Solutions

The good news is that there are steps parties can take—together—to streamline the costs associated with discovery. These require the parties to be open-minded and to work together to try to negotiate agreements that will be mutually beneficial.

E-Discovery Productions. There are a number of components of e-discovery that impact the total cost of compliance and production. Below is an overview of some of the issues parties should consider attempting to resolve through agreement in order to contain the scope and cost of e-discovery.

Parties are advised to work together to try to reach agreements on what sources of data must be preserved, reviewed, and produced. These agreements ideally should specify the following:

• What central drives or shared drives need to be reviewed and produced;

• Which individual custodians' files and data need to be preserved, reviewed, and produced;

• Whether only documents containing certain specified search terms need to be reviewed and produced;

• Any applicable date (time period) restrictions or parameters;

• Whether any unsupportable data files exist (such as where proprietary or licensed software is required);

• Whether the parties agree to use predictive coding; and

• Any other agreed-upon methods to be implemented to yield relevant data.

Parties are strongly advised to reach agreements regarding the form in which documents and ESI will be produced. These agreements ideally should specify the following:

• Whether the documents will be produced in a format that can be loaded into a particular type of database, such as a Concordance database or a Summation database;[1]

• The file type to be produced (e.g., Tif. with Optical Character Recognition [OCR] and page breaks);

• How will duplicate documents be treated? Will they be de-duped (i.e., will duplicates be removed to reduce the data set)?

• What level of metadata the parties will produce;

• Whether the parties will also agree to produce native files of particular types of documents, such as Excel files and photographs; and

• How to treat PDF file type documents.

Practice Tips: Rather than incur the cost to Tif. and OCR Excel spreadsheets (which can add thousands of dollars to production costs), see if counsel will agree to use a "placeholder" (a Bates-stamped page with the file name of the Excel spreadsheet that contains a hyperlink to the native Excel file). Placeholders can also be used for other types of electronic files, such as Primavera construction schedules.[2]

Photographs are another type of electronic data where consideration should be given to possible production in native

format (Tif. or JPEG). If it is likely that many photographs will be used in the litigation, a unique Bates prefix or range can be added to the file name.

If PDF documents are going to be produced, consider agreeing to OCR them in order to make them searchable.

Determine if oversized drawings will be scanned, produced in hard copy, or provided in both formats. The number of drawings is usually a cost driver in making the choice.

Agreements Regarding Privilege Logs. Litigants also should attempt to reach agreements regarding certain aspects of their respective privilege logs. Ideally, the agreements will address the following:

Parties should address the particular fields or categories of information their respective privilege logs will contain BEFORE THE PARTIES' PRIVILEGE LOGS ARE PRODUCED FOR THE FIRST TIME. Many unnecessary disputes arise when the parties' privilege lots contain different data fields. One issue parties may want to address in advance, for example, is the logging of privileged email strings. Specifically, parties may want to reach an agreement regarding whether to log only the top e-mail in the chain (the preferred method), or, instead, to separately log each separate email communication contained within the string. The Federal Rules of Civil Procedure do not expressly address this issue.

Courts have split on whether, absent an agreement regarding the treatment of email strings, parties need to log each separate communication within an email string. *Muro v. Target*, 250 F.R.D. 350, 362-63 (N.D. Ill. 2007) (discussing cases), aff'd, 580 F.3d 485 (7th Cir. 2009). The *Muro* court sustained Target's objection to the magistrate's ruling that Target's privilege log was inadequate "for failure to separately itemize each individual e-mail quoted in an e-mail string." Id. at 363.

Practice Tip: If the parties agree to log only the "top" email of an email string, the parties should also agree that if different names appear in the headers for the email string, these additional names will also be listed in the privilege log entry for the top email. This method will allow the opposing party to better evaluate the email chain by seeing all of the authors and recipients.

When the "top e-mail only" logging method is agreed to, the parties should also agree that the opposing party can later request a complete list of all authors and recipients of each email included within the chain to evaluate whether to challenge an assertion of privilege. Alternatively, the parties could agree to log only the top email of an email chain and to produce a redacted copy of each e-mail chain that reflects (i.e., does not redact) the authors, recipients, and dates included in the header of each email in the chain.

Practice Tip: Consider exchanging privilege logs in native Word or Excel files. This will allow each party to perform searches, to streamline the challenges process by adding a "challenge" column directly into the privilege log, and to sort by and separate out or list the documents for which the assertion of privilege is being challenged.

Claw-back Agreements. It also is common for parties to reach agreements allowing them to "claw-back" privileged documents that inadvertently were produced. Indeed, Rule 26(f) contemplates that counsel will discuss and formulate such agreements during their discovery conference.

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Other Avenues for Cooperation and Cost Reduction. Parties also should consider working together to reduce costs associated with third-party discovery. To the extent the parties subpoena documents from third parties, they should consider sharing the costs of such productions, particularly if both sides are pursuing third-party discovery. For example, if third parties' document productions are not produced with Bates numbers or in a manner that can be easily uploaded to or searched in the parties' respective review databases, the parties should consider agreeing to share the costs associated with remedying such issues for their mutual benefit.

Generally, this allows the adverse party to review certain documents to determine their relevance. Do not automatically reject the use of quick peek as it could save time and avoid, minimize, or resolve disputes that otherwise would end up before the trial judge or magistrate. It also can be used in different ways. Before agreeing to a quick peek process, however, parties should carefully review the relevant case law in order to assess steps necessary to preserve privilege.

A quick peek process can provide a vehicle for resolution of hundreds of challenges to a party's privilege log. By way of example, for what we will call low- to medium-grade documents as to which one party challenges another party's assertion of privilege, the party asserting privilege can allow the other objecting party's attorneys to review hundreds of documents (usually emails). The ground rules typically would require that no copies of the challenged documents can be retained and that no notes regarding the documents can be taken, and that anything learned from reading the documents cannot be part of the attorney's challenges. In our experience representing adversaries that engaged in a quick peek process in a large, commercial lawsuit , after reading several purportedly privileged documents and seeing that they would not assist in the prosecution of the claim, the plaintiff determined that it would not be cost-effective to further pursue the majority of its challenges to defendants' assertions of privilege with respect to a series of documents.

Conclusion

As we all know, discovery often is contentious and unduly expensive. Discovery disputes sometimes become a sideshow that distracts the parties from their substantive disputes. All litigants are best served by communicating and cooperating in an effort to reach agreements through which both sides can contain their discovery costs.

1. Condordance® is an electronic discovery and litigation document management platform, and Summation is a document, electronic data, and transcript review platform.
2. Primavera is project management software.