**The Insurers' Roles & Responsibilities: Doing Discovery Right**

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*Discovery is the bane of modern federal litigation.*

- Judge Posner, *Rosetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000).

## I. Discovery Wars

Discovery gone wrong is the kryptonite to a legal action. Unfortunately, few lawyers do discovery right. Poorly managed discovery drives up costs, wastes time, and can drive litigants, lawyers, and judges mad. Discovery fights slowdown or stop litigation, and lead to (otherwise avoidable) judicial intervention. With the proliferation of electronic documents and the evolution of the discovery rules, sanctions and judicial reprimands are on the rise. But with the right strategies, common pitfalls can be avoided, costs can be kept reasonable, and we can move toward the ideal of doing discovery right. For instance, one such strategy is the use of computer-assisted review. This is often referred to as predictive coding or technology assisted review. Courts have begun to acknowledge "[p]redictive coding has emerged as a far more accurate means of producing responsive ESI in discovery." *Progressive Cas. Ins. Co. v. Delaney*, 2014 WL 3563467 at * 8 (D. Nev. July 18, 2014). "Studies show it is far more accurate than human review or keyword searches, which have their own limitations." *Id.*

The goal of discovery is to seek the truth, so that disputes may be decided by what facts reveal, not by what facts are concealed. By encouraging full discovery of issues and facts before trial, parties are able to assess their respective positions, thereby facilitating settlement of disputes. *Nancarrow v. Whitmer*, 463 S.W.3d 243 (Tex. App.—Waco 2015). The Federal Rules of Civil Procedure (and most state rules) have been revised and modernized to meet this mission.

This modernization of the rules is relatively recent. Despite several updates, the Federal Rules of Civil Procedure (FRCP) remained largely limited to paper until 2006. Evidence, on the

other hand, had gone electronic and onto hand drives of computers and handheld devices. To synchronize the legal system to the realities of the digital age, electronic discovery (e-discovery) amendments to the FRCP were enacted on December 1, 2006. Put simply, changes to the FRCP mean that almost all discovery now involves e-discovery.

A year later, the FRCP were completely rewritten, under the leadership of *Legal Writing in Plain English* author Bryan Garner, for the avowed purpose of making them easier to understand. Confusion continued, and another revision to the rules went into effect December 1, 2015. Rule #1 now makes explicit what was perhaps previously implicit: all parties – not just the judge – must secure the just, speedy, and inexpensive determination of every action and proceeding. FED.R.CIV.P. 1. To achieve this goal, discovery must be "proportional" to the needs of the case. FED.R.CIV.P. 26. Objections to discovery must be specific and transparent (no more avoiding discovery with obscure objections), and documents must be produced at a specific time (not simply that they will be made available sometime in the future) FED.R.CIV.P. 34.

Three additional changes meant to speed up litigation include:

1. Service of process must now occur within 90 days instead of 120 days (Rule 4);
2. The judge issues a scheduling order within 90 days instead of 120 days (Rule 16); and
3. A litigant can now deliver document requests before the initial meeting (Rule 26).

All of these amendments are aimed at doing discovery right, by minimizing potentially exorbitant costs of e-discovery; removing methods of discovery misuse and abuse; and guiding litigants in properly obtaining evidence. If the rules are read and put into practice, payment bond claims that appeared unsettleable can become settleable.

## II. Technology Assisted Review (TAR): The Superior Tool for Voluminous ESI

In conjunction with the newly explicit requirements of Rule 1, technology-assisted review (TAR), also known as predictive coding or computer-assisted review, is a new tool in the mission to make responding to discovery requests more efficient and accurate. When responding to requests for document production, parties can often find themselves spending an immense amount of time (and money) manually sorting through titanic volumes of information to identify responsive documents. In cases requiring review of large repositories of ESI, technology provides a more efficient, accurate, and legally acceptable way of carrying out this process. *See Tinto v. Vale*, 306 F.R.D. 125, 127 (S.D.N.Y. 2015).

**Faster, Cheaper, and More Accurate**

Rather than billing clients for associates and law clerks to spend hundreds of hours manually sifting through mountains of documents, TAR enables a computer to take care of this work in a fraction of the time (at a fraction of the cost). TAR involves analysis by both people and technology. *Moore v. Publicis Groupe*, 287 F.R.D. 182, 189 (S.D.N.Y. 2012). The process initially requires manual review of a relatively small sample of the total ESI search pool. These documents then serve as a seed set that informs the computer's algorithm. Essentially, the computer learns what to look for during its portion of the review by analyzing the seed set. Moreover, as the computer reviews the rest of the ESI, attorneys periodically evaluate the computer's results, which in turn further refines the TAR algorithm. The end result is a demonstrated cost savings that often amounts to the cost of TAR equaling only 2% of exhaustive manual review costs in similar circumstances. *Id.* (citing the Text Retrieval Conference study by Maura R. Grossman and Gordon V. Cormack, published in 2011). Thus, the responding party can often produce TAR results that satisfy a production request in less time and at less expense than manual review.

In addition to relieving parties from the potentially crushing expense of manual review, TAR is also at least as accurate, if not more so, in identifying responsive ESI. *Moore*, 287 F.R.D. at 190 (pointing to a 2010 empirical study by Herbert L. Roitblatt, et al., showing computer categorization of documents to be at least as accurate as manual review). This fact has apparently impressed TAR's utility upon the courts. While some lawyers continue to mistakenly believe that exhaustive manual review is the gold standard, several courts recognize that TAR is gaining acceptance and even being promoted as the more accurate method of ESI review. *Tinto*, 306 F.R.D. at 127; *Malone v. Kantner Ingredients, Inc.*, No. 4:12CV3190, 2015 WL 1470334, *3 n. 7 (D. Neb. Mar. 31, 2015).

Add to this the fact that the process includes periodic quality assurance checks to improve the accuracy of the results, and it is evident that, compared with other methods, TAR is faster, cheaper, and more accurate in conducting review for responsive ESI. In short, TAR is *better* than the alternative options for ESI review. *Moore*, F.R.D. at 192; *Hyles*, 2016 WL 4077114, at *2; *see Duffy v. Lawrence Mem'l Hosp.*, No. 2:14-cv-2256-SAC-TJJ, 2017 WL 1277808, at *3 (D. Kan. Mar. 3, 2017). Thus, although some erroneously believe exhaustive manual review to be the preeminent method for production review, TAR has demonstrated that it is—as courts have so recognized—the superior method for conducting voluminous ESI review.

**Limitations: Practical Incompatibilities and the Responding Party's Discretion**

TAR is an excellent tool for discovery involving large amounts of ESI, but it is not without limitations. Some practical limits of TAR derive from limitations inherent in the underlying technology. While TAR is very useful for reviewing searchable text-based documents, it is not proficient for searching through image, video, or audio files, nor for reviewing files that are mostly made up of numbers (e.g., spreadsheets). Similarly, where the number of documents in the review

pool is relatively small, it is often more cost effective to conduct manual review or use another method that requires less effort to set up. Also, the costs of motion practice will increase where the parties cannot agree on specific TAR protocols.

Moreover, TAR is an option that *may* be implemented at the discretion of the responding party and cannot be compelled by the party making the discovery request. This is premised on the idea that the responding party is considered to be in the best position to determine how to search for and produce responsive documents. *See In re Viagra Prods. Liab. Litig.*, No. 16-md-02691-RS (SK), 2016 WL 7336411, at *1 (N.D. Cal. Oct. 14, 2016). Thus, even in circumstances where TAR is cheaper, more efficient, and superior to other review techniques, courts will not grant a requesting party's motion to compel a responding party's use of TAR when the latter would prefer to use another legally acceptable method of document review. *Hyles v. New York City*, No. 10 Civ. 3119 (AT)(AJP), 2016 WL 4077114, at *1 (S.D.N.Y. Aug. 1, 2016); *Tinto*, 306 F.R.D. at 127 n. 1 (S.D.N.Y. 2015); Dynamo Holdings LP v. Comm'r of Internal Revenue, 143 T.C. 183, 188–189 (2014); *see also Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1160 (8th Cir. 2017) (failing to overturn the lower court's denial of the requesting party's motion to compel the responding to use TAR). However, there is at least some judicial speculation that this rule may change at some point in the future. "There may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR. We are not there yet." *Hyles*, 2016 WL 4077114, at *4. Accordingly, arguments for compulsion will likely persist and may one day even prove successful.

## III. Proportionality: The New Defensive Weapon

*Lawyers spend a great deal of their time shoveling smoke.*

- Justice Oliver Wendell Holmes, Jr.

Generations of lawyers have labored under the misimpression that the scope of discovery is so broad that anything "reasonably calculated to lead the discovery of admissible evidence" is fair game – regardless of costs, and regardless of the size of the discovery in relation to the dollar amount of the case. This led to a widespread problem of litigation and discovery costs substantially exceeding the value of the case.

**Overview of New Rule 26(b)(1): Adding Proportionality, Ending "Reasonably Calculated"**

In order to limit ever-increasing discovery costs, the Advisory Committee made wholesale changes to Rule 26(b)(1), which defines the scope of discovery. The new Rule 26(b)(1) limits discovery to that which is "proportional to the needs of the case," and provides five illustrative factors for courts to consider:

1. the amount in controversy;
2. the parties' relative access to relevant information;
3. the parties' resources;
4. the importance of the discovery in resolving the issues; and
5. whether the burden or expense of the proposed discovery outweighs its likely benefit.

FED.R.CIV.P. 26(b)(1) (2015).

Proportionality determinations are to be made on a case-by-case basis using the above listed factors, and "no single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional." *Bell v. Reading Hosp.*, 2016 WL 162991, *2 (E.D. Pa. 2016).

Another notable change to Rule 26(b)(1) is to eliminate the phrase "reasonably calculated to lead to the discovery of admissible evidence." The Rules Committee tried without success to revise that sentence in previous proposed amendments, and has written committee notes making

clear that it does not establish a bedrock definition for the scope of discovery. Nevertheless, many practitioners and courts stick to the notion that a litigant can obtain discovery of virtually anything that's "reasonably calculated" to lead to something helpful in the case. Accordingly, the Advisory Committee eliminated this language in order to emphasize that discovery should not be permitted beyond the defined scope. *April 10-11, 2014 Report of Advisory Civil Rules*, pgs. 86-8. This amendment bolsters the "proportionality" requirement of permissible discovery.

**What is disproportionate?**

The late venerable Professor Arthur Miller, reporting to a committee in 1983, described disproportionate discovery with this example:

In a $10,000 damage case, spending $50,000 on discovery is disproportionate.

Arthur R. Miller, FED. JUDICIAL CTR., AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 32 (1984). Miller's discovery-cost hypothetical is closely in line with the average costs incurred in federal cases.

For every federal case in which any type of discovery is involved, estimated average costs incurred for discovery exceed $35,000 (http://logikcull.com/blog/estimating-the-total-cost-of-u-s-ediscovery/). Some cases substantially exceed this average.

Thus, if civil litigants in federal court find themselves fighting over $10,000, but anticipate an "average" amount of discovery costs, the issue of disproportionality should be explored, including a careful analysis of the five factors in Rule 26(b).

**How are proportionality concerns raised? Who has the burden of proof?**

Until late last year, there were few weapons a litigant could use to shield off disproportionate discovery. But now, the responding party can bring into issue the proportionality of the discovery, and it is likely a judge today would agree with Professor Miller: if the discovery costs will substantially exceed the amount in controversy, then the discovery request is impermissible, as it is outside the scope of permissible discovery (given the proportionality test).

The new proportionality rules have been enforced by federal courts, thereby limiting the scope of discovery requests. *Griffith v. Landry's*, 2016 WL 2961528 (M.D. Fla. May 23, 2016). Under the new scheme, proportionality is not a limit; rather, it defines the scope of what is permissible under the Rules. For instance, in *In re Bard IVC Filters*, patients brought a products liability action against Bard, a medical device manufacturer. *In re Bard IVC Filters Prods. Liab. Litig.,* 317 F.R.D. 562, 563 (D. Ariz. 2016). The patients sought discovery of ESI held by Bard's foreign subsidiaries regarding communications with foreign regulators. *Id*. Following the relevancy analysis, the court turned to determine proportionality by addressing two of several factors: (1) the importance of the discovery in resolving the issues; and (2) relative access to the relevant information. *Id.* at 566. The Defendants argued the burden and expense of the proposed discovery greatly outweighed the benefit because Bard had entities in 18 different countries. *Id*. The plaintiffs sought communications between each of these entities and their respective foreign regulatory authorities over the last 13 years. *Id*. The court was not persuaded such an expansive request was proportional to the needs of the case and concluded the Defendants need not search the ESI of foreign Bard entities for communications with foreign regulators. *Id*.

The question of who has which burdens of proof on the issue of proportionality remains a point of contention amongst scholars. Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, 16 Sedona Conf. J. 55 (2012). Even though the proportionality requirement is meant to

impose "collective responsibility [on the court and the parties] to consider the proportionality of all discovery," the early trend in the courts appears to be placing the burden on the responding party to explain why a discovery request is outside the scope of the Rules. *In re Bard*, at 564. The amendments were not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is "not proportional." FED. R. CIV. P. 26 Adv. Comm. Note to 2015 Amendment. Instead, the responding party must demonstrate why the discovery requests are disproportional when taking into account some or all of the factors enumerated in Rule 26(b)(1) (i.e. 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.).

Thus, Magistrate Judge Horan of the Northern District of Texas recently put the burden on the responding party to demonstrate disproportionality, i.e. that the requested discovery does not fall within Rule 26(b)(1)'s scope of proper discovery. *Carr v. State Farm Mutual Automobile Ins. Co.*, 312 F.R.D. 459, 464-66 (N.D. Tex. 2015). Likewise, a Special Master (appointed by the court to help resolve discovery disputes during complex litigation) determined that Boeing's proportionality objections were without merit where Boeing emphasized the burden of discovery "but failed to demonstrate how such a burden deviates from the proportionality required by Rule 26(b)(1)." *Ala. Aircraft Indus. v. Boeing Co.*, 2016 WL 562916, *3 (N.D. Ala. 2016), *accepted and adopted*, 2016 WL 557253, *1 (N.D. Ala. 2016). If Boeing had attempted to demonstrate why the discovery requests were disproportionate, it may have had a difficult time meeting the "amount in controversy" factor, as AAI is suing Boeing for over $100 million. Nevertheless, as discussed above, the dollar amount of the case is only one of the five "proportionality" factors. And, as no single factor is designed to outweigh the other factors, Boeing – had it done more than make a blanket objection

– would have had the opportunity to convince the court that some or all of the other four factors demonstrate disproportionality.

Therefore, in seeking a motion for protective order against seemingly disproportionate discovery, the party resisting discovery will likely have the burden of proving disproportionality, using the five factors in Rule 26(b)(1). Nevertheless, the requesting party should be able to explain the ways in which the underlying information bears on the issues as that party understands them. Although the resisting party will likely have the burden of proof, the requesting party must still comply with Rule 26(b)(1)'s proportionality limits on discovery requests; is subject to Rule 26(g)(1)'s certification requirement (e.g. the discovery request is not being used for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation); and faces Rule 26(g)(3) sanctions if a certification violates the rule without substantial justification. *Heller v. City of Dallas*, 303 F.R.D. 466, 475–77, 493–95 (N.D.Tex.2014).

**Putting proportionality into practice.**

This new mindset means closer cooperation with opposing counsel and taking advantage of the increasing willingness of the federal courts post-amendment to engage early on discovery issues. "[T]he revised rule places a shared responsibility on all the parties to consider the factors bearing on proportionality before propounding discovery requests, issuing responses and objections, or raising discovery disputes before the courts." *Salazar v. McDonald's Corp.*, No. 14-CV-02096-RS (MEJ), 2016 WL 736213, at *2 (N.D. Cal. Feb. 25, 2016). Frank conversations with opposing counsel about the discovery sought and burdens of providing it can inspire creative solutions that benefit both sides. The ability of the court to keep discovery focused through discovery conferences and pre-motion hearings also adds tremendous value. *See Siriano v. Goodman Mfg. Co., L.P.*, No. 2:14-CV-1131, 2015 WL 8259548, at *5 (S.D. Ohio Dec. 9, 2015) (directing the

parties "to engage in further cooperative dialogue in an effort to come to an agreement regarding proportional discovery" and scheduling discovery conference to discuss phased discovery). The 2015 amendment, after all, obligates all of the parties to consider the proportionality factors in making discovery requests, responses, or objections. *Dao v. Liberty Life Assurance Co. of Boston*, 2016 WL 796095, at *3 (N.D.Cal.2016).

While it is still too early to tell which directions courts will head in as to the various issues the stem from the proportionality rule, a handful of cases have suggested that the amended Rule 26(b) narrows the scope of discovery, in part to address the "explosion of information that has been exacerbated by the advent of e-discovery." *XTO Energy v. ATD, LLC*, 2016 WL 1730171, *17 (D. N.M. 2016). Another decision has similarly referred to "Rule 26(b)(1)'s narrowing of the scope of discovery." *Davita HealthCare Partners, Inc. v. United States*, 125 Fed.Cl. 394, 398 n. 3 (2016). Other courts, however, view the 2015 amendments not as creating new standards, but rather as a means to exhort judges to exercise their preexisting control over discovery more exactingly. *Robertson v. People Magazine*, 2015 WL 9077111, *2 (S.D.N.Y. 2015). Accordingly, litigants should remain up-to-date with proportionality case decisions in their jurisdiction to determine whether any courts are interpreting the Rule amendments as narrowing the scope of permissible discovery.

Proportionality is still a very new concept, by understanding the rule and how it is to be enforced, parties have a new defensive weapon to overbroad, overly burdensome, and disproportionate discovery requests. The increased prominence given to the concept of proportionality and the new mindset this fosters has the potential to greatly streamline the discovery process. By focusing on proportionality issues at the outset of litigation, being prepared to make specific and

supportable objections, cooperating with opposing counsel, and making use of the courts, defense counsel can make the most of this potential.

## IV. Requests for Production and the New Ban on Boilerplate Objections

Requests for production are primarily governed by Federal Rule of Civil Procedure 34, and are subject to related Rules, including the new proportionality rule, as discussed above. A party may generally serve on any other party a request to produce documents, including electronically stored information. The request must describe with reasonable particularity each item or category of items to be inspected; must specify a reasonable time, place, and manner for the inspection and related acts; and may specify the form in which electronically stored information is to be produced. FED.R.CIV.P. 34 (a)-(b).

The responding party generally has 30 days to respond, and must produce the documents or things within the time specified in the request or another reasonable time specified in the response. *Id.* at (b)(2). The recent amendments emphasize that any objections to discovery must be specific and transparent (not boilerplate or made without elaboration), and the responding party has the duty to specify the exact time it will produce the documents. FED.R.CIV.P. 34. The Rules do, however, permit rolling production, provided that the responding party specifies reasonable start and end dates in its written response. The responding party must also say whether documents are actually being withheld based on objections.

In a suit over an intra-family dispute regarding the management of a join venture, one court determined plaintiff's responses to defendant's Requests for Production were "deficient." *NOA, LLC v. Khoury*, 2016 WL 4444770 at *1 (E.D.N.C. Aug. 23, 2016). The plaintiff's answered a number of requests with the following phrase: "'[a]ny and all documents in the possession, custody

or control of the Plaintiff/Counter-Defendant that is responsive to this Request will be made available for inspection and/or copying at a mutually agreed date and time.'" *Id.* at *5. The court determined this was a "boiler-plate response" which "lacked [] the substance required by Rule 34." *Id.* The crux of the issue with this response was that plaintiff offered no "specific time, place, and manner" thereby providing an incomplete answer. *Id*. at *6. The court awarded monetary sanctions as punishment for the boilerplate responses. *Id.*

As stated in the rule, the documents must be produced in the requested format, or if a request does not specify a form for producing ESI, a party must produce it in one of two ways:

1. in a form or forms in which it is ordinarily maintained; or
2. in a reasonably usable form or forms.

*Id.* at (b)(2)(E). There have been numerous discovery fights over form of production, including what constitutes "reasonably usable."

For example, the issue in *Johnson v. RLI Insurance*, was "whether the documents that have been produced by RLI in paper or .pdf format satisfied Federal Rule of Civil Procedure 34(b)(2)(E)'s requirements that electronically stored information be produced 'as they are kept in the usual course of business' and 'in a form or forms in which [the information] is ordinarily maintained or in a reasonably usable form or forms.'" *Johnson v. RLI Ins. Co.*, 2015 WL 5125639 *4 (D. Alaska Aug. 31, 2015). The plaintiff sought to have responsive documents provided in native format with accompanying metadata. *Id*. The defendant asserted, "the documents in paper or .pdf form that it had [] already provided were [] reasonably usable and no further production should [have been] required." *Id*. After an extensive analysis on persuasive authority, the advisory committee note to Rule 34(b), and the Sedona Conference, the court determined the following as key factors to consider: (1) what metadata is ordinarily maintained; (2) the relevance of the

metadata; (3) the importance of reasonably accessible metadata to facilitating the parties' review, production, and use of the information; (4) whether there was a showing additional facts of real value would be found within the metadata; and (5) whether the volume of produced data was so large that metadata was necessary to manage the production of the documents. *Id.* Ultimately, the court determined requests for documents from 2005 to present, over 3,690 insurance policy claim files, and the unreasonable burden of navigating applicable privileges and statutory protections of such documents outweighed relevant information that might be derived from the metadata responses to these discovery requests. *Id,* at *6. The court therefore refused to compel RLI to respond to Johnson's requests for production for metadata and held the paper or .pdf formats already produced sufficed. *Id.*

Although e-discovery scholars' opinions on form of production vary, it is widely recommended that, in general, requesting parties should specify that production shall be in "native format." "Native format' refers to the file format which the application (e.g. Outlook) works with during creation, edition, or publication of a file. In other words, e-mail files should generally be produced in their original format, not in PDF, TIFF, or printed on paper and shipped in Bankers' Boxes. Courts have recently reaffirmed that producing e-mails in PDF form generally does not comply with the revised Federal Rules of Civil Procedure. *Mitchell v. Reliable Security,* 2016 WL 3093040 (N.D. Ga. 2016). Receiving native format ESI generally helps keep costs down, can be fundamental in efficiently and effectively reviewing documents, and contains more details (e.g. metadata) than flat files, such as paper. Subject to any relevant ethical rules, viewing the metadata of discovery received may unveil spoliation (i.e. showing a document was altered), may provide leads to other potentially important witnesses (e.g. comments to a Word Document made by a third party), and could provide other helpful evidence in developing your theory of the case.

## V. Depositions

Depositions in federal court are generally governed by Rule 30. A party may depose any person (generally without needing prior approval of the court), including a party witness, a non-party witness, or a corporate representative of a party. Court approval is generally needed when the deposition would result in more than 10 depositions being taken by any side in the case; when the deponent has already been deposed; or when the party is seeking to take a deposition before the time specific in Rule 26(d). A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address.

In 1970, Rule 30(b)(6) was added, for the primary purpose of ending the practice of "bandying," whereby organizations would produce deposition witness after deposition witness, each disclaiming knowledge of facts that, obviously, someone in the organization had to know. Fed.R.Civ.P. 30(b)(6) *advisory committee's notes, subdivision b* (1970).

30(b)(6) depositions, known as "corporate representative depositions," can be a very powerful tool when the opposing party is a corporation. 30(b)(6) depositions require the corporate-party to designate a representative or a group of representatives to testify about information "known or reasonably available to the organization." FED.R.CIV.P. 30(b)(6). Compare the 30(b)(6) requirement of the corporate representative to affirmatively acquire the knowledge of the corporation with the general rule of regular fact witnesses, who are not obligated to do anything to prepare for the deposition. In fact, it would probably not be much of a stretch to say that many litigators prepare their clients, if they are being deposed in an individual capacity, to get comfortable with the Holy Trinity of deposition responses: "Yes – no – I don't know."

Rule 30(b)(6) does not permit such tactics. Instead, an organization must prepare and produce a witness knowledgeable about the issues in the case (as set forth in the corporate representative deposition notice), regardless of how little knowledge the corporate representative has in her individual capacity. In short, the corporate representative must do her homework before the deposition, must investigate what the corporation knows and has reasonable access to knowing, and must be well-prepared to thoroughly answer questions related to the topics set forth in the deposition notice.

The corporation representative can be almost anyone. Pursuant to the Rule, the noticed corporation must provide "one or more" officers, directors, agents, employees, or "other persons" (which may include former employees, experts, etc.) who consent to testify on its behalf in response to matters known or reasonably available to the corporation. Once selected, such corporate representative(s) shall be designated as to each area of inquiry via written response to the 30(b)(6) notice.

## VI. Spoliation

Spoliation of evidence happens when a document or information that is required for discovery is destroyed or altered significantly. If a person negligently or intentionally withholds or destroys potentially relevant information, that party may be liable for sanctions for such misconduct. Importantly, the duty to preserve potentially relevant evidence is generally triggered as soon as litigation is "reasonably anticipated" (which is often before a lawsuit is filed). *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011).

The consequences for spoliation have historically been widely variable. In jurisdictions where the intentional act of altering or destroying evidence is criminal by statute, it may result in fines and incarceration. In some jurisdictions, courts have held that proceedings possibly altered

by spoliation warrant a “spoliation inference” – the fact-finder can infer that the lost or altered evidence would have been beneficial to the non-spoliating party.

The use of a spoliation inference may be warranted depending on the circumstances, but not all cases of spoliation warrant this serious response by the court. In a 2013 case before the Texas Supreme Court named *Brookshire Brothers Ltd. v. Aldridge*, a man named Jerry Aldridge went into one of Brookshire Brothers' supermarkets, and after a few minutes in the store, slipped and fell. He went to a doctor approximately 90 minutes later, and returned to the store five days after the accident to complain of back injuries caused by the fall. The supermarket chain's security department only kept what it felt was the relevant part of that store's surveillance video consisting of just before to a few minutes after Mr. Aldridge slipped and fell. When he first filed suit against Brookshire Brothers without an attorney, Mr. Aldridge was able to get video evidence consisting of the 30 seconds before he slipped and fell, plus the next seven minutes. He attempted to obtain more of the store's video surveillance footage, but was refused. When he hired an attorney, the attorney was also unable to obtain footage from before or after the event (which might have been useful to prove negligence based on how long the spill was on the floor, or on the seriousness of Mr. Aldridge's injury). The store's surveillance system automatically writes over previously recorded video after 30 days, unless saved separately. Brookshire Brothers did not keep any additional footage from before or after the accident. The trial court judge found that the store's refusal to provide the additional video footage constituted spoliation, and gave the jury a "spoliation inference instruction". The jury was instructed that they may find the failure by the store to retain (and subsequently provide to the other party) the additional footage may be considered an attempt to hide evidence that Brookshire Brothers' management knew would be damaging to their case. The jury returned a verdict for Mr. Aldridge in excess of $1 million. The Texas Twelfth

District Court of Appeals upheld the verdict and the spoliation inference instruction. The Texas Supreme Court reversed, ordering a new trial, stating that it was abuse of discretion by the trial court to issue a spoliation inference instruction in this case, that the court should have imposed a different corrective measure on Brookshire Brothers (a less severe sanction), and that a spoliation inference instruction to the jury is only warranted in egregious cases of destruction of relevant evidence.

Until late last year, the consequences of spoliation under the federal rules were widely variable, due in part to lack of express guidance on remedies for spoliation and the wide discretion afforded to district court judges. Before the 2015 revisions, Rule 37(e) afforded a "safe harbor" for "failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The Discovery Subcommittee reviewed the cases discussing Rule 37(e), however, and found that it has had very limited impact.

As recently revised, Rule 37(e) now explicitly defines when spoliation has occurred and what remedies a court may order to correct it. The rule lists three requirements for spoliation: (1) the "electronically stored information" at issue "should have been preserved in the anticipation or conduct of litigation"; (2) that information "is lost because a party failed to take reasonable steps to preserve it" and (3) "it cannot be restored or replaced through additional discovery." If these requirements are satisfied, and if another party is prejudiced by the loss, under Rule 37(e)(1) the court "may order measures no greater than necessary to cure the prejudice." Prejudice was proven in *Sec. Alarm Fin. Enterprises, L.P. v. Alarm Prot. Tech., LLC,* when two home security companies were engaged in a suit regarding the illegal poachment of customers and alleged defaming. *Sec. Alarm Fin. Enterprises, L.P. v. Alarm Prot. Tech., LLC,* 2016 WL 7115911 at *1 (D. Alaska Dec. 6, 2016). The plaintiff had recorded a number of calls to its call centers. *Id.* The defendant sought

discovery of those calls but it became apparent the recordings had been overwritten pursuant to the plaintiff's database overwriting process. *Id.* Notably, the plaintiff preserved "only a select few recordings that appeared [] to bolster its own case." *Id.* at *6. Rule 37(e) "authorizes two tiers of sanctions for spoliation" of electronically stored information. *Id.* at *5. The first tier allows the Court, if there has been a finding of prejudice, to order measures no greater than necessary to cure the prejudice. The plaintiff was unable to defeat the claim of Prejudice by showing that the information was available through other means. As a result, the court sanctioned the plaintiff under the first tier of the newly amended Rule.

If the party that lost the evidence "acted with the intent to deprive another party of the information's use in the litigation," more severe sanctions are available under Rule 37(e)(2), including a presumption that the lost information was unfavorable to the party, instructing the jury that it may or must apply such a presumption or even dismissing the action entirely.

Rule 37(e) and the duty to preserve evidence does not apply, however, when information is lost before litigation is "reasonably anticipated." *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011). In short, spoliation penalties generally cannot occur when the information was lost or modified before litigation was reasonably anticipated.

## VII. Informal Discovery

Informal discovery, i.e. uncovering factual information obtainable without a formal request to opposing counsel or an authorization from the opposing party, is a very valuable tool as both a precursor and a supplement to formal discovery because:

1. it does not hinge on (sometimes difficult to obtain) cooperation from opposing counsel, where costly and time-consuming discovery disputes may result;

2. it can be conducted at virtually any point after the potential for litigation arises, regardless of formal discovery schedules; and

3. it could swiftly reveal key facts in your case, all with the assistance of an associate or paralegal, utilizing free or low-cost search tools (e.g. Google searches or social media).

While the rules vary from state to state, as a general rule, attorneys may access and review the public portions of a party's social-networking pages without facing ethical repercussions. Seth I. Muse, *Ethics of Using Social* Media *During Case Investigation and Discovery*, AMERICAN BAR ASSOCIATION (June 13, 2012). However, the rules become more complicated when it comes to the issue of "friending" adverse witnesses on social media. Lisa McManus, *Friending Adverse Witnesses: When Does It Cross The Line Into Unethical Conduct?*, LEXISNEXIS (2011). Some states, like California, recommend an absolute bar on "friending" both represented and unrepresented parties based on communication with represented parties, the rules of professional conduct, and the duty not to deceive. SDCBA Legal Ethics Opinion 2011-2. Other states, like New York, view that the ethical boundaries are not crossed when an attorney or investigator friends witnesses using only truthful information (e.g. no fake names). NY Committee on Professional and Judicial Ethics, Formal Opinion 2010-2.

Subject to the rules of professional conduct, informal discovery may include interviewing, meeting with witnesses, getting affidavits signed, and accessing information from public sources. Public sources include court dockets revealing the party's conduct in other lawsuits, articles, journals, news stories, annual reports, and social media content.

The general rule permitting informal discovery was applied by the Supreme Court of West Virginia, when it held that lawfully observing a represented party's activities that occur in full view of the general public is not an ethical violation. *State ex. rel State Farm Fire & Cas. Co. v. Madden*, 451 S.E.2d 721, 730 (W.Va. 1994). At least one commentator has even suggested that the informal discovery of social media websites should be formalized as an affirmative duty, as a natural extension of Model Rule of Professional Conduct 1.1 and Federal Rule of Civil Procedure

11. Agnieszka McPeak, *Social Media Snooping and its Ethical Bounds*, 46 Ariz. St. L.J. 845 (2014).

## VIII. Conclusion

"Discovery is intrusive, unpleasant, time-consuming and costly. It is, like life itself, nasty and brutish. Unfortunately, it is not generally short. However, it is the inevitable concomitant of litigation and neither party is free to ignore the obligations imposed by the discovery rules."

- Judge Cole, *Flentye v. Kathrein*, 2007 WL 2903128 (N.D. Ill. 2007).

Notable authority indicates an attorney's citation to case law applying a prior version of the Federal Rules of Civil Procedure was not only inexcusable but sanctionable. *See Fulton v. Livingston Fin. LLC*, 2016 WL 3976558 (W.D. Wash. July 25, 2016). In *Fulton*, an attorney attempted to explain his erroneous reliance on the former Rule 26 by arguing the amended version "did not alter the relevance standard." *Id.* at *9. However, Rule 26(b)(1) further limits the scope of discovery to information "that is 'proportional to the needs of the case." *Id.* The attorney made no reference to the proportionality requirement or even the newly amended rule in his brief. *Id.* at *8. The court seemed to take special offense to the attorney's inability to "own [] up to his mis-representation." *Id*. at 9. Accordingly, the court sanctioned the attorney. *Id.* Bearing this in mind, the importance of staying up to date with changes to the Federal Rules is crucial.

Understanding the new federal approach (including proportionality) can help us move away from the view that discovery is "nasty and brutish," and towards the ideal of doing discovery right. The top three points to keep in mind are:

1. Learn the new e-discovery rules and best practices, and keep up to date with the latest decisions on issues left unanswered by the recent amendments;
2. Begin your discovery plan early, revisit it often, and follow it carefully;

3. Cooperate with opposing counsel, with the court, and with witnesses in planning for discovery and in collecting, preserving, and properly producing evidence.

With these points in mind, the new federal rules provide a vehicle for keeping costs appropriate;

for optimizing the discovery process; and for expediting resolution of disputes.