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LITIGATION

eDiscovery: 5 Keys to Success

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eDiscovery is doable. It's a good thing. Something that, when it's done right, can flesh out the truth in even the most complex cases. But when it's done wrong? Buckle up for never-ending discovery disputes, judicial angst against the parties, and skyrocketing litigation costs. At our firm, we emphasize the importance of being in the "doing it right" camp. Through experience in cases big and small; whether in state or federal court in Texas, Florida, Oklahoma, or Arkansas (or beyond); we have found that there are 5 keys to do doing discovery right:

(1) It's never too soon to think about your preservation duties. When you anticipate litigation, you should undertake three important steps: (1) identify potentially responsive sources of ESI (i.e. what machines/storage sources may contain the information); (2) take appropriate steps to inventory their contents (data mapping); and (3) take steps to preserve it (issue an effective legal hold notice).

(2) Take the meet and confer requirement under Federal Rule 26(f) seriously. Use it as a tool to nip discovery headaches before they happen. This is your opportunity to take the driver's seat for discovery in your case. Don't pass it up.

(3) Know your formats—native is always better. Native format is usually cheaper to produce, easier to search, and includes crucial metadata. Metadata is extremely important. It can show who created the document, when it was created, and even when it was last edited (among many other things). Metadata could be the key to winning your next case.

(4) Technology assisted review ("TAR")—the future, and its cost savings, is now. TAR can reduce costs and increase accuracy in identifying relevant documents. We suggest that it be considered in every case. For high volume document cases, it should be standard practice.

(5) Keep things proportional. eDiscovery, no matter how relevant, will not be allowed if it is not proportional. Proportionality is case specific. There is lots of room for advocacy here, and that advocacy can flow from, and be strengthened by, taking the steps laid out above. Indeed, demonstrating proportionality, or lack thereof, is often the culmination of "doing discovery right."

City of Rockford v. Mallincrodt ARD Inc., a recent case out of Illinois provides a great example of how to do discovery right. 326 F.R.D. 489 (N.D. Ill. 2018). There, the parties took their eDiscovery obligations, and their Rule 26(f) conference, seriously. They worked together to create a process to implement a search methodology, including search terms (and left the door open for TAR).

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Well done is better than well said.

- Benjamin Franklin

No doubt, the parties' ability to reach such an agreement (which was commended by the Court) was the result of doing discovery right. But the parties' couldn't agree on one thing—how to make sure ESI that was identified as non-responsive/irrelevant (the "null set") did not unknowingly harbor relevant and discoverable information? One party wanted a vague agreement that the parties would "meet and confer" if such a problem arose—the other wanted concrete guidelines requiring random sampling of the null set.

The Court sided with the party that sought random sampling for two reasons: (1) sampling the null set is reasonable under Rule 26(g), which requires party or attorney certification that a reasonable inquiry was made; and (2) sampling the null set was proportional to the needs of the case. The Court determined that random sampling was proportional because: (1) the issues at stake were very large (the case dealt with allegations of a pharmaceutical company selling critical infant drugs at a cost of tens of thousands of dollars more due to anticompetitive and racketeering behavior); (2) the potential amount in controversy was "extraordinary"; (3) the case involved asymmetrical discovery—i.e. the pharmaceutical company had all the documents; (4) the pharmaceutical company had the majority of the resources; and (5) "the burden and expense of a random sampling of the null set [did] not outweigh its likely benefit of ensuring proper and reasonable – not perfect – document disclosure."

Having a plan in place makes it easier to do discovery right. It starts from the beginning. When you anticipate litigation, take steps immediately to preserve ESI. If a lawsuit follows, take the meet and confer requirement seriously—even if your opponent doesn't. When it's time to receive a production, always request native format. When conducting your document review before production, think about how TAR can save you time, money, and increase your review accuracy. If you've done discovery right and are met with a discovery dispute, you will be in position to use proportionality as a sword to force production or as a shield to prevent it.

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