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The Boundaries of Cooperative Discovery

Courts will continue to define and refine the boundaries of cooperation.

The costs associated with pre-trial discovery of electronically stored information (ESI) present a significant burden to the judicial system. Cooperative discovery is an approach endorsed by courts throughout the country to decrease costs through cooperation in the discovery process while still ensuring zealous advocacy.

The Federal Rules of Civil Procedure (FRCP) bespeak cooperation. Rule 1 underscores the need to secure the "just, speedy, and inexpensive determination of every action and proceeding." Rule 16 allows courts to "discourage wasteful pretrial activities." Rule 26(b)(2)(C) requires the court to limit discovery when "the discovery sought is unreasonably cumulative or duplicative." Rule 26(f) requires the parties to develop a discovery plan in good faith, and Rule 26(g) allows the court to discourage uncooperative behavior that manifest in improper discovery requests and responses.

The proposed amendment to Rule 1 was originally drafted to expressly require cooperation, but that language was stricken to make clear that the "amendment does not create a new or independent source of sanctions." However, the Committee Notes observe the need to discourage "abuse of procedural tools that increase costs and result in delay," and that "[e]ffective advocacy is consistent with—and indeed depend upon—cooperative and proportional use of procedure."

FORM OF PRODUCTION

Rule 26(f) of the FRCP and Rule 8 of the Commercial Division of New York require parties to discuss the form of document production. Adversaries negotiate the format (PDF, TIFF, native) in which responsive ESI should be produced, and whether metadata (such as the dates of creation/modifications, file type, size, location and authors or users) should be produced.

According to Guideline No. 7 of the Best Practices in

E-Discovery published by the New York State Bar Association: "Counsel should agree on the form of production of ESI for all parties prior to producing ESI."

Pursuant to FRCP Rule 34, the requesting party may specify the form of production and the responding party may object, triggering an obligation to meet and confer under Rule 37(a)(2)(B).

Under Rule 34(b)(2)(E)(i), if the requesting party does not specify a form, the producing party must produce the information in a form in which it is "ordinarily maintained" or in a "reasonably useable" form. Section IV.10.3.3 of The Sedona Conference Cooperation Proclamation states that the form of production should "take[] into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party." Comments to the NYSBA's Best Practices guideline note: "Any request for metadata should be specific enough so that the requesting party can demonstrate why each field or type of metadata is relevant to the case," and that it's important that the form of production doesn't require "transform[ing] native ESI in a way that is unreasonably expensive."

SCOPE OF PRODUCTION

Adversaries are also expected to tailor discovery to what is proportional to the needs of the case. Local rules and guidelines in most federal and states courts require discussions regarding the scope of production and privilege, among other things.

In an effort to control discovery costs, courts encourage parties to "stage discovery by starting with the most likely to be relevant sources (including custodians), without prejudice to the requesting party seeking more after conclusion of that first stage of review." Moore v. Publicis Groupe, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012). Courts can also help set presumptive limits on the number of custodians who should be subject to discovery.

Parties are encouraged to cooperate regarding search methodology for identifying responsive ESI, including the use of search terms. Parties may choose to develop search terms with the opposing side to reduce the risk of subsequent disputes about the reasonableness of discovery. While courts encourage discussions about search terms, search terms that reveal an attorney's mental impressions and litigation strategy may be privileged. Use of a reasonable process to develop search terms and disclosure of metrics showing the effectiveness of the search terms (percentage of relevant and irrelevant documents retrieved), rather than disclosure of the search terms themselves, may be germane to the analysis.

Courts generally permit the use of predictive coding, a computerized process for selecting and ranking documents, to search and review ESI when the producing party proposes it; whereas courts have generally declined to compel the use of predictive coding. This trend is consistent with the practice of leaving it to the producing party to respond to discovery requests. Cases that deviate from this general approach have turned on specific facts.

Cases vary on the degree of cooperation required with respect to disclosure of seed sets—the documents counsel selects to program the computer algorithm to identify categories of documents (i.e., responsive, privilege, important). In a case where the producing party was permitted to use predictive coding despite the requesting party's protest, the court required disclosure of seed sets containing responsive/non-responsive (but not privileged) documents. FHFA v. HSBC (Jul. 24, 2012). Other courts have declined to permit discovery of seed sets on the grounds that requests seeking irrelevant or privileged documents reach beyond the scope of permissible discovery. In re: Biomet Prods. Liab. Litig., 2013 WL 6405156 (N.D. Ind. Apr. 18, 2013). As an alternative to disclosing seed sets, courts have suggested that parties exchange metrics on recall/precision, identify gaps in productions, and conduct sample reviews of documents categorized as non-responsive. Rio Tinto PLC v. Vale S.A., 2015 WL 872294 (S.D.N.Y. Mar. 2, 2015).

PRIVILEGE

Courts encourage cooperation to minimize costly privilege reviews and preparation of privilege logs by excluding certain categories of documents from being logged, and/or using a categorical approach instead of a document-by-document listing on logs.

Courts also encourage the use of Federal Rules of Evidence Rule 502(d) and its state analogues, which can help ensure that the production of ESI will not result in a privilege waiver regardless of whether the disclosure was inadvertent or the producing party undertook reasonable steps to preclude its production and rectify the error.

Parties must cooperate to curtail discovery to what is proportional to the needs of the case, and courts will continue to define and refine the boundaries of cooperation.

Giyoung Song is discovery counsel and Emma Glazer is an associate at Skadden.