

Meeting the Challenge of E- Discovery

Some Thoughts on Law and Policy

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Part 1: Why Can't We Cooperate?

What do we mean by “Cooperation?”

- Required
 - Honesty and good faith in dealing with opposing party
 - Avoidance of abusive discovery tactics
- Aspirational
 - Parties work jointly to develop solutions to common e-discovery issues
 - Reducing burdens
 - Developing search strategies and protocols
 - Sharing information to avoid formal discovery
- Cooperation is NOT capitulation!

Is this just a dream?

- Case law support
 - *Mancia v. Mayflower Textile Serv. Co.*, 253 F.R.D. 354 (Md. 2008)
 - Endorses concept of cooperation and lays foundation for compliance with cooperative discovery practices
 - *Cartel Asset Mgmt. V. Ocwen Fin. Corp.*, 2010 WL 502721 (D. Colo. Feb. 8, 2010)
 - Civil litigation too expensive to permit superficial compliance with meet & confer requirements under the civil rules
- Federal Rules of Civil Procedure
- Sedona Conference® Cooperation Proclamation
- Local Rules and Pilot Programs

The Case for Cooperation

- The Federal Rules call for Cooperation
- The professional conduct rules (ethics) require cooperation
 - Duty to expedite litigation
 - Duties of candor to tribunal and fairness to opposing party
 - No subordination of cooperation to duties regarding advocacy and confidentiality
- Courts expect cooperation
- Cooperation in the economic interest of the parties

Without Cooperation: Interrogatories

- Documents Sought
 - Retention policies/plan
 - Backup protocol and rotation policies
 - System architecture and protocols
 - Relevant applications (email, word processing, databases, etc.)
 - Information about timing and scope of preservation
 - Identity of custodians relevant to dispute

Interrogatories, contd.

- Time Spent
 - 1 week to prepare
 - 30-60 days to respond
 - 15-30 days for meet and confer
 - 30 days for supplemental responses
 - **Total = 80-120 days**

Interrogatories, contd.

- Expenses Incurred
 - Client meetings with HR, IT, and business unit personnel
 - Attorney time in drafting
 - Attorney time in researching applicability of objections
 - Client and attorney time in meet & confer process

Without Cooperation: Request for Production of Documents

- Documents Sought
 - Data map
 - Organizational charts
 - Written retention/destruction policies
 - Litigation hold directives
- Time Spent
 - 1-2 weeks to prepare
 - 30-60 days to respond
 - 15-30 days to meet and confer
 - 30 days for supplemental response
 - **Total = 80-120 days**

Request for Production of Documents, contd.

- Expenses Incurred
 - Consulting with experts
 - Attorney time in drafting
 - Attorney time in researching applicability of objections
 - Client and attorney time in meet & confer process
 - Processing and production expenses

Without Cooperation: Rule 30(b)(6) Depositions

- Documents Sought
 - Organizational structure of company
 - IT issues
 - Database issues
 - Technology and process used for search and collection of responsive information
 - Whether information was not searched for, collected or produced because of accessibility issues

Rule 30(b)(6) Depositions, contd.

- Time Spent
 - 30-60 days to schedule
 - 30 days for reading and signing
 - 1 week for deposition summary
 - **Total = 60-90+ days**
- Expenses Incurred
 - Attorney, paralegal and client time in preparing for deposition
 - Travel expenses
 - Court reporter fees
 - Attorney and client time in attending deposition

Without Cooperation: Pre-Discovery Motion Practice

- Preparation and filing of motion to compel or motion for protective order
- Opposition brief
- Reply brief
- Motion hearing
- Decision

Motion Practice, contd.

- Time Spent

- 1-2 weeks on attorney time in researching and drafting motion papers and preparation and filing of motion to compel or motion for protective order
- 10-30 days on meet & confer preparation and attendance and opposition brief
- 10-30 days to review briefs filed by opposing party and on reply brief
- 30 days on preparation for hearing and motion hearing
- 30-90 days on attendance at hearing and decision
- **Total = 90-180+ days**

Motion Practice, contd.

- Expenses Incurred
 - Attorney time in researching and drafting motion papers
 - Meet & confer preparation and attendance
 - Review briefs filed by opposing party
 - Preparation for hearing
 - Attendance at hearing



Part 2: Will the Federal Rules be Amended to Address Preservation Issues and Expenses?

A little history

December 2006: E-Discovery amendments to FRCP become effective

2008 – present: Stakeholders surveyed regarding effectiveness of 2006 amendments

May, 2010: Duke Conference

2010 – 2011: Rules Committee explores options

September, 2010: Dallas Mini-Conference

March, 2012: Next Rules Committee Meeting

Three categories outlined by Rules Committee

Category 1: Detailed and Specific Rules Provisions

- On triggering events
- On scope of preservation
- On applicable sanctions

Category 2: More general preservation addressing variety of specific concerns, but only in more general terms.

Category 3: “back end” rule addressing only sanctions

What's the problem?

- The trigger?
- Scope of preservation?
 - Temporal scope?
 - Custodians?
 - Data sources?
- Sanctions?
 - No standard approach?
 - Is fear of sanctions driving decisions to over-preserve?
- General cost of preservation?

What's the solution?

- Further development of common law?
- Development of technology?
- Better records management?
- Adoption of protocols designed by others?
 - 7th Circuit Pilot Project
 - NYSBA
- Amendments to FRCP?

Predictions?





Resources

<http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx>