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Discovery on Discovery

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This Article explains the key considerations for counsel seeking discovery about an opposing party's efforts to preserve data and comply with discovery requests (known as discovery on discovery) and, conversely, how to avoid or minimize discovery on discovery when faced with these requests.

Attorneys in civil litigation often suspect that the opposing party has withheld or, worse yet, destroyed important evidence. Counsel in this situation may consider seeking discovery on discovery, or meta-discovery, to audit the sufficiency of the opposing party's efforts to locate, preserve, collect and produce relevant electronically stored information (ESI) and other data. This discovery may require opposing counsel to reveal, in writing, the specific steps taken in preserving data and responding to discovery requests, and demand the opposing party to produce a designated witness to testify on these matters.

Discovery on discovery, however, frustrates the producing party and its counsel, who often dismiss these requests as a fishing expedition or a baseless ploy to drive up litigation costs. Moreover, responding to these requests can be problematic and risky even for the most diligent parties and counsel. To minimize the burden of discovery on discovery while still providing assurances that a party's discovery efforts were proper, counsel may consider pursuing a cooperative, informal exchange of information or asserting relevance and privilege objections where appropriate.

For information on key issues companies should consider to ensure compliance with their obligations to preserve and produce ESI in federal civil litigation, see *Practice Note, Practical Tips for Handling E-Discovery (www.practicallaw.com/8-500-3688)*.

SEEKING DISCOVERY ON DISCOVERY

Especially where discovery is contentious and the meet and confer process has failed, counsel should consider serving formal discovery requests about the opposing party's preservation efforts and search methods. This may be a critical first step to obtaining evidence of spoliation for a sanctions motion or determining whether a party's search for and production of documents was diligent and reasonable.

In general, discovery on discovery is permitted where counsel has reasonably grounded concerns of discovery misconduct (see, for example, *Ruiz-Bueno v. Scott, No. 12-0809, 2013 WL 6055402, at *2-4 (S.D. Ohio Nov. 15, 2013)*). Reasonable grounds might include:

- Deposition testimony that a party never issued a litigation hold notice to important custodians or failed to issue it in a timely manner.
- An absence of documents produced from certain custodians or timeframes.

(*See Vieste, LLC v. Hill Redwood Dev., No. 09-4024, 2011 WL 2198257, at *1 (N.D. Cal. June 6, 2011)*.)

The most common forms of discovery on discovery include interrogatories, requests for admission and depositions.

DISCOVERY ON PRESERVATION EFFORTS AND SEARCH METHODS

If preservation compliance and spoliation are of concern, counsel can request information regarding the actions the opposing party took to preserve responsive ESI and other data. Counsel seeking this discovery should keep in mind that:

- **Litigation hold notices usually are protected by the attorney-client privilege and work product doctrine.** If spoliation has occurred, however, litigation hold notices may be discoverable (compare, for example, (ordering production of litigation hold notice in light of preliminary showing of spoliation) with *Ingersoll v. Farmland Foods, Inc., No. 10-6046, 2011 WL 1131129, at *17 (W.D. Mo. Mar. 28, 2011)* (finding litigation hold notice was immune from disclosure given absence of spoliation allegations)) (see *Relevance and Privilege Objections*).

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- **Facts concerning the steps taken to identify and preserve data generally are discoverable.** Even if litigation hold notices themselves cannot be discovered, counsel may pursue discovery concerning:
  - the steps the notice recipients took in response to the notice to preserve and collect data (see *In re eBay Seller Antitrust Litig., No. 07-1882, 2007 WL 2852364, at *1 (N.D. Cal. Oct. 2, 2007)*; accord *Vieste, 2011 WL 2198257, at *1* (referencing court order that required party to provide detailed declarations on its preservation and collection efforts)); and
  - the information being retained for various lawsuits (see *Carlock ex rel. Andreatta-Carlock v. Williamson, No. 08-3075, 2011 WL 308608, at *3 (C.D. Ill. Jan. 27, 2011)* (spreadsheet from IT records that tracked litigation holds and categories of ESI needing to be retained was not privileged)).

For more information on litigation holds, see *Practice Note, Implementing a Litigation Hold (www.practicallaw.com/8-502-9481)*. For information on the sanctions a court may impose when relevant evidence was destroyed or lost and the standards used by each federal circuit to determine when a party's duty to preserve relevant evidence is triggered, see *Spoliation Sanctions by US Circuit Court Chart (www.practicallaw.com/0-549-3879)*.

Similarly, counsel seeking discovery on the methods used to locate relevant information in response to document requests should be aware that:

- **The requesting party usually must specify how the production was deficient.** Most courts require the requesting party to show that additional responsive materials exist and were withheld (see, for example, *Orillaneda v. French Culinary Inst., No. 07-3206, 2011 WL 4375365, at *5-9 (S.D.N.Y. Sept. 19, 2011)* (denying discovery on discovery where counsel failed to identify specific deficiencies in the opposing party's production)).
- **Some courts consider information about search methods to be protected work product.** In certain jurisdictions, information about search methods is shielded from disclosure absent a showing of substantial need and undue hardship (see, for example, *In re Exxon Corp., 208 S.W.3d 70, 75-76 (Tex. Ct. App. 2006)* (search methods used to respond to document requests are protected by the Texas work product doctrine); *In re Boxer Prop. Mgmt. Corp., No. 09-0579, 2009 WL 4250123, at *5-6 (Tex. Ct. App. Sept. 3, 2009)* (same)).

For information on analyzing an opposing party's response to a request for the production of documents, see *Practice Notes, Document Requests: What to Expect in Response to an RFP (www.practicallaw.com/4-519-6330)* and *Document Requests: Common Problems with an RFP Response (www.practicallaw.com/3-519-6335)*.

For a sample letter alerting opposing counsel to perceived deficiencies in its production and requesting additional discovery materials, with explanatory notes and drafting tips, see *Standard Document, Discovery Deficiency Letter (www.practicallaw.com/8-551-3326)*.

FORMS OF DISCOVERY ON DISCOVERY

To learn about the steps the opposing party took to preserve, identify and produce relevant data, counsel may consider:

- Serving interrogatories under Federal Rule of Civil Procedure (FRCP) 33.
- Making requests for admission under FRCP 36.
- Noticing a deposition of a company designee under FRCP 30(b)(6).

Interrogatories

Interrogatories can elicit information concerning the opposing party's discovery conduct that a less formal inquiry may not reveal. Through interrogatories, a requesting party can obtain specific information about a party's preservation efforts, such as:

- When the opposing party first anticipated litigation.
- The existence and timing of any litigation holds.
- The recipients of any litigation hold notices.
- How the litigation holds were implemented.

(See *E3 Biofuels, LLC v. Biothane, LLC, No. 08-0044, 2012 WL 2523048, at *9 (D. Neb. June 29, 2012)*; *Diodato v. Wells Fargo Ins. Servs. USA, Inc., No. 12-2454, 2013 WL 6055135, at *3-4 (M.D. Pa. Nov. 15, 2013)*.)

Interrogatories can also ask about whether any responsive ESI or other data was intentionally or inadvertently destroyed or lost. For example, in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Greystone Servicing Corp.*, the court ordered a party to answer the following interrogatory:

"Identify any documents, data or other information that relate to or reference the subject matter of this litigation, that have been deleted, physically destroyed, discarded, damaged, or overwritten, whether pursuant to a document retention policy or otherwise." (*No. 06-0575, 2007 WL 4179864, at *1, *3 (N.D. Tex. Nov. 26, 2007)*.)

Additionally, interrogatories can be used to learn the steps the opposing party took to locate responsive information, including details on:

- Each source of information searched, including e-mail accounts, computer hard drives, mobile devices and other storage media.
- The specific methods used to search, including search terms or filters applied to the data set.
- The persons involved in conducting the searches.
- When the searches were performed.
- The types of files that were searched.
- The steps the party took to gather and assemble responsive data for production.

(See *Ruiz-Bueno, 2013 WL 6055402, at *2-4; Rhea v. Wash. Dep't of Corr., No. 10-0254, 2010 WL 5395009, at *5-6 (W.D. Wash. Dec. 27, 2010)*; *Vieste, 2011 WL 2198257, at *1*.)

For information on the structure and content of interrogatories in a federal lawsuit, including tips for drafting definitions, instructions and specific interrogatories, see *Practice Note, Interrogatories: Drafting and Serving Interrogatories (www.practicallaw.com/1-548-4087)*.

Requests for Admission

Counsel may use requests for admission to help determine the important facts and narrow the issues regarding preservation and spoliation. These requests may require custodians to admit that they are aware of relevant ESI or other data that has been destroyed, deleted, discarded or lost. Similarly, custodians may be asked to admit that they have not removed relevant materials from servers, networks or shared drives. (See, for example, *John B. v. Goetz, 879 F. Supp. 2d 787, 850-51, 905-906 (M.D. Tenn. 2010)*.)

Requests for admission also may inquire about the opposing party's conduct in the litigation. For example, a party may seek an admission that all ESI and paper records in a custodian's possession or control, including both company and personal e-mail accounts and computers, have been searched for relevant materials (see *Goetz, 879 F. Supp. 2d at 905*). This information can assist counsel in devising methods to confirm that searches were sufficiently thorough and proportionate to the litigation.

FRCP 30(b)(6) Depositions

FRCP 30(b)(6) permits a party to depose a company on specific subjects through a representative whose testimony is based on information known or reasonably available to the company. FRCP 30(b)(6) depositions may uncover evidence of spoliation, and are an effective means for counsel to confirm that the opposing party's discovery efforts were properly conducted and diligently completed.

In many cases, the company designee will be a party's document retention coordinator, who is usually the person most knowledgeable about the party's retention policies and is expected to ensure that relevant data is preserved. Indeed, the default standards in several federal courts allow for an FRCP 30(b)(6) deposition of each party's document retention coordinator, absent a court order or agreement between the parties saying otherwise. The purpose of these depositions is to avoid later accusations of spoliation. (See, for example, *Administrative Order No. 174, In re Default Standard for Discovery of ESI at 1, 3 (M.D. Tenn. July 9, 2007)*; *Bankr. D. Del. R. 7026-3(g) (Feb. 1, 2013)*; *E.D. Pa. Model Order Governing Electronic Discovery for Judges Restrepo, Savage, Schmehl, Slomsky & Stengel*; see also *Vennet v. Am. Intercontinental Univ. Online, No. 05-4889, 2007 WL 4442321, at *4 (N.D. Ill. Dec. 13, 2007)* (FRCP 30(b)(6) deposition ordered to cover document retention and destruction practices where party had deleted relevant information after the initiation of litigation).)

Courts have also permitted counsel to use FRCP 30(b)(6) depositions to:

- Discover the search methods and software used to respond to discovery requests (see *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164, 2007 WL 1054279, at *4 (D. Kan. Apr. 9, 2007)*; but see *Ingersoll, 2011 WL 1131129, at *6 (FRCP 30(b)(6)* deposition on searching and producing ESI sought information protected by the attorney-client privilege and work product doctrine)).
- Inquire about gaps, inconsistencies or other red flags in a document production that have not been adequately explained through less formal inquiries (see *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., No. 07-222, 2008 WL 3480321, at *3-4 (M.D. Fla. Aug. 12, 2008)*).
- Determine when discovery is not being pursued diligently and remediate deficiencies if possible (see Ideal *Aerosmith, Inc. v. Acutronic USA, Inc., No. 07-1029, 2008 WL 4693374, at *3 (W.D. Pa. Oct. 23, 2008)* (compelling FRCP 30(b)(6) deposition testimony concerning steps taken to locate and produce documents where party "failed to produce any meaningful documents"); *Jacobson v. Starbucks Coffee Co., No. 05-1338, 2006 WL 3146349, at *3 (D. Kan. Oct. 31, 2006)*).
- Assess claims that data sought is inaccessible (see, for example, *Flying J Inc. v. TA Operating Corp., No. 06-0030, 2008 WL 5449714, at *3 (D. Utah Dec. 31, 2008)*).

For more information on FRCP 30(b)(6) depositions, see *Standard Document, Notice of Deposition (Fed. R. Civ. P. 30(b)(6)) (www.practicallaw.com/7-521-3489)* and *Practice Note, How to Prepare for and Successfully Defend a Rule 30(b)(6) Deposition (www.practicallaw.com/9-504-9935)*.

RESPONDING TO DISCOVERY ON DISCOVERY

When faced with requests for discovery on discovery, counsel must quickly assess whether and to what extent it is possible to avoid or minimize this added discovery burden and expense. As part of that assessment, counsel may consider:

- Having a cooperative, informal exchange of information in lieu of formal discovery.
- Objecting to the discovery requests on relevance or privilege grounds.

INFORMAL INFORMATION EXCHANGES

One of the most effective ways to avoid discovery on discovery is to cooperate with opposing counsel and informally address discovery issues at the outset of the litigation during the FRCP 26(f) meet and confer process. As one court recently noted when examining requests for discovery on discovery, the Rule 26(f) discussion "can and should include cooperative planning, rather than unilateral decision-making" (*Ruiz-Bueno, 2013 WL 6055402, at *3*).

Some of the topics counsel can address at the Rule 26(f) conference to limit the potential for discovery on discovery include:

- The topics of discovery.
- The custodians and data sources from which discovery will be sought.
- The timeframe for relevant data.
- The keywords and other filtering criteria the parties will apply to collected data.
- Whether either party has identified any inaccessible data.
- The scope of the parties' preservation efforts.

Several jurisdictions, recognizing the many pitfalls of discovery on discovery, now require this type of cooperative, informal information exchange in their local rules or standing orders. Guidelines like these can help minimize disputes concerning discovery of ESI, more clearly frame the parameters of those disputes or avoid the need for formal discovery on discovery entirely. For example:

- The US Court of Appeals for the Seventh Circuit requires counsel, before serving any requests for discovery on discovery, to confer about:
  - the specific need for, and relevance of, that discovery; and
  - the suitability of alternative means for obtaining the information.

(See *Seventh Cir. Elec. Discovery Comm., Proposed Standing Order Relating to the Discovery of ESI, Principle 2.04(b)*.)

- The judges in the US District Court for the Southern District of New York expect the parties to have detailed but informal discussions concerning, among other topics:
  - the scope and methods of preservation;
  - how potentially relevant data was identified;
  - the computer systems and programs used by the parties; and
  - who was responsible for data preservation.

(See *In re Pilot Project Re Case Mgmt. Techniques for Complex Civil Cases, No. 11 Misc. 388 (S.D.N.Y. Oct. 31, 2011)*.)

The US District Court for the Northern District of California "strongly encourages" counsel to informally discuss the discovery of ESI rather than seek this information through depositions or other formal discovery (see *N.D. Cal. Guidelines for the Discovery of ESI, Guideline 2.03*).

For more information on cooperating with opposing counsel, see *Articles, Learning to Cooperate (www.practicallaw.com/6-546-9065)* and *The Sedona Conference's Cooperation Proclamation: Significantly Influencing the Judiciary (www.practicallaw.com/3-523-4059)*.

RELEVANCE AND PRIVILEGE OBJECTIONS

Counsel may object to discovery on discovery if the information requests do not relate to any party's claim or defense and therefore are outside the scope of discovery allowed under FRCP 26(b)(1). However, courts differ on whether a party's efforts in responding to discovery are considered relevant to a claim or defense (compare *Ruiz-Bueno, 2013 WL 6055402, at *3-4* (discovery conduct is the proper subject of discovery where the parties failed to address search and collection methods in their Rule 26(f) conference and discovery plan) with *EEOC v. Boeing Co., No. 05-3034, 2007 WL 1146446, at *2 (D. Ariz. Apr. 18, 2007)* (discovery into the efforts taken to locate documents is not permitted unless a party can show that it is relevant to the claims and defenses in the case)).

Further, counsel may object that discovery on discovery is irrelevant absent an allegation of misconduct. For example, counsel may argue that discovery about his client's preservation efforts bears no relevance to the claims or defenses in the case because, absent evidence that his client failed to preserve or otherwise meet his discovery obligations, the client's preservation conduct is not at issue. Courts have generally been receptive to this approach (see, for example, *Hubbard v. Potter, 247 F.R.D. 27, 29 (D.D.C. 2008)* (additional discovery on discovery was not warranted absent a showing that documents existed and had been destroyed); *Ingersoll, 2011 WL 1131129, at *17* (same); but see *Am. Home Assur. Co. v. Greater Omaha Packing Co., Inc., No. 11-270, 2013 WL 4875997, at *6 (D. Neb. Sept. 11, 2013)* (permitting informal discovery on search methods even where a party could not identify any specific responsive records that were withheld)).

If the proposed amendments to FRCP 26 are adopted, counsel may also object to discovery requests seeking information about the opposing party's preservation and discovery steps on the basis that this discovery is disproportionate to the needs of the case and outside the scope of permissible discovery (see *Mem. from Hon. Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice and Procedure, to the Bench, Bar and Public at 289 (Aug. 15, 2013)* (last visited Mar. 7, 2014)).

In addition to relevance objections, counsel may argue that requests for discovery regarding a party's efforts to preserve or locate documents invades the protections afforded by the attorney-client privilege and work product doctrine, for example, by seeking discovery relating to a litigation hold (see *Capitano v. Ford Motor Co., 15 Misc. 3d 561, 564 (N.Y. Sup. Ct. 2007)*). However, some courts have noted that this discovery does not ordinarily or necessarily entail disclosing privileged materials (see *Ruiz-Bueno, 2013 WL 6055402, at *4*).

Still, counsel may wish to disclose otherwise privileged details regarding the client's preservation, collection and production efforts for tactical or other reasons. Counsel should exercise caution, however, because this disclosure may cause a broader waiver than anticipated or desired (see *In re Intel Corp Microprocessor Antitrust Litig., 258 F.R.D. 280, 291 (D. Del. 2008)* (party waived privilege over portions of counsels' notes from custodian interviews regarding preservation efforts by voluntarily producing summaries of same to resolve preservation concerns)). By negotiating an agreement with opposing counsel that the disclosure causes only a limited waiver, counsel can maintain the privileged nature of information that is not disclosed.

For more information on waivers of the attorney-client privilege and work product protection, see *Practice Notes, Attorney-Client Privilege: Waiving the Privilege (www.practicallaw.com/0-503-1204)* and *Work Product Doctrine: Waiving the Work Product Protection (www.practicallaw.com/0-504-4174)*.

For the links to the documents referenced in this note, please visit our online version at **http://us.practicallaw.com/4-560-9646**