

Effective Project Management In Discovery



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Litigators have an ethical obligation to guide the discovery process. Here's how.

DISCOVERY IS among the biggest risks facing modern litigants. Effective management of discovery can have an equal, or in some circumstances, greater effect on the outcome of litigation than the actual merits of the case. No one gets to summary judgment, trial, or in most cases, a settlement without first going through the discovery minefield.

Going through the discovery minefield without a plan means taking an unnecessary risk that something will “explode” and derail your litigation efforts and strategy. Not only can discovery errors result in excessive costs, affect the outcome of the case, or result in monetary sanctions levied against a client, but courts can impose monetary sanctions on counsel for discovery mismanagement as well. Effective project management is the key to avoid sanctions and other bad things that happen to lawyers and clients en route to case resolution.

This article will first briefly explain counsel's duty to manage discovery, then through several case examples, provide a description of the problems clients and counsel can encounter during discovery, and finally, provide a model for effective project management in discovery.

COUNSEL'S DUTY TO GUIDE THE DISCOVERY PROCESS

Counsel's duty to guide the client through the discovery process can be found in rules of civil procedure and an attorney's ethical obligations as an officer of the court. Fed. R. Civ. P. 26(a)(1)(E) requires a party to make initial disclosures based on information that is "reasonably available" and may be used to support its claims or defenses. Since lawyers decide what a party's legal claim(s) or defense(s) are, as a practical matter the duty actually falls on the attorney to become knowledgeable about the client's records such that he or she can communicate with its employees about the claims and defenses and help determine what information must be disclosed. Fed. R. Civ. P. 26(a)(1)(A)(ii) and 26(a)(1)(E). Rule 26(g)(1) also requires an attorney of record to sign all disclosures certifying that "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:...[the disclosure] is complete and correct as of the time it is made...." The practical effect of Rule 26(g)(1) is to impose a duty on counsel to guide, manage, and supervise the client's efforts to comply with its disclosure obligations.

Rule 26(g)(1) also requires that the attorney sign the client's objections and responses to discovery requests. By doing so, the attorney certifies they are "consistent with these rules." "[T]hese rules contemplate broad discovery. Parties can discover any non-privileged information that is relevant to the claims and defenses of the party, and if the court deems it appropriate, may discover information relevant to the subject matter of the litigation." Fed. R. Civ. P. 26(b)(1). Parties can obtain this discovery from "any medium from which information can be obtained" that is within a party's "possession, custody, or control." Fed. R. Civ. P. 34. With the reality of broad discovery and the complexities of modern corporate record-keeping systems, a lawyer must invest the time to become knowledgeable about how his or her client maintains records, and be actively involved in the process of preserving,

collecting, and producing relevant information so that he or she can certify compliance with the Rules to the court.

Rule 16 imposes a duty on counsel to participate in any conferences organized for the purposes of case management, and counsel must be familiar with the client as an organization and the manner in which it stores and retains data and records, so that he or she can be in a position to inform the opposing parties of any problems with proposed methods of discovery, and educate the court on any issues that may arise because of a proposed scheduling order. Fed. R. Civ. P. 16.

Lawyers can be personally sanctioned under both the Federal Rules of Civil Procedure and the court's inherent authority for any shortcomings in the discovery process. *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004).

In addition to rules of civil procedure, rules of ethics and professional responsibility also impose obligations on lawyers throughout the discovery process. For example, the ABA Model Rules of Professional Conduct, applicable with some modification in most states, require that a lawyer not knowingly "...make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Model Rules of Prof'l Conduct R. 3.3, available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html. The statements envisioned by these rules include not only oral representations, but also include written representations such as affidavits prepared by lawyers. *Id.* at 3.3 cmt. The Model Rules also state that a lawyer may not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value," or "in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Model Rules of Prof'l

Conduct R. 3.4, available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

PROBLEMS CREATED BY LACK OF ADEQUATE MANAGEMENT, COORDINATION, AND SUPERVISION IN DISCOVERY

- Lack of adequate management, coordination, and supervision can result in errors at any stage of the discovery process. At the preservation stage, counsel may fail to recognize when litigation or investigations are “reasonably anticipated,” and fail to issue a litigation hold at the appropriate time. *See Danis v. USN Communications*, 53 Fed. R. Serv. 3d 828 (N.D. Ill. 2000) (granting motion for sanctions for defendant’s failure to take reasonable steps to preserve data at the outset of discovery). If counsel is not familiar with the client’s document retention or records management policies, potentially relevant documents may be discarded. *See United States v. Phillip Morris USA*, 327 F. Supp. 2d 21 (D.D.C. 2004) (sanctioning 11 corporate officers \$250,000 each for failing to comply with document preservation policy). Counsel may fail to establish the proper scope of a litigation hold because they did not interview all of the key persons, which can result in the loss of invaluable information about potential data sources. Even when the hold is properly issued, counsel may fail to periodically remind the client of the duty to preserve potentially relevant information, or revise the litigation hold based on changes in the claims and defenses of the parties or the discovery of new information. When errors at the preservation stage occur and potentially relevant data is discarded, it potentially affects all stages of discovery that follow.

At the collection stage, errors may occur because best practices for collecting data are not followed. The collection phase may also raise issues of preservation, in that IT personnel or self-collecting custodians must preserve and adequately document the data’s chain of custody during the process. *See Metropolitan Opera Ass’n, Inc. v. Local 100*,

212 F.R.D. 178 (S.D.N.Y. 2003) (ordering judgment against defendant and payment of plaintiff’s attorneys’ fees for failing to adequately instruct the person in charge of document collection).

At the processing and review stages, lack of time or failure to invest in the establishment of a quality review process can result in discovery errors. Though clients often feel the pinch of the litigation budget, selecting the least costly options to process and review the data may result in the use of less-experienced staff who receive little or no training, and a process that lacks appropriate quality controls. This creates a potential for errors. In both litigation and, especially, government investigations, the timing of the production of data is often of primary concern. Errors are also made when the processing and review of data is rushed to meet deadlines.

Managing discovery at each stage is critical to avoid costly sanctions and other court-imposed penalties. When discovery is not managed appropriately errors occur, and the results can range from a waiver of the attorney-client privilege, to monetary sanctions and other judicially imposed penalties, and in the worst case, criminal or disciplinary proceedings.

EFFECTIVE PROJECT MANAGEMENT SOLUTIONS FOR LEGAL PROFESSIONALS

- “Project management” is an organized approach to effectively attaining a goal. In essence, project management replaces ad hoc, disorganized, and uncoordinated activities—which are often characteristic of group actions—with a comprehensive, detailed process for achieving the group’s goals. It requires defining goals for the project, assembling a team and designing a plan to achieve the intended goals, implementing the plan, documenting the plan and progress, monitoring progress and tracking it against expectations, making adjustments as necessary to meet the intended goals, and when necessary, relying on the planning

and documentation to enable counsel to defend the organization's efforts before a court or regulator. In short, successful project management in discovery requires an integrated and coordinated approach by all participants that is visible, transparent, and encompasses all stages of the e-discovery process, including preservation, collection, data processing and hosting, review, and production.

The objective or goal for project management in discovery can be generally described as follows: to preserve, collect, process, review, and produce all relevant non-privileged information (and withhold all relevant privileged information) on or before the date for production established by the court or parties. To achieve this goal, the team tasked with managing discovery should be ready to implement a project plan (discussed below) before a client receives notice of litigation or an investigation, so that it can begin implementing the process when notice comes. Additional team members can be added as the litigation develops, but there should be an ongoing core discovery project management team charged with managing the discovery, and designing and implementing the project plan. Active work on the project ends when the production of all responsive information is completed, but the duty to preserve potentially relevant information will continue until a case is settled or fully adjudicated.

The project plan is an important tool to manage and document the process. The project plan should identify all tasks that need to be completed to achieve the intended goal, and then break each task into sub-tasks that must be completed in chronological order before moving onto the next task. The plan should be updated as often as practical, but no less than once every week. This will allow counsel and the discovery team to ascertain dependencies for the completion of tasks, as well as threats to meeting deadlines, and allow adjustments to align progress with expectations.

The stages of the project management process in discovery are detailed below. Though Task 1 includes initial planning for the project plan, all stages will involve some level of planning that should be addressed and documented in the project plan as soon as the information necessary to make a decision is available. The documentation should be created with the understanding and belief that it will be necessary to defend the process to a court or regulator. For example, if a decision is made to preserve certain information, the documentation should describe the reasons supporting that decision. Similarly, if a decision is made to specifically exclude certain data sources, the supporting reasons should be documented.

Task 1: Initial Discovery Management Planning

At the outset, the discovery team should review the claims, defenses, and the subject matter of the litigation or potential litigation and collaborate with appropriate in-house counsel and other necessary personnel to identify the individuals who will need to be involved in implementing and managing the discovery process. At a minimum, the individuals who should be involved include experienced attorneys and paralegals employed by outside counsel, experienced attorneys and paralegals employed through in-house counsel, IT professionals or other systems personnel, company records management experts, human resources personnel with familiarity as to how the organization is structured, any key persons in the litigation (if known), and e-discovery vendors that will perform required tasks. It may also be appropriate to hire a consulting or testifying discovery expert, who can assist in guiding the process and validate the organization's efforts before a court or regulator. If the organization decides to retain an expert, it is important to communicate with that expert about what, if any, changes to process and/or documentation will be necessary to support

the expert's opinion about the process, and adjust ongoing efforts accordingly.

The next step is to identify the deadline for document production and work backward through each task that must be completed. Deadlines often change during litigation and investigations, so it is important to update these deadlines as they change. With input from appropriate participants, including collection, processing, and review vendors, due dates should be assigned for each of the tasks (initial planning, preservation, collection, processing, review, and production). Confirmation should be obtained that each responsible party has the resources necessary to complete the preservation, collection, data processing, review, and production tasks in the time available. Next, a regularly scheduled time should be set to meet and reevaluate whether there are additional individuals or sources that should be added to the discovery plan, and additional preservation, collection, and review work that needs to be completed based on changes in the litigation or evolution of the claims and defenses.

Task 2: Preservation

During initial planning, counsel should identify and document who among counsel will be responsible to draft and update the litigation hold, and identify the individuals who are responsible to disseminate the hold and track responses from recipients. In the preservation stage, it is important to identify all the places where potentially relevant information may be stored. Effective suspension of record-discarding protocols may involve gaining an understanding of how the client maintains its records. It may be necessary to sample data from different systems to determine whether the information is relevant. Discussion should occur on topics such as which, if any, system-level automatic deletions should be suspended, or if back-up tapes should continue to be recycled. After this is completed, those responsible to implement any changes to the client's record-keeping methods and IT sys-

tems should be identified. Similarly, identification and interviews should occur of all individuals who may have relevant information (the key persons).

In drafting a comprehensive litigation hold, it may also be important to review existing records management policies and existing litigation holds to identify additional sources of potentially relevant information. It can also help to know whether there are overlapping preservation directives so that the team can coordinate with other counsel to ensure data is not destroyed, should an overlapping hold be removed.

Next, all sources of potentially relevant information should be defined as either reasonably accessible or inaccessible. It is essential to review prior disclosures and coordinate with counsel in other cases to ensure that consistent positions are taken with respect to how company systems are identified and whether certain sources are designated as reasonably accessible or inaccessible.

Dates should be identified for dissemination and for reviewing and re-issuing the litigation hold. A process should be developed to ensure that the documents of departing employees are preserved, and that new employees who may generate relevant documents receive a copy of the hold.

After identifying the individuals and sources of data within the organization and determining a course of action for each, a litigation hold should be drafted that is designed to instruct all key persons and those responsible for IT systems and records management to preserve all potentially relevant data. As part of the documentation process, it is important to save all revisions to the hold and document why changes are made.

The hold should be issued and any necessary changes to the client's systems to effect preservation should be implemented. All recipients should acknowledge that they have reviewed and understand the hold requirements. Follow-up should occur with all recipients until acknowledgment is received and compliance is confirmed.

Task 3: Collection

Before collection, preferably during the initial planning stage, the discovery team should identify who will be responsible to track the status of collection efforts. It is also important to make sure the client has procedures in place to know what has been collected because subsequent collections may be necessary in protracted litigation. Failing to do so will drive up the cost and time required to review duplicative documents or “de-duplicate” the document collection. It also increases the risk of inconsistent coding of the same documents.

In the collection stage, if the client is utilizing a discovery vendor, collaboration should occur with the vendor to schedule and implement the data collection. The appropriate people should schedule a time to collect from each key person, ensure there is sufficient equipment, storage, and personnel to collect the data, and copy the information that needs to be collected or take the original information. The e-discovery vendor, IT personnel, records management personnel, and key persons must communicate to ensure that the data will not be modified or altered during the collection process.

It is important to track the collection, and know what has been and still needs to be collected. The collection team should meticulously monitor progress against the deadline for completion of the collection process to ensure that, where necessary, adjustments are made to ensure the information is available for the processing at the prescribed time. The discovery team should confirm that all responsive data is collected and instruct the key persons and appropriate IT and records management personnel that the data should continue to be preserved after the collection process. Finally, the collected data should be sent to the assigned vendor for processing.

Task 4: Processing

The discovery team should ensure that the processing vendor receives all of the collected data.

Counsel and the document review team should already be directing the vendor (preferably during initial planning) on how to organize the data and information in a manner that will make review and production more expedient and accurate. It is important to confirm that the files collected will be viewable through the review software that will be used to review the documents; to work with the client to obtain the necessary software or programs to view potentially relevant files; and to ensure that there is a method to track the data through the processing, search, and review process (e.g. Bates labeling). Data should be appropriately preserved, and should be stored in a manner that it can be reached quickly if necessary. Again, the team should meticulously monitor progress against the processing deadline, to ensure that, when necessary, adjustments are made to complete the processing stage in the time allotted.

Task 5: Search And Review

Preferably during initial planning, but before the processing stage, counsel, the discovery team, and any appropriate review vendor should evaluate and select the review platform that is appropriate for the work. The platform’s options and its suitability for the review required (e.g., keyword search and privilege log capabilities) should be considered. Counsel and review team leaders must also plan and document how the review will proceed. The plan should include a system of quality controls and post-review validation sampling to ensure the most accurate results. The team should also have a process to monitor the review progress so additional resources or other enhancements can be applied if needed to meet deadlines. Outside counsel and the discovery team should identify all potential categories and coding options for the documents. The team should also plan ahead for special document review requirements, such as documents that are highly technical or in foreign languages. Special-

ized review staff may be required in these circumstances.

Before the review, counsel and the discovery team should also develop and implement a training program for the review team that educates them on the litigation and the selected review tool. The review team and/or vendor should be provided information about the case, key persons, trial strategy, and discovery objectives.

The search and review should be conducted consistent with the plan, including segregation of the relevant documents from the non-relevant; documents withheld for non-relevance should be preserved. A privilege log should be generated for all documents relevant but withheld for privilege. (Counsel must advise the review team as to the requirements for asserting any applicable privilege and any requirements for a privilege log in the applicable jurisdiction, and determine whether it is necessary to obtain affidavits to support any asserted privileges.)

Task 6: Production

The discovery team should identify the best methods of production, taking into consideration any expressed preferences of opposing counsel, the costs involved, and the time to convert the data to different production formats. The documents should be produced to opposing counsel, with a duplicate copy of the production maintained with the producing counsel or vendor.

CONCLUSION • Taking the time and effort to design, effectively implement, and document a project management model for discovery will help reduce errors in the discovery process and mitigate the risk of judicially imposed penalties and other unfortunate consequences, including excessive costs, that litigants and counsel find themselves facing while proceeding toward case resolution. While a project management model requires some investment in time and resources, the benefits to clients and counsel of reduced errors in the discovery process well justify that investment.

PRACTICE CHECKLIST FOR Effective Project Management In Discovery

The practical effect of Fed. R. Civ. P. 26(g)(1) is to impose a duty on counsel to guide, manage, and supervise the client's efforts to comply with its disclosure obligations; Rule 16 imposes a duty on counsel to participate in any conferences organized for the purposes of case management; and rules of ethics and professional responsibility also impose obligations on lawyers throughout the discovery process. To conduct discovery that fulfills these obligations, effective project management is essential, and this consists of six tasks.

- Task 1. Initial discovery management planning:
 - ___ Review the claims, defenses, and the subject matter of the litigation or potential litigation;
 - ___ Collaborate with all necessary personnel to identify the individuals who will be involved in implementing and managing the discovery process;
 - ___ Identify the deadline for document production and work backward through each task that must be completed;

___ Set a regularly scheduled time to meet and reevaluate whether there are additional individuals or sources that should be added to the discovery plan.

- Task 2. Preservation:

___ Identify and document who will be responsible to draft and update the litigation hold, and the individuals who are responsible to disseminate the hold and track responses from recipients;

___ Identify all the places where potentially relevant information may be stored;

___ Discuss whether system-level automatic deletions should be suspended, or if back-up tapes should continue to be recycled;

___ Identify all sources of potentially relevant information as either reasonably accessible or inaccessible;

___ Draft a litigation hold designed to instruct all key persons and those responsible for IT systems and records management to preserve all potentially relevant data.

- Task 3. Collection:

___ Identify who will be responsible to track the status of collection efforts;

___ Make sure the client has procedures in place to know what has been collected;

___ If the client is using a discovery vendor, collaboration should occur with the vendor to schedule and implement the data collection;

___ Monitor progress against the deadline for completion of the collection process;

___ Confirm that all responsive data is collected;

___ Send the collected data to the assigned vendor for processing.

- Task 4. Processing:

___ Ensure that the processing vendor receives all of the collected data;

___ Confirm that the files collected will be viewable through the review software that will be used to review the documents;

___ Work with the client to obtain the necessary software or programs to view potentially relevant files;

___ Store data in a manner that it can be reached quickly if necessary.

- Task 5. Search and review:

___ Evaluate and select the review platform that is appropriate for the work;

___ Plan and document how the review will proceed;

___ Monitor the review progress so additional resources or other enhancements can be applied if needed to meet deadlines;

___ Plan ahead for special document review requirements, such as documents that are highly technical or in foreign languages;

___ Develop and implement a training program for the review team;

___ Generate a privilege log for all documents relevant but withheld for privilege.

- Task 6. Production:

___ Identify the best methods of production;

___ Produce documents to opposing counsel, with a duplicate copy of the production maintained with the producing counsel or vendor.