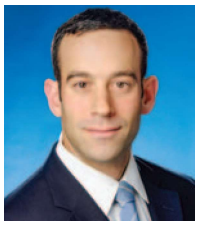
When 'Something Doesn't Feel Right' About the Evidence

The Nuts and Bolts of Requesting Missing Information Through Discovery on Discovery

By Scott A. Etish and Brielle A. Basso

Most attorneys have been involved in a litigation where they suspect that an adversary has failed to produce all relevant electronically stored information (ESI). Whether the failure to produce was intentional or due to a failure by the adversary to preserve ESI (leading to the destruction of ESI), the requesting party is confronted with the difficult decision of whether to pursue discovery regarding its adversary's efforts to search for, locate, preserve and collect relevant ESI (aka "discovery on discovery" or "metadiscovery"). This article will: (1) discuss the interplay between cooperation and transparency in the context of discovery; (2) explore judicial decisions involving requests for discovery on discovery; and (3) provide practical advice for avoiding discovery on discovery and strategic considerations for the potential offensive use of discovery on discovery.

Much has been written about the general expectation that parties cooperate in litigation to avoid discovery disputes. The Sedona Conference Cooperation Proclamation, Federal Rules of Civil Procedure, and countless judicial decisions extol the benefits of cooperation, and cooperation remains critical. Several of the Sedona Conference Principles discuss discovery on discovery as it relates to the intersection of the expectation of cooperation and the recognition that a responding party will be in the best position to respond to discovery. For instance, Sedona Conference Principle 3 provides that, "in some circumstances a party may effectively immunize itself from the risk of facing 'discovery on discovery' by cooperatively working to reach agreement on key ESI issues. Conversely, the failure to engage in meaningful



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discussions about ESI discovery can lead to expensive motion practice, which may lead to adverse court orders."[1]

The Sedona Conference Principle 6 provides that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."[2] The "Introduction" to Principle 6 explains that this "is premised on each party fulfilling its discovery obligations without direction from the court or opposing counsel, and eschewing 'discovery on discovery,' unless a specific deficiency is shown in a party's production."

While refusing to cooperate is extremely risky in light of the availability of sanctions under Federal Rule of Civil Procedure 37(f), there is no explicit requirement that a party be transparent as to what exactly was done to respond to discovery requests. Litigants should remain vigilant in recognizing when an adversary seeks to extend the concept of cooperation by demanding that a responding party also be transparent in responding to discovery requests.[3]

Judicial Treatment of Requests for Discovery on Discovery

Consistent with Sedona Conference Principle 6, courts are generally reluctant to permit discovery on discovery.[4] While there is very little New Jersey state case law addressing discovery on discovery, courts within the Third Circuit have held that discovery on discovery is "impermissible" and will usually deny such requests, unless the requesting party can demonstrate that the responding party acted in bad faith or unlawfully withheld documents.[5] Without any showing of bad faith or unlawful withholding of documents, requiring such discovery on discovery would "unreasonably put the shoe on the other foot and require a producing party to go to herculean and costly lengths…."[6]

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Consequently, it generally takes more than a requesting party's mere suspicion or a "conclusory allegation" that it has not received all of the relevant documents to persuade a court to permit discovery on discovery.[7] Decisions involving discovery on discovery are highly fact-sensitive, and some courts within the Third Circuit have permitted discovery on discovery when a requesting party provides an "adequate factual basis" for questioning the efficacy of the responding party's practices.[8] District courts within the Third Circuit generally require a showing of "bad faith" or that the production was "materially deficient" to justify discovery on discovery.[9] A requesting party may establish "an adequate factual basis" to justify such discovery through deposition testimony that a party never issued a litigation hold notice to important custodians; failed to issue it in a timely manner; and/or based upon an absence of documents produced from certain key custodians or timeframes.[10]

There are at least three different approaches commonly followed by courts concerning the discoverability of litigation hold letters themselves, depending upon jurisdiction. Some courts, including the District Court for the District of New Jersey, permit discovery into preservation and document retention policies, but ***only*** upon a preliminary showing of spoliation or discovery misconduct.[11] Under this analytical approach, litigation hold letters are generally considered privileged; however, when spoliation occurs, the letters become discoverable.[12] On the other hand, some courts allow discovery of document retention policies ***without*** a preliminary showing of spoliation or discovery abuses.[13] Even still, several courts have taken a different approach and have concluded that preservation efforts and document retention policies are not discoverable because they are not relevant to the claims and defenses at issue, pursuant to Federal Rule of Civil Procedure 26.[14]

Practice Tips

To avoid costly discovery on discovery, parties should cooperate with one another and seek to enter into ESI protocols that outline limits for how far a party can press for details on the discovery decision-making process, and under what circumstances those limits may be relaxed. Assuming the responding party has done exactly what it agreed to do in an ESI protocol, a requesting party will have a more difficult time convincing a court to permit discovery on discovery. Parties should also consider including certain baseline showings in an ESI protocol necessary before a party is permitted to seek discovery on discovery.

The need to preserve ESI cannot be overstated, particularly when a party has been put on notice of its obligation to preserve such evidence. Whether a party intentionally or negligently destroys ESI, the potential consequence is having

to produce privileged information, particularly a litigation hold notice. Litigation holds and other preservation-related documents are generally protectable attorney-client communications and attorney work product. However, and as discussed above, in many jurisdictions, sufficient preliminary evidence of spoliation or other discovery misconduct may well give rise to court orders to disclose these documents, or, in some cases, a party's decision to voluntarily produce them to defend against claims of misconduct. As such, attorneys should take caution to avoid including information in the hold notice that might ultimately prejudice their client's position if the document is disclosed, including comments regarding litigation strategy, the merits of the claim, and confidential material that is not otherwise essential to the purpose of the hold notice.

Cases in which courts have allowed discovery on discovery are reminders of the critical importance that: (1) litigation hold notices are timely issued; (2) custodians confirm receipt of the holds; and (3) custodians understand the importance of compliance with a litigation hold. Not only does discovery on discovery have the potential to significantly escalate the cost of a litigation, but it also can completely steer a litigation away from consideration of the merits.

The potential for discovery on discovery should also serve as a reminder of the importance of preparing and formulating a discovery plan. This plan should be clear and detailed and each step taken (or not taken) must be memorialized to defend against the assumption that the requesting party will be doing everything in its power to identify inconsistencies in a production via deposition testimony (statements by witnesses indicating that documents and/or communications exist), third-party subpoenas (third-party produced communications with responding party not otherwise produced), and comparison of documents produced by the requesting party to what was produced by the responding party (to identify documents produced by requesting party that responding party failed to produce as indicative of discovery deficiencies).

Depending on how the court will approach the issue, and whether the court will require a showing of spoliation, a requesting party is likely to be given wide berth from a court in fully exploring their adversary's discovery efforts (or lack thereof) once a certain baseline showing of discovery misconduct is made. The key to the effective use of offensive discovery on discovery is restraining the impulse to seek judicial relief too early. Courts have regularly rejected discovery motions based upon a requesting party's "mere suspicion" that an adversary has engaged in discovery misconduct. While it may not be appropriate for every case, an understanding of the mechanics of discovery on discovery is of critical importance to litigators who are regularly involved in matters with high volumes of ESI. ⚖

Endnotes

1. *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Volume 19 (2018), Principle 3, Comment 3.b., p. 78, citing *Ruiz-Bueno v. Scott*, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013) (ordering answers to interrogatories about search methods and noting that, where information is shared, it changes the nature of the dispute from whether the requesting party is entitled to find out how the producing party went about retrieving information to whether that effort was reasonable).
2. *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Volume 19 (2018), Principle 6, Comment 6.b., p. 118.
3. *See Miller v. Thompson-Walk*, 2019 WL 2150660, at *1 (W.D. Pa. May 17, 2019).
4. *See Jensen v. BMW of N. Am., LLC*, 328 F.R.D. 557, 566 (S.D. Cal. 2019).
5. *See Alley v. MTD Prod., Inc.*, 2018 WL 4689112, at *2 (W.D. Pa. Sept. 28, 2018) (granting protective order with respect to deposition topics regarding defendants' "systems for creating, storing, retrieving, and retaining documents" because plaintiff did not show that defendants acted in bad faith or that they unlawfully withheld documents); *see also Brand Energy & Infrastructure Servs. v. Irex Corp.*,

2018 WL 806341, at *6 (E.D. Pa. Feb. 7, 2018) (holding that discovery requests regarding the servers that defendants used to access and store digital information were impermissible).

6. *Ford Motor Co. v. Edgewood Properties, Inc.*, 257 F.R.D. 418, 428 (D.N.J. 2009).
7. *See, e.g.*, *id.* at 427 ("But such a conclusory allegation premised on nefarious speculation has not moved several courts, nor will it move this one, to grant burdensome discovery requests late in the game."); *Brand Energy*, 2018 WL 806341, at *6 (holding discovery requests regarding the servers that the defendants used to access and store digital information were impermissible, reasoning that "[f]ederal courts will not compel a party to disclose its discovery process as a result of the opponent's mere suspicion that the party's process has not produced adequate documents." (citations omitted)).
8. *Winfield v. City of New York*, 2018 WL 840085, at *3 (S.D.N.Y. Feb. 12, 2018); *see also Korbel v. Extendicare Health Servs., Inc.*, 2015 WL 13651194, at *15 (D. Minn. Jan. 22, 2015) (noting that meta-discovery is only warranted when there is a "colorable factual basis" for such discovery).
9. *Koninklijke Philips N.V. v. Hunt Control Sys., Inc.*, 2014 WL 1494517, at *2, *4 (D.N.J. Apr. 16, 2014) (denying the defendant's request for an IT deposition to discover whether the plaintiff was "using the appropriate search tools for ESI discovery," reasoning the defendant "failed to make the requisite showing that [the plaintiff's] production has been materially deficient").
10. *Vieste, LLC v. Hill Redwood Dev.*, 2011 WL 2198257, at *1 (N.D. Cal. June 6, 2011).
11. *See, e.g.*, *Major Tours, Inc. v. Colorel*, 2009 WL 2413631, at *2-*3 (D.N.J. Aug. 4, 2009) ("Although in general hold letters are privileged, the prevailing view, which the Court adopts, is that when spoliation occurs the letters are discoverable."); *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2020 WL 1321522, at *8 (N.D. Fla. Mar. 20, 2020) ("[L]itigation hold notices are discoverable only if there is a preliminary showing of spoliation."); *Nekich v. Wis. Cent. Ltd.*, 2017 WL 11454634, at *5 (D. Minn. Sept. 12, 2017) (holding that litigation hold letters are protected from disclosure under the attorney-client privilege, yet may be discovered if the requesting party presents evidence of spoliation); *Radiation Oncology Servs. of Cent. New York, P.C. v. Our Lady of Lourdes Mem'l Hosp., Inc.*, 69 Misc. 3d 209, 126 N.Y.S.3d 873 (N.Y. Sup. Ct. 2020) (while litigation holds are generally privileged, preliminary showing of spoliation of evidence may compel production of party's litigation hold).
12. *See Major Tours, Inc.*, 2009 WL 2413631, at *2-*3 (finding a "preliminary showing of spoliation of evidence" and, therefore, granting the motion to compel the production of litigation hold letters); *see also Keir v. Unumprovident Corp.*, 2003 WL 21997747 at *6 (S.D.N.Y. Aug. 22, 2003) (allowing detailed analysis of emails pertaining to defendant's preservation efforts after finding that electronic records which had been ordered preserved had been erased).
13. *In re Caesars Ent. Operating Co., Inc.*, 2018 WL 2431636, at *11 (Bankr. N.D. Ill. May 29, 2018) ("Even if there has been no spoliation,… 'discovery of document retention and disposition policies' is proper and 'is not contingent upon a claim of spoliation or proof of discovery abuses.'" (quoting *Burd v. Ford Motor Co.*, 2015 WL 4137915, at *9 (S.D. W. Va. July 8, 2015))); *Sharma v. BMW of N. Am., LLC*, 2016 WL 1019668, at *4 (N.D. Cal. Mar. 15, 2016) (determining that document retention policies were discoverable without requiring proof of spoliation because "[k]nowledge of [the defendant's] document retention policies will allow plaintiffs to assess the company's document production, determine whether any relevant documents are lacking, and evaluate whether additional discovery is necessary in this case").
14. *See, e.g.*, *Cunningham v. Standard Fire Ins. Co.*, 2008 WL 2668301, at *5 (D. Colo. July 1, 2008) (holding that the "storage, preservation and backup of emails" was not relevant to whether defendants breached plaintiff's insurance policy or acted in bad faith in adjusting his claim); *Fish v. Air & Liquid Sys. Corp.*, 2017 WL 697663, at *15 (D. Md. Feb. 21, 2017) (rejecting plaintiffs' request for discovery of defendant's document retention policies over an 85-year period where plaintiffs failed to explain why the request was relevant and proportional).

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