PROGRAM MATERIALS
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Getting on the Same Page: The Importance of Negotiating Comprehensive ESI Protocols

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Getting on the Same Page: The Importance of Negotiating Comprehensive ESI Protocols

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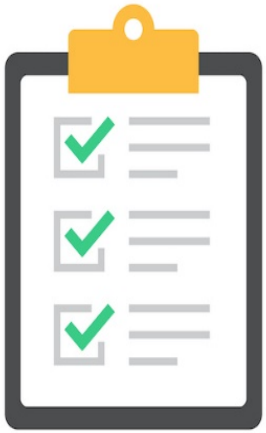
Program Agenda

- Critical nature of ESI Protocol
- Cooperation, Transparency and Sedona Conference Principle 6
- Proportionality and Emerging Data Sources
- Review Methodologies
- Protecting Confidential and Irrelevant Information
- Fed. R. Evid. 502



ESI Protocols – Cooperation and Federal Rules of Civil Procedure

- Countless judicial decisions have emphasized the need for cooperation since the Cooperation Proclamation. *Beaton v. Verizon New York, Inc.*, No. 20-CV-672 (BMC), 2020 WL 6449235 (E.D.N.Y. Nov. 3, 2020); *Tadayon v. Greyhound Lines, Inc.*, No. CIV. 10-1326 ABJ/JMF, 2012 WL 2048257 (D.D.C. June 6, 2012).
- And the term "cooperation" is emphasized in the official comments to the 2016 amendments to Rule 1 of the Federal Rules of Civil Procedure.
- Rule 26(f) requires cooperation by the parties in formulating a discovery plan and meaningfully meeting and conferring in the event a discovery dispute arises.
- In the event the parties fail to cooperate, Rule 37 provides the court the ability to sanction a party for failing "to cooperate in discovery." While litigants may often seek for transparency in discovery, there is no such requirement in the Federal Rules of Civil Procedure.

Sedona Principle 6

- "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Volume 19 (2018).

- "[A]s a general matter, neither a requesting party nor the court should prescribe or detail the steps that a responding party must take to meet its discovery obligations. . ." Comment 6.b

Avoiding Discovery on Discovery

- The introduction and comments to Sedona Principle 6 explain that
  - It "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."
  - "There should be no discovery on discovery, absent an agreement between the parties, or specific, tangible, evidence-based indicia (versus general allegations of deficiencies or mere "speculation") of a material failure by the responding party to meet its obligations. A requesting party has the burden of proving a specific discovery deficiency in the responding party's production."
- Reasonable grounds may include 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), or deposition testimony regarding deficiencies in litigation hold notice.
- Without any showing of bad faith or unlawful withholding of documents, permitting discovery on discovery would "unreasonably put the shoe on the other foot and require a producing party to go to herculean and costly lengths...." *Ford Motor Co. v. Edgewood Properties, Inc.*, 257 F.R.D. 418, 427 (D.N.J. 2011).

Avoiding Discovery on Discovery

- Best Practices
  - ESI Protocol – Address baseline showing needed to allow for "discovery on discovery"?
  - Include meet and confer requirements to address requested "discovery on discovery" before requesting judicial assistance.
  - Custodian interviews and summaries
  - Adequate supervision of e-discovery vendors
  - Protecting attorney-client and work product privileges

Creating Proportional Limits on Discovery

- Determining whether data types/sources may be excluded
- Limits on custodial sources
- Absent agreement, application to expand beyond agreed-upon limits likely to be based upon general notions of whether additional discovery would be cumulative, unduly burdensome and proportional. *See, e.g., Garcia Ramirez v. U.S. Immigration & Customs Enf't*, 331 F.R.D. 194, 196 (D.D.C. 2019)

Addressing Non-Traditional Data Sources

"Document" is used in the broadest sense possible and includes, without limitation, any and all . . . text messages, and messages from any social media platform or chat application (e.g. Skype, Microsoft Teams, WhatsApp, Facebook, LinkedIn, etc.)." *Bolus v. Carnicella*, 2020 WL 930329 (M.D. Pa. Feb. 26, 2020) (denying burden argument).

Creating Proportional Limits on Discovery

- Challenges associated with emerging data sources
- *Nichols v. Noom*, 20-CV-3677 (S.D.N.Y., March 11, 2021)
  - SDNY held that hyperlinked documents should not necessarily be considered "attachments"
  - Responding party not required to utilize a collection tool proposed by the requesting party, which would have collected all hyperlinked documents and maintained their familial relationship with the parent document
  - No meeting of the minds in the ESI protocol as to whether hyperlinked documents were considered attachments
  - No need for hyperlinked documents based upon proportionality concerns

Meet & Confer and ESI Protocol Drafting Tips

- Consider limiting scope through agreed-upon number of custodians
- Consider phasing (e.g., non-custodial sources or particular custodians first)
- Include good cause or other standard for expansion of any agreed-upon limits
- Consider ***excluding*** IMs from collection and/or retention efforts, informed by which employees may use IM and in what context
- Address data sources such as Slack, Microsoft Teams and OneNote, including whether to exclude any and production format issues
- Address hyperlinked documents

Search & Review Methods: Guiding Principles

- Transparency is not required!
- Sedona Conference Principle 6 (responding parties are in the best position to determine appropriate methodology)
- Proportionality (Fed. R. 26(b)(1); New Jersey Court Rule 4.10-2(g); Preamble to Commercial Division Rules of New York

Search & Review Methods: Using Technology to Increase Efficiency/Reduce Costs

- De-duplication (global or custodian)
- Search terms
- Email threading
- Technology Assisted Review (“TAR”)
- Are these mutually exclusive?

Search & Review Methods: Search Terms

- Exchange of terms, objections to proposed terms
  - Be extremely cautious about agreeing up front to terms unless you have access to data for test searches. *I-Med Pharma, Inc. v. Biomatrix*, 2011 WL 6140658, at *1 (D.N.J. Dec. 9, 2011)
- Expressly reserve right to review for responsiveness and disclaim production merely based upon hits
  - *Actavis Holdco U.S. Inc. et al. v. Connecticut et al.*, 2019 WL 8437021 (3d Cir. 2019), ordered petitioners to produce documents containing any of broad search terms and forbid them from "withhold[ing] prior to production any documents based on relevance or responsiveness."

Search & Review Methods: TAR

- TAR: generally accepted
- Ignore technology at your own risk: *In re Mercedes-Benz Emissions Litig.*, 2020 WL 103975, at *2 (D.N.J. Jan. 9, 2020)
  - "Defendants are cautioned that the Special Master will not look favorably on any future argument related to burden of discovery requests, specifically cost and proportionality, when Defendants have chosen to utilize the custodian-and-search term approach despite wide acceptance that TAR is cheaper, more efficient and superior to keyword searching."
  - Good to his word, the Special Master later rejected burden argument. *In re Mercedes-Benz Emissions Litig.*, 2020 WL 747195, at *6 (D.N.J. Feb. 14, 2020).
- But see *United States Equal Employment Opportunity Comm'n v. George Washington Univ.*, 2020 WL 3489478 (D.D.C. June 26, 2020)

Search & Review Methods

- Do we need requesting party's agreement on the details? *Livingston et al v. City of Chicago*, No. 1:2016-cv-10156 (N.D. Ill. 2019)
  - The parties agreed to search terms that would define the set of data to be identified and collected.
  - Plaintiffs objected to the City's plan to use TAR in its review process to identify documents to be produced.
  - The court agreed with the City "that as the responding party it is best situated to decide how to search for and produce emails responsive to Plaintiffs' discovery requests."
  - The court found that "Plaintiffs' insistence that the City must collaborate with them to establish a review protocol and validation process has no foothold in the federal rules governing discovery."

Search & Review Methods: E-mail Threading

- Understand what will you receive
- Obligation to produce ESI in form "in which it is ordinarily maintained or in a reasonably usable form or forms." FRCP 34(b)(2)(E)(ii)
- To be reasonably useable, ESI should be "searchable, sortable and paired with relevant metadata." *Lutzeier v. Citigroup Inc*., 2015 WL 430196, at *8 (E.D. Mo. Feb. 2, 2015).

Search & Review Methods

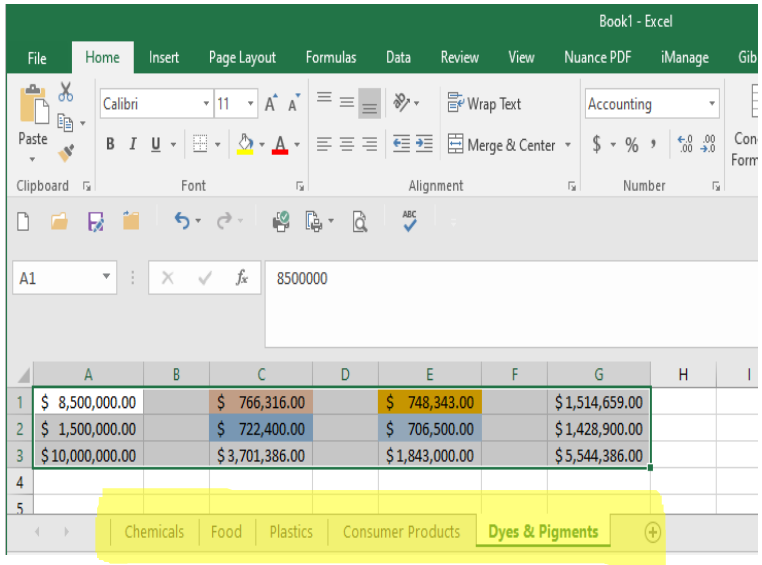
- What about “known collections” of responsive ESI?
  - Production of materials that are “reasonably known” to be responsive without subjecting to search criteria or TAR
  - Compare, for example, dedicated email or network folder to unfoldered Inbox, Sent Items, annual email archive

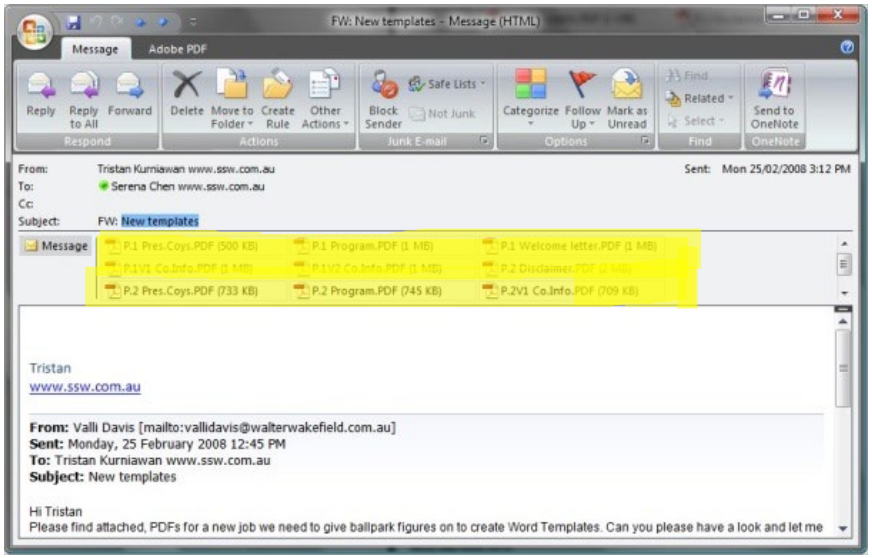
ESI Protocol Drafting Tips

- Metadata for “all custodians” if globally de-duplicated
- Metadata for any suppressed email threads
- Maintaining flexibility as to methods
- Disclaim obligation to produce all documents retrieved by any search method
- Exclude “known collections” from electronic search methodology

Protecting Your Information: Can I Redact Non-Responsive Information?

- The Problem: The reality of how we work





Protecting Your Information: Can I Redact Non-Responsive Information?

- The Majority: Presumption of Production
  - Principal arguments: need for "context" and distrust for "unilateral" relevance determinations
  - Why isn't confidentiality enough?

See, e.g., Engage Healthcare Commc'ns, LLC v. Intellisphere, LLC, 2017 WL 3624262, at *3 (D.N.J. Apr. 26, 2017) (collecting cases); *Corker v. Costco Wholesale*, No. 19-cv-0290RSL, 2020 WL 1987060 (W.D. Wash. Apr. 27, 2020) (prohibiting redactions); *In re: Takata Airbag Prod. Liab. Litig.*, No. 14-24009-CV, 2016 WL 1460143, at *2 (S.D. Fla. Mar. 1, 2016) (permitting redactions).

ESI Protocol Drafting Tips: Protecting Non-Responsive Documents

G. **Non-Responsive Attachments:** The Parties agree that non-responsive parent documents must be produced if they contain a responsive attachment and are not withheld as privileged. Non-responsive attachments to responsive parent emails need not be produced, but the Parties will meet and confer regarding a non-exhaustive list of criteria in determining whether a document is responsive within the meaning of Rule 26(b)(1) for purposes of the Litigation. The list may be specific to each Party. A Bates numbered placeholder will be provided for any document withheld pursuant to this ¶ II(G) and shall state that a non-responsive attachment has been withheld from production. The Parties will meet and confer regarding whether any other information will be contained on the placeholder to describe the category of document withheld by a producing Party. The requesting Party has the right to request the production of any attachment withheld solely on the basis of non-responsiveness that the requesting Party believes in good faith is responsive. For such attachments, the requesting Party shall provide a list of Bates numbers of any document produced that suggests that a responsive attachment was excluded from production as a non-responsive attachment and of any such attachment the requesting Party seeks to have produced, as well as explain why it believes the attachment is responsive.

ESI Protocol Drafting Tips: Protecting Non-Responsive Documents

What can be redacted

produced in discovery in this Action. In addition to redactions for privacy and privilege, a Producing Party may redact uniquely identifying information related to [redacted]. Examples of "uniquely identifying information" include, but are not strictly limited to, [redacted] if they are specific enough to allow for unique product identification, [redacted] if they are specific enough to allow for unique product identification, and [redacted]. A Producing Party may not redact any substantive information regarding [redacted], including, but not limited to,

How it may be redacted

[redacted]. The redactions for [redacted], unique product identifying information should not be intertwined with responsive information such that its redaction will interfere with the Receiving Party's ability to review responsive documents. The

4. Native Excel or other spreadsheet files that are redacted may be produced in TIFF format or by overwriting the data contained in a particular cell, row, column or tab with the word "Redacted," and shall make clear the reason for the redaction (e.g., "Redacted Privilege"), provided that such overwriting does not impact any other, non-privileged cells or information in the spreadsheet (*e.g.,* if a cell redacted for privilege contains a numerical value that is used in a formula by

ESI Protocol Drafting Tips: Protecting Non-Responsive Information

- Raise the issue, show (redacted) examples
- If you can reach agreement
  - Identify as specifically as possible what can be redacted
  - Require redactions in a manner that permits receiving party to understand nature of information redacted
  - Preserve objections to responsiveness/relevance
- If you cannot reach agreement
  - Raise with Court – Early!
  - At minimum, reach agreement to meet and confer on case-by-case basis

I. Rule 502 Update

- Overview of Fed. R. Evid. 502(b)
- Importance of Rule 502(d) clawback agreements
- Recent Decisions regarding Rule 502(b) & (d)

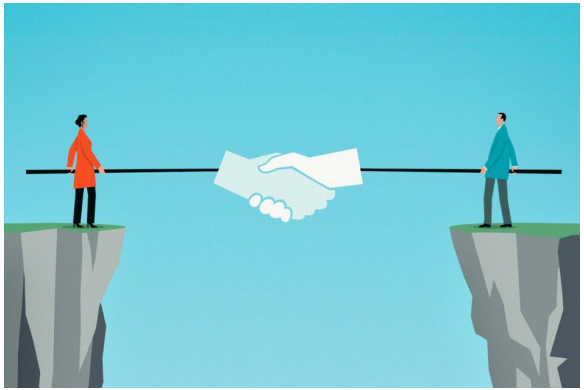
Inadvertent Disclosure

- FRE 502: Privilege is not waived if:
  1) Disclosure is inadvertent;
  2) Reasonable steps were taken to prevent disclosure; and
  3) Promptly take reasonable steps to rectify the error

Circumventing 502(b) Waiver Analysis

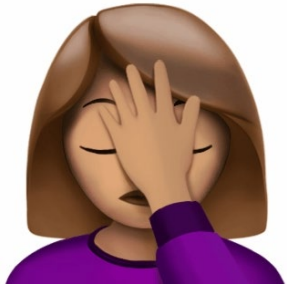
- For broadest protection, enter into a FRE 502(d) non-waiver or clawback agreement embodied in a court order, which:
  - avoids defining terms included in Rule 502(b), such as what constitutes inadvertence and precautionary measures to protect from disclosure and promptness.
  - *explicitly* agrees to clawback regardless of the pre- or post-production conduct of the producing party and disclaims the applicability of FRE 502(b) waiver analysis.

  See Irth Solutions, LLC v. Windstream Communications LLC, 2017 WL 3276021 (S.D. Ohio August 2, 2017)



Avoidable Headaches

- *Orthopaedic Hospital v. DJO Global, Inc.* (S.D. Cal. 2020)
  - In the absence of a FRE 502(d) agreement, Court found waiver from inadvertent disclosure for lack of "prompt" and "reasonable" steps to rectify error
- *Bellamy v. Wal-Mart Stores* (W.D. Tex. 2019)
  - Failure to seek FRE 502(d) order "was the first of many mistakes by Defendant's counsel in this case"



- *In re Keurig Green Mt. Single Serve Coffee Antitrust Litig.* (S.D.N.Y. 2019)
  - FRE 502(d) agreement failed to preclude receiving party from using inadvertently produced documents for the limited purpose of challenging the assertion of privilege

Limits to FRE 502(d) Orders

- 502(d) orders cannot be used as a “sword” in the discovery process
- *EEOC v. George Washington University* (D. D.C. 2020)
  - Confirmed 502(d) orders cannot be used to force a responding party to produce potentially privileged documents without first reviewing them

Questions?

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