Taming the Beast: Avoiding Pitfalls in E-Discovery
A Dos and Don’ts Guide

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I. Introduction

E-discovery. It is the subject everyone loves to hate. If e-discovery were a song, it would probably be “With or Without You” by U2. You can’t live with it, but can’t win a case without it. E-discovery leads to the smoking gun documents, and also to throbbing headaches. In relative terms, e-discovery is a fairly new phenomenon in the legal industry. But it is one that is not going away . . . ever. It has infiltrated every aspect of the practice of law – litigation, investigations, due diligence, etc. – and unless the world stops using computers cold turkey and goes back to a simpler time of pencil and paper, it is here to stay. So while we can’t get rid of e-discovery, and we can probably never make it a pain free, seamless process, we can learn to love it, or at least to tolerate it.

In 2014 and 2015, Fortune 1000 companies were reportedly spending $5-$10 million per year on e-discovery and many spend as much as $30 million. While the numbers are staggering, they are not surprising given how much electronic data humans are creating on a daily basis, whether in their personal lives or at work. Electronically Stored Information (“ESI”) goes way beyond just email. It includes everything from Word® documents and PowerPoint® presentations to chat programs, text messages, and social media posts. Gone are the days of junior associates being locked in a room to go through endless boxes of documents. They are replaced with junior associates being placed in front of a computer screen for hours on end to click through millions of documents stored on an electronic database.

The ease of creating electronic data has been the catalyst for its sheer volume, which in the legal context raises questions of preservation, collection and overall use. The technological developments have made incredible steps in the quest to cull electronic data into a useable medium for lawyers. However, even for the most tech savvy lawyer, let alone the technologically inept of
us, discovery in the electronic age and its ever evolving jurisprudence can still be a tricky field to navigate. But being knowledgeable in this area is no longer an option. Courts and state bars are even imposing obligations on lawyers to understand ESI and e-discovery.²

Understanding ESI and the discovery of ESI is becoming as important a part of being lawyer as learning about the Constitution. This paper aims to provide some practical guidance and tips in the form of a “Dos and Don’ts” guide to make your next foray into electronic discovery a little less headache inducing.

II. Dos and Don’ts Relating to the Updates to the Federal Rules of Civil Procedure

In December 2015, the Federal Rules of Civil Procedure (“FRCP” or the “Rules”) were again amended and included amendments that significantly affect e-discovery. When the amendments were issued, Chief Justice John Roberts stated in his 2015 Year-End Report on the Federal Judiciary that “the amendments may not look like a big deal at first glance, but they are.” Federal e-discovery rulings in 2016 were dominated by the interpretation of these amendments. This section will address dos and don’ts of e-discovery related to these amendments and their interpretation by courts thus far. These Dos and Don’ts should not only guide e-discovery practices in litigation, but setting up e-discovery practices for clients before disputes arise.

a. Don’t Cite to the Old Standards – Rule 26(b)(1)

The amended rules replace the “reasonably calculated” standard with a “proportionality” standard guiding discovery through the amendment to Rule 26(b)(1). This amendment is probably the most significant change to the Rules and limits a party’s ability to obtain discovery from discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense[.]” to discovery that is “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information,
the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

The amendment to Rule 26(b)(1) was “designed to protect against over-discovery and to emphasize judicial management of the discovery process, especially for those cases in which the parties do not themselves effectively manage discovery.”3 The Rule no longer refers to “the subject matter of the action” but instead allows for “proportional discovery relevant to any party’s claim or defense[.]”4 In the 1980s, proportionality language was included in Rule 26(b)(1) but was later moved to Rule 26(b)(2). Moving this language “restore[d] the proportionality factors to their original place in defining the scope of discovery.”5 Chief Justice Roberts noted that the amended Rule 26(b)(1) “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.”6

When the amendments were first issued, “[many speculated that these changes to the scope of discovery would bring about a sea change, reining in the perceived excesses of the discovery process. Others felt that, for all the hype surrounding amended Rule 26(b)(1), not much in the world of discovery would actually change”7 given that proportionality has always been principle of discovery under Rule 26. The results in practice are a mixed bag of the two. Courts have diverged over whether the initial proportionality burden is on the requesting party or the party opposing discovery.8

Some courts have noted that the rule “does not change any of the existing responsibilities of the court or the parties in considering proportionality” because even under the old Rule 26(b)(2)(C)(iii) the court could limit discovery when the burden of the discovery outweighed its benefit. At its core, however, the amendment to Rule 26(b)(1) was intended to change the mindset about discovery so that the focus is on proportionality rather than just relevancy.9 And although
there are some courts that have found the amendment does not change the substance of the Rule, at least one court has sanctioned a party’s counsel for citing case law analyzing pre-amendment cases and arguing for relevancy alone without applying the proportionality requirement.\(^{10}\)

While it’s unclear whether other courts will follow suit and take the extreme position of imposing sanctions on counsel for citing to the wrong standard, lawyers must take heed of the amendment. And they should. The amendment to Rule 26(b)(1) can streamline discovery and avoid sweepingly broad discovery that is both costly and unhelpful. When requesting discovery, moving to compel or resisting discovery, proportionality should be focused on from the initiation of a lawsuit.\(^{11}\) A very big Do is to engage both opposing counsel and the court in discussions to determine the scope of discovery, whether discovery can be phased, the sources of discovery and the overall discovery plan. But whatever you do . . . don’t cite to the old standard.

\(b.\) **Do Set a Preservation Strategy but Do Not Seek Imbalanced Sanctions - Rule 37(e)**

The December 2015 amendments to the FRCP also replaced the entire text of Rule 37(e).

The amended rule clarifies the standard for courts when imposing sanctions and provides that:

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.
The Advisory Committee noted that the earlier version of Rule 37(e) had “not adequately addressed the serious problems resulting from the continued exponential growth in the volume of [ESI].”  

Under the new Rule 37(e), “reasonable steps” to preserve ESI suffice, perfection is not required. After the 2006 amendments to the Rules were issued, “the federal circuits . . . established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve ESI.”  

The 2015 version of Rule 37(e) is “designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information.”  

It specifically rejects cases that authorize the most serious sanctions, like an adverse inference, upon only a showing of negligence or gross negligence.  

There are four requirements under the amended Rule 37(e) for sanctions to be imposed: some ESI must be lost; information must be the kind that should have been preserved; evidence must be lost because a party failed to take reasonable steps to preserve it; and evidence cannot be restored or replaced through additional discovery. Litigants seeking to impose the harshest sanctions like adverse inferences, dismissal or default judgments must demonstrate that the spoliation was done in bad faith as opposed to the more lenient standard previously adopted by the Second Circuit and other courts that only required a showing of negligence.  

Where there is no showing of prejudice, sanctions will not be imposed.  

The amended Rule 37(e) reiterates the need to preserve data.  

While the revised rule may promote the applying of sanctions sparingly, they will still be imposed if steps are not taken to preserve data once a duty to preserve arises. Reasonable steps towards preservation are fact specific. In-house counsel and outside counsel should work together to set up a general preservation strategy for their clients before disputes arise. The plan can then be put into action quickly at the inception of a dispute to ensure that no data is lost. The preservation plan should
include issuing a litigation hold, a listing of the potential custodians involved in different types of disputes, a plan for suspending any automatic deletion or clean-up programs, and outlines for interviewing custodians, among others. Each client’s preservation strategy will vary depending on type and size of client and the specific dispute at hand. But some type of reasonable preservation strategy is needed to avoid the possibility of sanctions, especially case losing sanctions.

c. Do Not Use Boilerplate Objections

Litigators have a love/hate relationship with boilerplate objections. We love to use them but hate to have them used against us. And they have been disfavored by courts for years. Now, under amended Rule 34(b)(2)(B), they are explicitly prohibited. The Rule now provides that the response to a request for production “must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons.” Further, “[a]n objection [to a request for production] must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.”

Under the amended Rule 24(b)(2)(B), courts have found boilerplate objections inappropriate and unpersuasive and have stricken them from a party’s discovery responses.19 It will be difficult to forego a practice that many of us have engaged in for years. But no longer can objections be made based solely on the grounds that the request is vague, broad, unduly burdensome, ambiguous, etc. Instead the objections must state with specificity why the request amounts to one of those adjectives to avoid being stricken and all objections waived.

III. Dos and Don’ts During Regular Business Operations

a. Do Understand Your Company or Your Client’s Electronic Systems
It is important for both in-house and outside counsel to understand their client’s electronic systems. This is something that should be done before a dispute arises so that when the time comes to institute a legal hold and to preserve documents, there is not a learning curve to first figuring out what types of documents there are and how they are stored. Lawyers should be familiar with the type and version of email system the company uses (in most cases it will be a version of Outlook), the type of documents created on a daily basis, whether there is an internal communication program that employees use, whether employees send text messages as part of their job, etc. Lawyers should also understand how documents are stored, including whether the company uses shared drives (and if each project has its own shared drive), whether it uses an Outlook based file system, or other storage tool. A full understanding of a company’s electronic systems must include learning about the company’s preservation and document retention policies including how long emails are stored for, if there are automatic deletion functions not only for emails but also all other documents. It is also important to know how employees are advised of document retention practices and whether employees are allowed to keep and delete documents as they see fit or if it is company-controlled.

Understanding your client’s electronic systems and document management policies will help to ensure the efficient institution of a litigation hold when a dispute arises. But it will also allow you to develop a more thorough and targeted e-discovery plan internally and with opposing counsel.

b. Do Maintain Project Files by Topic

This particular “Do” is construction-industry specific. It should go without saying that documents for separate projects should be filed separately. But files for each project should also be kept categorically, i.e., files for correspondence, daily reports, financing documents, schedules,
invoices, etc. It is possible to streamline the e-discovery process in a construction dispute if project files are kept in an organized manner.

Depending on the nature of the dispute, the parties can agree to satisfy their production obligations by turning over their project files (with the exception of privileged documents). This would save time and money in needing to collect documents from a variety of sources and numerous custodians. Or the parties can agree to turn over certain folders in the project files. For example, if the dispute only involves one subcontractor and the project schedule, the parties can agree to turn over the project files relating to that subcontractor and the schedule folder. How feasible this is will be of course depends on the subject matter of the dispute. And one glaring abstention from these files will be emails which may need to be dealt with separately. But this can help the process. One way to keep project files is to use a shared drive and provide access to all personnel working on the project.

c. Don’t Rely on Custodians to File Emails Appropriately

While project file folders are generally a good idea, email folders are not, at least not for purposes of e-discovery. There may be many reasons a company will ask employees to keep their emails segregated in separate folders by project, but assisting in the e-discovery process is not necessarily one of them. This requires employees to folder every email they send and receive, which requires additional steps beyond hitting send. Emails are often sent in a flurry and on the go, using phones and other handheld devices that may not be conducive to also saving.

With other project files, in order to retain them, one has to save them, which is why a shared space makes sense. Emails are automatically saved to the system unless steps are taken to delete them or they are archived after a certain period of time. In order to collect emails relating to a
project, you will have to collect them from the relevant custodians and use search functions to cull out the relevant documents.

d. **Do Train Employees on Appropriate Conduct**

Every lawyer reading this probably has a similar story to this one: You collect documents, including emails, from your client and as you review for relevancy and privilege you come across an email that says, “Please permanently delete this message.” The email is both relevant to the case and not good for your client, and those words only make it worse. The email is neither privileged nor are there any other grounds on which you can withhold it from production. Opposing counsel then uses this document to their pleasure at every deposition in which they can feasibly bring it in. Employees need to be trained on appropriate company email and other internal communication practices.

Additionally, it is insufficient simply to include this training in a handbook. Instead, yearly in-person training (it should only take an hour) should be conducted to warn employees about the types of phrases that should not be used in company communications, and on the fact that even if a message is deleted, it is never *really* gone. You may not be able to stop every damning email from being written or sent but you may be able to stop a lot of them. This may not only save your client money in the long run but will also help both you and your client to avoid unwanted headaches and save you money on Motrin®.

**IV. Dos and Don’ts at the Inception of a Claim/Litigation**

a. **Litigation Holds**

Litigation holds and their importance can be discussed *ad nauseum* and yet not enough. Last year’s Annual Meeting of this Forum devoted an entire paper and plenary session on the importance of a legal hold. That paper provides a great, in-depth discussion of the litigation hold
and its importance. This session will instead focus on some practical Dos and Don’ts tips for drafting an effective litigation hold.

1. **Do Remember Your Audience**

   This is the most important “Do” that permeates the rest of the Dos and Don’ts detailed below. Litigation holds are legal documents. But the audiences for these legal documents are not lawyers. In a construction dispute, legal holds are issued to any combination of project managers, engineers, architects, laborers, C-suite executives, business people, lawyers, financiers, secretaries, etc. Legal hold recipients very rarely have a legal background and often do not have a technical computer background or training. It is this principle that guides all of the practical tips relating to the drafting of litigation holds.

2. **Do Keep them Short**

   Litigation holds are usually sent via email or formal hard copy letter. They are increasingly being sent by email as the preferred method of internal communication at companies. The biggest challenge with issuing a litigation hold is getting people to pay attention to it. This is a challenge whether the hold is sent via email or formal letter but even more so with email holds because of the countless number of emails entering inboxes each day, many of which are unrelated to an employee’s daily responsibilities and therefore likely to be ignored. Couple this with the additional obstacle of emails often being read, at least initially, on a phone or tablet while on the go, it becomes important to grab the reader’s attention.20

   One way to ensure that an email hold (and even a letter hold) will be not glossed over and immediately deleted is to keep it short. While a legal hold must include certain information, including a summary of the dispute, the documents it applies to, that retention policies must be suspended, etc., it should set forth this information as concisely as possible. The litigation hold
should not contain lengthy, wordy paragraphs. Instead, use bullet points to highlight important points.²¹ Separate concepts by paragraphs and be as straightforward as possible. The length of a litigation hold will vary based on the particular facts of the underlying case, the breadth of the hold as well as other factors and circumstances unique to the company issuing the hold. Generally, however, the hold should not be longer than 1-2 pages to avoid losing your reader’s attention. Finally, one additional way to increase the chance that the message is not lost is to issue the litigation hold by both email and formal hard copy letter. Sending the hold through multiple forms of communication will enforce its importance and increase the chances that the audience pays attention.

iii. Do Use Plain English/Do Not Use Legal Jargon

This section started with an important reminder that although litigation holds are legal documents drafted by lawyers, they are not read by lawyers. And therefore, they should not be written in lawyer speak. Avoid using legal jargon and instead draft the letter with plain, clear English. For example, sentences like “cease and desist from rotation of backup media” should be avoided and replaced with sentences like “do not delete any files or communications related to X, Y, and Z.”²² Lawyers are sometimes guided by the principle, “why say it in 50 words when you can say it in 500.” Commentary on whether this is appropriate even for legal writing is outside the scope of this paper, but for litigation holds, the fewer words the better.

iv. Do Set Out Expectations and Requirements Specifically

A litigation hold is a call to action. The requested action must be clear and include that it needs to be taken immediately. Litigation holds should not just advise recipients to “preserve relevant data.”²³ Instead, it should provide guidance on what type of data is relevant to the particular dispute at issue.²⁴ It may also prove useful to include examples of what type of data is
not relevant to provide a better understanding of what the litigation hold does and does not cover. Again, the reader is not a lawyer and may have difficulty discerning what is relevant. They may take an overly broad view, or worse, too narrow a view that could lead to problems for your case down the line. The litigation hold should make clear the types of data sources that are implicated, i.e., emails, phone records, hard copy documents, internal messages, or all of the above.

The litigation hold should specifically set out what it means to preserve those documents that are included in the hold. This includes refraining from deleting any documents and also suspending any routine document clean-up programs that the recipient has in place, whether manual or automatic. The recipients themselves likely will not be able to stop any organization-wide document retention policies, but they should be advised that they will be halted by the IT department (or whoever handles technology internally). The hold should also detail any further course of action necessary. Likely when the hold is issued, the employee will have to do no more than preserve the data and collection will come at a later date. This should be previewed. Lastly, a litigation hold should very clearly state the contact information of in-house or outside counsel and a statement that questions are welcome and encouraged.

v. **Do Clearly Set Out Consequences of Not Complying with the Letter**

One way to ensure that the litigation hold is followed is to set forth the consequences for both the organization and the employee for failing to preserve data especially because those consequences can be severe. Make it clear that failing to implement the hold may have financial and/or strategic consequences for the organization in the dispute, and may ultimately affect the outcome of the case in a negative fashion. Such consequences not only affect the employer but could trickle down to affect the employee as well.

vi. **Do Write the Letter in a Polite Tone**
This may seem like an odd tip, but it is important, especially if you are an outside counsel drafting a litigation hold to be issued by your in-house counsel client. “In-house legal counsel cannot issue decrees to business units that read like they are issued by the king to his subjects.”

In-house counsel are often issuing these letters to members of their everyday team at the company and more generally, they teeter a fine line of serving a dual role of lawyer and colleague to the recipients. In-house counsel need to keep the respect of their fellow employees, whether working in the mail room or the C-suite, in order to be able to do their jobs effectively. The hold should be polite while still making clear the call to action. Phrases like “please be certain to preserve,” “please gather,” “I need to request that . . . ,” or, “This is important because . . .” should be used instead of phrases like “you are hereby commanded to . . .” “thou shalt . . .” or “we demand that you . . . .”

vii. Do Not Rely on the Litigation Hold Alone

Counsel, both in-house and outside, have an obligation with respect to preservation that extends beyond just issuing the litigation hold. Indeed, in the well-known Zubulake line of cases, Judge Scheindlen noted that the implementation of a litigation hold is “only the beginning.” Counsel (both in-house and outside) “must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents.” There should be ongoing communication between the lawyers and the client to “ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.”

Each recipient of the litigation hold should be contacted shortly after it is issued to ensure that it was read and understood and that the recipient has initiated preservation procedures.
Lawyers must then continue to follow-up with each recipient throughout the pendency of the hold to ensure that it is being followed. The litigation hold should also be re-issued and refined throughout the course of the dispute as a reminder of its ongoing call to action and of the obligations it imposes and to keep it at the top-of-mind of recipients, especially key players.29

b. Overlap Between Litigation Holds and Work Product Protection

i. Do Issue a Litigation Hold if you Plan to Claim Work Product Protection Over a Document

The standards for when a litigation hold should be issued and when work product protection attaches are nearly identical and the question arises how the two interact with one another. If the standards are the same, then does issuing a litigation hold trigger work product protection or vice versa? Although the answer from the courts on this varies somewhat by jurisdiction, generally, if work product protection is claimed, a litigation hold should have been issued contemporaneously or shortly after the time the supposedly protected document is created.

A litigation hold must be issued when a party “reasonably anticipates litigation.”30 Likewise, the work product protection protects “documents and other tangible things prepared ‘in anticipation of litigation by or for a party’s representative.’”31 In *Sanofi-Aventis Deutschland GmbH v. Glenmark Pharmaceuticals Inc.*, a patent infringement suit in which the defendant filed a Paragraph IV certification to challenge a patent in order to produce a generic version of a particular drug, the court acknowledged that “[t]he exact moment of when the duty to impose a ‘litigation hold’ [arises] is vague.”32 But the court found that the defendants’ argument that the duty was triggered by the filing of the Paragraph IV certification in mid 2007 was undermined by the fact that the defendant’s privilege log claimed work product protection over documents dating back to February 23, 2006, over a year before the filing.33 The court noted that “[a] party claiming work-product immunity bears the burden of showing that the materials in question were prepared
in the course of preparation for possible litigation[,]” and held that the “[d]efendants duty to impose a litigation hold and to institute legal monitoring for purposes of compliance arose no later than February 23, 2006.”

Other courts have found similarly. For example, in *Butterworth v. Laboratory Corporation of America Holdings*, the Middle District of Florida found that “by invoking the word product protection[,]” the defendant “necessarily anticipated litigation” that triggered the defendant’s preservation duty. The Western District of New York, the Western District of North Carolina, and the Southern District of West Virginia, among others to have addressed the issue also found that a plaintiff’s duty to preserve arose no later than when it asserted work product protection over documents. The Southern District of New York, while finding that “it is ‘common sense’ ‘that if the litigation was reasonably foreseeable for one purpose . . . it was reasonably foreseeable for all purposes[,]” also found that “the issuance of a litigation hold on a particular date does not, in itself, mean that litigation was not anticipated a week before.” While this holding seems to somewhat contradict that of the other courts, the Southern District of New York’s holding does not disagree with the other courts, but just refuses to draw a bright line rule that you cannot claim work product protection unless a litigation hold was issued. That court likely would not have allowed the defendant to invoke work product protection if the litigation hold had not been issued for months or years. But the litigation hold was issued contemporaneously, within a week, and the court refused to draw a rigid line.

Given the jurisprudence on this issue, inside and outside counsel should practice by the rule that once work product protection will be invoked, a preservation duty is triggered. Once that duty arises, the litigation hold must be issued. The longer the time between the triggering of the
preservation duty and the issuing of the litigation hold, the greater the risk that documents will be destroyed and that your client or employer could face spoliation sanctions.

V. Dos and Don’ts During Litigation

a. Creating an E-Discovery Plan

In the document- and data-rich environment of modern construction, the processes of not only seeking, obtaining, and analyzing an opposing party’s electronic documents and data, but also identifying, segregating, and producing a party’s own electronic documents have become increasingly important. However, waiting until litigation or arbitration has already been initiated to begin thinking about these processes can render electronic discovery cumbersome (at best) and potentially disastrous (at worst). This is why proper pre-litigation planning for e-discovery is key.

What will the client need to produce? Where is the data that responds to that production requirement? How will that data go from the client’s electronic systems to a document production? These are the questions which an effective electronic discovery plan should seek to answer.

i. Do Consider the Logistics of Responding to Discovery Requests

An effective electronic discovery plan should distill the electronic discovery process into a systematic, logistical plan of action. One helpful method of accomplishing that goal is to break down the process of responding to discovery requests that implicate electronic documents and data into the following stages:

1. Review: How does the client and/or its counsel plan to review the client’s electronic documents and data to determine questions of relevance, responsiveness, and privilege? Should a review platform be utilized to create a searchable database of electronic documents and data, or can the review process be handled simply by having the client and/or its counsel manually click through PDFs of potentially relevant documents? Is it cost-effective to have counsel perform
document review? What about the opportunity cost of having counsel devote valuable pre-trial hours on document review rather than motion practice or litigation strategy?

2. **Selection**: How do the client and/or its counsel plan to indicate which of the electronic documents or data are relevant, responsive, and ready to produce?

3. **Privilege**: How should claims of privilege, work-product protection, and the like be handled in connection with the electronic discovery process? What about the redaction of privileged or protected portions of otherwise-responsive electronic documents?

4. **Production**: What are the final goals of both the requesting party and the responding party in exchanging documents and data responsive to discovery requests? Should electronic documents and data be produced in their “native” format? If so, how (if at all) do the parties propose to handle the Bates numbering of those documents? Will metadata also be produced? Is there a particular document format into which documents must be converted in order for the parties to load them into their respective electronic review platforms? If so, which party will do that conversion? Or will all documents simply be produced in PDF format with Bates numbers stamped on each page? Even under that scenario, have the parties agreed to OCR the PDF documents prior to production so that they can be immediately searchable? And what about plain, old-fashioned paper documents? Will those be scanned into PDF files and produced electronically, or have the parties agreed to physically transmit stacks of paper as part of their respective document productions?

All of the foregoing are questions that should be prophylactically discussed with both the client and opposing counsel in order to arrive at an electronic discovery plan that is workable for all parties concerned.
ii. Don’t Let the Word “Electronic” Scare You Away from Conducting “Discovery”

Although the proliferation of computers, “smart” phones, and tablets in modern construction (not to mention the development of design, project-management, and accounting software specifically tailored for these devices) has made familiarity with the basics of electronic discovery essential among construction law practitioners, remember that the same overarching principles of discovery still apply. At base, conducting electronic discovery is still about a) identifying the types of potentially relevant documents and information an opposing party (or third party) may have in its possession, and b) asking for them to be produced. Similarly, responding to electronic discovery is still about a) identifying the types of documents and data that an opposing party has requested (or will likely request), and b) formulating a plan to segregate those documents and data for review and potential production.

iii. Do Use Information Learned from the Litigation Hold Process

An effective electronic discovery plan should dovetail with the identification of relevant electronic documents and data that should have already taken place during the litigation hold and data preservation phases of a construction dispute. This process should ideally involve detailed conversations with the client about the substance of the client’s electronic documents and data, as well as the manner in which such documents and data have been generated, recorded, and stored by the client in the usual course of business. Having completed these phases, both inside and outside counsel should already have a relatively clear understanding of the nature and extent of the electronic data which will need to be identified, segregated, and potentially produced during litigation.

iv. Don’t Start from Scratch
Although every construction dispute is different, the electronic documents and data which are typically generated by the parties to a construction project tend to be similar from case to case. As such, rather than starting from scratch with each case, using electronic discovery plans from previous cases as a framework can be helpful. Just be careful not to “rubber stamp” prior electronic discovery plans without thinking carefully about the differences between the present case and the former case. Old discovery plans can provide a useful framework, but the devil truly is in the details that make the new matter unique.

v. Do Work Collaboratively With the Client

Whether putting systems in place to isolate potentially relevant electronic documents and data from the client’s records or creating a plan of attack for requesting targeted documents and data from an opposing party, collaboration among outside counsel, in-house counsel, and the client’s custodians of business records is essential to a successful electronic discovery plan.

As outside counsel, it can be tempting to offload the responsibility to identify and segregate potentially relevant electronic materials to the client. After all, because the client was actually involved in the construction project during the genesis of the dispute, and because the client therefore presumably has first-hand knowledge of the issues that will be implicated in the resulting litigation, it stands to reason that the client will be in the best position to determine what documents and information will be potentially relevant and segregate them.

However, failure to collaborate with the client on evidence segregation processes on the front end will inevitably lead to piecemeal, ad hoc production sets on the back end. This can not only open up the client to expensive and unnecessary discovery disputes with the opposing party about incomplete document productions, but also hamstring outside counsel’s effective planning and implementation of a litigation strategy. There is no more sickening feeling than realizing days
before important depositions that you have not yet produced key items of evidence or (worse yet) that such evidence contradicts a legal position you have already taken.

By the same token, because client representatives (including in-house counsel) will necessarily possess a more intimate knowledge of the facts of the dispute than outside counsel, early collaboration with the client in formulating a plan of attack for requesting electronic documents and data can prove invaluable.

b. **Collection**

Once an electronic discovery plan has been formulated and put into place, the logical next step is to collect the electronic documents and data that will form the universe of potentially-applicable documents in the case.

i. *Do Collect Documents and Data in a “Defensible” Way*

In the modern climate of electronic discovery (which includes the potential for spoliation sanctions pursuant to Fed. R. Civ. P. 37(e)), it is important to collect electronic documents and data in a legally defensible way. The Electronic Discovery Reference Model (“EDRM”), which was acquired by the Duke Law School in 2016, sets forth certain best practices and considerations for developing a collection strategy for electronic documents and discovery. To the extent that the client may have an information technology (“IT”) director who is extremely sophisticated, the client may be able to follow the EDRM standards in collecting the data in-house. However, depending on the amount in dispute, the size of the universe of potentially-relevant electronic documents and data, and the centrality of electronic discovery issues to the potential resolution of the dispute, an outside vendor of electronic discovery solutions may be advisable.
ii. Do Document Every Step of the Data Collection Process

However the client ultimately opts to collect electronic documents and data, remember that the person (or persons) in charge of collecting such data may ultimately be called upon to testify in court to defend the processes employed in collecting such data. It is for this reason that outside vendors involved in the collection of electronic documents and data often become testifying experts if and when the construction dispute at issue goes to trial. This is why it is important for the client and/or the outside vendor to document every step of the data-collection process in order to provide evidence supporting the efficacy of the collection of such data.

c. Selecting a Vendor

i. Do Choose a Reputable Vendor

An effective vendor of electronic discovery solutions should be able to collect, search, and process electronic documents and data, as well as provide a review platform to assist counsel in searching and identifying relevant items of electronic evidence. Most vendors also have numerous litigation services under one roof, which means that many vendors also offer copy services, service of process, deposition services, trial-presentation services, legal staffing services, and the like. But not all vendors are the same. The vendor with the lowest bid will not always be less expensive than other vendors once hidden costs are taken into account. Similarly, the review platform which a vendor plans to utilize may not be appropriate for the size and complexity of the construction dispute at issue. This is why it is important to research not only the vendors themselves but also the software solutions they propose to employ.

d. Search Terms, Analytics, and Processing

The use of search terms and analytics can be extremely helpful in reducing the amount of electronic documents and data that must be reviewed and/or produced. Similarly, data processing
allows electronic documents and data to be reviewed in a useful format and prepared in the form of production sets of data.

i. *Do Work Through Search Terms with the Client, the Vendor, and Opposing Parties*

Because search terms are used in identifying what types of electronic documents and data are potentially relevant to a discovery dispute, it is important to work collaboratively to ensure that such search terms are tailored appropriately. If search terms are too broad, their effect on limiting the universe of potentially-relevant documents will be negligible. Conversely, if search terms are too narrow, they will have the effect of excluding too much data. For these reasons, the process of identifying what search terms to use -- whether for identifying and segregating the client’s own documents and data or for requesting production of the opposing party’s documents and data -- should involve detailed conversations among outside counsel, in-house counsel, the client’s custodians of business records, and the vendor (if any).

Similarly, to the extent that the parties may have an agreement in place to use data review platforms to identify documents and data responsive to the opposing party’s discovery requests, it may also be advisable to provide opposing counsel with a list of search terms to employ in responding to discovery. Specifying search terms in this way arguably allows counsel to exert greater control over which documents will be produced by the opposing party, in that it all but eliminates the discretion of the opposing counsel to determine that a particular document falls outside the scope of a particular discovery request due to some real or perceived ambiguity in the wording of the request.

ii. *Do Employ Analytics, if Available*

Whereas some analytics are built into the review platform, others are employed at the search and processing phase of the data reduction process. In either case, because analytics operate
to reduce the amount of data that will need to be reviewed, they can be useful tools in not only narrowing the scope of inquiry to potentially-relevant documents, but also eliminating duplicative items from the universe of potentially relevant documents. This can be particularly helpful in culling out repetitive email strings and attachments from series of electronic correspondences.

iii. Do Anticipate Processing Issues

Most construction cases include specialized file types that correspond to programs that are commonly used in the construction industry, such as Primavera for schedule analyses and AutoCad for design drawings. Depending on the file type, it may sometimes be necessary to have in-house copies of the relevant software in order to process such files. For instance, whereas Primavera files cannot be read without a copy of the applicable software, AutoCad files can be read using a free viewer. Either way, files of these types should usually be produced in “native” format, as they cannot be easily converted into PDF format.

e. Production Protocols

i. Do Insist on Discussing and Hashing Out Production Protocols

Almost every party engaging in electronic discovery will have a review platform program into which the opposing party’s document production will be loaded. Each such program will have specific file types into which the document production will need to be converted in order for the review platform to run optimally (or run at all). Working cooperatively with opposing counsel and the client’s electronic discovery solutions vendor (if any) is key, because agreeing upon a production protocol in advance can save both the producing party and the requesting party from spending unnecessary time and expense in converting and re-converting electronic documents and data into usable file types.

ii. Do Agree on Metadata to be Produced
Metadata is “hidden” data that describes or gives information about the electronic documents or data that are the subject of electronic discovery. In collaborating with opposing counsel about an appropriate production protocol, it is important that the parties reach agreement about which types of metadata must be included in the production of electronic documents and data (such as the date created, date last modified, number and size of attachments, etc.) in order to enable the parties to populate their respective review databases with the metadata fields necessary to search and organize data most efficiently. Whereas even basic versions of Adobe can be used to make PDF files searchable for specific words, it is the metadata which enables the more sophisticated review platforms to group electronic documents and data in more specialized and tailored ways.

VI. Dos and Don’ts Post Resolution

Congratulations! You won! Or maybe you lost. Or, more likely than not, you reached a settlement wherein neither party walked away from the dispute satisfied but everyone walked away with a sense of finality and resolution. Or perhaps the turbulent seas of an imminent lawsuit have been replaced with a protracted calm wherein litigation is no longer “reasonably anticipated.” What now?

a. Terminating Legal Hold
   i. Do Plan for the End in the Beginning

The Sedona Conference’s Commentary on Legal Holds advises that “[a]ny legal hold policy, procedure or practice should include provisions for releasing the hold upon the termination of the matter at issue so that the organizations can adhere to policies for managing information through its useful lifecycle in the absence of a legal hold.” In other words, every plan for implementing a legal hold over a company’s electronic documents and data should include an express plan for what happens at the termination of the dispute. At a minimum, this should include
a plan for documenting the end of the legal hold, allowing the parties to the dispute to revive normal documentation policies, and notifying employees and third parties involved in the legal hold (such as IT professionals, outside vendors, third-party recipients of document subpoenas, etc.) of the termination of the legal hold.40

ii. Do Issue a Legal Hold Termination Letter that Mirrors the Initial Legal Hold Letter

Because the initial litigation hold letter is a legal document directing business records custodians of both the client and the opposing party to begin a legal hold, it is important to close the loop on the legal hold by issuing a formal letter signaling to those business records custodians that the duty to preserve evidence (at least for the purpose of that particular legal dispute) has ended. Be careful not to communicate directly with the opposing party’s custodian; litigation hold termination letters to the opposing party should be directed to that party’s counsel of record.

To the extent that a client’s internal legal hold is being terminated based on the proposition that litigation and/or arbitration of a particular dispute is no longer “reasonably anticipated,” it is essential to recite in the termination letter the particular facts and circumstances known at the time of such termination that support that proposition. Reviewing courts will determine the reasonableness of a company’s release of an internal legal hold based on the company’s good faith evaluation of the facts and circumstances known at the time, so documentation of such facts and circumstances is key.41

iii. Do Be Specific About What Constitutes the End of a Legal Hold

It is not always clear what constitutes the resolution of a dispute (and the corresponding end of a legal hold). An executed settlement agreement with settlement payment in hand? Easy. But what about an arbitration award that has not yet been confirmed by a court of appropriate jurisdiction? What about a final judgment that still might be appealed? These can be significantly
murkier. This is why being specific in a litigation hold letter and/or in an electronic discovery plan about what constitutes the end of the parties’ dispute (thus triggering the duty to release a legal hold and/or return electronic data and documents to the opposing party) is essential.

It is also prudent to exchange correspondence with opposing counsel confirming both parties’ agreement that a particular dispute has been completely resolved prior to commencing with the parties’ agreed-to plan for returning and/or destroying the other party’s electronic documents and data. In general, a dispute is concluded when all parties sign a final settlement and release, the court enters a dismissal with prejudice as to all parties, or the deadline for any further appeals has run and the entered judgment is final.

b. Return of Data

   i. Do Create and Follow an Agreed-to Plan for Disposing of Data

In order to ensure that electronic data and documents are marshalled, returned, or disposed of in a manner consistent with the wishes of the party which generated such data and documents, it is essential to work out a detailed plan – ideally in the form of a step-by-step “checklist” – with opposing counsel for what should be done with those documents and data in the event of a resolution of the dispute. To the extent that such plan calls for the destruction of electronic documents or data, it is important to provide clear guidance regarding the precise mechanisms by which that destruction should be carried out, as well as documentation procedures for auditing the destruction process.

Finally, any plan for returning and/or destroying the parties’ respective electronic documents and data should include the requirement that each party issue a signed letter certifying that it has complied with the closeout procedures outlined by the parties. The requirement of a signed certification will not only ensure that the opposing party will be careful to comply with the
closeout procedures agreed to by the parties, but also provide each party with a specific, identifiable document signaling the end of a particular electronic discovery matter.

VII. Conclusion

E-Discovery can be more of an art than a science. The E-Discovery process will look different for every case depending on a number of variables including the type of dispute, the amount in dispute, the claims asserted, the number of custodians involved, the number of documents implicated, etc. While there is not a single path to success in handling e-discovery, following the above guidelines will help to ensure all of the e-discovery obligations imposed on a party are met and to avoid unwanted headaches. But the authors would like to provide the disclaimer that avoiding all e-discovery headaches is as likely as catching Bigfoot. Maybe, however, they have changed your e-discovery playlist to “Crazy for You” . . . or at least “You’re Ok.”
1 Jennifer Booton, Don’t Send Another Email Until You Read This, Market Watch (Mar. 9, 2015), available at http://www.marketwatch.com/story/your-work-emails-are-now-worth-millions-of-dollarto-lawyers-2015-03-06
3 Noble Roman’s Inc. v. Hattenhauer Distributing Co., 314 F.R.D. 304, 308 (S.D. Ind. 2016)
5 The Sedona Conference, Principles of Proportionality with Commentary, Vol. 18 (May 2017)
6 Id.
8 See, e.g. Carr v. State Farm Mut. Automobile Ins. Co., 312 F.R.D. 459, 468 (N.D. Tex. 2015) (finding that the burden of “showing that the discovery fails the proportionality calculation mandated by Rule 26(b)” rested with the party resisting discovery); First Niagara Risk Mgmt., Inc. v. Folino, 317 F.R.D. 23, 28 (E.D. Pa. 2016) (finding that a “party moving to compel discovery pursuant to Fed. R. Civ. P. 37 bears the initial burden of proving the relevance of the material requested” but then placing the burden on the party resisting discovery to “show that the factors in Rule 26 weigh in favor of . . . denying [the] request for otherwise relevant information.”); but see Gilead Sciences, Inc. v. Merck & Co., No. 5:13-cv-04057-BLF, 2016 U.S. Dist. LEXIS 5616, at *4 (N.D. Cal. Jan. 13, 2016) (finding that the party seeking discovery must “show, before anything else, that the discovery sought is proportional to the needs of the case.”); Eramo v. Rolling Stone LLC, 314 F.R.D. 205, 211 (W.D. Va. 2016) (requiring the party seeking discovery to make an initial showing of both relevance and proportionality).
ABA Proportionality (citing Gilead Sciences, 2016 WL 146574 at *1).


10 ABA Proportionality

11 Fed. R. Civ. P. 37(e) Advisory Comm. Note. A note of interest, the new Rule 37(e) is 130 words, but the explanation and interpretation from the rules committee is over 2,500 words.


14 Id. (citing Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002).


20 Id.


22 Id. (hereinafter “Ten Tips for Writing an Email People Will Actually Read”).


24 Outside counsel should also strive for this both as good lawyers and respected human beings.

25 Law360 Top 10 Tips


27 Ten Tips in Ten Minutes.


29 Gulf Ins. Co. v. Alliance Steel LLC, No. 00 CIV 2611 RO, 2001 WL 111195, at *1 (S.D.N.Y. Feb. 8, 2001); see also F.R.C.P. 26(b)(3).


31 Id.

32 Id.

33 Id.

34 Id.


38 Mr. Kulkarni would like to give special thanks to his colleague, Erin Barber, without whose sophistication, experience, and insight into all electronic-discovery-related matters this paper would not be possible.

39 The Sedona Conference, Commentary on Legal Holds, Vol. XI (September 2010)


41 E-Discovery White Paper (citing Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 345 n.18 (M.D. La. 2006)).

43 E-Discovery White Paper (citing Alan M. Anderson, Issuing and Managing Litigation-Hold Notices, 64 BENCH & B. MINN. 20, 23 (2007)).