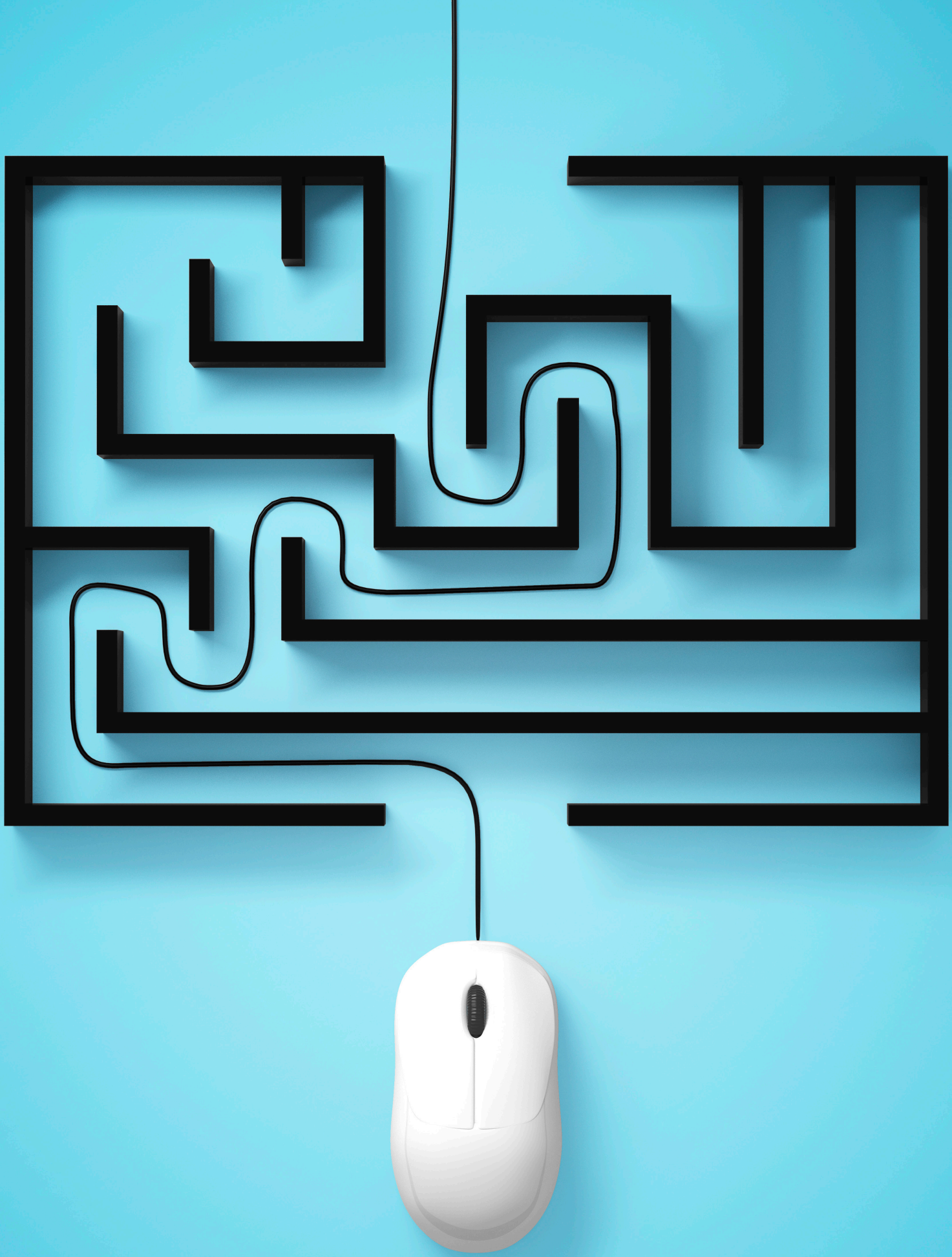

Preparing for Your Rule 26(f) Conference

When ESI Is Involved—And Isn't ESI Always Involved?

AMII CASTLE

Let's say you are contemplating filing a lawsuit in federal court, or your client unexpectedly gets served with a complaint. What happens in the next few months is crucial, particularly if electronically stored information (ESI) is involved, which will almost always be the case. Moreover, with the upcoming amendments to the Federal Rules of Civil Procedure,[1] litigators will have even more to do in these early stages.

ESI Is Almost Always Involved in Litigation

As electronic devices are becoming more pervasive in your own lives, so too are they in your clients' lives. Most of your clients create and store some, if not most, of their information electronically, and your clients' opposing litigants create and store some, if not most, of their information electronically, too. Emails, voicemails, videos, website activity, data stored on a cloud server—your clients are creating and storing today the documents and data over which you will be litigating tomorrow.

No wonder most current litigation involves some form of ESI—Word documents, text messages, photographs, databases, and spreadsheets, just to name a few. Email is a prime example of ubiquitous ESI. Given that most people use email, at least to some extent, email communications are relevant in many civil cases. Emails are just one form of ESI continually at issue in civil lawsuits.

At some point in your litigation practice, there will be relevant ESI you want to discover to ultimately submit to the court on summary judgment or to the jury at trial. With ESI comes a host of unique issues,[2] so educate yourself and adequately prepare to address ESI-related discovery issues early in the case.

Getting Started

Very shortly after a complaint is filed in federal court,[3] begin to prepare for a set of conferences: a conference with opposing counsel (the Rule 26(f) conference) and a conference with opposing counsel and the court (the Rule 16 scheduling conference). These conferences are governed by Federal Rules of Civil Procedure 26(f) and 16(b), respectively, both of which are being amended in December.[4] The purpose of the Rule 26(f) conference is, inter alia, to develop a mutually acceptable discovery plan with the other side. The purpose of the Rule 16 scheduling conference is, inter alia, to review that proposed discovery plan and memorialize the conference in a scheduling order.

The various time periods established in Rules 16 and 26 can be confusing, and some of the deadlines are changing under the amended rules. By the end of this article, hopefully you will understand the meet and confer process and know what is expected at each step along the way.

Let's begin when a complaint is served or a defendant first appears in a lawsuit.

Step One: Initial Scheduling Order

Within a few days after service of process or a defendant first appears in a case, expect to see an initial scheduling order issued by your district judge or magistrate judge.[5] The initial scheduling order usually sets forth a series of dates, including the all-important date of the Rule 16 scheduling conference. The court must schedule the Rule 16 scheduling conference within 90 days of a defendant being served or within 60 days of a defendant's first appearance.[6] The time frame is mandated by the federal rules.[7]

The initial scheduling order also will set the dates for the first Rule 26(f) conference and, correspondingly, the last date to submit

a written planning report to the court reporting on the conference and outlining the discovery plan (planning report). If these dates are not provided in the initial scheduling order, consult Federal Rule 26, as these deadlines are proscribed:

The deadline to meet and confer is set forth in Rule 26(f)(1), requiring the conference to occur "as soon as practicable—and in any event at least 21 days before a [Rule 16] scheduling conference is to be held or a scheduling order is due under Rule 16(b)."[8] The planning report must be submitted to chambers "within 14 days after the [Rule 26(f)] conference."[9] Accordingly, attorneys must submit the planning report 14 days after the Rule 26(f) conference, and the Rule 26(f) conference must occur at least 21 days before the Rule 16 scheduling conference. Say that three times fast!

After the initial scheduling has been issued, begin preparing for the Rule 26(f) conference with opposing counsel. Where do you start? Talk to your client, of course.

STEP ONE: Initial Scheduling Order

- ✓ Sets date for Rule 16 scheduling conference—within 60 to 90 days.
- ✓ Sets date for the party's Rule 26(f) conference.
- ✓ Sets date for submission of parties' planning report.

Step Two: Talk to Your Client About Relevant Documents and Data

When you meet and confer with the other side, you will be discussing a host of issues, many of which will revolve around preserving, searching, and producing documents and data. Before you can have an intelligent conversation with opposing counsel about ESI that may be relevant to the action, you must learn your own client's lay of the land in creating and storing ESI. Get to know your own client's document retention policies, processes, and systems. Only then can you meaningfully discuss and truly understand where relevant evidence may reside.

1. **Client Discussion: Relevant Evidence?** What exactly should you discuss with your client as you prepare for your Rule 26(f) conference? At the outset,[10] talk with your client about what evidence is relevant to the litigation. This means really thinking about the potential claims and defenses you can raise or that your opponent is likely to raise. Talk to the key players about the underlying facts and, as you talk to folks, be thinking about what evidence, such as emails, electronic documents, or data entries, you want to present to prove your case.

2. **Client Discussion: Where Does Relevant ESI Reside?** Next, determine with your client where relevant evidence may reside. For instance, do the draft contracts, which are relevant to your breach of contract claim, exist only in paper form? Or do the 2-year-old emails that are relevant to your client's defense of a sexual harassment lawsuit reside solely on backup tapes, which are stored at Iron Mountain? If so, are those backup tapes scheduled to be erased or the contents otherwise scheduled to be deleted any time soon?

   At this stage, identify the custodians who created or control the relevant information, determine where that relevant information resides, and discuss your clients' retention and deletion policies. Create a data map of your client's ESI architecture.

3. **Client Discussion: Is Relevant ESI Relatively Accessible?** Determine with your client the relative accessibility of relevant documents and data. Particularly with regard to ESI, documents and data may not be accessible at all, or they may be accessible, but only after great time and expense are incurred. For instance, relevant ESI might be saved for disaster-recovery purposes on backup tapes, but the data may not be in a readable format. Or you may also discover that relevant ESI has been erased, fragmented, or damaged. If the evidence you need is not reasonably accessible—the ESI is difficult or nearly impossible to get to—determine whether identical or substantially similar information exists.

4. **Client Discussion: Do Substantially Similar Copies Exist?** If your client has relevant data that is inaccessible, determine whether there are other sources from which substantially the same or similar data can be found on more readily accessible sources. In other words, do substantially similar copies of relevant evidence exist that can be more easily accessed? If so, consider whether preserving and producing that relevant ESI is proportional to the needs of the case.

5. **Client Discussion: Proportionality.** Here, consider whether obtaining that relevant evidence is proportional to the needs of the case. Seriously think about whether the costs of searching, preserving, and producing particular evidence is justified by the amount in controversy, among other factors,[11] and consider whether that evidence is truly important to proving a pertinent issue in the case. At this stage, analyze whether the burden and expense of searching, preserving, and producing the proposed discovery outweighs the likely benefits.

6. **Client Discussion: Summary.** Keep in mind these five client discussion points are not just helpful to prepare you for the Rule 26(f) conference; these discussion points will simultaneously prepare you to competently instruct your clients about their preservation obligations. Put another way, the location of relevant ESI must be discussed with your client at the outset of the case so that you can determine what ESI should be preserved.[12]

When you understand where your client's relevant documents and data reside, you are able to provide specific instructions to them about what documents and data they should preserve, and you do this by issuing a written litigation hold. A litigation hold should adequately describe the matters at issue, identify potential sources of information, and detail the collection procedure.

Finally, and a concept not to be ignored, *document* your analysis along the way. Consistently document—in the form of a memo to the file, a written communication to your client or law partner, or some other means—your preservation and production strategies. Clearly documented strategies on what evidence is relevant and proportional, and what evidence is not, will help if you later have to defend

those preservation or production obligations you instructed your client to undertake.

STEP TWO: Talk to Your Client

- ✓ What evidence is relevant to the litigation?
- ✓ Who are the key players?
- ✓ Where does relevant evidence reside?
- ✓ What is the relative accessibility of the relevant documents and data?
- ✓ If relevant data is effectively inaccessible, do substantially similar copies of relevant evidence exist?
- ✓ Are the preservation and potential production obligations proportional to the needs of the case?

After you talk to your client, begin preparing for your Rule 26(f) conference.

Step Three: The Rule 26(f) Conference

Where do you begin to prepare for your Rule 26(f) conference? Contact your opposing counsel to set the date for the conference (or dates, if numerous or complex discovery disputes are anticipated), and decide if the Rule 26(f) conference will be held in person or by phone.[13]

Next, locate any forms your district may provide to guide the discussions at your conference. For example, some district courts provide a form planning report. The contents of the form should identify the topics to discuss at the Rule 26(f) conference.

1. **Rule 26(f) Conference: Topics to Discuss.**[14] Rule 26(f)(2) governs the topics attorneys must discuss at the conference. The rule provides that, at the meet and confer, the attorneys must discuss the nature and basis of their claims and defenses, settlement possibilities, the timing of the parties' Rule 26(a)(1) automatic disclosures,[15] and the preservation of discoverable information. Discussions about preservation should include what steps each party is currently taking, and what steps each party plans to take, to preserve relevant and proportional evidence. In addition to discussing potential claims and defenses, settlement possibilities, automatic disclosures, and preservation, attorneys also must develop a discovery plan.[16]

2. **Rule 26(f) Conference: Discovery Plan.**[17] The required contents of a discovery plan are set forth in Rule 26(f)(3)(A)–(F).

A. Discovery Plan: Automatic Disclosures.[18] The first subject to include in your discovery plan is the timing of your automatic disclosures. For example, automatic disclosures are due within 14 days of your Rule 26(f) conference.[19] However, you and your opposing counsel may decide to exchange your automatic disclosures before the 14-day time period expires, or you may jointly determine that you need additional time beyond the 14 days. Whatever you decide, the timing of your Rule 26(a)(1) disclosures should be a subject included in your discovery plan.

B. Discovery Plan: Discovery Scope and Schedule.[20] The next subject to negotiate with opposing counsel and include in your joint discovery plan is the scope of discovery. Both sides should come to the Rule 26(f) conference with an idea about the subjects on which discovery may be needed. To that end, counsel should discuss the relevant information that exists, the key document custodians who created or control the relevant information, and how far back in time that relevant information may exist. Also include the subject of when discovery should be completed. In federal cases, four to six months for the completion of discovery is typical.

i. Consider Bifurcating Discovery. If the case you are litigating is by nature complex, consider proposing discovery in bifurcated phases, or otherwise limiting early discovery to a particular issue. This approach could save the parties significant resources: Propose initial discovery on an issue that is potentially dispositive, and depending how that issue is resolved, the case may resolve.

ii. Example: Bifurcated Discovery Schedule. A class action lawsuit provides a convenient example to illustrate a bifurcated discovery plan:

Phase I: For the first six months, the parties conduct discovery on whether the proposed class should be certified. Discoverable issues include how numerous the class is and whether the named-plaintiffs' claims are common among potential class members.[21]

Discuss with opposing counsel a workable schedule to brief motions for class certification, which will be filed after Phase I discovery is completed. The court will rule on class certification motions, and if the judge declines to certify a class, the case effectively ends. However, if the judge grants class certification, the next phase of discovery kicks in.

Phase II: Thirty days after any motion for class certification is granted, discovery may recommence. Phase II will include discovery on the merits of the class members' claims.

A class action is but one example of when bifurcated discovery may be appropriate. For instance, if a party anticipates raising personal jurisdiction as a defense to a breach of contract claim, asserting lack of minimum contacts with the forum state,[22] the attorneys may agree to set an early deadline for the parties to engage in discovery related to that jurisdictional defense. After limited discovery on defendant's contacts with the forum state, the judge can issue a ruling on jurisdiction and save the parties costly merits discovery if the court finds that the defendant had less than minimum contacts with the forum state.

3. **Discovery Plan: ESI.**[23] Rule 26(f)(3)(C) requires the discovery plan to include issues about the disclosure, discovery, and preservation of ESI, including the form or forms in which ESI should be produced. Let's start with the form of production, which is a critical matter you should discuss at your Rule 26(f) conference and include in your discovery plan.

A. Form(s) of Production. The parties should attempt to agree on the form of production. Simply put, the form of production is the manner in which documents and data will be exchanged and with what identifying information. There are generally five different forms of production, give or take. Here are some terms and guidelines with respect to the various forms of ESI.

i. Paper Documents. The first form is paper. Hard-copy documents produced in paper form include documents that are

copied from other physical documents or printed from ESI onto paper. Paper documents offer little to no searchability features.

ii. Image Files. The second form of production is to produce ESI as static image files, such as PDF or TIFF files. Lack of searchability and indexing functions can be problematic with image files, although some image files can be rendered text-searchable by undergoing optical character recognition.

iii. Image Files + Load Files. Image files also can be produced with accompanying load files. Text load files are electronic files that include extracted text from the images themselves—the contents are not formatted, but the text within the load files, which contains the text within the image, can be searched and indexed.

Other types of load files include metadata—data about the data being produced. Metadata can include information about who created a particular Word document at issue, when the document was last modified, or how large the document is. Or, if relevant evidence includes a photograph saved as a JPEG, metadata load files might include the camera's type and model number, a time stamp of where and when the photo was taken, and so on. Yet another type of load file could include information about the path or directory where the images may reside, sometimes referred to as a structure load file.

The practical functionality of exchanging image files with associated metadata and structure load files renders *image files + load files* a popular form of production. The contents of the metadata load files can be searched and indexed, and the metadata itself may be evidence that you want to present to the jury.[24] Productions that include load files alongside the image files are common forms of production and likely to be considered reasonably usable.

iv. Native Formats. A fourth form of production includes native formats. Native format refers to the ESI's internal structure at the time the document or data was created. In other words, what program created file, or in what program did a user save the file? For example, Word documents can be supplied in their native .doc or .docx formats, and Excel spreadsheets can be supplied in .xls and .xlsx formats. With native files, most all metadata should be intact.

v. Near-Native Formats. The final form of production is near-native. Some files, including most email and large databases, cannot be reviewed for production or produced without some form of conversion into a near-native format. For example, some large databases and data compilations can consist of massive amounts of undifferentiated, tabular data with hundreds of data fields, all stored on that company's enterprise system. With near-native productions, a party can agree to designate certain files to be extracted, then converted to another searchable format, while retaining the basic features of the native system.

For instance, emails may be converted to .htm, .msg, or .rtf files. Website databases may be converted to .csv or .xls files. These formats preserve the essential utility, content, and searchability of their native forms. So with near-native formats, files function similarly to their native application, but the forms are not, strictly speaking, native.

vi. Forms of Production: Summary. Discuss and attempt to reach an agreement on which form or forms of production the parties should utilize to exchange discoverable ESI. The form or forms of production, and what metadata should be included, can be a contested issue. Remember, as a general rule, if you want to receive searchable documents and data from the other side, then you should probably agree to produce searchable documents and data to the other side.

If your client has an information technology person or team, use those individuals to educate yourself on the ideal forms of ESI production so the documents and data that you will receive can be effectively managed and easily searched. Finally, do not forget to include your form request in your formal Rule 34 document request, even if you have previously agreed to the form with opposing counsel.[25]

B. Other Issues Specific to ESI. There likely will be a host of other issues specific to the disclosure, discovery, and preservation of ESI that should be addressed. With respect to general issues regarding ESI, you should explore with opposing counsel where relevant ESI is stored and what potential search protocols may look like. For example, if both parties are going to search for relevant ESI using keywords and phrases, try to reach agreement on what search words and phrases will be.

You should also reflect in your discovery plan that the attorneys conferred about the reasonable accessibility of relevant information, and if there is information that is not reasonably accessible, what costs and burdens are associated with restoring that information. Identify ESI issues where resolution can be had, and be prepared to raise disputed issues before the court at your Rule 16 scheduling conference.

4. Discovery Plan: Privilege Issues.[26] In addition to the foregoing, your discovery plan should include any proposals on how the parties will deal with privileged documents. Privileges can be tricky with some ESI forms: When documents are produced natively, redacting, marking, and labeling each document is near impossible.

To alleviate privilege issues, some attorneys enter into "clawback" agreements, providing for the return of privileged information slipping through into document productions. Clawback agreements typically provide that inadvertently produced privileged data shall be returned upon notification to the receiving party, and that any inadvertent productions shall not amount to a waiver of the attorney-client privilege. Express authority for clawback agreements and orders can be found in Federal Rule of Evidence 502.

Rule 502 also permits "quick-peek" agreements, which typically provide for the return of privileged information contained in a document production. Under a quick-peek agreement, a responding party can agree to provide—without first reviewing—materials for initial examination by the requesting party without the responding party waiving privilege or work product protections if such documents are included in the production. Quick-peek agreements differ from clawback agreements, in that they are used when the responding party undergoes no document-by-document review prior to production.

Reflecting that privilege agreements and confidentiality orders are becoming commonplace, amended Rule 26(f)(3)(D)

now includes express reference to Rule 502, reminding parties they may ask a court to enter an order providing that certain privileges are not waived by inadvertent disclosure.[27]

Your discovery plan should reference how the parties intend to deal with documents and data containing work product and privileged communications. To the extent you enter into any agreements and seek a Rule 502 order, note that in your discovery plan.

5. **Discovery Plan: Changes to Presumptive Limits.**[28] Include in your discovery plan any proposed changes to the discovery limits already imposed by federal or local rule. In your discussions with opposing counsel, you may agree that each side will need to serve more than 25 interrogatories, which is the presumptive limit under the federal rules.[29] Or you may decide more than 10 depositions will be necessary.[30] However you propose to alter the presumptive limits, that should be included in your discovery plan.

6. **Discovery Plan: Other Orders.**[31] You should try to make other agreements when possible, as courts are increasingly responsive to (and sometimes merciful on) parties who are sincerely cooperating and genuinely attempting to resolve discovery disputes among themselves. However, if you believe the other side is making unreasonable requests, you can seek a protective order under Rule 26(c),[32] asking the court to rule that your client should not be required to preserve or produce particular evidence. Or, if you have concerns that the other side is not adequately preserving relevant evidence, you may seek a preservation order from the court, asking the court to order the other side to preserve specific evidence. These are the sorts of "other orders" to discuss at your Rule 26(f) conference and include in your discovery plan.

You should try to make other agreements when possible, as courts are increasingly responsive to (and sometimes merciful on) parties who are sincerely cooperating and genuinely attempting to resolve discovery disputes among themselves.

7. **Respectfully Agreeing to Disagree.** A final note as to the Rule 26(f) conference and joint discovery plan: Keep in mind that you may not agree on every issue. For instance, if you believe discovery going back three years would likely capture all evidence relevant to the case, but your opposing counsel thinks your client should search the last five year's worth of documents and data, that may be a subject about which you strongly disagree. You can raise that issue and other discovery disputes at the Rule 16 conference before the judge, and hopefully the judge will issue rulings to guide the discovery process. Agree when you can, but only when those terms cause no harm or prejudice to your client. You can, respectfully, agree to disagree.

STEP THREE: Rule 26(f) Conference

- ✓ In person or by phone?
- ✓ Topics
- ✓ Nature and basis of claims and defenses
  - ▸ Settlement possibilities
  - ▸ Preservation of discoverable information
  - ▸ Automatic disclosures
  - ▸ Scope and schedule
    - • Consider bifurcation
- ✓ ESI
    - • Forms of production
    - • Other ESI issues?
  - ▸ Privilege issues
  - ▸ Changes to presumptive limits
  - ▸ Other orders (e.g., preservation or protective orders)
- ✓ Discovery plan

Step Four: The Parties' Planning Report[33]

Within 14 days of the Rule 26(f) Conference, you must submit your written planning report to the court. As a general rule, the planning report is not filed as a pleading in the case; rather, the parties usually submit their joint planning report to chambers via email.

Notably, the contents of the form planning reports offered by the various district courts vary dramatically. For example, the form report offered by the District of Kansas[34] is 10 pages containing a detailed list of topics to discuss, complete with instructions from the court on each of those topics. In contrast, the form report offered by the Northern District of Alabama[35] is two pages and contains very few of the required topics set forth in Rule 26(f)(2)–(3). Remarkably, the form report never mentions the phrase "electronically stored information," "electronic data," or any variations thereof. The form omits any indication that the preservation and production of ESI should be a topic at the Rule 26(f) conference or will be addressed at the Rule 16 scheduling conference. Somewhere in the middle of Kansas and Alabama (speaking figuratively, not geographically) is the form report offered by the Southern District of West Virginia,[36] which in its four pages generally lists most of the Rule 26(f)(2)–(3) required topics, including how disclosure of ESI should be handled.

No matter the jurisdiction—or the content of the court forms provided—your planning report should set forth the topics you discussed at the Rule 26(f) conference and should include your suggested, and sometimes extensively negotiated, discovery plan. The planning report also should include proposed deadlines for dispositive motions and expert disclosures. Work in tandem with your opposing counsel by exchanging report drafts, reduce your Rule 26(f) conference to writing, then jointly submit the planning report for the court's review prior to the Rule 16 scheduling conference.[37]

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STEP FOUR: Planning Report

- ✓ Submit planning report within 14 days of Rule 26(f) conference.

Step Five: The Rule 16 Scheduling Conference[38]

At the Rule 16 scheduling conference, you and your opposing counsel will appear before the court—either by phone, video, or at the courthouse.[39] In most districts expect the magistrate judge that issued the initial scheduling order to be the magistrate judge that both conducts the Rule 16 conference and issues the scheduling order.

You, along with your opposing counsel and the judge, will discuss the contents of your planning report and explore the various discovery topics: automatic disclosure timing; matters related to the discovery scope and scheduling; disclosure, discovery, and preservation of ESI; and privilege agreements. At the Rule 16 conference, the judge also may make limited discovery rulings. The attorneys and judge should address deadlines to file dispositive motions—motions to dismiss or motions for summary judgment. Along with discovery issues and motions deadlines, be prepared to discuss dates for expert disclosures, the pre-trial conference, and trial.

STEP FIVE: Rule 16 Scheduling Conference

- ✓ Discuss discovery scope and raise anticipated disputes.
- ✓ Discuss planning report.
- ✓ Agree on motions deadlines and expert disclosure time frames.
- ✓ Address pre-trial conference hearing date and trial date.
- ✓ Discovery rulings.

Step Six: The Scheduling Order

Soon after the Rule 16 scheduling conference, the judge will issue a scheduling order, which will set the dates that will guide the rest of the case through trial. For example, the scheduling order will say when discovery must be completed, when dispositive and other motions must be filed, when expert disclosures are due, and when the pre-trial conference and the trial will be.[40]

In practice, courts typically issue the scheduling order within a day or two of the Rule 16 scheduling conference. The scheduling order should look similar to your planning report, less any modifications jointly made at the Rule 16 scheduling conference or later by the judge.

STEP SIX: The Scheduling Order

- ✓ Issued soon after Rule 16 scheduling conference
- ✓ Automatic disclosure timing
- ✓ Matters related to the scope discovery scheduling
- ✓ Disclosure, discovery, and preservation of ESI
- ✓ Privilege agreements
- ✓ Rulings on other discovery matters

The scheduling order will set the dates that will guide the rest of the case through trial.

Conclusion

As you can tell, adequately preparing for your Rule 26(f) and Rule 16 conferences requires significant effort and planning, particularly when electronic documents and data will be at issue in the case. However, if you follow the steps outlined above, your conferences should be more efficient and productive, and, with any luck, you may avoid potential discovery disputes by having meaningful discussions with your client and opposing counsel as you prepare for your conferences. ⊙

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Endnotes

[1]The rules became effective on Dec. 1, 2015.

[2]ESI is easy to store, it tends to replicate itself, and it is harder to delete. Electronic data also is more fragile than paper documents, and ESI by its very nature more is more complex because it contains metadata. Finally, readable electronic data requires hardware—a computer on which to view the data—and software—a program to view the data. For all these reasons, discovery of ESI can be complicated, and costly, for your client.

[3]If your client files a lawsuit in state court or is sued in state court, review that state court's procedural rules to determine your initial discovery obligations. Many state's procedural rules are loosely modeled after the federal rules, so the concepts discussed in this article can be generally applied. In any event, no matter the procedural rules of the particular jurisdiction, meet with your opposing counsel early on, and candidly talk about discovery issues.

[4]The subsections of Rule 16 amended are: (b)(1)(B); (b)(2); (b)(3)(B)(iii); (b)(3)(B)(iv); and (b)(3)(B)(v). The subsections of Rule 26 amended are: (b)(1); (b)(2)(C)(iii); (c)(1)(B); (d)(2)(A)—(B); (f)(3)(C); and (f)(3)(D).

[5]In practice, magistrate judges usually handle the parties' discovery issues. As such, the magistrate judge usually issues the initial

scheduling order.

[6]The Dec. 2015 amendments to Rule 16(b)(2) reduced by 30 days the time the court has to issue the scheduling order. Fed. R. Civ. P. 16(b)(2) (Dec. 2015). The change is designed to encourage judges to engage in earlier case management.

[7]Fed. R. Civ. P. 16(b)(2) (Dec. 2015).

[8]Fed. R. Civ. P. 26(f)(1).

[9]Fed. R. Civ. P. 26(f)(2).

[10]Questions to ask your client about potential ESI are generally taken from The Sedona Conference Commentary on: *Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible* (Aug. 2008). For additional suggested topics and questions to ask your client, refer to The Sedona Conference "Jumpstart Outline": *Questions To Ask Your Client and Your Adversary To Prepare for Preservation, Rule 26 Obligations, Court Conferences & Requests for Production* (2011 ver.).

[11]A list of the proportionality factors to consider is set forth in the Federal Rule of Civil Procedure 26(b)(1), amended Dec. 2015.

[12]For a more detailed discussion of preservation, *see* Amii N. Castle, *Ready, Set … Proportionality! Preservation of Electronically Stored Information Under the Proposed Amended Federal Rules of Civil Procedure*, 84 J. Kan. B. Ass'n 6, 16 (2015).

[13]If time permits, and if the amount of the case warrants the additional expense, schedule an in–person Rule 26(f) conference. The meeting may prove more meaningful and productive if you meet face to face.

[14]Fed. R. Civ. P. 26(f)(2) ("In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan.").

[15]Rule 26(a) requires the following initial disclosures be automatically made to the other side: (1) known witnesses, (2) a description of the categories of documents and data known at the time to be relevant, (3) a computation of any claimed damages, and (4) disclosure of insurance agreements that may provide coverage for the dispute. Fed. R. Civ. P. 26 (a)(1)(A)(i)–(iv).

[16]Fed. R. Civ. P. 26(f)(2).

[17]Fed. R. Civ. P. 26(f)(3)(A) (a discovery plan must state "what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made").

[18]Fed. R. Civ. P. 26(a)(1)(C) ("A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference.").

[19]Fed. R. Civ. P. 26(f)(3)(B) (a discovery plan must state "the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues").

[20]*See* Federal Rule of Civil Procedure 23(a) and (b) for the criteria named-plaintiffs must satisfy to show that a case should be certified as a class action lawsuit.

[21]*Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[22]Fed. R. Civ. P. 26(f)(3)(C) (Dec. 2015) (a discovery plan must state "any issues about disclosure, discovery, *or preservation* of electronically stored information, including the form or forms in which it should be produced"). Thus, the amended rule adds preservation as a subject that must be discussed at the conference.

[23]For example, you may want to show the jury when that relevant document was last modified and by whom, or you may want to establish where and when that relevant photograph was taken.

[24]*See, e.g.*, *Lawson v. Sun Microsystems*, No.07Civ.0196, 2007 WL 2572170 (S.D. Id. Sept. 4, 2007) (plaintiff sent a letter requesting ESI in native format but failed to include that request in her formal requests for production of documents). Federal Rule of Civil Procedure 34(b) provides that parties "*may* specify the form or forms" (emphasis added), but the rule does not require the parties to make that specification. Fed. R. Civ. P. 34(b)(1)(C). As a matter of practice, always include a request as to the form or forms of production.

[25]Fed. R. Civ. P. 26(f)(3)(D) (Dec. 2015) (a discovery plan must state "any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502").

[26]Fed. R. Civ. P. 26(f)(3)(D) (Dec. 2015) (discovery plan to state asking the court to include in privilege agreement an order under Federal Rule of Evidence 502). Correspondingly, amended Rule 16(b)(3)(B)(iv) also includes express reference to Rule 502 as a subject that the court may include in a scheduling order. Fed. R. Civ. P. 16(b)(3)(B)(iv) (Dec. 2015) (permitted contents of a scheduling order include "agreements reached under Federal Rule of Evidence 502.").

[27]Fed. R. Civ. P. 26(f)(3)(E) (a discovery plan must state "what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed").

[28]Fed. R. Civ. P. 33(a)(1) ("[A] party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.").

[29]Fed. R. Civ. P. 30(a)(2)(A) (requiring leave to take more than 10 depositions).

[30]Fed. R. Civ. P. 26(f)(3)(F) (a discovery plan must state the parties' views on "any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c)").

[31]Fed. R. Civ. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order…").

[32]In the District of Kansas, this report is called a Report of the Parties' Planning Conference.

[33]In the District of Kansas, the form is titled Report of Parties' Planning Conference and can be found at http://www.ksd.uscourts.gov/forms/.

[34]In the Northern District of Alabama, the form is titled Report of Parties' Planning Meeting and can be found at http://www.alnd.uscourts.gov/forms/civil-form-52-report-parties-planning-meeting.

[35]In the Southern District of West Virginia, the form is titled Report of Parties' Planning Meeting and can be found at http://www.wvsd.uscourts.gov/local-forms-0.

[36]Your planning report 14 days after your Rule 26(f) conference, gives the judge at least seven days prior to the Rule 16 scheduling conference to review your planning report.

[37]Fed. R. Civ. P. 16(b)(2) requires courts to conduct a scheduling conference with the parties' attorneys and any unrepresented parties.

[38]The Dec. 2015 amendments to Rule 16(b)(1)(B) essentially require this conference to be live. Rule 16(b)(1)(B) was amended to encourage judges to hold in-person scheduling conferences.

[39]Fed. R. Civ. P. 16(b)(3)(B)(i)–(vii) (Dec. 2015) (listing the contents to be included in a scheduling order).