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Digital and Electronic Discovery for Solos and Small Firms: A Helpful Three-Step E-discovery Process

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Digital and electronic discovery, sometimes referred to as e-discovery or discovery involving electronically stored information (ESI), can feel overwhelming for even the most seasoned practitioners. This is especially so for solo practitioners, who may be working with limited time and resources to both identify and request information pertinent to their case and navigate reviewing and analyzing massive amounts of data and information. Moreover, the days of lawyers choosing how to navigate these challenges have ended, as many states have adopted the American Bar Association Model Rules of Professional Conduct regarding digital and electronic evidence. The challenges can be further exacerbated when practicing in federal courts, where litigation can often be high stakes and complex. So, what's a lawyer to do? Where do you even start?

Fear not, as there is a helpful three-step process for traversing digital and electronic discovery: Why, How, Analyze. The best place to begin in the e-discovery process is by examining *why* you are requesting the information in the first place. Next, consider best practices regarding *how* to draft discovery that

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will get you the information you need while minimizing the likelihood that you receive excessive and overwhelming responses. Finally, consider the technological resources you can use to process and *analyze* the responses you receive so you can effectively deploy them to help your case.

Starting with Why

The singular most effective place to start when drafting discovery, whether related to ESI or not, is to ask yourself why you are seeking the information you are after. This is especially true regarding ESI, where it often takes significant time to draft effective requests and even more time to sift through the information you receive in response. Consider that the most helpful starting point for drafting discovery may be referring to the elements of the claims involved in your case and corresponding jury instructions, if applicable. From there, examine what your client or the opposing party must establish to succeed in its claims or defenses and let that serve as your frame of reference throughout the discovery process. Also, consider reviewing Federal Rule of Civil Procedure 26(b) and the corresponding case law to make sure you are up-to-date on the latest guidance from courts in your jurisdiction as to the permissible scope of ESI discovery.

You should also consider why you are sending discovery relative to the stage of the case you are in. For example, at the outset of a case, when you know relatively little regarding the underlying factual basis for a party's claims or defenses, it is beneficial to focus on interrogatories to help discover additional information, such as relevant parties and dates to narrow the scope of your requests for production that you send later in the discovery process. Similarly, there may be instances where you can only ask a pointed interrogatory regarding the basis for a party's claim or defense after you sift through an opposing party's responses to your client's requests for production. These considerations are especially pertinent in the context of ESI, where a hastily drafted question could lead to your receiving a document dump from opposing counsel that will take you precious time to process. This approach has the added benefit of reducing your potential exposure to boilerplate objections that your discovery requests were overly broad and unduly burdensome. Overall, the more specific you can be when it comes to drafting discovery requests, the better.

Crucially, if you are working on a case that you know will include a significant amount of ESI, do not be afraid to spend time researching the ESI you will be working with. After all, the definitive value of discovery is how it can be leveraged to improve your client's position and, ultimately, provide you with the means to succeed at trial if need be. It is unlikely that you will be able to do either effectively if you don't have a sound understanding of the ESI and technology in your case. For example, how can you explain to a jury the significance of the metadata embedded in a document if you don't understand it yourself? Although this process can be frustrating at first, remember that once you become familiar with ESI and the technology you need to navigate it, you will be better positioned for the next occasion you work with it. The hard truth is that having a firm understanding of the ESI involved in a case is the only way to successfully position yourself to effectively engage in discovery regarding it.

How to Get What You Need

The process of discovery necessitates being intentional about the information you are requesting. ESI has further amplified the importance of this practice. Thirty years ago, a simple request for the production of all documents related to an employee's activities on a given day may have yielded a couple of pages of handwritten notes or a stamped time card. In response to a similar interrogatory today, you could reasonably expect to receive hundreds, if not thousands, of pages of emails, PDFs, and other electronic files depending on the particular employee and the scope of his or her employment responsibilities. As such, the advent of ESI has made it critical to be thoughtful about your discovery requests because an

overbroad or imprecise question could result in an unwieldy response that takes precious time to evaluate for useful evidence.

To the extent possible, work with opposing counsel to develop a plan and protocol for the exchange of electronic discovery. It is probably safe to say that not many lawyers enjoy spending their days reviewing thousands of pages of likely irrelevant discovery to identify privileged documents to withhold during document production when they don't have to, just as not many lawyers enjoy unnecessarily reviewing thousands of pages of discovery after it has been produced if there is no need. The prevalence of unnecessary work has been exacerbated due to the ever-growing prevalence of ESI, but it can be drastically reduced through simple communication among counsel. Helpful topics to address during these discussions include the nature of the ESI involved, the volume of said information, and the mechanics of production. At the beginning of litigation, consider utilizing the scheduling conference mandated by Federal Rule of Civil Procedure 26(f) as a natural occasion to address these matters. For ESI produced on a rolling basis, consider ongoing discussions with opposing counsel rather than a one-time conferral to evaluate what is working for the parties and what needs to be approached differently as the discovery process progresses.

It is unlikely that every attorney will keep up with every technological advancement. Consider reaching out to experts on the subject matter involved in your case to identify any potential opportunities and/or challenges with ESI. Such experts can help you specifically tailor your discovery requests to provide you with the most effective information for your case. For example, an expert's familiarity with a particular computer program might help you request a smaller, more manageable dataset that concisely addresses the subject matter you are after. These experts also can help you identify additional categories of available ESI related to that subject matter area that you did not previously know existed. As an example, say that you consult an expert who is familiar with the vehicle in a personal injury case, and this expert informs you of the existence of an internal log showing the speed at which the vehicle was traveling at the time of the accident. Consulting experts can help make your discovery requests more effective and help you identify evidence you were otherwise unaware of.

Analyzing and Deploying the Evidence

When it comes to analyzing ESI, a document review platform that facilitates the review of documents from multiple programs is critical. A document review platform utilizes a near-native review that allows you to see how a document appears in its original format without actually opening the document; this is crucial for ensuring the native document remains unchanged and that you avoid inadvertently altering its metadata (the information embedded in ESI). Examples of common metadata include a document's creation date, date last accessed, and date last modified. All this metadata can be preserved through the use of a document review platform, allowing you to make effective use of the ESI in your case.

Document review platforms can also assist in analyzing discovery responses by providing analytics and predictive coding to assist in managing ESI. In this context, analytics refers to the information computers identify about different aspects of your documents without the need for human input. Such analytics can be as simple as identifying duplicate or near-duplicate documents. Removing duplicate documents is incredibly helpful when reviewing ESI, which likely will include multiple copies of the same document. Perhaps even more helpful when processing significant amounts of ESI is near-duplicate identification, which identifies documents with similar content within a certain percentage of variance. By looking at the near-duplicate relationship, you can see how close documents are to each other and review a redlined mockup of the changes between each document, saving a significant amount of time and allowing you to identify helpful evidence more quickly. The near-duplicate functionality also catches minor but sometimes

significant differences between documents that you might not be able to identify through traditional means.

Additional helpful technologies for processing ESI include email threading, concept clustering, and concept searching. Email threading identifies all related emails in an email chain and notes the changes from one email to the next. This process provides a means for you to spot patterns or inconsistencies more easily. Similarly, concept clustering analyzes ESI's text and groups files with comparable content together. Reviewing concept clusters allows the reviewer to analyze multiple documents with similar content at one time, speeding up the process of identifying critical information. You can also use concept clustering to isolate groups of non-responsive documents, making it easier to eliminate them from a review set and boosting your efficiency. It may reveal patterns in the content of the documents, which allows you to pinpoint the most responsive documents early in the review process.

Document review platforms also typically have helpful advanced search techniques that can assist with identifying critical evidence. In addition to basic keyword search, many platforms offer concept searching or visual searching. A concept search takes an example paragraph or document and then searches the review set for all similar documents, which is more effective than a keyword search and looks at language patterns more broadly than single words. A visual search graphically displays results based on chosen metadata fields. This allows for easy identification of patterns and can be used to effectively identify helpful and responsive documents you can then utilize for your case.

A Changing World

The world of discovery in both state and federal litigation is changing by the day. The advent of e-discovery and ESI is constantly presenting attorneys with new challenges that can feel overwhelming at times. However, focusing on the Why-How-Analyze method will help you to break down the process into manageable components and provide you with a means of turning e-discovery and ESI from a challenge into an advantage for your clients and their cases.

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