Rule 1

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Western District Of Wisconsin Bar Association

Volume 25, Number 1 February 2015

Proposed Changes in Federal Rules of Civil Procedure

This issue focuses on discovery and depositions. Proposed changes to the Federal Rules of Civil Procedure would dramatically change discovery practice in federal courts and, if approved, would become effective December 1, 2015. The articles in this issue provide practitioners tools that, with a few exceptions, would be useful under either the current or proposed Rules. -Richard Briles Moriarty

Objection Perplexion: Avoid Sanctions By Knowing Your Jurisdiction Before Objecting To Form In A Deposition

By Deborah C. Meiners

The Federal Rules of Civil Procedure provide just one sentence of instruction concerning the permissible content of deposition objections: "An objection must be stated concisely in a nonargumentative and nonsuggestive manner." Fed. R. Civ. P. 30(c)(2). The 1993 advisory committee notes offer some helpful elaboration, stating that objections "ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at the time, *i.e.*, objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer."

So what does "concisely in a nonargumentative and nonsuggestive manner" mean? The answer, at least when dealing with objections to the form of a deposition question, depends upon your jurisdiction.

On one end of the spectrum are decisions that limit attorneys to little more than the words "objection, form" allowing further amplification only if requested by the attorney taking the deposition. *See, e.g. Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, *5 (D. Kan. Jan. 5, 2012) ("It is possible that a question could be so confusing, vague, or misleading that an objection to form would be appropriate. But such an objection ... should be limited to an objection 'to form,' unless opposing counsel requests further clarification of the objection."); *Druck Corp. v. Macro Fund* (U.S.) Ltd., 2005 WL 1949519, at *4 (S.D.N.Y. Aug. 12, 2005) ("Any 'objection as to form' must say only those four words, unless the questioner asks the objector to state a reason.") (emphasis original); *Turner v. Glock, Inc.*, 2004 WL 5511620, at *1 (E.D. Tex. Mar. 29, 2004) ("All other objections to questions during an oral deposition must be limited to 'Objection, leading' and 'Objection, form.'"); *Auscape Int'l v. Nat'l Geographic Soc'y*, 2002 WL 31014829, at *1 (S.D.N.Y. Sept. 6, 2002) ("Objections as to the form of the question ... shall simply state, "Objection." The objecting counsel shall not speak any additional words concerning the basis of the objection unless the examining counsel requests a clarification. Any clarification ... shall be stated as succinctly as possible, e.g., 'Argumentative,' or 'Ambiguous.'"); In re *St. Jude Med., Inc.*, 2002 WL 1050311, at *5 (D. Minn. May 24, 2002) ("Objecting counsel shall say simply the word "objection", and no more, to preserve all objections as to form.");

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Objection Perplexion

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Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 561 (N.D. Okla. 1995) ("If the form of the question is objectionable, counsel should say nothing other than 'object to the form of the question'. Should deposing counsel desire clarification of the precise basis of the objection, that inquiry shall be made outside the presence of the witness."); *Tuerkes-Beckers, Inc. v. New Castle Assocs.*, 158 F.R.D. 573, 575 (D. Del. 1993) ("Objections as to the form of the question should be limited to the words 'Objection, form.'").

On the other end of the spectrum is a recent opinion out of the Northern District of Iowa, in which Judge Mark W. Bennett admonishes attorneys in general (and one in particular) to offer more in the way of explanation for their form objections. The opinion in *Security National Bank of Sioux City, Iowa v. Abbott Laboratories,* 299 F.R.D. 595 (N.D. Iowa 2014), arose after Judge Bennett issued a sua sponte order to show cause as to why one of the defendant's lawyers (whom the court refers to simply as "Counsel") should not be sanctioned for her "serious pattern of obstructive conduct" in depositions. *Id.* at 598. First on the list of this attorney's transgressions, according to Judge Bennett, was her "excessive use of 'form' objections." *Id.*

In his opinion, Judge Bennett specifically criticizes "form" objections that are not accompanied by any statement "as to the objection's basis." *Id.* at 600. Properly understood, Judge Bennett writes, objections to "form" refer to "a *category* of objections, which includes objections to 'leading questions, lack of foundation, assuming facts not in evidence, mischaracterization or misleading question, non-responsive answer, lack of personal knowledge, testimony by counsel, speculation, asked and answered, argumentative question, and witness' answers that were beyond the scope of the question.'" *Id.* at 601, quoting *NGM Ins. Co. v. Walker Const. & Dev., LLC*, 2012 WL 6553272, at *2 (E.D.Tenn. Dec. 13, 2012). "[U]nspecified 'form' objections ... do nothing to alert the examiner to a question's alleged defect" and "do not allow the examiner to immediately cure the objection." Id. at 602-03. "Instead, the examiner must ask the objector to clarify, which takes *more* time and *increases* the amount of objection banter between the lawyers." *Id.* at 603 (emphasis original).

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Further, on review by a court, "it is difficult, if not impossible, for courts to judge the validity of unspecified 'form' objections." *Id.* "When called upon to rule on an unspecified 'form' objection, a judge either must be clairvoyant or must guess as to the objection's basis. Neither option is particularly realistic or satisfying." *Id.*

Judge Bennett acknowledges that "many lawyers—and courts for that matter—assume that uttering the word "form" is sufficient to state a valid objection." *Id.* at 602. He clearly disagrees, criticizing that approach, and court opinions requiring it, as making "little legal or practical sense." Id. at 603. "Nothing about the text of Rules 30 or 32," his opinion continues, "suggests that a lawyer preserves the universe of 'form' objections simply by objecting to 'form.'" *Id.* Rather, "lawyers are required, not just permitted, to state the basis for their objections." *Id.* at 602 (emphasis original).

Notwithstanding his criticism of decisions in other jurisdictions limiting attorneys to statements of "form" alone, Judge Bennett did not sanction the attorney in question for her use of unspecified "form" objections in recognition of such authority (although he did impose sanctions on other grounds). *Id.* at 603. The Northern District of Iowa may not be so charitable the next time the issue arises. The bottom line, therefore, is this: research any local practices, procedures, or decisions concerning deposition objections before you begin to regret that you have not done so. Knowing the interpretation of Rule 30(c)(2) that prevails in the jurisdiction of your cases could save you from sanctions.

Planning for Electronic Discovery In The Digital Age

By Timothy Edwards, Esq.[1]

I. Introduction.

Almost ten years ago, litigation attorneys sounded the alarm by predicting that litigation involving the disclosure of electronically stored information would engulf the discovery process, especially in complex cases. Many Plaintiffs' attorneys view electronic discovery as an opportunity to leverage settlement, and the lawsuit itself, by seeking broad fields of electronic data at considerable cost to the Defense. In response to these requests, Defense attorneys emphasize limited alternatives that often fail to produce meaningful, responsive information.

As this cat and mouse game unfolded, parties often overlook the need for a coordinated electronic discovery plan that anticipates and solves problems in the ediscovery process. This is a missed opportunity in which litigants failed to address critical issues, such as the early identification and preservation of potentially relevant electronic data and the authentication and admissibility of that data at trial. Even today, many competent practitioners profess ignorance about these questions and openly admit that e-discovery is not a central consideration in most of their discovery plans.

This Article will also propose a template for an electronic discovery plan that is suitable for Plaintiff and Defense lawyers. It focuses on current Rules and not, for example, on proposed Fed. R. Civ. P. 37(e) that, if approved, would take effect in December 1, 2015 and address preservation and spoliation of e-discovery. By necessity, this Article emphasizes the need for early cooperation as a necessary component of an efficient electronic discovery plan, grounded in the meet and confer requirements in Wisconsin's Rules of Civil Procedure. From there, this Article will provide the template for an Electronic Discovery Plan for Plaintiffs and Defendants that insures compliance with existing discovery obligations and provides guidance for the discovery electronic data in the ever-changing "digital age."

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II. Introduction to ESI.

In general terms, electronically stored information is nothing new. Prior to their recent amendment, the Federal Rules of Civil Procedure contemplated that electronic data stored in a fixed tangible form was on equal footing with paper "documents." While the recent amendments confirm that electronic data is a "document" governed by the rules of discovery, this has never been an issue.[2] Instead, the question is how counsel adjusts her strategy to the unique technological features of electronically stored information. To answer this question, it is necessary to examine the life-cycle of electronic data during the litigation process:

1. Identification of Data ------⇢
2. Preservation of Data -------⇢
3. Discovery of Data ----------⇢
4. Processing Data ----------⇢
5. Form of Production ---------⇢
6. Privilege and Clawback Agreements --------⇢
7. Authenticating Data ----------⇢
8. Admitting Data into Evidence ----------⇢

These obligations are similar, if not identical, to the process that applies in the discovery of traditional, paper documents. The difference rests in the complexity and expense involved in processing the information. This Article will focus on a suggested plan that recognizes the unique technology that accompanies the discovery of electronic data. In all cases, this process starts with the obligation to preserve electronically stored information through a properly drawn litigation hold.

III. The Identification and Preservation of Data: Spoliation and the Litigation Hold.

For years, Courts have recognized that a litigant has an affirmative duty to preserve potentially relevant information in anticipation of litigation or face sanctions for "spoliation" of evidence.[3]
This obligation applies equally to electronically stored information, which can be more difficult to identify and preserve due to the technology involved. While current Federal Rules do not weigh in on this specific issue, the most reliable formulation of the duty to preserve is set forth below:

1. First, when litigation is reasonably anticipated or at the commencement of litigation, counsel must issue a "litigation hold" which should be periodically reissued to keep it fresh in the minds of employees and to make new employees aware of it.

2. Second, counsel should identify the persons who are "likely to have relevant information" and communicate directly with these "key players" to ensure that they are aware of their duty to preserve relevant information. These "key players" are the persons identified in a party's initial disclosures and any supplementation thereof.

3. Third, the court found that counsel have a duty to instruct all employees of their client to produce electronic copies of their relevant active files and to identify, segregate and safely store relevant backup tapes. The court went so far as to suggest that, in an appropriate case, counsel take physical custody of relevant backup tapes to safeguard the information.[4]

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Preserving information relevant to a pending lawsuit is important for many reasons. If a party fails to preserve evidence after litigation is reasonably anticipated, this failure can lead to serious punitive consequences for evidence "spoliation."[5] These consequences can include monetary sanctions, awards of attorney's fees and costs for the price of investigating and litigating document destruction, and litigation consequences such as default judgments, dismissal of certain claims or defenses, or court instructions allowing a jury to draw adverse inferences about what destroyed evidence would have shown.[6]

Current preservation obligations for electronic data are no different than those that apply to traditional, paper documents, as the duty to avoid spoliation is well settled in the law. The only difference is the procedures that must be followed due to the unique, transitory nature of electronically stored information, which can theoretically be destroyed with a push of a button. This requires counsel to institute a litigation hold that identifies and preserves all relevant electronic data when litigation is reasonably foreseeable.[7] This raises questions regarding the timing of the obligation, its time frame and scope. In many cases, the duty to preserve is triggered, but the time frame of the preservation obligation will go back many years and require the preservation of different sources of electronic data.[8] Defense counsel, in particular, must be cognizant of this obligation and its nuances.

Compliance with preservation obligations is a two-way street. Plaintiffs often forget that they also maintain electronic records that could be relevant to the dispute. At the beginning of the case, Plaintiff's counsel must execute a litigation hold that identifies and preserves electronic data that is relevant to the claims and defenses of the case. The litigation hold should be specifically crafted to the facts of the case by defining the case, identifying relevant information and explaining preservation obligations in some detail. Counsel should take immediate steps to quarantine these records once litigation is foreseeable.

Once the preservation obligation is satisfied for both Plaintiff and the Defense, each party should prepare and discuss a preservation agreement that is tied to a number of basic objectives including, but not limited to: (a) early identification of most likely sources of electronically stored information; (b) the continued preservation of electronically stored information pursuant to a litigation hold that is properly executed and carefully documented. This preservation plan can be negotiated before or during the meet and confer session, but it should be one of the first steps in the process if there is doubt about the preservation of electronic discovery.

IV. The Meet And Confer Process.

The meet and confer process is vital to a successful electronic discovery plan.[9] A productive ESI discovery plan requires counsel to set aside the role of "zealous advocate" in favor of an exchange of information that accelerates the discovery process. It is a fool's errand to bypass the opportunity presented by a robust meet and confer session in a case involving substantial electronic discovery. This is an opportunity to learn about your opponent's data systems, preservation efforts and the existence of litigation hold and document retention policies that might shape the e-discovery process. If done properly, you have nothing to lose by participating in a meet and confer session in good faith. The key is early planning and preparation.[10]

A. Topics for the Meet and Confer.

The topics for a meet and confer session should not be confined to those set forth in the FederalRules of Civil Procedure. During the meet and confer conference, counsel should be prepared to address all of the issues referenced on the next page:

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B. Processing and Form of Production.

1. Processing Data.

a. Document Review Protocol. Manual or digital review for relevance, privilege and confidentiality.

b. Search terms: Agreed upon process: Search terms? Custodians? Time-frames? Sources: Databases? Unstructured data sources? E-mail servers? Legacy data? Back up data?

2. Form of Production: most common forms of production (pdf., native format, TIFF images), including disclosure of meta-data, deduplication obligations, production of structured data, production of inaccessible data, and bates stamping protocol;

C. Negotiated Protections.

1. Disclosure of document retention plans and policies.

2. The execution of documents that may be necessary to protect privileged information that is inadvertently disclosed during the litigation, including clawback agreements and privilege logs;

3. The use of a Protective Order to protect confidential information.

D. Efficient Use of Discovery Tools.

1. The use of discovery tools to avoid cost shifting or resolve cost shifting issues;

2. The implementation of a discovery plan that authenticates electronically stored information, through proof or stipulation, and identifies those documents that the trial court must authenticate;

E. Preparation for the Meet and Confer.

In many cases, the results of the parties' meet and confer could be scrutinized by the Court. Here, a discovery plan is likely to be more persuasive if counsel can demonstrate that it is supported by actual facts regarding the information requested and the actual costs involved.[11] Conclusory assertions that requested discovery is too burdensome are unlikely to prevail absent underlying facts. To the extent possible, counsel should identify key custodians and consider the use of search terms to alleviate cost while maximizing the potential response to Plaintiff's search. Under all circumstances, preparation and good faith will position counsel to obtain as much discoverable information as possible.

Defense counsel must be prepared to reveal his client's preservation efforts at the meet and confer session. In addition, Defense counsel should be prepared to identify legacy or back up data that is inaccessible to set the stage for cost shifting arguments as the case proceeds. If possible, Defense counsel should have information about the cost and burden of searching these records, along with any other difficulties presented by the company's computer system for search purposes. If critical data is located in one of these repositories, the parties should attempt to negotiate a resolution of this dispute or agree to bring the matter to the Court's attention. Unlike the Plaintiff's counsel, who should be prepared to demonstrate an efficient plan for obtaining ESI that will not cause an undue burden, it will be common for the Defense to explain expensive limitations in the Plaintiff's electronic discovery plan to set the stage for further limits on discovery.

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In preparing a proposal for discovery, Defense Counsel should consider:[12]

- The volume of data reasonable to review in the time frame allotted by the Court and your client's financial restrictions;
- The number of (and sources) from whom your client may need to collect data if the Plaintiff issues broad discovery requests;
- Arguments for limiting custodian list;
- Methods for phasing discovery;
- Methods for searching data, including date restrictions, search terms and other restrictions such as privilege;
- The timing for exchange of privilege logs;

In many cases, the volume of data in the case may be appropriately limited with keyword or concept searches or a computer-assisted review tool. Although often an effective means of identifying responsive documents and lessening the overall burden of the review, courts have recognized that the use of search terms can lead to under-inclusive or over-inclusive results and must be employed cautiously.[13] Courts have also begun to investigate and even endorse use of analytics technology to identify potentially relevant information – i.e., "predictive" or "automated" coding.[14]

Regardless of the tools used, it is important to interview custodians, reduce the number of custodians collected, and determine which core custodians' data really must be collected and reviewed – whether it be by a computer or attorneys. If the collection is large and the discovery requests broad, any method used will be expensive, and the parties will need to focus on limiting the core data set collected. Failure to obtain agreement with opposing counsel on the method by which data may be culled or, absent agreement, the failure to take reasonable steps to collect and produce core relevant data can lead to sanctions.[15]

The meet and confer process can be a lethal tool for a prepared lawyer with ESI experience. Sometimes, opposing counsel will appear unprepared for the meet and confer process or otherwise refuse to participate in a good faith exchange of information.

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Clerk's Corner

By Peter Oppeneer, Clerk of Court

Ending your case on the right note

You have reached a settlement and resolved your case. Now you need to properly terminate the case with the court. Typically, this is accomplished by filing a stipulation of dismissal with prejudice signed by all parties who have appeared pursuant to Rule 41(a)(1)(A)(ii). We often encounter filings that suggest some confusion about dismissals under Rule 41. The Clerk's Corner in this issue is directed to clarifying the effects and limitations of stipulations to dismiss. Here are a few key things to keep in mind when dismissing your case.

If you file a stipulation, you don't need an order. A stipulation under Rule 41(a)(1)(A)(ii) is self-executing, with the dismissal effective on filing of the stipulation. *See Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1277 (11th Cir. 2012) (collecting cases); *Jenkins v. Vill. of Maywood*, 506 F.3d 622, 624 (7th Cir. 2007) ("the dismissal was effective immediately upon the filing of the [s]tipulation"). In those circumstances, a court's subsequent orders are "void and [have] no legal effect." *Nelson v. Napolitano*, 657 F.3d 586, 587 (7th Cir. 2011).

Often, attorneys offer proposed orders that merely reiterate the fact of dismissal. Such orders are unnecessary and are typically ignored by the court. Of potentially greater concern, parties periodically stipulate to dismissal with prejudice, and propose an order wherein the court retains jurisdiction to resolve disputes under the settlement agreement. It is clear that courts cannot both dismiss an action with prejudice *and* retain jurisdiction. *Shapo v. Engle,* 463 F.3d 641, 643 (7th Cir. 2006). And because a stipulation to dismiss precludes the court from taking further action, such an order, even if the court chooses to enter it, is likely ineffective to revive the jurisdiction of the court that was lost when the stipulation was filed.

Possible approaches under circumstances where the parties have settled their case but contemplate further action by the court are a motion or stipulation for the entry of an order by the court that retains jurisdiction over limited aspects of the case; a stipulation to dismiss without prejudice as to certain future actions; or authorization of the standard order of dismissal used for decades in the Western District: "The court having been advised by counsel that the above-entitled action has been settled, this case is hereby dismissed. Any party may move to reopen for good cause shown."

Here, it is not uncommon for counsel to rely on assertions of privilege or conclusory allegations of undue burden in an effort to conceal their ignorance or avoid their meet and confer obligations. Under these circumstances, counsel should file an immediate motion with the Court compelling good faith participation in the meet and confer process-- a process that will now unfold under the supervision of the Court.[16] If used properly, opposing counsel's failure to participate in good faith can raise an early inference of bad faith that requires Court intervention, all to the Defendant's detriment.

F. Processing and Reviewing.

Before producing records, Plaintiff must process the data that he seeks to preserve pursuant to his client's ongoing litigation hold obligation. The first step is locating the potentially responsive data and securing it for future use. Depending on the volume, the next step is to review the document to determine whether it is privileged or contains confidential information that is governed by the Protective Order. Once the privileged documents have been withheld and recorded on a privilege log, they should be set aside and preserved, as should the proprietary information that was produced and appropriately labeled pursuant to the Protective Order. Finally, counsel should conduct a relevance review to determine whether certain documents are non-responsive or irrelevant to the case. These documents should also be set aside, if necessary, for future use.

The document process review can be much more onerous for Defense counsel, who often has access to more electronic data than the Plaintiff. Depending on the size of the organization, processing ESI for an organization or entity can be a daunting task. This is especially true at the early stages of the review process, where responsive documents are identified for production.

Often, review tools are necessary because simply opening files one-by-one in their many different source applications is impractical, and may result in the destruction of metadata. In these cases, it is necessary to load the ESI into a platform that is searchable and to apply a review tool that can perform a variety of functions, including file extraction, removal of system files and de-duplication. After the relevant data set is culled from the original production set, search terms are applied and responsive documents are processed for final review in the agreed upon format. This process will require the assistance of IT personnel or a qualified vendor.

Proper documentation can protect the inadvertent disclosure of privileged information in certain instances. Assume that Plaintiff's counsel reviewed over 100,000 documents after filing a lawsuit against the disgruntled CEO. By mistake, counsel disclosed a document in which his client made very damaging statements that directly impacted the strength of her case. If the parties reach an agreement during their discovery plan that includes an order that protects against the waiver of privilege, it is possible to retrieve the document and preserve the privilege without further problem.[17] To do so, the party must immediately give notice to the opposing party, in writing, that the document was produced inadvertently after reasonable steps were taken to prevent its disclosure. At that time, Defense counsel must promptly return, sequester or destroy the document.

Clawback provisions provide important protection against the waiver of the attorney client privilege that results from inadvertence due to the sheer volume of data involved. They also demonstrate how advance planning, at the meet and confer stage, can avoid significant problems that result from the volume of data that is often reviewed in complex e-discovery cases.

G. Form of Production.

Production is the next step in the ESI life cycle after the information has been preserved, collected and processed. The FederalRules of Civil Procedure provide a protocol for selecting the form of production, which begins at the meet and confer stage of the lawsuit. Notably, the requesting party is allowed to request the form or forms in which ESI should be produced (usually in a searchable format).[18]

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If the requesting party fails to request a form of production, or the responding party objects to the form requested, the responding party must state the form or forms it intends to use.[19] Absent exceptional circumstances, Plaintiff's counsel should insist that the documents are produced in a searchable native format, with meta data intact, which is likely to include savings in cost and time compared to other formats which require conversion of the ESI images into load files. Questions regarding form of production should be addressed to a competent IT manager or third party vendor.

H. Cost-Shifting Issues.

One of the most litigated questions in cases involving electronic data is "who pays?" In many cases, Defense counsel will argue that the discovery request is impermissible because it is overly broad, unduly burdensome or expensive.[20] In the ESI context, this is a short hand reference to "cost-shifting," a concept which acknowledges that the cost of pursuing specifically identified electronic discovery far exceeds any benefit from the search. In Wisconsin, the relevant factors to assess in determining whether cost shifting is appropriate are as follows:

- The specificity of the discovery requests;
- The quantity of information available from other and more easily accessed sources;
- The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
- The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
- Predictions as to the importance in usefulness of the information;
- The importance of the issues at stake in the litigation; and
- The parties' resources.[21]
- The effective use of discovery tools can avoid this debate. In cases with significant electronic discovery, it is no longer appropriate to serve blanket discovery requests for electronic discovery that seek every imaginable document on a particular issue.

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President's Corner

By Jeffrey A. Simmons

Things are kind of boring in the Western District of Wisconsin these days. Not that it's a bad thing. For more than four years the constant topics of conversation were the long-standing judicial vacancy and the burden it placed on the Court. Now, with Judge Peterson's ascension to the bench and the resulting reduction in Judge Crabb's caseload, it seems there is not much to talk about. By all accounts, the transition has been seamless. The trains are running on time and fast. Things are back to normal. When you have to write a column about what is going on in the Court, things being normal doesn't give you much to work with. But in this case, I think everyone agrees that normal is good.

And there are still few things going on. The WDBA's Pro Bono Fund just approved new rules for reimbursing attorneys for expenses they incur in handling pro bono cases. Judge Conley, like Judge Crabb before him, is committed to increasing the number of attorneys taking pro bono cases. The WDBA Pro Bono Fund is intended to reduce the financial burden of taking those cases. Funds are available to reimburse attorneys for costs associated with pro bono cases, such as expert witness fees. If you are interested in seeking reimbursement, you should contact the WDBA's pro bono committee chair, Sarah Siskind, for more information.

Our third annual WDBA happy hour event at The Coopers Tavern in January was a great success. Judge Conley and Judge Peterson stopped by to share a few beverages and conversation with our members. The turnout was excellent and everyone has a great time. Thanks to everyone who stopped by.

The next WDBA event will be our annual luncheon and CLE program. The details for that event will be announced shortly. And soon you will be able to read about all of these things on new and improved WDBA website, which will be unveiled in a few weeks.

That's all the news from the Western District of Wisconsin, where everything is happily normal and boring.

Targeted, specific discovery requests addressed at relevant documents material to the outcome of the litigation are much more defensible. In some cases, the focus of these requests can be refined after taking the deposition of your opponent's IT representative or third party vendor.

In e-discovery, it is no longer proper to search for a needle in an electronic haystack. The party seeking the information must specifically tailor his request to need, the likelihood of responsive information and the cost of production or be prepared to pay for what he is asking for. The party who fails to comply with these directives will often be stuck footing the bill.

V. Evidentiary Concerns.

Given the complexity of ESI, it is easy to forget that the main goal of electronic discovery is to identify, secure and submit admissible evidence for consideration by the fact-finder. Here, electronically stored information is different than traditional, documentary evidence in a number of important respects.[22] A well planned electronic discovery plan should take these differences into account.

Assuming that confidential and privileged information has been addressed through prior agreement, counsel must be prepared to authenticate electronically stored information. This can be done through properly drafted Requests for Admissions pursuant to Rule 804.11 or witness testimony taken pursuant to a deposition. Absent such proof, it can be very difficult to authenticate electronically stored information without specific proof that the evidence is what it is being offered for.
Unlike paper documents, which are fixed to a tangible medium of expression, electronically stored information reflects computer data that is routinely rearranged by the computer system in question, making it almost impossible to authenticate. To overcome this hurdle, it is necessary to provide evidence of systemic safeguards within the computer itself (password access, hash tags, encryption) that identify the document as being what it is offered to prove. Discovery should be focused on these key features of your opponent's computer system when authentication is in doubt.

Electronic discovery offers other evidentiary challenges. While authentication is the most difficult, questions of relevance, undue prejudice and hearsay routinely surface in the admissibility of electronically stored information. If necessary, a comprehensive e-discovery plan will anticipate these evidentiary arguments and lay the foundation for the admissibility of electronically stored information well before trial.

VI. Conclusion.

As this Article demonstrates, the principles that govern the discovery of electronically stored information are the same as traditional non-computer evidence. The complexity of electronic data requires the parties to replace the adversarial approach to discovery with one of cooperation, transparency and common sense. This approach saves money for the parties, avoids unnecessary discovery disputes and focuses the parties and the court on legitimate, contested issues surrounding the discovery of electronically stored information. In all cases, these goals are advanced by a thoughtful discovery plan that flows from a thoughtful meet and confer process that is grounded in consensus and good faith.

ENDNOTES APPEAR ON FOLLOWING PAGE

(Endnotes)

1 Cullen Weston Pines & Bach LLP.
2 Rule 34(a), Fed. R. Civ. P. and Advisory Committee Notes.
3 *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2007)("*Zubulake IV*").
4 *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("*Zubulake V*"); Edwards, *Spoliation of Electronic Evidence*, 2010 Wis. Lawyer 83, No. 11.
5 *Silvestri v. General Motors Corp*., 271 F.3d 583, 590 (4th Cir. 2001).
6 *See, e.g., Arista Records, LLC v. Tschirhart*, 2006 WL 2728927 (W.D. Tex. 2006)(imposing a default judgment on defendant after finding that defendant used "wiping" software to erase data); *Nursing Home Pension Fund v. Oracle Corp*., 2008 WL 4093497 (N.D. Cal. 2008)(sanctioning defendant with adverse inference at trial); *Great Am. Ins. Co. of N.Y. v. Lowry Dev., LLC*, 2007 WL 4268776 (S.D. Miss. 2007)(reducing the plaintiff's burden of proof as spoliation sanction against defendant).
7 See "*Zubulake V*" at 433.
8 *Pension Comm. Of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 U.S. Dist. LEXIS 4546 at * 15.
9 See Rule 26(b)(2)(c), Fed. R. Civ. P.
10 *Mancia v. Mayflower Textile Servs. Co*., 2008 U.S. Dist. LEXIS 83470 at *13 (D. Md. 2008).
11 *Helmert v. Butterball, LLC*, 2010 U.S. Dist. LEXIS 28964 (E.D. Ark, 2004).
12 Griset and Laws, *Navigating a Case Through E-Discovery* (McGuire Woods 2012).
13 *Victor Stanley*, 250 F.R.D. at 256-57.
14 *National Day Laborer Organizing Network v. U.S. Immigration and Customers Enforcement Agency*, 2012 WL 2878130, at *12 (S.D.N.Y., July 13, 2012).
15 *Jones*, 2010 U.S. Dist. LEXIS 51312 (N.D. Ill., May 25, 2010)(awarding monetary sanctions, imposing an adverse inference and requiring additional discovery).
16 *See e.g., Kleen Products LLC, et al., v. Packaging Corp. of America*, 2012 U.S. Dist. LEXIS 139632 at *48 (N.D. Ill. 2012).
17 *See* Rule 502, Wis. R. Evid.; Rule 502, Fed. R. Evid.
18 Rule 34(b)(2)(E), Fed. R. Civ. P.
19 *Id*.
20 *See* Rule 26(b)(2), Fed. R. Civ. P.
21 *See* Rule 26(b)(1), Fed.R.Civ. P; Edwards, E-Discovery: Who Pays? 2012 Wis. Lawyer 85, No. 10.
22 *See* Edwards, *Getting Through the Door: The Admissibility of Electronically Store Information*, 2014 Wis. Lawyer 87, No. 1.

Recipe for No-Fuss, Low-Drama Depositions

By Richard Briles Moriarty[1]

First things first

Witnesses can rarely be helped during depositions. The job of attorneys preparing deposition witnesses is to train them for their job. During their depositions, witnesses must be prepared to handle whatever is thrown at them, without your assistance or intervention. That's why it's called "depo prep."

Think of a kitchen, which "is a dangerous place. Not only are you working with hot surfaces, and boiling liquid, but you're handling sharp knives and utensils that can injure you in a second. So let's learn how to stay safe in the kitchen. … Rushing around the kitchen will almost guarantee accidents." Larsen, Top 15 Kitchen Safety Tips, http://tinyurl.com/7j46tu7.

Rushing around a deposition will almost guarantee accidents. Physical harm is unlikely. But bad results, or at least a longer deposition, are likely. Speaking of prep, think of "prep chefs" in busy kitchens, who get in trouble unless they are responsive, listening carefully to the head chef, while remaining alert, attentive and engaged.

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On first contact with the witness, schedule a future time for your depo prep. The witness must focus. "Is now a good time?" is rarely a good time. In those first contacts, assure witnesses that, when prep is done, they will be comfortable with the process and ready to be deposed.

From that first contact forward, carefully control what the witness reviews. Anything reviewed is fair game for disclosure. You should decide what lay witnesses review and have good reasons if any document not needed for general recall is included.

Schedule prep in locations where witnesses won't be distracted. Prepping them in their own offices is inadvisable. Corollary: attorneys for witnesses should never allow depositions to be held in the offices of those witnesses. Offices are packed with physical and mental distractions and may also provide deposing attorneys with insights or tools best left undisclosed.[2]

You must be attentive - and assure witness attentiveness

During prep, check in periodically. "Any questions so far? Anything unclear so far?" If witnesses are distracted during prep, stop. Eliminate all distractions. If necessary, offer to meet later when total attention can be paid. Warn witnesses that being unprepared and anything less than fully engaged is dangerous.

Role-play with the witness during prep, and invite questions, to assure your guidelines are understood and absorbed. "Let's drop into deposition mode." Require witness to play along using your guidelines. Lead them into traps that emphasize what can go wrong.

A suggested depo prep recipe – adapt to taste

Here's a recipe to prep witnesses that should result in no-fuss, low-drama depositions. Developed by the author through many years of trials and errors, he finally committed to paper. Substitute ingredients to taste.

- What's your prior experience with depositions or other testimony?
    - Minimal? Great, when we're done, you'll be comfortable and ready.
    - Experienced? Great, now set that aside and we'll start from scratch.
    - I'll go through my guidelines, even if you're experienced. That way, we don't miss anything. Also other attorneys approach this differently. At the deposition, we want one consistent set of guidelines.
    - Some attorneys advise witnesses to use "Yes"/"No" answers. Not me. Never volunteer, but it is critical to provide complete answers.
- Being a witness is unlike all other roles in your life.
    - The witness role is exclusively responsive.
    - Don't think about strategy or where the attorney may be headed.
        - Every question is important.
        - Focus on providing discrete pieces of information as requested. This case is like a jigsaw puzzle. You'll be asked to put specific pieces down on the table. When witnesses try to think "big picture", their answers won't fit into any coherent picture that attorneys later try to assemble.

- Don't let the setting, or the questioner, lull you into thinking the process is informal. Though no judge is there, it is like testifying in court.
    - The questioner is not your friend.
    - A deposition is not a conversation.
- The process, and what's expected of witnesses, is contrary to how humans communicate.
- Expect everything you vocalize to be transcribed.
- If attorneys joke with each other, or act informally, don't join in. Smiling is okay, vocalizing is not.
- Questioners may have dual purposes:
    - Just gathering info.
    - Developing evidence helpful to them or harmful to their opponents.
    - Each question could have one or both purposes. Just recognize those dual purposes may be at play and don't worry about it.

- Be detached and on task.
    - Animosity? Anything bugging you? Let's deal with it now.
    - Any special worries? Now's the time.
    - Each party has a right to be there and may be there. Don't let it bother you. If you think it will, let's talk that through now.
    - Any health conditions or medications that may distract? Anything else?
- Objections.
    - Don't expect me to object. Don't be surprised if I do or don't.
    - If I do object, pay attention, but don't assume I am sending any signals. Could be for reasons having nothing to do with you.
    - Never repeat my objection. That may suggest coaching. It's vital that everything you say comes from you and appears to be coming from you.
- Question and Answer process:
    - One step at a time.
        - Don't think about earlier questions or ones coming up.
        - Focus fully on each question one at a time.
        - Answering each question is like a golf stroke – a lot of activity carefully executed with each swing focused on a single event with an intended result. Keep your eye on the ball at all times.
        - Concentrate on each question, do your best, move on.

- You can change a prior answer (unlike in golf).
    - Note that you want to amend a prior answer and wait for direction. Questioners will allow those amendments (no questioner with an operating brain would charge ahead – it makes all prior answers worthless).
    - Asked to go ahead, generally identify the prior question/answer or subject and then note the extras or changes.
    - Amending a prior answer is by nature a distraction. Don't try to juggle two things at once. Best if this happens when no question is pending.
    - If a question is pending when you start the process, do not try to recall that question. Whenever you turn attention to that pending question (before or after you amend the prior answer), have it read back or repeated.
- Witnesses must answer each question that they understand.
    - Rare exception: when you are directed not to answer.
    - I may object and, rarely, may even fuss. But unless you are directed not to answer, you must answer.
- Witnesses are entitled to questions they understand 100%.
    - Framing understandable questions is the questioner's job, not yours.
    - The questioner asks, the witness responds.

- Don't understand the question 100%? Provide no substantive info.
    - Say "I'm sorry, I don't understand the question" or its equivalent. Then wait.
    - "What part of the question don't you understand?" Nope, not your job. Say again, "I'm sorry, I don't understand the question."
- Fully understand question but erroneous assumption?
    - Correct the misassumption.
    - Then have question rephrased, or read back if questioner does not want to rephrase, to assure you are focused on the question.
    - Questioners don't necessarily intend bad assumptions (sometimes they do). They may just not know what you do.
- The "Pause" rule. The most important rule.
    - Here's the process for each question that you fully understand. The attorney is plainly done with the question. Before vocalizing anything, think through your answer, then pause, then start talking.
    - Many reasons for the "Pause" rule:

- That space is my time slot for objecting.
- The questioner may stop talking while tightening up a question and then finish off the question. If you start talking during that gap, you won't hear and absorb the full question (the reporter will). Your answer may be much broader – and will be wrong- since it is an answer to a different question.
- Witnesses who jump at answering are a joy for questioners. Though counterintuitive, rushing through a deposition likely assures a longer, and more problematic, deposition.
- Pausing breaks the flow that questioners may, for strategic reasons, want.
- Pausing (or not pausing) creates impressions as the questioner sizes you up. Calm, deliberative and focused witnesses are no fun. Those witnesses are usually done sooner with fewer problems. Bonus: the questioner may decide against calling you at trial.

➢ If I remind you of the "Pause" rule, pay attention. May touch your sleeve.

- Avoid interjecting anything in the midst of questions.
  - ➢ Hard to do since that's how people – particularly "people people" – relate, e.g., letting the person talking know that you are listening.
  - ➢ In depositions, interjecting "uh-huh" or "yes" or "okay" in the midst of a question looks, when read, as if you agreed with parts of the question as it unfolded. That is confusing at best when your ultimate answer is an emphatic "no" and it really messes things up.
  - ➢ Vocalize only what you intend.
- The meaning of "telling the truth" is doing your best.
  - ➢ The "truth" is your sincere belief that your answer is true.
  - ➢ Could be completely contrary to what is actually true.
  - ➢ You have a contrary recall later, maybe by looking at a document? Testify to what you recall at that later time and, to the extent you can, why. You will tell the truth each time, because you sincerely believe each answer is correct when stated.
  - ➢ You later see contrary info in a memo attributed to you but still believe your first answer is true? Stick with the first answer. You can say you see what the memo says, but don't try to resolve the disparity. Just testify to what you believe is true.
- Don't answer questions not asked. But do provide complete answers.
  - ➢ Never volunteer, but also don't hold back.
  - ➢ "Yes" or "No" is appropriate only if it is a complete answer. But when it is, "Yes" or "No" is the right answer. If more is required to completely answer a question, make sure you give us the complete answer.
- Hold onto your qualifiers.

- Attorney may try to push you to drop qualifiers. For example, you testify to a "vague recollection that the car was blue." A later question starts with "When you testified earlier that the car was blue, …." Reiterate that the prior testimony was based on a vague recall.
- Part of your job is to hold onto qualifiers – unless you change them.
- If your qualifiers change (better memory, etc.), then hold onto your new qualifiers. Never be bullied, pushed or tricked.

- Losing track or focus.
  - You can ask to have the reporter read things back. Great tool. Never hesitate to use it. Don't worry about the time it may take. The transcript will not show anything other than "[Question read back]" or something equivalent.
  - Making four points and distracted after the third? Ask for a read back.
  - Simple question/answer but you are distracted? Ask for a read back.
  - Witnesses only look "stupid" during depositions when they try to bull their way through without complete 100% focus.
  - Sometimes, after back and forth over whether the witness had more to say, the questioner asks the witness if there is anything else and the witness knows there was but has forgotten it. Ask for time to think about it. Get a read back if that would help. Don't just say, "No, I don't think so."

- Interruptions.
  - Likely that only you know you're being interrupted. You must alert us. Then wait for directions.
  - Directed to finish prior answer? I insist that you ask for a read back. Then finish answer and stop. Questioner forgets the new question? Not your job. Just wait for next question.
  - Answer new question? I insist that you ask for a read back. Same rules for any Q&A (understand, etc.) Then, after answer, stop. Prior answer never completed? If that's clear on the record, the questioner goofed. Not your job to help the questioner.
  - You must assure either that your answer is complete or that the record is clear that your answer is not complete.

- Knowledge and memory.
  - Knowledge consists of everything any of your five senses took in throughout your life. If asked to exceed personal knowledge, that's okay. But we need to have a clear record about when you're exceeding personal knowledge.
  - Anything within the scope of knowledge is also within the scope of memory. You have knowledge about lots of things that you are unlikely to ever remember. Don't attribute lack of memory to lack of knowledge.

- Tell us both substantive info and the state of your knowledge or memory.
    - Substantive info alone is often not telling the truth. Give us the state of your knowledge or memory. That's part of a complete and truthful answer.
    - Recall several things discussed but only recall three now? Give us a complete answer – details on what you recall and the fact other subject were discussed but you don't now remember anything about the rest of the conversation.
- "I don't know" – bad answer. Give us more.
- "I don't remember" – bad answer. We can't explain why there's no memory one minute and it springs back later. Best to use qualifiers. "I don't remember right now" or "I don't recall at this time" etc. or "I recall X, Y, Z, and that we talked about other things but can't recall right now what they were."
- Remember something but vaguely? Relate that you have a vague recall and what that vague recall is, and whether you think there was more.
- Remember some things well, know there were other things and cannot recall what the other things were? That drives what you vocalize.

- Don't bluff or try to connect dots.
    - Attorneys will assemble jigsaw puzzles. Out of place answers will leap out.
    - Give us discrete pieces of info responding only to questions asked.
    - Depositions are not the time to tell stories. (Contrast with trial testimony, which is often storytime.)
    - Human brains strive to connect dots. Resist the temptation.
    - Sometimes witnesses are expressly asked about connections between two events or things. Do so only if you can base that on your personal knowledge, not speculation or assumptions that there must be a connection.
- You think your answer may be harmful?
    - You are obliged to tell the truth.
    - Never answer questions not asked. But don't be clever or cute.
    - There is a range of ways to answer, all truthful? Use discretion but always assure that your answer is truthful.
    - Whatever comes out, I'll deal with it. Not your worry.
- Attorney-client communications
    - If an answer may involve attorney-client communications, we must stop!
        - If I say anything about "attorney-client" – or just ask to speak with you outside - don't vocalize anything until I give you direction.

- But don't count on my detecting "attorney-client" issues or on my jumping in. Only you may know that the answer you are considering includes what occurred in a privileged communication.

➢ If you have any concerns that your answer might involve any attorneyclient communications, ask to speak with me outside.

- The questioner may ask why.
- If asked, just say that it may involve attorney-client issues.

➢ We'll step outside, talk about it, and resolve what to do.

- When handed any document, review it.

➢ While reviewing the document,

- Don't vocalize anything.
- Think about whether you saw the document during the transactions involved (usually before the lawsuit began).
- Assure all pages are in the document and that all referenced attachments are attached. (I'll look for this too.) Sometimes only the text mentions an attachment, not any notation at the bottom, so be alert to that.
- Take your time. The transcript won't display the length of review time.

➢ If asked just to review a document, without a specific question, become generally familiar with the document – even if you reviewed it a day or two earlier.

➢ When done with review, say so. Then wait.

➢ If the questioner, while handing you the document, asked you a question, review the document. Then say that you've reviewed it and ask to have question repeated or read back. Don't try to concentrate on both reviewing the document and framing an answer to the question.

➢ If the questioner asks about a document that you did not see during the transactions involved, clarify that fact if it is not already clear in the record.

➢ Attorney may just want you to identify the document and then move on. If you didn't see it at the time, you're not the right witness to identify it.

➢ If a question focuses on a phrase, sentence or paragraph within the document, go back & carefully read, or re-read, as much of it as is needed to get context. Take your time. Re-read as needed. And ask for read-back if needed.

- Breaks.

➢ Need a break? Ask. (Except for attorney-client issues, we can't talk about anything substantive during breaks).

➢ Don't wait until you absolutely need a break, since the attorney will likely want to finish the current line of questions.

- What to bring – and not bring
    - Bring no documents.
        - Don't bring documents intending to leave them in your vehicle.
        - If you forget and do bring documents, do leave them in your vehicle.
    - Generally liquids are available. But if you have a specific preference, may be best to bring your own.
    - Bring your brain. Be ready to use it.
- Dress as you would if testifying in court. (Alert witness to potential video.)
- Most important rule? The "Pause" rule.
    - If you internalize the "Pause" rule, you'll have time to recall the others.
    - Regardless, if you forget all other rules, make the "Pause" rule your mantra.

(Endnotes)

1 Views and errors are solely those of the author, not those of any entity or other person. Permission to copy and distribute freely granted.

2 Witnesses should not be deposed in their offices. A principal was accused of physically abusing my student client. He had pinned, on his bulletin board behind his desk, a picture of a pistol pointed towards the viewer. Taking the videographer aside, I assured that the video displayed that picture above his shoulder. The case settled.