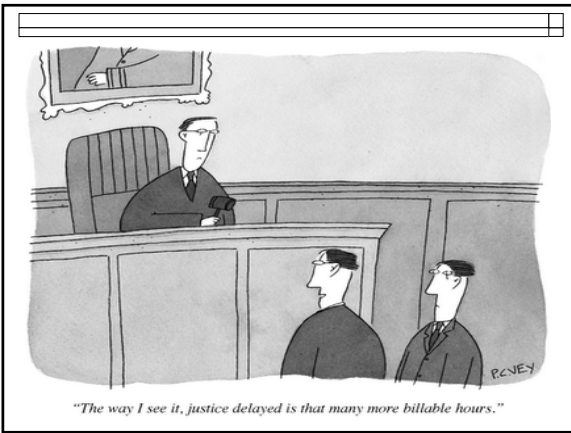


*Managing Discovery, ESI, and
Privilege Issues in an Antitrust Context*

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The Basics of Antitrust Discovery

1. Discovery Tools (i.e., the Rules)
2. Preservation
3. Developing a Plan
4. Coordination Among the Parties
5. Production / ESI Issues
6. Privilege Issues
7. Nonparty Discovery
8. Discovery Motions
9. Experts

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Federal Rules of Civil Procedure

- Rules 16 and 26(f): Meet and Confer; Report
- Rule 26: Duty of Disclosure, Scope of Discovery, Protective Orders; Experts
- Rule 30: Depositions
- Rule 33: Interrogatories
- Rule 34: Production
- Rule 36: Requests for Admission
- Rule 37: Motions; Sanctions; ESI Safe Harbor
- Rule 45: Nonparty Discovery

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Preservation

- Early investigation and interviews (“key players”)
- Determine the type of ESI the client has
 - Paper documents
 - Electronic documents — servers, hard drives, retired servers or hard drives
 - Blackberries, computers
 - Storage, Archiving, Legacy Systems

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Preservation

- Determine where relevant information may be located
- Determine if the information is reasonably accessible and, if not, document why
- Issue Litigation Hold (*Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC*)

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Developing a Plan

- Consider the type of discovery you want, from other parties and nonparties
- Consider staying discovery until motions to dismiss are resolved
- Establish a contact for ESI and other document issues

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Developing a Plan: Discovery You May Want

- Email
- Meeting Minutes
- Contracts
- Calendar Entries
- Letters
- Databases / Sales Information
- Voicemail messages
- Faxes
- Instant messaging
- Text messages
- Storage/Archives

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Coordination Among Parties

- Consider Early Agreements
 - Regarding scope of search and relevant dates
 - Clawback agreement (as a part of a protective order)
 - ESI letter governing format and metadata

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Coordination Among Parties:
Rules 16(b) and 26(f) Meet & Confer

Rule 16(b)(3): Scheduling Orders

Rule 26(f)(3) Discussions of Discovery Plan

- Discuss what changes should be made in the limitations on discovery imposed under the rules
- Discuss ESI issues and consider whether the proposed scheduling order should address them
- Consider, and the court may enter, any agreements for (i) asserting claims of privilege or of protection as trial-preparation material after information is produced and (ii) protecting confidentiality

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Coordination Among Parties:
E.D. Pa. Local Rules

- No ESI Local Rules
- Judges Rules and Procedures
 - Judge Goldberg
 - Judge Jones
 - Judge Savage
 - Judge Slomsky

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Coordination Among Parties:
M.D. Pa. Local Rules

- Local Rule 26.1
 - Duty to investigate and disclose
 - Duty to meet and confer
 - Consider early intervention of the court
 - Rule 26 report

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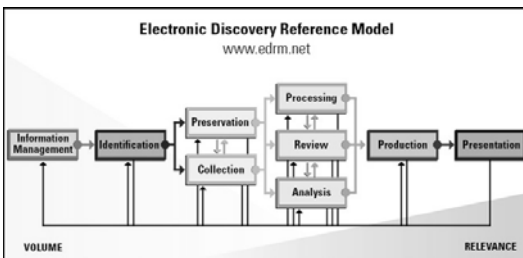
Coordination Among Parties: W.D. Pa. Local Rules

□ Local Rule 26.2

- Duty to investigate
- Designation of resource person
- Duty to meet and confer
- Rule 26 report

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Production



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Production: Rule 34 Requests Production

Any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

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Production: What Makes ESI Different?

- Easily searchable
- Difficult to delete
- Difficult to ensure its integrity
- Metadata
- Informal

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Production: Rule 26(b)(2) Duty of Disclosure

(B) Specific Limitations on ESI

- A party need not produce ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost
- The court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C)
- The court may specify conditions for the discovery

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Production: Rule 26(b)(2) Duty of Disclosure

(C) When [Limitations Are] Required

“(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive . . .

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

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Privilege: Rule 26(b)(5)

Claiming Privilege or Protecting Trial-Preparation Materials

“(B) If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. . . .

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Privilege: Rule 26(b)(5)

Claiming Privilege or Protecting Trial-Preparation Materials (cont'd)

(B) . . . After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.”

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Privilege: FRE 502

Waiver?

Disclosure does not operate as a waiver if

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)

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Privilege: FRE 502

Scope of Waiver

Waiver extends to an undisclosed communication or information only if:

1. the waiver is intentional;
2. the disclosed and undisclosed communications or information concern the same subject matter; and
3. they ought in fairness to be considered together.

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Privilege: FRE 502

Controlling effect of court orders

“A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court -- in which event the disclosure is also not a waiver in any other Federal or State proceeding.”

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Rhoads Indus., Inc. v. Building Material Corp. of America

1. the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production;
2. the number of inadvertent disclosures;
3. the extent of disclosure;
4. any delay and measures taken to rectify the disclosure; and
5. whether the overriding interests of justice would be served by relieving the party of its errors

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Discovery Motions / Authority

- Traditional Rules of Civil Procedure
- E-Discovery Rules (Plus Explanatory Notes)
- Case Law
- Sedona Conference (especially ESI)

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Recent Pennsylvania Case Law

Deference to Counsel

- *Integrated Service Solutions Inc. v. Rodman*, No. 07-3591, 2008 U.S. Dist. LEXIS 101653 (E.D. Pa. Nov. 3, 2008)
- *Bianco v. GMAC Mortgage Corp.*, No. 07-4650, 2008 U.S. Dist. LEXIS 84950 (E.D. Pa. Oct. 22, 2008)

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Lessons from Recent Pennsylvania Case Law

Destruction of Discoverable Material

- *Phillips v. Potter*, No. 7-815, 2009 U.S. Dist. LEXIS 40550 (W.D. Pa. May 14, 2009)
- *Kotakis v. Wesco Distrib.*, No. 08-0285, 2009 U.S. Dist. LEXIS 54224 (W.D. Pa. June 26, 2009)

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Rule 45: Nonparty Discovery

Producing ESI

Nonparties must produce ESI subject to the same requirements on parties, as well as the same limitations of reasonable accessibility

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Experts

□ Rule 26(a)(2):

Must produce “the data or other information considered by the witness in forming [the opinions].”

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