Plenary Session: The Current Legal Landscape for "Discovery on Discovery"

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Discovery disputes come in all shapes and sizes. The discovery of electronically stored information ("ESI"), in particular, creates fertile ground for disputes. Recently, a growing number of these disputes have involved attempts to conduct discovery of a party's preservation or collection efforts (or "discovery on discovery," also sometimes referred to as meta-discovery). This type of "discovery on discovery" has become more significant and prevalent as technology has evolved, law has developed, and parties have focused increasingly on potential data loss.

I. HIGHLIGHTS OF THE AMENDED FEDERAL RULES OF CIVIL PROCEDURE RELATING TO "DISCOVERY ON DISCOVERY"

When "discovery on discovery" disputes arise, parties should turn to the amended Rule 26(b)(1) as a starting point. Specifically, the Advisory Committee ("the Committee") on the Federal Rules of Civil Procedure recognized the need for clearer guidance and structure regarding proportionality in the discovery process. To address this need, the Committee amended Rule 26(b)(1) to provide:

> Unless otherwise limited by court order, the scope of discovery is as follows: ***Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*** Information within this scope of discovery need not be admissible in evidence to be discoverable.

This change moved the old proportionality language from Rule 26(c) directly into the "Scope" section of the Rule and added specific factors for courts to consider when faced with disputes over the scope of discovery. Therefore, if a request for "discovery on discovery" is received, a party should first consider whether there has been any showing that there may have been a

failure to retain ESI at a time that a duty to preserve was owed and, if so, whether the discovery request into the alleged failure to preserve is proportional to the needs of the case.

When analyzing the amended rule, one may wonder what happened to the language concerning additional areas of discovery—specifically, "the existence, description, nature, custody, condition, and location of any documents or other tangible things"—given that this encompassed the concept of "discovery on discovery." FED. R. CIV. P. 26 (prior version). The Committee found that such discovery "is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples." FED. R. CIV. P. 26 advisory committee's note (2015). Thus, this change does not modify a party's ability to pursue "discovery on discovery."

The new Rule 37(e) also relates to the issue of "discovery on discovery." Rule 37(e) provides:

> (e) If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> > (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> >
> > (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> >
> > > (A) presume that the lost information was unfavorable to the party;
> > >
> > > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> > >
> > > (C) dismiss the action or enter a default judgment.

Accordingly, under Rule 37(e)(1), courts should consider intermediate measures—additional discovery, restoration from alternative sources—before imposing serious sanctions for failure to preserve ESI. Further, under Rule 37(e)(2), significant sanctions should be ordered only if the court determines the party's actions caused substantial prejudice in the litigation and were intentional. Rule 37(e), therefore, may provide some guideposts as to appropriate areas of inquiry for "discovery on discovery." For instance, if an appropriate preliminary showing for such discovery has been made, discovery should focus first on whether a duty to preserve existed, what preservation steps were taken, and whether potential alternative data sources exist. If data was lost at a time when a preservation duty existed and the data cannot be restored, then inquiry into intent and prejudice would be appropriate.

II. EARLY PRE-TRIAL ACTIVITIES TO CONSIDER RELATING TO "DISCOVERY ON DISCOVERY"

In light of the increased focus on ESI and "discovery on discovery," parties can consider taking steps early in a litigation to try to prevent later disputes. For instance, a party could consider sending a "Day One Letter" to the opposing party that outlines the general types of data a party is willing to preserve given the scope of the case. If the parties can reach an agreement as to what ESI should be preserved, it could reduce the likelihood of "discovery on discovery" occurring later in the case; and, if not, then the parties could seek early intervention from the court, which also could help prevent later disputes.

In addition, parties can consider negotiating an agreeable discovery plan at the Rule 26(f) conference. Notably, such plan could include a procedure for discovery of preservation or collection efforts, and an agreement to engage in a thorough meet-and-confer process before either delving into formal "discovery on discovery" or seeking court intervention. This is in line with courts' preference for the parties to resolve discovery disputes between themselves before

seeking court intervention. *Cardoza v. Bloomin' Brands, Inc.*, 141 F. Supp. 3d. 1137, 1145 (D. Nev. 2015) ("Discovery is supposed to proceed with minimal involvement of the Court." (citation omitted)).

During the course of litigation, a party should consider providing specific information to the opposing party as to which data sources are (or are not) being produced in formal discovery responses. For instance, if back-up tapes exist but data is not being produced from them, this can be disclosed with appropriate objections, *e.g.*, proportionality, relevance, cost, and/or burden. Also, parties should strongly consider whether informal discovery is advisable, as it may not create a clear record of objections and qualifications to production. Finally, in the event that a party discovers a gap in its document retention or production efforts, it should disclose this to the opposing side as soon as reasonably possible, given that a failure to disclose could create bigger problems down the road.

III. RECENT CASE LAW REGARDING "DISCOVERY ON DISCOVERY"

Despite best efforts, disputes will undoubtedly continue to arise regarding a party's preservation or collection efforts. Below are some recent examples of how courts are treating these types of "discovery on discovery" requests.

A. Burden of Establishing "Adequate Factual Basis" to Take Discovery

***Freedman v. Weatherford Int'l Ltd.*, No. 12 CIV. 2121 LAK JCF, 2014 WL 3767034 (S.D.N.Y. July 25, 2014):**

- In *Freedman*, the District Court was faced with the task of deciding whether it was appropriate to compel defendants to produce reports summarizing multiple discovery search results for prior related litigation in order to compare such results to those in the current case. *Freedman*, 2014 WL 3767034, at *2. Plaintiffs had already obtained the search terms that defendants used in the prior litigation, but argued they needed the

reports to compare the results adequately. *Id.* Although the court noted that "collateral discovery" is sometimes warranted, the court found that "the burden of demonstrating *relevance* is on the party seeking discovery." *Id.* at *3 (emphasis added). To obtain such "discovery on discovery," the court required plaintiffs to "proffer[] an *adequate factual basis* for their belief that the current production is deficient." *Id.* (emphasis added). Without such a showing, no "discovery on discovery" would be permitted. Because plaintiffs had not made such showing, the court denied plaintiffs' motions to compel. *Id.*

***Mortg. Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.*, No. 15CIV0293LTSJCF, 2016 WL 3906712 (S.D.N.Y. July 14, 2016):**

- In *Mortgage Resolution*, the plaintiffs alleged contract, tort, and RICO claims centered on residential mortgage loans purchased from defendant. *Mortg. Resolution*, 2016 WL 3906712, at *1. During discovery, the parties filed several motions to compel, requests for protective orders, and motions to stay discovery. *Id.* The court began its review of the discovery issues by analyzing the recent proportionality amendments to Rule 26(b)(1). *Id.* at *3. As part of the proportionality analysis, the court relied on defendants' submission of a declaration from one of the defendant's "Executive Director for Electronic Platform Discovery Services – a professional who manages the firm's e-Discovery technologies and responsibilities," which they submitted as support for the burden and cost for the requested production. *Id.* at *6. Plaintiffs then requested an order for a Rule 30(b)(6) deposition of defendant's Executive Director. *Id.* The court, however ruled that "[a] party must provide 'an adequate factual basis' for its belief that discovery on discovery is warranted." *Id.* at *7 (quoting *Freedman*, 2014 WL 3767034, at *3). Because plaintiffs had not offered any factual basis to support its request for the Rule 30(b)(6) deposition, the court declined to enter the order. *Id.* Furthermore, the court

noted, "requests for such 'meta-discovery' should be closely scrutinized in light of the danger of extending the already costly and time-consuming discovery process ad infinitum." *Id.* (quoting *Freedman*, 2014 WL 3767034, at *2).

***Banks v. St. Francis Health Ctr., Inc.*, No. 15-CV-2602-JAR-TJJ, 2015 WL 7451174 (D. Kan. Nov. 23, 2015):**

- In *Banks*, the plaintiff, who had brought claims under the Civil Rights Act, sought a motion to compel the discovery of defendant's search efforts by means of answers to interrogatories. *Banks*, 2015 WL 7451174, at *1. Specifically, the plaintiff requested that the defendant "[i]dentify (1) the search terms utilized, and (2) each computers/systems searched or queried to locate electronically stored information ("ESI") responsive to these interrogatories and/or Plaintiff's Request for Production of Documents." *Id.* at *7. Additionally, plaintiff asked defendant to "[i]dentify the protocol and methods that Defendant utilized to search [its] hard drives, computers, servers, personal hand held device, phones, databases, e-mail folders, document programs and applications to locate and collect all ESI responsive to these interrogatories and/or Plaintiffs Request for Production of Documents." *Id.* Here, the court not only looked to the Federal Rules of Civil Procedure, but to its own developed guidelines on ESI discovery. *Id.* The guidelines generally discouraged such discovery, and required a meet-and-confer process and showing of good cause before court intervention. *Id.* Based on the plaintiff's failure to meet and confer with defendant and failure to show good cause, the court denied the motion to compel. *Id.* at *8. However, the court left open the possibility that plaintiff could reopen the motion by "showing specific instances and examples from which the Court could reasonably conclude that Defendant did not make

reasonable and adequate efforts to preserve or collect relevant information and thereby justify discovery concerning Defendant's preservation and collection efforts." *Id.*

The above cases illustrate that courts will require the requesting party to provide "an adequate factual basis" establishing a retention or production shortcoming before allowing any "discovery on discovery." In addition, the burden is upon the requesting party to establish that the scope of the discovery sought is relevant and proportional to the needs of the case.

B. Litigation Holds and Other Privilege Concerns

Privilege and confidentiality concerns arise when a party receives a request for "discovery on discovery." Although a responding party may argue that their litigation hold notice should be considered confidential or privileged, the courts may not always agree. Consider the following examples:

***U.S. ex rel. Barko v. Halliburton Co.*, 74 F. Supp. 3d 183 (D.D.C. 2014):**

- In *Barko*, the court considered whether several litigation hold notices were covered by the attorney-client privilege or work product doctrine. *Barko*, 74 F. Supp. 3d at 190. The notices at issue were sent via email from the company's CEO and vice-president of the legal department to large groups of employees within the company. *Id.* The court began by noting that, in the corporate setting, the attorney-client privilege is usually limited to the sharing of the communication with "need-to-know" individuals. *Id.* at 191. Here, the notices were sent to all employees, who were in-turn encouraged to share the notice with other employees who may not have seen it. *Id.* The notices also did not include warnings or directives regarding their potential confidential nature. *Id.* Thus, the court concluded that attorney-client privilege did not apply. *Id.* Further, with regard to the work-product doctrine, the court noted, "[a] party may discover the steps the opposing party has taken to preserve relevant information." *Id.* Moreover, the court found that the

content of the notices mostly contained descriptions of retention policies, rather than preparation for litigation. *Id.* at 191–92. Ultimately, the court found that neither protection applied and permitted the production of the notices. *Id.*

***Boyington v. Percheron Field Servs., LLC*, No. 3:14-CV-90, 2016 WL 6068813 (W.D. Pa. Oct. 14, 2016):**

- In *Boyington*, which involved Fair Labor Standards Act and state wage law claims, the plaintiff issued interrogatories seeking "'a list of names of individuals who received a litigation hold notice for this case, along with the dates of transmission and the categories of information that were addressed therein.'" *Boyington*, 2016 WL 6068813, at *11. Defendant responded by claiming attorney-client privilege and work product protections. *Id.* Further, the defendant argued, "a threshold finding of spoliation is necessary before the production of litigation-hold notices is appropriate." *Id.* The court noted "[a]s a general matter hold letters are not discoverable, particularly when a party has made an adequate showing that the letters include material protected under attorney-client privilege or the work-product doctrine." *Id.* However, discoverability of the holds hinged on the showing that they were actually protected, and defendant failed to show that "the attorney-client privilege or work-product doctrine appl[ied] to the information surrounding the preservation efforts." *Id.* This, coupled with what the court considered legitimate concerns over defendant's preservation efforts, led the court to order responses to the interrogatories. *Id.* at *12. Although the court ordered defendant to respond to the interrogatories, it also ruled that defendant need not produce the hold notices themselves. *Id.*

Accordingly, a party may face an uphill battle to protect the discoverability of a litigation hold if opposing counsel has made the required preliminary showing to take "discovery on discovery." However, even if the court determines that the litigation hold itself should be produced, the party should make all appropriate efforts to protect attorney-client privilege and work-product protections as to additional forms of "discovery on discovery." In other words, even if the litigation hold itself is not protected, this does not mean that protections are waived as to what in-house or outside counsel advised the company regarding how to comply with the litigation hold, or collection and production efforts made in the context of litigation.

C. Forms of Discovery Allowed if Preliminary Showing Is Made

In the event that the requesting party establishes an adequate factual basis, relevance, and proportionality for "discovery on discovery," there are several forms of discovery that could be pursued: informal discovery, interrogatories, document requests, requests for admission, and Rule 30(b)(6) depositions. In the Seventh Circuit, before serving any requests for discovery about preservation and collection efforts, the parties must confer about the need for and relevance of the discovery, and suitability of alternative means for obtaining the information. 7th Circuit Electronic Discovery Committee, Principles Relating to the Discovery of Electronically Stored Information at Principle 2.04(b) (Rev. 8/1/2010). Outside of local guidelines and requirements, however, the law does not appear to require a requesting party to select one form of discovery over another.

No matter what form of discovery is pursued, areas of inquiry may include:

- When litigation was or should have been reasonably anticipated;
- Company policies, procedures and practices for litigation holds;
- Timing and content of litigation holds;
- Implementation of litigation holds, including recipients;

- Any audits performed of litigation hold practices;
- Collection methods and sources for production;
- Search methods for production; and/or
- Potential alternative sources of data, including back-up tapes.

* * *

In short, efforts to pursue "discovery on discovery" are likely to continue to increase. Whether you are seeking such discovery or trying to avoid or minimize it, the key considerations will be proportionality, whether there is an "adequate factual basis" establishing a retention issue, relevance, attorney-client privilege and work product protection. Parties also should consider whether there are steps that can be taken to try to work out as many of these issues as possible before seeking court intervention.