COURT MANAGEMENT OF DISCOVERY IN COMPLEX CASES

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Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability," WASHINGTON LAW REVIEW
Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution, NEW YORK UNIVERSITY LAW REVIEW
In Defense of Targeted ERIPs: Understanding the Interaction of Life-Cycle Employment and Early Retirement Incentive Plans, TEXAS LAW REVIEW
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TABLE OF CONTENTS

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Multiparty actions, class actions, actions consolidated for pretrial proceedings, and other complex cases present special challenges for discovery. Hopefully, the judge in your case will be familiar with court management techniques for overcoming the obstacles presented by these types of cases. If not, however, you will need to take the lead in proposing to the other parties and the court mechanisms for managing discovery so that discovery does not spiral out of control.

I. INITIAL CONFERENCE

Court management of discovery in complex cases should start early. In federal court, the initial conference and initial disclosure processes are designed to identify early in the case the challenges parties expect to face in discovery. In state court, you may need to request an initial conference with the court, move for the entry of a detailed scheduling order and pray that you have a judge who will enforce strictly the deadlines and limits on discovery imposed therein.

A. The Scheduling Order

1. Deadline to Add Parties

Establishing an early and firm deadline for adding parties is probably the most important thing a court can do to ensure that discovery in a complex case does not become a mess. Nothing creates more problems than a new party being added after depositions have already been taken in the case by other parties. The new party will have a powerful argument for re-deposing those witnesses it believes are crucial to the new party's defense, and the new party's document production may raise new facts and avenues for exploration for each or some of the other parties, resulting in others joining in on the request for second depositions. This increases the costs of litigation tremendously and dramatically increases motion practice as those who have already sat for deposition oppose having to sit a second time or seek restrictions on the time and scope of second depositions.

2. Staging Discovery

In complex cases (as well as some not so complex cases), courts often bifurcate discovery into fact and expert. Doing so avoids the frequent problem of experts not having all the facts they need at the time their reports are due, which results in experts "supplementing" their opinions after reports are due through deposition or otherwise, which then results in fights over the scope of opinions and requests for exceptions to the schedule. It also makes sense to defer expert discovery until other discovery is completed to give the parties a clearer sense of what expert testimony is truly needed.

One reason to not bifurcate discovery is if expert testimony is required for the quantification of damages. It is very difficult to settle a case when a defendant's exposure is uncertain. Courts should ensure that bifurcation orders do not discourage settlement by delaying discovery necessary to damage quantification.

B. Motions to Dismiss

1. Oral Identification of Defects

Some courts require parties to identify at the initial conference what defects they believe require motion to dismiss practice. Oftentimes, the court can determine through such a discussion whether the defect is curable or whether motion practice is worthwhile. For example, courts are frequently opining at initial conferences whether they think *Twombly* motions are likely to be well-received.

2. Employing a Limited Stay

One controversial but efficient tool for managing discovery in complex cases is the automatic stay upon dispositive motion. Federal courts more often than state courts will employ an automatic stay upon service of a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) or 12(c). While discovery of documents, electronically stored information and tangible things may proceed pursuant to Rule 34, all other discovery with respect to any claim that is the subject of the motion is stayed pending the Court's decision on the motion.

This approach makes sense in complex cases for several reasons. First, it is most efficient to complete document production before proceeding to deposition discovery anyway. The time the motion is pending can be used for that purpose. Second, if depositions proceed while motions to dismiss are pending, there is a significant risk that parties will spend substantial time and resources on claims that do not survive. Because motions to dismiss often result in leave to replead, the nature of the case can change as a result of rulings on such motions and thus again affect the conduct of depositions.

The automatic stay of discovery beyond document discovery during the pendency of a motion to dismiss is controversial in large part because some courts take many months if not a year or more to rule on a pending motion to dismiss. In that event, plaintiffs are disadvantaged greatly by this procedural mechanism. This is not a problem in Texas state court. Pursuant to Texas Rule of Civil Procedure 91a, the Court must rule within 45 days of filing. Tex. R. Civ. Proc. 91a.3(c).

C. Protective Orders

The court should enter a protective order at the start of the case so as to avoid delays in the production of documents. The protective order should include a "snap back" provision that allows parties to "snap back" or

"claw back" any document inadvertently produced that is privileged. This type of provision will increase the speed with which parties can produce documents, because parties do not have to be petrified that if a privileged document is overlooked during the production of terabytes of data, the production will be argued to constitute a waiver of privilege.[1]

Until a non-waiver order is entered, the parties should agree (or the court should order) that information that contains privileged matter or attorney work product shall be immediately returned to the producing party (i) if such information appears on its face that it may have been inadvertently produced or (ii) if the producing party provides notice within 15 days of discovery by the producing party of the inadvertent production.

D. Privilege Logs

While you are discussing protective orders with the court, see if you can get an order as to what does not need to be logged on a privilege log. In complex cases, the amount of electronic data and documents can be overwhelming, which means privilege logs can become ridiculously long. Spreadsheets with 60,000 rows are not fun for anyone to review.

Propose to the opposing party, and absent agreement, see if the court will order, that the privilege log need not include:

1) Communications exclusively between a party and its trial counsel.
2) Work product created by trial counsel, or by an agent of trial counsel other than a party after commencement of the action
3) Internal communications within a law firm, a legal assistance organization, a governmental law office or a legal department of a corporation or other organization2
4) With respect to privileged or attorney work product information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.
5) Activities undertaken in compliance with the duty to preserve information.3
6) In a patent infringement action, documents authored by trial counsel for an alleged infringer even if the infringer is relying on the opinion of other counsel to defend a claim of willful infringement.

These categories of documents have been recognized by various courts to be appropriate for exclusion from privilege logs.

E. Service

E-filing has greatly simplified service in most courts. In courts that do not offer e-filing, the parties should agree or, absent agreement, ask the court to order email service. It is the most cost efficient and prevents counsel from playing games by faxing materials at 3 am or shifting back and forth between mail, fax and email. Even in cases where there is e-filing, it is most efficient if the Court orders that the parties establish email groups for plaintiff and defense counsel for service of materials not required to be filed with the court.

In addition, if your case is one of 50 that has been consolidated for pretrial cases, consider asking the court to order all parties to specify in the caption of their filing whether a filing relates to all actions or just one particular case in the consolidation. This is a standard requirement in multi-district litigation, where filings relating to all actions are filed on the mater docket and otherwise are filed in the associated individual actions. Specifying to which action a filing applies in the caption is a small thing that saves a tremendous amount of time as you start to receive 20 e-filing notices each day.

II. DOCUMENT DISCOVERY

In complex litigation, electronic discovery can often be overwhelming. Courts have dealt with the enormity of the task in a variety of ways.

A. Excluding Certain Categories of ESI

Many courts hold that absent a special circumstance back-up tapes, voicemails and mobile phones are not reasonably accessible. While these may be important sources of data in some cases, they are not easily swept into one data repository and often require tremendous expense to access.

B. Using Search Terms

In nearly all complex cases, parties will need to use search terms to locate responsive electronically stored information (ESI). The court should specify a protocol for the exchange and agreement or objections to search terms. For example, the court might require that the parties exchange a list of search terms they plan to use, allow a short window for discussion and objection, and resolve disputes over search terms by teleconference.

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[1] Such a provision does not protect inadvertently produced privileged material from being claimed to constiutte a waiver in a separate state court case, however.

[2] These first three categories come from a Memorandum from the New York State Bar Association Commercial and Federal Litigation Section to the Office of Court Administration (May 14, 2014).

[3] These categories are from the District of Delaware's Default Standard for Discovery, Including Discovery of Electronically Stored Information.

Alternatively, the court might simply mandate that a producing party disclose its selected search terms and that the requesting party may add no more than 5 additional search terms absent good cause and ruling of the court. In that event, the court will need to order that the terms to be added be focused and not overbroad. Otherwise, a requesting party might increase unnecessarily the cost and burden of discovery by proposing the use of a broad search term (e.g. product or company name). Of course, the court could counteract that incentive by holding up front that any search term returning more than a certain number of megabytes of data is presumed overbroad.

Regardless, it is much better to have the court and parties spend time resolving disputes about search terms before they are employed, documents reviewed and productions made than to have a producing party have to redo all the steps of its search and production months into the case when someone objects to the search terms used. The court should establish a similar protocol for determining for which custodians ESI will be searched.

As an example, parties in patent cases in the Eastern District of Texas must specifically request emails in production requests and identify the custodian, search terms, and time frame to be searched. Absent agreement of the parties, each party may only identify five custodians per producing party and ten search terms per custodian.

C. Specifying Formats

The court may require the parties to meet and confer to agree on the format for ESI production. Alternatively, the court may simply order certain features of the production. For example, many courts require in complex cases that ESI be produced in a format that is searchable (e.g. TIFF with a companion text file) and can be loaded into a database. As an example, the Eastern District of Texas specifies for patent cases the following production requirements:

> "The parties shall produce Concordance DAT and Summation DII files containing unique field delimiters and the following fields: Beginning Production Number; Ending Production Number; Extracted or OCR text . . . if the producing party extracted text or OCR'ed the documents."

The court may further order that files not easily converted into image format be produced in native format (e.g. Excel, Access files, and drawing files). Courts also often require that metadata be produced. For example, the Easter District of Texas generally requires for patent cases the following metadata to be produced "if reasonably accessible to the producing party":

- Beginning Attachment Range;
- Ending Attachment Range;
- Custodian;
- Author or Sender;
- Recipient(s);
- Carbon copy (CC) recipients;
- Blind carbon copy (BCC) recipients;
- Date Sent;
- Date Modified;
- Date Created;
- Title;
- Email Subject; and
- Confidentiality Designation.

D. Requiring Bates Labeling

The court should also order that no documents may be produced without a unique Bates Number. While standard in most complex cases, because there is no Bates labeling requirement in Texas state courts, litigants should be sure to raise the issue at the start of the case. Nothing is worse than receiving 50 boxes of documents that are not Bates labeled; the documents are incredibly hard to work with, and the receiving party often ends up having to Bates label the materials itself in order to track the materials. By the same turn, the court should order that on-site inspection of electronic media shall not be permitted absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties to cut down on gamesmanship.

E. Organizing Distribution

As noted above, many courts order that productions are to be made simultaneously through all counsel using a common email group for all plaintiffs or defense counsel. In a criminal case, a Northern District of California federal court ordered that every time the government produced information it was to post it to a website that generated an automatic email to all counsel, notifying them of the update.

F. Technology Assisted Review

Technology Assisted Review (TAR), also referred to as predictive coding or computer-assisted review, is becoming more commonplace. While I know of no court that has compelled the use of TAR, every court to have considered TAR has approved it as a legitimate discovery tool. In cases where you are the plaintiffs, and a defendant is claiming it will take eighteen months to review and produce responsive documents (even after using agreed-upon search terms), you might want to suggest the defendant use TAR to speed up the review. Of course, if you do so, be prepared to pay for it. TAR is expensive, and, while you can argue TAR will save the defendant costs overall (by saving on attorney time),

as far as I could discover, no court has yet compelled a party to use TAR.

If you use TAR, the cases suggest that you need to be very transparent as to how you conducted the search and production. Some cases suggest this transparency includes even producing the seed set of documents; however, at least one court has approved the substitution of non-confidential documents for the nonresponsive material that was in the seed set but the producing party did not want to produce to a competitor, not privileged materials that it did not want to use.

III. DEPOSITIONS

The federal rules and Texas state court rules both provide limits on the number of depositions to be taken per side. In complex cases, however, those limits are likely to be set aside. For example, in a case where two plaintiffs were suing 62 defendants, 10 depositions per side were clearly not going to be sufficient. The plaintiffs had the right to depose every defendant, and the number of material witnesses was in the hundreds.

A. Preventing Surprise

Courts can reign in deposition discovery, however. First, courts can order that any witness listed for trial be produced for deposition within the month following the exchange of witness lists. This removes the incentive to depose every prospective witness so that a party is not surprised at trial.

B. Eliminating Expert Depositions

Second, courts can consider eliminating expert depositions all together by ordering that experts produce -- and be limited to opinions contained in -- comprehensive expert reports pursuant to the Federal Rules of Civil Procedure. The effectiveness of this approach depends on the decisiveness of the particular judge presiding as parties will always argue about whether a particular opinion elicited at trial is within the scope of the report served.

C. Limiting Deposition Length

Next, courts can consider curtailing the time allotted for depositions. For example, in a mass tort action where there were hundreds of individuals to be deposed on substantially similar claims, the court limited depositions to 3 hours each and ordered that depositions occur in a location close to where the action was brought, 2 a day, back to back other than for lunch, double tracked in 2 week blocks each month until the depositions were completed. Alternatively, courts can require that depositions be taken on a sample basis with verified interrogatory responses to a standard set of questions being served in lieu of depositions for the rest.

By the same turn, in cases that are consolidated for pretrial discovery, corporate representative depositions can be categorized into topics common to a side and specific to a party. For example, in a case where 62 different actions had been consolidated for discovery, the 62 defendants wanted to depose the corporate representative of the plaintiff for 62 days, arguing that each defendant had questions specific to only it and was entitled to a full deposition day. On the other hand, the plaintiff contended that its corporate representative should have to sit only for one day. The court properly rejected both extreme and ordered the parties to meet and confer on a middle ground. One middle ground that could be ordered is to require the defendants to propose their list of topics and streamline them into common topics and specific topics, allowing for a few days on common topics and an hour or two each on specific topics. A court in another matter set a blanket rule that there could be no corpore representative deposition longer than 24 hours.

D. Coordinating Deponent Lists

Next, the court can require that a side with multiple parties coordinate to come up with a common list of deponents. Where a side involves more than 50 defendants, coordination can be difficult, time consuming and expensive. Nonetheless, a coordinated proposal for witnesses to be deposed will be more efficient than 50 parties arguing for their own individual lists.

E. On Call Judges During Depositions

The most effective means to ensure smooth deposition discovery may be having the court available to resolve by telephone any discovery dispute that arises during the course of the deposition. Knowing that the judge is only a phone call away has a wonderful tendency to make lawyers more reasonable, and telephone conferences eliminate the opportunity to use discovery disputes to obstruct the litigation. Establishing this procedure at the outset of a case greatly reduces the number of discovery disputes.

F. Other Limitations

Some courts get into the weeds in governing the depositions in complex cases. For example, in one case, the court imposed the following limitations:

- Parties intending to use exhibits at a deposition must bring at least 2 copies for the witness and witness' counsel and at least 6 additional copies for other counsel present.
- The party noticing the deposition must arrange conference call access to accommodate those wishing to participate by phone.
- Those wishing to participate in a deposition by phone must give 72 hour notice; however, failure to provide such notice is not grounds to exclude the

person failing to give such notice absent action by the court.

- Those intending to attend the deposition in person shall try to inform the noticing party at least 5 days before, but failure to do so is not grounds to prevent those persons from attending absent action by the court.
- Expert witnesses can attend depositions, but no more than 2 expert witnesses for any single party may attend in person.
- Depositions may be scheduled Tuesday-Friday from 9 a.m. to 6 p.m. with a break from 12-1, unless otherwise agreed by the parties.
- No depositions will be scheduled for legal or court holidays unless agreed by the parties.
- Depositions of non-parties shall be noticed for suitable physical accommodations sufficient to accommodate the number of attorneys reasonably believed likely to attend.

While legislating through court order such small details may seem to some to be overkill, the order minimizes the number of issues that need to be coordinated amongst the parties and thus minimizes the disputes, often petty, that can result and require court intervention later.

IV. DISCOVERY DISPUTES

A. Monthly Status Conferences

Because of the number of counsel in complex cases, courts usually set monthly status conferences. In complex cases, there are always going to be discovery disputes; the issues presented are difficult, and the number of lawyers involved often makes it hard for the parties to reach consensus on every aspect of discovery. Instead of leaving the parties to fight for limited hearing time on the court's docket, courts often set aside a 2 hour conference every month and require the parties to set all their motions to be heard at that time. Courts frequently choose Friday afternoons to disincentivize taking excessive amounts of the court's time!

Monthly status conferences also provide an opportunity for the court to find out about problems that might throw the schedule off before the problems ruin the schedule. For example, in one case, an involuntary bankruptcy petition was filed against one of the plaintiffs in a complex matter. Unlike a voluntary bankruptcy proceeding, an involuntary bankruptcy proceeding does not give rise to an automatic stay against all litigation; instead, during the gap period between the filing of the involuntary bankruptcy and the bankruptcy court granting the petition so as to place the debtor into bankruptcy, an automatic stay arises only as to claims pending against the company. Consequently, the stay did not derail the state court litigation but did throw a wrench into it, since the company could continue with its claims but the defendants could not proceed with their claims against the company. This type of occurrence is more easily dealt with if flagged earlier rather than later, since the court could stay the entire matter and direct the parties to obtain relief from the stay in bankruptcy court.

B. Pre-Motion Teleconferences

In addition to monthly status conferences (or sometimes in lieu thereof), courts may prohibit parties from filing discovery motions without going first through a pre-motion conference process. Usually, the court will require each side to submit a letter with a 1-3 page limit and then hold a teleconference to discuss the discovery dispute. If the discovery dispute is not resolved through the teleconference, the court will authorize motion practice to begin and a hearing to be sent.

Some courts in the Southern District of Texas do this. Many courts in the Southern District of New York do it. Some practitioners do not like the process because it ends up feeling like having the discovery fight twice.

C. Special Master

Some courts appoint a special master to oversee discovery. The advantage is that the special master generally has more time than the Court to resolve discovery disputes. The disadvantage is that special masters are expensive.

D. On Call Judges

Federal judges have the luxury of using magistrate judges to assist them with complex cases. One frequent use of magistrate judges in these types of cases is to designate a magistrate judge as the "on call" judge each week to resolve discovery disputes that arise during depositions. As discussed above, this is a very powerful technique to avoid wasted litigation costs by addressing problems as they come up during depositions and they frequently do away with the problems all together. It is amazing how much better attorneys behave and how much more they can resolve when they know that a judge is actually available to hear them should either party call.

E. Privilege Disputes

Judges can speed up privilege disputes by requesting the parties submit letter briefs on the legal issues and the documents for in camera review. While no judge enjoys having to review a box of documents, judges can effectively decrease privilege disputes by being willing to do so. At least one judge I know has forced the parties to sit with him in the courtroom while he reviewed every challenged page!

V. HEARINGS

A. Eliminating Oral Argument

Monthly status conferences can easily morph into all day hearings if the court does not impose tight controls. One of the easiest ways to limit the length of status conferences is to limit motion hearings held during the conferences to opportunities to answer the court's questions. In those cases where the court has read the briefing, oral argument to restate the points made in the papers is unnecessary, and everyone is better off if the court just asks the questions it has after reading the briefs. Some judges employing this practice notify the parties of the court's questions prior to the argument, so as to ensure the parties come prepared and do not waste further time by being unable to answer the court's questions.

B. Ruling from the Bench

While largely out of the litigants' control, judges are better off ruling from the bench in complex cases at least with regard to the discovery issues that are not complex. Usually, issues do not become easier to resolve with time. Instead, judges forget the points made at oral argument as time passes, creating more work for the judge who has to refresh her recollection by reviewing her notes. In addition, ruling from the bench can obviate the need for writing opinions. While some motions will require a thought out written analysis, most motions can be ruled upon orally with the court reporter providing the record of the court's order. Ruling from the bench saves the court time and work and moves the case more quickly than taking motions under advisement.

VI. CONCLUSION

Courts can significantly streamline litigation in complex cases by imposing tight controls on discovery. While litigants cannot control the court, litigants can propose the mechanisms being employed in complex cases around the country to other parties and the courts in their cases. Doing so decreases the cost of litigation and the headaches often endemic to discovery in complex cases.