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SYMPOSIUM 2025

Negotiating Discovery

Don't Throw Away Your Shot



Agenda

- ESI Protocols and The Meet & Confer
- Ask The Experts
 - Strategic Approaches to Negotiating ESI Protocols
 - Messaging, Modern Data, and Emerging Challenges
 - Visibility, Transparency, and Gamesmanship
 - Clients: Internal Dynamics and Communication
 - Disputes and Judicial Involvement
 - Looking Ahead: What's Next
- Final Thoughts
- Questions

ESI Protocols and The Meet & Confer

Negotiating Discovery: Don't Throw Away Your Shot

What is an ESI Protocol?

- An agreement between the parties of a litigation to conduct discovery in a specific way
 - It can be entered by the court as a *stipulated order* or as a *discovery order*
- Is an *ESI Protocol* the same as an *ESI Stipulation* or a *Discovery Plan*?
 - FRCP Rule 26(f)(3) describes the content of the Discovery Plan as part of the Meet & Confer process.

Do You Need an ESI Stipulation?

- First inquiry: is it *required* by the court?
- If not required, why might you still want one?
 - Predictability
 - Cost Savings
 - Consistency
 - Sword Approach
 - Shield Approach



When Do You Not Want an ESI Stipulation?

- If you don't understand it! Never agree to a provision you don't understand.
 - Seek out your experts, they're there to help.
- If the amount of time spend negotiating the agreement is not worth the outcome.
- As a corporate client, you might not want agreements to specific provisions out there for other litigants to use against you in different matters.
- Strategically, you may want to keep your discovery plans private, unless you must disclose them.

The Meet & Confer: How Do Reconcile This Tension?

Cooperation



Zealous Advocacy

- FRCP Rule 26(f) asks us to make a good faith attempt to agree on discovery issues as part of a joint proposed discovery plan.
- We are required to “meet and confer” to find areas of common ground—chess pieces that can be removed from the game board to narrow the issues.
- *The Sedona Principles*, No. 6: “Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own [ESI].”
- In other words: We don’t need the court or the other side telling us how to meet our obligations until/unless we’re deficient.

Ask the Experts

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Ask the Experts

Strategic Approaches to Negotiating ESI Protocols



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Messaging, Modern Data, and Emerging Challenges



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Visibility, Transparency, and Gamesmanship



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Clients: Internal Dynamics and Communication



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Disputes and Judicial Involvement



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Looking Ahead: What's Next





Final Thoughts

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Questions

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