



New Considerations in Negotiating ESI Protocols

BY IAN D. MCCAULEY, ESQUIRE

There are many factors outside of an attorney's control that can cause litigation costs to rise. One of the main drivers of litigation costs is the ever-increasing amount and variety of discoverable data. The proliferation of client data and the myriad modes of communication cannot be stopped or contained. Some things, however, are still within a litigator's control.

One effective method of controlling litigation costs is through the negotiation and agreement of a protocol governing discovery of electronically stored information ("ESI"). The negotiating of an ESI Protocol is required in the Complex Commercial Litigation Division of the Superior Court, the Default Standard in the District Court of Delaware governs the exchange of ESI, and ESI issues are discussed in the Court of Chancery Guidelines.

ESI Protocols can range from the simple to complex, and typically cover such topics as the format

of production, how search parameters should be applied against data, and the method through which documents are exchanged. The advent of new data types, creation of new sources of data, and advanced analytics, however, have introduced more complex issues into discovery; parties may want to address these subjects in the ESI Protocol to streamline litigation and reduce costs.

Below are some relatively new discovery concerns one may consider when negotiating an ESI Protocol.

Establish a Common Language

Litigators often use different words and phrases when talking about the same concept. For example, some attorneys refer to "processing" of data while others may call it "indexing." One may call "loading" what others refer to as "promotion." "Threading" may often be confused with "deduplication." Even the term "production" can mean multiple things. Defining these various terms can streamline negotiations so that opposing counsel are not speaking past one another.

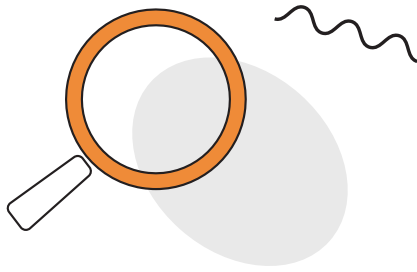
Modern Attachments

The concept of email parents and document attachments and how they are treated has long been something that litigators have dealt with in discovery. A new type of relationship to consider is "modern attachments." These are typically hyperlinks to cloud-based storage or document management systems embedded in email communications. Sharing documents in this way has become much more common and this issue has now made its way into the discovery space.

Typically, the documents contained in these hyperlinks are not automatically picked up during document collection.



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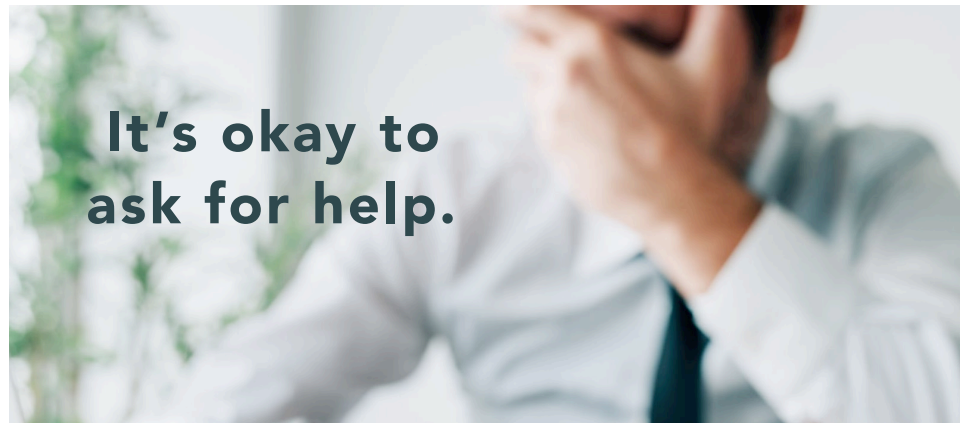
Regardless, the documents referred to in these hyperlinks are often sought in document requests. When negotiating an ESI Protocol parties should be mindful of how their records custodians utilize hyperlinks, and the implications of agreeing (or not) to collect and produce the documents. It is important to consider how the hyperlinked data will be produced; parties that agree to produce emails in sequential order with hyperlinked documents must be prepared for a significant amount of manual work to first collect and then ensure that the documents are placed in the agreed upon order. Others may choose to produce the hyperlinked documents, but not in any specific order.

Text and Instant Message Communications

Text messaging is perhaps the foremost way people communicate on a personal level and it has become commonplace in business as well. Solutions such as WhatsApp are popular abroad and becoming more common domestically. As discovery of these types of communications has become normalized, many counsel find themselves at a loss in determining how best to search and produce them.

Text messages taken on a one-by-one basis may not make much sense in a vacuum. Attempting to search single text messages using traditional keywords often fails to recover relevant information. But viewed together, the conversation begins to paint an intelligible picture. Because of this, parties may choose to treat whole groups of text messages as one document, broken down on a temporal basis (daily, weekly, etc.). One way of

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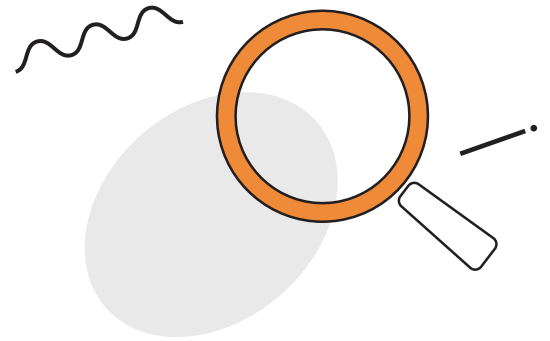
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accomplishing this is to utilize the Relativity Short Message Format (“RSMF”).

It is important to note that individuals often are more relaxed and freewheeling when communicating via text. Multiple subjects may be tackled in a small space of time. This means parties choosing to go the RSMF route may inadvertently agree to produce clearly irrelevant information that occurs within the same timeframe as the relevant communications, since text messages that are grouped together are treated as one “record.” This is something to consider prior to agreeing on how to handle text messages.

Emojis have become important as well, and it is important for counsel to determine whether these will be included in production, since these can be lost during the processing of text messages.

Email Threading

One of the most effective methods of controlling costs is to reduce the number of documents to be reviewed. An effective way of doing this (beyond the obvious methods of search term testing, date restrictions, or technology assisted review) is to only review or produce the most inclusive email in a thread. This means that if four distinct emails have been exchanged, only one will be reviewed, since the most recent email would include all prior content from the other three emails. Exceptions are

often made for non-inclusive emails that contain unique attachments or branch off into separate conversations.

Most vendors now offer automatic threading which will isolate only those most inclusive threads. Parties should decide whether manual threading should be allowed and should also discuss whether non-inclusive threads should still be produced, even if only inclusive threads are reviewed. This is important to discuss, because while inclusive emails will include all the content of a conversation, they will not include all metadata (or header information).

Metadata Fields

Format of production and metadata fields are commonly included in ESI Protocols. What is often missed is the inclusion of specific metadata fields that assist the receiving party with organizing the documents it has received. For example, producing parties may want to include metadata that will allow the receiving party to quickly identify documents that contain redactions, have been produced in native, have been slip sheeted as privileged, contain higher levels of confidentiality, or have been produced pursuant to specific document requests or interrogatories.

Exclusion of Sources of Data

Counsel may want to avoid processing sources of data that have a small likelihood of containing relevant docu-

ments. Rather, more targeted solutions should be considered. Counsel must balance this through effective custodian interviews and storage methods. For example, a custodian may point to a handful of relevant documents on a laptop. These documents may be organized in a specific folder. Parties can save significant costs by only collecting that folder, rather than collecting an entire hard drive. Parties should weigh including language in the protocol that allows for more targeted collection of data, with appropriate safeguards, while also considering Courts’ guidance regarding self-collection.

In addition, parties may decide that the cost and expense to collect certain sources of data is not proportional to the needs of the case, or just may not result in a large amount of probative documents, and mutually agree to not collect or search those sources. For example, this could apply to voicemails, certain system log files, and proprietary databases.

Negotiating the above topics may appear to be a tedious process, but incorporating these issues into an ESI Protocol may result in significant cost savings to clients while avoiding motion practice and promoting cooperation. These are only some of the topics one should think about when beginning the negotiating process. 🎧