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Lessons Learned From the Overuse of ESI Protocols

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While not found in the Federal Rules of Civil Procedure (FRCP), ESI protocols are tools the Judiciary and Bar developed in the early days of e-discovery to limit unnecessary discovery disputes and reduce discovery costs.

At their heart, ESI protocols are intended to be a *voluntary* agreement between the parties, which may be entered as orders by the court to improve enforcement, regarding how certain aspects of discovery should be accomplished. In exchange for voluntary transparency regarding how the responding party will conduct discovery and an agreement on specific reasonable efforts, the receiving party agrees to those efforts are reasonable and proportional limits to discovery. In theory, the requesting party gains transparency and knowledge that discovery will be done in a reasonable way, and responding parties gain cost certainty and limits on the scope of discovery.

While nice in theory, as a practical matter, as courts and practitioners have slipped into thinking such agreements are mandatory and responding parties who push back on them are obstructionist or obfuscating, ESI protocols have become a Frankenstein monster of requirements

that create obligations well beyond the Federal Rules of discovery, addressing a vast array of discovery topics including search terms, privilege logs and technology-assisted review (TAR). Ironically, parties can spend more time discussing ESI protocols than they spend on document requests and productions themselves.

What lessons can we take away from the overuse of ESI protocols?

ESI Protocols Should Support—Not Hinder—Compliance with Discovery Obligations

Courts should exercise more caution in imposing ESI protocols in the face of a party's

objections absent a compelling reason or clear evidence of obstructionism. As explained in *In re Diisocyanates Antitrust Litigation*, by Special Master Judge Francis when he refused to impose plaintiff's proposed ESI order: "[the] principle that the producing party is the master of its methodology is a deterrent to imposing a requesting party's proposed procedures unless it is evident that the producing party is unable to come up with a reasonable alternative." MDL No. 2862, 2021 WL 4295729, at *12 (W.D. Pa. Aug. 23, 2021).

Similarly, in *In re Apache Corp. Securities Litigation*, where plaintiffs objected to defendants' plan to search for and produce documents, the court refused to "unilaterally impose an ESI order dictating all manner of internal review protocols" No. 4:21-CV-00575, 2023 WL 5322444, at *1 (S.D. Tex. Apr. 10, 2023) (internal quotations omitted).

We should remember that these protocols are voluntary and both sides should receive a benefit to the bargain they are striking. Because discovery is self-executing, where a court preemptively imposes a certain process of discovery on a party, they are effectively finding there is only one reasonable way to conduct discovery.

ESI Protocols: Snapshots in Time with Limited Flexibility To Address New Information

ESI protocols have become contracts and, like contracts, courts will mandate compliance with stipulated discovery protocols even where circumstances that existed when the ESI protocol was entered have changed. Where ESI protocols are too specific, a litigant may deprive themselves of valuable evidence, discovered later, if the opposing party weaponizes the existing ESI order by arguing that the parties agreed that certain types of applications were out of scope.

In *Latin Markets Brazil v. William McCardle,* the court denied a motion to compel production of text messages where the ESI protocol negotiated by the parties stated that text messages did not need to be collected or produced even though other discovery indicated that communications may have happened over LinkedIn and text messages. 79 Misc. 3d 1224(A) (N.Y. Sup. Ct. July 14, 2023).

While parties may be able to renegotiate the ESI order—in fact, it is often contemplated in the protocols themselves—parties rarely do and courts, who are not huge fans of discovery in the first place, do not want to reopen that can of worms. This natural and understandable reluctance creates inefficiencies as parties cannot adapt to the changing conditions of their cases, data, documents or technology.

ESI Protocols Can Be Highly Technical in Nature, Leading to Potential Compliance Issues

Significant problems can arise where technology has evolved in the months or years since the protocol was executed or where parties do not fully comprehend the ramifications of the ESI protocol. *See Cody et al v. City of St. Louis*, No. 4:17-CV-2707 AGF (E.D. Mo. June 16, 2021) (denying plaintiffs' motion to compel defendants to produce documents in their native format with metadata where parties, through the ESI protocol, had agreed to produce documents in PDF format previously).

Litigants should have a firm understanding of the technical aspects of the ESI protocol, especially provisions relating to new technologies, such as hyperlinked documents. As courts wrestle with the question of whether hyperlinked documents should be treated as attachments for discovery purposes, one factor is consistent: courts will uphold whatever provisions parties

agree to with respect to hyperlinked documents in their ESI protocols, even if the parties later discover that those agreements are *impossible* to honor.

In *In re Refund Litigation*, parties stipulated to an ESI protocol that required the production of hyperlinked documents with their document families. 2023 WL 3092972 (N.D. Cal. Apr. 25, 2023). Even though it had agreed to produce the hyperlinks, the defendant eventually found that it was extremely difficult, if not impossible, to produce the hyperlinked documents for reasons outside their control.

The court did not find the defendant's challenges to produce hyperlinked documents persuasive, and in granting plaintiffs' motion to compel, the court urged parties to "get back to basics: Litigants should figure out what they are able to do *before* they enter into an agreement to do something." *See Nichols v. Noom*, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021) (rejecting the requesting party's demand for production of hyperlinked documents after noting that "the court does not agree that a hyperlinked document is an attachment" and finding the fact that the producing party had already produced the hyperlinked documents separately and the fact that the "ESI order does not treat hyperlinked documents as attachments" persuasive).

Refund Litigation is a cautionary tale for litigators: parties must understand each nuance and technicality of the ESI protocol before agreeing to it. Ironically, the same parties and lawyers who would understandably object to answering interrogatories early in matters before they have an opportunity to fully understand the facts of their cases, will be forced to agree to ESI protocols that tie their hands on discovery process before they have any meaningful chance to understand the pertinent IT systems or data at issue.

ESI Protocols Can Lead to Preservation Quagmires

As Judge Francis noted, data gets lost in nearly every case. *Orbit One Communications v. Numerex*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010) (stating that there is a "likelihood that some data will be lost in virtually any case …"). Rule 37(e) was adopted in 2015, in part, to limit the court from imposing sanctions for the loss of ESI caused by merely negligent preservation. F.R.C.P Rule 37 Committee Notes on Rules—2015 Amendment. Rule 37(e)(1) only allows courts to impose corrective measures and prohibits more draconian sanctions unless the court finds "and intent to deprive" under Rule 37(e)(2).

However, if an ESI protocol becomes an order and requires "reasonable steps to preserve" and a party makes an unreasonable mistake, then the court is no longer bound by Rule 37(e) and can sanction the party and its lawyers for failing to comply with a court order under Rule 37(b)(2)(a). Thus, the same conduct, can lead to two very different results, simply because the party agrees to include the relatively banal sentence "all parties agree to take reasonable steps to preserve" in their ESI protocols.

For example, in *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, the parties agreed to take certain steps to preserve their ESI, including issuing legal holds and interviewing agreed upon custodians to determine where they kept their relevant information. *In re Keurig* shows that simply agreeing to "take reasonable steps to preserve" in an ESI Protocol that later becomes a court order can undermine a party's rights under the Federal Rules.

Model ESI Orders Are Becoming a Problem in Their Own Right

To assist parties who were less familiar with e-discovery, many courts developed Model ESI

Orders that provide suggested provisions for ESI protocols. They were meant to be a guide to practitioners and parties in considering whether an ESI protocol was a good idea for their case and if they could reach an agreement as to the logistics and parameters of discovery.

In the authors' experience, Model ESI Orders become de facto orders even though it is *not required*—or even mentioned—in the FRCP and may not be appropriate given that what is reasonable in discovery is highly dependent on the nature of the parties; the context and scope of litigation; and the documents and data at issue. Where a model order is used as the starting point in the negotiation, there is no longer an even bargaining ground because it puts an impermissible burden on the party who is opposed to using the Model ESI Order, which is often the responding party, to prove why it is not appropriate given the facts of the case.

Courts should be clear with the parties that Model ESI Protocols are meant to be instructive and not mandatory. They should not place a burden on parties to prove or convince the court that any (or all) provisions of a model order do not work in a particular case or for a particular party.

Takeaways

Litigants should ensure that they understand each aspect of an ESI protocol prior to executing it and that they can honor the provisions set forth. Remember:

• **Is it really necessary?** Parties should ask themselves: Do we really need an ESI protocol at all? If so, is every provision really necessary? Less can be more.

• **Retain flexibility**: ESI protocols are negotiated and entered early in cases before either party knows the scope of discovery. Provide for flexibility and limit the requirements so that they are safe harbors, but reasonable conduct is always acceptable.

• **For evolving technology**: Use general language that is not tied to specific applications.

• **For preservation:** Confirm that it is possible to comply with any preservation provisions before finalizing the ESI order.

• **For model ESI orders**: Recognize that Model ESI Orders are templates and parties should adjust the provisions to reflect the needs of the case.

• **For any provision:** If you do not understand a provision, do not agree to it. Instead, offer to meet and confer with opposing counsel as specific issues arise.

• **Agreement to meet and confer**: Be explicit that an agreement to meet and confer on a future issue (i.e., search terms or TAR) is not an agreement to agree or gives the requesting party a veto on your process.

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