

TOWARDS A NEW PARADIGM FOR E-DISCOVERY IN CIVIL LITIGATION: A JUDICIAL PERSPECTIVE

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Abstract

The Federal Rules of Civil Procedure provide the basic framework for production of discovery that is relevant and proportional to litigants' claims and defenses. In the past, litigants and attorneys far too often used these rules to obstruct the discovery process rather than to facilitate it. This Old Discovery Paradigm used overbroad discovery requests, boilerplate discovery responses, dilatory behavior, and a lack of cooperation among opposing counsel. However, with the emergence of ever-expanding technologies using email, texts, and other forms of electronic communication, the modern legal system requires a New E-Discovery Paradigm to govern how litigants, their counsel, and judges utilize the federal discovery rules when dealing with the vast amount of electronically stored information involved in most civil cases. A New E-Discovery Paradigm must emerge if our modern legal system is to leap into the twenty-first century and effectively and economically deal with ESI. This New E-Discovery Paradigm contains at least ten crucial core components that illuminate and ultimately execute the language and intent of the drafters of the most recent amendments to the Federal Rules of Civil Procedure.

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INTRODUCTION

Jurists, attorneys, and litigants are routinely confounded, frustrated, and hampered by unnecessary electronic discovery (e-discovery) disputes in civil litigation.¹ Since virtually all discovery is now e-discovery, these

1. See, e.g., Sam Skolnik, *Judges Frustrated by Lawyers' Lack of E-Discovery Expertise*, BNA (Feb. 12, 2019), <https://www.bna.com/judges-frustrated-lawyers-n57982096160/> [<https://perma.cc/8ZZM-GD2F>] (noting that many judges “remain frustrated by the lack of e-discovery expertise of many lawyers who appear before them”).

disputes infect every aspect of litigation.² They often become the proverbial “tail wagging the dog,” that is, the discovery process often drives many months or years of contentious and oftentimes unnecessary litigation, which delays the ultimate resolution of the case on the merits—whether by trial, summary judgment, settlement, or otherwise.

This Article is written from the perspective of a jurist. In general, judges want the discovery process to be fair to all parties, efficient, and cost-effective. The discovery process must be an aid, not a hindrance, to the just, speedy, and inexpensive resolution of every civil action, as required by Federal Rule of Civil Procedure 1.³ Judges want the parties to obtain the discovery they need to attempt to prove their claims or defenses while avoiding wasteful or unnecessary discovery.

This Article first briefly discusses the old paradigm of discovery, which is likely quite well-known to many seasoned litigators and jurists. This Article discusses the old discovery paradigm for only two reasons. First, this Article discusses this old paradigm to dismiss it and hopefully help in relegating it to the depths of “Discovery Hell.” Second, this Article contrasts the old discovery paradigm with the new e-discovery paradigm, which will enhance, accelerate, and improve the e-discovery process in civil actions.

This Article will next discuss the emerging, new paradigm for e-discovery in litigation, including its ten most crucial core components. This new paradigm is a practical approach from a judge who has observed and presided over numerous discovery disputes and battles. It incorporates many concepts that other groups and organizations, including the Sedona Conference, have been advocating for several years. This Article does not suggest that this proposed e-discovery paradigm is the end of the road; rather, it is a paradigm that others will hopefully consider and improve upon as courts progress in dealing with the thorny issue of e-discovery in the twenty-first century.

I. THE OLD DISCOVERY PARADIGM

The traditional paradigm of discovery is a contentious, pugilistic, take-no-prisoners approach where litigants demand extensive, far-reaching, mind-numbing, and overwhelming discovery with no real

2. See William Gleisner, *The Rise of E-Discovery*, THOMSON REUTERS: LEGAL SOLUTIONS BLOG (June 2, 2014), <https://blog.legalsolutions.thomsonreuters.com/practice-of-law/rise-e-discovery/> [<https://perma.cc/6PQR-MTTB>] (“[I]n the past ten years[,] courts and practitioners have made major strides in the area of e-discovery.”).

3. See FED. R. CIV. P. 1 (“[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

concern for cost, proportionality, or burdensomeness.⁴ In fact, one of the goals of propounding discovery in the traditional paradigm is to wear the other side down with a large volume of nearly repetitive discovery requests in an effort to make life as difficult as possible for the opponent.⁵ As a driving force behind this part of the old paradigm, litigants ask for virtually everything under the sun (including the proverbial kitchen sink) in an effort to make the battle exceedingly costly for their opponents with the hope that perhaps they will fold their tent and go away.⁶ Also, with legal malpractice a prevalent thought in the litigator's mind, surely the client could never say his attorney forgot to ask for something if the attorney had asked for everything theoretically possible—in numerous, repetitive, overbroad requests!⁷

The responding litigant is often equally diabolical, raising page after page of boilerplate, redundant, picayune, and obscure objections with the goal of frustrating the opponent and producing as little discovery as possible.⁸ Under this old paradigm, respondents pride themselves on making as many objections as humanly possible, admitting or saying nothing or next to nothing, and making their opponent's discovery process exceedingly costly and akin to pulling sharks' teeth in the dark.⁹ As a driving force behind this part of the old paradigm, litigators try to look tough to their opponents (and clients) to make the opposing party and counsel realize they are in for a costly and lengthy legal battle.¹⁰

At the top of this old paradigm is the tired and weary judge who must review numerous, contentious discovery motions, responses, and replies;

4. See, e.g., Michael R. Nelson & Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH., no. 4, 2006, at 1, <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1253&context=jolt> [<https://perma.cc/46JQ-MJVC>] (explaining that traditional discovery principles created “burden, expense and uncertainty”).

5. See John C. Koski, *From Hide-and-Seek to Show-and-Tell: Evidentiary Disclosure Rules*, 17 AM. J. TRIAL ADVOC. 497, 497 (1993) (“Discovery may be abused purposefully by the unscrupulous lawyer who seeks to wear down an opponent by repetitive and costly discovery practices.”).

6. See *id.*; see also Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352, 357 (1982) (“[D]iscovery benefits a litigant by allowing him to threaten to impose costs—in the form of burdensome requests—upon his opponent.”).

7. See Koski, *supra* note 5 (“Fearing . . . the risk of malpractice liability . . . lawyers leave no stone unturned.” (quoting William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178, 178–79 (1991))).

8. See, e.g., Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 928 (2013).

9. See, e.g., *id.* (listing some of these diabolical boilerplate objections and noting that this “add[s] to an already expensive process of discovery”).

10. See, e.g., *id.* at 927 (“The practice of using boilerplates objections imposes monetary costs on clients and the litigation process. The major cost is time.” (footnote omitted)).

sit through endless discovery hearings; review numerous overbroad discovery requests and boilerplate objections; babysit the warring attorneys; and ultimately decide what should be produced and what should not be produced. Acting as a referee in these discovery slugfests is a waste of judicial resources. Due to time constraints and the press of many other cases, judges may make decisions with little information about what the case is really about and without much help from counsel who bitterly battle, routinely seek sanctions against their opponent, and make no real attempt at cooperation. This procedure leads to inevitable and lengthy delays in the ultimate resolution of the case, causes exorbitant financial costs to the litigants, and often causes the discovery process to consume the bulk of the litigation.¹¹

The old discovery paradigm is unsustainable in the twenty-first century where extensive electronic data accumulates and expands at a staggering rate and where e-discovery predominates. Judges—supported by the amended Federal Rules of Civil Procedure (which took effect on December 1, 2015),¹² the Sedona Conference principles,¹³ and the United States Supreme Court Chief Justice’s 2015 Year End Report¹⁴—can no longer tolerate such discovery shenanigans. It is well past time for the legal field to move on to a new discovery paradigm.

II. THE NEW E-DISCOVERY PARADIGM

The new e-discovery paradigm contains, at least, the following ten core components:

- 1) proper and timely preservation of potential discovery;
- 2) prompt and complete Rule 26(a)(1) initial disclosures;
- 3) targeted and precise discovery requests;

11. See Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 2 REV. LITIG. 71, 72 (1981) (“Unjustified demands for and refusals to provide discovery prolong litigation and increase its costs.”).

12. See, e.g., FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment (explaining that the 2015 amendments to the Rules emphasize that courts and parties have a joint responsibility to administer the Rules in a way that ensures a “just, speedy, and inexpensive determination of every action” while considering the proportionality of discovery in resolving disputes).

13. See generally, e.g., THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2d ed. 2007) (discussing the impact of e-discovery and electronically stored information (ESI) on modern discovery).

14. JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–8 (2015), www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [<https://perma.cc/56SA-975M>] (discussing issues relating to ESI).

- 4) complete discovery responses devoid of boilerplate and meritless objections;
- 5) professionalism, cooperation, and honest good faith, personal conferral among the parties' counsel when the inevitable discovery dispute arises;
- 6) limitation of discovery by the court to discovery that is relevant and proportional to pending claims or defenses, as required by Rule 26(b)(1),¹⁵ and elimination of wasteful or unnecessary discovery;
- 7) early and routine involvement of the parties' in-house information technology (IT) professionals during the discovery process;
- 8) use of e-discovery companies, vendors, and experts to assist as needed in litigation;
- 9) greater reliance on technology assisted review (TAR), search terms, sampling, artificial intelligence, and other scientific or technical methods to aid, hasten, and economize the discovery process in a transparent and reliable manner; and
- 10) active participation of judges in the discovery process and prompt resolution of any discovery disputes by the court.

Though this list of core components may seem lengthy to a reader, this Article will now break them down piece-by-piece into a digestible paradigm.

III. THE CORE COMPONENTS OF THE NEW E-DISCOVERY PARADIGM

A. *Core Component 1: Proper and Timely Preservation of Potential Discovery*

In the U.S. Court of Appeals for the Eleventh Circuit, for example, a duty to preserve arises when litigation is pending or is reasonably foreseeable.¹⁶ Other circuits may have slightly different standards, but all

15. See FED. R. CIV. P. 26(b)(1) ("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 . . .").

16. See, e.g., *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 301 (11th Cir. 2009); *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, No. 14-cv-62216, 2016 WL 1105297, at *3 (S.D. Fla. Mar. 22, 2016).

circuits have a duty to preserve at some point.¹⁷ So, what is a company, person, or attorney to do when civil litigation is pending or reasonably foreseeable? The simple answer—preserve.

Proper, timely, and complete preservation of potential discovery avoids spoliation claims and possible sanctions under Federal Rule of Civil Procedure 37(e).¹⁸ Spoliation motions are virtually always time-consuming for the court to resolve, and they often require lengthy evidentiary hearings.¹⁹ If litigants properly preserve discoverable information at the outset, they can avoid spoliation issues during litigation.

Companies of all sizes need to have a vigorous, effective, and justifiable preservation policy in place. A valid and effective document retention policy needs to be in place and must be periodically reviewed and updated. Further, that company policy needs to be transparent, followed, and enforced. A company's Information and Technology (IT) professionals are crucial in the preservation process.²⁰ The company's IT professionals know, for example, the automatic deletion policy or process, and they know how to stop it for preservation purposes. For this reason, they are essential.

Attorneys representing individuals or entities who find themselves involved in litigation, or for whom litigation is reasonably foreseeable, need to instruct their clients about the clients' preservation obligations relating to text messages, emails, social media, and other electronically stored information (ESI), and to ensure preservation from the outset. Whether this means that attorneys should, at the outset of their representation, make a copy of the individual client's cell phone, computer hard drive, or other electronic device or storage, or alternatively hire an ESI vendor to work with a company's IT staff to preserve data or take some other reasonable action, the attorney should ensure that this is done.

It is important to understand that preservation is a two-way street. In the pre-litigation phase where litigation is reasonably foreseeable, it applies equally to both potential defendants and plaintiffs.²¹ Although

17. See, e.g., FED. R. CIV. P. 37(e) (requiring federal litigants to preserve ESI).

18. See *id.*

19. See, e.g., Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH. TELECOMM. & TECH. L. REV. 1, 3 (2011).

20. See generally Philip Favro, *Defensible Deletion: The Touchstone of Effective E-Discovery*, 7 TECH. FOR LITIGATOR 13 (2013) (discussing overall strategies for retaining data, including IT professionals and their crucial role).

21. See, e.g., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 498 (S.D.N.Y. 2010) (instructing the jury that "each . . . plaintiff[] failed to preserve evidence after its duty to preserve arose"), *abrogated on other grounds by* Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012).

preservation is often thought of in terms of its applicability to potential corporate defendants, including large companies, corporations, and insurers, it also applies equally to current and future plaintiffs, whether corporate or individual.²² So, for example, if an individual client comes to see an attorney about a potential Telephone Consumer Protection Act of 1991²³ claim—where the individual claims that texts were sent to his cell phone or calls were made without his consent—that client must preserve his cell phone data from the outset.²⁴ And, the attorney has a duty to advise the client and ensure that proper preservation takes place.²⁵

Timely, complete, and ethical preservation of ESI at the outset is required of all parties, whether corporate or individual.²⁶ Preservation is the building block upon which the discovery process is based. To have an effective discovery process, there must first be an effective and valid preservation process. On a going-forward basis in the area of ESI preservation, there will be significant challenges due to the viral and creative nature of proliferating communication tools, collaboration devices, and social media platforms. That is, the challenge will be, how does one preserve data in a cost-effective manner when that data is so voluminous, varied, and constantly changing and morphing in this modern electronic age?

Therefore, the first big challenge in the e-discovery context is preservation, which must reliably occur before the difficulties inherent in collecting and searching such myriad data and information can be discussed. As time relentlessly goes on, it is essential that litigants and attorneys rely more on ESI vendors and IT professionals in this important preservation process.

B. Core Component 2:

Prompt and Complete Rule 26(a)(1) Initial Disclosures

Federal Rule of Civil Procedure 26(a)(1) requires parties to disclose not only the identities of individuals likely to have discoverable information, but also “a copy—or a description by category and

22. See, e.g., *id.*

23. Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 (2012)).

24. See *Living Color Enters. v. New Era Aquaculture, Ltd.*, No. 14-62216-CIV, 2016 WL 1105297 at *4 (S.D. Fla. 2016).

25. See generally, e.g., *Spoilation: What's the Lawyer's Duty to Preserve Evidence?*, STATE BAR WIS. (Nov. 19, 2014), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=6&Issue=22&ArticleID=23700> [<https://perma.cc/VEP4-CY75>] (discussing the obligation to preserve evidence and the lawyer's role in advising the client).

26. See generally Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381 (2008) (discussing the duty to preserve evidence and noting that there is no uniform source for the duty to preserve, but that, nonetheless, “the duty [to preserve] is well-established”).

location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.”²⁷ Rule 26(a)(1) should not be overlooked or minimized; it is an important rule that, when parties fully comply in good faith, enhances and greatly assists the discovery process.

When used properly, Rule 26(a)(1) lays the groundwork and provides an efficient pathway for future discovery. It is akin to a roadmap showing the parties and counsel how and where discovery needs to proceed. It allows parties and counsel to make informed decisions regarding the extent of discovery necessary and how document requests should be framed.²⁸

Courts should require parties and their counsel to fully comply in good faith with the Rule’s requirements. Failure to fully comply should result in sanctions where appropriate. Full compliance will allow all parties to map out the most effective and economical discovery process, and it will allow the court to understand the discovery needs of a specific case.²⁹ Rule 26(a)(1) should be used as an important and beneficial tool; that is, the roadmap, building block, and foundation to an effective and efficient e-discovery process during litigation.

C. Core Component 3: Targeted and Precise Discovery Requests

The days of overbroad, excessive, and “any and all” discovery requests are gone. Such requests do more harm than good, especially in the area of ESI, and courts will no longer tolerate or indulge them. Judges dislike and reject shotgun discovery requests just as they do shotgun complaints. Parties and their counsel have a duty and obligation to seek only relevant and proportional documents or information in the discovery process.³⁰ Under Federal Rule of Civil Procedure 34(b)(1), parties are required to specifically “describe with reasonable particularity” the information that is being requested.³¹ Parties and their counsel must comply with this requirement voluntarily or judges will force them to do so.

27. FED. R. CIV. P. 26(a)(1)(A)(ii).

28. See RONALD J. HEDGES ET AL., *MANAGING DISCOVERY OF ELECTRONIC INFORMATION* 18–19 (3d ed. 2017).

29. See Renfrew, *supra* note 11, at 71 (“[T]he civil justice system in the United States [is] a system that depends upon the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice.”).

30. See FED. R. CIV. P. 26(b)(1).

31. *Id.* at 34(b)(1)(A).

General discovery requests for anything and everything indicate that a party's counsel is making no real attempt to seek only relevant and proportional documents or information. Discovery requests, including requests for production, must comply with the proportionality requirements of Rule 26(b).³² Discovery requests must be limited in time and scope, and must take into account the requisites of the case and the pending claims or defenses.³³ Again, if the parties' counsel will not make these efforts, the court will require them to do so.

Discovery requests must consider the costs or burden to the responding party—and not endeavor to unnecessarily increase that burden or cost.³⁴ Parties and their counsel who fail to properly target their discovery requests to the pending claims or defenses violate the discovery rules and risk incurring the ire of the presiding judge.

D. *Core Component 4:*
Complete Discovery Responses Devoid of Boilerplate
and Meritless Objections

Core Component 4 is the other side of the coin that this Article discusses regarding Core Component 3. Simply stated, boilerplate and meritless objections to discovery requests are no longer justified or permitted.³⁵ Yet, incredibly, they continue to exist.³⁶ Under Rule 34(b)(2), a party responding to discovery must state objections with specificity.³⁷ For example, the timeworn phrases of “vague,” “overly broad,” and “unduly burdensome” are, without specifics, utterly meaningless and will be rejected out of hand.³⁸ Improper discovery responses of this type can no longer exist in the twenty-first century world of ESI.

Frequently, discovery responses will first list page after page of so-called “general objections” and then go on to incorporate those general objections into each numbered discovery response, along with additional objections apparently designed on some obtuse level to respond to the specific numbered discovery request in mind. This type of response is often followed by the meaningless statement that, “subject to the

32. *See id.* at 26(b).

33. *See id.*

34. *See id.* (“Parties may obtain discovery . . . proportional to the needs of the case, considering . . . whether the burden or expense of the proposed discovery outweighs its likely benefit.”).

35. *See Jarvey, supra* note 8, at 919 (“[B]oilerplate objections do not serve the goals of the Federal Rules of Civil Procedure . . .”).

36. *Id.* at 925.

37. FED. R. CIV. P. 34(b)(2)(C).

38. *E.g., Spencer v. City of Orlando*, No. 6:15-cv-345-Orl-37TBS, 2016 WL 397935, at *2 (M.D. Fla. Feb. 2, 2016).

foregoing objections,” the responding party will produce documents responsive to the request. Such responses are improper and expose the responding party and counsel to potential sanctions. Responses of this type provide the opposing party and the court with no clue whatsoever as to what is being produced or withheld. These hodgepodge, all-inclusive objections routinely include baseless privilege objections such as attorney–client privilege or work product protection without the production of the requisite privilege log.³⁹ In the words of the late Justice Scalia, such responses are “[p]ure applesauce.”⁴⁰

The improper use of boilerplate, meritless, mind-numbing objections, following along in-kind with the improper use of overbroad, excessive, and disproportionate discovery requests, is anathema to an efficient, relevant, proportional, cost-effective, and fair discovery process. If you or your firm are engaging in any of these tactics, please stop now!

E. Core Component 5:

Professionalism, Cooperation, Honest Good Faith, and Personal Conferral Among the Parties’ Counsel When the Inevitable Discovery Dispute Arises

Litigation is adversarial. Parties and their counsel routinely have divergent views regarding the validity of claims or defenses. That is to be expected. Hard-fought, important litigation proceeds daily in this nation’s state and federal courts. But just because litigation is adversarial does not mean that it has to be hostile. Nor does it mean that the parties and their counsel must be uncooperative. In fact, hostility and lack of cooperation in litigation between parties and their counsel are counterproductive.⁴¹ Hostility and lack of cooperation unnecessarily increase costs and attorneys’ fees, as well as greatly delay the prompt and efficient resolution of a case.⁴²

39. A party asserting a privilege, such as attorney–client privilege or work product privilege, must promptly prepare and serve a complete privilege log. *See* Fed. R. Civ. P. 26(b)(5); S.D. Fla. L.R. 26.1(e)(1). It is important for litigants to understand that a privilege claim can be waived by failure of the party asserting the privilege to serve a timely and proper privilege log. *Devries v. Morgan I Co. LLC*, No. 12-81223-CIV, 2013 WL 3243370, at * 3 (S.D. Fla. 2013); *Alvar v. No Pressure Roof Cleaning, LLC*, No. 17-80725-CIV, 2018 WL 1187777 (S.D. Fla. 2018).

40. *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

41. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 516 (1994) (explaining that cooperation between both parties is beneficial).

42. *See id.* at 564 (noting that adversarial cooperation allows “both sides [to] make every attempt to move the case to resolution as simply, expeditiously and cost-efficiently as is reasonably possible”).

Discovery disputes routinely arise in litigation,⁴³ which is to be expected. However, when the inevitable discovery dispute arises, it is incumbent upon opposing counsel to engage in good faith, personal conferral to resolve the discovery dispute without the necessity of judicial intervention. When independent resolution proves impossible, counsel should, at the very least, endeavor to limit the discovery dispute. In many instances, opposing counsel are unable to resolve discovery disputes even after good faith conferral. Issues of attorney–client privilege or work product protection, for example, can be thorny and may require judicial resolution. But the vast amount of discovery disputes can and should be resolved by competent counsel who are well versed and trained in e-discovery concepts.

Law school curriculum should include discovery law and training, especially in the context of e-discovery. Law students need to learn from the outset what e-discovery is, how to navigate its contours through effective use of e-discovery tools, the rules and case law that govern e-discovery, and how to engage in effective and cooperative resolution of e-discovery disputes so as to best represent future clients.

Likewise, law firms and governmental agencies need to teach and train their attorneys and legal staff in e-discovery law, concepts, and tools. The benefits of effective, good faith cooperation among opposing counsel and parties must be paramount in this training process. Law firms and agencies should study and take to heart the Sedona Conference’s Cooperation Proclamation, which promotes “cooperative, collaborative, [and] transparent discovery.”⁴⁴

Cooperation and zealous advocacy are not conflicting concepts under professional conduct rules.⁴⁵ In fact, cooperation among opposing counsel, especially in the e-discovery context, is part and parcel of effective, zealous advocacy. Back in 2009, William Butterfield stated, “If parties are expected to continue to manage discovery in the manner envisioned by the Federal Rules of Civil Procedure, cooperation will be necessary. Without such cooperation, discovery will become too expensive and time consuming for parties to effectively litigate their disputes.”⁴⁶

Nearly a decade later, those words continue to ring true. Lawyers who cooperate with one another in the discovery process are not abdicating their roles as zealous advocates. Rather, they are more effectively

43. Renfrew, *supra* note 11, at 71–72 (“[A]buse of the judicial process . . . is widespread. [Such a]buse . . . occurs most often in connection with discovery.” (footnote omitted)).

44. THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION 1 (2008).

45. See William P. Butterfield, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 344 (2009).

46. *Id.* at 362.

representing their clients by saving their clients' time and money during the discovery process so the case can proceed quickly and expeditiously to its final conclusion.

F. *Core Component 6:*

Limitation of Discovery by the Court to Discovery That Is Relevant and Proportional to Pending Claims or Defenses, as Required by Rule 26(b)(1), and the Elimination of Wasteful or Unnecessary Discovery

On a daily basis, federal judges, especially United States Magistrate Judges, deal with the discovery process and discovery disputes. The amendments to the Federal Rules of Civil Procedure in general, and to Rules 1 and 26(b)(1) in particular, have been extremely helpful and valuable in the discovery process and in the resolution of discovery disputes. The increased emphasis upon relevancy and proportionality, both of which must be considered in conjunction, was a welcomed amendment that reverberated throughout discovery-related opinions and orders in federal courts.⁴⁷ While the evolution of case law interpreting the revised Rule 26(b)(1) is out of this Article's scope of discussion, the underlying spirit of these amendments and resultant opinions seems clear.⁴⁸

The goal in discovery under the amended rules is to ensure that the parties obtain the information necessary to prove their claims or defenses without engaging in frivolous, wasteful, or overbroad discovery pursuits. The discovery process should be fair to both sides in every case and must take into account the requisites and facts of each case while keeping the discovery process moving in an efficient and cost-effective manner. John Roberts, Chief Justice of the United States Supreme Court, has weighed in on the discovery process under amended Rule 26(b)(1):

The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.⁴⁹

47. See, e.g., *Blackrock Allocation Target Shares: Series S. Portfolio v. Bank of N.Y. Mellon*, No. 14 Civ. 9372, 2018 WL 2215510, at *6–7 (S.D.N.Y. May 15, 2018).

48. See, e.g., *id.*

49. ROBERTS, *supra* note 14, at 7.

The parties' counsel must be at the forefront of the discovery process and must keep these concepts in mind when requesting or responding to discovery. Counsel must ensure that they and their clients comply with the letter and spirit of these new rules.

G. Core Component 7:

Early and Routine Involvement of the Parties' In-House Information Technology (IT) Professionals During the Discovery Process

It is clear that a company's IT professionals should be the first and best source of information and knowledge regarding the company's network, its configuration, and the extent and location of a company's data. Why counsel do not routinely contact their client's IT experts before responding to discovery is confounding.

Sometimes, counsel will claim that production in response to their opponents' discovery requests would be extremely burdensome and would cause their clients to incur thousands if not hundreds of thousands of dollars. When judges ask counsel if they have been in touch with their clients' IT professionals or if counsel have obtained an affidavit or declaration of their clients' IT professionals attesting to the great expense and burden claimed, the answer is often that they have not. Why such a step would not be taken by counsel before making such a claim of excessive burden or cost makes little sense, especially in the spirit of due diligence.

Email, still a major source of discovery, can be difficult to locate, collect, and produce without the assistance of the company's IT professionals. Disputes can occur over how such discovery must be produced—either in native format with metadata or in Adobe PDF format—and the difficulty in recovering responsive emails. Text messages, chats, and new communications technologies add to the e-discovery menu and exacerbate these problems.⁵⁰ At times, the counsel opposing an e-discovery request will emphatically state how difficult and expensive it will be for the client to produce the discovery, while counsel for the party pursuing the discovery will emphatically state that all the responding party has to do is push a few buttons to obtain the discovery. But, shockingly, neither side has an IT professional's affidavit or declaration to back up those claims.

During litigation, the parties should bring their respective IT professionals into the e-discovery process early and often. In appropriate cases, the IT professionals of opposing litigants should be required to confer and mutually suggest reasonable procedures to ensure the accurate

50. See, e.g., Thomas Bonk, *Modern Communication Brings E-Discovery Challenges*, LAW360 (July 16, 2018, 4:06 PM), <https://www.epiqglobal.com/epiq/media/thinking/ediscovery/modern-communication-brings-ediscovery-challenges.pdf> [<https://perma.cc/2RHN-7QNF>].

location, collection, and production of relevant and proportional discovery to avoid wasteful and unnecessary discovery pursuits. In the discovery process and during discovery disputes, the IT professional is the attorney's best friend. Judges do not want to hear attorneys' unsupported claims of great burden or expense; rather, they want facts from IT professionals upon which they can make a reasoned decision. For this reason, the new paradigm requires attorneys to get their client's IT professionals involved in the discovery process and in dealing with discovery disputes.

H. *Core Component 8:*
Use of E-Discovery Companies, Vendors, and Experts
to Assist as Needed in Litigation

In many cases, it is not enough to rely solely on the party's IT professionals to ensure that discovery is preserved, collected, and produced in a transparent and legally justifiable manner. Instead, it is becoming increasingly important for parties and their counsel to retain outside e-discovery experts or vendors.⁵¹

This is because while a party's IT professionals will know and understand that party's system and network, they are not normally data collection experts. That is, they often do not possess the technological skill or knowledge to collect data in a manner that will withstand the level of scrutiny a legal proceeding brings. Collecting data for parties to use as evidence in a legal proceeding is a complicated process that must be undertaken by professionals who can certify that the procedure followed is proper and complete.⁵² Moreover, e-discovery experts can employ tools and programs that can make the discovery process more efficient.

The use of e-discovery experts provides an attorney with the support needed to represent to opposing counsel that the client has engaged in robust discovery collection, review, and production. Further, if a discovery dispute arises, counsel can credibly argue to the court that their

51. See, e.g., *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 168 (3d Cir. 2012) (“[B]ecause the electronic discovery services are highly technical and beyond the expertise of the [litigants’] own attorneys . . . retaining experts to perform the services are unavoidable.”).

52. See, e.g., Brian Focht, *EDiscovery Experts: The Secret Weapons of Modern Litigation*, CYBER ADVOC. (July 29, 2015), <http://www.thecyberadvocate.com/2015/07/29/ediscovery-experts-secret-weapon/> [<https://perma.cc/354J-E23X>] (advocating for the hiring of e-discovery experts because lawyers do not typically have the expertise necessary to properly collect this data); see also Tyler D. Trew, *Ethical Obligations in Electronic Discovery*, A.B.A. (June 5, 2018), <https://www.americanbar.org/groups/litigation/committees/professional-liability/practice/2018/ethical-obligations-in-electronic-discovery/> [<https://perma.cc/5P5Q-WPY7>] (noting that the “pitfalls” regarding the collection of data “could result in judicial sanctions, ethical violations, and malpractice claims” against a lawyer if the lawyer is not knowledgeable in this complicated arena).

clients engaged in a transparent and legally justifiable discovery collection, review, and production process. Counsel can more forcefully argue and establish that their clients are not hiding the proverbial ball, and counsel will likely have the necessary foundation and support to avoid or rebuff an opponent's sanctions motion.

The use of such e-discovery experts, vendors, or companies can provide a measure of comfort to the court as well when having to deal with complex discovery disputes. In fact, it is becoming more common for judges to suggest to parties that their respective e-discovery experts communicate with each other and cooperate in an effort to make the discovery process as efficient, economical, and complete as possible.⁵³

The reliability and efficiency of the discovery process can be greatly enhanced by the use of e-discovery experts in appropriate cases. As the legal field embarks further into the twenty-first century and encounters new, rapidly evolving technologies and ever-expanding data sources, the use of e-discovery companies, vendors, and experts will become more than a luxury, but in many cases, a necessity.

I. Core Component 9:

Greater Reliance on Technology Assisted Review (TAR), Search Terms, Sampling, Artificial Intelligence, and Other Scientific or Technical Methods to Facilitate the Discovery Process in a Transparent and Reliable Manner

Moving forward, there will, by necessity, be greater reliance upon technology to assist in discovery collection, review, and production.⁵⁴ It appears, however, that many litigants, attorneys, and judges are simply not prepared for the technological advances that can provide extensive assistance in the e-discovery process.⁵⁵ The use of technology to assist the parties, counsel, and courts in discovery collection, review, and production is rapidly evolving and holds great promise if properly guided and directed.

Data is pervasive and rapidly expanding. According to one legal commentator, “[I]n 2013, 90% of all the world’s data was created within

53. See, e.g., THE SEDONA CONFERENCE, *supra* note 44, at 1–3; see also *Capitol Records, Inc. v. MP3Tunes, LLC*, 261 F.R.D. 44, 47 (S.D.N.Y. 2009) (acknowledging that a party “reflected a failure to heed [the] Magistrate Judge[’s] . . . recent ‘wake-up call’ regarding the need for cooperation concerning e-discovery”).

54. See, e.g., Stephen Embry, *2018 Litigation & TAR*, A.B.A. (Dec. 5, 2018), https://www.americanbar.org/groups/law_practice/publications/techreport/ABATECHREPORT2018/2018LitTAR/ [<https://perma.cc/N8C9-ZF8M>] (“The percentage of lawyers *not* using technology in the courtroom continues to drop: 20.6% in 2018 . . .”).

55. See *id.* (explaining that about 58% of lawyers only obtain courtroom technology training from the court itself).

the previous two years alone.”⁵⁶ That commentator went on to correctly state, “The rise of ‘big data’ and the commensurate rise of ‘big discovery’ have drastically altered the quantity and types of information produced throughout the discovery phase in litigation.”⁵⁷ It is a fact of modern life that many of the words that we use to communicate, write, text, email, chat, and speak are captured and collected by various devices, programs, or systems. As stated by U.S. Magistrate Judge John M. Facciola, “The first problem is that this explosion of words has been matched by the ever-increasing capacity of machines to capture and preserve them.”⁵⁸

The old discovery paradigm is ill-suited to this data explosion. The new discovery paradigm is much better and able to handle it, relying in great part on a scientific methodology known as technology assisted review (TAR), which is also known as “predictive coding” or “computer assisted review.”⁵⁹ According to the Electronic Discovery Reference Model (EDRM) at Duke Law School:

A machine-learning process known as technology assisted review (TAR) is an early iteration of AI for the legal profession.

. . . .

TAR is similar conceptually to a fully human-based document review; the computer just takes the place of much of the human-review work force in conducting the document review. As a practical matter . . . the computer is faster, more consistent, and more cost effective . . . than human review alone.⁶⁰

TAR can search extensive amounts of data better, faster, more accurately, and cheaper than humans.⁶¹ In effect, TAR involves skilled humans teaching a computer to rapidly, accurately, and reliably search

56. Josh Blane, Note, *Drowning in Data: How the Federal Rules Are Staying Afloat in a Flood of Information*, 45 RUTGERS L. REC. 65, 65 (2017), <http://lawrecord.com/2017/12/27/drowning-in-data-how-the-federal-rules-are-staying-afloat-in-a-flood-of-information/> [<https://perma.cc/4W97-8VU5>].

57. *Id.*

58. John M. Facciola, *Foreword* to Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 1, 3 (2013), <https://www.fclr.org/fclr/articles/html/2010/grossman.pdf> [<https://perma.cc/BM3A-XBHM>].

59. *See, e.g., Technology Assisted Review*, EDRM AT DUKE LAW SCH., <https://www.edrm.net/frameworks-and-standards/technology-assisted-review/> [<https://perma.cc/L7RD-NCC9>].

60. EDRM AT DUKE LAW SCH., BOLCH JUDICIAL INST., TECHNOLOGY ASSISTED REVIEW (TAR) GUIDELINES, at iv (2019).

61. *See id.*

and identify relevant documents within large sets of data.⁶² This means that lawyers or teams of lawyers do not have to sit in a room and risk losing their eyesight reviewing countless documents to determine those that are relevant for production and those that are irrelevant. In conjunction with TAR, the use of search terms to help identify relevant documents and the use of sampling of certain data sets are methods that must be understood and employed in the e-discovery process.⁶³

Many in the legal profession are hesitant to embrace TAR, Artificial Intelligence (AI), search terms, sampling, and related tools or technology. But embrace it they must.⁶⁴ TAR, AI, and other technological advancements are the only way to deal with e-discovery collection, review, and production in twenty-first century litigation. The data explosion requires legal practitioners and the courts to adopt new machine-learning methods such as TAR and AI to reliably and fairly economize and hasten the e-discovery process.

This does not mean that lawyers and judges will be replaced by machines in the e-discovery process. Far from it. Lawyers and judges will be assisted, not displaced, by this new technology. And this complicated and technological process will require the use of e-discovery experts to assist the litigants, their counsel, and the courts in finding the best way to obtain relevant documents from large batches of data. Cooperation among opposing counsel will greatly help in this process, but cooperation will not always carry the day. Disputes will surely arise regarding the methodology of TAR and the types of tools to be utilized by the parties' experts during the search process. For example, counsel often argue over search terms, sample sizes, and related issues, and then, somewhat desperately, they ask the court to intervene and decide those complicated issues for the parties. Although these issues are best resolved cooperatively by counsel and their technological experts, the court must be ready to quickly resolve any disputes that the parties are unable to resolve.

In sum, the cooperative use of this new e-discovery technology, and the use of e-discovery experts to assist with this new technology, is absolutely essential to a fair, balanced, cost-effective, and efficient e-discovery process in twenty-first century litigation. Therefore, litigants, counsel, and judges should consider embracing this new technology to ensure the just, speedy, and inexpensive determination of every action, as required by Rule 1.

62. *See id.*

63. *See id.* at 13, 20.

64. *Artificial Intelligence (AI) for the Practice of Law: An Introduction*, ROSS (Aug. 8, 2018), <https://blog.rossintelligence.com/post/ai-introduction-law> [<https://perma.cc/5N4H-E9CD>] (recognizing lawyers' hesitance).

*J. Core Component 10:
Active Participation of Judges in the Discovery Process and Prompt
Resolution of Any Discovery Disputes by the Court*

The new e-discovery paradigm requires the active participation of federal judges, whether district judges, magistrate judges or bankruptcy judges, during the discovery process. First, the judiciary needs to encourage cooperation among opposing counsel and litigants in the e-discovery process. Second, the judiciary should also mandate such cooperation among litigants and counsel within the bounds of zealous and ethical advocacy. Third, judges should consider taking a proactive approach to discovery so that discovery disputes do not fester and get out of hand. When a discovery dispute does arise, judges should endeavor to promptly resolve any such motion or dispute and promptly set discovery hearings when necessary.

Like adhering to a cut on one's finger, it is much easier to put some Neosporin and a Band-Aid on a discovery dispute at the outset of a case, rather than letting it fester and become infected to the point that it negatively affects the entire body of the litigation. Judges must become more like emergency room doctors and rapidly intervene in a discovery dispute to resolve it before it gets out of hand and the case becomes "infected." This requires a leadership, hands-on role by the court. As stated by Chief Justice Roberts:

Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation. Faced with crushing dockets, judges can be tempted to postpone engagement in pretrial activities. Experience has shown, however, that judges who are knowledgeable, actively engaged, and accessible early in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing.⁶⁵

Finally, judges should become knowledgeable in dealing with e-discovery and evolving technologies so that they can effectively handle e-discovery disputes in twenty-first century litigation—and they should insist that counsel appearing before them do the same.

CONCLUSION

Through a detailed explanation of each core component, this Article lays out the basic nuts and bolts of the new twenty-first century e-

65. ROBERTS, *supra* note 14, at 10–11.

discovery paradigm in civil litigation. Faced with an enormous data explosion, the legal field cannot let the volume of data exceed the ability of the e-discovery process to reliably collect, review, and produce relevant and proportional discovery in accordance with court rules.

Judges want the e-discovery process to be fair. They do not want cases to live or die solely because of an inability to obtain relevant and proportional discovery. But they also want the process to be efficient, expeditious, and cost-effective. They want to “move the case along, counsel,” while still providing necessary, relevant, and proportional discovery to all parties. This is a real challenge in twenty-first century litigation, but it is a challenge the legal field can meet so long as all stakeholders—litigants, counsel, experts, and judges—agree to work together in a collaborative effort to improve the e-discovery process in civil litigation.