Litigation News

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Pretrial Preparation

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Note from the Chair: A New Year for the Litigation Section

by David M. Rose

It is a privilege to prepare my first Note from the Chair for *Litigation News*, the newsletter of the WSBA Litigation Section. I am writing to provide an update with respect to the Section's past and upcoming activities.

As we have done in the past, we continue to focus and comment upon pending legislation that could affect the Litigation Section and its members. To that end, we are pleased to announce that the special legislative subcommittee headed by former Section Chair Bob Siderius will continue to review proposed legislation. The subcommittee takes in and reviews, if appropriate under GR12.1, all potentially relevant proposed legislation provided by WSBA and makes a recommendation to the Executive Committee regarding whether the section should take a position with regard to the legislation. The Executive Committee then votes on the recommendation and passes the results on to the WSBA's legislative liaison, Kathryn Leathers.

The Section will continue to produce newsletters with articles focusing on a specific litigation topic area. We have received positive responses to this practice over the past several years. This particular issue is focused on pretrial preparation. This issue includes articles regarding efficient case preparation, picking the correct battles during discovery, pretrial preparation insight from the bench, motions *in limine*, witness preparation, new local rules regarding electronic discovery in the Western District of Washington, and tips when introducing evidence. As we have in the past, we welcome suggestions for future topics as well as members interested in writing an article for publication in a later issue of the newsletter.

Speaking of pretrial preparation, our annual CLE was successfully completed on August 23, 2013. The CLE was well attended and we received very positive feedback from those who attended in person and online. The topics included efficient case management, motions in limine, strategic use of court rules, efficient written discovery, depositions of expert and lay witnesses, and getting the case in shape for mediation.

We are continuing our practice of community and law school outreach. We are currently preparing to hold events at the law schools at the University of Washington, Seattle University, and Gonzaga University. We present $750 scholarships to support the schools' moot court programs during each visit.

This autumn should see a lot of activity in the Litigation Section. We will do our best to keep the Section informed of all the events and resources that the Section provides to its members.

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Effective and Efficient Case Management: Streamlining Cases Without Sacrificing Quality

by Bruce Winchell

As attorneys we frequently observe inefficient and wasteful litigation practices. These practices cost clients money, reduce attorney job satisfaction and impair the quality of client representation. The good news is that there are specific practices that we can follow that can improve our case handling and our clients' satisfaction.

Effective initial case assessment

Quality case handling requires an effective initial case assessment. We invariably start with a client interview. This initial interview is crucial and should be as thorough as possible and well documented. During the interview, you should develop the chronology, potential witnesses, what they are likely to know and say, an understanding of the client's documents, and where additional documents needed for the case are located. You should ask challenging follow-up questions, such as "How do you know that?" and "Why do you believe that?" It is vital to have the client provide every document that is potentially relevant to the case at the earliest stages. In this way, between a thorough interview and a careful review and organization of documents that can be voluntarily obtained, the attorney can create a written factual chronology that is both detailed and reliable.

Having created this factual chronology, the attorney can overlay the elements of potential claims. In many cases, these can be obtained from pattern jury instructions. For other claims this may require brief legal research. This will also allow your discovery to be targeted rather than scattered.

Whole case task assignment

Most of us have experienced a rotating cast of characters performing litigation tasks on a seemingly random basis. This results from a lack of planning or because the person available at the moment of urgency ends up performing a task rather than the person who is best suited. Without effective whole case planning, many tasks are delayed to the last minute and performed as if they were essentially unforeseen until it was nearly too late.

Whole case task assignment involves making a list of the tasks to be performed at the beginning of the case through the beginning of trial. A representative list is attached as Exhibit A. Case management checklists are simply a listing of the recurring tasks associated with almost all litigation with space for internal and external deadlines, and responsible personnel. Planning in this manner results in clarity as to who is doing what so that responsibility is clearly fixed. By establishing front-loaded deadlines, you avoid a myriad of problems associated with last minute case handling. The checklist can be expanded to provide more detail. For instance, as witnesses are identified, specific attorneys or paralegals can be assigned to interview or depose them. Importantly, the checklist anticipates all relevant documents are gathered through production requests and third-party subpoenas within 90 days from the inception of the case.

A potential problem with this form of case management is that it can fall into disuse without routine follow up. A technique to avoid this is to require monthly reports or team meetings to go through the list. These follow-up techniques should be calendared at the start of a case to occur monthly. Such techniques are simply accountability mechanisms that require all team members to perform at a reliable level.

Deciding what not to do

We have all found ourselves mired in depositions that are too long, with unnecessary questions being asked, responding to motions that have little

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point to them, and attending depositions of witnesses who have only tangential relevance to case handling. This problem often stems from a lack of trial experience that can cause attorneys not to understand how discovery is actually used at trial. It can also stem from a simple lack of planning or understanding of the elements of claims and defenses.

These problems do more than waste the lawyer's time. They profoundly affect client satisfaction. While we are often limited in our ability to control the actions of our opponents, we can at least deal with our own conduct by constantly asking ourselves how everything we do will contribute meaningfully to cost-effectively winning the case. If we cannot answer this question clearly, we should question the value of what we are doing.

Outside the legal profession, an interesting illustration of this is recounted in the book, *Transforming Health Care*, by Charles Kenney (Productivity Press, 2011). This book describes the rigorous process being followed by Virginia Mason to improve and streamline its patient treatment procedures. What it has essentially done is to import the Toyota manufacturing principles into a complex service environment. It has had to overcome enormous amounts of skepticism on the part of some of its professionals. The results, however, have been clear. Virginia Mason hospital is rated near the top nationally for both quality and cost effectiveness.

A simple example illustrates the potential value of doing less. One source of patients for VM were Starbucks employees who apparently have frequent issues with back pain.VM had been routinely performing MRIs as a first step to diagnosing the problem. It often took weeks to see a doctor who could authorize this initial step. VM ultimately determined that 80 percent of these patients never needed to go through this initial step, which delayed treatment, and contributed nothing to recovery. Those 80 percent of patients could go directly to physical therapy, which was the most effective means of solving their back problems. Eliminating the initial MRIs for those patients saved their employers large sums of money and increased the satisfaction of the patients because they were treated sooner and more effectively.

While it can be counterintuitive in law that less is more, it is undoubtedly true. Much of what we do is a habit and does not "add value" for our clients.

The right amount of delegation

Effective delegation in the first instance requires a clear assignment of case responsibilities at the beginning of a litigation matter. It also involves "skill-task alignment" in which the right person performs the right task. In some cases, having paralegals interview witnesses will make sense while in others an associate or partner should perform this task. The least effective way to delegate is to have a rotating cast of lawyers or paralegals working on a matter based upon availability. Every time a new attorney works on a case, there is either a substantial learning process, or a sacrifice in quality because of a lack of case familiarity.

The right time for settlement discussions

We have all been in mediations that were ineffective because the parties were not prepared beforehand. Enough discovery should be done so that the parties understand each other's case without having to exhaust every last detail.

Conclusion

Efficient case handling is primarily a matter of taking the time at the beginning of a case to lay out the steps that will be needed for case handling, assigning responsibility and deadlines for those tasks, and working with opposing counsel to handle the case smoothly. It also requires you to constantly ask if what you are doing is valuable to your client. This will improve quality and, from the client's perspective, will add greatly to the value of the services you provide.

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Witness Preparation: What to Do, What Not to Do, and Best Practices

by Jessica Andrade & Lisa M. Marchese

"By failing to prepare, you are preparing to fail."
– Benjamin Franklin

Witness preparation can be one of the most challenging, if not frustrating, components of trial preparation. As attorneys, we spend hours upon hours to prepare our case, including witness interviews, document collection and review, discovery, and legal research. When it comes time for our clients and key witnesses to tell their story, however, we are often at the mercy of their recollection and communication skills, no matter how well we have prepared our case.

From the witness's perspective, the prospect of testifying can even be more anxiety producing. Most witnesses have never testified in a court proceeding and have no life experiences remotely similar to assuming the stand at trial. Ultimately the elements of chance and real-time flubs can never really be removed from the testimonial components of trying a case. Despite these challenges, targeted and strategic preparation can minimize risk and maximize a witness's ability to testify effectively at trial. This article will offer helpful tips and best practices for successfully preparing your witnesses for trial.

Identifying and Choosing Witnesses

Perhaps one of the most important aspects of witness preparation is simply identifying witnesses for trial. Significant strategic thought is required. The fact that a person has knowledge of material events surrounding a claim or defense does not necessarily mean that he should be a witness at trial. To identify and evaluate a potential witness, you must consider questions such as: What is it I need this witness to say? What element of a claim or defense is this witness providing or refuting? Is this witness providing new or cumulative information? Is this witness necessary for the introduction of key evidence?

After considering the substance of the anticipated testimony, you then need to consider whether the witness has the ability to communicate effectively to a fact finder. In this respect, a potential witness may present certain risks that outweigh their utility. You should consider: How will this witness hold up on cross-examination? What background or baggage does this witness bring that could affect not only her credibility but your case as a whole? How will this witness be viewed by a typical jury? In summary, you should engage in a careful risk-benefit analysis to identify and select a witness. Individuals who present more risk than potential benefit rarely make effective witnesses at trial. Here, the adage that "less is more" is one to live by.

In certain circumstances, we do not have the luxury of a choice and we may be forced to call a witness who presents considerable risk. In addition to certain preparation methods we offer herein, you should seek to narrow and focus a problematic witness's testimony as much as possible.

Preparation

When it comes to preparation, we tend to focus on our witnesses instead of ourselves. In fact, one of the keys to successful witness preparation is *attorney preparation*. Before you meet with a witness, you should know your case inside and out and be familiar with all of the documents you believe the witness may be shown during his testimony. Always draft an outline of both the evidentiary issues that you want your witness to be able to testify to, as well as the difficult questions your witness is likely to confront on cross-examination. A skilled trial lawyer should be able to anticipate the major issues that will come up in the cross-examination of her witness. There should be no surprises if you have prepared your witness effectively.

Aside from the substantive preparation for your meeting with the witness, you also need to make sure you are familiar with the local customs and practices of the courtroom where the trial will be held. Does the judge have certain practices that may bear on the presentation of testimony? How is the courtroom configured? Where is the witness box situated in relation to the jury? Ideally, you will want your witness to see the courtroom before he testifies. If this is not possible, you will want to provide your witness with a physical description of the courtroom, how it is laid out, where counsel will stand when questioning, and other details. To attorneys, this information may seem insignificant. However, to lay witnesses with little to no experience with adversarial proceedings, this information will help to de-mystify the process and build a level of comfort and confidence essential to presenting effective testimony.

Practicalities of Meeting the Witness

Thorough preparation of a witness generally cannot take place in one day. Further, a witness's attention span will only last for a few hours, if that, and she will need time to digest the information she will be given. Neither should witness preparation occur too close to the time of testimony. You do not want to meet your witness and discover a glaring potential issue with his testimony and then not have sufficient time to rectify the situation. Accordingly, try to meet with your witnesses as early and as often as possible, particularly if they will be important to your case. This is not always feasible, but it could save you a lot of headaches in the end.

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In the event you have to meet with a witness shortly before the time for his testimony, do not overwhelm the witness with information. Simply give the witness a basic outline of the essential information he will be asked, and provide him with basic tips for responding to questions on cross-examination. The last thing you want is an anxious or flustered witness, and it is better that he messes up on the small details rather than appear uncomfortable or insincere overall.

If possible, try to meet with your witness away from her workplace or home, such as in your offices or at a neutral location. You will need your witness's undivided attention, and if the witness is in a location where coworkers can stop in, phones ring or distractions will occur with any frequency, your preparation session will be significantly compromised.

What to Tell the Witness

When you meet with a witness, be sure to start with an overview of what she should expect in the courtroom. She should be familiar with the procedures of giving testimony, which will increase her comfort when the day of her testimony arrives. Go over all of the key points of the substantive information she will be asked to testify to during direct examination. Educate the witness on what she does not recall, and make sure she understands what key points you will be seeking to establish with her testimony. Go over any negative points or counter-arguments you think opposing counsel will pursue during cross-examination. Again, there should be no real surprises when your witness takes the stand.

Role-playing can be uniquely effective in this regard. Run through the witness's direct testimony and practice crossing her on sensitive issues in the case. Finally, during this process, assess her performance. Consider whether she have any nervous habits, patterns of speech, or expressions that may not be well-received by a jury or judge. Coach her on these issues if you believe they will be problematic, but be cautious not to make the witness too anxious over natural mannerisms that may be impractical to change.

- Key Pointers for the Witness:
  - Tell the Truth – No matter what, always instruct your witness that he or she must honestly answer each question that is asked.
  - Pause Before Answering – Caution the witness that speed is his enemy. He should take all of the time he needs to respond to questions, and he should never respond to an attorney's urging him to answer before he is ready. Mention that you may object to a question after it is answered, and in that case they should wait until the objection is resolved before answering.
  - Do Not Answer a Question You Do Not Understand – Make sure the witness knows that it is completely acceptable to ask for clarification of a question. In no circumstances should the witness allow herself to feel compelled to answer a question she does not understand.
  - Do Not Speculate – Explain that saying "I don't know" is perfectly acceptable, and is in fact preferred when the witness lacks the knowledge to respond.
  - Be Comfortable – A bit of nervousness is to be expected, but an overly stressed witness will not present well to a judge or jury.
  - Do Not Volunteer Information – On cross, the witness should only answer what is asked, and should not answer with long narratives or otherwise volunteer information.
  - Be Nice – This is basic advice, but politeness is often forgotten when the witness is being cross-examined on the stand, especially when it is his case at issue. Juries and judges hate a rude witness, or a witness that tries to play games with the attorney. The witness must be prepared to "take the high road" and be professional and polite throughout his testimony.
  - Damper Emotions – Following from the direction to "be nice," the witness should be cautioned not to get too emotional during testimony. This is a difficult proposition considering that testimony may be the only chance the witness has to tell his story in the case. At the same time, heightened emotions can make the witness seem overly defensive, nonsensical, or unreliable. It is best to stay calm in order to effectively deliver testimony.

Document Issues

Some attorneys may want to share a lot of documents with their witnesses, and even provide them with an outline of the testimony that they want them to provide. This, however, puts your work product in danger as the witness may be asked extensively about what he reviewed in preparation for testimony. Only show your witness documents that were produced in discovery, or, better yet, only exhibits that will be submitted in court. Your witness will likely not remember or review documents you give them to study independently anyways, so it is best to rely on the conversations you have with them for substantive preparation.

Ethics Questions

Finally, be prepared for ethical issues that may arise in the course of witness preparation. Rule of Professional Conduct 3.4 prohibits "assist[ing] a witness to testify falsely." *See also* RPC 1.2 (a lawyer shall not counsel a client to engage in criminal or fraudulent behavior). Similarly, RPC 3.3 ("Candor Towards the Tribunal)" applies to witnesses you have prepared, not just the attorneys themselves. If you know a witness has of-

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Through the Court's Eyes: Judicial Perspectives on the Pretrial Process

by Gemma Zanowski

Working for the past two years as the judicial law clerk to four of the eight superior court judges in Kitsap County has without a doubt made me a better lawyer. The mentoring I have received from the judges as well as my observations of and interactions with experienced attorneys have impressed upon me numerous practical lessons. In this article I discuss what I consider to be the most valuable information on courtroom pretrial practice I have learned during my tenure.

Lay the right foundation

Know the applicable state and local court rules. It is often apparent that an attorney has not cracked a copy of the court rules—local court rules in particular—before filing a motion. While court rules vary by jurisdiction, and learning them cuts into a lawyer's already scant time, disregard of local practices and procedures is unsound lawyering. Missing a deadline set by a local court rule can cause delay or prevent the court from considering a pretrial issue. On a multi-judge bench with rotating calendar assignments, attorneys will encounter both judges who rigidly adhere to court rules and judges who take a more flexible approach. Attorneys should assume judges are all sticklers and save themselves a heart attack.

Timely provide bench copies of your pleadings. Some judges will not consider a matter if bench copies have not been provided. Some judges will call an attorney out in court if she did not provide bench copies. And even if a judge does neither of the above, attorneys should consider bench copies an indispensible component of motions practice. Judges read bench copies. A bench copy is the medium through which a judge educates herself on a pending matter. Judges highlight and write questions and thoughts on the copies and tab what they consider to be critical issues or irreconcilable weaknesses—issues an attorney then may have the opportunity to address in oral argument.

Bench copies should provide all the materials the attorney wishes the judge to consider for the motion under consideration. It may not be apparent in the record to which document an attorney is referring. If these documents are not benched, the judge wastes time fishing around for them (best-case scenario) or misses or disregards the document altogether (worst-case scenario).

Write professional briefs

Assume all judges want to make legally sound rulings. It is an attorney's job to fully prepare the judge to rule on the issues in her motion—if the motion was important enough to bring in the first place, it is important enough to prepare thoroughly. Ask: What information can I provide the judge to ensure she makes a sound ruling? Then provide that information in a clear and concise manner. Note that while an attorney may be an expert in a legal area, the judge may not. Give legal context when necessary. The same goes for any scheduled oral argument.

Never cite a case you did not read completely. Attorneys with busy schedules and pressure from clients, partners, and impending deadlines may be tempted to cut corners by skimming only what they consider to be the meat of the case they are citing, or by failing to read the case at all. By doing this, an attorney runs the risk of missing important details that may help his case. Or of missing an opportunity to reconcile factors that distinguish the case from his own. Or of missing the fact that the authority is contrary to, rather than supportive of, his seminal point. Judges read cases cited in briefs. Motions have been won and lost on this point.

Cite check and edit briefs. If the judge cannot find a case cited because the attorney failed to cite to it correctly, the

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Witness Preparation: What to Do, What Not to Do, and Best Practices *from previous page*

fered false information in court, you may have an obligation to notify the court.

Also, be on the lookout for potential conflicts of interest that may arise between the witness, your client, or other parties. This may be a concern particularly in the area of corporate witnesses. If your client is the corporation, and you are preparing an unrepresented employee, that employee should be advised that you are not her attorney.

Final Notes

In general, preparing a witness for trial testimony can be a challenging proposition, but it does not have to be a daunting one if you are well prepared and understand the limitations of what can be accomplished. Above all, you cannot (and should not) control the witness on the stand, and trying to obtain that sort of assurance of witness performance is a lost cause. Simply provide the witness with the information she needs to testify as clearly, effectively and painlessly as possible. If that approach is taken, your witnesses will deliver effectively testimony at trial and be very grateful she had the chance to work with you.

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attorney risks looking incompetent, dishonest, or sloppy. Typos emerge in briefs from even the most skilled practitioners, but rampant spelling and grammar errors detract from readability and are an immediately apparent reflection of the time and care the attorney put into her briefing, a point that may carry on to the judge's consideration of the merits of the brief.

Eliminate sarcasm or ad hominem attacks from briefing or oral argument. Personal attacks between lawyers bring down the entire profession. A cheap shot can be smugly satisfying to make. But judges do not like and do not want to hear such attacks. When a judge does not want to hear something, the judge stops listening. And that's generally a poor position for an advocate.

Use oral argument to assist the judge

Take oral argument seriously. Some lawyers assume that a judge has already made a ruling before taking the bench and that oral argument is an extraneous formality. This often is not the case. Motions can be won or lost on oral argument. If a motion has an accompanying oral argument scheduled, an attorney is wise to take it as a critical component in the judge's decision-making process and to prepare accordingly.

Be quick and concise in oral presentations. If an attorney has written a thoughtful and complete brief and timely provided a bench copy to the court, the judge should be well-apprised of the key issues at bar. There is no need to perform a read-through of the brief. An attorney may have only 10 minutes to present an argument, and should use that time on critical points.

Thoughtfully address the judge's questions. When a judge asks a question, the question is an opportunity to provide the judge with important information that may persuade her to rule in your favor. If a judge is asking questions, it means she is engaged in the material at bar and has given thought to the matter. Listen to the question. Answer the question asked—and that question only. Like a bench copy, an answer to a judge's question is an opportunity to educate the judge in a uniquely precise manner.

Do not lie to the judge. Attorneys should abide by the same oath all witnesses take when they testify, and tell the truth, the whole truth, and nothing but the truth. It can take years of diligent work to build a reputation and seconds for that reputation to come tumbling down. If an attorney does not know the answer to a question, he should admit it. If an attorney did not read a case, he should admit it. If an attorney made a mistake, he should admit it. Judges are far more gracious toward these concessions than of attempts to conceal or deceive.

Judicial insight on common pretrial motions

Discovery Motions. Before filing a discovery motion, attorneys should ensure they have met any prerequisites to bringing the motion, such as a CR 26(i) conference. When asking for sanctions, they should take the time to do a thorough analysis of the remedy they are requesting. If an attorney has requested harsher sanctions such as dismissal or exclusion of evidence, the judge must make a record that he considered less severe alternatives and the attorney should provide the information he needs to make these considerations competently.

Summary Judgment. Summary judgment can be an important force in the quest to narrow a case prior to trial. The law should be settled before trial starts. Trials should be about facts. Motions for partial summary judgment are a good—and underused—tool to achieve clarity on legal issues prior to trial. Often attorneys use motions *in limine* to attempt to exclude matters that could have been resolved earlier on summary judgment; this strategy can complicate trial unnecessarily.

Motions in Limine. Attorneys should make motions in limine early. The first day of trial with the jury waiting is probably not the best time. If the motions are important enough to be made, the judge should be provided sufficient time to give them due consideration. Do not bring motions in limine that merely repeat rules of evidence the judge will apply to your case anyway (e.g., "exclude from evidence any inadmissible hearsay"). Along with wasting the judge's time, some judges see these boilerplate motions as an insult to their intelligence, as they imply that the judge does not know the rules of evidence.

A final word

The better an attorney is, the easier a judge's job becomes. On the other hand, a frustrated judge will make an attorney's job more difficult. Pretrial interactions with the court form the basis for the judge's relationship with the attorneys on a case as well as provide form and scope for the trial. Attorneys should keep these considerations in mind while setting the course for trial.

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Picking Battles and Winning Wars: The Art of Choosing the Right Battles During Discovery

by Timothy B. Fitzgerald

"The supreme art of war is to subdue the enemy without fighting."
– *Sun Tzu*, The Art of War

Fighting can be an uncertain, expensive, and exhausting proposition. Even for the victor, the act of battle can often inflict more harm than whatever the combatants originally stood to gain. For this reason and others, the time-tested words quoted above, first articulated more than 2,300 years before the founding of the Washington State Bar Association, remain equally true today: The best form of victory is almost invariably the one that entails the least amount of conflict.

Yes, we are lawyers, and ardent legal representation frequently requires us to engage in what many have analogized to a civil form of "warfare," broken down into a series of distinct battles. But in the context of civil discovery, it would be a mistake to tally wins and losses based solely upon the battles that are actually fought. Indeed, avoiding the wrong discovery battle can be every bit as important as winning the "right" one, and effective litigators understand that half the battle is deciding which disputes are worth being drawn into in the first place.

The following article sets forth a very brief discussion regarding the "art" of picking *correct* battles within the context of civil discovery, keeping in mind that decisive victories in the context of discovery often take the form of battles that are *not* fought. Although volumes could be written on this subject, limitations of time and space prevent a more detailed discussion here. As such, the following article sets out to accomplish three very modest goals.

This article begins by discussing the liberal discovery standards set forth in the Civil Rules, and explains why it rarely makes economic, strategic, or business sense to oppose discovery requests that are not clearly out of bounds. Second, this article attempts to illustrate the limited circumstances in which, notwithstanding Washington's liberal discovery rules, a client's objectives might be well-served by opposing technically-relevant discovery requests. Finally, this article concludes by briefly discussing a critically important issue that goes hand-in-hand with correctly picking discovery battles, and that is the practice of setting reasonable client expectations regarding the nature, purpose, and scope of civil discovery.

Liberal Discovery Is the Standard

This article begins by noting the obvious: Liberal discovery is the standard in the state of Washington. Under CR 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Per that provision, it "is not ground for objection that the information sought will be inadmissible at trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence." As it relates to pretrial discovery, the concept of relevancy tracks the definition set forth in ER 401, which states that "'[r]elevant evidence' means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401 (emphasis added). "Clearly, this broad definition includes evidence that does not facially relate to a given controversy, but whose relevance arises *indirectly* from context." *Sanders v. State*, 169 Wn.2d 827, 855 (2010) (emphasis added).

In other words, even evidence that only indirectly or circumstantially relates to the claims or defenses at issue may be discoverable under Washington's Civil Rules. Given that extremely broad standard, Washington courts routinely afford more (rather than less) discovery, and for that reason it rarely makes sense to oppose discovery requests that are not clearly out of bounds. Indeed, unless there is some compelling reason why the discovery in question should not be had, efforts to oppose discovery that is at, near, or slightly over the proverbial relevancy line will frequently prove unsuccessful.

Drawing the Line

Setting aside the issue of privilege, there are of course limits to what a party must endure in the name of liberal discovery, and there are occasions where it is perfectly appropriate to draw a line. Civil Rule 26(c) explicitly allows the court to limit discovery "to protect a party from annoyance, embarrassment, oppression, or undue burden or expense." As lawyers, one of the many challenges we face is determining if, when, and where to draw that line. Unquestionably, the thought process underlying such determinations is a form of art, not a science, and judgment calls will need to be made depending upon the particular circumstances at hand.

With that being said, parties who successfully oppose technically relevant discovery requests invariably demonstrate material harm flowing from one or more of the factors set forth in CR 26(c). While those circumstances could arise within a broad range of settings, there are a number of increasingly familiar discovery scenarios that—in this author's experience—frequently satisfy the criteria of CR 26(c). A few such scenarios are briefly discussed below. The point to be taken away from the following examples is this: While liberal discovery undoubtedly is the rule within the State of Washington, there most certainly are

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some occasions in which opposing technically relevant discovery *does* constitute the "correct" battle.

- Apex Depositions. An increasingly common litigation tactic is to issue deposition notices to high-ranking officers of an opposing corporate party at the outset of discovery, even though the officers in question have limited, indirect knowledge of relevant events, and even though numerous lower-level employees have direct knowledge of the events in question. While there are some limited circumstances in which such "apex depositions" might be appropriate, nearly every court addressing the issue has recognized the potential for abuse embedded in such a discovery process. *See*, *e.g.*, *Moyle v. Liberty Mut. Retirement Benefit Plan*, No. 10cv2179-DMS (MDD), 2012 WL 5373421, *3 (S.D. Cal. Oct. 30, 2012) ("Virtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment." (citation omitted)).

  Assume, for example, that the CEO of a Fortune 100 company occasionally orders lunch off of the company's cafeteria menu, and that she is familiar with the various items contained therein. Assume further that a company employee claims to have sustained food poisoning as a result of eating an item on that menu. Even though the CEO has knowledge regarding a matter that is indirectly or circumstantially related to an issue in the case, there certainly are others within the company with more direct knowledge of the events at issue. Under such circumstances, seeking to depose the CEO at the outset of discovery (or, indeed, at all) would seem to epitomize the annoyance, harassment, oppression, and undue burden that CR 26(c) is intended to prevent. Although this simplified illustration presents an obvious case for application of the apex doctrine, the point to be taken away is this: Where an adversary seeks to depose a high-ranking corporate officer *solely because* she or he is a high-ranking corporate officer, opposing such an apex deposition may constitute the "correct" discovery battle.

- Discovery Intended to Strain Potential or Existing Business Relations. Another increasingly common discovery tactic is to issue sweeping document requests to the actual or potential clients, lenders or business partners of an opposing party. While such discovery requests are not *per se* improper, it is not difficult to imagine scenarios in which such requests have *the purpose or effect* of straining the potential or existing business relationships of an adverse party, or to gain an improper advantage in the marketplace on the part of the requesting party. Although such discovery requests can present a number of prickly issues that are beyond the scope of this article, counsel should keep in mind that Washington courts are generally more amenable to limiting discovery aimed at non-parties. *See*, *e.g.*, *Eugster v. City of Spokane*, 121 Wn. App. 799, 813 (2004) (recognizing that "the unwanted burden thrust upon non-parties is a factor entitled to special weight"). As such, where it appears that an adversary's technically relevant third-party requests are aimed at straining a client's potential or existing business relationships, moving for relief may constitute the "correct" discovery battle.

- Overly Burdensome Requests for ESI: Yet another increasingly common discovery issue concerns the production of prohibitively expensive electronically-stored information ("ESI"). While discovery standards and methods regarding ESI are continuing to evolve alongside rapidly changing technological developments[1], it continues to be the case that many types of electronic discovery requests – such as requests for restoration of back-up tapes—frequently entail prohibitive expense. Indeed, there are many instances in which the cost of restoring a single back-up tape can eclipse the total amount in dispute. *See*, *e.g.*, Jeffrey C. Fehrman, *E-Discovery for Backup Tapes*, Integreon White Paper (2011). Where the ESI in question resides on tens or hundreds of backup tapes—as is frequently the case in the context of large commercial lawsuits—restoration costs can easily reach into the seven-figure range. *Id.* Under such circumstances, opposing an adversary's request for ESI, or seeking cost-shifting with respect thereto, likely constitutes the "correct" discovery battle.

Managing Client Expectations Regarding the Purpose, Nature, and Scope of Civil Discovery

Avoiding the wrong discovery battles requires proper client counseling regarding the nature, scope, and purpose of civil discovery—a conversation that should occur at the outset of the representation, before the exigencies inherent in the discovery process emerge. While there certainly are occasions in which it is appropriate to resist an opposing party's discovery requests—and a few such scenarios are set forth above—the general rule is that all requested evidence that is directly or indirectly relevant (and not privileged) must be produced. It is imperative that clients understand the potentially significant discovery obligations imposed by the Civil Rules, and that resisting discovery generally is (subject to limited exceptions) a losing proposition. Failing to properly advise clients regarding these important issues can easily lead them into fighting (or wanting to fight) the wrong discovery battles, resulting in a waste of time, money, and effort, and perhaps more

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Developing Strategic and Creative Uses for Motions *in Limine*

by Travis Dailey

Motions *in limine* are a powerful advocacy tool. But all too often, they are not used to their maximum potential to control what evidence is admitted at trial. In addition to preventing the jury from hearing or seeing irrelevant or unfairly prejudicial evidence, motions *in limine* can narrow or eliminate issues for trial, focusing the court's and jury's attention on the critical issues in the case. When granted, they dispense with issues that would otherwise be argued during the trial, conserving scarce time and streamlining the presentation of evidence. They also help a party avoid unfair surprise or prejudice at trial.

Motions *in limine* also provide an opportunity to put detailed and comprehensive briefing before the court, particularly if an issue is complex or otherwise does not lend itself to quick oral argument during trial. Along the same lines, the motion can force a preview of opposing counsel's argument, providing an opportunity to improve on an argument—or, in some cases, find a different argument—before trial.

With these purposes in mind, consider the following when planning motions *in limine*.

Pushing a Narrative and Theory of the Case

Although motions *in limine* are often a series of motions relating to discrete and isolated evidentiary issues, they should still be an advocacy piece, especially when viewed as a whole. Like any other motion, and like the trial brief in particular, motions *in limine* should convey a factual and legal theory of the case to the extent reasonably possible. The more the court appreciates the context of its possible ruling, the more likely it might be to rule in favor of a particular motion.

If the court allows or requires each motion to be combined into one brief, consider a succinct factual overview at the beginning to convey the background information, narrative, and theory of the case. Then introduce and integrate facts important to each motion before and/or within the argument for that motion. Integrating direct citations to the documents supporting the argument is also very helpful to a court hard-pressed for time.

A Motion *in Limine* Can Seek to *Admit* Evidence

The most common motion *in limine* is the defensive one, which tries to keep unfairly prejudicial or otherwise irrelevant (and often harmful) evidence from the jury. These motions are also designed to keep the *argument* about the admissibility of the evidence from the jury, which itself can be harmful even if the evidence does not come in. The court's orders *in limine* can therefore prevent a party and counsel from referring to a fact in any way, including during witness examinations or in statements to the jury.

But a motion *in limine* can also request that the court *admit* evidence in advance of the trial. This approach can provide certainty (or confirm uncertainty) as to the admissibility of particular evidence. It also has the added advantage of giving an advocate two briefs— the motion and reply—instead of just a possible response in opposition to the opposing party's motion to exclude.

With an offensive motion in limine, the party seeking admission has the advantage of framing, allowing that party to get out in front of the issues and use

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Picking Battles and Winning Wars: The Art of Choosing the Right Battles During Discovery *from previous page*

importantly, a possible loss of credibility in the eyes of the court.

Conclusion

It is no secret: Courts do not expect to deal with the vast majority of discovery disputes. That is why CR 26(i) requires counsel to make an effort at privately resolving discovery issues before bringing them to the court. That is also why CR 29 expressly allows the parties to modify the civil rules and/or methods of discovery to suit the particular needs of the case. Those observations alone caution against allowing discovery issues to come before the court except when absolutely necessary.

The foregoing article has attempted to illustrate that, given the liberal discovery standards applicable in Washington, discovery disputes generally are *not* absolutely necessary, generally do *not* advance the client's interest, and generally do *not* constitute the "correct" battle. Indeed, if "the supreme art of war is to subdue the enemy without fighting," counsel would be well served to let the vast majority of discovery disputes go, to freely provide liberal discovery (and to expect the same in return), and to focus energy where it really matters: on resolving disputes on their merits.

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1 For example, the Federal Rules of Civil Procedure were amended in December 2006 to address various ESI-related issues. *See, e.g.*, Fed. R. Civ. P. 16(b)(3)(B)(iii), 26(b)(2)(B), 26(b)(5)(B), and 26(f)(3)(C). Although Washington's Civil Rules have yet to incorporate corresponding ESI provisions, some Washington courts have seemingly followed the framework set forth in the federal amendments. *See, e.g.*, *Bedford, LLC v. Safeco Ins. Co. of Am.*, 140 Wn. App. 1033 (2007).

the potential evidence as a sword before the trial even starts. (Like getting that key impeachment evidence admitted, or that smoking-gun document loaded with hearsay and authenticity issues.) Note, however, that in some instances, the element of surprise may be better, with a hotly contested argument before the jury having a substantially greater impact than if the evidence was pre-admitted, which might allow the opposing party an opportunity to strategize and mitigate any harm.

Use Previous Rulings, the Trial Brief, and Jury Instructions

A lot has happened by the time motions *in limine* are written. Court rulings clarify legal issues; claims and defenses may be partially or entirely eliminated. As a result, there might now be inappropriate or irrelevant facts that opposing counsel may try to slip in as evidence at trial. And if that is the case, even if an objection to that evidence is sustained, the jury takes notice—as the saying goes, you cannot unring the bell. A motion *in limine* prevents reference to such matters and keeps the jury's focus only on appropriate evidence.

The same is true of the trial brief and jury instructions, especially where there is a dispute about how (or whether) the court should instruct the jury. Although trial briefs generally address the legal issues, and motions *in limine* the evidentiary issues, consider a motion *in limine* seeking to exclude evidence that would become inappropriate or irrelevant should the judge decide to instruct the jury in a particular way. The motion presents yet another opportunity to frame and brief the legal issues, and educate the judge about the context and significance of his or her ruling.

What Happened in Discovery Need Not Stay in Discovery

One potentially untapped supply of motion *in limine* topics is discovery; in particular, the opposing party's interrogatory responses—or the lack thereof. Here, a limine motion can use an opposing party's failure to disclose certain information against that party to limit the scope of the evidence that party can offer at trial.

Indeed, the rules of civil procedure authorize the trial court to impose penalties on parties that fail to answer discovery or disclose certain information; these penalties can prevent the party from supporting or opposing a claim or defense, or exclude certain evidence.[1] The thrust of the argument is that discovery responses are designed to narrow the issues and allow the parties to prepare for trial. Allowing the use of undisclosed evidence would be trial by ambush and unfairly surprise and prejudice the opposing part[2]—something that the duties in the discovery rules to disclose and supplement were specifically designed to prevent. Here, think failure to disclose certain facts, damages, witnesses, topics of expert testimony, or even a legal theory, claim, or defense.[3] Such a motion will not only provide needed certainty when preparing for trial, but can also strike a severe blow to the opposing party's case.

Sanctions for discovery abuses, although less likely to arise, can also form the basis for a motion *in limine*. These range from violation of a discovery order to failure to attend a deposition, answer properly served discovery, or produce documents.[4] Sanctions can include precluding the introduction of certain evidence, establishing certain facts as true, prohibiting a party from supporting or opposing certain claims or defenses, excluding a party or witness from testifying, and terminating sanctions such as dismissal, default, or striking pleadings.[5] Note, however, that there are heightened standards governing when the harsher sanctions of excluding testimony, dismissal, and default may be justified.[6]

Use Requests for Admission Strategically

Motions *in limine* are not written until the later stages of a case, but you should be developing possible topics throughout the discovery process. Requests for admission can help establish key facts supporting your eventual motions—and can be an early shot across the bow exposing substantial weaknesses in an opposing party's case.

Say there are serious credibility issues with a key witness, such as a plaintiff in a personal injury case who was convicted of a crime of dishonesty and engaged in other instances of misconduct bearing on his or her character for truthfulness. Or, say that an adverse inference instruction might be appropriate because this plaintiff destroyed evidence that would have established key facts supporting a claim or defense.

Key admissions relating to these matters would not only help get the impeachment evidence admitted and/or help obtain the spoliation sanction, but could also become part of a motion *in limine* to conclusively establish the admitted matters for trial,[7] which would streamline the trial and avoid wasting precious time establishing certain facts and laying the appropriate evidentiary foundation.

Another effective combination of requests for admission and motions *in limine* that streamlines trial is establishing the authenticity of documents or the existence of a particular hearsay exception.

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1 *See* CR 26(a), (e) and 37(d); FRCP 26(a), (e) and 37(c), (d).

2 *See, e.g., Stark v. Allis-Chalmers & Nw. Roads, Inc.*, 2 Wn. App. 399, 404 (1970).

3 *See id.*

4 *See* CR and FRCP 37(b)-(d).

5 *See id.*; CR 37(b)(2).

6 *See Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 348 (2011); *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87 (2002) (en banc).

7 *See* CR and FRCP 36(b).

Introducing Evidence to Maximize Results

by Kammi Mencke Smith

The outcome of a trial either before a jury or a judicial officer will always hinge on applying the facts of your case to the law. As attorneys we are overly familiar with both the facts and the law of our case, but need to be mindful that the decision maker will most likely be hearing these facts and law for the very first time. Therefore, in order to persuade the decision maker, we must educate that decision maker on the law and the facts. The struggle for most litigators is how to best accomplish this education task.

Selection of exhibits

Litigators often confuse the terms "evidence" and "exhibits." "Evidence" is defined by Black's Law Dictionary as the collective mass of things that are presented before a tribunal in a given dispute. Evidence includes all witness testimony and documents presented to the court and jury. "Exhibit" is defined as a document, record, or other tangible object formally introduced as evidence in court. Often, testimony can be supported or corroborated with a tangible piece of evidence, whether it is a document, a summary of many documents[1], or a recorded telephone call—these supporting materials are the exhibits.

The distinction between these two words, as well as how they interact, is important when engaging in trial preparation. The selection of exhibits by a litigator takes skill, careful analysis, and can make or break your case because it is these selected exhibits that will frequently determine how well the fact finder is educated about the facts.

If a key witness's testimony can be corroborated with a tangible piece of evidence, then it should be made an exhibit. A witness with supporting tangible evidence is obviously more likely to be found credible than a witness testifying only from memory. ER 801(d)(1)(ii) allows admission of a prior statement by a witness that is consistent with his testimony and is offered to rebut an express or implied charge of recent fabrication. Likewise, ER 803 provides for many hearsay exceptions (i.e., recorded recollection, then existing state of mind). If such testimony is the "smoking gun" of the case, then the supporting exhibit should be used as a visual exhibit during trial.

All litigators have had clients or witnesses who feel compelled to tell the whole story in excruciating detail, regardless of the relevance of these details. Supporting exhibits, with a little bit of witness preparation, can help shape the testimony of the witness regarding facts that are important, and can assist in focusing the testimony on the relevant issues.

The selection of exhibits is important because exhibits go into the jury deliberation room after closing arguments. The jury can read the exhibit, be reminded of the witness's testimony, and compare it to what the witness said. The jury members can put their hands on exhibits, and the exhibits can be scrutinized by the jury for authenticity and accuracy.

Exhibits keep the jury engaged and interested in the facts of the case and the testimony that they are hearing.

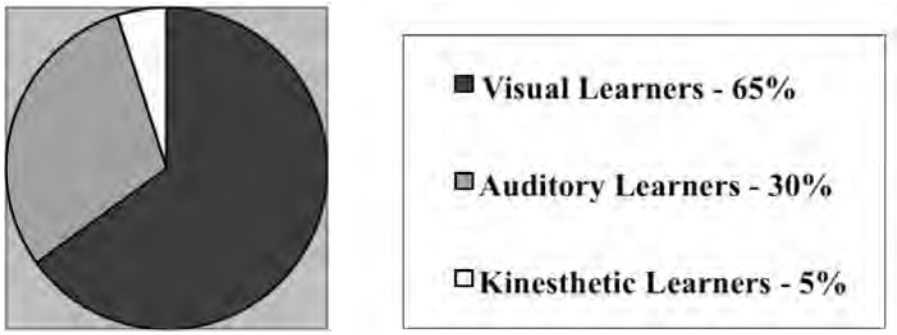
Because of these above factors, it is imperative that litigators select the best exhibits to present to the court or jury that will effectively aide them in educating the fact finder and maximizing results.

Presentation of Exhibits

There are two integral parts in presenting evidence to a jury in a manner that will maximize results. After carefully selecting the exhibits to be used, the next step—and possibly the most important—is determining how the exhibit is presented.

An exhibit is only as good as the manner in which it is presented. The most effective communicators educate and persuade the decision maker by adjusting the communication style to suit the audience. Most lawyers are auditory learners and communicators,[2] and commonly use a lecture style when presenting evidence to a jury. However, most non-lawyers are visual learners. Recent studies show that only 30 percent of the general population is auditory learners (those who learn by hearing), and that 65 percent of the general population is visual learners (those who need to see what they are learning and have difficulty following oral lectures). The remaining 5 percent of the population is kinesthetic or experiential learners (those who learn by doing and touching).

Learning Styles of the General Population



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Therefore, on a jury of 12 people, nearly eight people will likely be visual learners. Only three or four people on a jury of 12 will be auditory learners. Regulating voice tone, inflection, and body language will help the jury maintain interest and attention; however, in order to adequately persuade and educate your jury, lawyers must be prepared to present the important pieces of evidence in a visual manner. This visual presentation will meet the learning requirements of nearly eight of the jury members—with the goal of educating them, persuading them, and receiving a favorable decision. A lecture style of communication during a jury trial cannot be avoided, and the remaining jury members will most likely be educated during this usual auditory presentation.

The largest hurdle is determining how to visually present the important exhibits in the most effective manner. Visual learners benefit from physical models, diagrams, charts, pictures, videos, and written directions. These can be presented on mediums such as poster boards, flip charts, Elmo projectors, computer document programs, or Power Point.

Evidence presented in an altered form (i.e., blown up, highlighted, or presented in a summary) allows the exhibit to have the necessary attention and emphasis placed on it. Usually these altered exhibits are not allowed into the jury deliberation room, but have been allowed when requested by the jury. On occasion, judges also request to keep such exhibits after a bench trial, indicating their desire to use the exhibit to analyze the case.

Having an interactive presentation of the evidence will appeal to all types of learners, including the kinesthetic learner, and can be accomplished in numerous ways. Some examples include:

- Using physical models of vehicles to show how an accident happened;
- Using physical models of body parts to demonstrate how a person was injured;
- Highlighting or enlarging, in front of the jury, using a computer program and projector, the important terms of a contract—this makes those terms "come to life" in front of the jury;
- Supporting an expert's opinion with a Power Point presentation;
- Filling in information on a chart contemporaneous to the testimony;
- Filling in important dates on an enlarged calendar or timeline on poster board—or better yet, having the witness put the important information on a poster board calendar or timeline;
- Filling in damage figures on a poster board chart as witnesses testify about those damages; and
- Establishing the hierarchical scheme of a company or management team on poster board or a flip chart as a witness is testifying about it.

It is also vital to use visual exhibits during closing arguments. Visually showing the jury the important jury instructions and highlighting the key parts of those instructions will help the jury sift through the tangle of instructions to determine which ones are the most important. Revisiting the important visual exhibits during closing arguments will not only keep the attention of the jury or judge, but will help close the gaps in the facts by connecting the dots and retelling your client's story. Finally, an infrequently used (but very effective) visual tool to use during closing arguments is the jury verdict form. Most jurors have never seen a verdict form, return to the jury deliberation room and truly have very little idea how to fill the form out—despite a litigator's best attempt at clearly outlining the directions. Therefore, walk through the form and fill it out in favor of your client. Use the jury instructions and the admitted visual exhibits to go through the form and support each of the answers.

So much time, preparation and emotional energy is expended during litigation. It is truly a shame to see all of it go to waste simply because a litigator has not chosen the right exhibits to be admitted, or has not presented the exhibits in a manner that reaches the majority of the audience. Be sure to select and use exhibits to educate the judge and jury so that they are armed with the facts needed to decide in your client's favor.

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1 ER 1006 governs summaries and allows for the contents of voluminous writings, recordings or photographs which cannot be conveniently examined in court to be presented in the form of a chart, summary or calculation.

2 Eye Movements and Persuasion, A2L Consulting, can be found at *http://www.a2L.com/eyechart/*.

Western District of Washington Adopts Federal E-Discovery Rules

by Brian Esler

On December 1, 2012, the United States District Court for the Western District of Washington adopted revised Local Civil Rule 26, as well as a "Model Protocol for Discovery of Electronically Stored Information in Civil Litigation" (now referred to in the rules as the "Model ESI Agreement"). This article describes these new requirements.

Changes to Local Civil Rule 26(f)

The preamble to the new LCR 26(f) states the court's intentions in adopting the expanded rule:

> The rule is intended to promote the just, efficient, speedy and economical determination of every action and proceeding and to promote, wherever possible, the prompt resolution of discovery disputes without court intervention. Counsel are expected to cooperate with each other to reasonably limit discovery requests, to facilitate the exchange of discoverable information, and to reduce the costs of discovery.
>
> The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) must be applied in every case when parties formulate a discovery plan and promulgate discovery requests. To further the application of the proportionality standard in discovery, discovery requests and related responses should be reasonably targeted, clear, and as specific as possible.
>
> LCR 26(f).

The court's expanded LCR 26(f)(1) now has a detailed list of 10 different subjects (with additional subparts) that should be covered in the initial Rule 26 conference(s) and subsequent joint status report. The new topics to be discussed include how to manage discovery "to promote the expeditious and inexpensive resolution of the case," anticipated "targeted discovery" and "phasing motions to facilitate early resolution of potentially dispositive issues." LCR 26(f)(1)(D), (E), (F).

The lengthiest changes involve issues regarding discovery of electronically stored information, known as ESI. Thus, the local rule now requires attorneys to discuss "any preliminary issues relating to the preservation of discoverable information and the scope of the preservation obligation." LCR 26(f)(1)(G). Further, if the parties anticipate discovery and production of ESI, the attorneys must discuss the "nature, location and scope of discoverable ESI" as well as whether the parties agree to adopt the Model Protocol or some modified version of it (referred to as the "Model ESI Agreement" in the local rules).

If the parties will not be agreeing to adopt the Model Protocol (discussed below), then the attorneys must discuss and try to agree on alternative procedures to deal with a list of eight ESI-related topics. While the Model Protocol may be sufficient for most civil litigation, especially complex (or relatively simple) cases may not benefit from adopting the Model Protocol; nonetheless, a decision not to use the Model Protocol must be informed by a thorough discussion of many of the topics included in the Protocol.

Accordingly, under the revised local rule, parties cannot avoid discussion of ESI issues altogether but instead have two choices – adopt the Model Protocol (or a variant of it), or adopt their own bespoke approach, which will probably involve greater effort and discussion. If the parties decide for a bespoke approach, they now must discuss at least the following:

> (i) The nature, location and scope of ESI to be preserved;
>
> (ii) The production format(s) for ESI;
>
> (iii) Methods for identifying an initial subset of relevant ESI, including search terms, date ranges, and the use of computer-assisted review; and
>
> (iv) Whether and how ESI stored in any relevant databases can be produced and used.

LCR 26(f)(1)(J). Any motion for a protective order or to compel that involves ESI must include a certification stating that the parties adopted the Model Protocol, or that the parties have met and conferred regarding the topics listed above. LCR 26(f)(3).

Further, there is now an explicit mandate that attorneys learn about their client's data storage and ESI systems before any Rule 26 or discovery conference (which applies whether or not the parties agree to adopt the Model Protocol):

> The attorneys for each party shall review and understand how their client's data and ESI are stored and retrieved before the Rule 26(f) conference and before any meet and confer discussions related to the production of ESI in order to determine what issues must be addressed during those discussions. To satisfy this requirement, the attorney may choose to include in the Rule 26(f) conference and/or meet and confer discussion a paralegal, information technology specialist, or other person with knowledge about how the client's data and ESI are stored and retrieved.

LCR 26(f)(2). In other words, the local rule now recognizes what most busy attorneys have known for a while—we probably are not sufficiently knowledgeable about ever-changing technology for creating and storing ESI to be completely competent to discuss the issues, and ought to bring along a specialist to ensure that the right questions are asked, and the right answers are given.

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The Model Protocol

The Model Protocol is generally divided into three sections: 1) an outline of the goals of the protocol, 2) an outline of the basic principles the District Court expects to apply in most cases, and finally some more specific provisions that the parties may want to consider in complex cases. The Protocol is intended as a starting point, and the parties are free to tweak it to fit their particular circumstances.

As stated in the Protocol's "Introduction," the District Court believes that "establishing a framework for anticipating and addressing ESI-related discovery at the earliest stages of litigation will encourage mutual and cost-effective solutions and speedier and more informed resolutions of disputes." In approaching issues surrounding ESI, the District Court "expects that the parties will consider the nature of the claim, the amount in controversy, agreements of the parties, the relative ability of the parties to conduct discovery of ESI, and such other factors as may be relevant under the circumstances in deciding on adopting and/or tailoring the provision of the Protocol." As emphasized a number of times in the Protocol, the proportionality standard of Fed. R. Civ. P. 26(b)(2)(C) should govern most discussions and decisions regarding discovery and production of ESI.

Regarding the "standard" provisions, parties are expected to disclose (usually within 30 days of the initial Rule 26(f) conference) information regarding the custodians most likely to have discoverable ESI, non-custodial data sources, third-party data sources and a list of data sources not reasonably accessible. While the Protocol acknowledges parties' preservation obligations, it also explicitly states that generally parties "shall not be required to modify, on a going-forward basis, the procedures used by them in the ordinary course of business to back up and archive data." The Protocol also lays out eight categories of ESI that generally do not need to be preserved, such as deleted data, RAM files, temporary internet files, duplicative back-ups, network logs, and data from mobile devices (as long as that mobile device data is routinely saved elsewhere). The Protocol also lays down general standards for addressing privilege issues, though the parties are free to create their own agreements on that subject.

Although the Protocol acknowledges the advent of computer-assisted predictive search, the District Court "presumes that in the majority of cases, the use of search terms will be reasonably necessary to locate ESI likely to contain discoverable information." Hence, parties are to try to agree on search terms before any query is made; however, the onus is placed on the producing party to determine what search terms are likely to return the most relevant evidence. After receiving the result of such queries, the requesting party is "entitled to no more than 5 additional terms or queries to be used in connection with further electronic searches absent a showing of good cause or agreement of the parties." Any search terms returning more than 250 megabytes of data are presumed to be overbroad. The only files that should be produced in native format are those not easily converted to a searchable image format (such as Excel files). Each party is expected to bear the costs of producing its own ESI; however, the District Court will shift that burden "upon a showing of unequal burdens, unreasonable requests, or other good cause."

In addition to the above generally applicable provisions, the Protocol also has suggestions for cases involving unusually complex or unique ESI issues. There are suggestions regarding more complex search methodology disclosures, suggestions regarding bates numbering, a discussion of how to handle extracted text and metadata fields, and even the production of hard-copy documents in an electronic format.

The revised LCR 26(f) and Model Protocol are not even a year old, so it is hard to judge their effectiveness at this point. No court rule or protocol can cover all situations perfectly, but by adopting the revised LCR 26(f) and the Model Protocol, all lawyers practicing in the Western District of Washington will have at least a baseline framework from which to start a reasoned discussion of whatever unique electronic discovery issues may arise.

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