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META-DISCOVERY: ALLEGATIONS OF AN INCOMPLETE DOCUMENT PRODUCTION

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Introduction

The federal courts have not yet provided a clear standard to apply to cases where a requesting party alleges that the producing party has made an incomplete production. The Texas Supreme Court has recently ventured into this arena. United States Magistrate Judge (Ret.) Craig Shaffer also recently discussed this topic and thoroughly discussed the applicable federal rules of civil procedure in a recent *Sedona Conference Journal* article.[1] Judge Shaffer's article, however, addressed two distinct issues. His thoughtful discussion addressed whether initial discovery about discovery that may help a litigant "properly frame" discovery requests is relevant and proportional.[2] Judge Shaffer's article then also interwove an analysis of cases that tackled allegations of an incomplete document production. Judge Shaffer concludes that "process-directed" discovery as opposed to "merits-based" discovery "may, in fact, fall within the scope of relevance under Rule 26(b)(1) when a party's production has been incomplete."[3] After acknowledging the various differing

1. Hon. Craig B. Shaffer, *Deconstructing "Discovery about Discovery,"* 19 SEDONA CONF. J. 215 (2018).

2. Judge Shaffer opines that "[p]ursuing discovery in order to draft discovery seems, at the very least, unnecessarily expensive." *Id*. at 235.

3. *Id*. at 239.

approaches courts have used to review allegations of an incomplete production, Judge Shaffer advocates that "[p]rocess-directed discovery be predicated on a thoughtful analysis of strategic considerations, the goals of the Federal Rules, and a factual record that is consistent with the well-recognized burdens of proof." Yet he proposes no standard that courts should apply to address an allegation of incomplete production nor reconciles the numerous cases applying differing theories with his statement that there are "well-recognized burdens of proof."

This article analyzes the recent Texas opinion, compares it with federal court cases, proposes a standard that courts should apply, and opines that when a requesting party has made an initial showing (beyond subjective belief) of a material deficiency in the producing party's discovery production, a court should grant a motion to compel allowing further discovery into the producing party's discovery processes applying the discovery proportionality factors, and in appropriate cases allow for limited forensic examination of relevant computer devices to ensure that discovery production has been adequately completed.

In re Shipman[4]

Jamie Shelton argued that Marion Shipman, her former business partner, kept detailed business records on his computers––both the one that "crashed" in 2012 and his current computer. After exchanges of discovery, a motion to compel was filed. The trial court ordered Shipman to produce more financial documents. In a deposition following the court order, Shipman testified that he had produced all such documents in his possession. He added, however, that some relevant data was on a computer that "crashed" in 2012, more than two years before Shelton sued him. Shipman testified he was unable to retrieve records from

4. *In re* Shipman, 540 S.W.3d 562 (Tex. 2018).

that computer. A few days after his deposition, Shipman reported that his son had helped him discover files from his old computer in a "backup" folder on his replacement computer, and his attorney subsequently produced these newly found documents.

Shipman further testified in his deposition that several years before suit was filed, his certified public accountant had advised him that he could destroy documents more than seven years old, so he burned those files in 2011. Both Shipman and his attorney submitted affidavits stating they had diligently searched Shipman's files, both physical and electronic, and produced all responsive documents, more than 6,000 pages.

Because of the new deposition testimony and belated production of new documents, Shelton filed a second motion to compel, essentially arguing that Shipman could not be trusted to fulfill his discovery obligations. Shelton asked the trial court to compel Shipman to turn over his computers for forensic inspection. The forensic examiner testified he could determine if more backup files existed, whether files had been deleted, and whether files could be recovered from the "crashed" computer.

The trial court ordered Shipman to produce not only his computer but also all "media" for forensic examination, including "all internal hard drives and external media (including, without limitation, thumb drives, hard drives, CDs, DVDs, zip drives and any other storage medium) in Shipman's possession, custody or control and used by Shipman or his agents at any time during the period January 1, 2000 through the present."[5] The order provided a forensic-examination protocol to protect

5. It appears that, at the Supreme Court, all parties agreed that this Order was broader in scope than requested, and the Supreme Court found the breadth and time span violated the Court's recent opinion in *In re* State Farm Lloyds, 520 S.W.3d 595 (Tex. 2017).

Shipman's privacy and legal privileges. The forensic examiner would generate a list of all file names on the media and provide the list only to Shipman's counsel, who could then make objections before turning anything over to Shelton's counsel.

In response to the court order, Shipman filed a mandamus action in the court of appeals arguing the trial court had abused its discretion in ordering the forensic examination. The appellate court denied the petition. Shipman then filed his action in the Texas Supreme Court.

In granting the mandamus petition, the Texas Supreme Court acknowledged that Shipman had given conflicting answers in his deposition testimony. At one point he stated he searched his files and he didn't have any responsive documents. At other times when asked about certain financial documents he stated: "I'll have to look and see," "I don't know if our records go back that far," and "I don't know if I've still got it."[6] In his deposition testimony he also admitted deleting files from a computer, but he later clarified that he meant deletion from the "old" computer.

The Texas Supreme Court concluded that Shipman's belated production of the backup files, although inconsistent with his earlier testimony, indicated an effort to comply with his discovery obligations. "And the discovery process is best served by rules that encourage parties to produce documents belatedly discovered in good faith. They should not face the perverse incentive to conceal such information lest they be forced to hand over the underlying electronic devices for forensic examination."[7]

6. *In re Shipman*, 540 S.W.3d at 568.

7. *Id*.

Regarding the adequacy of the initial searches, the Court concluded that Shipman was "competent at some level to operate a computer and create and negotiate computer files"[8] and that Shelton offered no evidence that Shipman was incapable of searching for computer files, "or that an exhaustive search for backup files has not now been conducted, either by Shipman or his son."[9] "Shipman's affidavit testimony that he has produced all responsive documents is his ultimate answer on what documents are in his possession. His inability to remember off the cuff what documents he possesses, even when combined with any skepticism surrounding late production of the 'backup' folder, creates only more skepticism, not evidence of default under *Weekley*."[10]

So what evidence is necessary to show that a party has not complied with his discovery obligations?

The *Shipman* Court stated that it was not suggesting "that a requesting party can never establish a discovery-obligation default under *Weekley*[11] by offering evidence of a producing party's technical ineptitude."[12] Nor did the Court "discount trial-court discretion in determining when that line is crossed."[13] But the Court concluded that the "burden imposed by *Weekley* is high."[14] The Court complained that the record was silent as to what exactly Shipman's and his son's technical capabilities were.

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8. *Id*. at 569.
9. *Id*.
10. *Id*.
11. *In re* Weekley Homes, L.P., 295 S.W.3d 309 (Tex. 2009).
12. *In re Shipman*, 540 S.W.3d at 569.
13. *Id*.
14. *Id*.

In *Weekley*, which in turn relied on Texas Rule of Civil Procedure 196.4,[15] the Texas Supreme Court addressed a case where the defendant had produced only a handful of emails and no emails from the email accounts of two individuals "very involved" in a subdivision project at issue in the case. The Supreme Court recognized "the trial court could have concluded that HFG made a showing that Weekley did not search for relevant deleted emails that HFG requested."[16] Nevertheless, the Court stated that this foundation did not necessarily establish that a search of the employees' hard drives would likely reveal deleted emails or that they would be reasonably capable of recovery.[17] "[Plaintiff's] conclusory statements that the deleted emails it seeks 'must exist' and that deleted emails are in some cases recoverable is not enough to justify the highly intrusive method of discovery the trial court ordered, which afforded the forensic experts 'complete access to all data stored on [the Employees'] computers.' The missing step is a demonstration that the particularities of Weekley's electronic information storage

15. "196.4 Electronic or Magnetic Data. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."

16. *In re Weekley Homes, L.P.*, 295 S.W.3d at 319.

17. *Id*. at 320.

methodology will allow retrieval of emails that have been deleted or overwritten, and what that retrieval will entail."[18]

So according to the *Shipman* Court, evidence that some discovery production was late, and some deposition answers were equivocal, only amounts to mere suspicion that more unrecovered data exists. A party must be "pressed" at his deposition concerning the producing party's computer skills, the specific steps taken to search his computer, and the adequacy of the search. All this because "forensic examination of electronic devices is 'particularly intrusive and should be generally discouraged.'"[19]

The Texas Supreme Court is rightly concerned with ensuring that discovery requests propounded by a party are proportional to the case at hand. But courts should be mindful that relevant discovery generally no longer resides in "hard copy" and is prevalent in computer systems and mobile devices.[20] Although there are legitimate privacy interests that need to be weighed and costs to be taken in account, courts should approach discovery of electronically stored information (ESI) with these realities of modern recordkeeping practices in mind.

Does Texas's practice mirror federal court rules and opinions?

Generally, federal courts have analyzed discovery disputes in four ways: (1) objections asserting a lack of relevance, (2) ob-

18. *Id*.

19. *In re Shipman*, 540 S.W.3d at 569.

20. FEDERAL JUDICIAL CENTER POCKET GUIDE SERIES, *Managing Discovery of Electronic Information* (3d Ed. 2017) ("Discovery involving word-processing documents, spreadsheets, email, and other ESI is commonplace. Once seen primarily in large actions involving sophisticated entities, it is now routine in civil actions and is increasingly seen in criminal actions.").

jections lodged because of privilege, work product, or trade secrets assertions, (3) proportionality or undue burden/cost assertions, or (4) failure to produce relevant documents. This article confines its analysis to this last segment of cases.

Federal courts assume that parties have fulfilled their obligations under Federal Rule of Civil Procedure 26(g). "The discovery process is designed to be extrajudicial, and it relies on responding parties to search their own records and produce documents or other data."[21] Under Rule 26(g), counsel must certify that to the best of her knowledge, information, and belief formed after a reasonable inquiry, a discovery production is complete and correct as of the time it was made, and counsel may rely on assertions made by a client, as long as that reliance is appropriate and reviewed on the totality of the circumstances.[22]

Thereafter, federal courts require that the parties confer in good faith prior to the filing of any motion to compel and/or for sanctions.[23] In appropriate cases, some courts have utilized the services of a special master or an eDiscovery mediator to resolve any dispute.[24]

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21. Hespe v. City of Chicago, No. 13 C 7998, 2016 WL 7240754, at *4 (N.D. Ill. December 15, 2016).

22. *See* Venator v. Interstate Resources, Inc., No. CV415-086, 2016 WL 1574090 (S.D. Ga. April 15, 2016).

23. FED. R. CIV. P. 37(a)(1) ("The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."); *cf.* TEX. R. CIV. P. 191.2.

24. *See* EPAC Tech., Inc. v. HarperCollins Christian Publ', Inc., No. 3:12-cv-00463, 2018 WL 1542040, at *4 (M.D. Tenn. Mar. 29, 2018) (Court appointed a special master despite the defendant's objection that "it should have an opportunity to continue to supplement its production in light of the revealed deficiencies and that any discovery issues could be more expediently handled by the Court.").

Regarding the failure to produce relevant documents thought likely to exist, the party seeking discovery has the burden of proving that a discovery response is inadequate. But that burden has not been interpreted as strictly as was suggested by the Texas Supreme Court in *In re Shipman*.[25]

When a motion to compel has been filed for incomplete disclosure under Federal Rule of Civil Procedure 37(a), many courts have reached the same conclusion as *In re Shipman* that "mere suspicion" or speculation that a party is withholding discoverable information is insufficient.[26] Some courts have also

25. *See* Tsanacas v. Amazon.com, Inc., No. 4:17-CV-00306, 2018 WL 324447, at *4 (E.D. Tex. Jan. 8, 2018) ("When some documents have been produced in response to a request, Courts have interpreted 'evasive or incomplete' to place a modest burden on the requesting party to support, with existing documents, a reasonable deduction that other documents may exist or did exist but have been destroyed."); *see also* Toyo Tire & Rubber Co. v. CIA Wheel Grp., No. SACV1500246DOCDFMX, 2016 WL 6246384, at *1 (C.D. Cal. Feb. 23, 2016) (Court found CIA's response inadequate because it told the court "next to nothing about what was searched and what search terms were performed." Furthermore, the court did not "share CIA's belief that Toyo must take a deposition to identify shortcomings in CIA's methods. At a minimum, parties must share some information about the protocol used to ensure that responsive documents are collected and produced." Notwithstanding the above, the request for a forensic examination of CIA's computer systems was denied "at this time.").

26. John B. v. Goetz, 531 F.3d 448, 460 (6th Cir. 2009) ("[M]ere skepticism that an opposing party has not produced all relevant information is not sufficient to warrant drastic electronic discovery measures."); *In re* Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (vacating order allowing discovery to defendant's databases because there was no finding of some non-compliance by Ford of its discovery obligations); Gordon v. Greenville Indep. Sch. Dist., No. 3:13-cv-178-P, 2014 WL 6603420, at *2 (N.D. Tex. Nov. 20, 2014) ("Although Plaintiff is not satisfied with this response, he fails to point to anything that suggests such reports actually exist. The Court cannot compel GISD to produce documents that do not exist."); Seahorn Investments, L.L.C. v. Fed. Ins. Co., No. 1:13CV320-HSO-RHW, 2014 WL 11444117, at *4 (S.D.

referenced the intrusiveness of an examination of a party's electronic devices or information systems.[27] "However, when the requesting party is able to demonstrate that 'the responding party has failed in its obligations to search its records and produce the requested information,' . . . an inspection of the responding party's electronic devices may be appropriate."[28] Further, courts have been less apprehensive of requests to inspect electronic devices where there is a "substantiated connection between the device the requesting party seeks to inspect and the claims in the case."[29]

By way of example, in *Wallace v. Tesoro Corp.*, the court granted a motion to compel after Tesoro failed to produce a single document responsive to the central issue in the case. The

Miss. Oct. 16, 2014) ("In response to the motion to compel, Plaintiff affirms that all responsive documents have been produced. The Court will therefore require no further response . . . ."); NOLA Spice Designs, L.L.C. v. Haydel Enterprises, Inc., No. 12-2515, 2013 WL 3974535 (E.D. La. Aug. 2, 2013) (defendant failed to receive documents it suspected should exist, but plaintiff stated under oath it did not possess any such documents); McElwee v. Wallantas, No. Civ. A. L-03-CV-172, 2005 WL 2346945, at *3 (S.D. Tex. Sept. 26, 2005) ("[T]he Court cannot order the Defendants to produce documentation that does not exist. Therefore, unless the Plaintiff can provide proof that the documents exist, rather than mere speculation, the Court will not entertain motions to compel the Defendants to produce documentation whose existence is nothing more than theoretical."); Henderson v. Compdent of Tenn., Inc., No. Civ. A. 97-617, 1997 WL 756600, at *1 (E.D. La. Dec. 4, 1997) ("The Court cannot compel production of what does not exist. Of course, if defendants have or acquire evidence that the response is incomplete or that the affidavit is false, other remedies may be sought by motion.").

27. *See* A.M. Castle & Co. v. Byrne, 123 F. Supp. 3d 895, 909 (S.D. Tex. 2015).

28. Hespe v. City of Chicago, No. 13 C 7998, 2016 WL 7240754, at *4 (N.D. Ill. December 15, 2016).

29. *Id*.

plaintiff learned that the defendants refused to employ a Boolean search in their document review process and instead employed a restrictive qualifier that was "virtually guaranteed to avoid finding relevant ESI."[30]

In *Venator v. Interstate Resources, Inc.*, the court granted in part a motion to compel and for sanctions when counsel never confirmed that all hard drives had been searched and a party merely designated a human resource manager responsible for the searches of its computer systems to gather responsive documents. The client had an IT department, but failed to adequately consult that department, and the HR manager admitted he did not fully understand the IT systems. The court required the defendants to pay the plaintiff's reasonable expenses and fees associated with the filing of her motion because of the "woefully insufficient electronic records search" but declined to order a site inspection of the defendant's computer systems.[31]

One court granted a motion to conduct a forensic examination where a party failed to timely implement a litigation hold, allowed executives to self-collect ESI, and collected email using a single search term. In that case, many of the witnesses testified that counsel never issued instructions on how to search for ESI or documents, never saw the requests for production, and were unable to state whether there was an automated deletion process or backup tapes.[32]

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30. Wallace v. Tesoro Corp., No. SA-11-CA-00099, 2016 WL 7971286 (W.D. Tex. Sept. 26, 2016).

31. Venator v. Interstate Resources, Inc., CV415-086, 2016 WL 1574090 (S.D. Ga. April 15, 2016).

32. Procaps S.A. v. Pantheon Inc., No. 1:12-cv-24356, 2014 WL 11498060 (S.D. Fl. Dec. 1, 2014).

In some cases, courts have ordered the taking of a corporate representative's deposition under Federal Rule of Civil Procedure 30(b)(6) "to consider whether adequate efforts have been made to respond to requests for production."[33] Thereafter, some courts have ordered the production of relevant computer hard drives "based upon discrepancies or inconsistencies in a response to a discovery request or the responding party's unwillingness or failure to produce relevant information."[34]

By comparison, in denying a motion to compel, the Court in *A.M. Castle & Co. v. Byrne*[35] concluded that Castle had not shown that the defendants were in wrongful possession of any company documents, nor had it provided any evidence that the defendants were or had been deleting files. To the contrary, the defendants hired an independent firm to perform a forensic examination of their computers that included a search for hundreds of terms requested by Castle. "That Castle is skeptical, without anything else to support its request for an intrusive fishing expedition in Defendants' electronic devices is insufficient to support such a drastic discovery request."[36]

Likewise, in *Memry Corp. v. Kentucky Oil Technology, N.V.*,[37] the court denied a motion to compel a forensic examination where the defendant represented it had made a reasonable search for responsive documents and the plaintiff could only point to two missing emails out of thousands of documents produced. In addition, the court appeared concerned that there was

33. Robinson v. City of Arkansas City, Kan., No. 10-1431-JAR-GLR, 2012 WL 603576, at *15 (D. Kan. Feb. 24, 2012).

34. *Id*. at *17.

35. 123 F. Supp. 3d 895, 908 (S.D. Tex. 2015).

36. *Id.* at 908–09.

37. No. C04-03843, 2007 WL 832937 (N.D. Cal. Mar. 19, 2007).

no showing that the computer devices to be inspected had a "special connection to the lawsuit."[38]

In *Areizaga v. ADW Corp*., the court noted that "'courts have permitted restrained and orderly computer forensic examinations where the moving party has demonstrated that its opponent has defaulted in its discovery obligations by unwillingness or failure to produce relevant information by more conventional means.'"[39] In this wage and hour case, the plaintiff discarded his personal laptop and smart phone. The court determined that the employer's "request to obtain a forensic image of Plaintiff's personal electronic devices was too attenuated and not proportional to the needs of the case at this time, when weighing [the employer's] explanation and showing as to what information it believed might be obtainable and might be relevant against the significant privacy and confidentiality concerns implicated by [the employer's] request—even with [the employer's] offer to pay all expenses and to use a third-party vendor who would restrict [the employer's] access to the substantive information of any user-created files and particularly data that appears to be of a personal nature that may be included in the proposed forensic image."[40]

Other courts have denied motions to compel while admonishing the party that the Federal Rules of Civil Procedure require a party to conduct a reasonable search of its files to determine whether it has responsive documents, stating that the parties should have a meaningful meet-and-confer session, and

38. *Id*. at *3–4.

39. No. 3:14-cv-2899-B, 2016 WL 9526396, at *3 (N.D. Tex. Aug. 1, 2016) (quoting NOLA Spice Designs, LLC v. Haydel Enters., Inc., No. Civ. A. 12-2515, 2013 WL 3974535, at *2–*3 (E.D. La. Aug. 2, 2013)).

40. *Id*.

telling a party that it "cannot meet its discovery obligations by 'sticking its head in the sand' and claiming ignorance."[41]

Tips for requesting parties

The case law cited above fails to provide any clear guidance––but some general principles can be mined from federal court decisions to date.

If a requesting party suspects that the producing party has failed to make a complete production, consider the following before filing a motion to compel:

- Did you make a specific request for the ESI or documents?
- If so, did the request seek relevant, nonprivileged documents or ESI?
- Was the request overly broad, unduly burdensome, or not proportional under the factors stated by Texas Rule of Civil Procedure 192.4 or Federal Rule of Civil Procedure 26(b)(1)?
- Have you conferred with the producing party and suggested search terms that it may wish to employ?
- What questions should you pose to deposition witnesses to support your position that all responsive documents have not been produced?
- Among the documents produced, do any of these documents or ESI support your position that other relevant documents exist but have not been produced?

41. E. Bridge Lofts Prop. Owners Ass'n, Inc. v. Crum & Forster Specialty Ins. Co., No. 2:14-CV-2567-RMG, 2015 WL 12831731, at *3 (D.S.C. June 18, 2015).

- Should you take the deposition of a corporate representative under Texas Rule of Civil Procedure 199.2 or Federal Rule of Civil Procedure 30(b)(6)?[42]
- Have you conferred and exhausted all good-faith efforts to resolve the dispute with opposing counsel pursuant to Federal Rule of Civil Procedure 37(a)?

Laying a factual predicate to support a motion to compel will be critical to achieving relief; conclusory statements that there must exist additional documents or ESI or speculation that such data exists will likely not suffice.

Tips for producing parties

- Ensure that you have complied with Federal Rule of Civil Procedure 26(g) or Texas Rule of Civil Procedure 191.2.

42. *See* Burnett v. Ford Motor Co., No. 3:13-CV-14207, 2015 WL 4137847, at *9 (S.D.W. Va. July 8, 2015) ("Contrary to Ford's contentions, discovery of document retention and disposition policies is not contingent upon a claim of spoliation or proof of discovery abuses, and may be accomplished through a Rule 30(b)(6) witness." Ford "has failed to supply any detailed information to support its position. Indeed, Ford has resisted sharing any specific facts regarding its collection of relevant and responsive materials. At the same time that Ford acknowledges the existence of variations in the search terms and processes used by its custodians, along with limitations in some of the searches, it refuses to expressly state the nature of the variations and limitations, instead asserting work product protection. Ford has cloaked the circumstances surrounding its document search and retrieval in secrecy, leading to skepticism about the thoroughness and accuracy of that process.").

- Consider carefully whether you may have unreasonably relied on your client to conduct the search for responsive documents.[43]
- Discuss with the requesting party why they believe other documents exist.
- Consider conferring with the requesting party about how the search for responsive documents was conducted.[44]
- Review the steps you have taken to validate the accuracy of your search and production (i.e., quality control).[45]

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43. *See, e.g.*, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.").

44. Ruiz-Bueno v. Scott, No. 2:12-cv-0809, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013) (concluding that the plaintiff's concern about the lack of ESI appeared to be reasonably grounded and defendants were less than forthcoming with information about the discovery process, and ordering defendants to fully answer interrogatories and discuss in good faith what additional search methods should be undertaken).

45. The Sedona Conference, *Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process*, Principle 6, THE SEDONA CONFERENCE (Sept. 2016), https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Defense%20of%20Process ("[V]alidating the results of an e-discovery process entails gaining a reasonable level of confidence that the process has resulted in a reasonably accurate, correct, and complete production, consistent with the responding party's legal obligations. As with other aspects of the e-discovery process, the effort undertaken to validate the results of a process should be proportionate to the expected benefits of that validation.").

- Keep in mind that a late production is better than being caught in a misrepresentation to the court.

Tips for Judges

When faced with arguments that a document production is incomplete, consider requiring the respondent to file a sworn statement confirming that it has no unproduced, responsive documents or ESI in its possession, custody, or control.[46] Although the Rule 26(g)(1) certification on a response generally should suffice, sometimes requiring a statement under penalty of perjury from a client representative with knowledge could be warranted and will avoid the expense and burden of further discovery on discovery or "meta-discovery."

And consider including in that sworn statement an explanation of the search and retrieval process that allowed the affiant to reach the conclusion that all responsive documents have been produced—but do so with caution where an argument can be made that this kind of disclosure could invade the work-product privilege.[47]

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46. *See, e.g.*, Harper v. City of Dallas, Texas, No. 3:14-cv-2647, 2017 WL 3674830, at *16 (N.D. Tex. 2017); ORIX USA Corp. v. Armentrout, No. 3:16-mc-63, 2016 WL 4095603, at *6 (N.D. Tex. 2016); Desire, LLC v. Rainbow USA, Inc., No. CV154725DSFPLAX, 2016 WL 6106740, at *5 (C.D. Cal. June 29, 2016) ("Rainbow shall provide a declaration signed under penalty of perjury by a corporate officer or director attesting that it has not sold garments bearing the subject design since July 22, 2015, and that all relevant responsive documents and information have previously been provided.").

47. *See* Sean Grammel, *Protecting Search Terms as Opinion Work Product: Applying the Work Product Doctrine to Electronic Discovery*, 161 U. PA. L. REV. 2063, 2069 (2013) ("Attorneys develop search terms through an iterative process of assessing the case and gathering information. Lawyers review documents, interview witnesses or key players, and test search terms in a cyclical manner. Through this process, an attorney creates mental impressions about the case and decides which keywords best distill those impressions to produce

Conclusion

Courts should be disinclined to allow discovery on discovery or meta-discovery "in light of the dangers of extending the

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relevant documents with high recall and precision."). For a sampling of cases where courts ordered a party to explain their search methodology see *In re Facebook Privacy Litig.*, No. 5:10-CV-02389-RMW, 2015 WL 3640518, at *2 (N.D. Cal. June 11, 2015) (requiring plaintiff to "submit a declaration explaining her search in detail, including, but not limited to, all sources searched and all search parameters used"); *Fleming v. Escort, Inc.*, No. 1:12-CV-066-BLW, 2014 WL 4853033, at *6 (D. Idaho Sept. 29, 2014) ("Although the allegations in this case cover events occurring more than 15 years ago, as well as events still occurring today, Escort has produced almost no e-mail in response to Fleming's 65 document requests and 12 interrogatories. Escort argues that its emails are privileged. But Escort has not filed a privilege log, and it is unbelievable that 15 years of emails are all privileged." "Recognizing this, Fleming asked Escort three simple questions: (1) What search terms did you use? (2) What computers or repositories did you search within? and (3) What was the time frame for your search? When Escort refused to provide an answer to these three simple questions, Fleming was forced to file this motion to compel. The Court will grant the motion. There is no way that Fleming—and this Court—can evaluate Escort's claim that it has produced everything unless Escort answers the three questions. This is especially true given Escort's fantastical claim that all the emails it discovered are privileged. Escort's stonewalling is yet another example of vexatious conduct by its counsel Gregory Ahrens and Brett Schatz."); *Alomari v. Ohio Dep't of Pub. Safety*, No. 2:11-CV-00613, 2013 WL 5874762, at *4 (S.D. Ohio Oct. 30, 2013) ("In the event that Defendants maintain that no further responsive documents exist, Defendants and/or Defense counsel are DIRECTED to set forth, in affidavits, the steps they took to locate and produce responsive documents. Defense counsel must execute an affidavit certifying that Defendants have completed a reasonable inquiry in locating and producing responsive documents and that all responsive documents of which they are aware have been produced. The affidavits must confirm that their efforts in locating responsive documents are complete. The Court concludes that full disclosure of Defendants' and Defense counsel's search efforts is necessary here for a number of reasons. First, Defendants have demonstrated a pattern of inexcusable delay and non-responsiveness throughout the discovery phase of this case.").

already costly and time-consuming discovery process ad infinitum."[48] Although no clear standard has emerged, the consensus view from the federal case law appears to dictate that a party should not be required to provide discovery about its production process without good cause.[49] At a minimum, a requesting party has the burden of demonstrating that the discovery response was inadequate.[50] Court decisions on what constitutes inadequacy range across a broad spectrum.[51]

We suggest that a standard as high as the Texas Supreme Court suggests may only encourage discovery abuse. We further suggest that a standard limiting discovery on discovery to instances of bad-faith misconduct or "unlawful withholding of documents"[52] is similarly under-inclusive. Although bad-faith misconduct may be informative on the issue of sanctions, the

48. Catlin v. Wal-Mart Stores, Inc., No. 0:15-cv-00004, 2016 WL 7974070 (D. Minn. Sept. 22, 2016).

49. Brewer v. BNSF Ry Co., No. CV-14-65, 2018 WL 88812 (D. Mont. Feb. 14, 2018).

50. *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 131 (2018).

51. The Sedona Conference, *Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process*, *supra* note 45, at 42–45 (collecting cases requiring some finding of non-compliance with discovery rules; a "material deficiency" in the responding party's discovery process; "bad faith" in the discovery production). There may exist differing standards being proposed even within the Sedona Conference. *See The Sedona Principles, Third Edition*, *supra* note 50, Comment 6.b. (discussing a "tangible, evidence-based indicia . . . of a material failure by the responding party to meet its obligations").

52. *See* Brand Energy & Infrastructure Services, Inc. v. Irex Corp., No. 16-2499, 2018 WL 806341 at *2 (E.D. Penn. Feb. 9, 2018) ("Without any showing of bad faith or unlawful withholding of documents . . . , requiring such discovery on discovery would unreasonably put the shoe on the other foot and require a producing party to go to herculean and costly lengths . . . .").

appropriate standards for purposes of a motion to compel are different. A meritorious motion to compel under Federal Rule of Civil Procedure 37(a) is meant to require a party to fully respond to a discovery request, although 100% accuracy has never been required. It is fundamentally different than sanctions under Federal Rule of Civil Procedure 37(c)(1), which address "sandbagging" or holding back evidence and on which courts assess the justification for the late disclosure and prejudice to the requesting party. A Rule 37(a) motion to compel is also fundamentally different than sanctions under Federal Rule of Civil Procedure 37(e), which involve failures to produce ESI that was required to be preserved and now is "lost." Under Rule 37(a), "courts have consistently held that they have the power to compel adequate answers [to discovery requests]."[53]

Courts are correct to deny discovery on discovery when a requesting party merely suspects or believes that a discovery production is not complete. There should be some showing of a specific deficiency in the other party's production.[54] In other words, a requesting party should make a showing that allows a court to make a reasonable deduction that other documents may exist or did exist and have been destroyed before being allowed meta-discovery.[55]

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53. FED. R. CIV. P. 37 advisory committee's note (1970 Amendment).

54. *Brewer*, 2018 WL 88812 at *2.

55. Freedman v. Weatherford Int'l Ltd., No. 12 CIV. 2121 LAK JCF, 2014 WL 4547039, at *2 (S.D.N.Y. Sept. 12, 2014) ("In certain circumstances where a party makes some showing that a producing party's production has been incomplete, a court may order discovery designed to test the sufficiency of that party's discovery efforts in order to capture additional relevant material."); Orillaneda v. French Culinary Inst., No. 07 CIV. 3206 RJH HBP, 2011 WL 4375365, at *6 (S.D.N.Y. Sept. 19, 2011) ("Indeed, the search and maintenance of a party's information systems may be relevant when a party can 'point to the existence of additional responsive material' or when the docu-

The Texas Supreme Court appears to suggest that some limited meta-discovery may be allowable to determine if a producing party has met its discovery obligations. And no doubt alternatives other than across-the-board imaging and review of hard drives should be explored, but there is a real risk to the effectiveness of the discovery process if courts proceed from the background assumption that meta-discovery is to be discouraged or prohibited. This approach has expressly been rejected by The Sedona Conference. In its September 2016 *Commentary on Defense of Process*, Principle 12 recognizes that reasonable and proportional meta-discovery is sometimes appropriate (such as when testimony raises serious questions about the integrity of preservation and collection efforts).[56]

The goal of a lawsuit should be to secure the "just, speedy, and inexpensive determination" of the case.[57] In some cases, requiring the requesting party to expend additional efforts in the taking of depositions and propounding interrogatories about the discovery process may be unwarranted when it is readily apparent that discovery has been withheld. To require a requesting party, as the *In re Shipman* Court does, to demonstrate that the particularities of a producing party's electronic information storage methodology will allow retrieval of documents that have likely been withheld, and what that retrieval will entail, does not appear to comport with Rule 1.

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ments already produced 'permit a reasonable deduction that other documents may exist or did exist and have been destroyed.'"); Hubbard v. Potter, 247 F.R.D. 27, 29 (D.D.C. Jan. 3, 2008) (relying upon Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 313 (S.D.N.Y. 2003)).

56. The Sedona Conference, *Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process*, *supra* note 45, Principle 12 at 44.

57. FED. R. CIV. P. 1.

A standard requiring good cause—that may generally be met with a showing of a "material deficiency" in production—coupled with an application of the proportionality factors that Federal Rule of Civil Procedure 26(b)(1) sets forth[58] appears to better achieve the goal of Rule 1, complies with the case law relying on responding parties to search their own records and produce documents, and should be considered for use by litigants and courts when meaningful meet-and-confer sessions fail to resolve a discovery dispute based on an allegedly incomplete production.

58. FED. R. CIV. P. 26(b)(1) ("Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: 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, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.").