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A Low-Tech Solution to High-Tech Discovery

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The requirement to collect and produce electronic documents will elicit a variety of reactions from clients and attorneys alike.

Clients may fear a perceived invasion of privacy and a distraction from their lives or businesses. Undoubtedly, they do not like the exorbitant costs that often correspond with discovery.

Attorneys themselves have an ambivalent relationship with electronic discovery. Many will claim they do not get involved with electronic discovery.[1] Others suggest their matters do not involve electronic documents. (While theoretically possible, any case where parties use computers, email, or mobile devices likely involves some electronic documents.) For those who do roll-up their sleeves to engage in good faith discovery, they are likely all too familiar with the typical tension between clients who protest an attorney's attempt at complying with discovery obligations and opposing counsel who will scrutinize every decision along the way. Waiting in the background, should that tension result in dispute, is a busy court. The court understandably may not have the time nor inclination to delve into the minutia that is typical in electronic discovery disputes.

Finally, to compound matters, there are parties and attorneys who seek to impermissibly exact leverage from discovery. Unfortunately, some engage in the self-selection of helpful discovery and the intentional disregard of damaging, but relevant discovery. Others serve abusive discovery requests and initiate motion practice when there is a substantial disparity in resources and capabilities.

For those doubting the utility of showing your cards to the other side, engaging in such a transparent and cooperative exercise has numerous benefits.

For those wary of wading into electronic discovery waters, the foregoing is incentive enough to stand ashore.

The most common reaction to these issues is for attorneys to unilaterally conduct discovery as they or their clients see fit. Disputes raised by one side are often met with return fire in the form of competing deficiency letters or discovery motions. But, most hope that their efforts in the discovery process never come to light.

Fortunately, there is a low-tech solution to these "high-tech" electronic discovery concerns — discovery plans. Stated simply, they represent an agreement among parties as to how discovery will be conducted and they can be entered by the court as an order. In that vein, they are no different than routine confidentiality or scheduling stipulations that govern the conduct of litigating parties. Such discovery plans have been in use in our Superior Court for a number of years. In the Court of Chancery, discovery plans have become more prevalent in recent years. For example, in 2016, the parties in *Partner Investments, L.P. v. Theranos, Inc.* entered into a discovery plan modeled off of samples from courts across the country and our Superior Court.

Since then, Vice Chancellor J. Travis Laster has encouraged parties to use a similar form of order that, in my estimation, is the gold standard for discovery plans. Spanning nearly thirty pages, it is hard to contemplate an issue that counsel should not consider in discovery — e.g., the amount of written discovery to be served, litigation hold notices, the scope and sources of discovery, the identification of custodians, search protocol, form of production, privilege logs, motion practice, etc.

What makes this discovery plan or any similar plan so appealing is that they are customizable. For massive cases, the Vice Chancellor's discovery plan allows the parties to identify in detail precisely how discovery will be conducted. But it also affords parties an opportunity to reach agreements on what will not be subject to discovery. For example, parties can elect that data from mobile devices or personal computers will not be subject to discovery.

For those doubting the utility of showing your cards to the other side, engaging in such a transparent and cooperative exercise has numerous benefits.

First, parties can take control of discovery, including discovery-related costs. Instead of letting discovery run amok, the limitations and guidelines in a discovery plan can control costs and make discovery proportional to the issues at stake. Without discovery plans, often such limits are achieved through court orders resulting from motion practice. Discovery plans give the parties the power to set such limits before costly disputes arise.

Second, such plans provide security. If there are disputes about what should have occurred in discovery, the parties can look to their court-ordered discovery plan to determine if discovery was conducted as agreed.

Finally, discovery plans help focus litigation. By engaging in a thorough self-analysis of one's case and then a meaningful meet and confer with the other side, parties should begin to identify the key issues in their case, the key witnesses, and the costs that it will take to litigate the case.

For sample discovery plans, please feel free to email me.

Notes:

1. Because "electronic" is essentially a superfluous adjective given the abundance of electronic documents in today's practice, litigators cannot truly avoid electronic discovery. Trying to ignore it stands in direct contrast to the competency requirement of Rule 1.1 of the Delaware Rules of Professional Conduct. *See* cmt. 8 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.").

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