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## **E-Discovery: It's Like Déjà Vu All Over Again**

**By: Ryan P. Newell, Esquire**

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# E-Discovery: It's Like Déjà Vu All Over Again

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**W**hen it comes to electronic discovery, many litigators repeatedly find themselves wrestling with questions that seemingly appear in every case. When did the duty of preservation arise and was electronically stored information preserved? How much discovery is each party entitled to? How expensive will e-discovery be for my client? And, because there is no such thing as a perfect discovery process — have there been errors in the discovery process that might result in sanctions or that will prompt protracted saber rattling and threats of sanctions (which can often be as expensive to the client as sanctions)? The consequences arising from these questions are now routine parts of litigation — extensive letter writing campaigns, meet and confers lacking in transparency, but overflowing with invectives and threats of judicial intervention, and escalating discovery costs. As the great philosopher Yogi Berra once said, “It’s like déjà vu all over again.”

But, it doesn’t have to be. Instead of dealing with e-discovery in a reactionary posture once litigation has arisen or is reasonably likely to, parties may be wise to address e-discovery before there is a dispute. For contracting parties, they can address e-discovery in the same manner they address choice of law, forum selection, and damages. Likewise, companies can plan ahead with e-discovery terms in their governance documents.

By addressing these issues affirmatively in advance of any disputes, parties can inject more certainty into the

discovery process and reduce the time and expenses involved. For a thorough discussion of how parties can effectively do so, please see Jay Brudz & Jonathan M. Redgrave, *Using Contract Terms to Get Ahead of Prospective Ediscovery Costs and Burdens in Commercial Litigation*, 18 RICH. J.L. & TECH. 13 (2012). In their article, Brudz and Redgrave provide sample terms that can be readily implemented. So, before enduring that déjà vu feeling all over again, consider some of the terms suggested by Brudz and Redgrave, such as the following:

## Discovery

The Parties<sup>1</sup> recognize that the costs of litigation, arbitration, or any other mode of dispute resolution can be substantial. Each Party agrees that in the interests of minimizing dispute resolution costs, speeding resolution time, and decreasing uncertainty of costs, it may be desirable for both Parties to waive certain rights to which it would otherwise avail itself. Accordingly, the Parties agree, with respect to any litigation, arbitration, mediation, or any other claim arising under or related to the Agreement.

## Notice of Dispute

“Notice of Dispute” means a notice by one Party to the designated notice contact of another Party, setting forth the substance of the dispute, the timeframe of the relevant facts, a listing of initial known participants, the amount in dispute, and making specific reference

1. Please see the full article for definitions of the capitalized terms.

to the Agreement and the preservation obligations specified herein.

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Within a reasonable time after receipt of a Notice of Dispute, the Parties shall:

i. Issue a Legal Hold Notice to its current employees directly involved with the subject matter of the dispute directing those employees to preserve relevant documents in their possession (with notices sent to additional current employees directly involved as those additional employees are identified);

ii. Take reasonable steps to preserve responsive Documents in the custody of current employees subject to a Legal Hold Notice who are terminated or transferred; and

iii. Take reasonable steps to preserve responsive Documents located in Server Based Systems.

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No party is obligated to take preservation efforts prior to receiving the written Notice of Dispute and the Parties agree that they will not argue that any failure to preserve information prior to receiving the written Notice of Dispute is culpable, wrongful, or sanctionable in any fashion.

## Determination of Individual Custodians

The Parties agree that:

i. In matters where the Claim Amount involves less than \$5 Million, each Party shall only be required to collect, search and produce Documents from no more than five

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(5) Individual Custodians directly involved in the dispute.

ii. In matters where the Claim Amount is greater than \$5 Million, the collection and production shall be limited to no more than twenty (20) Individual Custodians.

iii. The Requesting Party shall be entitled to identify the Individual Custodians specified in paragraphs i. and ii. above from whom documents are to be collected, by name or job responsibility.

iv. In the event that a Producing Party voluntarily produces Documents from an Individual Custodian not designated by a Requesting Party pursuant to paragraphs i. and ii. above (i.e. to support its own claims

or defenses), such Producing Party may be required, upon request of the Requesting Party, to collect, search and produce Documents from such Individual Custodian.

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Absent a claim of fraud, misrepresentation, or bad faith supported by clear and convincing evidence, no Producing Party shall be liable for, and no Requesting Party shall seek any remedy for spoliation, adverse inference instruction or other sanction from any Producing Party provided such Producing Party has complied with its obligations under this Section.

### Indemnification

If any Requesting Party seeks to compel a Producing Party to require greater

preservation, collection, or production requirements than are set forth herein (or seeks relief based upon the other party's failure to preserve, collect or produce documents beyond the obligations contained herein), or otherwise breaches any of the provisions of this Section, or challenges the enforceability of any provisions of this Section, the Requesting Party shall indemnify the other Party for any costs associated with defending against such efforts and any costs incurred as a result of any increased requirements that may result from such efforts, including all reasonable legal fees, outside vendor costs, and internal expenses associated with the collection, review, redaction, and production of such documents. Ⓢ

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