CHAPTER 1

General Scope of Discovery

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I. *Introduction*

In 1958, the U.S. Supreme Court explained that discovery should "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[1] This fundamental philosophy has not changed, although the mechanisms of discovery have certainly changed dramatically in the intervening years. Electronic data, machine learning search technology, deposition videography, and publicly available information online are just a very few of the major changes that litigants and courts now must address to govern discovery fairly and expeditiously. More than ever, a construction lawyer must approach complex case discovery with a detailed plan of intelligent design. Discovery must be properly tailored to obtain what is needed while avoiding cost-prohibitive activities. The proliferation of data mandates reciprocal protections for inadvertently produced data and for enforceable confidentiality. Sanctions for data destruction or loss add greatly to the challenges. Later chapters in this book address electronically stored information and the applicable law governing retention and production, which is essential to every construction litigator today.

In construction litigation, a case is very rarely proved or defended with data solely in possession of one's client at the time the dispute arose. Instead, documents, information, data, and testimonial evidence from the opposing party or third parties are often essential to winning a case. Not only is properly planned and conducted discovery critical to winning the case, but mismanaged discovery can devastate a case. Willful or gross abuses of the discovery process can result in severe sanctions, including dismissal.[2]

1. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).
2. *See, e.g.*, Brown v. Columbia Sussex Corp., 664 F.3d 182 (7th Cir. 2011); Vallejo v. Santini-Padilla, 607 F.3d 1 (1st Cir. 2010); Belk v. Bd. of Educ., 269 F.3d 305, 348 (4th Cir. 2001); Valley Eng'rs, Inc. v. Elec. Eng'g Co., 158 F.3d 1051 (9th Cir. 1998); Anheuser-Busch,

Practice Pointer

Organize and manage your discovery plan effectively. Conduct a prediscovery meeting, and use the checklist provided at pages 21–22.

From the perspective of litigation cost management, discovery is the most expensive component of most legal disputes, and thus must be planned and organized from the outset of the attorney's involvement. Even in the largest cases, in which substantial legal expenditure may be warranted, following every conceivable path to obtaining helpful information is not possible. Therefore, the job of the lawyer must be to learn enough about the case, and the issues that will need to be proved, to plan and manage the discovery process effectively. This book provides instruction on how to organize a construction case and how to use the available discovery tools to best advantage.

II. *Identify the Forum and Applicable Rules*

A. Court Rules

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The Federal Rules of Civil Procedure and state rules patterned after them govern the basics of civil litigation discovery, and serve as a model for the procedural rules of most states. Federal Rule 26 establishes the broad parameters of fact discovery and expert discovery. The subsequent rules govern specifics of production of documents and things and entry on land (Rule 34); depositions (Rules 27, 28, 30, and 32); interrogatories (Rule 33); and requests for admission (Rule 36). All of these discovery methods, together with informal fact gathering through available sources, will be needed in the complex construction case.

One note of caution: In August 2013, the Judicial Conference Advisory Committees on Bankruptcy and Civil Rules proposed amendments to several of the Federal Rules of Civil Procedure discussed in this chapter that would limit the scope of discovery.[3] The proposed amendments, if approved by the relevant committees, the Judicial Conference, and the Supreme Court, will become effective on December 1, 2015, unless Congress elects to defer, modify, or reject them.[4] Also, should they become effective, revisions may have occurred during the process. Therefore, the reader should review a current set of the rules if such date has passed.

Rule 26(b)(1) establishes a broad scope:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature,

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Inc. v. Nat'l Beverage Distribs., 69 F.3d 337 (9th Cir. 1995); Chilcutt v. United States, 4 F.3d 1313, 1324 (5th Cir. 1993); Marrocco v. Gen. Motors Corp., 966 F.2d 220, 224 (7th Cir. 1992) (all dismissing claims for violation of discovery rules and procedures).

3. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure (Aug. 2014), http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment [hereinafter Proposed Rules].

4. *See id.* at 289–90.

> custody, condition, and location of any documents, or other tangible things and the identity and location of persons who know of any discoverable matter. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.[5]

Neither the rules nor the substantial body of case authority interpreting federal and state rules limit discovery to admissible evidence. Instead, any information reasonably calculated to lead to the discovery of admissible evidence is currently allowed. Although recent decisions reflect a trend to prevent harassment through the use of overly broad discovery,[6] entitlement to generous interpretation of good-faith discovery requests remains the norm. Rule 26(c) permits the court to shift the cost of discovery if the producing party shows undue burden or expense.[7] Moreover, the proposed amendment to Rule 26(b)(1) alters the current language significantly to read 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 amount in controversy, the importance of the issues at stake in the action, 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 need not be admissible in evidence to be discoverable*.[8]

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Every litigation begins with an analysis by the prospective plaintiff of the forum in which the case should be initiated. Naturally, the discovery rules of the chosen forum must be followed after the case is filed. Although the rules themselves will not likely be a factor in forum selection, the manner in which the rules are administered by the state or federal court can make a difference in the discovery process. Most federal courts will have magistrate judges assigned to hear discovery disputes, and will similarly have required discovery parameters, including number of depositions, length of depositions, and time permitted for overall discovery. State courts are typically more free-form, although many busy jurisdictions now employ discovery masters. Most state courts also have limits on the time for discovery, depending on the setting of a trial date. One thing is universal: judges in both state and federal court dislike discovery disputes, and the rules thus require the parties to attempt resolution of disputes cooperatively before bringing the matter to a court.[9]

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5. Fed. R. Civ. P. 26(b)(1).
6. Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003) (unduly broad subpoena quashed and sanctions imposed).
7. Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) (establishing a seven-part test to determine which party should bear the cost of discovering inaccessible electronic documents); OpenTV v. Liberate Techs., No. C02-0655 JSW, 2003 WL 25816918 (N.D. Cal. Dec. 2, 2003) (cost shifting appropriate when inaccessible data is sought).
8. *See* Proposed Rules, *supra* note 3, at 289–90 (emphasis added).
9. *See* Fed. R. Civ. P. 37(a)(2) (a motion to compel discovery must "include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.").

A trend toward sanctioning discovery abuses has resulted in substantial case authority recognizing the trial court's broad discretion to curb parties from engaging in practices that are abusive, wasteful, or evasive.[10]

B. Mandatory Disclosure Rules

The federal courts, and most state courts, now require mandatory disclosures to be provided by litigants without the necessity of a discovery request. Local rules of court frequently require form filings to accompany or promptly follow the filing of a complaint. Rule 26(a)(1) governs initial disclosures in all but exempt proceedings, including the identification of individuals likely to have discoverable information (Rule 26(a)(1)(A)(i)); a copy or a description of documents or things in possession of the party that the disclosing party may use to support its claims or defenses (Rule 26(a)(1)(A)(ii)); a computation of damages and access to data on which the computation is based (Rule 26(a)(1)(A)(iii)); copies of any relevant insurance agreements (Rule 26(a)(1)(A)(iv)). These disclosures must be made at or within 14 days after the Rule 26(f) discovery conference.

Rule 26(a)(2) mandates disclosure of expert testimony and reports. The expert report must contain "a complete statement of all opinions to be expressed and the basis and reasons for them; the facts or data considered by the witness in forming them; any exhibits to be used to summarize or support them; the witness's qualifications, including a list of all publications authored by the witness within the preceding 10 years; a list of all cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and a statement of the compensation to be paid for the study and testimony in the case."[11] Absent other direction, these disclosures must be made at least 90 days before the trial date.

Parties are under an affirmative obligation to supplement or correct disclosures, at least "in a timely manner."[12] Signing of mandatory discovery disclosures carries an obligation of the signing attorney or party that the information is "complete and correct as of the time it is made."[13]

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10. *See, e.g.*, Arthur Andersen & Co. v. Finesilver, 570 F.2d 1370, 1374–75 (10th Cir. 1978) (upholding sanction of preventing a party from presenting evidence on certain claims on the basis that the sanction served a general deterrent effect); Jama v. Denver, 280 F.R.D. 581 (D. Colo. 2012) (stating that the determination of whether a discovery rule violation is justified or harmless, for purposes of imposing discovery sanctions, is entrusted to the broad discretion of the district court); Kindergarteners Count, Inc. v. DeMoulin, 209 F.R.D. 466 (D. Kan. 2002) (upholding sanction "that it be taken as established for purposes of this lawsuit that [the counter-defendant] made similar telephone calls"); Ochoa v. Accelerated Benefits Corp., No. CV-00-1075-ST, 2001 WL 34047029 (D. Or. Jan. 26, 2001) (upholding sanction in an action for breach of an oral contract, where the court deemed established that the parties entered an oral agreement on the terms alleged in the complaint).
11. Fed. R. Civ. P. 26(a)(2)(B).
12. Fed. R. Civ. P. 26(e).
13. Fed. R. Civ. P. 26(g)(1).

Rule 26(a)(3) also codifies the provision of witness and evidentiary materials in advance of trial, at least 30 days before trial. Objections must thereafter be made by an opposing party within 14 days, or they are waived unless excused by the court for good cause shown.

C. Scope of Discovery Allowed under AAA and Other Arbitral Rules

Parties who have contracted for arbitration generally will not have the same broad entitlement to discovery as that afforded by the court system. Most state arbitration statutes, and some arbitration rules, give the arbitrator or arbitration panel some discretion to order prehearing discovery.[14] In construction cases, a document exchange is almost always required, even in arbitration. Depending on the size of the dispute, deposition discovery may also be permitted, usually with specific limits. Other discovery tools common in court cases, such as interrogatories or requests for admission, are seen very rarely in arbitrations.

Naturally, parties who have contracted for arbitration can always agree on discovery exchanges, and can even conceivably contract for full discovery under applicable court rules. Since arbitration is viewed by many people as a streamlined and speedier process than court litigation, such agreements are uncommon. Consensual information exchange is rarely subject to the rigorous procedures, or possible sanctions, imposed by courts on discovery.

Advocates who believe that a substantial need for discovery exists in a case in which the client has agreed to binding arbitration will need to study the applicable statutes and rules, and be prepared to make a compelling showing to the arbitrators that fairness requires discovery beyond an exchange of exhibits and witness names. Even where the statutes and rules grant arbitrator discretion, arbitrators will be reluctant to order the kind of discovery common in court proceedings, given the admonition that arbitration is intended to be more streamlined and efficient than court litigation.

Discovery in arbitration proceedings is treated in greater detail in chapter 10 of this text.

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III. *Develop a Discovery Plan and Budget*

A. Identification of Claims

1. *Disputed Issues*

In a construction case, the lawyer's early information from the client should include interaction with the most knowledgeable personnel, and a review of what the client believes to be the key documents. If the case involves a monetary claim, it will be essential to review the project cost report or other summary financial data that will allow verification that the areas of loss coincide with the client's description of the problem. Preparation of the discovery plan will require an understanding of what

14. The Federal Arbitration Act, 9 U.S.C.A. 2, does not address discovery, but the Act and the case law interpreting the Act make clear that the agreement of the parties will be enforced.

Practice Pointer

When involving experts and consultants in the early phases of a dispute, be aware of the discovery risks. The opinions of a nontestifying consultant, hired solely for the purpose of assisting the lawyers, will be protected as privileged work product (FRCP 26(b)(4)(D)). By contrast, a testifying expert is not only subject to broad questioning, but will also be required to produce all documents and things that were provided in the course of the engagement. Communications with clients and lawyers are not privileged (FRCP 26(a)(2)(B), (b)(4)(C)). Think ahead about how you will use the help of a consultant or expert. It makes sense to err on the side of treating outside experts as if they will testify ultimately.

kind of immediate relief the client may be expecting, or needing, including an evaluation of the prospects for injunctive relief or termination of performance.

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2. *Factual Issues*

The complex construction problem will require study of the complex construction documentation. If the problem involves changes or alleged defects, the plans and specifications must be studied in detail. If the problem involves delay or disruption, the schedules and updates are essential. It may be necessary to seek outside expertise to understand these technical documents. In many cases, the client representatives are able to explain important technical issues so that the lawyer can frame a discovery plan that is designed to obtain information that will enable a successful proof or defense. If the client is not sufficiently available or does not have sufficient expertise, then an expert or consultant must be hired to assist with issue identification and claim evaluation. The dispute/litigation is likely to be resolved ultimately in a presentational setting, such as a settlement meeting, mediation, trial, or arbitration. The lawyer must understand, and be prepared to explain, the construction and technical issues, in addition to the legal issues. The lawyer is not required to be an expert in all matters, but must be a competent interpreter.

B. Legal Issues

As simple as this sounds, identification of the legal issues that are involved in a dispute, and advance research of the governing law, needs to be accomplished ahead of adopting a discovery strategy. For example, if the contract contains a "no damage for delay" clause, and those clauses have been enforced in the jurisdiction in which the suit is pending, a plaintiff's case should not be structured as a delay claim.[15]

If joining an additional party as a defendant will destroy diversity jurisdiction, and advantages are presented by a state court venue, the pleadings may be framed

15. *See, e.g.*, Atl. Coast Mech. v. R.W. Allen Beers Constr., 592 S.E.2d 115 (Ga. App. 2003) (summary judgment based on "no damage for delay" language reversed; impact damages distinguished).

with broader claims. Obviously, the legal issues are unique to each construction case. Identification of these issues, and crafting a discovery plan that targets evidence to prove each element of a cause of action or defense, is essential.

1. *Construction Contracts*

This simplest of commandments remains the most important: read the contract. In any construction case, the contract will determine resolution strategies, and thus discovery needs. Significant contract issues, such as notice and waiver, can be proved most effectively through the documents of the opponent or third parties. Most contracts these days are complex and detailed, with appendices and incorporated plans and specifications. Even before any discovery is propounded, the contract will begin to define the legal course of action: What is the required forum for disputes—court, arbitration, or other? What are the prerequisites to a complaint or demand—notice, documentation, mediation? What types of damages are prohibited? What state's law applies? Who are the proper legal parties to a contract dispute? What type of penalties or formulaic damages is specified? What is the time for performance and the remedies allowed for failure to achieve it? What are the requisites for increasing or decreasing the contract price? Reviewing the contract and identifying these requirements in advance will allow the lawyer to formulate a discovery plan that promotes an achievable resolution within the parameters of the legal commitments the client made or accepted.

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2. *Common Law*

The causes of action pled in the complaint, and the affirmative defenses or counterclaims raised, will generally be governed by case law in the applicable jurisdiction. The discovery conducted should be designed to support the factual requisites for proof of common law entitlements. Many construction cases, for example, include common law claims based upon third-party-beneficiary status, unjust enrichment, oral contract, promissory estoppel, or fraud. These are legal theories that generally require substantial factual development. Thinking through the sources of information that can support these types of claim theories will allow a proper framing of the discovery requests. Most complex construction cases involve multiple rounds of written discovery. A comprehensive evaluation of the types of documentation, questions, or admissions needed to prove common law claims will avoid the costly process of repeat discovery. Similarly, the defenses of notice, waiver, and estoppel, to name a few, require factual proof obtained through the discovery process.

3. *Statutory and Regulatory*

Statutory causes of action may, in some cases, be more important than contract claims.[16] The evidence to prove conclusively breach of statutory duties will need to

16. *See, e.g.*, A.I.G. Constr. Co. v. Thomson, No. 14-03-00021-CV, 2004 WL 2002556 (Tex. App. Sept. 9, 2004) (subcontractor's failure to perform in a workmanlike manner was not a breach of contract, but was a violation of the Deceptive Trade Practices Consumer Protection Act).

be developed through discovery. Discovery conducted in the context of a construction contract case may also give rise to an amendment to add claims based upon statutory violations.

C. Sources of Information

1. *Individuals with Knowledge*

a. *Early Contact*

Proper case management includes identifying and evaluating the effectiveness of potential witnesses. An understanding of the ability to present a case through the client witnesses will guide decisions about choice of forum, necessary discovery, and the ultimate strength of the case. Related witnesses, who may not be employed by the client, but whose positions are aligned, can be the strongest allies in a presentational setting—trade contractors; inspectors; designers; engineers; consultants.

Lawyers rarely take sufficient advantage of the ability to interview cooperative witnesses. Most witnesses are met for the first time in deposition. Money can be saved, and advantage can be obtained, by scheduling meetings and interviewing project participants. Most states, and the ABA Ethical guidelines, now allow liberal contact with ex-employees of the adversary.

The rules of discovery should not be applied rotely. Informal discovery can lead the lawyer to the true issues that require support and workup. A working meeting with project participants and allies will be an education about the facts from the people who lived them. The participants will often remember collectively what one individual may have forgotten or disregarded.

A lawyer should plan the case development with the ultimate trial/arbitration in mind. Evidence is presented ultimately through witnesses. Documents are organized by witness, as well as by issue. Witnesses allow the trier of fact to evaluate credibility and entitlement. Of course, cross-examination also depends upon documents being organized for use with a given witness. For all these reasons, early witness identification, and organization of key evidence based upon which witness will introduce that concept, is important.

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Practice Pointer

Before meeting with third parties, consider whether their inclusion will make information shared discoverable to the opposition. In the proper case, a joint defense agreement or common interest privilege protection statement, signed by all parties, can protect communications from unwanted discovery.*

* *E.g., In re* Keeper of the Records Grand Jury Subpoena Addressed to KYZ Corp., 348 F.3d 16 (1st Cir. 2003) (attorney's advice during a conference call with client, another corporation, and medical advisor not privileged).

Practice Pointer

Create a matrix of key names and information about those project participants. This data, especially dates of employment, project title, current contact information, and cross-references to other possible witnesses, is helpful for a variety of tasks. A project organizational chart, or project directory, are good starting points. Create an outline early on with the key elements needed to prove the case, and the witnesses who will be used to prove it. Consider who the opposition witnesses will be.

The document database to be developed for exhibits should contain witness fields, so that documents can be tagged and organized by witness. This will be important in scheduling early depositions to tie down these key personnel, and especially to limit them in their future testimony.

b. *Identify Candidates for Depositions*

A litigator should ascertain at the earliest possible stage of a complex construction case an opposing party's formal position regarding factual issues or claims in dispute, by way of the Rule 30(b)(6) corporate representative deposition. Rule 30 of the Federal Rules of Civil Procedure generally governs the manner in which depositions are to be scheduled and/or taken and states in pertinent part as follows: (b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party who wants to depose a person by oral questions must give reasonable written notice to every other party to the action. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is not known, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) If a subpoena *duces tecum* is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audio-visual, or stenographic means. The noticing party bears the recording cost. Any party may arrange to transcribe a deposition. With prior notice to the deponent and other parties, any party may designate another method for the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose

of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the deponent's name; (D) the officer's administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(6) In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a non-party organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.[17]

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If the person to be deposed is a party, or an officer, director, or managing agent of a party to an action, a subpoena is not required to compel his or her attendance at deposition.[18] If the person to be deposed is a mere employee of a corporate party, the deposing party must secure his or her attendance via a Rule 45 subpoena.[19] When a party to be deposed is a corporation, the deposing party may designate within its Rule 30(b)(6) notice of deposition the particular individual who will speak on behalf of the corporation, if the named individual is a director, officer, or managing agent of the corporation. Otherwise, the deponent corporation will

17. Fed. R. Civ. P 30(b) (emphasis added).

18. Cont'l Baking Co. v. M&G Auto. Specialists, No. 92 C 3714, 1993 WL 75066, at *1 (N.D. Ill. Mar. 15, 1993); Rapoca Energy Co., L.P. v. AMCI Exp. Corp., 199 F.R.D. 191, 193 (W.D. Va. 2001).

19. *Rapoca Energy Co.*, 199 F.R.D. at 193; Sugarhill Records Ltd. v. Motown Record Corp., 105 F.R.D. 166, 169 (S.D.N.Y. 1985).

designate the person to be deposed in light of the subject matter identified within the 30(b)(6) notice.[20]

When determining whether an individual qualifies as a "managing agent" of a corporate deponent, the federal courts consider factors such as:

> 1) whether the individual is invested with general powers allowing him to exercise judgment and discretion in corporate matters; 2) whether the individual can be relied upon to give testimony, at his employer's request, in response to the demand of the examining party; 3) whether any person or persons are employed by the corporate employer in positions of higher authority than the individual designated in the area regarding which information is sought by the examination; 4) the general responsibilities of the individual "respecting the matters involved in the litigation," . . . and 5) whether the individual can be expected to testify with the interests of the corporation.[21]

The test for determining whether one is a managing agent is made at the time of the deposition.[22] The burden of proving managing agent status of an individual named within a 30(b)(6) notice rests upon the deponent.[23] This notwithstanding, close questions are to be resolved in favor of the examining party.[24]

Within the 30(b)(6) deposition notice, counsel is required to identify, with specificity, the area or areas in which the representative shall be knowledgeable and shall speak on behalf of the corporate party. Accordingly, a litigator should identify within the notice of deposition any and all conceivable areas (both general and specific) which may be or become relevant in the litigation. Generally, a litigator can expect such a witness (or witnesses) to be well prepared for the deposition, to the extent that he or she maintains "the party line" with regard to the dispute at issue while simultaneously providing as little negative information as possible. This notwithstanding, a 30(b)(6) deposition provides a litigator with a golden opportunity to force an opponent to "show its hand" on certain factual issues and "pin down" its position with regard to the pertinent facts in dispute.

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2. *Documents*

As with any litigation, documentary evidence and contemporaneous data are the singular most important sources of information cataloguing the progress and

20. *In re* Honda Am. Motor Co. Dealership Relations Litig., 168 F.R.D. 535, 540 (D. Md. 1996) (citing Advisory Committee Note to 1970 Amendments to Fed. R. Civ. P. 30(b)(6) and Founding Church of Scientology v. Webster, 802 F.2d 1448, 1451 (D.C. Cir. 1986)); *Sugarhill Records*, 105 F.R.D. at 169.
21. *Sugarhill Records*, 105 F.R.D. at 170 (citation omitted); *see also In re* Honda Am. Motor Co. Dealership Relations Litig., 168 F.R.D. at 540–41.
22. *In re* Honda Am. Motor Co. Dealership Relations Litig., 168 F.R.D. at 541.
23. *Sugarhill Records*, 105 F.R.D. at 170.
24. *Id*. at 171.

completion of a construction project. In most instances, a properly documented project will provide independent or corroborating evidence of the project participants' performance, or lack thereof. In general, documentary evidence to be obtained via discovery requests for production should cover the project as a whole, including but not limited to the following:

- Contract and subcontract documents, including all agreements, amended agreements, general conditions, specifications, budgets, drawings and plans, production requirements, and correspondence related thereto;
- Applicable payment or performance bonds covering the project;
- Applicable insurance policies covering the project;
- Correspondence between any of the project participants, including commencement notices, notices of nonpayment, and/or notice of lien, demands, and so on;
- Requests for change orders and requests for information;
- Invoices and/or applications for payment;
- Lien waivers;
- Project progress reports and/or analyses;
- Applicable damage reports, cost analysis, and damage or cost estimates;
- Minutes or reports from construction and/or progress meetings;
- Original as planned schedules, schedule updates, fragnets, and as-built schedules.

While the discovery of such documentation enables a litigator to analyze, or have analyzed, the project as a whole, deposition testimony will normally be necessary to obtain an opposing party's formal position on the disputes and/or issues that are the subject of the litigation.

3. *Public Information*

Some of the most helpful discovery is available free on the Internet. Any lawyer whose case deals with publicly traded participants will benefit from locating and analyzing that party's Securities and Exchange Commission filings, all available online. Scheduling or delay cases can make beneficial use of public inspection documents, much of which is now available electronically, if not online. The opposing party's website will contain useful information, including photographs and videos that can be used for presentations. Checking the adversary's litigation history is easier now that most court systems are online. The secretary of state records, the local licensing boards, regulatory agencies who monitor projects and business operations—most are now readily available without court process. Expenses based upon lack of legal capacity or standing can often be supported through online research.

The federal government and most (if not all) states have statutory schemes requiring the disclosure of public records maintained by a public entity. Accordingly, public documents relating to private projects, such as construction permits and certificates of occupancy, may be obtained by any party via a request to the appropriate governmental office. In the case of public projects, a party may be able to obtain copies of all agreements, design documents, addenda, applications for

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payment, requests for change orders, and nonprivileged documentation maintained in relation to the project, without the need for or reliance upon the discovery phase in the litigation.[25] Attorneys representing a public entity or asserting claims on a public project should, therefore, be mindful of the general public's right of access to nonprivileged documentation when communicating information, when reviewing documentary transmittals between the public entity and third parties, or when communicating with third parties. Failure to recognize the public's right of access may result in the untimely, embarrassing, or politically polarizing disclosure of disputes within such forums as local newspapers, magazines, or television news.

D. Assembly of Documents and Database Development

1. *Document Maintenance*

Electronic maintenance of evidence is no longer optional. To effectively manage a complex construction case, state-of-the-art electronic evidence storage and search-and-retrieval systems should be employed. Discovery of the opponent's electronic media and data is essential. Several key recent cases have interpreted the rules and the discovery of electronic media, and how the cost of that discovery should be borne. The seven-part test recited in *Zubulake v. UBS Warburg LLC*[26] is gaining popularity. The court considered:

a. Whether the request is tailored to discover relevant information.
b. The availability of the information from other sources.
c. The total cost of production compared to the amount in controversy.
d. The total cost of production compared to each party's resources.
e. Each party's relative ability to control costs.
f. The importance of the issues at stake in the litigation.
g. The relative benefit of the information to each party.[27]

Document databases are by no means restricted to the large cases anymore. The ability to carry and access voluminous documentation is a wonderful and powerful convenience. Numerous options are available for database management. The decision of which to use may be influenced by the existing regime employed by the client and the project. Many complex construction projects, and client participants, use imaging and retrieval software. Equally important, however, is the adaptation (and experience) of the software to litigation uses and the ultimate presentational capability.

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25. Some commentators are spotting a trend of deference to executive branch and federal agencies in designating information as confidential. *See* Assassination Archives & Research Ctr. v. Cent. Intelligence Agency, 334 F.3d 55 (D.C. Cir. 2003); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003).
26. 216 F.R.D. 280 (S.D.N.Y. 2003).
27. *Id.* at 284 (after considering the various factors, the party requesting discovery was ordered to pay for 25 percent of the cost of data restoration).

Practice Pointer

If the litigator does not have a history with database management, or have a technology guru involved on the case, it may be necessary to get a consultant involved early in the discovery process. It makes sense to start from the beginning with a system that can be used in the arbitration or trial, if necessary.

Some of the leading case management software options are reviewed in Jie Zhang, Debra Logan & Garth Landers, *Magic Quadrant for E-Discovery Software*, GARTNER (June 19, 2014), http://www.gartner.com/technology/reprints.do?id=1-1VKNVIC&ct=140619&st=sg.

a. *Imaging*

Technology has changed so fast in the last several years that much of the early days' expertise of handling computerized documentation is already obsolete. Almost any reasonably new laptop now has sufficient hard drive space for a large complex case file. Any copy company can create electronic images of documents and other types of files. Images incorporate Bates number identification and bar coding. Images can be organized and made search-capable for easy retrieval.

The tough decision, if the client has not maintained image files throughout the project, is whether to incur the expense of imaging all the project documents, or whether to image only selected documents. The lawyer must determine which files can be copied into a useable database and must evaluate the cost-effectiveness of imaging everything as opposed to select files. As a practical matter, before the case reaches a conclusion, someone will need to review all the files that the client maintained.

The discovery plan should provide also for documents that will be obtained during discovery. Imaged copies from document productions of the files of other parties will be included in the master database. It is often helpful to obtain a duplicate copy of images of documents selected by others when reviewing the client's files. The image files can be organized by distinct Bates labeling and file categories. The database programs permit numerous searchable fields, in addition to text searching. Using the available organization consistently will be a huge help finding the documents needed for discovery, motions, and proof.

Imaging is not limited to documents used as evidence. Pleadings and client files are now routinely imaged and are available by computer search. Electronic filing and maintenance of privileged files needs to be as fastidious as hard-copy filing. The real challenge of using images is to achieve management of a case with less paper, as opposed to a case that has the same amount of paper plus images. Although the search capability and portability of images is great, eliminating duplicative paper is an important goal. Most lawyers still use hard-copy exhibits for depositions and trials. Witnesses are not used to reading lengthy documents on computer monitors. So, imaging does not entirely eliminate paper, but it does enable easier retrieval and ensured access, and eliminate the risk of losing key documents.

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b. *OCR*

The single greatest tool for document access is OCR (optical character recognition) scanning. As with imaging, technological improvements over the past several years have made this a necessary management tool. OCR scanning is now extremely accurate, so very little data is missed in searching. New programs allow the OCR images to appear nearly identical to the original document, as opposed to a funky text file. OCR scanning of all documents maintained in the database is essential. Even most handwriting now scans with reasonable accuracy.

OCR scanning can be done at the time the images are created. If document images are obtained from an adversary in discovery, software programs can create an OCR file from the images. The database containing the OCR files allows word searching throughout the document database, so that a researcher can retrieve and review any documents located by searching a particular word or phrase. Word searching may be as simple as searching for a person's name (creating a virtual file of all documents written by or to a witness). Word searching may also be used to create, or add to, issue files that contain documentary support for important case events or theories. Most database programs allow the searcher to "tag" the documents selected for a particular issue file and then save that file for future use or modification.

c. *Bates Labeling*

Complex cases always involve documents received from numerous sources. The principal advantage of Bates labeling is to enable identification of where the document came from. The document management system should have a code system that can be expanded and used for Bates labeling throughout the discovery process. A prefix denoting the party who produced the document, the cabinet number, file folder number, and image number are examples of the codes that will be helpful later. By way of example, documents produced by a party (called ABC) may be labeled ABC12.02.04–003.005.000000123 (initials of producing party; date of production or imaging; box or drawer number; folder number; page number).

In addition to the traditional Bates labeling that can be done with stickers or stamps, most imaging software will now apply virtual Bates numbers to imaged documents. The documents can be printed with or without the numbers, but the number is always attached to the computer image.

Bates labeling is important in the constant challenge of policing recalcitrant parties in the discovery process. The reviewer can always identify where a document came from and whether the set of documents is complete. Agreements with litigating parties about Bates labeling are helpful to this process.

d. *Indexing and Coding*

Document database management requires indexing and coding to allow access and efficient use of evidence. The way in which "issue" files are created for understanding the case, and ultimate presentation, requires indexing and coding. Coding options range from subjective coding, to objective coding, to no coding at all. In most cases, at least some objective coding is required to facilitate document review and organization.

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Objective coding simply attaches to the document image and related OCR scan information that is segregated into "fields." These fields are searchable, sortable, and editable. Coding is termed "objective" because it requires no knowledge of the facts or the case. Qualified input personnel simply include data in each field from a review of the document they are coding. Coding can be accomplished in house, or as part of a package purchased from the chosen copy company or database consultant. Objective coding includes (1) document type (e.g., letter); (2) author; (3) recipient; (4) carbon copy recipients; (5) subject or regarding line; and (5) date. Depending on the type of case, some other objective data may be useful.

Objective coding, coupled with OCR scanning, may be sufficient, especially with large quantities of documents that are produced by other parties. As a practical matter, issue files are generally created as an outgrowth of word-searching documents. The objective coding affords a summary list of documents and their characteristics that are located in response to a word search. Objective codes also permit sorting of search results for easier evaluation. Documents that prove helpful in connection with a crucial issue can then be maintained in electronic files that can be further culled or supplemented with important evidence.

Subjective coding requires the person reviewing the documents or data to make a decision about how that evidence should be categorized. As compared to the creation of issue files in response to document searches, subjective coding more commonly refers to a systematic review of all documents or data, by a person knowledgeable about the case and issues. Documents and data are thus systematically coded to specific issues or fields. A person studying a specific issue can simply pull up all the documents that have been coded into that category. Using subjective coding in concert with word-search capability is the most comprehensive process for developing issue specific evidence files.

The choice of how best to organize and code electronic evidence files will depend on the amount of documentation; the cost of the process; the time available; and the relative expertise of database users.

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2. *Database Maintenance*

The database system itself, in addition to the issue files, coding, and search files, constitute work product, and therefore must be protected. A system needs to be developed

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Practice Pointer

Many court reporting firms now create Internet sites for access of all deposition transcripts and attached exhibits. If fast-access Internet is readily available to all users, a private site can also be created for remote access to the discovery database and repository. Of course, the creation of an Internet site for evidentiary access will require detailed privacy considerations, firewall construction, and access code limitations. These problems are surmountable. Numerous consulting firms have the capability to provide this web-based service, if your case can afford the cost.

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whereby new groups of documents or data that are obtained through discovery can be added to the master repository, without rendering obsolete files that persons using the database have created. In addition, since many persons using the files will be using them on the go, or replicating the database and images on their personal computers, a backup system needs to be in place that will preserve work product but will not require repeated reproduction of the extensive image files.

Various customized solutions are available, depending on the size of the case, the locations where people will be working, and the number of users. One master database needs to be set up and designated as the central repository. Specific individuals need to be assigned exclusive responsibility for updating or changing the central database. Other users can access the database through the network or Internet, but cannot alter the images or basic data. They can, however, create their own subfiles for their own uses. Individual users can also replicate the database on remote computers, but they then must retain responsibility for updating those files as the central repository is updated or enhanced. An overall database directory needs to be maintained so that users can verify whether they are searching or accessing the latest version of the evidence.

By comparison to images, evidence that was obtained originally in electronic format must be managed separately. A set of files that is "locked" in the exact configuration of the files originally obtained must be maintained. A lawyer must be able to prove that documents or files are authentic for purposes of introduction into evidence. Equally important, a lawyer must be able to ascertain whether any file has been modified by another user. The simplest example of this type of evidence is electronic schedules. These files are usually obtained on CD or DVD, and the original disk produced should be maintained securely. The files can be copied onto a computer for review and use. The same simple principle applies to any files that may include meta data, or hidden fields, or may simply be changed by virtue of opening and use. Copies of these electronic files may be incorporated into the master evidence database, but the originals should be maintained separately.

An electronic management program should be implemented and communicated to all participants. Every case will be a little different, depending on the number of people using the database; the quantity of documentation; and the complexity of the issues.

3. *Identifying and Protecting Privileged Documents*

Privileged data includes lawyer correspondence; memoranda; legal research; work product; e-mails; notes; and preparatory files. Since most lawyers keep these files not only on their central network, but also on their personal computers, a system needs to be maintained for backup and integration of personal files into protected office files. Decisions need to be made about levels of access to privileged files. Most law firms will have password permissions, at a minimum, for privileged files. Document management systems are commonly used, to standardize file names and locations, and permit universal access to authorized users. In organizing documents for use in a case, the internal files of the lawyers should be maintained separately from the evidentiary database. If documents that are included within the evidentiary database are determined to be privileged, or otherwise protected by a

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confidentiality order, or other privilege, they need to be segregated or tagged for easy identification and protection.

E. Early Steps to Preserve Information and Evidence

The court in *Toste v. Lewis Controls, Inc.*, said: "As soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action."[28]

Similarly, the *Wm. T. Thompson Co.* court stated:

> While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is subject of a pending discovery request.[29]

The client should be advised of the duty to maintain documents that may be relevant to litigation, and to suspend document-retention policies absent prior consultation with counsel. A party who fails to take reasonable steps to preserve evidence can be subject to severe sanctions for spoliation.[30]

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F. Informal Witness Discovery

Witness interviews and sworn statements are useful as pretrial investigation techniques. While much less formal than a deposition or subpoena, the pretrial witness interview and statement allow a litigator to speak directly with a potential fact witness (assuming no ethical limitations apply) and obtain his or her personal recollection of

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28. Toste v. Lewis Controls, Inc., No. C-95-01366-MHP, 1996 WL 101189, at *3 (N.D. Cal., Feb. 27, 1996) (citations omitted); *see also* Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992).
29. Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); *see also* Wiginton v. Ellis, No. 02 C 6832, 2003 WL 22439865, at *4 (N.D. Ill. Oct. 27, 2003) ("A party must preserve evidence that is properly discoverable under Rule 26 . . . *even before a request is actually received*" (emphasis added)).
30. "Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001). The Judicial Committee has also proposed an amendment to Rule 37(e) designed to "ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts." *See* Proposed Rules, *supra* note 3, at 318. Proposed Rule 37(e)(1) provides that "If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may (A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and (B) impose . . . sanction[s] or give an adverse-inference jury instruction" in certain enumerated circumstances. Proposed Rules at 314–15.

a fact or facts at issue. Oftentimes the witness is much more candid and forthcoming in this type setting. By obtaining such a statement under oath, a litigator is given reasonable assurance that the witness's recollection during a later deposition, trial, or arbitration will be consistent with the previous statement. Otherwise, the sworn statement is available to refresh the witness's memory or to impeach the witness's credibility if his or her story changes over time (for whatever reason). Another benefit of the witness interview is the fact that it may be important to obtain the statement without the involvement or knowledge of opposing parties (once again assuming that no ethical obligations are violated in so doing). If the statement contains factual information harmful or negative to the client, applicable "work product" evidentiary rules may generally protect that party from having to involuntaril disclose the written document to opposing parties during the discovery process.

G. Consultants and Expert Witnesses

A litigator will normally need the assistance of a variety of "experts" in the construction field to assist with case preparation and trial. Specifically, experts can be used in the determination and evidentiary presentations of technical issues such as project scheduling, engineering and architectural issues, alleged defects in the project work, cost analysis, and damages. A good expert obviously needs to be experienced and knowledgeable in the particular construction discipline or issue for which the testing is offered. In addition, their factual findings and opinions must be well grounded and reliable based upon the facts at issue and presented in a clear and succinct manner to the trier of fact. In the federal litigation context, a person may be qualified as an expert, and thus able to give his or her scientific or technical opinion, under Rule 702 of the Federal Rules of Evidence, which states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[31]

Two seminal U.S. Supreme Court cases have addressed the scope and function of Rule 702 within the last ten years. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[32] the Supreme Court addressed a challenge to expert testimony provided in a pharmaceutical product liability case. In ruling that the evidence at issue was admissible under Rule 702, the Supreme Court in *Daubert* concluded that Rule 702 placed upon a trial judge the task of ensuring that an expert's testimony rests upon a reliable foundation and is relevant to the case at issue. In so doing, the *Daubert* court rejected the Ninth Circuit Court of Appeals' prior holding that Rule 702 required any and all expert testimony to

31. Fed. R. Evid. 702.
32. 509 U.S. 579 (1993).

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be "generally accepted" as reliable in the relevant scientific community prior to obtaining admissibility at trial.[33] In 1999, the Supreme Court addressed the scope and application of Rule 702 again in *Kumho Tire Co. v. Carmichael*.[34] In *Kumho Tire*, the Supreme Court was called upon to review the 11th Circuit Court of Appeals' affirmance of an Alabama U.S. district court judge's refusal to allow expert testimony proffered by plaintiffs in a wrongful death action arising out of an alleged tire defect. In so doing, the *Kumho Tire* court reversed the 11th Circuit's holding that the *Daubert* opinion was limited only to expert testimony proffered in a "scientific context," as opposed to technical testimony based upon the purported expert's own skill or experience. In so doing, the *Kumho Tire* court clarified that the *Daubert* "gatekeeping" obligation applies to all expert testimony under Rule 702 of the Federal Rules of Evidence. Additionally, the *Kumho Tire* court held that a trial court may consider one or more of the specific *Daubert* factors in its Rule 702 analysis, as well as any other factors that are relevant to the facts and issues presented and that are reasonable measures of reliability.

As for the specific factual evidence to be obtained from a construction expert, a litigator in a complex construction case should devote a significant amount of time, if necessary, to ensuring that the expert understands the legal strategies used and positions asserted on behalf of the client. Preparing an expert to offer an opinion is one of the most critical elements of the process. This often requires a detailed review of project documentation and testimony on critical issues as well as interviews with the project participants. This detailed preparation is paramount if the expert is to be properly qualified under Rule 702 and the *Daubert/Kumho Tire* standards. The more thorough the preparation, the more likely that the opinions offered will be credible and unassailed.

While a litigator should avoid putting words into an expert's mouth or requiring a result-based analysis, a litigator should be confident that the expert's factual analysis and opinion testimony is consistent with the client's overall litigation theme. This can be particularly crucial in the context of multiparty disputes. Different causes of action against different parties will be impacted to varying degrees by expert opinions that may be offered. In summary, an expert witness's factual analysis and opinions, to the extent possible, should be sufficiently detailed so that there is no overlap or inconsistency with the client's litigation strategy.

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H. Discovery Sequence

The hardest part of discovery in a complex case is the follow through. Inexperienced lawyers think their job is done when they draft paper discovery and send it out the door. The lawyer needs to remember that the goal is not sending the discovery, but getting what is needed to win the case. A prediscovery meeting can organize and focus the discovery efforts, creating the structure to follow so that the essential discovery is obtained. Opponents will be recalcitrant, so a follow-up system needs to be in place. Unfortunately, forcing the other side to fight for full discovery has become the norm—mostly because lawyers really don't follow through. A prediscovery meeting checklist follows:

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33. *Id*.
34. 526 U.S. 137 (1999).

- ✴ Organize review of your client's documents.
  - ➤ Factual analysis for case evaluation, presentation, and organization of client documents into electronic database, OCR database, and imaged files.
  - ➤ Creation of issue files.
  - ➤ Privilege review.
  - ➤ Facilitating production to adversaries.
  - ➤ Evaluation of nondocumentary files.
  - ➤ Electronic file catalog: understanding the mechanics (and desirability) of obtaining, reviewing, culling, and producing electronic media.
  - ➤ Plan for reciprocal exchange criteria for documents and electronic media; evaluating risks and parameters of discovery
- ✴ List available cooperative (informal) sources of documents.
  - ➤ Freedom of Information Act and state equivalents
  - ➤ Cooperative project participants or parties from whom you have a contractual right to demand documents; do any contracts include the right to audit costs or records?
  - ➤ Internet research sources (SEC; courts; trade associations; party websites; government websites; news media).
  - ➤ Former employees
- ✴ Evaluate document requests to your principal adversary. Consider types of data that are likely maintained. E-mail, schedules, spreadsheet files, and database files must be obtained electronically. Do you need a consultant to assist in electronic data evaluation and review? What is the plan for proper analysis of data that can only be reviewed thoroughly in electronic format (nonprintable data, such as schedules and formulaic spreadsheets)? Plan to maintain the integrity of the evidence, as well as having versions for review and analysis. Are you prepared to make a reciprocal exchange?
- ✴ Review your database system and plan for document organization.
- ✴ List parties from whom documents need to be subpoenaed or requested.
  - ➤ Owner
  - ➤ Lenders
  - ➤ Investors
  - ➤ Contractor
  - ➤ Subcontractors
  - ➤ Suppliers
  - ➤ Design professionals
  - ➤ Insurance companies
  - ➤ Sureties
  - ➤ Testing companies
  - ➤ Authorities having jurisdiction
  - ➤ County, city, state inspectors
  - ➤ Consultants
  - ➤ Tenants or ultimate project users
- ✴ Interrogatories (persons with knowledge; identification of damages; expert disclosures; specific key facts; defenses and contentions—protecting your position for future surprises, as well as getting information).

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- ✳ Requests for admission (specific drafting required; opportunity for cost shifting if opponent fails to admit).
- ✳ Create list of potential universe of witnesses.
- ✳ Identify possible cooperative witnesses for interviews.
- ✳ List depositions needed.
  - ➤ "30(b)(6)" corporate representatives on key topics
  - ➤ Individuals and desired timing
  - ➤ Videotaping: need for court order or agreement?
- ✳ Cost-saving opportunities—what can the case reasonably afford?
- ✳ Available services from court reporters (website access; imaging; maintenance of searchable exhibit database; digital video coordinated with transcript projection; real time; negotiated cost savings for large cases).
- ✳ Presentation aids: How will the discovery obtained be used in the final presentation? How can you organize now to minimize the cost later?
- ✳ Assign tasks, including responsibility for negotiating discovery parameters with opposition; responsibility for drafting paper discovery; responsibility for document review; responsibility for deposition tasks; and so on.

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I. Budget Considerations

The hardest part of discovery planning is cost containment. Complex cases inevitably cost a lot to manage and resolve, and these are costs the client rarely included in the business plan. The client, with the lawyer's guidance, needs to make some difficult decisions about which courses of action are cost effective and which costs are essential to winning. Document management, for example, is always a task that costs money, and one that clients would like to minimize by doing some of the work themselves. The decision to allow the client to handle key litigation tasks is always a risky one.

The high cost of complex litigation is not due to the senior lawyer/case manager spending too much time. Very rarely will clients complain about the lead lawyer giving the case too much attention. The cost is in the minions. To handle a complex matter effectively, decisions must be made early about how the case will be staffed. A minimum of retooling is in the client's best interest. If a case lasts several years, some staff turnover and duplication is inevitable, but advance planning can minimize the impact of staffing changes.

A complex case will require at least one lawyer or paralegal who is very well versed in electronic data storage and retrieval. The extreme advantage of having accessible documents in a small storage space is lost without someone who is very adept at searching, locating, and organizing the documents. A complex case also requires a lawyer who can accomplish legal research tasks, briefings, and discovery in a cost-effective manner. Every lawyer and firm has a view of case staffing, and there is certainly not one correct way. A complex case necessarily involves some compartmentalization. Someone (and not everyone) always needs to be managing the big picture. The best way to stay within the planned discovery budget is to avoid duplication of effort, and to work through a methodical plan. An overall knowledge of the discovery tools available, and of what can be obtained reasonably and used effectively, is essential to completing a competent discovery program at a reasonable price for the client.