



2022 CLM Construction Conference

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San Diego, CA

Leveraging Artificial Intelligence Technology to Support Complex CD Litigation

I. 2020 called and wants it's PDF back

Common Issues Seen In CD Discovery

Whether taking a case to trial, focusing on issues related to determining damages or simply achieving a settlement, evaluating the evidence early is the key to success. We often see defendants asked to collect their own documents and provide them via PDF to their lawyers, experts, and other professionals. From raising doubt as to the thoroughness to spoliation, the pitfalls are numerous but avoidable.

Collection - Without guidance and direction, the most well-intentioned parties use the wrong tools and methods resulting in several downstream headaches. Converting native documents to PDF and placing in common storage repository results in the loss of critical metadata necessary for efficient search and organization.

Culling and ECA – Removing the junk and getting an early understanding of the evidence is severely compromised when working with flattened documents.

Processing – Processing maintains the critical features of a native document, the image, the searchable text, and the metadata with a link back to the native, while securing it from spoliation, and providing the ability for further discovery actions such as branding and issue coding. This process is skipped when parties convert documents to PDF or print.

Repository – Using the right tool for the job is necessary in any profession. The ability to perform all the necessary tasks throughout discovery is inefficient or completely lost using Box.com or any other non-discovery type repository. As important as analyzing your client's documents is the ability to analyze opposing party productions.

II. An Evidence First Strategy

Begin with the end in mind, 26(f) meet and confer

Managing complex construction defect litigation is vastly different than that of a single-family home or simple structure. Hence, the term complex. The growing volumes of disparate data types involved in these cases demands beginning with the end in mind. How we preserve, collect, and present this information throughout discovery has a direct impact on our ability to find the evidence necessary to favorable outcomes. Only in the largest cases do we see ESI orders clearly articulated. Rule 26(f) requires parties in litigation to meet and “confer as soon as practicable . . . [to] . . . consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures . . . ; discuss any issues about preserving discoverable information; and develop a proposed discovery plan.” Fed. R. Civ. P 26(f)(1) and (2). Many attorneys view Rule 26(f) conferences as a perfunctory obligation; however, the consequences of a poorly conducted Rule 26(f) conference can lead to costly discovery headaches, even costlier remedies, and possible sanctions. These risks can be mitigated, if not avoided, by a well-implemented and well-planned Rule 26(f) strategy.

Attorneys must be well-informed of their case prior to the conference. The more informed attorneys are, the more capable they will be to address relevant issues and streamline the discovery process, which can undoubtedly be done by preparing a thoughtful discovery plan.

Collection – Think of this as the foundation of your discovery house. This is a minor investment that will prevent many headaches down the road. Potentially relevant evidence may be stored in numerous formats and devices. Starting with a detailed questionnaire will help uncover often overlooked areas such as text and chat platforms. Preserving and collecting this data may require the guidance and tools of a forensic consultant. Many of the problems we see are the result of incomplete and/or corrupt data provided by clients.

Culling and ECA – Start broad and let the technology do the work. While using date restrictions and key terms can be effective in narrowing data sets, Ai enhanced models provide valuable insight to your data prior to review. Search terms are often hotly contested. Ai models help determine the most effective terms that will meet your discovery obligations and provide the information to argue for those terms. Communication snapshots are one of the most powerful deliverables once your data is processed providing quick analysis of who was talking to whom, about what including a timeline of their communication with sentiment analysis.

Repository – As mentioned, using the right tool for the job is necessary in any profession. Now that the groundwork has been laid through an efficient Ai ECA strategy, the real work can begin. Machines don’t replace lawyers; they provide a competitive advantage by pointing you in the right direction sooner. Using categorization and prioritization, improves both the speed of review and the quality. This is very useful in CD litigation where we can cater to the specific nuances of the case, especially on larger document reviews across multiple reviewers. By analyzing text and metadata, Ai provides context about the data. These models can be standardized and transferrable from one case to the next. As important as analyzing your client’s documents is the ability to analyze opposing party productions. Quickly find gaps in production, missing custodians, and anomalies.