

Phasing the Review and Production of ESI: A Measured Approach

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Phasing or sequencing electronic discovery is one solution that can appeal to both sides in litigation. While this option has always been available, recent case law and commentary suggest that its use is likely to increase as parties look for ways to handle the ever growing volume of potentially relevant electronic evidence and the costs associated with its preservation, review and production. Recently, the court in *Tamburo v. Dworkin*, 2010 WL 4867346 (Nov. 17, 2010) refused to issue a stay of all electronic discovery requested by the defendants,

support a stay unless the motion addressed such threshold issues as immunity from suit or a jurisdictional issue which defendants' motion did not, citing *Solomon Realty Co. v. Tim Donut U.S. Ltd.*, 2009 WL 2485992 (S.D. Ohio 2009).

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and instead ordered the parties to conduct electronic discovery in phases. Citing recent commentary from the Sedona Conference, the *Tamburo* court directed the parties to "actively engage in cooperative discussions to facilitate a logical discovery flow."

In *Tamburo*, the defendants sought to stay all discovery in the case until the court ruled on their motion to dismiss the plaintiffs' seventh amended complaint for damages relating to the defendants' alleged "concerted campaign of blast emails and postings" accusing plaintiffs of "stealing" the contents of a dog-pedigree software program. According to the plaintiffs, the Internet postings were defamatory and tortiously interfered with plaintiffs' software business. The court, however, rejected the defendants' request for a stay of all discovery, stating that the filing of a motion to dismiss was generally "insufficient" to

have "considerable flexibility," the court stated that "to insure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this actions, the Court orders a phased discovery schedule." Quoting *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, the court pointed out that:

the court, or the parties on their own initiate may find it appropriate to conduct discovery in phases, starting with discovery of clearly relevant information located in the most accessible

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and least expensive sources. Phasing discovery in this manner may allow the parties to develop the facts of the case sufficiently to determine whether, at a later date, further potentially more burdensome and expensive discovery is necessary or warranted.

11 Sedona Conf. J. 289, 297 (2010). *The Sedona Commentary on Proportionality* also points out that “given that the vast majority of cases settle, phasing discovery may allow the parties to develop a sufficient factual record upon which to base settlement negotiations without incurring the costs of more burdensome discovery that may only be necessary if the case goes to trial.”

the claims that are most likely to go forward and “concentrate their discovery efforts” in that direction before moving on to other claims. Third, the court suggested that the parties should “prioritize discovery that is less expensive and burdensome.” Finally, the *Tamburo* court stated that nothing in its order would prejudice the parties from conducting all forms of discovery after the pending motion to dismiss had been ruled upon by the court.

One important consideration in an agreement to phase discovery, is to reach a clear understanding as to whether and to what extent discovery will continue after the completion of a particular phase. Failure to include such an understanding at the outset, may result in one party taking the position that no further discov-

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With this framework, the *Tamburo* court ordered during the initial phase of discovery that the parties would be limited to written discovery of the named parties, postponing non-party discovery until the second phase, “after the parties have exhausted seeking the requested information from each other.”

The court next ordered the parties to “meet and confer to prepare a phased discovery schedule” in the next two weeks. Citing *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, 2010 WL 502721 (D. Colo. 2010) and *The Sedona Conference Proclamation*, the court directed the parties “to actively engage in cooperative discussions to facilitate a logical discovery flow.” The court provided additional guidance on areas for the parties to consider in their cooperative discussions. First, the court suggested that if their initial disclosures were not complete, then the parties should address them before proceeding to other discovery requests. Second, the parties should identify

ery is necessary after a particular phase has been completed. Parties may wish to “condition” their agreement to a phased approach based upon the completion of successive phases and meeting agreed upon deadlines.

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