Effective Strategies to Prevail on Motions to Compel

Tyler J. Anderson, Partner

Idaho State Bar Litigation Section
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MOFFATT THOMAS

www.moffatt.com

TYLER J. ANDERSON

Tyler J. Anderson is a shareholder and partner in the Idaho law firm, Moffatt Thomas. Tyler's practice is focused in the areas of litigation and mediation at both the trial and appellate level, with a primary emphasis on commercial, banking and finance, construction defect, and employment litigation. He has represented a wide variety of clients throughout the United States in state and federal trial and appellate courts.

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Effective Strategies to Prevail on Motions to Compel

- Not efficient way to get discovery.
  - Time consuming
  - Costly
  - Polarizes clients and counsel
- Do not file unless you must.
- Did you do your part to avoid dispute?

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- Did you meet and confer?
- Are you sure you have a good record to take to the Court?

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- Your audience is always the judge
  - Act accordingly
  - Run every discovery request, response, and related correspondence through the lens of your audience

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- "Dear Gentlemen: I am in receipt of defendants' answers to my client's discovery requests, such as they are. To call these discovery responses inadequate would be an insult to inadequate discovery responses everywhere. . . . While I recognize that the discovery process provides lawyers ample opportunity to pad their clients' bills with unproductive and ultimately wasteful time, I think we owe our clients, and the profession in general, at least some effort to engage in discovery in good faith."

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- Unethical
- Unconscionable
- Tiresome
- Irritating
- Silly
- Getting on my last nerve
- Frivolous
- Outlandish
- Amusing

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- Begin with the end in mind
  - Do I really need this discovery?
  - Why do I need it?

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- Where does e-discovery fit into this?

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- 2015 Survey (www.exterro.com/judges-survey)
- 22 federal judges across the United States
  - "Too many attorneys have not gained the knowledge that they need to effectively represent their clients."

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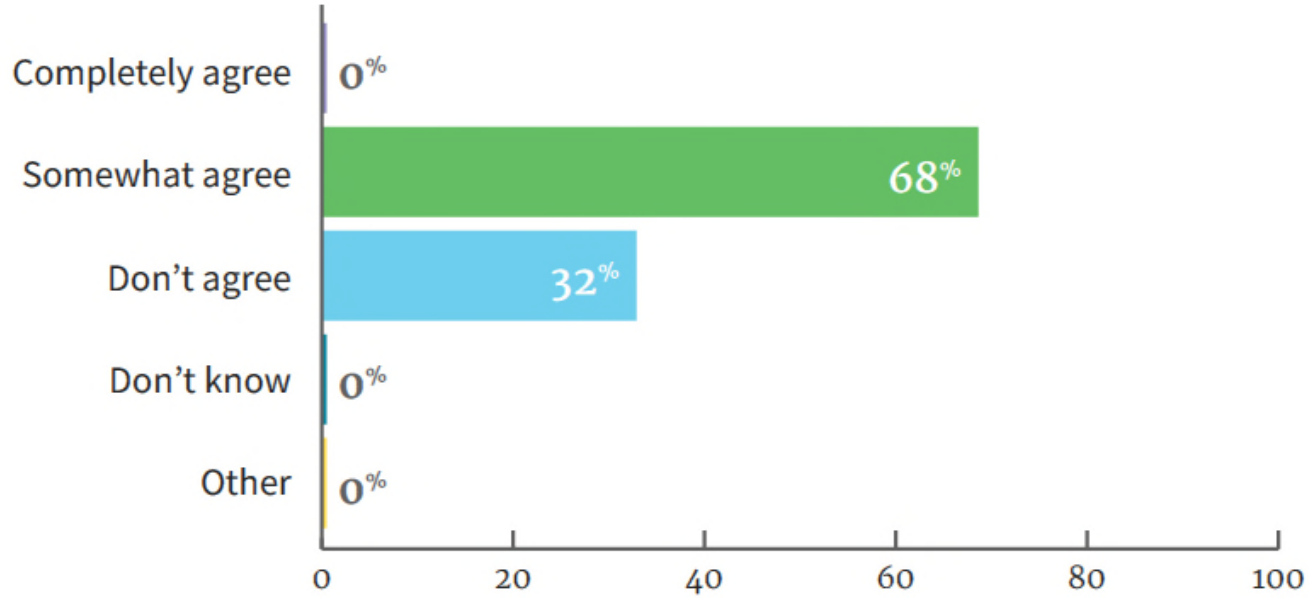
SURVEY QUESTION:

The typical attorney appearing before me possesses the subject matter knowledge (legal and technical) required to effectively counsel clients on e-discovery matters.



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- Who is doing the looking?
- Where are they looking?
- E-mail files only? Other files?
- Should I look in counsel's computer?
- What start dates are we going to pick? Why?
- What stop dates are we going to pick? Why?
- How are we going to look? Word searches? What terms? How arrive at those terms?
- If using terms, be consistent. Imagine this question: Why did you have one custodian use certain search terms, but not another? Exact terms or noisy searches? Predictive coding?
- Are we done yet? Archived information. Save it; court may order you to re-run searches later and you don't want to be the one who says, we deleted it.

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- Survey (www.exterro.com/judges-survey)
- "Frequently, knowledge about e-discovery is asymmetrical, with one side having no clue."
- "Some attorneys are highly competent; but most appear to have significant gaps in their understanding of e-discovery principles."

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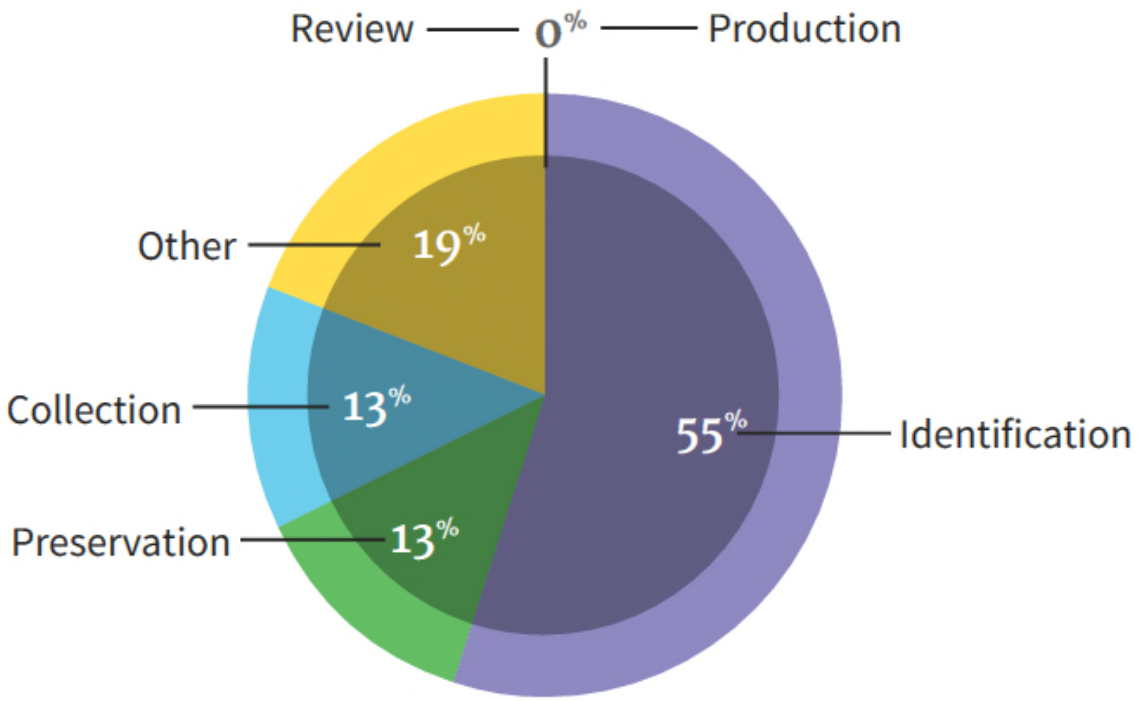
SURVEY QUESTION:

In my courtroom, the most common e-discovery mistakes occur in the _____ stage.



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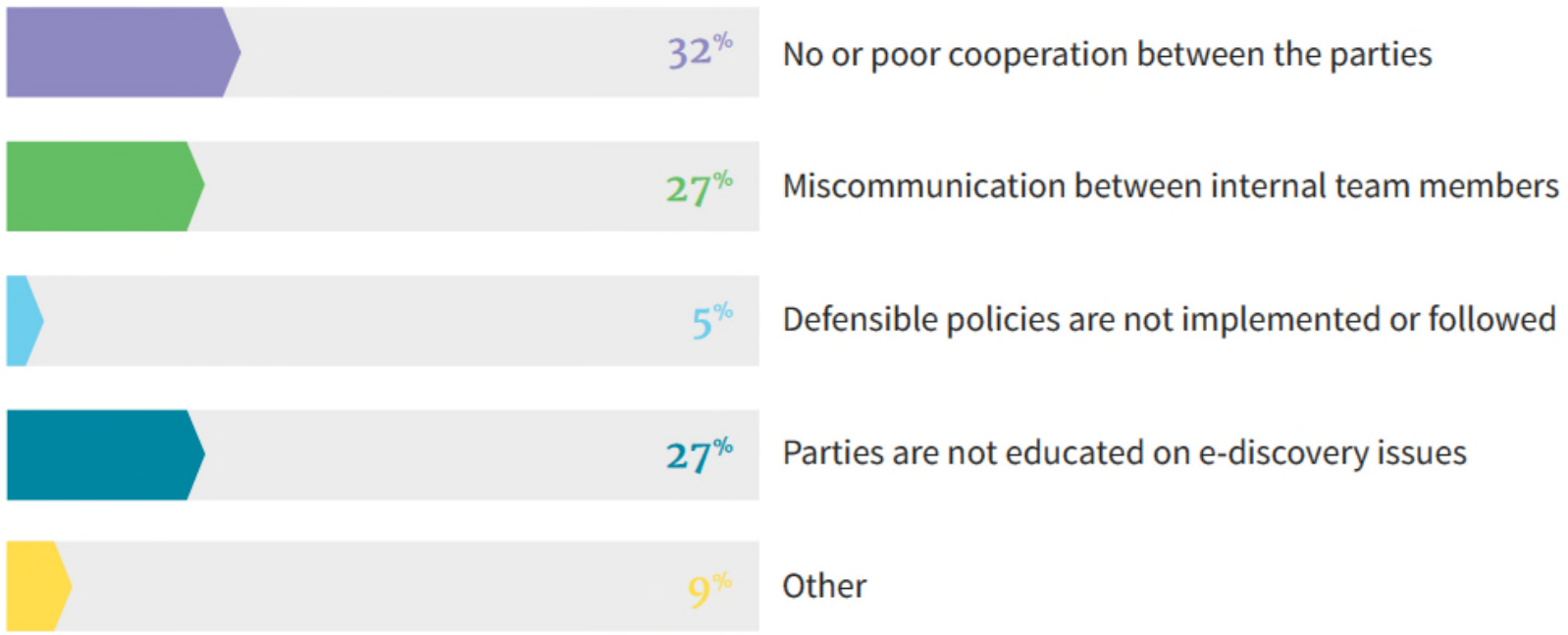
SURVEY QUESTION:

What is the source of the most common e-discovery problems for parties in your court?



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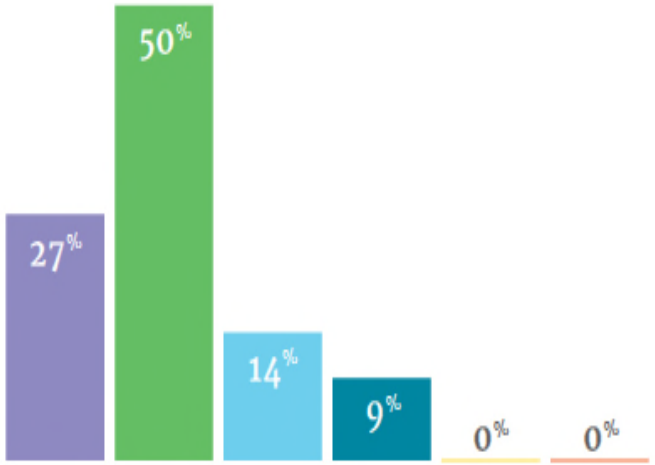
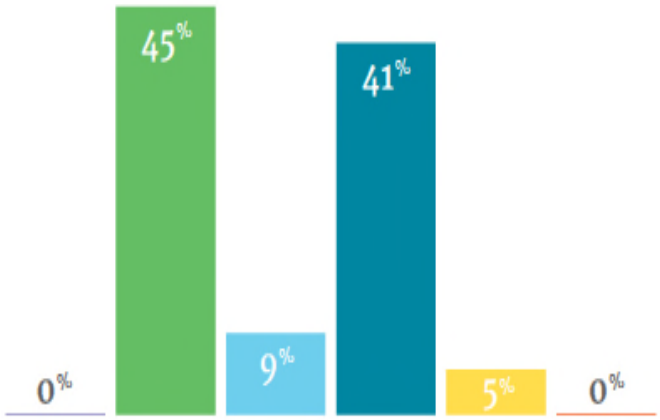
SURVEY QUESTION A:

The typical amount of ESI involved in matters before me has grown substantially over the past five years.



SURVEY QUESTION B:

I see predictive coding being employed with regularity in cases.



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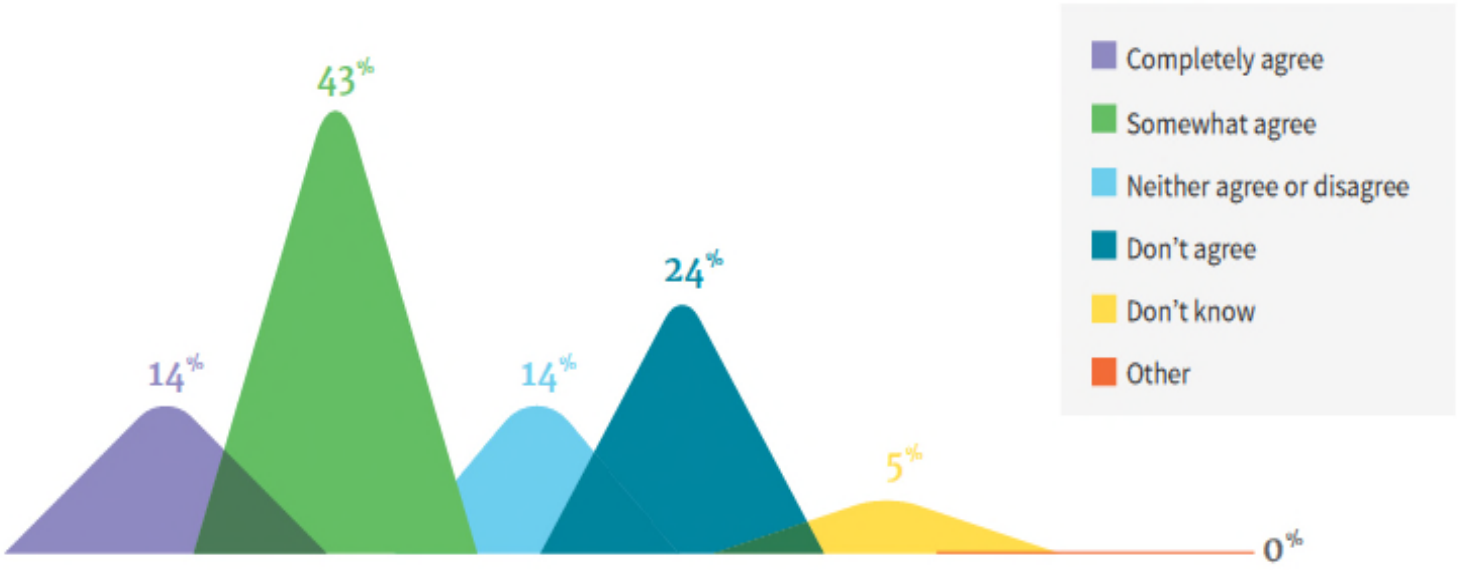
SURVEY QUESTION:

Upcoming amendments to the FRCP will help solve many problems that currently occur in e-discovery today.



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- Proposed amendments to Federal Rule of Civil Procedure 26(b)(1)

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- Rejected proportionality argument where 15 man-hours required to search for and find responsive documents where information sought might aid in proving key issue of mental state of infringing party. *Fleming v. Escort, Inc.*, 1:12-cv-066-BLW (Feb. 13, 2015).
- "Less burdensome" approach in fraud case was to allow answers to contention interrogatory identifying fraud evidence "generally," and then permit detailed questions by deposition. *Burch-Lucich v. Lucich*, 1:13-cv-218-BLW (D. Idaho Jan. 5, 2015).

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- Granting motion for protective order to preclude examination on topic identified in 30(b)(6) deposition notice where "the information sought . . . [was] overly burdensome because Plaintiffs had an opportunity to depose [prior witnesses] and could have asked those witnesses" about the subject matter in the topic. "Plaintiffs have therefore had 'ample opportunity to obtain the information' through other discovery in this action, Fed. R. Civ. P. 26(b)(2)(C)(ii), and the Court will grant the Motion for Protective Order . . . ." *Castillon v. Corrs. Corp. of Am.*, 1:12-cv-00559-EJL (D. Idaho Sept. 2, 2014).

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- A word about sanctions

For more information or questions, please contact:

Tyler J. Anderson
MOFFATT THOMAS

101 S. Capitol Blvd., 10th Floor
Boise, ID 83702

tya@moffatt.com

(208) 345-2000
1-800-422-2889

www.moffatt.com