

# Electronic Discovery

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# E-discovery - Breakdown

- ▶ What is E-Discovery?
- ▶ What is metadata?
- ▶ Touchstone of E-Discovery
- ▶ Scope of E-Discovery
- ▶ Rules related to E-Discovery
- ▶ Process of E-Discovery
  - ▶ Identification
  - ▶ Preservation
  - ▶ Collection
  - ▶ Processing and Review
  - ▶ Production
  - ▶ Post-Production

# What is Electronic Discovery?

- ▶ E-Discovery comes from CR 34, Fed. R. Civ. P. 34
  - ▶ Recognizing the ability to request for production “Electronically Stored Information” or ESI.
  - ▶ Authorizing requests for “data or data complications - stored in any medium from which information can be obtained either *directly, or, if necessary, after translation by the responding party into a reasonable usable form*”
  - ▶ ESI includes any information that is stored electronically including:
    - ▶ Electronically stored files, e.g. pdfs, word documents,
    - ▶ Email
    - ▶ Text messages,
    - ▶ Social Media Posts
    - ▶ Metadata

# What is Metadata?

- ▶ Data about data
- ▶ “metadata is used to describe the information that a computer stores about the creation, alteration, and distribution of a document.”
  - ▶ “Electronically stored information—Metadata,” 1 Federal Rules of Civil Procedure, Rules and Commentary § 34:15
- ▶ Commonly includes
  - ▶ Date created
  - ▶ Date modified
  - ▶ Author
  - ▶ For email would include, date sent/received, senders, recipients (including ‘bcc’s), subject line.

# Scope of Discovery

- ▶ Scope of Discovery
  - ▶ Defined by rule as within “possession, custody, or control”
  - ▶ Control is key - and broad
    - ▶ Think about contracts the person/entity has, does it give them the right to certain data?
  - ▶ Think about third party services, including email and social media
    - ▶ Does the person/entity have the right to retrieve data?
    - ▶ If so, within control.
  - ▶ See *In re NTL, Inc., Secs. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (requiring defendant to produce where defendant had legal right to records and the practical ability to obtain them).

# Touchstone of E-Discovery: Cooperation

- ▶ *The Sedona Conference Cooperation Proclamation*, 10 Sedona Conf. J. 331 (2009)
  - ▶ Cooperation does not conflict with “zealous advocacy”:
    - ▶ “Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests - it enhances it. Only when lawyers confuse advocacy with adversarial conduct are these twin duties in conflict.”
    - ▶ Note - term “zealous advocacy” is not correct in WA.
      - ▶ See Preamble: A Lawyer’s Responsibilities, Washington Rules of Professional Conduct (using “ardently” rather than “zealously”)
  - ▶ Cooperation is required or encouraged by the civil rules. See Fed. R. Civ. P. 26(f); CR 26(f), (i) (mandating a “duty of good faith” in developing a discovery plan and conferring about disputes)

# Rules of E-Discovery

- ▶ Rules can be helpful in *limiting* e-discovery
  - ▶ Fed. R. Civ. P. 26(b)(1)
    - ▶ Considering proportionality
      - ▶ Importance of issues at stake
      - ▶ Amount in controversy
    - ▶ Relative access to relevant information
    - ▶ Resources
    - ▶ Importance of discovery in resolving the issues
    - ▶ Whether the burden or expense of the proposed discovery outweighs its likely benefit
- ▶ CR 26(b)(1), requiring the Court to limit Discovery
  - ▶ Unreasonably cumulative or duplicative
  - ▶ Obtainable from a more convenient, less burdensome, less expensive source
  - ▶ Unduly burdensome or expensive taking into account
    - ▶ Needs of the case
    - ▶ Amount in controversy
    - ▶ Limitations on the parties and resources
    - ▶ Importance of issues at stake in litigation

# Rules on E-Discovery, cont.

- ▶ Required or optional planning and conferences
  - ▶ Fed. R. Civ. P. 26(f) - required discovery conference and plan at initiation of case
    - ▶ This conference must take place, *at least* 21 days before a scheduling conference under 16(b).
    - ▶ Discovery is stayed pending this discovery conference
    - ▶ This is an opportunity to address numerous issues with the parties and the court relative to e-discovery
      - ▶ Any issues about disclosure, discovery, or preservation of ESI, including forms of production
      - ▶ Any issues about change claims of privilege or of protection, e.g. Fed. R. Evid. 502 agreement
      - ▶ Limitations on discovery
  - ▶ CR 26(f) - optional discovery conference
    - ▶ Court may direct, if requested by a party “court shall do so.” Requested via motion, including:
      - ▶ Statement of the issues
      - ▶ A proposed plan and schedule of discovery
      - ▶ Any limitations proposed
      - ▶ Any proposed orders
    - ▶ Obligation to participate in “good faith”
    - ▶ Other party can add issues to be addressed.
    - ▶ The Court is required to issue an order
      - ▶ Tentatively identifying issues of discovery
      - ▶ Establishing a plan and schedule
      - ▶ Setting limitations
      - ▶ Determining other matters, e.g. allocation of expenses
      - ▶ Free amendment of order in interests of justice

# Rules of E-Discovery cont.

- ▶ CR 26(g), Fed. R. Civ. P. 26(g)
  - ▶ Requiring requests be signed by at least one attorney of record
  - ▶ Objections shall be responsive to the specific request objected to
  - ▶ Prohibiting general objections
  - ▶ Identify privilege “including sufficient information to allow other parties to evaluate the claim of privilege”
  - ▶ Signature certifies that attorney has performed a “reasonable inquiry” and
    - ▶ Consistent with rules
    - ▶ Not interposed for any improper purpose
    - ▶ Not unreasonable or unduly burdensome or expensive
  - ▶ Authorizing sanctions for violations
    - ▶ Highest award in WA, 1 million dollars from July of 2025.

# Rules of E-Discovery, cont.

- ▶ CR 37(b)(2) - Failure to comply with Order, consequences
  - ▶ Taking fact as established
  - ▶ Refusing to allow claim or defense, or refusal to accept evidence on claim or defense
  - ▶ Striking pleadings
  - ▶ Staying proceedings pending compliance
  - ▶ Dismissing action
  - ▶ Entering default judgment
  - ▶ Contempt
- ▶ CR 37(d) - failure to answer RFPs
  - ▶ Authorizes taking of any action including under (b)(2) above.
  - ▶ Mandates award or reasonable expenses, including attorney fees unless substantially justified
  - ▶ Evasive misleading answer is failure to answer
  - ▶ Objectionable request is not a defense unless protective order sought

# Identification and Preservation

- ▶ Requirements are largely stemming from common law and CR 26(g)
- ▶ Institute a legal hold, by sending a legal hold notice
  - ▶ A “legal hold *notice*” is the document that is sent effecting the legal hold
  - ▶ A “legal hold” preserves “relevant information” which is not necessarily admissible evidence, but rather has the same standard as discoverable evidence.
    - ▶ Relevant information is information is different in federal versus state court.
      - ▶ Federal law uses relevance standard but also add that the evidence is “proportional to the needs of the case.” Fed. R. Civ. P. 26 (b)(1).
      - ▶ State law still uses “reasonably calculated to lead to the discovery of admissible evidence” standard. CR 26(b)(1).

# Why preserve?

- ▶ A legal hold requirement stems from the common law regarding spoliation
- ▶ In Washington, spoliation is the “intentional destruction of evidence” and thus requires bad faith.
  - ▶ Bad faith not required in federal court for court to impose sanctions for spoliation. *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (“a finding of “bad faith” is not a prerequisite to this corrective procedure”).
- ▶ Washington Courts look to the (1) the potential importance or relevance of the missing evidence and (2) the culpability or fault of the spoliating party.
- ▶ Where a court finds that a party has committed spoliation the court can award monetary sanctions, grant an adverse inference instruction, or even grant a default judgment.
  - ▶ *See British Columbia Breweries (1918) Ltd. v. King Cty.*, 17 Wn.2d 437, 135 P.2d 870 (1943);
  - ▶ *Henderson v. Tyrell*, 80 Wn. App. 592, 910 P.2d 522 (1996).
  - ▶ *J.K by Wolf v. Bellevue School District No. 405*, 20 Wn. App. 2d 291 (2021); *See also Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 26 Wash. App. 2d 319, 347, 527 P.3d 134, 149 (2023) (reiterating no general duty to preserve).

# How to Preserve?

- ▶ First determine: is an obligation to preserve triggered?
  - ▶ Yes, when party reasonably anticipates litigation
    - ▶ Sedona Conference guideline: “Reasonable anticipation of litigation arises when an organization is on notice of a *credible probability* that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.”
- ▶ Second: what is the proper scope of obligation?
  - ▶ Requirement: Reasonable steps to preserve relevant information.
  - ▶ Does not mean everything. *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)
- ▶ Third: draft legal hold notice
  - ▶ Include, nature of claim, working definition of what must be preserved, instruction to halt routine destruction
- ▶ Fourth: oversee implementation
  - ▶ Sedona Conference Guideline: “Fulfilling the duty to preserve involves reasonable and good-faith efforts, taken as soon as is practicable and applied proportionately, to identify persons likely to have information relevant to the claims and defenses in the matter and, as necessary, notify them of their obligation to preserve that information.”

# Scope of Preservation

- ▶ Accessibility
  - ▶ Can be a factor in preservation (just as it is a factor in production).
  - ▶ Data that is not reasonably accessible may not need to be preserved.
    - ▶ *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217 n.22 (S.D.N.Y. 2003) (dealing with backup tapes).
  - ▶ Should also consider what is known about the potential data
    - ▶ Does that data have to do with key players?
    - ▶ Is this the only likely source of the information?
    - ▶ How likely is there to be admissible information?
    - ▶ How probative will the information be?
    - ▶ What is the cost of having to restore the data from the backup and searching them for potential content?
- ▶ Probative value
  - ▶ *Tavai v. Walmart Stores, Inc.*, 176 Wash. App. 122, 136, 307 P.3d 811, 818 (2013) (declining to “require store premises to retain all video anytime someone slips and falls and files an accident report.”). But see *J.K.*, fairly expansive determination of what is relevant and probative
- ▶ Relative Burdens

# Implementation of preservation

- ▶ Obligations can be satisfied in two ways:
  - ▶ Collect the relevant data
  - ▶ Or merely preserve *in place* the relevant data.
- ▶ Counsel should understand what client is doing and give advice on which may be better
- ▶ Technical or storage costs may be a factor
  - ▶ Collection is generally a duplication and creates more data.
  - ▶ A preservation in place prevents the routine destruction of the data that already exists.
  - ▶ Collection happens in a single moment and does not preserve *future data*
- ▶ Hold notice should address collection versus preservation, which may be different for different types of data
- ▶ If doing collection, care should be undertaken to preserve meta-data
- ▶ Dangerous to rely on custodians to preserve and collect discoverable information:
  - ▶ *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (noting that mere notification to employees with expectation that they comply is insufficient).

# Best monitoring means documenting

- ▶ Document the process
  - ▶ Date when hold was initiated
  - ▶ Analysis of triggering event (especially if determining *not* to initiate legal hold)
  - ▶ Initial determination of scope of information sought
    - ▶ Custodians
    - ▶ Data sources
    - ▶ Systems
  - ▶ Information from custodians
    - ▶ Receipt of legal hold
    - ▶ Implementation of legal hold (stopping routine destruction or collection)
    - ▶ Data sources in custodians possession
    - ▶ May involve interviewing key custodians
  - ▶ Follow up with expansion of scope or custodians, issue updated legal hold notice where necessary
- ▶ Creation of Data map

# Collection

- ▶ Competence - Attorneys must review and understand how their client's data and ESI are stored and retrieved. Usually prior to any initial conference developing a discovery plan.
  - ▶ Consider working directly with IT specialist from company/agency
- ▶ General considerations:
  - ▶ Where is the relevant information?
  - ▶ What should be collected?
  - ▶ Who will collect?
  - ▶ Did you get what you were expecting?

# Where might there be relevant information?

- ▶ Email
- ▶ Chat Platforms, e.g. Teams
- ▶ Network Locations, e.g. shared network drive
- ▶ Databases
- ▶ Phones/computers/other devices
- ▶ Special systems, unique to work of entity or custodian

# What should be collected?

- ▶ Scope of collection
  - ▶ Go and get locations
  - ▶ Areas where repositories need to be searched
  - ▶ Attorney must verify manner of collection for preservation of meta data
- ▶ Areas where repositories
- ▶ Consider agreements with counsel
  - ▶ Limiting discovery to particularly relevant custodians/players
  - ▶ Limit in time frame
  - ▶ Limit data systems or sources
  - ▶ Develop search terms
  - ▶ Discuss priority of production
  - ▶ Privilege issues
  - ▶ Manner of production
- ▶ Touchstone is reasonableness and proportionality

# Data repositories

## ▶ Selection criteria for Repositories

- ▶ Utilize a Data Map to develop list of locations where responsive records may be contained
  - ▶ Include, custodial and non-custodial repositories
- ▶ Communicate with custodians about potential sources of records
  - ▶ Don't just think about email
- ▶ Consider record retention policies to see what documents should be available
  - ▶ Most larger companies/entities have record retention policies, but especially state and local governments subject to PRA
- ▶ Selection criteria: priority custodians, date ranges, key terms, specific file extensions, file type, etc.
- ▶ Possible to do a “full collection” of a repository and then narrow for production but be careful
  - ▶ Collects significantly more data
  - ▶ May require review and production absent agreement

# Draft and execute collection

- ▶ Document selection criteria to be provided to client for collection
  - ▶ Admonish to include proper extraction to preserve metadata
- ▶ A request for any logs that may be generated by the repository or system, e.g., M365 collection logs indicating errors, etc.;
- ▶ Consider whether you need screenshots to verify manner of production
- ▶ Specific instruction regarding delivery of the collection (e.g. to whom should the collection be sent or should it be uploaded to a secure link, etc.).
- ▶ Attorney should review logs and troubleshoot issues including assessing contents of what is returned
  - ▶ Is anything obviously missing, e.g. date ranges or absence of expected information?
  - ▶ Is further collection needed?
  - ▶ Does collection reveal a reasonable inquiry? May need to follow up

# Processing and Review

- ▶ Upload to processing platform
  - ▶ Upload considerations
    - ▶ Deduplication
    - ▶ Time zone (Pacific v. UTC)
- ▶ Troubleshoot upload issues
- ▶ Develop a Review Protocol
  - ▶ Consider, what is the goal of review? Just production or also finding key files for defense use?
- ▶ Prepare the review population
- ▶ Complete Review
- ▶ Attorney to conduct quality control
  - ▶ This may mean re-review or a percentage re-review
  - ▶ Must be thorough enough for attorney to sign CR 26(g) certification

# Review Protocol

- ▶ Used when a team or paralegals or attorneys doing review to establish known issues and have consistency
  - ▶ Note: Attorney cannot leave discovery just to support staff, there must be attorney involvement throughout the process to ensure it is done properly.
- ▶ Review protocol must dictate the manner of review, including redaction/withholding instructions, coding requirements, privilege issues
- ▶ Coding instructions should include whether records will be coded as responsive to particular RFPs
  - ▶ This is *not* preferred. Preference is to produce as kept in the usual course of business. CR 34
  - ▶ Coding instructions should also indicate how to deal with troublesome issues,
    - ▶ E.g. code for attorney review, etc.
- ▶ This is a living document and should be updated as troublesome issues arise on attorney's instructions

# Considerations for review protocol

- ▶ Privilege log
  - ▶ What type of privilege log will be used?
- ▶ Coding options
  - ▶ Responsive/nonresponsive? Or more complicated
- ▶ Confidential/protected information
  - ▶ Protective order for confidential designation?
  - ▶ Types of protected information?
    - ▶ PHI, PII, FERPA, HIPAA, Whistleblower information
- ▶ Meet with reviewers to discuss protocol, explain issues, answer questions

# Review Protocol

## Discovery Review Protocol<sup>1</sup>

**CASE NAME:** Click or tap here to enter text.

**BRIEF DESCRIPTION OF CASE:** Click or tap here to enter text.

**DOCUMENTS FOR REVIEW:**


**CONTENT TO BE REDACTED AND LEGAL BASIS:**

TERMS/ISSUES	STATUTE

**CONTENT TO BE WITHHELD AND LEGAL BASIS:**

ISSUES/TERMS	STATUTE

**PRODUCTION OF RESPONSIVE DOCUMENTS WILL BE BY:**

**Category of Documents Responsive to RFPs:** Click or tap here to enter text.

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<sup>1</sup> TO BE COMPLETED BY PARALEGAL 2/3 IN CONSULTATION WITH, AND FOLLOWING REVIEW BY, ASSIGNED ATTORNEY PER CASE

**Document coded by RFPs following individual review:** [Click or tap here to enter text.](#)

**DOCUMENTS PRODUCED BASED ON SEARCH TERMS:** [Click or tap here to enter text.](#)

**NON-RESPONSIVE DOCUMENTS:**

**The following documents will be coded non-responsive:** [Click or tap here to enter text.](#)

**METADATA IN REDACTION/WITHHOLDING LOG WILL INCLUDE:** [Click or tap here to enter text.](#)

**SECOND LEVEL REVIEW BY ATTORNEY TO INCLUDE: :** [Click or tap here to enter text.](#)

**DATE INITIAL PRODUCTION IS DUE AND DATES OF ROLLING PRODUCTION, IF APPROVED:** [Click or tap here to enter text.](#)

**FURTHER PRODUCTION CONSIDERATIONS:** [Click or tap here to enter text.](#)

**ADDITIONAL RESOURCES NEEDED**

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# Review Verification/Quality Control

- ▶ Attorney should conduct a second level of review
  - ▶ This can be a percentage review based on volume and complexity of review and trust in paralegal team
  - ▶ Must include a review of both documents to be produced and documents being withheld or deemed non-responsive
  - ▶ Verification of consistency of treatment of document and application of privilege
    - ▶ Consider looking at email threads to verify consistent treatment and coding across thread
  - ▶ Verify coding and redactions are consistent with any protective order
- ▶ Where there are issues discovered in second-level review, Attorney should provide new instructions in review protocol and have fixed across entire data set

# Production

- ▶ Confirm the format of production, including metadata subject to production;
  - ▶ Must produce in the manner requested
  - ▶ Where no request must produce in reasonable manner
- ▶ Isolate and confirm the production population;
- ▶ Prepare the production for service;
- ▶ Prepare a privilege/withholding log for service;
  - ▶ Privilege log is required for any production where document are withheld or redacted unless you have a written agreement from opposing counsel to the contrary
    - ▶ E.g. an agreement limiting discovery to date prior notice/filing to avoid work product
- ▶ Securely deliver the production.

# Post-production obligations

- ▶ Obligation to seasonably supplement discovery
  - ▶ New supplementation rules in state court
    - ▶ See CR 26(e)
  - ▶ No longer stand behind responses were correct at the time they were made
  - ▶ **(e) Supplementation of Responses.** A party who has responded to a request for discovery with a response has a duty to seasonably supplement or correct that response with *information thereafter acquired*. Supplementation or correction shall clearly set forth the information being supplemented or corrected. Failure to seasonably supplement or correct in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.
- ▶ Set a review schedule
  - ▶ Suggest review every month and one month before discovery cutoff

# Artificial Intelligence in E-Discovery

- ▶ Clustering
  - ▶ Gathers like and related files for mass analysis or efficient review
- ▶ Predictive Analytics/Coding
  - ▶ Technology Assisted Review
  - ▶ Relies on automated identification and ranking of files meeting specified criteria
  - ▶ Attorneys train it and it does the work and attorneys must validate results
- ▶ Concerns with AI
  - ▶ How is data going to be used by AI software? Is it an “open” AI model?
    - ▶ Is AI learning off of your data?
  - ▶ Is data confidential? PII, PHI, HIPAA, etc.
  - ▶ Validation of accuracy of discovery, CR 26(g) touchstone, diligent review
  - ▶ Protective Order limitations

Questions?

