UF Law 10th Annual
E-Discovery Conference

Preservation Toolkit for Collaboration Platform Data

FEBRUARY 2023

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2023 Preservation Toolkit for the University of Florida Law 10th Annual E-Discovery Conference Compiled by:

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Curing Collaboration Program Preservation Headaches

What Are Collaboration Programs?

Collaboration programs or platforms are software programs that allow people and devices to remotely access and work on projects. Businesses and organizations use them to communicate, track tasks, optimize resources, and efficiently manage work product and flow. Platforms can be machine or cloud based. Availability, variety, and power of these programs exponentially increased during and post-COVID as working remotely or at home became more viable, if not preferable. The market for collaborative platforms originally led tech companies to develop standard programs like Microsoft Teams, Google docs, and Slack, as well as custom or industry-specific programs like medical record software and construction industry design and project management software. With a burgeoning market came refinements to these products as well as a plethora of new, more powerful, and diverse products.

What E-Discovery Challenges Come from Collaboration Programs?

Diversity in types and power of different programs and the number of people and devices that can be given access to the collaborative process are advantages of collaboration programs. Collaboration programs are generally designed to allow extensive access and flexibility in manipulating and producing work product and managing workflow, which generates, collects, modifies, and distributes documents or data and families, strings, or versions of documents and data that are often fluid and evolving over time. Collaboration programs can manage, gather, and produce diverse forms and versions and large volumes of data located in multiple locations on myriad devices, including ephemeral or fragile data. Data is often accessed, modified, or added by users or machines in ways that are not always intended or known to the managers or custodians, harboring data in obscure and less accessible forms and places. The power, flexibility, and remote accessibility that are so attractive to organizations and users unfortunately create unintended eDiscovery headaches. The programs are designed for wide-ranging input and flexibility, but are commonly less efficient for search, culling, and production of ESI for discovery. Software developers may offer search and collection capabilities and requirements for their party applications to access entire enterprise systems which increases security risks at escalating cost, and search, review, and flexibility of output are sometimes only available in the priciest versions, if at all. Other limitations may include proprietary software barriers to access during discovery and with legacy data when versions or software subscriptions expire. Each eDiscovery case involving collaborative tools is unique because collaboration, manipulation, communication, and storage of data varies from program to program, version to version, organization to organization, and user to user. Finding the keys to locating and accessing data can be case-specific, complex, and burdensome, which challenges parties, counsel, and the courts in achieving proportional collection and preservation.

With the emergence of collaborative platforms, eDiscovery and preservation irrevocably changed and continues to evolve. Those who work in the eDiscovery sphere need to adapt and evolve as well. The good news is that the data in these programs is not fundamentally different, so the methodology and processes honed on email, IM, databases, visual media, and other existing forms of ESI will provide guidance on the development of similar processes for collaboration software data. Successful, defensible preservation depends on methodical, informed planning and execution tailored to a larger, fluid, less structured playing field.

Curing the Headaches

Standard eDiscovery methodology and best practices may work on data in collaboration platforms. However, understanding the specific platforms and the way they are being used is essential. Keen issue identification and careful inquiry are required. Avoid making broad assumptions, such as expecting users to follow organizational rules or software manufacturer recommendations for collaboration. The breadth and variety of complications requires flexibility and an open mind in attacking the problems. Preservation efforts will require at a minimum:

1. **Early understanding and evaluation of the client's data.** Expect data to be voluminous; varied in content, location, and version; ephemeral or fragile; and often containing additions or omissions generated without notice to all users or managers.[1] This requires input from legal staff who understand the issues, claims, and defenses in the case, employees involved in the collaborative process or with other roles in the project or matter at issue, IT or records management personnel, managers, or others with knowledge of how data is created communicated, and stored by the organization and third party entities or persons involved.[2]

2. **Flexibility in determining effective processes for search and preservation.** Methods in one case may not fit another. Even within a case or an organization using the same collaborative product, data creation, modification, communication, and storage can vary from user to user. Do not assume consistent usage of systems within or across organizations. Inquire, sample, prove, and recheck for success in scope of preservation.

3. **Adequate preparation for court hearings.** Proof of process, preservation, and proportionality in the case of collaboration data requires competent factual support. Presenting the evidence to the court may require expert testimony on scope, cost, and methodology.

4. **Learn from the experts.** Become familiar enough with the technology in play, the jargon, and the manner of use of the collaboration software to be able to identify issues and articulate preservation requirements to the client, users, third parties, opponents, the eDiscovery team, and expert advisors. Be able to identify when search, collection, and preservation may require specialized assistance from a vendor or expert. Learn as much as possible from the consultants.

5. **Govern proportional discovery by identifying essential issues.** Every case has a legal basis or burden of proof that trial lawyers articulate to the finder of fact through development of a credible theme of the case. Discovering and

[1] Sedona Principles, Comment 5c. In assessing the scope of a preservation duty, as soon as practicable, parties should consider persons likely to have relevant as well as non-custodial sources of relevant ESI. *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 101-02 (2018) also found at https://thesedonaconference.org/sites/default/files/publications/The%20Sedona%20Principles%20Third%20Edition.19TSCJ1.pdf ("Sedona Principles").
[2] *Id*. at p. 102.

amassing evidence, creating a factual basis supporting the theme sufficient to prove (or disprove) each element of the cause of action or prove (or disprove) an affirmative defense are what trial lawyers seek. There are usually some significant facts relating to *credibility* of witnesses or themes. The case is built on either side brick by brick based on relevant facts. All other facts are surplusage, distractions, and potentially harmful to the successful resolution of the case due to proportionality. In the worst-case scenario, ungoverned scope of discovery can either hide relevant facts in a morass of data, or cause limitations in discovery in the name of proportionality that place relevant, essential facts outside the permitted scope. To avoid distraction, the trial lawyer must identify for the team, the client, and any consulting expert exactly what legal issues are the focus of a case and the proof needed to support them. The luxury of getting every piece of data available can not only be counterproductive, but it can also be fatal to the case.

Preservation Checklist for Collaboration Programs

Relevant, proportional ESI from collaboration software is discoverable. Preservation obligations apply to collaboration data. It is incumbent on a party to make a reasonable, proportional, and good faith effort to locate sources of relevant data stored within collaboration platforms, conduct a reasonable search to identify potentially relevant ESI and a plan for secure preservation in accordance with the law. Depending on the type of collaboration program and variety of data thereon, customized programs and processes may be needed to reasonably conduct these obligations. Vendors and eDiscovery experts are acutely aware of the problems, but there is no one-size fits all solution to these tasks. It is difficult to develop a proficient search and sometimes equally difficult to accurately estimate in advance how much such an effort will cost. This is especially true when the organization or party has a less than adequate understanding of the full range of data and all the places it may be located.

1. **Effective Communication.** One of the most challenging aspects of eDiscovery efforts is communication among the stakeholders. The party often talks in business or industry terms. The IT personnel's language is exquisitely technical. The language and goals of the lawyer are legalistic. It is incumbent on counsel to have sufficient knowledge of all three areas to be able to communicate across the various disciplines, which may require involving an in-house or outside eDiscovery expert to bridge the gaps between the groups. The responsible lawyer in litigation is obligated to ensure everyone meets legal requirements for preservation. Counsel should confirm advice in a legal hold notice supplementing adequate oral advice to the appropriate personnel and management[3] as well as follow-up and supervision to ensure compliance. In the case of collaboration software, preservation instructions should meet the challenges of the complexities involved, which means it is incumbent on counsel to ensure the detail and quality of the advice and instruction on preservation is sufficient so that the responsible persons in the organization understand the task sufficiently to execute the preservation strategy. Such a complex array of instruction may need to be developed by or with the assistance of an expert or experts if counsel does not have the requisite expertise.

2. **eDiscovery Team Approach.** Carrying out eDiscovery responsibilities takes a team approach involving the client, the lawyer, client IT personnel, primary or responsible management or custodians, and potentially outside experts. The team must be led by the responsible trial lawyer to keep the case on track to ensure the theme of the case is honored and necessary proof is obtained without unnecessary cost or burden. Unreserved delegation of responsibility for eDiscovery can lead to errors, which may be costly or irreversible. Communication is essential. With collaboration software, all stakeholders should understand the complexities and potential challenges of the task at hand.

[3] "The legal hold notice should be sent to persons responsible for preserving information relevant to claims or defenses in that litigation or investigation. This usually includes persons with knowledge of the underlying facts of the matter, since they are likely to generate, receive, and maintain relevant information. The list also may include the persons responsible for maintaining and operating relevant computer systems, files, or databases, including application teams or administrators, as well as those who can assist with certain steps such as suspending
auto-deletion policies for certain custodians, backup, or archiving systems that may fall within the scope of the preservation obligation." *Id.*, Comment 5d, at p. 104.

3. **Early eDiscovery Assessment.** Attacking eDiscovery issues early in the case is a best practice in every case[4] but ensuring the depth of early assessment and preservation steps includes all potentially relevant data in collaboration software involves special attention to identifying the software products being used, the participants in collaboration, and the locations of stored data from the myriad participation efforts. An organization's process for communication and collaboration will undoubtedly include public folders, discussion platforms, and shared folders or networks that do not belong to any specific employee, collaboration participant, or traditional "custodian."[5] Such areas require careful preservation attention to ensure proportionality while maintaining effective communication of litigation holds or other preservation notice to opposing parties, nonparties, and non-employee participants.

4. **Buy-in from the Client and Budgeting.** Counsel must inform the client of eDiscovery responsibilities and challenges. Even sophisticated clients may not understand the nuances of collaboration software and the exceptional challenges of preservation responsibilities with collaboration data. Reasonable and appropriate cooperation between legal, technical, and business components of an organization and its discovery team is imperative for successful and economical execution of preservation obligations. Proportionality requires budgeting -- and a discovery plan and budget developed by the team with client buy-in assists in client relations as well as justification of preservation and search and production to opposing counsel and the court. A full understanding of the complexity and uniqueness of the process for discovery of data from collaboration software involves time invested for search and review for privilege, privacy, and perhaps most importantly relevance. Big volume in multiple locations and variety of devices and data involved raises complexity and cost. A factual basis and potentially expert opinion may be needed to accurately accomplish the task and to justify limitations in scope due to proportionality.

5. **Proof of Process and Educating the Judge.** Proof of process may be required to battle motions to compel or motions for sanctions. Carefully recording the steps taken in preservation and search efforts for production will allow efficient and effective defense of process in discussions with the opposing party or, if necessary, the court.[6] Consider taking IT personnel or experts to meet and confer or to court to justify the team's plan and scope for preservation, search, production, or discovery requests to the opposing side. Especially in state court, where judges see less eDiscovery issues, the judge may not be aware of the complexities and difficulty of dealing with collaboration program data. The responding party is in the best position to determine the appropriate process for preserving and producing their own electronically stored information, and best situated to preserve, search, and produce its own ESI. The responding party should be given the first opportunity to determine and meet its preservation and production obligations.[7] Judges should not be the first resort for decisions on preservation and production. Before a preservation order or ESI protocol is issued, the parties should determine as much as possible themselves through thorough and informed meet and confer to discuss the scope and parameters of the preservation obligation. Jointly stipulated preservation orders can make the discovery process more efficient and reduce costs and maintain the benefit of negotiated outcomes as opposed to decisions by the court based on limited

[4] "Parties should define the scope of their preservation obligations as soon as practicable after the duty to preserve arises." *Id*., Comment 5c, at p. 102.
[5] *Id.*, Comment 5i, at p. 116. "Preservation efforts should include consideration of ESI that is not specific to individual custodians, including shared or orphaned data."
[6] "Organizations should consider documenting the key decisions made in the preservation process, and the reasons for any exceptions to an organization's standard protocols for preservation." *Id.* at 103; Comment 6c. Documentation and Validation of Discovery Processes.
[7] *Id*., Principle 6 and Comments 6 a-c; *See* Comment 14 *below*: Responding Party's Preservation and Production Opportunities and Obligations.

and early knowledge disclosed in hearings and papers.[8] A good faith meet and confer process has the added benefit of establishing credibility and a working relationship between parties and counsel that may be invaluable as the case proceeds.[9]

6. **Meet and confer.** Federal Rule 26 and many state and federal ESI protocols and trial management orders require the parties to meet and confer on eDiscovery issues for good reason. Open and cooperative[10] discussion among the parties may lead to agreement on a reasonable path for discovery that results in disclosure of discoverable information without the need to resort to expensive and time-consuming processes or motion hearings. Often both sides want equal treatment and the opportunity to forgo needless document review on both sides, and the best way to accomplish that is sitting down together early and often enough to address potential issues to avoid potential disputes. Such a process requires trust and give and take. Opposing parties frequently have significant amounts of discoverable material on both sides with similar issues of cost and proportionality. Lawyers who specialize in specific types of cases are likely to encounter each other in other cases and are motivated to develop a reputation for trust and professional cooperation. Cooperation is not capitulation. It takes a prepared and knowledgeable lawyer to be open with the opponent and forge a lean and straight path to resolution of mutual discovery needs.

7. **Consider Nonparty Data.** Litigation frequently involves multiple parties and nonparties with possession or control of relevant information. Collaboration programs may involve participation by persons or organizations who are not parties to the case. ESI referenced in collaboration software may be data obtained from other persons or organizations and unaffiliated third parties like outside consultants or eyewitnesses. Nonparties may be repositories of relevant data such as visual media, emails, IM, and databases that were originally generated or stored outside the collaboration software. Often data in the hands of third parties has metadata that makes it more usable, and the outside data may be less burdensome to access than the versions imported to the collaborative software. Relevant ESI data in the possession and control of nonparties are subject to subpoena and must be preserved. Nonparty information may be significant to the case and may be easier and less burdensome to access directly from third parties in a form appropriate to the case. Preservation correspondence and meeting and conferring with nonparties to communicate and agree upon preservation and production parameters is an effective way to head of delay and expense.

8. **Ephemeral data.** Collaboration programs may include an element of ephemeral messaging which disappears after a specified time. These programs are useful for communication that does not need to be recorded or for which keeping a record requires a conscious step by participants. This option is like a Zoom meeting that may be recorded or not recorded at the option of the host. Ephemeral elements allow conversations or messaging that do not need to be kept, cluttering storage. In some cases, ephemeral communication is undertaken to avoid a record of a private conversation. Care must be taken with ephemeral elements if records are required by contractual or legal obligations or when data is lost after preservation obligations are triggered due to preservation request, discovery request or reasonable anticipation of litigation.

[8] *Id*. Principle 5, Comment 5f at p. 111.
[9] Credibility and experience with each other in meet and confer can pay dividends for counsel in settlement negotiations or mediation.
[10] *See* Guideline 2, Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible, 10 SEDONA CONF. J. 281, 293 (2009) also found at https://thesedonaconference.org/node/179.

9. **Use the Most Accessible Data Sources First.** One of the more difficult and potentially expensive proportionality challenges with collaboration platforms is the burden of accessing the variety of shared and imported data types and obtaining sufficient metadata. A standard approach to the proportionality requirement is to consider the most reasonably accessible alternative sources of the same or equivalent data or information, such as primary sources. Much of the data in collaboration software is derived from other primary sources and added in various ways, which can complicate their collection and processing. The primary source may be much easier to access, search, and provide context and easier authentication through native metadata. In many cases, collaboration programs are not a primary source and perhaps not as reasonably accessible as original sources.

10. **Location and Control of Records and Information Governance.** Data management can be a game changer for eDiscovery in any case. Proper information governance starts with an understanding of the data retention and storage needs of an organization and how those needs are being met. When it comes to collaboration platforms, it is incumbent on the organization to know and understand what is being generated by their devices and software and best practices for managing and storing it. A workable and reliable records retention program governs and monitors what is intentionally kept and what is discarded.

    Records in the custody or control of parties and nonparties may be required for litigation and decisions on accessibility should be made as a matter of proactive information governance. Collaboration software typically involves so many people and devices that manipulate, access, and store collaborative data that finding and controlling data can complex and challenging. Even when the methods of access and requirements for storing the data from the process and the work product are prescribed by the owner or manager of an organization, the likelihood of everyone complying with the requirements is questionable. The larger and more diverse the workgroup is, the more likely a user, or multiple users, will employ their own methods for editing or storing work. For example, in Microsoft products like Teams and Works, instead of collaborating on a document by editing and commenting on the version kept and circulated by the software, one party may download the document and work on it in Word on their device, thereby creating a separate location of evolving versions of the document. Another may download it and do the same but in Google docs. Yet another may download a version and store it on their computer or in OneDrive, thereby creating a separate location of one version of the document. In retrospect, when the organization is legitimately asked for the document as well as its evolving versions with information on who did what when, finding all the data requested and the context for such information can be difficult to extraordinarily burdensome. A party that does not reasonably control their data may be required to bear the costs of finding and producing all responsive ESI.

    A proactive effort to find and use collaboration software that is conducive to reliable and searchable storage for business and litigation purposes is a good start. Develop a document retention plan and policies and procedures that are workable for the organization, which includes limiting document retention to data necessary for business and legal purposes limited to specified locations with sufficient data security and accessibility. Ensure all users understand and agree to the methods prescribed and monitor compliance with the plan. Reasonable efforts to accomplish these fundamental steps will serve the organization well in eDiscovery defense of process and proportionality judgments. Perhaps more importantly in some cases, such steps should yield a more efficient and economical repository of important information for business purposes as well.

11. **Legacy Data.** Software programs come and go. A challenging and often expensive problem for an organization is storing and accessing legacy data from previous software programs or outdated versions of current programs that are no longer available. Software these days is done by subscription, and change can occur by expiration of a subscription term or when the software manufacturer updates its software. Forethought on whether legacy data will be needed in the future and planning on how it could be accessed can head off undue expense in discovery or response to a records request.

12. **Software Selection.** When an organization decides which collaboration program to use or which version of an existing software should be purchased, a fundamental inquiry involves what information will be created by this software, how and where will it be stored, who will control access and availability, and will we be able to search and retrieve what we need for business and for litigation later? Regrettably, collaboration software is marketed and purchased based on all the great ways it can bring remote people or machines together to create, manage, or operate. The designers and their buyers focus on the power and variety of the operative applications, losing sight of the morass of digital data that results from the operations if it cannot be organized, managed, stored, searched, and produced in readily usable form and content. Impressive amounts of collaborative data that can only produce "reports" or portions of the content requiring the use of proprietary software to unlock or view the truncated data and is not readily searchable invariably results in expensive headaches in discovery. Inquiry into accessibility and facility of search should be considered when making software choices.

13. **Meet the Problem Head On.** When eDiscovery was in its infancy in the late nineties, some lawyers took the extraordinary step of avoiding the problem rather than mastering the knowledge and techniques needed to effectively accomplish eDiscovery. Instead of exchanging relevant ESI, lawyers sought agreements to exchange paper versions of documents or to exclude whole categories of ESI like legacy data because the data was difficult to access and search. Obviously, suffering the lack of metadata in paper production or risking the potential loss of relevant evidence by excluding whole categories of ESI are not reasonable sacrifices to overcome discovery challenges. Counsel should be wary of agreeing to exclusionary language that provides an easy fix but may eliminate opportunities to discover potentially relevant information, such as stipulating that collaboration program data is not reasonably accessible and need not be collected and preserved.[11]

14. **Responding Party's Preservation and Production Opportunities and Obligations.** A responding party should be given the opportunity to determine how to meet its own preservation and production obligations unless and until there is an indication there is a factual basis for court involvement such as a deficiency in production or loss of data.[12] "The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate."[13] The obligations of the

[11] *See* Evrythng Ltd. v. Avery Dennison Retail Info. Servs., 2022 U.S. Dist. LEXIS 41319 (S.D. N. Y. Mar. 7, 2022), where the Court entered an order approving a protocol created by agreement of the parties that stated: "Absent a showing of good cause, voicemails, text messages, PDAs, mobile phones, and other forms of non-e-mail business communications such as Google Hangouts, Microsoft Teams, Skype, WhatsApp, and Slack are deemed not reasonably accessible and *need not be collected and preserved*." (e.s.). There may have been a case-specific reason known only to the parties and the court that such data should be excluded from discovery, but the case should not be cited for the proposition that such information is generally not reasonably accessible. Excluding whole categories of collaboration software documents from preservation should have a sound basis in fact, lest valuable evidence be destroyed.

[12] Sedona Principle 6 "recognizes that a responding party is best situated to preserve, search, and produce its own ESI. Principle 6 is grounded in reason, common sense, procedural rules, and common law, and is premised on each party fulfilling its discovery obligations without direction from the court or opposing counsel, and eschewing 'discovery on discovery,' unless a specific deficiency is shown in a party's production." Sedona Principle 6, and Comments 6a-c, supra n. 1 at p. 118-27 and cases cited therein.

[13] Sedona Principle 7, *supra* n. 1 at p. 131.

responding party must be carried out through reasonable, timely, and thorough responses appropriate to the needs of the case and while maintaining the ability to validate the effort.[14] If the requesting party is disappointed with the outcome of preservation or production, that is not enough. The requesting party carries the burden of showing by factual evidence a specific and material deficiency in the responding party's discovery productions. The law requires reasonable and good faith steps to preserve and produce, not perfection.[15]

Conclusion

Mastering eDiscovery is the ethical responsibility of counsel who undertake contemporary litigation. And, while the landscape of issues and challenges seems to constantly change, established eDiscovery processes can be applied to handle novel complex issues like those presented by collaboration program data. The key is, and always has been, learning what is needed to be able to identify issues in the first place and remaining current on developing trends so that new problems are met with reasonable solutions in a timely fashion, so the problems are solved, and data is not irretrievably lost. The emergence of collaboration platforms is a development that counsel can and will handle using this key once again.

[14] *See* 1983 Advisory Comm. Note to Fed. R. Civ. P. 26(g)("If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse."); Sedona Principle 6, Comment 6c, *supra* n. 1 at p. 126.
[15] *See* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp.2d 456, 461 (S.D.N.Y. 2010) ("Courts cannot and do not expect that any party can meet a standard of perfection" regarding electronic discovery); Sedona Principle 5, Comment 5c, *supra* n. 1 at p. 102.

Caselaw: Preservation and Collaboration Programs

Preservation and Scope of Discovery: Collaboration Platform Data

Failure to Preserve Collaboration Application Data

Waymo LLC v. Uber Techs., Inc., 2018 U.S. Dist. LEXIS 16020, 2018 WL 646701 (N.D. Cal. Jan. 29, 2018) (Court granted sanctions, including the intention to inform the jury that Uber deliberately concealed its destruction of evidence and other relief, and the Court reserved the possibility of an adverse-inference instruction pursuant to FRCP 37(e) based on Uber's spoliation of evidence).

Kelley v. BMO Harris Bank N.A. (In re Petters Co.), 606 B.R. 803, 2019 Bankr. LEXIS 2001, 2019 WL 5109866 (Based on the record and evidence available, the court found that Defendant intentionally destroyed and failed to preserve email backup tapes in bad faith to deprive Plaintiff of their use in this adversary proceeding, and the court ordered sanctions under both Rule 37(e)(1) and 37(e)(2)).

Trigger of Duty to Preserve

Drips Holdings, LLC v. Teledrip LLC, 2022 U.S. Dist. LEXIS 153668, 2022 WL 3282676 (N.D. Ohio Apr. 5, 2022) (Defendants had a duty to preserve the Slack data beginning in August of 2019 when it was on notice of or should have had notice of potential litigation from Drips; that Defendants failed to preserve the Slack data in order to deprive Drips of the evidence; that the deleted/lost Slack data was relevant to Drips's claims and/or defenses; and a permissive adverse-inference instruction balances the interests of the parties and adequately punishes Defendants' culpable behavior).

Fast v. GoDaddy.com LLC, 340 F.R.D. 326, 2022 U.S. Dist. LEXIS 19857, 111 Fed. R. Serv. 3d (Callaghan) 1535, 2022 WL 325708 (D. Ariz. Feb. 3, 2022) (In this employment discrimination case, Plaintiff used evidence she saved from Slack communications in her suit against her employer; As early as May 2, 2018, while still employed at GoDaddy, Plaintiff started coordinating with a co-worker to gather instant messages from her work Slack account for use in potential litigation; Court agreed that Plaintiff's own duty to preserve arose in May 2018 when she began gathering evidence to use in a potential lawsuit against GoDaddy).

Motions to Compel Discovery

Motion to Compel re Production of Collaboration Application Data GRANTED

Twitter, Inc. v. Musk, 2022 Del. Ch. LEXIS 219, 2022 WL 4095542 (Del. Chan. Sep. 7, 2022) (Letter Opinion) (decision resolves the Motion to Compel Production of Slack Messages filed by Defendants Elon R. Musk, et al., against Twitter in this Delaware Chancery Court action after negotiations broke down).

Calendar Research LLC v. Stubhub, Inc., 2019 U.S. Dist. LEXIS 65307, 2019 WL 1581406 (C.D. Cal. Mar. 14, 2019) (Court Granted the Motion to Compel in part and ordered the Defendants to produce any outstanding non-privileged

Slack message files, by a certain date and to have its vendor submit a declaration confirming that "all Block & Tackle Slack channels and messages" made available to it "have been searched using the parties' stipulated terms" and identifying the steps taken to perform the search; Plaintiff sought inherent authority adverse inference and monetary sanctions for discovery violations, which were denied by the court).

Benebone LLC v. Pet Qwerks, Inc., 2021 U.S. Dist. LEXIS 43449, 2021 WL 831025 (C.D. Cal. Feb. 18, 2021) (Court found that requiring review and production of Slack messages by Benebone is generally comparable to requiring search and production of emails and is not unduly burdensome or disproportional to the needs of this case — if the requests and searches are appropriately limited and focused).

Bidprime, LLC v. Smartprocure, Inc., 2018 U.S. Dist. LEXIS 222868, 2018 WL 6588574, at *2 (W.D. Tex. Nov. 13, 2018) (Court GRANTED Motion to Compel and ordered production of the unproduced Slack messages because they may be relevant and SmartProcure has not provided a specific objection to the contrary; a party objecting to discovery must state with specificity the objection and how it relates to the request being opposed, and not merely that it is overly broad and burdensome or oppressive or vexatious or not reasonably calculated to lead to the discovery of admissible evidence).

Cooley v. Target Corp., 2021 U.S. Dist. LEXIS 253610, 2021 WL 6882660 (D. Minn. Sep. 17, 2021) (Motion to Compel was GRANTED requiring a Slack search because Target did not demonstrate that it lacked the capability to perform ESI searches of Slack).

Gopher Media, LLC v. Spain, 2020 U.S. Dist. LEXIS 260540 (S.D. Cal. Aug. 24, 2020) (Court found that plaintiff's indiscriminate designation of the totality of its document production as "For Counsel Only" was abusive and improper and GRANTED the Motion to Compel and required Plaintiff to serve amended responses to defendants' Requests for Production, indicating which documents in the 139,311 document production correspond to each request and re-designate the 139,311 documents produced to date--the "For Counsel Only" designation shall be used only for the most sensitive information, consistent with the terms of the Protective Order).

Warner Bros. Ent. Inc. v. Random Tuesday, Inc., 2021 U.S. Dist. LEXIS 250597, 2021 WL 6882166 (C.D. Cal. Dec. 8, 2021) (Court GRANTED in part plaintiff's Motion to Compel, ordering RTI to produce in readable format all non-privileged, responsive Facebook and Slack communications; to the extent necessary, plaintiff was ordered to consult with defendants and/or defendants' e-discovery vendor to resolve any difficulties in production; Defendant RTI was required to confirm compliance with the production in a declaration signed by a corporate representative under penalty of perjury).

Mobile Equity Corp. v. Walmart Inc., 2022 U.S. Dist. LEXIS 1135, 2022 WL 36170 (E.D. Tex. Jan. 4, 2022) (Court indicated that it was sensitive to the burden that Walmart would incur if all forty SLACK channels are ordered to be produced, so the parties were ordered to meet and confer and narrow the list of forty channels; Court was hesitant to place a limit on the number of channels that were to be produced but indicated that the Court would resolve any dispute remaining after the parties' meet and confer efforts).

Podium Corp. v. Chekkit Geolocation Servs., 2022 U.S. Dist. LEXIS 98197, 2022 WL 1773016 (D. Utah Jun. 1, 2022) (neither Defendants nor the court could determine whether Podium has adequately responded to the discovery requests, so Podium was ordered to identify by Bates number the documents it has produced in response to each request).

Motion to Compel re Production of Collaboration Application Data DENIED

Milbeck v. TrueCar Inc., 2019 U.S. Dist. LEXIS 165649, 2019 WL 4570017 (C.D. Cal. May 2, 2019) (based on evidence from their eDiscovery provider, Defendants showed that the Slack data would be so extensive that it could not be processed and produced in time for discovery and trial and Court determined that the burden and expense of the discovery was too great and would clearly outweigh any likely benefit given the compressed discovery and trial schedule so Motion to Compel was DENIED without prejudice and the trial was continued to allow time for discovery of the Slack data).

Lamaute v. Power, 339 F.R.D. 29, 2021 U.S. Dist. LEXIS 93942, 2021 WL 1978971 (D.D.C. May 18, 2021) (Court narrowed the requests significantly and ESI deemed within the scope of ordered production from any of the named programs or platforms, including Slack, was presumably ordered to be produced).

Laub v. Horbaczewski, 2020 U.S. Dist. LEXIS 247102, 2020 WL 7978227 (C.D. Cal. Nov. 17, 2020) (Court concluded that Plaintiffs' request for the Slack messages was not proportional to the needs of the case and Plaintiffs' request to compel production of those documents was DENIED based on proportionality).

References and Resources

Craig Ball, **The Perfect Preservation Letter**, found at https://craigball.net/2020/09/10/the-perfect-preservation-letter-a-new-guide/.

Proportionality Toolkit, UF E-Discovery Conference 2022 (included as an Appendix)

The Sedona Principles, Third Edition: ***Best Practices, Recommendations & Principles for Addressing Electronic Document Production***, 19 Sedona Conf. J. 1 (2018)(relevant excerpts included at p. ___) also found at https://thesedonaconference.org/publications.

Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible, 10 SEDONA CONF. J. 281 (2009) also found at https://thesedonaconference.org/node/179.

MEDICAL RECORD COLLABORATION APPLICATIONS AND PROGRAMS

Hon. Ralph Artigliere, Chad P. Brouillard, Dr. Reed D. Gelzer, Kimberly Reich & Steven Teppler, **Diagnosing and Treating Legal Ailments of the Electronic Health Record: Toward an Efficient and Trustworthy Process for Information Discovery and Release**, 18 Sedona Conf. J. 209 (2017).

The Sedona Conference Principles on Preservation Excerpts

The Sedona Principles, Third Edition: ***Best Practices, Recommendations & Principles for Addressing Electronic Document Production***, 19 Sedona Conf. J. 1 (2018) also found at https://thesedonaconference.org/publications.

The Sedona Principles are core principles and best practice recommendations for addressing the production of electronic information in litigation. The published principles include comments and commentaries which expand on each Principle with analysis and guidance on key legal doctrines, issues, and notable exceptions. Excerpts below include Principle 1 on preservation in general, Principle 3 on voluntary meet and confer, Principle 5 on the preservation obligation, and Principle 8 on the role of reasonable accessibility in preservation Those Principles and certain relevant comments are set out here, but further excellent commentary, context, and references implicating preservation are available at 19 Sedona Conf. J. 1.

PRINCIPLE 1. Electronically stored information is generally subject to the same preservation and discovery requirements as other relevant information.

Introduction

Whether dealing with electronically stored information (ESI) or paper copies, the scope of discovery in federal court is non-privileged matter that is relevant to the claims and defenses in the case, and proportional to the needs of the case. But, as explained in the Introduction, ESI has become so pervasive that the volume of ESI involved in most cases dwarfs the volume of any paper records. This makes ESI the driving force behind the scope of preservation and discovery requirements in many cases, and behind the litigation-related aspects of many effective information governance programs.

Comment 1.a. The scope of discovery is generally the same for ESI as for other relevant information, but ESI can present unique preservation and discovery issues.

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PRINCIPLE 3. As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.

Comment 3.a. Parties should attempt to resolve discovery issues early.

Early discussion of all discovery issues, including the overall scope of discovery, preservation, and production of ESI, should reduce misunderstandings, disputes, and the need for court intervention. Doing so is consistent with Rule 1, which states that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." This Principle applies to party discovery, as well as requests under Rule45 to obtain information from non-parties. ***

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Comment 3.c. The early discussions should include procedural issues relating to form of production.

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Comment 3.d. The early discussion should include issues relating to privilege claims and privilege logs for voluminous ESI.

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Comment 3.e. Search and retrieval parameters and techniques are appropriate topics for discussion at an early meet and confer session.

It usually is not feasible, and may not even be possible, for most litigants to collect and review all relevant data from their computer systems. The extraordinary effort required to do so could cripple many organizations. Yet, without appropriate guidelines, if any data is omitted from a production, an organization may be accused of withholding data that should have been produced and, if that data is not preserved, of spoliation. Unnecessary controversy over peripheral discovery issues often can be avoided if the parties discuss early the scope of relevance, the costs of preserving and collecting relevant data from various sources, and approaches that may be used to assist in the search or retrieval of relevant information. Accordingly, and consistent with the Federal Rules and best practices, parties should be prepared to discuss the sources of ESI that have been identified as containing relevant information as well as the steps that have been taken to search for, retrieve, and produce such information.

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Comment 3.g. Communications with opposing counsel and the court regarding ESI should be informed and candid.

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Principle 5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information.

Comment 5.a. The preservation analysis includes two aspects: When the duty arises, and the scope of ESI that should be preserved.

The common law duty to preserve evidence clearly extends to ESI. Indeed, the vast majority of information upon which businesses and individuals operate today is generated electronically, and much of this information is never printed to paper. Therefore, parties must take reasonable steps to preserve ESI when litigation or government investigation is pending or reasonably anticipated.

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Comment 5.b. Organizations must prepare for electronic discovery if they are to reduce cost and risk. While the main purpose of computer systems is to assist the organization in its business activities, the need to respond to discovery in litigation is a fact of life for many organizations.

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Comment 5.c. In assessing the scope of a preservation duty, as soon as practicable, parties should consider persons likely to have relevant as well as non-custodial sources of relevant ESI.

Parties should define the scope of their preservation obligations as soon as practicable after the duty to preserve arises. The duties of preservation apply equally to plaintiffs as to defendants in litigation. For organizations, identifying and preserving relevant ESI will normally require input from legal staff who understand the claims and defenses in the case, from employees involved in the transaction or event that caused the lawsuit, and from information technology or records management personnel with a good understanding of where and how the organization stores relevant ESI. Failure to initiate reasonable preservation protocols as soon as practicable may increase the risk of arguments that relevant information was not preserved.

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Based on the information available to the organization about the credible threat of litigation or investigation, the organization should assess the persons likely to have relevant information, and the sources of non-custodial relevant information (such as structured systems and databases, and other non-custodial sources such as collaboration tools, social media, and those referenced in Comment 5.i.). In making the preservation decisions, organizations should carefully consider likely future discovery demands for relevant ESI to avoid needless repetitive steps to capture data again in the future.

Organizations should consider documenting the key decisions made in the preservation process, and the reasons for any exceptions to an organization's standard protocols for preservation.

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Comment 5.d. Parties should, in most circumstances, send notices to preserve relevant information to persons having relevant ESI or responsible for maintaining systems containing relevant ESI.

Once a preservation obligation is triggered, as discussed in Comment 5.a., a party should take reasonable steps to communicate to appropriate persons the need to preserve information that is relevant to the claims and defenses and proportional to the needs of the case.

Usually this communication will take the form of a "legal hold notice." The legal hold notice should be sent to persons responsible for preserving information relevant to claims or defenses in that litigation or investigation. This usually includes persons with knowledge of the underlying facts of the matter, since they are likely to generate, receive, and maintain relevant information. The list also may include the persons responsible for maintaining and operating relevant computer systems, files, or databases, including application teams or administrators, as well as those who can assist with certain steps such as suspending auto-deletion policies for certain custodians, backup, or archiving systems that may fall within the scope of the preservation obligation.

The legal hold notice does not need to reach all employees; however, it should be reasonable and reach those individuals likely to maintain information relevant to the claims or defenses in the litigation or to the investigation and which will be needed in discovery.

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Comment 5.i. Preservation efforts should include consideration of ESI that is not specific to individual custodians, including shared or orphaned data.

An organization's networks or intranet may contain shared areas (such as public folders, discussion databases, and shared network folders) that are not regarded as belonging to any specific employee. Similarly, there may be no one "owner" of the ESI for collaborative workspace areas within the organization.

Such areas should be considered in the preservation analysis to determine if they contain relevant ESI proportional to the needs of the case and, if so, reasonable steps should be taken to preserve the relevant ESI. See Comment 5.d.

If an organization maintains archival data on tapes or other offline media not accessible to end users of computer systems, steps should be taken promptly to determine whether those archival media are reasonably likely to contain relevant ESI not also present as active data on the organization's systems. These steps may include notifying persons responsible for managing archival systems to retain tapes or other media as appropriate.

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Sedona Principle 6: Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

Principle 6 recognizes that a responding party is best situated to preserve, search, and produce its own ESI. Principle 6 is grounded in reason, common sense, procedural rules, and common law, and is premised on each party fulfilling its discovery obligations without direction from the court or opposing counsel, and eschewing "discovery on discovery," unless a specific deficiency is shown in a party's production.

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Comment 6.a. A responding party should determine how to meet its own preservation and production obligations.

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FN 92 See Rule 26(a) (mandatory initial disclosures), Rule 34(b)(2) (parties directed to respond to requests for documents or ESI), Rule 33(b)(1)(A) (parties directed to respond to interrogatories), and Rule 36(a)(3) (parties directed to respond to requests for admissions); Dynamo Holdings Ltd. P'ship v. Comm'r, No. 2685-11, 2014 WL 4636526, at *3 (U.S. Tax Ct. Sept. 17, 2014) ("And although it is a proper role of the Court to supervise the discovery process and intervene when it is abused by the parties, the Court is not normally in the business of dictating to parties the process that they should use when responding to discovery."); Diepenhorst v. City of Battle Creek, No. 1:05-CV-734, 2006 WL 1851243, at *3 (W.D. Mich. June 30, 2006) (The "discovery process is designed to be extrajudicial, and relies upon the responding party to search his records to produce the requested data."); see also Hon. James C. Francis IV, Judicial Modesty: The Case for Jurist Restraint in the New Electronic Age, LAW TECH. NEWS (Feb. 2013) (No Federal Rule "has given judges the authority . . . to dictate to the parties how or where to search for documents.").

Comment 6.b. Responding parties should be permitted to fulfill their preservation and discovery obligations without preemptive restraint.

FN 102. See, e.g., In re Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (vacating order for discovery of certain databases where no finding of "some non-compliance with discovery rules by Ford"); Koninklijke Philips N.V. v. Hunt Control Sys., Inc., No. 11-cv-03684, 2014 WL 1494517, at *4 (D.N.J. Apr. 16, 2014) (moving party failed to show a "material deficiency" in the responding party's electronic discovery process); Freedman v. Weatherford Int'l, No. 12 Civ. 2121, 2014 WL 4547039 (S.D.N.Y. Sept. 12, 2014) (request for "discovery on discovery" denied for failure in absence of factual basis to find original production deficient); Larsen v. Coldwell Banker Real Estate Corp., No. SACV 10-00401, 2012 WL 359466, at *7 (C.D. Cal. Feb. 2, 2012) (denying discovery on discovery where plaintiff's "isolated examples cited" of alleged deficiencies "fail[ed] to demonstrate that Defendants have not reasonably and in good faith produced the documents required"); Orillaneda v. French Culinary Inst., No. 07 Civ. 3206, 2011 WL 4375365, at *7–8 (S.D.N.Y. Sept. 19, 2011) (plaintiff not entitled to conduct discovery about defendant's document production without "specific statements" to prove deficiency instead of relying on "generalities"); Steuben Foods, Inc. v. Country Gourmet Foods, LLC, No. 08-CV-561S, 2011 WL 1549450 (W.D.N.Y. 2011); Hubbard v. Potter, 247 F.R.D. 27, 31 (D.D.C. 2008) (denying discovery on discovery because of only a "theoretical possibility" that additional electronic documents may exist); Memory Corp. v. Kent. Oil Tech., No. C04-03843, 2007 WL 832937 (N.D. Cal. Mar. 19, 2007); In re Honeywell Int'l. Inc. Sec. Litig., 230 F.R.D. 293 (S.D.N.Y. 2003).

Comment 6.c. Documentation and validation of discovery processes.

Responding parties and their counsel should consider what documentation of their discovery process (i.e., preservation, collection, review, and production) is appropriate to the needs of the particular case. Such documentation may include a description of what is being preserved; the processes and validation procedures employed to preserve, collect, and prepare the materials for production; and the steps taken to ensure the integrity of the information throughout the process. Since The Sedona Principles was first published, applications have been developed to automate the legal hold issuance, tracking, and documentation processes, as well as some collections. Having documentation can help respond to legitimate challenges (see Comment 6.b.)—even those made years later—to the processes employed, avoid overlooking ESI that should be collected, and avoid collecting ESI that is neither relevant nor responsive to the matter at issue. Organizations should endeavor to revise their standardized documentation and validation procedures as appropriate, e.g., when the organization introduces new technologies to store or create ESI, including some technologies that create new types of ESI.

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Comment 6.d. Rule 34 inspections of electronic information systems are disfavored.

Courts have repeatedly found that Rule 34 does not create a routine right of direct access to an opposing party's electronic information system. Inspection of an opposing party's computer system under Rule 34 and state equivalents is the exception and not the rule for discovery of ESI. In the majority of cases, the issues in litigation relate to the informational content of the data stored on computer systems, not the actual operations of the systems; and, as noted above, the obligation to produce relevant content lies with the responding party. Unless the requesting party can prove that the actual operation of a particular system is at issue in the litigation, if the responding party provides the informational content of the data, there is no need or justification for direct inspection of the responding party's computer systems. Direct access to an opposing party's computer systems under a Rule 34 inspection also presents possible

concerns such as: a) revealing trade secrets; b) revealing other highly confidential or private information, such as personnel evaluations and payroll information, properly private to individual employees; c) revealing confidential attorney-client or work-product communications; d) unreasonably disrupting the ongoing business; e) endangering the stability of operating systems, software applications, and electronic files if certain procedures or software are used inappropriately; and f) placing a responding party's computing systems at risk of a data security breach.

FN 106. See, e.g., SEC v. Strauss, No. 09 Civ. 4150, 2009 WL 3459204, at *12 n.8 (S.D.N.Y. Oct. 28, 2009) ("There is a general reluctance to allow a party to access its adversary's own database directly. The Advisory Committee Notes to the 2006 amendments to Rule 34 explain that Rule 34(a) is not meant to 'create a routine right of direct access to a party's electronic information system' and advises that courts 'guard against undue intrusiveness resulting from inspecting or testing such systems.' Thus, courts have declined to find an automatic entitlement to access an adversary's database." (citing cases) (emphasis in original)).

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Principle 7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.

Principle 8. The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.

Craig Ball Preservation Letter

The following Preservation Letter or Preservation Demand is the work of Craig Ball, Law Professor at Tulane University and is included with his kind permission. Excellent guidance on Preservation Letters is located at http://www.craigball.com/Perfect_Preservation_Letter_Guide_2020.pdf.

APPENDIX: Exemplar Preservation Demand to Opponent

What follows *isn't* the perfect preservation letter for *your unique* case, so ***don't deploy it as a form***. Instead, use it as a ***drafting aid*** to flag issues unique to relevant electronic evidence, and tailor your preservation demand proportionately, *scaled to the unique issues, parties, and systems in your case.*

Demand for Preservation of Electronically Stored Information and Other Evidence

I write as counsel for **[Plaintiff(s)] [Defendant(s)]** to advise you of **[a claim for damages and other relief against you]** growing out of the following matters (hereinafter this "cause"):

[DESCRIPTION OF MATTER, INCLUDING ACTORS, EVENTS, DATES, LOCATIONS, CLAIMS/DEFENSES]

We demand that you preserve documents, tangible things, and electronically stored information potentially relevant to the issues and defenses in this cause. As used in this document, "you" and "your" refers to **[NAME OF OPPONENT]**, and its predecessors, successors, parents, subsidiaries, divisions and affiliates, officers, directors, agents, attorneys, accountants, employees, partners Assigns and other persons occupying similar positions or performing similar functions.

You must anticipate that information subject to disclosure and responsive to discovery resides on your current and former computer systems, phones and tablets, in online repositories and on other storage media and sources (including voice- and video recording systems, Cloud services and social networking accounts).

Electronically stored information (hereinafter "ESI") should be afforded the broadest possible meaning and includes (*by way of example and not as an exclusive list*) potentially relevant information electronically, magnetically, optically, or otherwise stored as and on:

- Digital communications (e.g., e-mail, voice mail, text messaging, WhatsApp, SIM cards)
- E-Mail Servers (e.g., Microsoft 365, Gmail, and Microsoft Exchange databases)
- Word processed documents (e.g., Microsoft Word, Apple Pages or Google Docs files and drafts)
- Spreadsheets and tables (e.g., Microsoft Excel, Google Sheets, Apple Numbers)
- Presentations (e.g., Microsoft PowerPoint, Apple Keynote, Prezi)
- Social Networking Sites (e.g., Facebook, Twitter, Instagram, LinkedIn, Reddit, Slack, TikTok)
- Online ("Cloud") Repositories (e.g., Drive, OneDrive, Box, Dropbox, AWS, Azure)
- Databases (e.g., Access, Oracle, SQL Server data, SAP)
- Backup and Archival Files (e.g., Veritas, Zip, Acronis, Carbonite)
- Contact and Customer Relationship Management Data (e.g., Salesforce, Outlook, MS Dynamics)
- Online Banking, Credit Card, Retail and other Relevant Account Records
- Accounting Application Data (e.g., QuickBooks, NetSuite, Sage)
- Image and Facsimile Files (e.g., .PDF, .TIFF, .PNG, .JPG, .GIF., HEIC images)
- Sound Recordings (e.g., .WAV and .MP3 files)
- Video and Animation (e.g., Security camera footage, .AVI, .MOV, .MP4 files)
- Calendar, Journaling and Diary Application Data (e.g., Outlook PST, Google Calendar, blog posts)
- Project Management Application Data
- Internet of Things (IoT) Devices and Apps (e.g., Amazon Echo/Alexa, Google Home, Fitbit)

- Computer Aided Design/Drawing Files
- Online Access Data (e.g., Temporary Internet Files, Web cache, Google History, Cookies)
- Network Access and Server Activity Logs

ESI resides not only in areas of electronic, magnetic, and optical storage media reasonably accessible to you, but also in areas you may deem *not* reasonably accessible. You are obliged to *preserve* potentially relevant evidence from *both* sources of ESI, even if you do not anticipate *producing* such ESI or intend to claim it is confidential or privileged from disclosure.

The demand that you preserve both accessible and inaccessible ESI is reasonable and necessary. Pursuant to the rules of civil procedure, you must identify all sources of ESI you decline to produce and demonstrate to the court why such sources are not reasonably accessible. For good cause shown, the court may order production of the ESI, even if it is not reasonably accessible. Accordingly, you must preserve ESI that you deem inaccessible so as not to preempt the court's authority.

Preservation Requires Immediate Intervention

You must act immediately to preserve potentially relevant ESI, including, without limitation, information with the *earlier* of a Created or Last Modified date on or after **[DATE]** through the date of this demand and continuing thereafter, concerning:

1. The events and causes of action described **[above] [in the Complaint] [in the Answer]**
2. ESI you may use to support claims or defenses in this case
3. ….

Adequate preservation of ESI requires more than simply refraining from efforts to delete, destroy or dispose of such evidence. You must intervene to prevent loss due to routine operations or active deletion by employing proper techniques and protocols to preserve ESI. *Many routine activities serve to irretrievably alter evidence and constitute unlawful spoliation of evidence.*

Preservation requires action

Nothing in this demand for preservation of ESI should be read to limit or diminish your concurrent common law and statutory obligations to preserve documents, tangible things and other potentially relevant evidence.

Suspension of Routine Destruction

You are directed to immediately initiate a litigation hold for potentially relevant ESI, documents and tangible things and to act diligently and in good faith to secure and audit compliance with such litigation hold. You are further directed to immediately identify and modify or suspend features of your information systems and devices that, in routine operation, operate to cause the loss of potentially relevant ESI. Examples of such features and operations may include:

- Purging the contents of e-mail and messaging repositories by age, quota, or other criteria
- Using data or media wiping, disposal, erasure or encryption utilities or devices
- Overwriting, erasing, destroying, or discarding backup media
- Re-assigning, re-imaging or disposing of systems, servers, devices or media
- Running "cleaner" or other programs effecting wholesale metadata alteration
- Releasing or purging online storage repositories or non-renewal of online accounts
- Using metadata stripper utilities

- Disabling server, packet, or local instant messaging logging
- Executing drive or file defragmentation, encryption, or compression programs

Guard Against Deletion

You should anticipate the potential that your officers, employees, or others may seek to hide, destroy or alter ESI. You must act to prevent and guard against such actions. Especially where company machines were used for Internet access or personal communications, you should anticipate that users may seek to delete or destroy information they regard as personal, confidential, incriminating or embarrassing, and in so doing, they may also delete or destroy potentially relevant ESI. This concern is not unique to you. It's simply conduct that occurs with such regularity that any custodian of ESI and their counsel must anticipate and guard against its occurrence.

Preservation of Backup Media

You are directed to preserve complete backup media sets (including differentials and incremental backups) that may contain unique communications and ESI of the following custodians for all dates during the below-listed intervals:

[CUSTODIAN] [INTERVAL, *e.g.*, 1/1/20 through 7/15/20]

Act to Prevent Spoliation

You should take affirmative steps to prevent anyone with access to your data, systems, accounts and archives from seeking to modify, destroy or hide potentially relevant ESI wherever it resides (such as by deleting or overwriting files, using data shredding and erasure applications, re-imaging, damaging or replacing media, encryption, compression, steganography or the like).

System Sequestration or Forensically Sound Imaging [When Implicated]

As an appropriate and cost-effective means of preservation, you should remove from service and securely sequester the systems, media, and devices housing potentially relevant ESI of the following persons:

[NAME KEY PLAYERS MOST DIRECTLY INVOLVED IN CAUSE]

In the event you deem it impractical to sequester systems, media and devices, we believe that the breadth of preservation required, coupled with the modest number of systems implicated, dictates that forensically sound imaging of the systems, media and devices of those named above is expedient and cost effective. As we anticipate the need for forensic examination of one or more of the systems and the presence of relevant evidence in forensically significant areas of the media, we demand that you employ forensically sound ESI preservation methods. Failure to use such methods poses a significant threat of spoliation and data loss.

"Forensically sound ESI preservation" means duplication of all data stored on the evidence media while employing a proper chain of custody and using tools and methods that make no changes to the evidence and support authentication of the duplicate as a true and complete bit- for-bit image of the original. The products of forensically sound duplication are called, inter alia, "bitstream images" of the evidence media. A forensically sound preservation method guards against changes to metadata evidence and preserves all parts of the electronic evidence, including deleted evidence within "unallocated clusters" and "slack space."

Be advised that a conventional copy or backup of a hard drive does not produce a forensically sound image because it captures only active data files and fails to preserve forensically significant data existing in, e.g., unallocated clusters and slack space.

Further Preservation by Imaging

With respect to the hard drive, thumb drives, phones, tablets and storage devices of each of the persons named below and of each person acting in the capacity or holding the job title named below, demand is made that you immediately obtain, authenticate and preserve forensically sound images of the storage media in any computer system (including portable and personal computers, phones and tablets) used by that person during the period from **_____ 20___ to _____, 20___,** as well as recording and preserving the system time and date of each such computer.

[NAMES, JOB DESCRIPTIONS OR JOB TITLES]

Once obtained, each such forensically sound image should be labeled to identify the date of acquisition, the person or entity acquiring the image and the system and medium from which it was obtained. Each such image should be preserved without alteration and authenticated by hash value.

Preservation in Native Forms

You should anticipate that ESI, including but not limited to e-mail, documents, spreadsheets, presentations, and databases, will be sought in the form or forms in which it is ordinarily maintained (i.e., native form). Accordingly, you should preserve ESI in such native forms, and you should not employ methods to preserve ESI that remove or degrade the ability to search the ESI by electronic means or that make it difficult or burdensome to access or use the information.

You should additionally refrain from actions that shift ESI from reasonably accessible media and forms to less accessible media and forms if the effect of such actions is to make such ESI not reasonably accessible.

Metadata

You should anticipate the need to disclose and produce system and application metadata and act to preserve it. System metadata is information describing the history and characteristics of other ESI. This information is typically associated with tracking or managing an electronic file and often includes data reflecting a file's name, size, custodian, location and dates of creation and last modification. Application metadata is information automatically included or embedded in electronic files, but which may not be apparent to a user, including deleted content, draft language, commentary, tracked changes, speaker notes, collaboration and distribution data and dates of creation and printing. For electronic mail, metadata includes all header routing data and Base 64 encoded attachment data, in addition to the To, From, Subject, Received Date, CC and BCC header fields.

Metadata may be overwritten or corrupted by careless handling or improper preservation, including by carelessly copying, forwarding, or opening files.

Servers

With respect to servers used to manage e-mail (e.g., Microsoft 365, Microsoft Exchange, Lotus Domino) and network storage (often called a "network share"), the complete contents of each relevant custodian's network share and e-mail account should be preserved. There are several cost-effective ways to preserve the contents of a server without

disrupting operations. If you are uncertain whether the preservation method you plan to employ is one that we will deem sufficient, please contact the undersigned.

Home Systems, Laptops, Phones, Tablets, Online Accounts, Messaging Accounts and Other ESI Sources

Though we expect that you will act swiftly to preserve data on office workstations and servers, you should also determine if any home or portable systems or devices may contain potentially relevant data. To the extent that you have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from external storage drives, thumb drives, CD- R/DVD-R disks and the user's phone, tablet, voice mailbox or other forms of ESI storage.). Similarly, if you used online or browser-based e-mail and messaging accounts or services (such as Gmail, Yahoo Mail, Microsoft 365, Apple Messaging, WhatsApp or the like) to send or receive potentially relevant messages and attachments, the contents of these account mailboxes and messages should be preserved.

Ancillary Preservation

You must preserve documents and other tangible items that may be required to access, interpret or search potentially relevant ESI, including manuals, schema, logs, control sheets, specifications, indices, naming protocols, file lists, network diagrams, flow charts, instruction sheets, data entry forms, abbreviation keys, user ID and password rosters and the like.

You must preserve passwords, keys and other authenticators required to access encrypted files or run applications, along with the installation disks, user manuals and license keys for applications required to access the ESI.

If needed to access or interpret media on which ESI is stored, you must also preserve cabling, drivers, and hardware. This includes tape drives, readers, DBMS other legacy or proprietary devices and mechanisms.

Paper Preservation of ESI is Inadequate

As hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for, or cumulative of, electronically stored versions. If information exists in both electronic and paper forms, you should preserve both forms.

Agents, Attorneys and Third Parties

Your preservation obligation extends beyond ESI in your care, possession or custody and includes ESI in the custody of others that is subject to your direction or control. Accordingly, you must notify any current or former agent, attorney, employee, custodian and contractor in possession of potentially relevant ESI to preserve such ESI to the full extent of your obligation to do so, and you must take reasonable steps to secure their compliance.

Preservation Protocols

We are desirous of working with you to agree upon an acceptable protocol for forensically sound preservation and can supply a suitable protocol if you will furnish an inventory and description of the systems and media to be preserved. Alternatively, if you promptly disclose the preservation protocol you intend to employ, we can identify any points of disagreement and resolve them. A successful and compliant ESI preservation effort requires expertise. If you do not currently have such expertise at your disposal, we urge you to engage the services of an expert in electronic evidence

and computer forensics so that our experts may work cooperatively to secure a balance between evidence preservation and burden that's fair to both sides and acceptable to the court.

Do Not Delay Preservation

I'm available to discuss reasonable preservation steps; however, *you should not defer preservation steps pending such discussions if ESI may be lost or corrupted because of delay*. Should your failure to preserve potentially relevant evidence result in the corruption, loss, or delay in production of evidence to which we are entitled, such failure would constitute spoliation of evidence, and we will not hesitate to seek sanctions.

Confirmation of Compliance

Please confirm by **[DATE]**, that you have taken the steps outlined in this letter to preserve ESI and tangible documents potentially relevant to this action. If you have not undertaken the steps outlined above, or have taken other actions, please describe what you have done to preserve potentially relevant evidence and what you will not do. Else we will rely upon you to complete the preservation sought herein.

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Practical Tips for Trial: Handling E-Discovery In Litigation

Electronically Stored Information (ESI) refers to discoverable information "stored in any medium from which the information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form," according to the Federal Rules of Civil Procedure. This month, Suzanne Clark, Discovery Counsel for the firm's Mass Torts Section, details a step-by-step process she uses to unpack and assess incoming ESI. Suzanne has a great deal of experience in this area of discovery. Let's take a look at her approach.

Capturing the Landscape of Incoming Productions: Techniques for Assessing the Documents and ESI Received from Opposing Parties

You have just received a production of documents and ESI in response to your Request for Production. What now?

It is time to unpack what you have received, and there are many different methodologies that can be employed to tackle this task. The following are techniques I use to accomplish the initial assessment of incoming productions of ESI.

I. Ingest the Production and Conduct Pre-Assessment Work

My first step when opposing counsel provides a production (typically by FTP link) is to send that link to the eDiscovery service provider we have in place for the litigation. The vendor's project manager then ingests the production into the document review software and lets me know of any issues or problems identified.

While the vendor is doing their part, I pull together any documentation that could be helpful in guiding me through the production assessment, including:

- the ESI Protocol,
- discovery requests,
- discovery responses and/or objections,
- opposition's initial disclosures,
- cover letters that relate to or accompany the production(s), and
- lists of search terms, custodians, and data sources.

The above information arms me with a picture of what should be in the production by answering some relevant questions at the forefront. For example:

- What metadata fields are going to be produced (e.g., file name, folder path, date, custodian, sender, recipient(s), etc.)?
- What are the expected date ranges?
- Will all custodians and data sources be produced at once, or will there be rolling productions?
- If there will be rolling productions, which custodians and data sources should I expect to find when I "unpack" this particular production?

- Which topics should I expect to find: for example, in medical device and drug litigation: regulatory, marketing, testing, etc.?
- Am I able to predict ahead of time which concepts I expect the software to show me?

If the ESI Protocol identifies certain metadata fields, and those fields are empty, I have the ESI order/agreement in hand to quickly identify those fields for opposing counsel and request they remedy the deficiency immediately before document review begins. Also, if a cover letter asserts that the first production is of non-custodial data sources, then there is no need for me to waste time determining if all custodians are produced because I know those productions will come later. Additionally, if I know there will be a rolling production, and I see fewer documents for one custodian than another, a different date range, or less information on a topic than I expected to see, then I will know to look out for that information in a future production before prematurely becoming alarmed that ESI is missing.

II. Assess the Landscape of the Production

The next step is to dive into the data. Looking at a high-level overview of what has been produced enables me to get an understanding of the sources of ESI and the content of the ESI. At this phase, I concentrate on what has, in fact, been produced. In addition to looking for red flags and anything that stands out, I also simply look for what story is told by analyzing data volume, time frames, people, and data types. This provides a framework or landscape of the production. All of this assessment work allows me to make an intentional plan for analyzing and reviewing the data in an efficient and effective way, a plan that is often different from a linear review in order of Bates page number.

a. Review a Small Random Sample

If I find value in laying eyes on a few documents at this stage, I do so. Typically, the document review software will allow me to take a small sample of a random selection of documents. When using this technique to get a feel for the data, I like to divide the production into tranches by data source and/or custodian and look at 10-50 documents for each to see exemplars or examples of what kind of information is contained in that source.

b. Run Search Terms and Review Search Term Reports

I also run search terms and create a search term report to get a visual picture of how many documents hit on the search terms, with and without family (email and attachments), and how many unique hits occur for each term. Unique hits can show how valuable a term is and whether there were false hits that could indicate irrelevant documents were produced.

c. Run and Review Conceptual Analysis

Another tool available through many document review platforms is conceptual analytics, which shows the relevant concepts and terminology in the data, including code words and nicknames that might not have been contemplated during discovery and search term negotiations, as well as how the concepts found in the dataset relate to one another. This is another excellent way of seeing a big picture of the production and/or homing in on important documents, rather than having to build that picture brick by brick through reading documents in a linear fashion.

d. Study the Metadata

One more technique I use is to study the metadata by using filters to pull files names or folder paths with key concepts and, by doing so, identify important documents. Metadata is a rich source of information. Being able to scroll through

thoughtfully filtered file names or sort and isolate folder paths can quickly get you up to speed on what topics you will encounter once review begins.

e. Examine the Custodians

Yet another approach is to look at which custodians have been produced and cross reference that to the custodian list. I then take each custodian separately and look at the volume of the document produced, date ranges, and search term hits. Next, I compare that to their role and tenure at the company to spot gaps in date ranges and get a feel for their relevant topics. I also may be able to identify additional potential custodians through this work.

f. Inspect File Types

An additional task is to look at file types and what is the percentage of emails, attachments, and stand-alone documents. Are there any atypical sources of ESI being produced, such as text messages or ESI from workplace collaboration tools (such as MS Teams or Slack data)? What file types are they, and what is their volume compared to the production as a whole?

III. Conclusion

Once I have gone through the above exercise, I compare what I have discovered from the data itself to the requests and the responses/objections, along with my knowledge of the facts from other research and sources, to determine the completeness of the production and to make a plan for how to review the production in the most effective and efficient way. By implementing these methods, I gain a fulsome understanding of what has been produced that I can share with the rest of the litigation team even before “document review” has begun.

APPENDIX

Proportionality Toolkit, UF E-Discovery Conference 2022

UF Law 9th Annual

E-Discovery Conference Resource

Proportionality Toolkit

March 2022

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Proportionality Checklist

- Client briefing and client buy-in on proportionality
- Develop Team made up of legal/technical/support staff for ESI discovery and management
- Develop and communicate essential issues and theme of case to Team to assist in narrowing ESI to relevant evidence
- Discussion with client (client IT team, if applicable) to assess ESI/technical infrastructure/network architecture utilized by client/within the organization
- Assess client data and prioritize data necessary for preservation and then for collection
- Identify opposing party or third party locations for relevant ESI
- Identify key custodians via client briefing, organizational charts, discovery in case at bar and other similar litigation, and industry assessment (e.g., construction, medical, etc.)
- Prioritize custodians and any non-custodian data sources
- Conduct burden assessment and identify potential for collection from less burdensome alternatives
- Assess privacy, privilege, and trade secret burdens on proportionality
- Consider sampling of certain data sources
- Build an E-Discovery cost estimate
- Reduce burden by form of collection/request and limiting imaging to essential documents
- Use AI and efficient platforms to limit size of data pool and cost of review
- Meet and confer with opposing counsel on proportionality
- Cooperate and agree to the extent possible to eliminate unreasonably cumulative or redundant sources
- Continue burden assessment and cost reduction efforts throughout case

Rule 26(b), FRCP with Advisory Notes

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is 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 importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, 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 within this scope of discovery need not be admissible in evidence to be discoverable.

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(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) *Signature Required; Effect of Signature.* **Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:**

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* **If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.**

(emphasis supplied)

Most recent Notes of the Civil Procedure Rules Advisory Committee relating to proportionality:

Notes of Advisory Committee on 2015 Amendments. Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of overdiscovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). . . . On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4)." Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations," no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery. . . ."

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech,

and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

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Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

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Proportionality Comments in Chief Justice Roberts' 2015 Year-End Report

2015 Year-End Report on the Federal Judiciary

Excerpts below relating to *proportional* discovery and the *responsibilities* of the court and the parties …

Chief Justice Roberts' full report is found at 2015 Year-End Report (supremecourt.gov)

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… .The amended rules, which can be viewed at http://www.uscourts.gov/federal-rules-civil-procedure, went into effect one month ago, on December 1, 2015. They mark significant change, for both lawyers and judges, in the future conduct of civil trials. The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report. For example, Rule 1 of the Federal Rules of Civil Procedure has been expanded 6 by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.

> Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality:
>
> > "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 importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, 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."
>
> The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.

(emphasis in original)

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State Equivalents to Rule 26(b) with Committee Notes

Proportionality exists in most state court civil procedure rules. Often the rules are based in substantial part on the federal rule in which proportionality is a limiting factor in scope of discovery.

See, e.g., Florida Rule of Civil Procedure 1.280 and Texas Rule of Civil Procedure 192.4:

Rule 1.280. General Provisions Governing Discovery.

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(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

***

(d) Limitations on Discovery of Electronically Stored Information.

(1) A person may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of burden or cost. On motion to compel discovery or for a protective order, the person from whom discovery is sought must show that the information sought or the format requested is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order the discovery from such sources or in such formats if the requesting party shows good cause. The court may specify conditions of the discovery, including ordering that some or all of the expenses incurred by the person from whom discovery is sought be paid by the party seeking the discovery.

(2) In determining any motion involving discovery of electronically stored information, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive; or **(ii) the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.**

(emphasis supplied)

Commentary

Committee Notes

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2012 Amendment. Subdivisions (b)(3) and (d) are added to address discovery of electronically stored information.

The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information. These issues may also be addressed by means of a rule 1.200 or rule 1.201 case management conference.

Under the good cause test in subdivision (d)(1), the court should balance the costs and burden of the requested discovery, including the potential for disruption of operations or corruption of the electronic devices or systems from which discovery is sought, against the relevance of the information and the requesting party's need for that information. Under the proportionality and reasonableness factors set out in subdivision (d)(2), the court must limit the frequency or extent of discovery if it determines that the discovery sought is excessive in relation to the factors listed.

In evaluating the good cause or proportionality tests, the court may find its task complicated if the parties know little about what information the sources at issue contain, whether the information sought is relevant, or how valuable it may be to the litigation. If appropriate, the court may direct the parties to develop the record further by engaging in focused discovery, including sampling of the sources, to learn more about what electronically stored information may be contained in those sources, what costs and burdens are involved in retrieving, reviewing, and producing the information, and how valuable the information sought may be to the litigation in light of the availability of information from other sources or methods of discovery, and in light of the parties' resources and the issues at stake in the litigation. (emphasis supplied)

WARNING: The scope of relevant discovery in Fla. R. Civ. P 1.280(b)(1) differs from the scope of relevance in Fed. R. Civ. P. 26 (b)(1).

Texas Rule of Civil Procedure 192.4. Limitations on Scope of Discovery.

The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

See In re State Farm Lloyds, 520 S.W.3d 595, 2017 Tex. LEXIS 482, 60 Tex. Sup. J. 1114, 2017 WL 2323099 (Tex. 2017)(our application of proportionality principles aligns electronic-discovery practice under the Texas Rules of Civil Procedure with electronic-discovery practice under the Federal Rules of Civil Procedure).

Case Law

Proportionality under the Federal Rules

Court and Parties Have Shared Responsibility for Proportional Discovery in Scope of Discovery and in Resolving Discovery Disputes

Weidman v. Ford Motor Co., 2021 U.S. Dist. LEXIS 107877, 2021 WL 2349400 (E.D. Mich. June 9, 2021) (the parties and courts share the "collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes").

UnitedHealthcare of Fla., Inc. v. Am. Renal Assocs. LLC, No. 16-cv-81180, 2017 U.S. Dist. LEXIS 174454 (S.D. Fla. Oct. 20, 2017) (counsel are expected as ethical professionals to work together to arrive at the production of relevant and proportional discovery in this case).

Noble Roman's, Inc. v. Hattenhauer Distrib. Co., 314 F.R.D. 304, 306, 2016 U.S. Dist. LEXIS 38428, 2016 WL 1162553 (S.D. Ind. Mar. 24, 2016) (federal discovery rules emphasize the power and duty of the district courts actively to manage discovery and to limit discovery that exceeds its proportional and proper bounds).

Proportionality and Scope of Discovery

Motorola Sols., Inc. v. Hytera Communs. Corp, 365 F. Supp. 3d 916, 2019 U.S. Dist. LEXIS 42286, 129 U.S.P.Q.2D (BNA) 1639, 103 Fed. R. Serv. 3d (Callaghan) 229, 2019 WL 1216406 (E.D. Ill. Mar. 15, 2019) (under Rule 26, the discovery sought must not only be relevant, but it must be "proportional" to the needs of the case, so relevance alone does not translate into automatic discoverability under Rule 26).

Benebone LLC v. Pet Qwerks, Inc., 2021 U.S. Dist. LEXIS 43449, 2021 WL 831025 (C.D. Cal. Feb. 18, 2021) (requiring review and production of Slack messages is generally comparable to requiring search and production of emails and is not unduly burdensome or disproportional to the needs of this case — if the requests and searches are appropriately limited and focused).

Proportionality and Forensic Examination of Devices

Motorola Sols., Inc. v. Hytera Communs. Corp, 365 F. Supp. 3d 916, 2019 U.S. Dist. LEXIS 42286, 129 U.S.P.Q.2D (BNA) 1639, 103 Fed. R. Serv. 3d (Callaghan) 229, 2019 WL 1216406 (E.D. Ill. Mar. 15, 2019) (given all that forensic inspection entails, courts rightly require a showing that such a request is proportional to the needs of the case).

Tingle v. Hebert, 2018 U.S. Dist. LEXIS 60301, 2018 WL 1726667 (M.D. La. Apr. 10, 2018) (defendants have made no showing that the requested forensic examination of Plaintiff's personal cell phone and personal email accounts are proportional to the needs of this case).

Garrett v. Univ. of S. Fla. Bd. of Trs., 2018 U.S. Dist. LEXIS 156996 (M.D. Fla. Sep. 14, 2018) (USF Board's requests for forensic examination of personal computer and cell phone are disproportional to the needs of the case).

Proportionality Using Phased Discovery

Huntsman v. Southwest Airlines Co., 2021 U.S. Dist. LEXIS 150170, 2021 WL 3504154 (N.D. Cal. Aug. 10, 2021) (defendant objects to this request as overbroad and not proportional to the needs

of the case but agrees to conduct a phased search of its custodians' data for responsive documents--- court agrees with defendant's phased approach).

Proportionality Using Technology Assisted Review

Huntsman v. Southwest Airlines Co., 2021 U.S. Dist. LEXIS 150170 at *6, 2021 WL 3504154 (N.D. Cal. Aug. 10, 2021) (Southwest's approach to using keyword searches and technology-assisted review in tandem does not offend the court's expectation that the parties conduct a reasonable inquiry as required by the rules).

Proportionality and Non-party Discovery Using Rule 45 Subpoenas

Noble Roman's, Inc. v. Hattenhauer Distrib. Co., 314 F.R.D. 304, 2016 U.S. Dist. LEXIS 38428, 2016 WL 1162553 (S.D. Ind. Mar. 24, 2016) (the limits and breadth of discovery expressed in Rule 26 are applicable to non-party discovery under Rule 45).

Culliver v. Ctr. for Toxicology & Envtl. Health LLC, 2022 U.S. Dist. LEXIS 28212 (N.D. Fla. Feb. 16, 2022) (courts view Rule 45's prohibition against unduly burdening a non-party through a different lens when the non-party is not truly disinterested; an interested non-party is an entity that does not have an actionable right at issue in the litigation, but has a significant, underlying connection to the case and, typically, some sort of financial or reputational stake in the litigation's outcome).

Proportionality under State Law

In re State Farm Lloyds, 520 S.W.3d 595, 2017 Tex. LEXIS 482, 60 Tex. Sup. J. 1114, 2017 WL 2323099 (Tex. 2017) (our application of proportionality principles aligns electronic-discovery practice under the Texas Rules of Civil Procedure with electronic-discovery practice under the Federal Rules of Civil Procedure).

Required Proof on Burden and Proportionality

Culliver v. Ctr. for Toxicology & Envtl. Health LLC, 2022 U.S. Dist. LEXIS 28212 (N.D. Fla. Feb. 16, 2022) (to meet its burden, CTEH was required to put forward by way of an affidavit or otherwise "specific information demonstrating how Plaintiff's request is overly burdensome”).

References and Resources

DISCOVERY PROPORTIONALITY MODEL A NEW FRAMEWORK, James F. Humphreys Complex Litigation Center, George Washington Law School (January 7, 2022)(Public Comment Draft) found at https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/New_Framework_January_7_2022_Draft.pdf

The Sedona Conference, Commentary on Proportionality in Electronic Discovery, 18 Sedona Conf. J. 141 (2017) also found at https://thesedonaconference.org/publications.

LaPorte and Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26, 9 THE FEDERAL COURTS LAW REVIEW 2 at p. 19 (2015) also found at SECTION HEAD (fclr.org).

The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 65-9 (2018) also found at https://thesedonaconference.org/publications.

Creating and Managing an E-Discovery Budget

By Mike Quartararo

Understanding the things that drive costs in e-discovery, knowing how to design and execute the project with those drivers in mind, and developing the scope of the e-discovery project to be commensurate with the value of the case and the expectations of the client are essential skills for any e-discovery practitioner.

In project management, the process of estimating and controlling costs is called cost management.

In the legal business, we might refer to this as ***proportionality management***.

The goal is to prepare a cost estimate and budget for an e-discovery project. The project manager must identify the scope of the project, including the time, resources, and materials needed to complete the project. Additionally, it will be necessary to gather several inputs, like the cost of the people performing project work and any vendors who may have a role as well.

One way of budgeting and cost estimating is called bottom-up estimating. This process uses a work breakdown structure or WBS to break the project into its smallest parts. Each activity is broken out—using a project management technique called "decomposition"—and the cost and time for each activity or task are identified. The costs are then aggregated upward through the project activities to arrive at an overall project cost.

Begin this process by breaking down each phase of an e-discovery project into its smallest component parts. Using a task list, measurable expenses, and the resources needed, it is possible to build an accurate working cost estimate.

A sample budget tracking document is attached at p. 17. The typical budget components are as follows:

Identification and Preservation. Cost estimates in the identification and preservation phase will be based on the number of consultative and advisory hours dedicated to the project. Multiplying the number of hours required by the hourly rate of the individuals involved (attorneys, paralegals, project managers, litigation support or vendors) will result in a reasonable estimate of the cost to identify and preserve ESI for the project.

Collection. Assess the number of custodians, the data sources, and the volume of the overall collection, usually in gigabytes. Collections are typically performed by a technician who charges by the hour. Knowing the volume of the data enables the technician to estimate the number of hours required to complete the collection. Multiply the hours by the technician's hourly rate and that should be an estimate of the collection cost. Service providers may also charge a flat per-custodian fee. If the work is performed by client in-house personnel, use a reasonable hourly rate based on their salary and benefits or a rate the company routinely charges for their services.

Processing. Costs are based upon the volume of the ESI collected and the various processes to be run on the data during processing. In most instances, processing services are charged on a per gigabyte basis. Multiply the cost per gigabyte by the number of gigabytes and that's the cost of processing. Sometimes there are charges for project management time at an hourly rate.

Document review. This is the most expensive phase of an e-discovery project because of the human element and the time involved. Attorney billing rates for reviewing documents are high. Even when using temporary or contract attorneys, who charge much lower rates, review costs can be considerable.

To prepare a cost estimate for a document review, it is necessary to know the volume of documents to be reviewed and the hourly rates of the individuals involved. It can be difficult to estimate how many documents may be reviewed in a given period of time. It varies depending upon the types of documents, the density of the document content, and the skills and motivation of the reviewers. An estimate for document review is prepared by dividing the number of documents by an acceptable review rate and multiplying by the hourly rate. For example, if a document review involves 100,000 documents, and if a single document reviewer who charges $100 per hour can complete 500 documents in a 10-hour day, it is possible to conclude that it will take 2000 hours (or 200 days) and cost $200,000 to complete the review. Rarely, does a single document reviewer look at this volume of documents. But, understand that adding additional reviewers to the review will result in the review being completed sooner, but not necessarily less expensively because the time still needs to spent looking at the documents.

Document production. These costs are straightforward. Whomever is preparing and quality checking the production is billing for their time by the hour. Multiply the number of hours required to prepare the production by that individual's hourly rate and you have your estimate.

It is a good practice in cost management to include what is referred to as "reserves" in the project management world. A project manager might add a 10% reserve cost to a budget to account for anticipated but uncertain events or what are called "known unknowns."

If you aggregate the costs of each phase of this project, you're going to have a reasonably accurate estimate of the cost of an e-discovery project.

FACTORS AFFECTING THE E-DISCOVERY PROJECT BUDGET

Number of custodians: Volume is the single most significant driver of e-discovery costs, and the number of custodial sources included in the collection is the biggest driver of overall volume. If possible, the parties should discuss and reach agreement on the number of custodians. Keeping the number of custodians to a minimum is going to reduce costs. Any steps that can be taken to limit the volume of ESI to be reviewed will ultimately help control costs.

Custodian interviews: Custodian interviews can be an incredibly rich source of information. Frequently, attorneys investigating in the early stages of a case will learn the most from custodians about relevant facts and where ESI is stored. But there's a point at which such interviews may become redundant and costly, mostly because attorneys are expensive when billing by the hour. Sometimes, it makes sense to have skilled paralegals conduct interview. Either way, limiting the number of interviews can be an effective way to control costs.

Collection: Collection can sometimes be performed by the client if they have the proper tools, though such practice can also be much riskier. If the client does not have the personnel to do the collection, a vendor may be engaged. Sometimes using a vendor is important to eliminate bias from collection. Also, knowledgeable vendors can often reduce costs or increase accuracy because of the litigation experience factor. Keep in mind that travel to remote locations adds to the cost. It is possible to collect most ESI remotely and there are affordable software tools on the market that can be used to collect ESI. A forensic collection is often not necessary and sometimes it is needlessly expensive.

Document review: The complexity of the coding instructions (meaning the number of tags reviewers will apply to documents), the complexity of the privilege issues presented, the number of passes of review that are anticipated, and similar issues all will affect the cost of the review. The number of redactions required and the time to create a privilege log should be considered when estimating document review costs.

USE OF SERVICE PROVIDERS AND THEIR IMPACT ON BUDGETS

It is necessary to consider how and when to use service providers or third-party vendors. The costs of any vendor must be included in the e-discovery budget. Vendors are available to assist with every step of the e-discovery process, including collecting, processing, hosting on a review platform, for providing staffing to conduct the actual review, and for preparing document productions. Make sure your vendor prepares a complete budget for any work they are performing, and ensure the vendor is prepared to stick to the budget.

Some vendors offer “managed services” arrangements, which are agreements to contract with a vendor for a period of time, usually for a fixed fee. If your project involves vendors, make sure the vendor develops a budget for any part of the project on which they are working so you may incorporate it into your overall project budget.

KEEP TRACK OF THE BUDGETING PROCESS

Budgeting is important to keep costs in line, to inform the client of what costs are expected to meet legal obligations and achieve litigation goals, and to achieve client buy-in on the plan and cost, to amass evidence for proportionality negotiations and hearings, if necessary. Having a working budget with back-up information can provide “proof of process” if such evidence is needed in court.

One benefit of a working budget is the ability to seek and assess alternative, less burdensome methods for discovery. This is a legal requirement and good practice. Knowing costs can assist in the evaluation of narrowing time scope, staged or phased discovery, sampling, use of AI, and other opportunities for achieving efficient discovery that may present themselves. A working budget also gives the trial lawyer an overall view of the progress of discovery in order to maintain management control and be able to identify anomalies or issues that may present in the course of discovery.

The cost of “discovery about discovery” and the cost of litigating discovery issues are part of the process and should be considered to assist in proportionality analysis and also provide a basis for cooperative negotiation with opposing parties to avoid unnecessary conflict.

Sample E-Discovery Budget

Identification & Preservation

Number of Consulting Hours	10
Hourly Rate	$200
Total Cost	**$2,000**

Collection

Number of Custodians	10
Total User Data from all Custodian Workstations (GB)	25
Total Data from all Custodian Email Accounts (GB)	40
Total Data from all Custodian Network Personal Shares (GB)	15
Total Data from all Network Department Shares (GB)	20
Total GB of Data to be Collected (GB)	100
Number of Hours to Complete Collection	20
Collection Costs per hour	$250
Total Collection Costs	**$5,000**

Processing

Total GB Collected	100
Processing Fees/GB	$150
Total Processing Fees	**$15,000**

Paper Document Processing

Total Boxes Collected	10
Number of Pages per box	2,500
Total Pages Collected	25,000
Cost to Scan/OCR per Page	$0.10
Total Paper Processing Costs	**$2,500**

Document Review

Total Documents to Review	100,000
Attorney review rate (Files/Hour)	50
Cost per hour of attorney review	$100
Attorney hours needed to complete review	2,000
Number of Review Attorneys	20
Weeks to Complete Review	2
Cost of Review	**$200,000**

Production

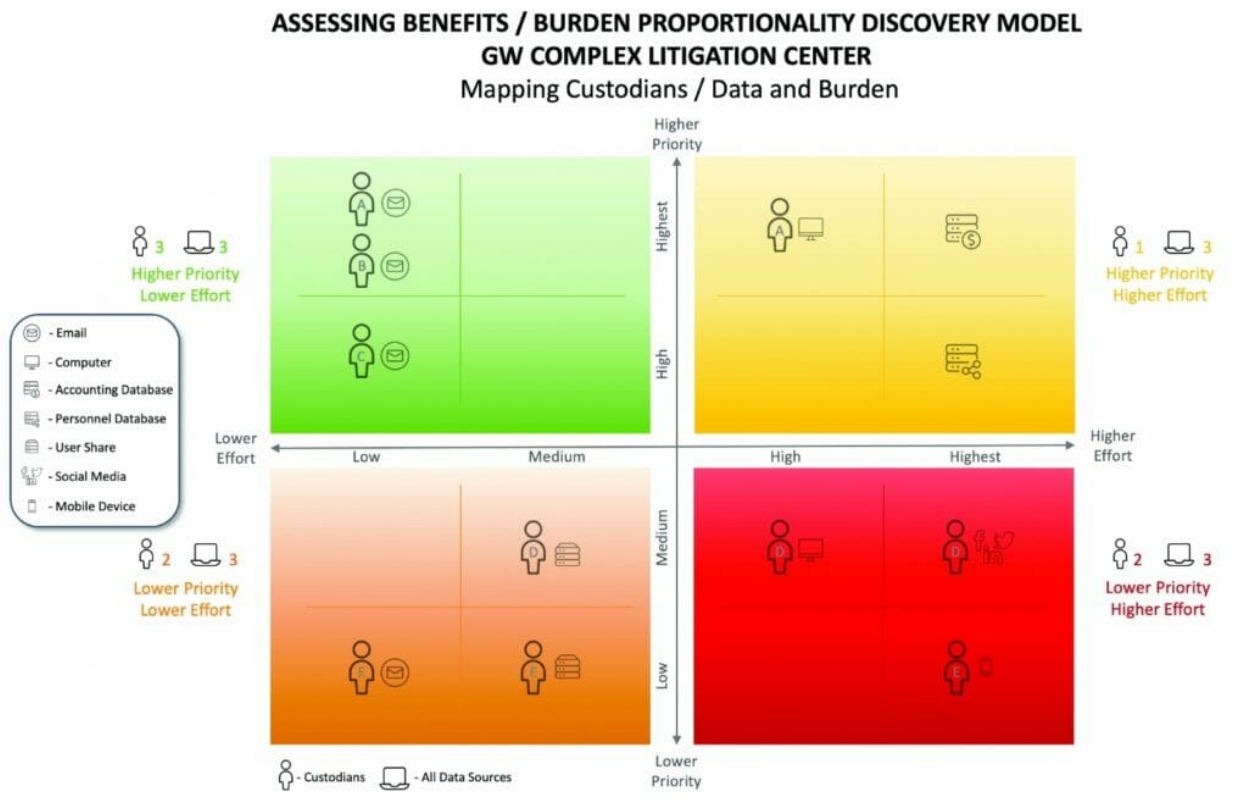
Number of Documents to be Produced	25,000
Hours to Prepare Production	4
Project Manager/Analyst Hourly Rate	$200.00
Total Costs of Production	**$800**

Total Budget for Project: $225,300

Note: Budget tools are also available from EDRM at https://edrm.net/resources/budget-calculators/

GW Proportionality Law Burden Analysis Chart

[The GW Proportionality Initiative: A New Framework for eDiscovery - Complete Discovery Source (cdslegal.com)]



Client Briefing and Client Buy-in on Proportionality

Note: This information focuses exclusively on proportionality factors that ought to be considered in preparing for a client meeting on electronic discovery for the case. The complete agenda for a client meeting is case-specific and covers many factors beyond the proportionality information included below.

Discussion Point: Why is proportional discovery necessary and beneficial to the client?

1. The law requires proportional discovery and ESI that is not proportional is not discoverable.
2. Overbroad discovery is wasteful and expensive.

   While the "discovery team" must get trial counsel the evidence they need to win the case, we must keep e-discovery costs manageable. This is a team effort with thoughtful input from the major stakeholders, such as in-house attorneys, client IT staff, client management, and trial counsel. The team will need to make many hard yet, well-advised, decisions in relation to e-discovery strategy, not the least of which is "how much is too much?" Further:

   a. If we request it, we will need to process it.
   b. Asking for excessive or overbroad discovery leads to like requests by the opponent.
   c. Overbroad discovery may lead to opening issues, claims or defenses that we do not need or want in the case.
   d. Excess discovery or lack of controls and careful budgeting leads to loss of control of cost of discovery, and proportionality is the touchstone to managing cost.

Discussion Point: What is the plan for ensuring proportional discovery and sticking to the agreed budget?

3. Trial counsel with advice from the team makes the determination of the distinction between what data is preserved versus collected and what opposing party or third party data is subject to a request to preserve or request for production.
4. Review of methodology to manage size of data set for the case through machine review and eyes on review, discuss pros and cons with client and obtain buy-in on approaches.
5. Assemble electronic discovery team and proof plan and budget for final client buy-in.

Discussion Point: Achieving full, lawful, and proportional discovery is an ongoing task with adjustments made as the case progresses. Methodology for considering, deciding, and reporting on adjustments to the budget and discovery scope should be agreed between client and trial counsel and known to the discovery team from the outset of the case.

Preparation for a Hearing on Scope of Discovery

Proportionality requires counsel and the Court to consider whether relevant information is discoverable in view of the needs of the case. In making this determination, federal courts are guided by the non-exclusive list of factors in Fed. R. Civ. P. 26(b)(1). Application of the proportionality factors must start with the actual claims and defenses in the case, and a consideration of how and to what degree the requested discovery bears on those claims and defenses. *See* Rogers v. Minn. Life Ins. Co., 2021 U.S. Dist. LEXIS 240246, 2021 WL 5961299, at *4-5 (M.D. Fla. Dec. 16, 2021) *citing* Graham & Co., LLC v. Liberty Mut. Fire Ins. Co., No. 2:14-cv-2148, 2016 U.S. Dist. LEXIS 45662, 2016 WL 1319697, at *3 (N.D. Ala. April 5, 2016).

Responding Party

- Know your case, including the sources and extent of relevant ESI
    - What is the relevant evidence, forms of evidence, amounts of data?
    - Structure of the client's company?
    - Devices and ESI locations; servers; cloud-based storage?
    - Cross border issues?
    - Who are the key custodians?
    - Who are the key witnesses?
    - Privilege, privacy, and trade secrets?
- Value of case or issue vs. cost of discovery requested
- Less costly alternatives to full discovery, such as sampling, staging, etc.
- Meet and confer with opposing counsel on proportionality
- Cooperate and agree to the extent possible to eliminate unreasonably cumulative or redundant data or data sources
- Be prepared to present a factual basis in evidence for positions to be taken at hearing

Requesting Party

- Identify relevance of ESI to precise issues in pleadings
- Identify opposing party or third party locations for relevant ESI
- Identify key custodians via organizational charts, discovery in case at bar and other similar litigation, and industry assessment
- Prioritize custodians and any non-custodian data sources
- Conduct burden assessment and identify potential for collection from less burdensome alternatives or use of staging or sampling
- Consider AI or key word search to yield a subset of relevant and proportional evidence
- Meet and confer with opposing counsel on proportionality
- Cooperate and agree to the extent possible to eliminate unreasonably cumulative or redundant data or data sources
- Be prepared to present a factual basis in evidence for positions to be taken at hearing

Proportionality Best Practices

10 Best Practices for Counsel (and Clients) to Better Understand and Apply Proportionality Factors to Civil Discovery Disputes[1]

1. Focus on the specific discovery at issue (micro-level analysis) and avoid arguments about discovery in general (macro-level analysis).
2. Recognize that proportionality and relevance are conjoined considerations for civil discovery.
3. Understand that proportionality is a consideration that can support a multi-faceted approach to discovery.
4. Respect that non-parties have greater protections from discovery and that burdens on non-parties will impact the proportionality analysis.
5. Raise discovery scope and proportionality issues early in the litigation and continue to address and revisit them as needed.
6. Do not consider the "amount in controversy" factor to be determinative with respect to the proportionality of discovery requests or responses.
7. Do not approach discovery disputes with the notion that discovery is perfect or that it will result in the production of "any and all" relevant documents or information.
8. Do not address proportionality arguments by citing superseded case law, rotely reciting the rules, or making unsupported assertions of burden.
9. Do not get caught up in an academic dispute regarding the "burden of proving" proportionality as courts will expect that each side of the dispute will have something to contribute, although not necessarily equally, and the most reasonable position will likely prevail.
10. Do not forget that proportionality considerations also apply to preservation decisions and disputes

[1] LaPorte and Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26, 9 THE FEDERAL COURTS LAW REVIEW 2 at p. 51 (2015) also found at SECTION HEAD (fclr.org). Each of the Ten Best Practices is discussed in detail in pages 52-70 of the LaPorte-Redgrave article.

Culling Practices to Reduce the Expense of Discovery and Document Productions

Culling Tags

- For any documents culled/not promoted for review, apply a nested Culling tag. Culling tag should include the date of culling and the general reason for culling. This way we can search for anything that was held back from review, see when it was held back, and why it was held back. Example:
    - CULL
        - Culling Reason
            - Junk File Extension
            - Non-Responsive On Its Face
            - Large Family
            - No Term-Hit
            - Tech Issue
        - Culling Reason
            - Non-Responsive On Its Face
    - The idea is that anything that is promoted for review has a “Promote” tag, and anything not promoted has a “Cull” tag that includes the tag of culling and reason for culling.
        - *At the end of this process, every single document in the ECA workspace should have either a “Promote” tag or a “Cull” tag. If this is not the case, search for documents where both fields are NULL and review them.*

Categories of Docs To Isolate

- Extremely large families:
    - Sort by BegAttach and export to Excel, with highest count at the top. For families with 30+ attachments, you can then quickly copy/paste the BegAttach back into Relativity and look at the parent to see if it warrants review. If it doesn’t, you can mass tag that entire family.
- “Junk” file extensions which are Standalones
    - Search for standalones (you cannot exclude entire families just because one child has an odd file extension).
    - Examples of common junk files:
        - .tmp
        - .log
        - .cache
        - .bak
        - .thumbdata (can be searched via filename as well)

- Mass Emails
    - Search by Recipients – if more than 50 recipients, this is likely a mass-mailer. Click through them and perform cursory review before culling.
    - Search Email Subject for terms like “sale”, “news”, “alert.”
- Non-Responsive Date Ranges
    - If the complaint/doc request specifies a time frame for relevant docs, you can cull docs that have a DateCreated or DateSort date that is outside of that range.
- Common Standalone Dupes
    - Search for standalones, then export the count of MD5 Hash. Sort by largest in Excel and then copy/paste each hash value. Look at each doc. If it’s Non-Responsive, then you can mass tag all of them. If it is responsive, you can mass-tag for promotion right away, as well as coding them as responsive.
- Non-Responsive Folder Paths
    - Export a list of all folder paths. If there is a folder that is clearly Non-Responsive, like “Mexico Vacation 2019,” look at a small sampling of those docs to ensure they are not relevant and then mass-tag for culling.
- Non-Responsive Clusters
    - Run clustering, if not already set up. Drill down to potentially irrelevant clusters, if any. Perform cursory review and cull if needed.

Asymmetrical Litigation – A Requesting Party Point of View and Practice Tips

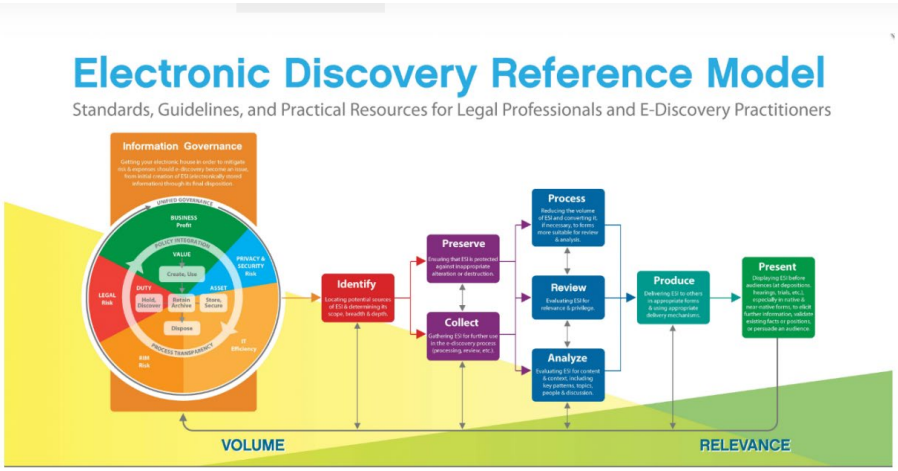
By Suzanne Clark

I. "Burden or Expense," Practically Speaking

The 6th proportionality factor is somewhat of a "catch-all" that states "whether the ***burden or expense*** of the proposed discovery outweighs its likely benefit." (Emphasis added.) Therefore, expense is but one type of burden, and the language of the rule allows for burdens other than expense. I want to talk about how the *expense* of discovery is not cut and dried and, practically speaking, more within the control of the responding party than the requesting party, in my opinion.

When a responding party argues that responding to discovery requests and producing documents will not be proportional to the needs of the case – that it is too much, too expensive, etc. – my first argument is that they should demonstrate factually what the expense will be. If they agree to show this, and their argument is that it will take *this* many hours of attorney time and *this* many dollars per hour to review, I ask whether they have investigated alternatives to attorney review hours in meeting their discovery obligations. Responding parties applying outdated methods to review and analysis of modern data is not an acceptable reason to state that discovery is too expensive and not proportional, in my opinion.

The EDRM Model[2] shows visually with the triangles at the bottom of the chart that with eDiscovery we start broadly with high volumes of data in the identification and preservation phases, and we reduce the volumes of data as we move through the discovery life cycle into collection, analysis, review, and production. There are many methods and tools available to reduce the volume of data sent to attorneys for review. (Review being the most expensive phase in eDiscovery.)



[2] Available at https://edrm.net/edrm-model/

Two main methods are (1) Early Case Assessment (ECA) and (2) vetting service providers and tools through comparison shopping to get the highest-level service and capabilities at the least expense.

1) Early Case Assessment

Service providers now offer Early Case Assessment (ECA) workspaces and workflows. Typically, the hosting charges are less per gigabyte than full scale review functionality. Within ECA, you can accomplish many functions that can reduce the expense of discovery. For example, culling is a simple technique for reducing data volumes. If you are collecting an entire .pst for a custodian, then you can take a handful of hours of concentrated culling work to greatly reduce the volume of documents that need to be promoted to review. (*See*, Proportionality Toolkit, Culling Practices to Reduce the Expense of Discovery and Document Productions.)

My point is, as a requesting party in asymmetrical litigation, on the outside looking in, without any ability to assess how business was conducted at defendant corporations, I often wonder "is opposing counsel utilizing all the methods and tools available to them to conduct the most defensible discovery possible?" Along these lines, I ask the question, "are they truly reducing expenses as much as possible, or are they unaware of certain cost-savings relating to tools and methods, that they could apply?"

2) Tools and Service Providers

E-Discovery pricing is not one size fits all, and not all E-Discovery tools and services are created equal. Questions to ask yourself when selecting a tool and service provider:

A. Project Management: What tasks can your firm do itself and what does your firm need to outsource? Do you have internal people who can manage a tool or do you want the service provider to handle it? What is the cost of training your internal people compared to hourly rates of a project manager? Do your internal people have capacity and time to manage a tool?

B. Hosting Volume: Do you have a high volume of data where you can negotiate a discount and flat fee for a certain amount of data? Will you meet the volume required for a discount or will you end up paying more because you aren't using all the storage? What are your pricing options (dollars per gigabyte) for smaller volumes?

C. Functionality: If you invest in higher functionality with the capability to add efficiencies and reduce review time, is your team capable of employing those function towards cost savings? For example, would a higher level of analytics help you save time on review? Do you have people who can use a tool to add efficiency and time savings, or will the service provider offer the people to help with this?

D. Pricing: How can you comparison shop to get the tools and services that are the best fit for your firm? For example, at what point will a 2-terabyte minimum pay off with the volume discount and when are you in fact paying more than if you went with per gigabyte pricing? Does the tool that offers the discount provide the same level of functionality as other options? Would you even use the full functionality of the other options?

How does this translate to proportionality?

In my opinion, if you can show opposing party and/or a judge that you have fully assessed the options available to you and that you've reduced the cost as much as possible while maintaining efficiency and effectiveness, and the expense STILL outweighs its likely benefit, you are in a better position to argue scope limitations, like date range, custodians, search terms, than if you offer no factual evidence to your efforts to reduce costs.

II. Drafting Proportional Discovery Requests, Responses and Objections

Requesting Party tips on drafting proportional discovery requests:

1. Avoid “any and all” language. That is outdated and no longer in compliance with the rules.
2. Know what you are asking. Know your requests. Don’t repeat requests.
3. Be specific. Tailor requests to the ESI you will need to prove your case.
4. Have the reasoning for your request prepared before your request is served, while keeping your reasoning internal unless and until it is needed for meet and confer conferences, motions, or hearings. Reasoning is based on claims and defenses, and it can be helpful to reference the complaint, answer, affirmative defenses, jury instructions, etc.
5. Organize your requests topically. Headings can be helpful. You may add an instruction that organizational efforts are intended to be helpful not a substantive part of the requests and should be disregarded rather than seen as cause for objection.

Responding Party tips on drafting proportional discovery responses and objections:

1. Avoid boiler plate objections. These are not in compliance with the rules since 2015. Some judges will sanction parties for general objections, including striking objections.
2. If you object, state whether any ESI has been withheld based on your objection(s).
3. If you object to scope, produce within the scope you are agreeing to, and state whether any ESI has been withheld based on your argument that it is outside the scope (date ranges, topics, etc.). If you have not searched outside your scope limits, state this.

If both parties comply with the above tips, it provides transparency and allows for meaningful negotiations about scope of discovery and proportionality. This allows the parties to work through many disagreements and then only bring to the court very narrow issues that cannot be resolved.

The Sedona Conference Commentary on Proportionality in Electronic Discovery

The Sedona Conference, ***Commentary on Proportionality in Electronic Discovery***, 18 Sedona Conf. J. 141 (2017) also found at https://thesedonaconference.org/publications.

The Commentary presents six practical Principles of Proportionality along with commentary and references explaining the application of the principles in litigation. The Commentary is a rich resource providing a balanced view of proportionality by thought leaders and experts in e-discovery. The Principles on Proportionality are set out here, but further excellent commentary and references implicating proportionality are available at 18 Sedona Conf. J. 141, 150-76.

Principle 1: The burdens and costs of preserving relevant electronically stored information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation. (p. 150).

Principle 2: Discovery should focus on the needs of the case and generally be obtained from the most convenient, least burdensome, and least expensive sources. (p. 154).

Principle 3: Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party. (p. 159).

Principle 4: The application of proportionality should be based on information rather than speculation. (p. 162).

Principle 5: Nonmonetary factors should be considered in the proportionality analysis. (p. 168).

Principle 6: Technologies to reduce cost and burden should be considered in the proportionality analysis. (p. 173).

The Sedona Conference Principles on Proportionality

The Sedona Principles, Third Edition: ***Best Practices, Recommendations & Principles for Addressing Electronic Document Production***, 19 Sedona Conf. J. 1 (2018) also found at https://thesedonaconference.org/publications.

The Sedona Principles are core principles and best practice recommendations for addressing the production of electronic information in litigation. The published principles include comments and commentaries which expand on each Principle with analysis and guidance on key legal doctrines, issues, and notable exceptions. Principle 2 on Proportionality and portions of Principle 5 on preservation and the attendant comments are set out here, but further excellent commentary and references implicating proportionality are available at 19 Sedona Conf. J. 1 at pp. 65-9; 93; 108; 112.

PRINCIPLE 2: When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, 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. (p. 65).

Comment 2.a. Rule 26(b)(1) demands the application of the proportionality standard and makes proportionality an element of the scope of discovery. (p. 65).

Comment 2.b. Proportionality should apply to all aspects of the discovery of ESI. (p. 67).

Comment 2.c. Proportionality of discovery of ESI should be addressed by the parties and counsel at the Rule 26(f) meet and confer, and with the court at the Rule 16(b) scheduling conference. (p. 67).

Comment 2.d. Parties should address the full range of costs of preserving, collecting, processing, reviewing, and producing ESI. (p. 68).

Comment 2.e. Parties objecting to the production of ESI on proportionality grounds should state the basis for the objection with reasonable specificity. (p. 69).

PRINCIPLE 5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information. (19 Sedona Conf. J. 1, 93).

Comment 5.e. Preservation efforts need not be heroic or unduly burdensome. (p. 108).

Comment 5.h. Absent good cause, preservation obligations should not extend to disaster recovery storage systems. (p. 112)