E-discovery: Planning for and Conducting E-discovery (WA)

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by Julie Anne Halter and Bree Kelly, K&L Gates, LLP

This practice note discusses the practice of conducting electronic discovery (e-discovery) in Washington state superior court, including key rules and standards, as well as practical guidance and best practices during each phase. Specifically, this note outlines the superior court civil rules addressing e-discovery, identifies resources for additional learning, and describes how to proceed through each phase of e-discovery, including planning in advance, preservation, collection, processing, review, and production.

For additional information on related aspects of discovery in Washington, see Discovery Planning and Strategy (WA), Document Requests: Drafting and Serving RFPs (WA), Document Requests: Responding to RFPs (WA), Motion for Protective Order: Making and Opposing the Motion (WA), Motion to Compel Discovery: Making and Opposing the Motion (WA), Preserving Evidence (WA), Privilege and Work Product Doctrine: Asserting and Opposing Claims (WA), and Scope of Discovery and Objections to Discovery (WA).

Rules Specifically Addressing E-discovery

In Washington, two Superior Court Civil Rules explicitly address discovery of electronically stored information (ESI).

- **Wash. CR 34** was amended in 2013 to both specifically reference the discoverability of ESI and to provide practical guidance for requesting ESI, responding to such requests, and ultimately producing.
- **Wash. CR 33** was amended in 2015 to acknowledge that ESI could be produced as a business record in response to interrogatories.

Since 2015, Washington State rules committees have considered additional amendments to the civil rules that align more closely with the federal rules addressing the discovery of ESI, although to date no additional rules or amendments addressing e-discovery have been adopted.

Other Important Rules Affecting E-discovery

Despite the relative dearth of specific language addressing e-discovery in the current Washington state Civil Rules, they are more than up to the job of providing incredibly useful guidance—you just have to know where to look. And, keep in mind, e-discovery really is just discovery, so your existing knowledge of rules and standards will go a long way to keeping you on track.

Begin your e-discovery preparation with Wash. CR 26—General Provisions Governing Discovery. As the name implies, it is a treasure trove of discovery guidance.

Crafting a Discovery Plan Through Negotiation/Cooperation or Court Intervention – Wash. CR 26(f)

Cooperating with opposing counsel to draft a reasonable and proportional discovery plan is one of the best ways to avoid unnecessary conflict and expense. Such a plan is an invaluable tool for successful e-discovery. You should plan to craft one in every case. To that end, Wash. CR 26(f) contains a mechanism to require opposing counsel to participate in the framing of a discovery plan in good faith.

Here's how it works: First, prepare yourself. Before reaching out to opposing counsel, you must determine what you and your client would like to include in a discovery plan—and what you wouldn't. Be creative and expansive. Courts will almost always approve agreements between the parties, especially regarding discovery, if it will head off tedious motions practice later. Ask yourself: Are there certain issues you or your client consider deal breakers and some for which you are willing to compromise? It helps to identify such issues in advance and to prepare the best arguments in support of your proposals. When considering these issues, you must also evaluate the capabilities and limitations of the resources available to you and your client and take care to avoid proposing or agreeing to provisions you won't be able to uphold.

Topics to specifically consider include:

- The timing of discovery, including possible phased discovery to focus on known priorities first (and potentially only)
- Preservation obligations
- Limitations on discovery, such as limitations on the number or identity of custodians, or on collection or review of certain information repositories
- Methodologies for collection or review, including reliance on search terms (and whether cooperation is anticipated/required) and/or reliance on technology in processing and review
- Format of production –and–
- Privilege (e.g., the timing and nature of privilege logs, non-waiver agreements or orders, etc.)

When you're ready, reach out to opposing counsel and invite them to participate in crafting a discovery plan.

If you cannot reach agreement, Wash. CR 26(f) permits either party to move for a discovery conference with the court. The rule outlines the required elements of such a motion, including a statement that the moving party made a reasonable effort to cooperate to resolve the issues in advance. Notably (and importantly), the rule states that "[e]ach party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party." That is

part of the rule's built-in leverage to ensure participation from all sides. But there's more: The power of Wash. CR 26(f) is further enforced by Wash. CR 37(e), which makes clear that the failure to participate in good faith in the framing of a discovery plan as is required by Wash. CR 26(f) can result in order to pay the "reasonable expenses, including attorney fees, caused by the failure." In any event, following a discovery conference pursuant to Wash. CR 26(f), "the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires."

For additional discussion of discovery conferences, see Discovery Planning and Strategy (WA).

Achieving Proportionality in Washington's Superior Court Civil Rules – Wash. CR 26(b)(1)

The principle of proportionality has become a vital e-discovery tool, embodying the proposition that the extraordinary burdens that can be imposed by discovery must be worth their benefits in light of the unique circumstances and needs of each case. The principle is a necessary tool to limit burdensome discovery requests that offer little corresponding benefit. While Wash. CR 26 does not explicitly reference proportionality, it has long included the concept by identifying factors to be considered when assessing the scope of discovery and providing a mechanism for limiting overly burdensome discovery: a motion for a protective order. Specifically, CR 26(b)(1) states that the "frequency or extent of use" of discovery methods "shall be limited by the court if it determines 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;
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> (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
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> (C) 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. . . . "

Proportionality is best invoked at either of two points in the discovery timeline: (1) in negotiations with opposing parties and counsel before discovery begins (crafting a discovery plan), or (2) in response to specific requests for discovery that are overly burdensome in light of the overall needs of the case.

- **Choose the early option whenever possible.** Invoking proportionality during meet and confer discussions in *advance* of discovery is preferable to establish a reasonable scope of discovery that will serve both parties' needs. Moreover, doing so has the potential to save time and money by avoiding the need for expensive motions practice later. That said, even the best laid plans often go awry, and it may be necessary to invoke the principle in motions practice, even despite a well-crafted discovery order.
- **Move for a protective order to invoke proportionality if necessary.** If you believe a request for discovery creates burdens for your client that are disproportional to the needs of the case, you must move for a protective order, in accordance with Wash. CR 26(c), and establish good cause

for the same. Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp., 122 Wn.2d 299, 354, 858 P.2d 1054 (1993).

Be prepared to articulate *specific* facts illustrating the alleged burden of the requested discovery, for example, the specific characteristics of a particular information repository that make the burden of discovery disproportional to the needs of the case (proprietary systems that cannot be easily accessed, legacy file formats that are no longer supported, etc.), and to back up those claims with evidence, such as an affidavit from your client's IT director, office manager, or someone else with specific knowledge of the system and its limitations. Mere assertions will be insufficient. If your arguments are based on cost, provide any estimates or calculations that support that position, if possible, and be prepared to address how those costs are disproportionate to the benefit (if any) that the requested discovery will supply.

For more on protective orders, see Motion for Protective Order: Making and Opposing the Motion (WA); see also Scope of Discovery and Objections to Discovery (WA).

Avoiding Waiver of Privilege – Wash. ER 502

Perhaps surprisingly, the other major rule affecting e-discovery is not found in the civil rules. Rather, turn to the rules of evidence addressing privilege, specifically Evidence Rule 502 – Attorney-Client Privilege and Work Product; Limitations on Waiver. A common problem facing lawyers conducting e-discovery is the sheer volume of potential evidence to be addressed. In the context of privilege, high volumes can create a real risk of privilege waiver, in that it may not be possible to cost-effectively conduct the type of searches and review necessary to identify every instance of privileged material to be withheld. Even relatively low-volume cases can cause heartburn where consequences for mistakes in production can be grave. Wash. ER 502(d) states that "[a] Washington court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court - in which event the disclosure is also not a waiver in any other proceeding." Plainly stated, a Wash. ER 502(d) order prevents the waiver of privilege that could otherwise result from the production of a privileged document. Full stop.

Other provisions in the rule provide potential protection against privilege waiver as a result of production, but have major downsides. Wash. ER 502(e), for example, allows for agreement between the parties that no waiver will result from production, but is not binding in other matters. In other words, parties in other litigation may be able to successfully argue that the privilege that would have applied to the document was waived as a result of the production in the earlier matter. Similarly, Wash. ER 502(b) addresses the evaluation of waiver resulting from inadvertent production, but offers no guaranteed protection. Wash. ER 502(d) has no such complications. There is literally no downside; such orders should be sought in every case.

- **Seek agreement, but don't let that stop you.** Wash. ER 502(d) does not require the parties to agree for a court to issue a non-waiver order. Accordingly, cooperation with opposing counsel to draft acceptable non-waiver language is encouraged, but not mandatory. If opposing counsel won't play ball, seek an order from the court on your own.
- **Draft a straightforward provision to avoid confusion or room for interpretation.** A Wash. ER 502(d) order needn't be complicated. Rather, it can and should be quite direct. Consider the Western District of Washington's recently amended [Model] Agreement Regarding Discovery of Electronically Stored Information and [Proposed] Order incorporating the below language:

> Pursuant to Fed. R. Evid. 502(d), the production of any documents in this proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute a waiver by the producing party of any privilege applicable to those documents, including the attorney-client privilege, attorney work-product protection, or any other privilege or protection recognized by law. Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party, and its production shall not constitute a waiver of such protection.
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> Propose the same or similar language in your cases, with appropriate revision to reference our state rule, or draft your own. The key to successful implementation is clarity and concision.

For more on asserting privilege or work product protection claims during discovery, see Privilege and Work Product Doctrine: Asserting and Opposing Claims (WA).

Cooperating with Opposing Parties and Counsel

Despite the inherently adversarial nature of litigation, cooperation has become a break-out star of e-discovery, appealing in particular to judges who have neither the time nor inclination to serve as referee over the myriad disputes that may arise. If you also practice in federal court, you have no doubt heard a similar refrain and should be aware of the 2015 amendments to Fed. R. Civ. P. 1. Those amendments make clear that it is the obligation of courts *and parties* to secure the "just, speedy, and inexpensive determination of every action and proceeding." The Committee Notes regarding this amendment underscore that, "[e]ffective advocacy is consistent with - and indeed depends upon - cooperative and proportional use of procedure."

In Washington, the idea of cooperation in litigation, including discovery, has garnered support and at the time of drafting, proposals for specific rule amendments encouraging cooperation continue to be considered in WSBA committees. In the meantime, cooperation is widely supported by the judiciary at large and should be embraced by practitioners as a solid strategy in e-discovery. See, e.g., The Sedona Conference, Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009 Supp.) (endorsed by more than 200 judges nationwide).

- **Be reasonable and proportional.** The key elements of cooperation are reasonableness and proportionality. Their implications are clear: compromise. Particularly in cases where high volumes of ESI will be an issue, looking for reasonable compromise to focus on the most relevant and material evidence is important and can benefit all sides.
- **Cooperation is not capitulation.** Although good faith cooperation to reach reasonable agreement is a vital component of modern discovery, a failure to agree is not a failure to cooperate. While reasonable compromise may be beneficial in many instances, good faith does not require acquiescence to every proposal (or even any, if they are truly unreasonable). That said, be prepared to defend your position with specific, fact-based evidentiary support in the event of court intervention.

Educating Yourself about E-discovery

Rules and standards are important, especially to the courts, but they don't provide a lot of practical guidance for how to actually conduct e-discovery. So, while it is vital to understand the rules of the jurisdiction(s) in which you practice, there is much to be learned from federal and other states' case law; local federal district court checklists and guidelines; and industry discussions, publications, and webcasts that address real-world examples of e-discovery best practices. These resources are available from a variety of sources, from law firms, to not-for-profit educational institutes, to for-profit e-discovery vendors and software providers. A simple internet search reveals a whole universe of information.

- **Start with local federal district courts.** By way of example and as discussed briefly above, the Western District of Washington has developed a model e-discovery order addressing a number of topics and provides a wonderful resource for practitioners otherwise uninitiated in the world of e-discovery. Many other federal district courts provide similar resources, each adding valuable information to the overall e-discovery landscape. Check them out as a way to learn about all the considerations of e-discovery and the different, but defensible, ways to proceed. And don't hesitate to cherry pick the best of what you see to incorporate in your own discovery plans.
- **Seek out additional resources.** While comprehensive recommendations for additional learning are beyond the scope of this discussion, two standouts do come to mind:
    - **The Sedona Conference©.** The Sedona Conference is a non-profit organization that, through the members of its working groups, develops commentaries and guidelines in many areas of the law, including e-discovery. Its e-discovery publications are excellent, free (with registration), and are broadly recognized for providing accurate and appropriate guidance on the topics addressed.
    - **The Electronic Discovery Reference Model (EDRM).** EDRM is another organization long-dedicated to developing resources for practitioners seeking to learn more about e-discovery, including for example, diagrams, draft protocols, and white papers, that discuss all manner of e-discovery issues. These materials are also free to use.

Bottom line: There are many easily accessible resources available to practitioners, judges, and even interested parties wanting to learn more about e-discovery. It is critically important for all practitioners to remain up to speed on the latest. See, e.g., Fulton v. Livingston Fin., LLC, No. C15-0574JLR, 2016 U.S. Dist. LEXIS 96825 (W.D. Wash. July 25, 2016) (imposing sanctions for counsel's misrepresentations of law and fact, including citation to case law analyzing outdated standards under civil rules affected by 2015 amendments, and calling such citation "inexplicable" and "inexcusable.").

Planning for E-discovery

Prior proper planning prevents poor performance. So, plan ahead for e-discovery before a case even comes through the door.

- **Get educated (see above).** Attorneys in Washington have a duty of competence that encompasses "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . " Wash. RPC 1.1 comments. As discussed in this very note, there are some specific considerations relevant only to e-discovery that practitioners should be prepared to address, including technology. Some bar associations have addressed the duty of competence with regard to e-discovery specifically. Of note, the State Bar of California concluded

that "An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation." The State Bar of California Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. No. 2015-93. With this in mind, practitioners are well advised to educate themselves regarding relevant rules, standards, and considerations in e-discovery and to give preliminary thought as to how they will handle e-discovery in their cases, including whether assistance may be required.

- **Evaluate your skill set.** After educating yourself about the unique issues in e-discovery, conduct a thorough and honest self-evaluation. Do you have the requisite knowledge and skill to conduct competent e-discovery in your cases? If not, line up help before you need it. Do you have friends or colleagues well-versed in e-discovery issues that can guide you? Can you identify e-discovery lawyers, vendors, or consultants in your network that you can reach out to for assistance? It may be useful, for example, to identify potential vendors or consultants who can assist with e-discovery in advance, to get a clear sense of how the relationship operates, what services they provide, and the cost of those services, so that you can be ready to reach out if needed, and to advise your client regarding precisely why such expertise is necessary, what value it adds to the case (e.g., it helps you comply with the rules!), and what they can expect to pay.
- **Prepare a toolkit.** Set yourself up for success in advance by preparing an e-discovery toolkit. Your toolkit might include:
    - o Copies of model e-discovery orders or guidelines from around the country (e.g., the Western District of Washington's [Model] Agreement Regarding Discovery of Electronically Stored Information and [Proposed] Order) that contain provisions for potential incorporation into specific e-discovery proposals, plans, or orders
    - o Model legal hold notices to be customized for each case and distributed to evidence custodians to ensure preservation
    - o Model or template preservation requests to be sent to opposing parties/counsel
    - o Model language to be used in requests for production (RFPs) that defines electronically stored information, for example, or specifies the requested format of production (e.g., TIFF images, searchable PDFs, etc.)
    - o IT inventory checklists or template questionnaires to ensure useful and productive assessment of your client's information systems (and to ensure you don't forget to ask important questions from case to case)
    - o Names and phone numbers of potential vendors or consultants you can call for assistance
    - o Anything else that is likely to be useful in all/multiple cases and can be gathered/created in advance of litigation
- **Know your case.** While beyond the scope of this note, it must be acknowledged that success in discovery is directly affected by your understanding of the claims and defenses at issue, the elements to establish the same, and the evidence needed to support anticipated arguments. Such understanding will be the basis of your decision-making going forward. What must you preserve? What must you collect? What must you review AND what are you looking for? Diving into

discovery without sufficient understanding of a case can have devastating consequences, including unnecessary cost (sometimes substantial) and, worse still, failure to identify key evidence.

For more discussion of the importance of discovery planning and strategies for the same, see Discovery Planning and Strategy (WA).

Preserving ESI

Preservation and its correlate, spoliation, are hot topics in e-discovery. Federal courts have *clearly* recognized an obligation to preserve potentially relevant evidence upon anticipation of litigation or understanding that certain information or evidence is or may be relevant in litigation. See, e.g., Knickerbocker v. Corinthian Colls., 298 F.R.D. 670, 677 (W.D. Wash. 2014) (citing E.E.O.C. v. Fry's Elecs., Inc., 87 F. Supp. 2d 1042, 1044 (W.D. Wash. 2012)) ("A party's 'duty to preserve evidence is triggered when a party knows or reasonably should know that the evidence may be relevant to pending or future litigation.'"); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (citing Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir.2001)) (providing a broad discussion of the duty to preserve and its trigger and scope and concluding: "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."). Moreover, issues of preservation, specifically in the context of the failure to preserve, are addressed by Fed. Rule Civ. P. 37 Failure to Make Disclosures or Cooperate in Discovery; Sanctions.

In Washington, the preservation waters are a bit murky. Although there is no recognized general duty to preserve evidence, as discussed below, sanctions may nevertheless be imposed for its spoliation. When assessing whether to impose sanctions, courts generally will examine the importance of the evidence lost and the culpability of the adverse party. Henderson v. Tyrell, 80 Wash. App. 592, 910 P. 2d 522 (1996) (acknowledging and applying Alaska's assessment of the two factors). As to the latter, courts have focused on whether a party acted in bad faith or had a duty to preserve. Henderson, 80 Wash. App. at 609.

Washington courts have not acknowledged a general duty to preserve evidence. Cook v. Tarbert Logging, Inc., 190 Wash. App. 448, 450, 360 P. 3d 855 (2015) (Div. III) (concluding that the trial court had "erred in concluding that Washington has recognized a general duty to preserve evidence; it has not"); see also, e.g., Cottrell v. Shahrvini, No. 35347-4-II, 2008 Wash. App. LEXIS 30, at *11 (Wash. Ct. App. Jan. 8, 2008) (acknowledging the argument that a duty to preserve arose because defendant knew plaintiff "was considering a lawsuit" but reasoning that plaintiff "fail[ed] to cite any case law" to support that conclusion). Instead, Washington courts have looked for a specific trigger to create a duty to preserve evidence, including for example one's duty as the managing partner of a business to render accurate accounts or legal requirements to preserve documents and information independent of pending litigation. Henderson, 80 Wash. App. at 610. At least one court has acknowledged the possibility of a duty to preserve on "the eve of litigation" but none has affirmatively concluded the same. Homeworks Constr. Inc. v. Wells, 133 Wash. App. 892, 908, 138 P.3d 654 (2006) ("While Wells and Thompson may be correct that a party has a general duty to preserve evidence on the eve of litigation, we do not agree that this duty extends to evidence over which a party has no control.").

- **Tread carefully**. Despite the lack of a general duty to preserve, tread carefully with evidence in your client's possession (custody or control). The lack of clarity could cut both ways with regard to a

court's analysis. Many judges are well-aware of the widely recognized duty to preserve in federal court and its surrounding jurisprudence and, in some cases, have relied upon it. Thus, even where a court found itself unable to impose sanctions for the loss of evidence, it would not make a favorable impression.

- **Preserve potentially relevant evidence.** Although the parameters of the duty to preserve may be unclear, you should identify and preserve potentially relevant information in the possession of your client as soon as possible after litigation is anticipated or a complaint is filed.

  - **Identify custodians of potentially relevant information.** Consider the facts and circumstances of the anticipated or pending litigation and identify the person or persons who may possess potentially relevant information. Think broadly at the outset, but have a reason for every person chosen, both to guard against unnecessary over preservation and in preparation to answer possible questions about the reasonableness of the scope of preservation if confronted later in litigation.

  - **Identify relevant information repositories.** It is frequently the case that potentially relevant information is maintained in a shared location (e.g., at a network location utilized by an entire department or company division) or in a particular database or software system that cannot be associated with a single custodian. Such information may nonetheless be subject to preservation, and a particular person should be designated as responsible for the preservation of such repositories when litigation arises. This is frequently a member of the IT staff.

    — **Issue an IT questionnaire/checklist.** An IT questionnaire may be prepared in advance of litigation and added to your toolkit. The questionnaire should include questions about whether the client's IT infrastructure is managed in-house, or whether it is outsourced to a service provider; the types of computers and other devices used by the client and/or its employees, including possible use of personal devices; the systems and servers used by the client that contain potentially relevant information (e.g., Microsoft Exchange email servers, Office365, Google Docs, and other network file share locations); the applications and document management software used by the client, including details regarding email (including questions such as what system is used, whether the client deploys a janitorial system that automatically deletes data, whether email is automatically archived); the existence of disaster recovery programs; the client's records management and document storage policies, if any; and any other questions focused on the receipt, creation, storage, and deletion of potentially relevant ESI.

  - **Think broadly.** Recall that pursuant to Wash. CR 34, parties may seek discovery of information within a responding party's "possession, custody, *or control*." (Emphasis added.) In this modern age, such information could include data maintained by third-party service providers or data stored outside of a party's information systems (e.g., cloud storage sites). Accordingly, when assessing the scope of your client's preservation obligation, be sure to think about data which may technically be in the possession of a third party, but which is clearly within your client's control. For additional discussion of the concept of possession, custody, or control, see Document Requests: Responding to RFPs (WA).

  - **Don't forget personal devices.** It is common these days to communicate via text message or using other similar applications on one's phone. If such communications could be relevant to ongoing litigation, they must also be preserved. For example, when representing a business

entity, it is important to understand if its employees use their phones for business purposes and in what fashion (e.g., email, text messages, etc.). If it is possible that such devices or applications thereon will store potentially relevant and unique data (not available elsewhere), preservation is likely required.

o **Issue a legal hold.** A legal hold notifies potential evidence custodians of the anticipation of litigation or receipt of a complaint (the duty to preserve), identifies the anticipated or actual issues in the case, and requests preservation of relevant evidence. If possible, legal hold instructions should include specific examples of categories of information to be preserved. Legal hold instructions should be issued to individual evidence custodians, as well as to those responsible for broader information repositories. Recall, too, that preservation may require the suspension of janitorial programs that automatically delete certain data after a period of time.

- **Request preservation by opposing parties.** Consider sending a formal preservation request to opposing parties, requesting the preservation of relevant evidence, and identifying specific evidence to be preserved if possible. While such a request may not affirmatively create a duty to preserve those items, it puts parties on notice that such information may be requested and may bolster arguments in favor of sanctions if such information is nonetheless lost or destroyed. Once such a request has been issued, consider following up with opposing counsel to cooperate in good faith regarding a more specific scope of preservation, including the identification of specific information to be preserved. For example, you may be able to agree upon a date range outside of which information is not considered relevant and therefore not subject to preservation as a way to lessen preservation burdens on the parties.

  o **Remember that turnabout is fair play.** If you request preservation, expect a request in return. With that in mind, avoid unreasonable and disproportional demands.

  o **Take quick action to request discovery of vital evidence.** Even in cases where parties have requested preservation, courts have been sympathetic to the passage of time and have declined to impose spoliation sanctions where substantial time has passed. See, e.g., Henderson, 80 Wash. App. at 604 (affirming trial court's denial of sanctions for the loss of a car involved in the at-issue accident absent a "pattern of willful destruction" and where the car was available for inspection for nearly two years before being salvaged). So, identify the evidence you expect to be material and request production early in discovery to best ensure its availability for your case.

For additional discussion, see Preserving Evidence (WA).

Collecting ESI

When ESI is identified as potentially relevant to litigation or is specifically responsive to requests for production, it must be collected from your client's information systems to be prepared for review and production. In most cases, the scope of preservation is broader than what is actually collected for review, which is ultimately broader than what is actually produced, particularly where the scope of preservation is often established very early in the case, before requests for production have been received. Once served, however, the requests may serve as a useful guide to determine what must actually be collected.

Collection methods will vary, depending on the type and volume of information at issue and the systems in which it is stored. In some cases, formulating a collection strategy may require assistance from an e-discovery professional. That said, there are myriad ways to go about gathering relevant evidence, and you should seek to employ the least burdensome method, while ensuring compliance with any existing or anticipated provisions in an ESI protocol or related order addressing collections.

- **Consider the burden of collecting and seek a protective order if necessary.** It may be that potentially relevant information is stored in way that makes collection quite burdensome. Information may be stored in a proprietary or legacy format, for example, which may be difficult to restore. If you believe that collection from a particular repository is unduly burdensome and not justified by the needs of the case, seek first to cooperate with opposing counsel to reach agreement regarding the need to collect that data. For example, it can be difficult and expensive to collect from cellular phones in a manner that preserves the original metadata. Might opposing counsel be amenable to the production of screen shots, which would not require the assistance of a forensic expert? If they are not amenable, consider a phased approach in which the more burdensome locations are preserved, but not collected from until after the more accessible resources are examined, and the true need for additional information is established. If no agreement can be reached, seek a protective order.
- **Consider the use and purpose of the information at issue.** The anticipated use and relevance of the information to be collected may bear on the best collection method. Returning to the example of cellular phones, if text messages are relevant, consider why. Is it the content of the message that is critical? Or is your focus on the date and time of the message, or the geolocation of the sender or recipient? If the former, a screen shot may suffice. If the latter, a more comprehensive forensic collection may be required.
- **Determine the scope of collection before you begin, but remain flexible.** Do you really need to collect everything? Consider whether it is preferable to collect broadly from a particular location, with plans to winnow further in processing or review, or whether it is better to target the collection as much as possible from the outset. It is frequently the case, for example, that search terms are applied to certain information repositories to target potentially relevant files and to leave behind those less likely to have bearing on your case. That said, when you start talking to custodians or digging into information repositories, you may find your plans will change. It could be the case, for example, that a custodian was not as organized as he or she thought or that relevant information is not as easily targeted as you anticipated. It is important to remain flexible and to modify your collection strategy when appropriate. And, be prepared for the possibility that you may check one custodian off your list, only to add another, as it is common for custodians to name new persons or information systems for consideration. While exhaustive investigation of every scrap of information is not required, when a specific person or system is identified for consideration, due diligence is necessary to determine its potential relevance.
    - **Search terms can be tricky.** In many cases, parties seek to cooperate by agreeing upon terms to be used in collection or review, to ward off challenges later on down the road. When negotiating search terms for use in e-discovery, be sure to keep the door open to further negotiation in the event the terms prove overly broad or otherwise problematic. Agreeing in advance to use terms proposed by opposing counsel or parties without room for objecting to breadth or overburden can result in unnecessary burden and cost to your client if the terms return broad results.

If you find yourself unable to reach agreement with opposing counsel, feel free to proceed. Take care to track your decision-making carefully, however, and be prepared to defend your decisions in the event of a challenge to the reasonableness of the chosen terms and your application of the same. Remember, too, that many systems have specific syntax and formatting requirements, which must be adhered to for successful searching, so be sure to test your terms before relying on results.

- **Learn about the systems at issue.** Every information system has unique functionalities, capabilities, and restrictions that can affect collection methods. As just discussed, for example, some systems require search terms to be formatted in a particular way. This may be another area in which consultation with a trusted e-discovery advisor is warranted. That said, it may be sufficient to consult with your client and/or their IT staff about the at-issue repositories and to recruit their assistance with collections from the same.

  Notably, some repositories may be more accessible than first anticipated. If your client's social media is at issue, for example, it is often the case that they can easily obtain their posts and other relevant history themselves without the need for external support. Or, if only a small volume of email is at issue, your client may once again be well suited to accomplish the collection. That said, there are pitfalls to even simple collection methods and care should therefore be taken when choosing how to proceed. For example, clients should be discouraged from forwarding relevant messages, as that creates an additional, irrelevant, and potentially privileged message in the thread. Rather, instruct your client to zip the relevant emails and to send them to you as an attachment or on an encrypted thumb drive or using another secure transfer protocol.

- **Track everything.** You're busy. Six months down the road, there is at least a reasonable chance you won't remember the specifics of why you collected from certain individuals but not others, what specific data repositories you collected from each of those individuals, and why you collected certain information from those repositories and not others. Write it down. If the adequacy of your collections is challenged, you'll be glad you did.

Processing ESI

Processing prepares ESI for review. In some cases, processing may be quite minimal, limited to the application of a date range, the use of search terms to target materials for review, or the deduplication of files to defensibly reduce volume. All of these may be accomplished manually, if necessary and if volumes allow. In other cases, the volume and type of materials collected may require substantial attention to prepare the materials for review. As with smaller cases, this will usually include the application of a date range, search terms, and deduplication, but may also require more sophisticated efforts to render certain file types capable of review or to prepare and load them to a document review platform, where they can be reviewed, redacted, and produced.

Outside assistance is readily available to help practitioners defensibly navigate the phases of electronic discovery, including processing. Indeed, practitioners may contract with e-discovery vendors to process and host both client ESI and opposing party productions, to allow for the efficient review and production of ESI in electronic format. There are myriad options available in this space. Care should be taken, however, when choosing such assistance, including careful review of any contracts and pricing schedules and consultation with references, when provided, to ensure a sufficient understanding of the services

offered, the responsibilities of all parties, the costs at each phase, and the capabilities (and limitations) of the vendor and review platform.

- **Assess each case as early as possible to identify the need for outside assistance.** What kind of case is it? Will there be large volumes of data to review and produce? Will complex file types be implicated? For example, construction cases often implicate design and engineering files that can be difficult to review without an appropriate tool or platform. Is source code at issue? If so, you are well advised to seek the advice of a consultant or vendor to ensure you are prepared to deal with such files, including appropriate collection and processing methods to allow for often monitored on-site review. In any event, the nature of the case may dictate the need for assistance with processing and review in discovery. The early identification of this need can avoid a scramble later on when deadlines may already be looming.

Reviewing ESI

It is worth repeating: when preparing for review, the importance of prior planning cannot be overstated. This is the case in all discovery, but can be particularly vital in the context of e-discovery, where large volumes of data (both from the client and from opposing party productions) can be unwieldy if not carefully managed. Notably, while this note discusses e-discovery in the context of discreet phases, all steps are interrelated and should be carefully considered at the outset of each case, resulting in a comprehensive plan for approaching review and production, rather than ad hoc decisionmaking as questions arise.

Generally speaking, there are two types of review in litigation: (1) reviewing client files for possible production, and (2) reviewing files produced to you. When reviewing client files, there are several goals: (1) the identification of responsive information for production, (2) the identification of privileged information to be withheld, and (3) the identification of good and bad evidence in anticipation of depositions and trial. The focus when reviewing produced files is often narrower: the identification of good and bad evidence as it relates to the claims and defenses at issue in the litigation.

Leverage Technology

Technology may be leveraged in cases of all sizes and can contribute significantly to the efficiency of your review. That said, before proceeding (in any phase), take care to ensure any ESI protocol or standing order affecting your case does not prohibit the use of contemplated technologies or require input or even consent from opposing counsel.

Document Review Platforms/Software/Applications

Once a review population has been established (e.g., of client files or files produced to you), there are many ways to proceed. As in the processing phase, the volume of files at issue and their format, as well as the underlying facts of the case, will likely guide decisionmaking. In cases with sufficiently small volumes and/or that implicate relatively common file types, it may be preferable to review all files collected by simply paging through them (electronically speaking) to identify what should be produced. Indeed, in many cases, your document review may consist of merely opening each file, reviewing its contents, and noting relevant details about the file in a deliberate and systemized fashion (e.g., in a spreadsheet or other tracking document) so that they can be produced, withheld as privileged and logged,

or withheld as nonresponsive as appropriate. Even email can be reviewed in this fashion, depending on its format. If you receive data in an unfamiliar format, a bit of due diligence will often reveal a number of options for opening and viewing the contents using free or low-cost applications or tools and for preparing files for production, including readily available applications and tools to assist with applying redactions, bates labels, and other endorsements. A short conversation with an e-discovery practitioner or technology consultant could also help to identify and understand the capabilities of available review tools and to choose an option that best serves the needs of your case. Take care, however, to guard against the alteration of metadata in your review. To that end, consider making a copy of the data before conducting review, to ensure access to a pristine version of the data as it was received in the event of accidental alteration or even deletion (it happens).

For larger or more complex cases, it may be wise to investigate your options for utilizing a more formal document review platform, of which there are many. Again, it may also be wise to solicit outside assistance when preparing for such a review. Broadly speaking, a document review platform is complex database that allows for files to be uploaded, organized, searched, and reviewed in an electronic setting. Notably, there are a number of options for accessing such a resource, including by contracting with a vendor who may provide remote access to such a tool, as well as the technical support necessary to appropriately and efficiently leverage its capabilities. In other cases, you or your firm may be in a position to license or otherwise acquire long-term access to such a tool for use in multiple cases. Regardless of the size of your case, it is important to undertake the effort to understand the capabilities and limitations of any such tools, to make the most its functionality and to ensure your efforts are defensible.

While the advantages to such a platform are myriad, the ability to code and annotate files as you review is chief among them. More specifically, most document review platforms allow a reviewing attorney to identify and code files as Responsive, Not Responsive, Privileged, or any other designation of interest and in many cases to apply additional issue tags to identify files addressing certain topics of interest. Document review platforms can also help to prepare for production (e.g., by allowing for redaction of privileged materials and by efficiently formatting files for production and preparing accompanying metadata).

Some document review platforms offer additional capabilities, beyond mere organizing and coding, including the use of analytics to more closely and specifically parse your review population for more efficient and targeted review. At least for now, the pinnacle of such analytics is predictive coding leveraging continuous active learning—a more sophisticated undertaking in which the review tool is provided with a set of responsive and not responsive files identified by a person with intimate knowledge of the case and learns from those files to identify responsive characteristics in the remaining review population. As a result, the tool ranks the remaining files to be reviewed on a numeric scale from most to least likely to be relevant and continually updates those rankings as additional files are coded in review. Such a tool and others like it can be incredibly useful, but are not necessary in many or even most cases.

Search Terms

There are many strategies for targeting potentially responsive files for review. One of the most popular is the application of key word search terms (and phrases). Simply stated, the idea is to identify search terms that are likely to be contained within files responsive to discovery requests and to use those terms to winnow the files that will be subject to eyes on review.

In some cases, clients may be inclined to skip the review altogether and to produce files identified by key word searches or other methods (e.g., all files from a particular repository or from a particular custodian). While this is certainly reasonable and defensible in many instances, depending on the case, as noted above in the context of Wash. ER 502, and as discussed below, care must be taken to prevent the production of privileged information.

- **Attempt to cooperate.** Search terms are sometimes negotiated with opposing counsel. Indeed, search terms are frequently identified as an area ripe for cooperation between parties, and agreement can help to ward off challenges to the sufficiency of your efforts down the road. Recall that while cooperation is encouraged, it is vital to hold open the ability to test terms to allow for refinement in the event they return unreasonable volumes for review. And, keep in mind that cooperation is not capitulation. If opposing counsel's suggestions are unreasonable, push back. Looking out for the best interests of your client does not necessarily degrade good faith.
- **If cooperation fails, proceed and track your efforts carefully.** Absent successful cooperation, you are generally free to proceed with terms of your choosing, *provided you are not precluded by any ESI protocol or standing order from doing so and can defend or supplement your methodology if challenged*. Use the Complaint and Answer and the requests for production as guides to the development of good search terms and test your results by assessing how many files are hit by each term and the apparent responsiveness of those files based on spot checks. Is the term hitting on unintended results? Are known, relevant files missing from the results returned? Best practice also requires that you spot check files NOT hit by the terms, to help ensure no responsive materials are overlooked. While reliance on search terms is certainly permitted to assist with the identification of responsive files, parties are nevertheless required to conduct their own due diligence to ensure they have relied on *appropriate* terms. For this reason, cooperation with counsel really is a best practice, whenever possible.
- **Protect privileged materials.** When reviewing client files in preparation for production, privilege must be protected.

    o **Prepare a list of privileged names.** To guard against inadvertent production of privileged materials, gather a list of privileged names to be used as search terms in your review. The list should include attorneys' names and email addresses, their firms' names and obvious or common abbreviations, and the firms' web domains. Consider too whether any terms could be generated to assist in the identification of work product. Be thorough. Educate your client about the importance and intended use of your list and encourage them to think carefully about all potentially privileged persons who have assisted them with legal issues, *even those not related to the matter at hand.* Unless your collection efforts are carefully targeted, there is always a chance that nonrelevant information, including privileged information, can make its way into the data collection. A thorough privileged names search can help to catch and remove such files from review and production.

    o **Secure an ER 502(d) order.** As discussed above, a Wash. ER 502(d) order provides robust protection against the waiver of privilege.

Producing ESI

The format of production of ESI, including what metadata must be produced, is another topic particularly ripe for cooperation and can (and should) generally be agreed upon between the parties before discovery begins. Establishing the details of production up front can substantially reduce the associated costs and burdens, including by reducing the likelihood of disputes on these issues.

It is frequently the case that excel spreadsheets and other hard-to-convert file types are produced in their native format (i.e., the format in which they are ordinarily maintained). Files produced in something other than native format are frequently "imaged" for production or converted to PDF (which is very similar). Imaging a document is like taking its picture—you can see, but can't manipulate, the contents. Accordingly, imaged files are frequently made searchable before production (e.g., by rendering the PDF images searchable through optical character recognition (OCR) or by producing the images with accompanying load files), to match up underlying metadata and help restore document composition when the images are uploaded for review, and text files, containing searchable text for each image. The advantages of imaging are many, but include in particular the protection of files against manipulation or changes, to ensure all parties are working with the same, original information. Other oft-cited advantages of imaging files for production are the ability to redact privileged information and to endorse files with Bates labels. Of course, files produced in native format can (usually) also be redacted and can be Bates labelled by including the label in the file name, for example. Protective order designations may also be included in file names when producing files in native format.

Wash. CR 34 specifically addresses discovery of ESI, including requests for and production of the same. Simply stated a requesting party may specify the desired format of production in its requests. If the responding party objects or if the requesting party fails to specify a format of production, the responding party must state the form or forms of production it intends to use. "Unless otherwise stipulated or ordered by the court, for good cause shown, a party need not produce the same electronically stored information in more than one form." Wash. CR 34(b)(3)(F)(iii).

When it comes to the actual production of ESI, there are two important and closely related issues also addressed by the rule: (1) organization and (2) format. Notably, at the time of drafting, no Washington state superior court case addressing these issues in the context of e-discovery was identified. However, "[w]here a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance, though such analysis will only be followed if the reasoning is found to be persuasive." Beal for Martinez v. City of Seattle, 134 Wash.2d 769, 777, 954 P.2d 237 (1998). While there are subtle differences between the state and federal rule, federal guidance is nonetheless instructive and persuasive.

Organizing ESI

Parties producing ESI must "produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." Wash. CR 34(b)(3)(F)(i). This of course begs the question of how to produce ESI as "kept in the usual course of business." While the most straight-forward way to accommodate such a requirement may be to produce the device or a forensic copy of the device on which the responsive information is maintained (understanding that forensic copies can be very expensive and are rarely truly necessary), it is not the only option:

> In the alternative, [a] responding party may choose to produce electronic files or documents rather than the devices. If it does so, however, it must ensure that the ESI is produced in a format that preserves the functional utility of the electronic information and provides sufficient information about

> the context in which the information was kept and organized by the producing party so that the requesting party can substantially replicate the system and find relevant documents. McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co., 322 F.R.D. 235, 249–50 (N.D. Tex. 2016).

Money Mailer, LLC v. Brewer, No. C15-1215RSL, U.S. Dist. LEXIS 55173, at *3 (W.D. Wash. Mar. 30, 2020).

Courts have provided some specific guidance regarding the production of files as maintained in the usual course.

> A party demonstrates that it has produced documents in the usual course by revealing information about where the documents were maintained, who maintained them, and whether the documents came from one single source or file or from multiple sources or files. See Nolan, LLC v. TDC Int'l Corp., No. 06-CV-14907-DT, 2007 U.S. Dist. LEXIS 84406, 2007 WL 3408584, at *2 (E.D. Mich. 2007) (Majzoub, Magistrate Judge). A party produces emails in the usual course when it arranges the responsive emails by custodian, in chronological order and with attachments, if any. MGP Ingredients, Inc. v. Mars, Inc., No. 06-2318-JWL-DJW, 2007 U.S. Dist. LEXIS 76853, 2007 WL 3010343, at *2 (D. Kan. 2007). For non-email ESI, a party must produce the files by custodian and by the file's location on the hard drive--directory, subdirectory, and file name. Id.

Valeo Elec. Sys., Inc. v. Cleveland Die & Mfg. Co., No. 08-cv-12486, 2009 U.S. Dist. LEXIS 51421, at *5–6 (E.D. Mich. June 17, 2009).

In many cases, the required information is provided via a simple spreadsheet. In others, and in particular where the requesting party intends to load the files to a litigation support database for review, producing parties may prepare load and text files to accompany the production. Such files provide important information regarding document composition (e.g., where a file begins and ends and its attachments), including matching the underlying metadata to the imaged files, and allow them to be searched in review.

Producing ESI in a "Reasonably Usable Form"

In addition to organizational requirements, absent a specific request to produce in a particular format, CR 34(b)(3)(F)(ii) also requires production of ESI in the format in which it is ordinarily maintained—often referred to as the "native" format—or in a "reasonably usable form or forms." Although no Washington authority has weighed in on the parameters of this requirement, there is a great deal of federal authority to illuminate the issue. Mostly notably, Fed. R. Civ. P. 34, contains an identical provision with accompanying Committee Notes. Therein, the Advisory Committee advises:

> But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Notably, some courts have indicated that conversion from the native format could be disallowed. See, e.g., Money Mailer, U.S. Dist. LEXIS 55173, at *3-4 (citing McKinney/Pearl Rest. Partners, L.P., 322 F.R.D. at 250 (N.D. Tex. 2016)) ("A file that is converted to another format solely for production, or for which

the application metadata has been scrubbed or altered, is not produced as kept in the ordinary course of business . . . "). However, this sentiment has not been widely adopted. Rather, it is generally understood that a producing party may not degrade the usability of a particular file, where they themselves retain full access to its functionality. This could mean that documents must be rendered searchable, if not produced in native format, and can also apply to other functionality, such as the ability to sort or filter in excel files, for example.

Related Content

Practice Notes

- Discovery Planning and Strategy (WA)
- Document Requests: Drafting and Serving RFPs (WA)
- Document Requests: Responding to RFPs (WA)
- Interrogatories: Drafting and Serving Interrogatories (WA)
- Interrogatories: Responding to Interrogatories (WA)
- Motion for Protective Order: Making and Opposing the Motion (WA)
- Motion Practice Fundamentals (WA)
- Motion to Compel Discovery: Making and Opposing the Motion (WA)
- Preserving Evidence (WA)
- Privilege and Work Product Doctrine: Asserting and Opposing Claims (WA)
- Scope of Discovery and Objections to Discovery (WA)

Annotated Forms

- Document and Evidence Preservation Demand Letter (WA)
- Litigation Hold Letter (WA)
- Notice of Claim of Privilege or Work Product Protection for Previously Disclosed Material (WA)
- Objections and Responses to Requests for Production of Documents (WA)
- Requests for Production of Documents (RFPs) (WA)

Checklists

- Discovery Planning Checklist (WA)

End of Document