Pretrial Discovery: Defensibility Does Not Require Perfection

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WGACA

WHAT GOES AROUND COMES AROUND

The central unremembered consideration for litigation but especially for pretrial discovery

- LEGAL HOLD SCOPE
- DISCOVERY REQUESTS
- OBJECTIONS & ARGUMENTS
- MOTIONS TO COMPEL & FOR SANCTIONS

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KISS

KEEP IT SIMPLE, STUPID

Complex info management, legal hold, & other discovery processes will be ignored

Complex discovery orders will be violated

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KITA

KICK IN THE ASS – MANAGEMENT MUST BE WILLING TO ENFORCE PROCESS

NEED LEADERSHIP BUY-IN

- WITHOUT ADEQUATE STAFFING & FUNDING, NO EDISCOVERY PLANN WILL WORK
- WITHOUT SUPPORT OF DEPARTMENT MANAGEMENT, ESI CUSTODIANS WILL IGNORE PROCESSES INCLUDING LEGAL HOLD MEMOS & INTERVIEW QUESTIONS

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Two Central Defensibility Issues

1. Are your eDiscovery process policies reasonable & in good faith? That is the toughest of the two to address.
2. Did you follow your policies? Documentation/Audit Trail
   A. in large part provided by any of the robust eDiscovery support products including, e.g., Clearwell-Veritas IF PROPERLY IMPLIMENTED & USED.
   B. But you may need expert testimony to authenticate & explain the "trail" and there the eDiscovery services fall short.

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Glossaries & Basic Resources

Links to Sedona Conference Publications on eDiscovery, https://thesedonaconference.org/publications (as of Sept. 27, 2018) (free registration required to download individual publications);

Links to EDRM Resources, https://www.edrm.net/resources/ (as of Sept. 27, 2018);

Exterro, E-Discovery: The Basics of E-Discovery Guide,

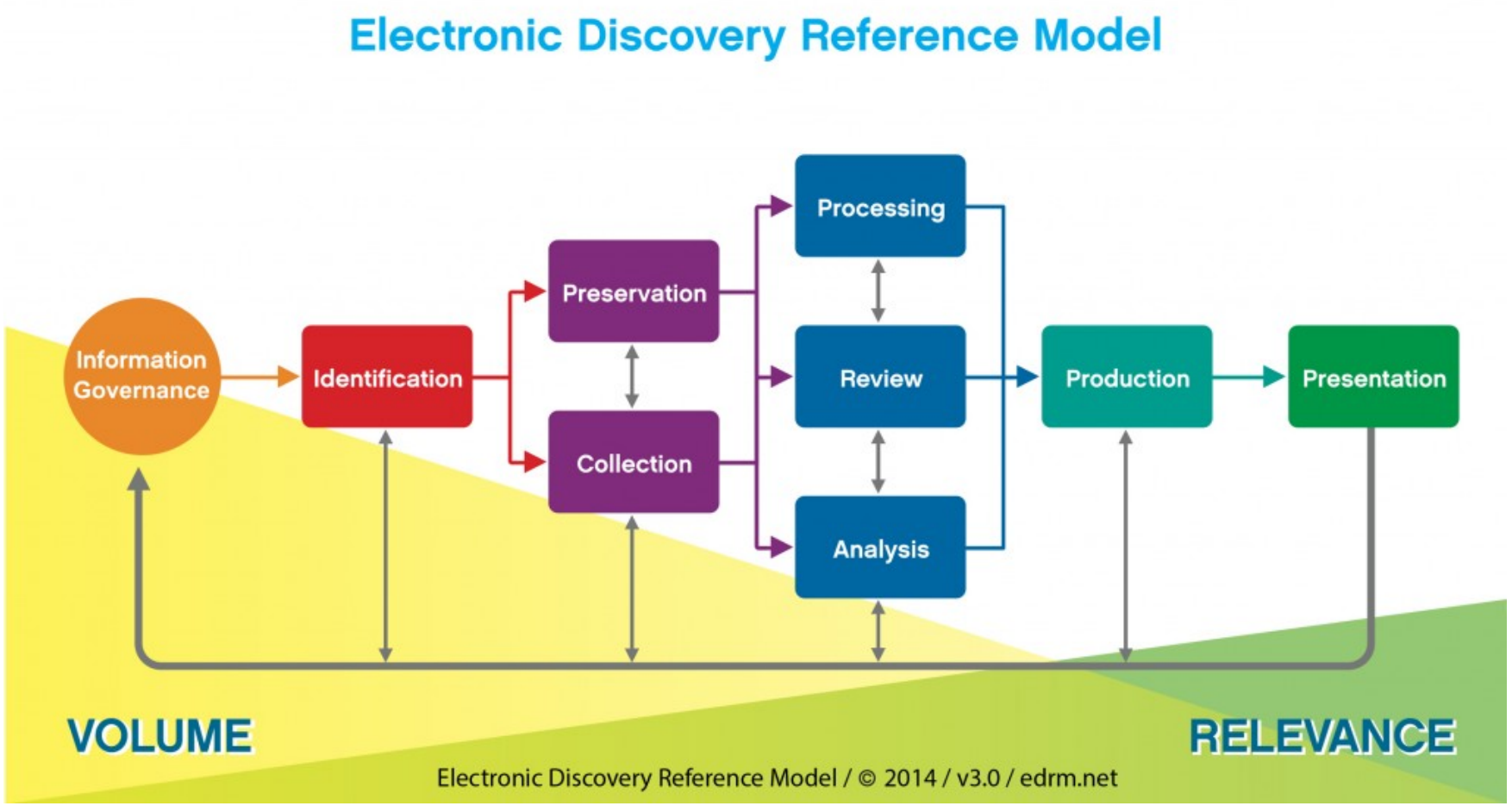
The Sedona Conference Glossary: E-Discovery & Digital Information Management, Fourth Edition (Apr. 2014), https://thesedonaconference.org/download-publication?fid=535 (as of Sept. 27, 2018) (free registration required).

CDSlegal.com, 52 eDiscovery Terms That You Should Know, https://cdslegal.com/wp-content/uploads/2012/07/52-ediscovery-terms-you-should-know.pdf (as of Sept. 27, 2018);

https://www.exterro.com/basics-of-e-discovery/ (as of Sept. 27, 2018).

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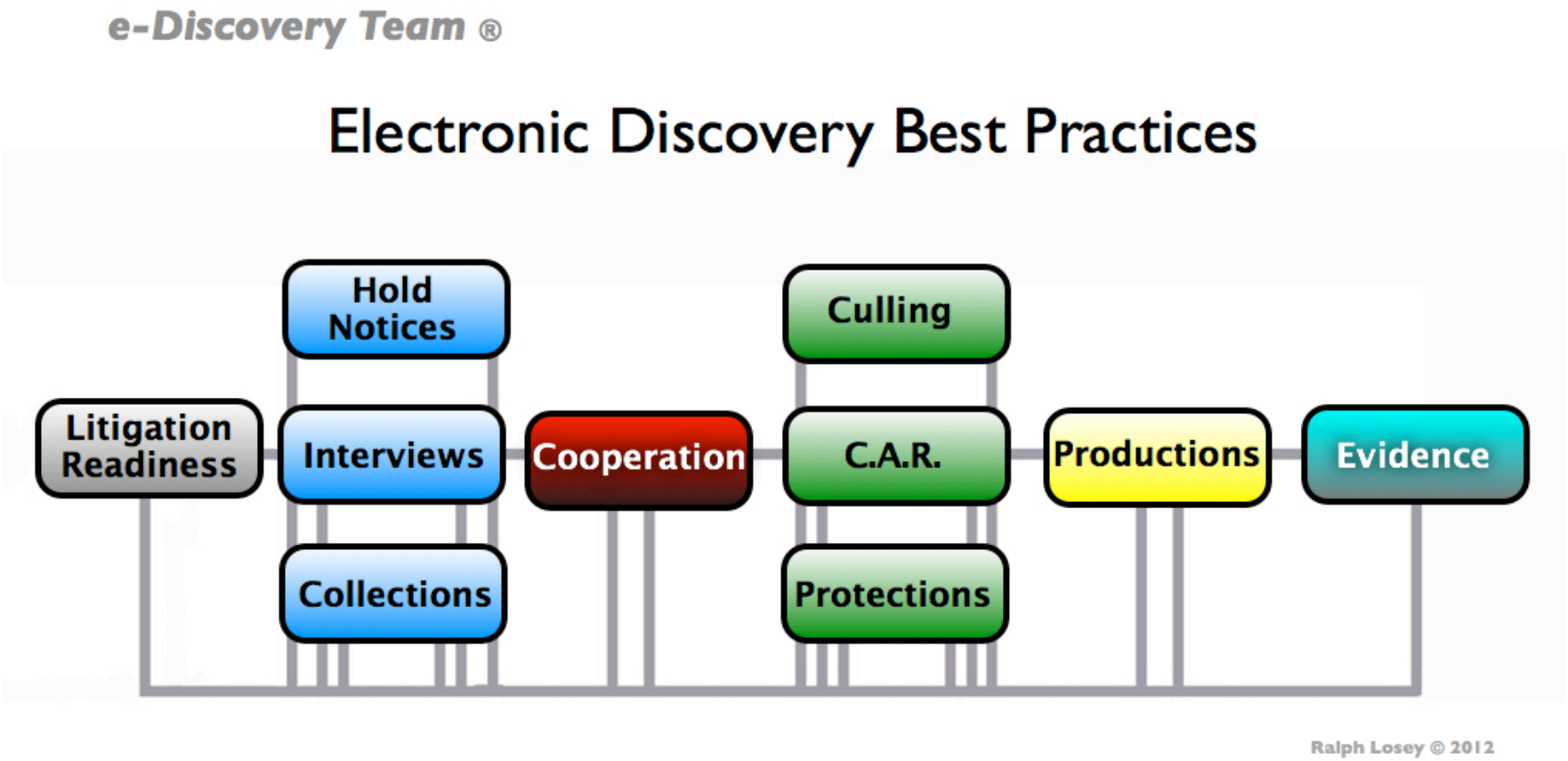
EDRM WWW.EDRM.NET



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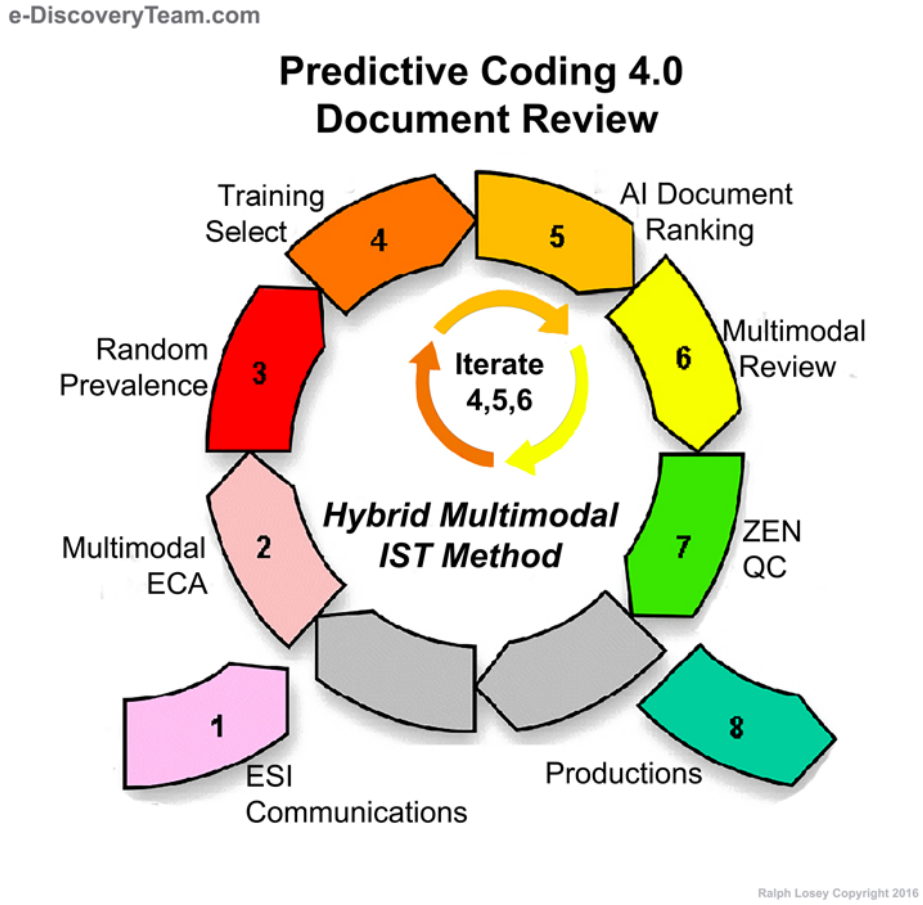
E-DISCOVERY TEAM (RALPH LOSEY) MODEL

https://e-discoveryteam.com/



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RALPH LOSEY TAR (CAR) MODEL



SEDONA CONFERENCE

The Sedona Conference Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process (Aug. 2018), https://thesedonaconference.org/publication/Commentary_on_Defensible_Disposition (as o0f Sept. 24, 2018)(free registration required).

[P#] = SEDONA PRINCIPLE #; [lower case letter] = commentary designation

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P1 – REASONABLENESS, NOT PERFECTION

Principle 1. An e-discovery process is not required to be perfect, or even the best available, but it should be reasonable under the circumstances. When evaluating the reasonableness of an ediscovery process, parties and the court should consider issues of proportionality, including the benefits and burdens of a particular process.

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P1a. PERFECTION NOT REQUIRED

Comment 1.a. Perfection is Not Required

FUNDAMENTAL DISTINCIONS BETWEEN LEGAL HOLD & SUBSEQUENT STAGES –

1. **LEGAL HOLD (INITIAL FREEZE, IDENTIFICATION, & COLLECTION) MISTAKE MIGHT CAUSE PERMANENT LOSS OF ESI WHILE UNDER-PROUC TION IS CURABLE IF LEGAL HOLD WAS ADEQUATE. SHOULD WE OVER-HOLD??? ACT REASONABLY & WITH COURAGE & DISCLOSURE**
2. **LEGAL HOLD STARTS WHEN LITIGATION REASONABLY ANTICIPATED. UNLIKE LATER STAGES, MAY BE IMPOSSIBLE TO GET CONTEMPORANEOUS COURT APPROVAL OF METHOD & SCOPE.**

- **SO TRY TO GET OPPONENT'S PRE-SUIT AGREEMENT;**
- **IF CANNOT, AT LEAST DISCLOSE WHAT YOU ARE DOING SO NO LATER CLAIM OF SURPRISE.**

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P1b. Proportionality Central to Reasonableness

Comment 1.b. Proportionality is Central to Reasonableness

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.

Fed. R. Civ. P. 26(b)(1).

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P1b. Proportionality Central to Reasonableness (2)

Comment 1.b. Proportionality is Central to Reasonableness

"... the scope of discovery is as follows: Parties may obtain discovery . . ." Fed. R. Civ. P. 26(b)(1).

But proportionality also has been made relevant to legal hold as well as to discovery. *See* FED. R. CIV. P. 37 advisory committee's note to 2015 amendment, subdivision (e) (one "factor in evaluating the reasonableness of preservation efforts is proportionality.").

Courts should not second guess reasonable good faith proportionality preservation decisions.

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P1b. Proportionality Central to Reasonableness (3)

Comment 1.b. Proportionality is Central to Reasonableness

Courts should not second guess reasonable good faith proportionality preservation decisions.

"*See* FED. R. CIV. P. 37 advisory committee's note to 2015 amendment, subdivision (e) (in deciding whether and when a duty to preserve arose in advance of litigation, "it is important not to be blinded . . . by hindsight arising from familiarity with an action as it is actually filed."); *see also Marten Transp., Ltd. v. Platform Adver., Inc*., No. 14-cv-02464-JWL-TJJ, 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016) (denying sanctions under Rule 37(e) because the party took reasonable steps to preserve relevant information; the party "had no knowledge or information from which it should have known that [the lost ESI] would become relevant in the case" before the ESI was last); In re Delta/AirTran Baggage Fee Antitrust Litig., No. 1:09-md-2089-TCB, 2015 WL 4635729, at *10 (N.D. Ga. Aug. 3, 2015) ("The fact that, with perspective adjusted by hindsight and over a year of discovery, it might have been helpful for Delta to preserve the data sources now at issue is insufficient to support a motion for sanctions if it is not shown that the duty to preserve reached this evidence to begin with.") (internal quotation omitted)."

Sedona Conf. Commentary on Legal Holds: The Trigger & The Process, n. 65 at 20-21 (Oct 2017 draft).

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P2. DUE DILIGENCE

Principle 2. An e-discovery process should be developed and implemented by a responding party after reasonable due diligence, including consultation with persons with subject-matter expertise, and technical knowledge and competence.

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P2a. DUE DILIGENCE REQUIRED

Comment 2.a. The Requirement for Due Diligence

THE ATTORNEY IS PRIMARILY RESPONSIBLE FOR DUE DILIGENCE. EVEN IF OUTSIDE COUNEL RETAINED, INSIDE COUNSEL RETAIN SUBSTANTIAL RESPONSIBILITY.

Court Sanctions In-House Counsel for Failure to Issue a Litigation Hold and Ensure Preservation

Swofford v. Eslinger, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009). View the full case summary at http://www.krollontrack.com/case-summaries-1209/?news=US_CaseLaw_Dec_09_txt-A&#DecCase1 .

Court Awards Attorneys' Fees and Costs Citing Party's Failure to Issue a Proper Litigation Hold

Tango Transp., LLC v. Transp. Int'l Pool, Inc., 2009 WL 3254882 (W.D. La. Oct. 8, 2009). View the full case summary at http://www.krollontrack.com/case-summaries-1209/?news=US_CaseLaw_Dec_09_txt-A&#DecCase2

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P2a. DUE DILIGENCE REQUIRED

DUE DILIGENCE REQUIRES COMPETENCE, INCLUDING TECHNOLOGY COMPETENCE

TEXAS HAS NOT YET ADOPTED ABA COMMENT [8] TO MODEL RULES 1.1 ON TECH COMPETENCE:

> [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

BUT IGNORANCE OF TECHNOLOGY + FAILURE TO OBTAIN NEEDED EXPERT ASSISTANCE CAN LEAD TO ETHICS GRIEVANCE AND SANCTIONS AGAINST CLIENT. MALPRACTICE LIABILITY POSSIBLE IN PRIVATE SECTOR.

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P2b. ELEMENTS OF DUE DILIGENCE

Comment 2.b. Elements of Due Diligence AT LEAST:

- The identity and role of relevant custodians
- The locations of sources of relevant ESI
- Reasonable steps to be taken, to preserve relevant information
- The suitability of criteria used to identify relevant ESI
- The suitability of tools used to identify, collect, preserve, and produce relevant ESI (e.g., TAR)
- The qualifications, competence, knowledge, and experience of individuals or entities entrusted to collect, process, search, and review ESI

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P2c. EXPERTS & E-DISCOVERY LIAISONS

Comment 2.c. The Role of Experts or E-Discovery Liaisons

- The Role of Experts: To provide tech competence

- Role of E-Discovery Liaisons: Expert to expert &/or paralegal to paralegal or lawyer to lawyer with opposition (USE EXTREME CAUTION TO LIMIT SCOPE OF COMMUNICATIONS BETWEEN NON-LAWYERS) & between/among CAO & IT & custodians' departments

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P2c. EXPERTS & E-DISCOVERY LIAISONS (2)

Comment 2.c. The Role of Experts or E-Discovery Liaisons

Designated eDiscovery Liaisons as points of contact between/among CAO & IT & custodians' departments: ABSOLUTELY VITAL

Must be sufficiently senior or have immediate access to managers to get responses

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P3. RESPONDENTS KNOW BEST

Principle 3. Responding parties are best situated to evaluate and select the procedures, methodologies, and technologies for their e-discovery process

"[T]he people who are producing the records, producing the documents are in a better position to know, since they have to do the work, spend the money, spend the time, they know their people, they know their material." Kleen Products LLC v. Packaging Corp. of Am., Inc., Civ. No. 10-cv-05711, Dkt. No. 319-1, at 297–98 (N.D. Ill. May 17, 2012).

"BEDROCK" BUT COURTS WILL SECOND-GUESS, HOWEVER, THEY SHOUD NOT SECOND-GUESS ABSENT INDICATIONS OF BAD FAITH OR INCOMPETENCE

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P3. RESPONDENTS KNOW BEST (2) – No Second-Guessing

See FED. R. CIV. P. 37 advisory committee's note to 2015 amendment, subdivision (e) (in deciding whether and when a duty to preserve arose in advance of litigation, "it is important not to be blinded . . . by hindsight arising from familiarity with an action as it is actually filed."); *see also Marten Transp., Ltd. v. Platform Adver., Inc.*, No. 14-cv-02464-JWL-TJJ, 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016) (denying sanctions under Rule 37(e) because the party took reasonable steps to preserve relevant information; the party "had no knowledge or information from which it should have known that [the lost ESI] would become relevant in the case" before the ESI was last); In re Delta/AirTran Baggage Fee Antitrust Litig., No. 1:09-md-2089-TCB, 2015 WL 4635729, at *10 (N.D. Ga. Aug. 3, 2015) ("The fact that, with perspective adjusted by hindsight and over a year of discovery, it might have been helpful for Delta to preserve the data sources now at issue is insufficient to support a motion for sanctions if it is not shown that the duty to preserve reached this evidence to begin with.") (internal quotation omitted).

Sedona Conf., Commentary on Legal Holds, n. 65 at 20-21 (Draft Oct. 2017).

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P3. RESPONDENTS KNOW BEST (2)

Principle 3. Responding parties are best situated to evaluate and select the procedures, methodologies, and technologies for their e-discovery process

AMBUSH POTENTIAL: PLAINTIFF EX-EMPLOYEES OR OTHER FORMER INSIDERS MAY HAVE EQUAL OR BETTER INFORMATION THAN THE CITY ABOUT ESI DATA LOCATION, COMMUNICATIONS METHODS, ETC. See, Brown v. Tellermate, No. 11-cv-1122, 2014 WL 2987051, at *4, 17 (S.D. Ohio July 1, 2014).

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P3a. RESPONDENTS KNOW BEST

Comment 3.a. Application of Existing Sedona Principles

Referring back to earlier Sedona Conference pronouncements & approving judicial citations: Presumptions that producing party will make key collection & production decisions, and bear cost of collection &production – court can shift either or both for good cause.

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P3b. RESPONDENTS KNOW BEST

Comment 3.b. No Safe Harbor – Presumption of Best Knowledge not License to Act Unilaterally

See P11 – P12: COURT CAN QUESTION PROCESS IF CHALLENGED FOR BAD FAITH OR REASONABLENESS

See P4 – RESPONDING PARTY NEEDS TO CONFER WITH REQUESTING PARTY & COOPERATE RE CHOOSING METHODS TO AVOID FUTURE DISPUTES

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P4. TRY TO PREVENT DISPUTES INFORMALLY

Principle 4. Parties may reduce or eliminate the likelihood of formal discovery or expensive and time consuming motion practice about an e-discovery process by conferring and exchanging non-privileged information about that process.

[RELATED TO P.11 – TRY TO RESOLVE DISPUTES INFORMALLY WHEN THEY DO HAPPEN]

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P4a. TRY TO PREVENT DISPUTES INFORMALLY

Comment 4.a. Benefits of Sharing Information

Fed. R. Civ. P. 26(f) requires parties to "attempt in good faith to agree on [a] proposed discovery plan," that addresses "any issues about the disclosure or discovery of electronically stored information."

WILL please the court

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P4b. TRY TO PREVENT DISPUTES INFORMALLY

Comment 4.b. Scope of Information Exchange

Voluntary disclosure of a party's e-discovery process during the Rule 26(f) conference "would [have] change[d] the nature of dispute from one about whether plaintiffs are entitled to find out how defendants went about retrieving information to one about whether those efforts were reasonable. . . . In the absence of shared information about the nature of the search, [the] issue cannot be discussed intelligently either between counsel or by the Court."

Ruiz-Bueno v. Scott, No. 12-cv-0809, 2013 WL 6055402, at *4 (S.D. Ohio Nov. 15, 2013).

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P4b. TRY TO PREVENT DISPUTES INFORMALLY (2)

Comment 4.b. Scope of Information Exchange. **Consider:**

- the extent to which the information about the process is discoverable or apparent;
- the extent to which the processes being employed may be rejected by court if challenged;
- the extent to which rejection of the process could result in significant delay or additional expense in resolving the dispute on the merits;
- whether the process being employed could lead to an irreversible loss of discoverable information;
- whether information about the process is protected by the attorney-client privilege or the work-product doctrine; and
- the extent to which disclosure is likely to lead to a more just, speedy, and inexpensive determination of the matter, including by reducing the likelihood or extent of discovery related discovery, motion practice, or sanctions.

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P5. CONSIDER DEFENSIBILITY AT ALL STAGES

Principle 5. When developing and implementing an e-discovery process, a responding party should consider how it would demonstrate the reasonableness of its process if required to do so. Documentation of significant decisions made during e-discovery may be helpful in demonstrating that the process was reasonable.

- What will be likely challenges to each step?
- What will be your justifications?

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P5. CONSIDER DEFENSIBILITY AT ALL STAGES (2)

"At the outset of any e-discovery process, the Team Leader (or his or her delegate) should determine the documentation standards and controls . . . to ensure their ultimate defensibility. [He or she] should act under the assumption that every aspect of the process employed could be challenged and, as appropriate, include quality measures designed to answer those challenges in the overall project plan. This entails creating and updating documentation in real time, as decisions are made, to best assure that declarations and other statements regarding the outcome of the process will be adequately supported if and when the need arises at a later date."

Sedona Conference, *Commentary on Achieving Quality in the E-discovery Process*, 15 SEDONA CONF. J. 265, 284 (2014)

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P5. CONSIDER DEFENSIBILITY AT ALL STAGES (3)

Steps to document? Checklist

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P6. REASONABLE VALIDATION

Principle 6. An e-discovery process should include reasonable validation.

- Need not be perfect, but need reasonable level of confidence that the process has resulted in a reasonably accurate, correct, and complete production, consistent with the responding party's legal obligations.
- Validation effort should be proportionate to the expected benefits of that validation.

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P7. CULLING

Principle 7. A reasonable e-discovery process may use search terms and other culling methods to remove ESI that is duplicative, cumulative, or not reasonably likely to contain information within the scope of discovery.

NOT UNIVERSALLY ACCEPTED – NEED AGREEMENT OR COURT ORDER TO IMPLIMENT. MAYBE LEGAL HOLD ALL BUT PRODUCE ONLY SINGLE VERSION.

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P7a. CULLING

- Comment 7.a. Eliminating ESI that is Cumulative or Duplicative

- MAY NOT BE PERMITTED AT LEGAL HOLD BUT HOPEFULLY AT PRODUCTION STAGE
- IF YOU'RE GOING TO RELY ON A VERSION OF A DOCUNMENT, YOU MUST HAVE PRODUCED IT.

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P7a. CULLING (2) - USEFUL AUTOMATED TOOLS

De-Duping: Using hash values. For a single custodian (vertical) or global (horizontal).

Threading: e-Discovery tools can identify emails that belong to the same thread and exclude those emails whose content is wholly contained within other emails in the same thread (i.e., retain only the last email in a continuous email chain), BUT be careful to identify emails that branch off from the main thread (e.g., forwards to other parties) or that contain unique attachments). Just produce the last complete email in the chain.

De-NISTING: Cull files that do not contain substantive data.

Query Databases for Reports to Produce. Prevents exporting raw duplicative data.

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P7b. CULLING

- Comment 7.b. Eliminating ESI that is Outside the Scope of Discovery

- Reasonable steps (search terms if intelligently chosen & used)
- Proportionate efforts

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P7c. CULLING

- Comment 7.c. The Use of Search Terms to Cull ESI

Use Boolean Signals, stemming, Proximity Delimiters, perhaps Fuzzy Logic function, & specific narrow searches within subsets of hits

Consult Those Knowledgeable About the Relevant Subject Matter – Apply their abbreviations, terminology, codes, shorthand, spelling variants, nicknames

Consult Technical Experts – Design searches using tech tools, maybe need someone familiar with your software/SAAS

Use an Iterative Term-Selection Process – Repeat searches with added terms that yield fewer false hits & higher proportion of relevant hits

Validate Results - Random sample of hits to determine false hits & of misses to determine false misses. Also Compare results to set of known true hits,

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P7c. CULLING (2)

- Comment 7.c. The Use of Search Terms to Cull ESI (cont'd)

Fuzzy Logic/Fuzzy Search: **A**llows a search variants of a search term that might be off by a letter or two. Thus, if the word brakes was misread as brokes or even blokes, it would still match the search term.

Random Number Generator: E.g., https://www.random.org/sequences/ - If your eDiscovery support app has one, use it instead. Only being used for informal validation, so not vital that the method select mathematically "true random" numbers so long as you preserve where you got them & court/opponent can test.

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P7c. CULLING (3)

- Comment 7.c. The Use of Search Terms to Cull ESI (cont'd)

Documentation of the Search Process (see P5) - At least keep history of searches (support software should do that) and of validations.

Disclosure to or Cooperation with the Requesting Party. (see P4) - If partial disclosures, CAUTION AGAINST DISCLOSING PRIVILEGED INFORMATION. Consider allowing opposing party to suggest search terms.. It may actually improve searches, particularly if they have special knowledge, and will substantially enhance your litigation position if you later have a dispute over search method.

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P7d. CULLING

- Comment 7.d. Other ESI Culling Techniques

Technologically Assisted Review ("TAR"): See P8, P9.

Filters: Date ranges, file types, custodian names

Stepped review: Starting with most promising platform may lead to settlement or agreement to limit or stage further discovery.

*******AGREEMENTS & STIPULATIONS OF THE PARTIES – REDUCED TO COURT ORDERS**

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P8. MANUAL REVIEW OF EACH FILE SHOULD NOT BE REQUIRED [TAR* CAN BE ACCEPTABLE ALTERNATIVE]**

Principle 8. A review process can be reasonable even if it does not include manual review of all potentially responsive ESI.

*TAR = TECHNOLOGICALLY ASSISTED REVIEW

** NOW THE TREND TO PERMIT TAR, BUT NOT UNIVERSALLY ACCEPTED. GET AGREEMENT OR COURT ORDER. IF OPPOSING, FORMULATE REASONS (PROBABLY INVOLVING SAMPLING OTHER PARTY'S PROPOSED TAR METHOD).

KEY WORK SEARCHES FIND ONLY ± 76% OF RESPONSIVE FILES [THOMSON REUTERS TRAINING SESSION]

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P8. MANUAL REVIEW OF EACH FILE SHOULD NOT BE REQUIRED [TAR CAN BE ACCEPTABLE ALTERNATIVE](2)

"Linear manual review is simply too expensive where, as here, there are over three million emails to review. Moreover, while some lawyers still consider manual review to be the "gold standard," that is a myth, as statistics clearly show that computerized searches are at least as accurate, if not more so, than manual review."

Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 189 (S.D.N.Y. 2012).

TRY TAR TO NARROW DATA SET & THEN KEY WORDS??

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P9. TAR METHOD TO BE MEASURED BY REASONABLENESS

Principle 9. Technology-assisted review should be held to the same standard of reasonableness as any other e-discovery process.

PERFECTION NOT REQUIRED

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P9a. COURTS DIFFER ON TAR STANDARDS

Comment 9.a. The Application by Some Courts of Differing Standards.

TOO MYSTERIOUS, OPAQUE & NEW, SO SUSPECT.

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P9b. TAR METHOD TO BE JUDGED BY SAME STANDARDS AS OTHER REVIEW METHODS

Comment 9.b. Common Standards Should Apply to All Review Methods

REASONABLENESS – SEDONA NOTES ON P8 & P9 PROVIDE STATISTICAL SUPPORT THAT TAR AS EFFECTIVE AS KEY WORD SEARCHES & CAN BE CHEAPER & QUICKER.

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P10. TO TAR OR NOT FOR PRIVILEGE REVIEW

Principle 10. A party may use any reasonable process, including a technology-assisted process, to identify and withhold privileged or otherwise protected information. A party should not be required to use any process that does not adequately protect its rights to withhold privileged or otherwise protected information from production.

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P10a. TO TAR OR NOT FOR PRIVILEGE REVIEW – REASONABLE?

Comment 10.a. The Reasonableness of Using Technology to Aid in Privilege Review

A privilege review process is defensible when (1) well planned, (2) subjected to proper due diligence, and (3) appropriately validated.

Failure to test whether any documents identified as "potentially privileged" were actually privileged was unreasonable & so unacceptable. Also, need to be able to identify privileged documents sufficiently to defend privilege claim *Victor Stanley v. Creative Pipe Inc.,* 250 F.R.D. 251 (D. Md. 2008).

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P10b. TO TAR OR NOT FOR PRIVILEGE REVIEW – RIGHT TO CHOOSE?

Comment 10.b. A Party's Right to Select an Appropriate Process

Including manual privilege review. BUT, may have to compromise depending on pretrial scheduling order & budget.

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P11. TRY TO RESOLVE DISPUTES INFORMALLY

Principle 11. Whenever possible, a dispute about an e-discovery process should be timely resolved through informal mechanisms, such as mediation between the parties and conferences with the court, rather than through formal motion practice and hearings.

[RELATED TO P.4 – PREVENT DISPUTES INFORMALLY]

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P11a. TRY TO RESOLVE DISPUTES INFORMALLY

Comment 11.a. Benefits of Informal Dispute Resolution

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P11b. TRY TO RESOLVE DISPUTES INFORMALLY

- Comment 11.b. Mechanisms for Dispute Resolution

1. Meet and Confer
2. Pre-Motion Conferences
3. Mediation
4. Special Masters
5. ORDERS: FRE 502, Tex. R. Evid. 11)

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P12. USUALLY NO DISCOVERY ABOUT DISCOVERY

Principle 12. A party should not be required to provide discovery about its e-discovery process without good cause.

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P13. COURT SHOULD NOT DECIDE DISCOVEY MOTION WITHOUT ADEQUATE FACTS

Principle 13. The court should not decide a motion regarding the adequacy of an e-discovery process without a sufficient factual record. In many instances, such a motion may not be ripe for determination before there has been substantial or complete production

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- **Perfection Not Required in Technology Assisted Review, but Transparency Might Be | Discovery Advocate**

" . . . In *Winfield v. City of New York*,(SDNY _) Magistrate Judge Katharine H. Parker ordered limited transparency (and encouraged even greater transparency) regarding the defendant's use of TAR after examining their process *in camera*. Ultimately, Judge Parker found that the defendant's process was essentially accurate and reliable, although the defendant's process was not without its own flaws. . . ."

https://www.discoveryadvocate.com/2018/02/05/perfection-not-required-in-technology-assisted-review-but-transparency-might-be/ (as of Feb. 7, 2018).

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Large, Medium or Small Case (1)

Suggests polling participants as a game to decide proportionality issues related to preservation & accessibility for what size to treat a new case for eDiscovery purposes (an eDiscovery Team post from 2017):

Proportionality Φ and Making It Easy To Play "e-Discovery: Small, Medium or Large?" in Your Own Group or Class | e-Discovery Team ®,
https://e-discoveryteam.com/2017/11/26/proportionality-%cf%86-and-making-it-easy-to-play-e-discovery-small-medium-or-large-in-your-own-group-or-class/ (as of Sept. 27, 2018)

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Large, Medium or Small Case (2)

Hive Mind e-Discovery Proportionality Game

The 33-point checklist item language in this game **by Ralph Losey** was created and is used by the U.S. Dist. Court of Fl., S. Dist., as a guide for Rule 26(f) Conferences and Reports.

The purpose of this game is to refine (and test) your skills in Proportionality analysis by classifying each of the items as either SMALL, MEDIUM or LARGE. All thirty-three of the checklist items are appropriate for Large cases, but many of the items are not appropriate for Small cases, they are not even appropriate for Medium size cases. The Game is to determine if an item is proportionally appropriate for Small cases, or for Medium cases. Note if an item is appropriate for Medium sized cases, then it is automatically also appropriate for Small size cases. You need to pick one, and only one, of the three Answers for all thirty-three.

To illustrate how the game works we share the Answer for the first item. It is appropriate for Small Cases (meaning all size cases, including medium and large) and so the Small box is checked. Go through the remaining 32 items and give your best, educated guess as to the proportionality value of each by checking on of the three boxes. Remember, all of them are appropriate for Large Cases, so if you think a particular task among the remaining thirty-two is too burdensome for Small and Medium size cases, then you would check Large. If you think a task is too burdensome for Small cases, but not Medium sized, then check the Medium box. If you think a task should be done in all cases, then check Small. Got it? Still have questions, email your group leader, game-master at [redacted].

Like all good games, there will be winners and losers. Your game-master will let you know your score and publicize the top scores only. Start by putting in your name: [redacted].

Preservation

1. **The ranges of creation or receipt dates for any ESI to be preserved.**
   SMALL ☒ **MEDIUM** ☐ **LARGE** ☐
2. **The description of ESI from sources that are not reasonably accessible because of undue burden or cost and that will not be reviewed for responsiveness or produced, but that will be preserved in accordance with Federal Rule of Civil Procedure 26(b)(2)(B).**
   SMALL ☐ **MEDIUM** ☐ **LARGE** ☐
3. **The description of ESI from sources that: (a) the party believes could contain relevant information; but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved.**
   SMALL ☐ **MEDIUM** ☐ **LARGE** ☐

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Large, Medium or Small Case (2)

eDiscovery in Office 365 | Microsoft Docs, https://docs.microsoft.com/en-us/office365/securitycompliance/ediscovery (as of Sept. 27, 2018)(new feature that I've not yet used)..

Bruce A. Olson and Tom O'Connor, "Electronic Discovery for Small Cases" (ABA eBook 2012) (**$79.95**) (print version also available);

Bruce A. Olson, Managing E-Discovery in Small to Medium Cases: Software Solutions, https://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/november11/managing-e-discovery-in-small-to-medium-cases-software-solutions.html

Craig W. Ball, eDiscovery for Everybody; the EDna Challenge (2009), http://www.craigball.com/E-Discovery%20for%20Everybody.pdf (2009).

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IMLA eDiscovery-Legal Hold Working Group

This group deals with the ever-evolving legal world of evidence, litigation holds, spoliation, privacy, data protection, and more. Join this group to see how to best protect and preserve your office's data.

MONTHLY TELECONFERENCES (2D TUES., 1 PM ET)

ACTIVE LISTSERV

IMLA MEMBERSHIP LOG IN REQUIRED TO:

- CLICK HERE to sign up online
- CLICK HERE FOR SIGN UP FORM

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Questions or Comments?



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Thank you!





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