



ESI Playbook

A Resource
for the
Members
of the
IADC

International Association of Defense Counsel
303 West Madison, Suite 925
Chicago, Illinois 60606
Phone: 1.312.368.1494
www.iadclaw.org

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Disclaimer: The ESI Playbook is intended only to provide general information on the subjects covered. The contents should not be construed as legal advice or opinion. Readers should consult with legal counsel to obtain specific legal advice based on particular situations.



FOUNDATIONAL ELEMENTS

Players
Infrastructure
Advocacy
Strategy



EDRM

Governance
Preservation
Processing
Review
Analysis
Production



CONTINUOUS IMPROVEMENT

Review
Learn
Improve

A special project of IADC's Drug, Device, and Biotechnology Committee, the ESI Playbook suggests some practical issues to consider as part of your organization's electronic information practice plan. Comprised of key considerations, checklists, and action items, the ESI Playbook draws upon leading e-discovery resources and publications to provide a concise, practical assembly of ESI issues to consider as part of your organization's overall plan. No one size fits all, and every company or firm's information practices may vary.

The following lawyers at IADC member firms contributed to the content of the ESI Playbook. Their specific contributions are identified by section beneath their firm names.

Contributors:

Douglas J. Moore
IRWIN FRITCHIE
URQUHART & MOORE LLC
(Preservation, Continuous Improvement)

Julie Flaming, Renee Dankner, Katie Rector

Nelson Mullins®
(Advocacy Strategy)

J. Scott Murphy
GARRITY GRAHAM
ATTORNEYS AT LAW
(Foundational Elements, Players, Technology Infrastructure)

Jeffrey Lilly
GORDON REES
SCULLY MANSUKHANI LLP
(Collection, Production)

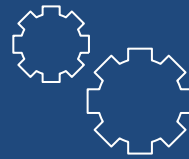
Julie Callsen, Brenda Sweet
Tucker Ellis | LLP
(Processing, Review-Analysis)

Patricia Lowry, Scott Kane
SQUIRE
PATTON BOGGS
(Information Governance, Data Management)

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Foundational Elements

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FOUNDATIONAL ELEMENTS

Modern business management involves a constant exchange of data and communications with a crushing expansion of data creation and distribution at multiple levels within the organization. Often this includes employees, temporary employees and third party service providers. Business information may be generated on company-owned systems or personal devices and, depending upon business information practices, it may be stored in a variety of locations, including on company-owned assets, social media networks, “the cloud,” with third party service providers and beyond.

The emphasis on paperless files and collaborative computer systems has created an even greater volume of electronic information. It has been estimated that 93% of all information today is created in an electronic format, resulting in 15 petabytes of data created every day.

A proactive approach to developing a plan for defensible information governance can help best position the company to both manage its information for business purposes and to defensibly respond to request for information when litigation or an investigation strikes. To quote Omar N. Bradley: “If we continue to develop our technology without wisdom or prudence, our servant may prove to be our executioner”.

Foundational elements to consider include a focus on the *players or participants* in the process, the available *technology and infrastructure* in which the data or documents may be found, and an *advocacy* plan to meet potential discovery obligations.

PLAYERS

The first step in developing a solid ESI plan is to identify the anticipated players. Proper identification should start with an evaluation / analysis of the company's departments and/or units that might be impacted by a litigation demand. Key players may include representatives from: information technology, records management, archivists, privacy professionals, human resource professionals, legal, security, risk management, compliance and business leaders.

In addition, for companies that use third party technology providers, storage managers, or "cloud" based systems, representatives from these providers and/or SLA (service level agreement) considerations may come into play.

Consider conducting periodic interviews of potential document custodians and IT personnel to ensure that your foundational assessment of key players remains current and that all potential custodians and locations have been identified. Special attention should be given to identifying "key players" from within the organization.



TECHNOLOGY INFRASTRUCTURE

As with *Players*, assessing and understanding the organization's technology *infrastructure* is important to establishing a sound ESI foundation. Consider technology systems within the company, any personal or mobile device policies or practices, cloud or third party data storage providers, social media platforms, among other technology in assessing the organizations business technology infrastructure and practices. Developing this foundation will help ensure that data preservation, collection, and management is reasoned, appropriate and defensible – which will serve to prevent the unwanted consequences of failing to properly identify, preserve, and produce responsive ESI in litigation.

ADVOCACY STRATEGY

A sound ESI foundation is the platform from which an advocacy strategy is launched. Advocacy for the company may include both internal players and external counsel and vendors who have a working knowledge of the company's e-Discovery processes and are therefore able to advance the company's e-Discovery position.

➤ Key Internal Advocacy Personnel May Include:

- **Legal** – an attorney for a specific case or type of litigation, as well as any e-Discovery attorney or team that may be in place to handle preservation and/or collection of information
- **IT** – technical specialists aware of the company's data storage and current or previous retention, disposal, preservation, or collection processes
- **Records Management** – professionals knowledgeable of the company's records retention policies, processes, storage facilities and vendors, and systems
- **Business Unit** – employees with knowledge regarding the company's business practices to help inform advocacy for the company's position
- **Human Resources** – HR personnel can be helpful in connection with human resource-related systems, and potentially assist in identifying custodians and tracking people movements within the company, including departing employees

➤ Key External Advocacy Personnel May Include:

- **Outside Counsel** – knowledgeable on preservation, collection, and discovery and review-related strategies to help advocate and advise on overall process defensibility and discovery scope
 - Outside counsel can also assist with analyzing, creating and maintaining the company's e-Discovery processes to help ensure process defensibility before litigation commences.
- **Technology Vendors** – can provide analytics and process recommendations based on the company's processes and overall data needs in a particular litigation
- **Forensic Firms** – may be helpful in accessing stored data

The Advocacy Process

Company advocacy can begin before litigation is filed with defensible retention and disposal policies, alongside litigation hold and preservation policies once specific litigation is reasonably anticipated.

➤ Key Elements:

The following are some key elements to consider as part of the overall advocacy process:

- **General Records Retention and Disposal Policies** – Appropriate records retention policies can serve as an important foundational step in establishing a defensible approach for managing ESI.
- **Data Systems and Sources** – Understanding the company's various data systems and sources for business communications is another important foundational step, and may include identifying systems that house company data inside and outside the company (such as off-site storage, cloud vendors, SAAS vendors, call centers, etc.), and assessing agreement provisions for any third party systems and vendors to determine data management, retention, and lifecycle considerations.
- **Preservation** – Having in place appropriate preservation and litigation hold policies and practices to identify and preserve potentially relevant information is another key element to consider; foundational steps in assessing and developing practices may also include steps to periodically review and revise any litigation holds as necessary to address potentially evolving needs in a case.
- **Collection** – Consider beginning collection early in the case from sources identified as likely to have discoverable information to help ensure that discovery deadlines are met, especially in cases with large volumes of ESI.
 - Both internal and external discovery team members may assist in setting strategy early on to identify custodians, other data sources containing structured and unstructured data, date ranges, and other parameters to help ensure collection of potentially relevant data
- **Review** – Data collected for a particular case may be over-inclusive and contain information not pertinent to the litigation. Advocacy before the court and opposing counsel can help to right-size the scope of review to meet the needs of the matter.
- **Production** – Once the responsive information is identified, it is produced to the opposing party in accordance with the parameters negotiated in the case.

The Advocacy Process (Cont.)

- **Early Case Assessment Approach:** Early case assessment can be important when advocating for the company in any litigation. This assessment can help inform counsel of the data related to the case and can help make informed decisions on the best way to move forward with the litigation while remaining mindful of the risks and benefits inherent in choosing an approach.
 - ***Risk-Benefit Analysis*** – It is important to think about the inherent risks and benefits of a particular piece of litigation from the beginning. Questions to consider may include: Is there a large monetary exposure? Where actual damages are relatively small, is reputational damage possible? Is the claim one that may be possible to settle early? Does a particular case have pertinent precedential value? Discussing potential answers to these questions can help inform a full case and discovery strategy to help bolster the company's position from the outset.
 - ***Data Preservation and Litigation Holds*** – Litigation holds are vital to any case. Recent extensively publicized judicial decisions regarding spoliation and sanctions for destruction of data have increased the focus on data preservation in litigation. In some cases, these issues can impact the final determination in the case, as sanctions can mean that otherwise excludable material is admitted at trial. Gaps in data availability, while often completely unintentional, can frame the reputation of a litigant in ways that can and should be avoided where possible.
 - ***Begin to Gather and Process Relevant Data*** – If the company is able to get an idea of the breadth of potentially responsive, likely producible information and the burdens and challenges associated with various data sources earlier in the case, it can then better understand the cost, time, and resources needed to respond to discovery and assert burden arguments, as appropriate.
 - Consider use of technologies that allow for filtering of data, search term application, and data analytics, as these can help inform counsel regarding the data volume in the case and help identify negotiation points when discussing e-Discovery with opposing counsel or the court. The more informed counsel is, and can demonstrate the reasonableness of their approach, the more likely they are to craft reasonable discovery-related protocols.



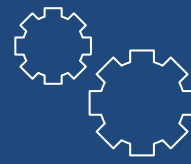
➤ Meet and Confer Practices and Judicial Orders:

- **26(f) Conference** –Federal Rule of Civil Procedure 26(f) requires parties to discuss ESI at the initial discovery planning conference. This allows parties to begin the discussion regarding e-Discovery at the outset of the case, and provides an early opportunity to advocate for the company's position regarding electronic data and documents. The discussion should include form of production for ESI and can address many other ESI collection and production issues. Counsel should be prepared to address a number of issues, potentially including: the sources of information or data that could contain potentially relevant ESI; any issues of access, including burden and potential cost-shifting; specific topics and time periods for which discovery is sought; and production of metadata. Early case assessment can be important to inform counsel for this initial meeting: if counsel is prepared with specific arguments regarding ESI issues, the 26(f) conference may be an opportunity to begin laying the ground work for a right-sized discovery effort.
- **ESI Protocol** – Some jurisdictions now require a formalized ESI protocol early in the case. Even where this is not required, it may be valuable to establish such a protocol (or obtain by court order where necessary) before productions begin to ensure a common and consistent production process and formalize issues such as data sources, preservation standards, search methodology, production format, metadata production, and privilege. These protocols are often the result of negotiations between the parties, where advocacy for the company's position will be integral in striking the right balance for discovery in the litigation.
- **502(d) Orders** – These orders can be one of the most important strategic steps in the litigation regarding privilege, as they allow for disclosure of privileged information without waiving that privilege in the litigation pending before the court, or in any other Federal or State proceeding. 502(d) orders allow for a “claw back” of privileged information, and address the privilege review process and implications of review and production of privileged information.
- **30(b)(6) Preparation** – There has been an increase in plaintiffs' requests for 30(b)(6) depositions regarding e-Discovery practices and document retention/preservation. These depositions may cover topics relating to data location and accessibility, preservation, litigation holds, culling and search terms methods regarding relevance, and document review and production. Identifying an individual early on as part of the company's discovery team who could serve as a 30(b)(6) witness if needed, and having steps in place to successfully prepare for a 30(b)(6) deposition, may be important in many cases. Advocacy in this area may require narrowing the topics for the deposition by negotiation or by providing written responses in lieu of deposition testimony for certain issues. Of course, appropriate defense of the deposition is also fundamental to effective advocacy in this area.

The Advocacy Process (Cont.)

➤ Key Considerations

- ***Documentation of Key Decisions and Actions*** – Documentation of decisions regarding e-Discovery and ESI in a particular case is helpful to assist with defensibility of process both in general and to defend against any allegations of spoliation that arise in litigation. As noted above, company advocacy begins long before litigation is filed with defensible retention and disposal policies, alongside litigation hold and preservation policies once specific litigation is reasonably anticipated. Documentation of decisions can help demonstrate the reasonableness of a certain course of conduct that occurs long before litigation is filed. Documentation can also make advocacy much easier as counsel does not have to try to reconstruct the rationale for actions and can provide concrete and defensible reasons for the decisions at the time they were made.
- ***Point Person for e-Discovery for Litigation*** – It is often helpful to have a single point person for e-Discovery in a particular litigation to assist with questions regarding ESI or retention and collection and ensure both consistency of decisions and appropriate tracking of litigation hold compliance and collection.
- ***Training*** – Training of employees, especially regarding their responsibilities when they receive a litigation hold, can be important to increase defensibility of the company's processes. Training can also help minimize questions and time and effort when a litigation hold is issued.
- ***Templates/Forms*** – Often helpful for litigation holds, a template or form tailored to a particular litigation can help ensure that necessary information is captured and communicated to all recipients. Templates or tools can also assist with uniformity across matters and can simplify defensibility concerns.



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Electronic

Discovery

Reference

Model

EDRM is intended to create practical resources to improve e-discovery and information governance. The following draws upon key resources to provide a step-wise approach to guide you through the e-discovery process. This section identifies the key considerations and action items for each of the following key steps for an efficient EDRM:

Information
Governance

Preservation
& Collection

Processing

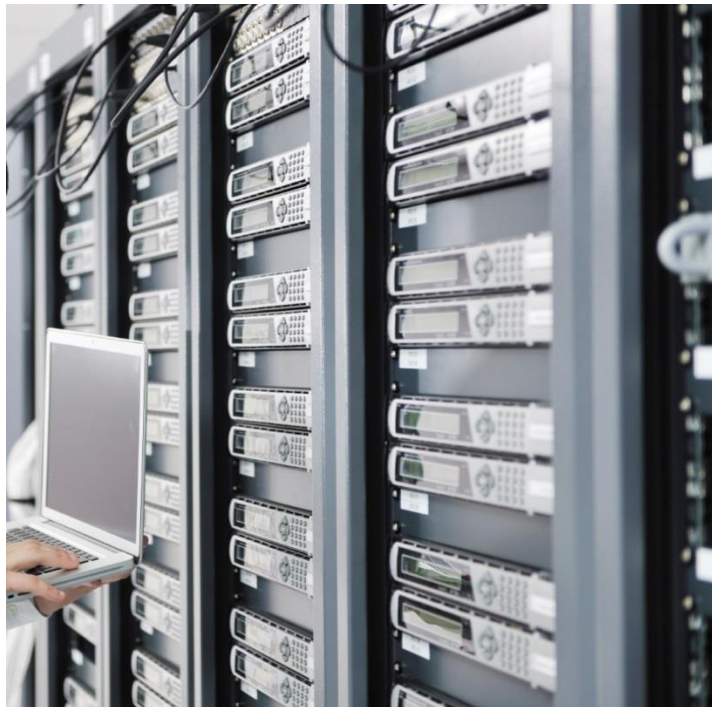
Review &
Analysis

Production

INFORMATION GOVERNANCE & DATA MANGEMENT

Key Considerations:

- A company's information governance and data management practices will impact all aspects of electronic discovery
- Understanding information governance practices is crucial to meeting electronic discovery obligations in an effective and defensible manner
 - Information governance includes not only a records management component, but also a data management component.
 - For electronically stored information, the data management component encompasses both the structure and operation of the client's electronic information systems.
- Knowing how and where your company maintains its data will promote efficiency across the other phases of the EDRM
 - Effective preservation and litigation hold decision-making requires an understanding of where the data is located in the first instance
 - Knowing where data is stored can facilitate reasonable and informed decisions about what to collect (and what does not need to be collected)
 - Targeted collection makes the review and analysis of information more effective and less expensive



INFORMATION GOVERNANCE & DATA MANGEMENT (Cont.)

Action Items / Checklist:

- Coordinate litigation hold procedures with information governance and data management practices
 - Ensure that custodians understand that litigation hold/preservation requirements trump any document retention guidelines that would otherwise call for subject information to be destroyed
 - Suspend any automatic deletion or overwriting (e.g., age-based deletion of emails) until appropriate preservation or collection steps have occurred
 - Include representation from the client's IT and records management functions in the communications and decision-making concerning preservation obligations
- Determine how and where the client stores data that may be relevant to the matter in dispute (including by reference to any existing "data maps" or eDiscovery procedures the client may already maintain).

Email

- What email system does the client use?
- Is email (or other types of data) subject to automatic deletion based on age or mailbox size?
- Where is email data stored – server or cloud location, individual laptop/desktop, or both?
- Does the company maintain an email archive or other central storage location outside of individual users' mailboxes?
- Does the client's environment permit users to create .pst or .nsf files (and if so, have custodians done so)?

Other Unstructured Data (word processing, spreadsheets, PowerPoints, etc.)

- What can/do custodians save to their hard drive?
- Can/do custodians save to a network drive location (and if so, is it partitioned by user)?
- Do custodians store data in departmental (e.g., legal, accounting, marketing, etc.) or other shared locations?
- Are there relevant Sharepoint/intranet/extranet sites?

Structured Data

- What databases does the company maintain that may be relevant to the matter in dispute (HR/Accounting/Sales/etc.)?
- Are the databases static or automatically updated?
- What are the preservation or collection options?
 - Copying
 - Export functionality
 - Query features

Other Data Types/Locations

- Custom or industry specific systems
- Cloud based systems
- Instant messaging
- Portable or external storage (thumb drives, CD's/DVD's, external hard drives, etc.)
- Phones/tablets/mobile devices (most often are duplicative of other storage locations)

Back-up Procedures

- What back-up systems/procedures does the company use?
- How often is email and non-email data backed up?
- What is the tape rotation cycle?
- Are the back-ups used only for disaster recovery or also other purposes?

Changes

- Have relevant systems/procedures changed during the time period in question?
- If so, does the company maintain archived or legacy data from prior systems or sources?

INFORMATION GOVERNANCE & DATA MANGEMENT (Cont.)

- Based on the evaluation of the company's information governance and data management approaches, identify types and sources of data that
 - can be identified as not reasonably accessible because of undue burden or cost (FRCP 26(b)(2)(B) or state law analogues), and/or
 - that may be subject to discovery proportionality arguments, such as:
 - Deleted, fragmented, slack space, or other data accessible only through forensic recovery
 - RAM, temporary files, or other ephemeral data that is difficult to preserve
 - Data from mobile devices
 - Instant messages
 - Voicemails
 - Back-up tapes or other sources of information used only for disaster recovery
 - Legacy or archive data that is no longer used for business purposes and/or difficult to restore
 - Internet access data (temporary files, cookies, caches, etc.)
 - Data that is completely or partially duplicated by more accessible sources
- Determine whether any potentially relevant data is subject to data privacy restrictions
 - HIPAA
 - State data privacy restrictions
 - Cross-border eDiscovery issues (e.g., EU data privacy restrictions)
 - Contractual restrictions on disclosure
- Effective information governance should include the deletion of information that is not subject to a duty to preserve and which the client no longer needs for business purposes
 - More data means more eDiscovery cost
 - Unnecessary data that continues to be stored makes it harder to find the data that actually matters

PRESERVATION & COLLECTION

Key Considerations:

- The duty to preserve and potentially collect ESI begins when litigation or an investigation is reasonably anticipated. Many times, this will happen well before a lawsuit or claim is filed against the company.
- Once the duty to preserve arises, companies must prevent the loss of potentially relevant ESI by issuing a hold and suspending their routine document destruction under their normal document retention policies
- Failing to preserve relevant ESI can result in:
 - Penalties, including legal fees and costs
 - Preclusion of evidence to support a claim or defense
 - Adverse inference instruction(s)
 - Default judgment or dismissal.
- Know what triggers the duty to preserve ESI:
 - Your company has initiated a lawsuit or claim
 - Your company has been on notice of a lawsuit against it
 - Your company received a subpoena for information as a third party to a lawsuit
 - Your receives notice of an investigation by a regulatory body
 - Your company has become aware of a potential legal claim against it.
- Consider strategies for reducing risk and increasing defensibility of preservation policies:
 - Ensure actions are timely
 - Ensure actions are sufficient in scope
 - Ensure efficiency for identifying and communicating with relevant personnel
 - Guarantee that holds are issued in a timely fashion and contain all necessary information
 - Consider implementing a standard set of data / content types subject to preservation.

PRESERVATION & COLLECTION (Cont.)

Preservation Action Items / Checklist:

- Preparation of the litigation hold – Once the duty to preserve ESI is triggered, a litigation hold should immediately issue. Content of the hold should include:
 - An overview of the matter
 - Specific examples of the types of information to be retained
 - Possible sources of data
 - Applicable date ranges
 - Provide contact information for the legal department
 - Indication that the communication is Attorney-Client Privileged
 - Explicit notice that normal retention / destruction / recycling policies have been suspended
 - Description of the subject matter of relevant material
 - Description of categories of materials to preserve
 - Instruction to err on the side of preserving a document if it is questionable whether it should be preserved
 - Instruction on any affirmative steps to preserve documents
 - Direction for handling new documents
 - Consider whether the claims and issues relate to past conduct only, or whether they also relate to future or continuing conduct
 - Inform recipients of their ongoing obligation to preserve responsive materials
 - A prominent warning that not complying with the notice may result in the loss of relevant documents and potentially subject the company to sanctions
 - Instruction regarding what custodians should do with their documents if they change computers, transfer to a new department, or leave the company.
 - Instruction regarding what custodians should do if they run out of space to store documents.
 - Instruction for how to suspend any automated document destruction / recycling.

PRESERVATION & COLLECTION (Cont.)

Preservation Action Items / Checklist (cont.):

- Distribution of the litigation hold
 - Identification of Custodians / Key Players
 - Implement uniform protocol for the identification of those people who may possess information potentially relevant to the litigation.
 - The key players are the employees who created or received documents that may support or refute the claims in the litigation.
 - Not every employee is a key player, even though some relevant documents may have been distributed company-wide.
 - Conduct telephone or in-person interviews to insure custodians are sufficiently identified
 - Consider departmental notifications to ensure sufficient scope



- Distribution of the litigation hold should be in multiple formats, both paper and electronic
- Distribution and receipt should be verified and documented
- Consider surveying custodians / key players to confirm receipt of hold and assess sufficiency in substance and scope, as well as compliance

PRESERVATION & COLLECTION (Cont.)

Collection Action Items / Checklist:

➤ Collection

- Determine the types of systems that could contain relevant ESI
- Gather information about the following:
 - Document Management Systems
 - Email server and software
 - Applications
 - Network file shares
 - Cloud based storage, communication
 - Janitorial Programs, criteria and disability functionality
 - Disaster Recovery Systems for email and other file servers
 - Electronic voicemail
 - Instant messaging
- Assess the physical location of ESI:
 - Databases
 - Networks
 - Computer systems
 - Servers
 - Hard drives (including portable Hard Disk Drives (HDDs))
 - Archives
 - Disaster recovery media
 - Storage Media: DVDs, CDs, Flash drives, Tapes, Cartridges, etc.
 - Laptops
 - Internet Data
 - PDAs
 - Cellular Phones
 - Tablet Computers



- Facilitating the Collection
 - Minimize disruption by coordinating with IT personnel
 - Determine if ESI may be collected remotely, or through direct access
 - Create an archive or library of ESI that is organized and accessible
 - Consider dedicating servers to ESI collection with disaster recovery
 - Avoid accessibility barriers which cause unnecessary expense
 - Keep a description of the guidelines and procedures followed in collecting and preserving the ESI
 - Ensure that the integrity of the electronic data, including maintaining the file structure of documents and email, and metadata, are preserved through collection and preservation
 - The collection process should be performed in a defensible manner that includes documenting the entire process and ensuring that there is a chain of custody for all ESI
 - Care should be taken during the collection process, because a collection process that is not done properly subjects all other parts of the process to attack
 - The time saved by taking shortcuts in the collection process can often result in multiplying the time spent later in the process (e.g. not properly filtering or de-duplicating documents in the collection process can result in greater time for review of ESI)
 - Prepare for meet and confer pursuant to Federal Rule of Civil Procedure 26(f)
 - Meet with client and IT to discuss ESI and the form(s) for producing ESI
 - Pursuant to Federal Rule of Civil Procedure 34(b)(2)(E)(ii), if a request does not specify the form, the ESI must be produced in the form in which it is ordinarily maintained, or in a reasonably usable form(s)
 - Consider questionnaire for client's IT department with questions about form(s) of production, servers, sources of ESI, retention and destruction policies, etc.

PROCESSING

Key Considerations:

- An investment of time and resources in gathering information and planning for the management of data before the actual collection phase can result in more effective e-discovery review and analysis.
 - Consider the key issues in the litigation and background facts that will need to be established to address the claims and then involve key departments and personnel, including those in IT and finance.
 - Define document unit(s); what are the types of documents to be collected and processed, will social media platforms, instant messaging systems, and/or voice mails be included?
 - Email presents unique issues including threads, strands, and attachments; case law has varied on what constitutes a “document” or “communication;” this issue mainly comes up in the context of privilege challenges. A good risk management practice would be to discourage the use and proliferations of email threads.
 - Involve IT personnel in analyzing maintenance and upkeep of system, system upgrades, and relevant licensing to determine impact at the outset of the process
 - The scope of collection and production can be limited by dates, subjects, and types of documents. May also be able to limit collection to key custodial accounts or shared sites but will need to explain and support rationale for any limitation.
 - No search and information retrieval tool can guarantee the identification of all responsive documents in large data collections, so focus on basic facts and then consider documents needed to tell the company story behind the claims.
- Convert to format suitable for review and production
 - Generally TIFF files, producing documents in their native format is often requested by the opposing side and ordered by courts so may need to include some metadata fields.
 - Converting often removes metadata from the original document and therefore will need to include a separate file containing each document’s metadata (the “load file”) in order to review the data or produce it.
 - Document and expect to explain choice of key custodians, searches implemented, and methodology to opposing parties, before the court, at deposition, and/or at trial.

PROCESSING (Cont.)

- Database systems provide useful information, often in summary format, however these systems may use specific software to review, which could be proprietary, thus it may be necessary to consider alternative formats for processing data maintained in databases.
- Choice and management of outside vendor
 - Ascertain familiarity with specific litigation issues/product and company.
 - Should be able to handle entire e-discovery lifecycle from identification through production.
 - Software chosen should be capable of producing privilege, redaction and production logs.
 - Assign internal resource with outside counsel to oversee vendor as needed to maintain knowledge and control of process.
 - Cost considerations—consider alternative fee arrangements and/or billing cycles. Review pricing structures for inclusion of technical time versus comprehensive processing fee; ask about contingency plans in case of disaster.
- Assessment of e-data
 - Identify data that needs to be processed, note trouble spots, QA methodologies, and exceptions handling protocols.
 - Cull out spam, de-duplication (globally or by custodian), routine listserv notifications, and personal correspondence.
 - Develop and implement filters for relevant dates, custodians, and file types.
 - If foreign language documents will be implicated; may be able to categorize and then address at later stage but will be more efficient to include in initial processing.
- Managing off-shore reviews
 - Develop, implement, and utilize protocols for regular communications and conduct periodic check-in via e-conferences.
 - Keep a running Q&A electronically to accommodate any language and time zone issues.

PROCESSING (Cont.)

Action Items /Checklist:

- Identify key company personnel involved with relevant product at issue in litigation to gather background information and history.
- Choose outside vendor and involve in process at outset along with internal resources and outside counsel. Assign a single project manager to oversee and direct process.
- Develop keywords and phrases with the involvement of key personnel.
 - A well thought out process with substantial human input on the front end will enhance any automated search method. Document custodians can help identify company jargon, common abbreviations, and code names.
 - Provide list of in-house counsel and outside counsel involved through e-mail addresses and domain names (outside counsel) to flag for privilege as content within documents not always obviously privileged.
- Be prepared to run quality control searches before actual production to “test” process is implemented.
- Document each step of process, including rationale for options chosen.



REVIEW AND ANALYSIS

Key Considerations:

- Reviewers should be trained so that they develop a comprehensive understanding of the legal issues and factual background before actual review starts; consider general meeting to review objectives and make assignments by subject areas to achieve efficiency and consistency.
 - Develop and distribute review guidelines including those applicable to redaction and privilege; revise and update periodically based on actual review.
 - Conduct training in technology utilized and develop FAQs based on feedback to leverage full use of technology.
 - Provide summary of any special discovery orders or stipulations to review team.
- Goal of document review--Relevance to the litigation matter and responsiveness to discovery requests
 - Consider using issue or category codes and relevancy ranking to assist in further review of important documents; involve key personnel in exclusion of other subject areas to focus review to meet goals.
 - Utilize fact development projects vs. straight document review, e. g. regulatory history chronologies, deposition kits.
 - Use and review daily logs to identify important themes and flesh out key words or people not previously identified as relevant to the litigation.
 - Grouping similar documents types (contracts, drawings, reports, financial reports) can result in quicker review process and lead to uniformity in handling.
- Confidentiality—protected health information, employee personal identifiers such as social security numbers and bank accounts should be redacted; utilize redaction guidelines.

➤ Attorney client privilege and work product

- Include in negotiated protective order a clawback provision [F.R.C.P. 26(b)(5)(B) and F.R.E. 502(b)] stating that inadvertent disclosure does not constitute a waiver of any privilege. Include a process for returning/destroying any inadvertently produced materials.
- In-house counsel review and input needs to be for the purpose of legal advice-F.R.C.P. 26(b)(5)(A), including any attachment sent for such input.
- The more sophisticated your search methodology, the more likely a court will find that the company took reasonable precautions to protect against inadvertent disclosure of privileged information.
- Creation of production and privilege logs is essential.
- If using technology assisted review (TAR) or predictive coding, statistical sampling to determine accuracy of coding is essential to prevent inadvertent disclosure.

➤ Technology assisted review (TAR)

- Use of predictive coding to categorize documents through training the software to recognize irrelevant, relevant, and privileged documents.
- Tools rely on algorithms and computerized searches to categorize documents.
- Need for human input is crucial at start of process; can then increase efficiency once implemented.
- Can streamline workflow and reduce scope of documents for manual (human eyes) review.
- Use of text recognition and auto-coding is useful as general screening tools but can be difficult to identify privileged documents.
- Consider complexity of matter and types of documents to be collected/reviewed as TAR is more useful in cases involving larger amounts of data in a similar format conducive to concise differentiation of subject matter.
- Automatically generated filters can be useful to allow reviewer to review documents from one custodian, one date range, one file type, one sender, and/or one recipient; allows reviewer to quickly learn key facts about their documents.

REVIEW AND ANALYSIS (Cont.)

Action Items /Checklist:

- Staffing document review; start with project manager and consider culling strategies.
- Determine and put in place pricing plan and structure after considering options presented.
- Centralization of review will achieve efficiency, consistency and lower overall costs.
 - Determine if any existing tracking capability is available in-house.
- Review any local rules, guidelines, and standing orders of applicable court for requirements/best practices.
- Be prepared for change based on developments that occur during litigation, new theories asserted, etc. by tracking and documenting review process implemented.



PRODUCTION

Key Considerations:

- Consider the pros and cons of the different production formats early and before deciding on a particular format
- Do not use a single production format for all data
- Tailor the form to the data
- Reaching an agreement on production formats, numbering, metadata, source information, privilege non-waiver, protection of confidential information, and load format can save time and money for the parties
- Consider your metadata obligations in terms of what was requested and/or that you agreed to provide
- Do not provide metadata that was not requested or that you did not agree to provide

Production Formats:

- Pursuant to Federal Rule of Civil Procedure 34(b)(2)(E)(ii), if a request does not specify the form, the ESI must be produced in the form in which it is ordinarily maintained, or in a reasonably usable form(s)
- Common production formats:
 - Native – the file is preserved in original format
 - Near-Native – requires some form of conversion before it can be reviewed
 - Image – PDF and TIFF files
 - Load files – generally an image file as well as associated information such as the text represented by the image and metadata from the original, native version
 - Hosted – online with a third party
 - Paper – sometimes the original format and other times it is the result of printing ESI



PRODUCTION (Cont.)

Considerations for the Common Production Formats:

➤ Native

- Usually saved in a form recognized by only certain programs (e.g. Microsoft Word document with a .doc extension)
- Generally the best form for spreadsheets, CAD, and complex data sources
- All data created with the program is saved with the native file format
- Best format for preserving metadata and keeping all production options open
- Native format does not allow for numbering of pages, redacting, or marking material as confidential

➤ Near-Native

- Examples of the near-native format include most email and large databases
- Rather than being saved in separate files for each email, emails are often saved in single text file or database
- Some form of conversion is therefore required for review
- Requires some costs for the conversion but generally the conversion is less costly than the conversion to an image production
- Readily searchable
- Near-native format does not allow for numbering of pages, redacting, or marking material as confidential

➤ Image

- Essentially a picture of how the data appears
- Often the image format is utilized because of a preference for images that can be printed
- Image format is also utilized so that a Bates number may be affixed to the document
- Ability to number, redact, and mark documents as confidential
- Non-editable and carries less risk for accidental alteration

PRODUCTION (Cont.)

- Images cannot be searched or indexed
- Optical character recognition may make scanned documents searchable, but sometimes the results are imperfect
- Load file
 - Information is generated in proprietary formats, sometimes referred to as load files
 - Combination of images and text that preserves metadata and allows for searching
 - Some formats are specific to products or platforms (e.g. Concordance and Summation)
 - Must have a license to utilize the product
- Paper
 - Some lawyers prefer paper and may request this format
 - ESI printed to paper loses the metadata associated with the ESI, and the ability for electronic searching
 - Often utilized in small productions where indexing and searching is not as important
- Technology:
 - Computer-Assisted Review / Predictive Coding / Technology-Assisted Review – computer software that codes documents based on the input of expert reviewers
 - Data extraction – software that extracts data and analyzes it to provide relevant information

Continuous Improvement

- After Action Reviews
- Lessons Learned



FOUNDATIONAL ELEMENTS

Players
Infrastructure
Advocacy
Strategy



EDRM

Governance
Preservation
Collection
Processing
Review
Analysis
Production



CONTINUOUS IMPROVEMENT

Review
Learn
Improve

AFTER ACTION REVIEWS

Consider implementing post-action reviews for each component of your ESI plan. Doing so can provide meaningful guidance on making adjustments during the process and can also provide a foundation for retrospective analysis and improvement once the litigation is concluded. After action reviews can include:

- Interviews of key personnel for opinions on improvement
- Institution-wide surveys concerning the process
- An evaluation of productivity impact
- An assessment of sufficiency or over-breadth of preservation
- An evaluation of collection proficiency
- Quality-control and evaluation of processing and coding
- Analysis of production formats, costs, and usability

LESSONS LEARNED

Those that do not learn from history are bound to repeat it. No matter how carefully thought-out the plan, the ESI demands of major litigation present an ever changing set of novel challenges and burdens. At the conclusion of every major litigation, it is recommended that a full retrospective analysis of the company's ESI performance be undertaken.

The focus of a lessons learned analysis should seek to identify those areas where adjustments to the organization's foundational elements can be made to better meet the unique challenges that e-discovery might present in future litigation.

Equally important is ensuring that the burdens of the ESI collection and production were proportionate to the severity of the litigation and that appropriate measures were taken to minimize, or shift, institutional costs.

A key element to keeping a company's ESI house in order is to continually review, learn, and improve.

IRWIN FRITCHIE URQUHART & MOORE LLC

Douglas J. Moore

Douglas Moore is a partner at Irwin Fritchie Urquhart & Moore in New Orleans. He devotes his practice to the defense of complex personal injury claims. As a trial lawyer, Douglas has handled every aspect of trial and has served as lead trial counsel in a variety of matters. He has extensive experience in the defense of complex class actions and multi-district litigations (MDLs).

Contributions: Preservation, Continuous Improvement

GORDON REES

SCULLY MANSUKHANI LLP

Jeffrey Lilly

Jeffrey Lilly is a partner in Gordon & Rees's Austin office and is a member of the firm's Drug & Medical Device and Tort & Product Liability practice groups. He also serves as Co-Chair of the E-Discovery Practice. As a litigator, Jeff represents clients in state and federal court, including national MDLs. Jeff primarily handles and manages nationwide litigation issues with an emphasis on pharmaceutical and medical device mass torts.

Contributions: Collection, Production

GARRITY GRAHAM

ATTORNEYS AT LAW

J. Scott Murphy

J. Scott Murphy is a Managing Litigation Partner at Garrity Graham Murphy Garofalo & Flinn located in New Jersey and New York. He is litigation defense trial counsel in the capacity of lead trial counsel, regional trial counsel or national trial counsel. His areas of trial practice include Products Liability, Professional Liability, Employment Practices, Construction Defect, Financial Lines, E&O/D&O, Transportation and General Liability.

Contributions: Foundational Elements, Players, Technology Infrastructure

Tucker Ellis | LLP

Julie Callsen

Julie Callsen is a partner with Tucker Ellis in its Cleveland Office. She defends manufacturers of pharmaceuticals and medical products as both national coordinating counsel and local counsel, and defends hospitals, physicians, nurses, and other healthcare providers in medical negligence actions. She also consults with pharmaceutical manufacturers on FDA regulatory matters, and frequently presents to medical and physician groups.

Brenda Sweet

Brenda Sweet is an associate with Tucker Ellis who focuses on the defense of medical device and pharmaceutical companies, healthcare institutions, and healthcare practitioners. She helps coordinate the defense of product liability multi-district litigations on behalf of drug and medical device manufacturers, as well as the defense of serious personal injury products liability claims.

Contributions: Processing, Review-Analysis

SQUIRE PATTON BOGGS



Patricia E. Lowry

Patricia E. Lowry is the leader of Squire Patton Boggs' global product liability and mass tort practice. She is a Fellow in the American College of Trial Lawyers and focuses her practice on product liability and employment litigation, with expertise in pharmaceutical defense. She has more than 25 years' experience defending cases involving prescription medications, over-the-counter products and medical devices.



Scott Kane

Scott Kane is a partner in Squire Patton Boggs' Litigation Practice Group and serves as managing partner of the Cincinnati office. He represents financial institutions, manufacturers, technology companies, design and construction firms, and other businesses in a variety of commercial litigation matters in courts and arbitration proceedings throughout the US.

Contributions: Information Governance, Data Management

Nelson Mullins®



Julie A. Flaming

Julie A. Flaming is a litigation partner at Nelson Mullins Riley & Scarborough LLP, and a member of the Firm's Encompass division, which provides information governance, litigation readiness, and discovery services. She regularly counsels clients on a variety of electronic discovery issues, including defensible strategies for the collection and production of electronically stored information.



Renee S. Dankner

Renee S. Dankner is of counsel to Nelson Mullins Riley & Scarborough LLP, and head of client relations for the Firm's Encompass division, which provides information governance, litigation readiness, and discovery services. Her areas of focus include electronic information governance, e-discovery and business intelligence.



Katie Rector

Katie Rector is an associate in Nelson Mullins Riley & Scarborough's Columbia office. Katie practices in the areas of pharmaceutical and medical device litigation, products liability, and business litigation.

Contributions: Advocacy Strategy

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