

# TMI – Considerations for Choosing an E-discovery Platform When Too Much Information Overwhelms Your Production Plans

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As "individuals and corporations increasingly do business electronically ... the universe of discoverable material has expanded exponentially..."

*Zubulake v. UBS Warburg LLC (Zubulake I)*, (217 F.R.D. 309, 311 (S.D.N.Y. 2003))

## Respondents to a 2009 National Employment Lawyers Association survey:

- Reported spending 70% of their time and expense on discovery, though they believe that number should be closer to 50%
- Agreed while e-discovery increases the costs of litigation, properly managed e-discovery can **reduce** the overall costs of discovery

[https://www.uscourts.gov/sites/default/files/nela\\_summary\\_of\\_results\\_of\\_fjc\\_survey\\_of\\_nela\\_members\\_0.pdf](https://www.uscourts.gov/sites/default/files/nela_summary_of_results_of_fjc_survey_of_nela_members_0.pdf)

Blickstein  
Group-  
Exterro's  
Study of  
Effective  
Legal Spend  
Management

94% found that using e-discovery  
technology effectively helps  
reduce e-discovery spend

# What is an e-discovery platform?

## *ENABLES:*

- Review of documents
- Finding information
- Filtering data & information
- Streamlining documentation
- Improving discovery process through tracking, tagging, filtering, sorting

# Why Use an E-Discovery Platform?



- ❑ High volume of documents exchanged in discovery
- ❑ Embedded information in documents
- ❑ Private/confidential/privileged information in documents
- ❑ Document storage/space issues
- ❑ Back-up copies of crucial documents not only locally saved on firm's server

# Why use an E-Discovery Platform?

- Shows diligence by producing party
- Enhanced search, sort, tagging
- Enhanced culling of information for production logs & privilege logs
- Enhanced workability with documents (i.e. bates numbering, redacting, PDF conversion, commenting and tagging)

# Why use an E-Discovery Platform?

- Reduces risk of inadvertent production of privileged/confidential information
- More easily discover key information
- Aids in preparing trial exhibits

...



# Critical Questions to Ask



# 5 Key Factors When Choosing a Vendor

- Respect for Users
- Security
- Innovation
- Speed
- Transparency

*Choosing a vendor is challenging, but crucial:*

- *Overwhelming number of vendors*
- *Resistance to change*
- *Lack of urgency*
- *E-discovery is viewed as a cost center*

# What to look for in a platform?

- Sorting
  - i.e. emails by sender/recipient/subject/date
- Managing document families & email chains
- Tech support and responsiveness
- Tagging documents & commenting functions
  - Ability to customize and modify
- Access to client and experts?
- Smart searching for redactions to remove PHI, personal data
- Cost
- Ability to see who, when, and what changes made to documents
- Bates numbering/redacting/Pdf conversion
- Speed
- Ease of learning/use

# The IRCP and E-Discovery

- ❑ Current Rules
- ❑ Proposed Changes by the ISC CJRTF
- ❑ Considerations

# Current IRCP 26(b)(1)(B)

## Discovery Scope and Limits

- A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.
- On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.
- If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1)(C).
- The court may specify conditions for the discovery.

# Current IRCP 34

## Requests for ESI

- Recognizes ESI as the type of item that may be requested.
- Requires that the request “specify the forms or forms in which the ESI is produced.”

## Responses to ESI Requests

- Allows objections to requests for ESI.
- Requires that a responding party must state the form of ESI it intends to use if the objection is to a requested form type.
- Also requires that the responding party to produce ESI in “a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.”
- Responding parties “need not produce the same [ESI] in more than one form.”

# Idaho Supreme Court Civil Justice Reform Task Force

- *“The suggested changes to the civil rules are intended to provide more timely and cost-effective justice in approximately 70 percent of the general cases filed in Idaho courts.”*
- *“The Task Force recommendations are designed to fulfill the promise of IRCP 1 ‘to secure the just, speedy and inexpensive determination’ of these types of civil cases.”*

# Task Force Recommendations

- Discovery based on a tiered system.
- Requiring proportionality standard.
- Requiring initial disclosures.





<b>DISCOVERY TYPE</b>	<b>TIER 1 – SIMPLE</b>	<b>TIER 2 – REGULAR</b>	<b>TIER 3 – COMPLEX</b>
<b>Interrogatories</b>	5	10	20
<b>Requests for Production</b>	5	10	20
<b>Requests for Admissions</b>	10	20	40
<b>Total Hours of Fact Depositions</b>	5	15	30

## Proposed Change -- Tiered Discovery Limitations

State courts will now be asked to designate a case tier based on an analysis of numerous factors, such as a stipulation, the amount in controversy, discovery needs, expert needs, etc. The tier of a case will influence trial scheduling and amount of discovery permitted, like the Federal Rules of Civil Procedure's proportionality standard.

# Proposed Changes Rule 16

## Seven (7) days prior to scheduling conference:

- A party who wishes a designation *other than tier 1* must file civil tier worksheet. May be heard at sched conf.

## Fourteen (14) days after scheduling conference:

- Court assigns tier type, with any “exceptions further limiting or expanding the discovery allowed.”

## Court assigns tier for each case, considering these factors:

- Stipulation by the parties
- Initial disclosures by the parties
- Extent & type of discovery
- Extent to which **e-discovery** will be necessary
- Number of witnesses
- Extent of motion practice
- Factual or legal issues
- Importance of issues
- Hostility of parties

# Proportionality – Rule 26(b)(1)



*Limiting discovery to “nonprivileged matters relevant to any party’s claim or defense” and requiring that the information sought be proportional in light of a number of factors. The scope and proportionality limits are the same as currently embodied in the recently amended federal rules of civil procedure.*

*--Idaho Supreme Court Civil  
Justice Reform Task Force*

# Proportionality – Rule 26(b)(1)

## **General Scope of Discovery.**

- 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 following:
  - 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.

# Initial Disclosures – Rule 26(a)(1)

- Within 35 days of the date the first responsive pleading is due, or otherwise ordered by the Court.
- Must include:
  - Name, address and telephone of individuals likely to have discoverable information and subjects of that information
  - A copy or description of all documents, ESI, tangible things the party has in its possession, custody, or control
  - Computation of each category of damages claimed by disclosing party, including materials bearing on the nature and extent of injuries
  - Insurance agreements
  - Copies of all documents referred to by disclosing party in the pleadings

It's (probably) not too late for comments!



- [CourtComments@idcourts.net](mailto:CourtComments@idcourts.net)
- [https://isc.idaho.gov/files/Summary\\_Statement.pdf](https://isc.idaho.gov/files/Summary_Statement.pdf)

# Considerations

- Recognize when e-discovery will be central to your case.
- Identify confidential, trade secret, peer-review, personal information.
- Become familiar with client policies.
- Encourage preservation and avoid spoliation.
- Pursue active supplementation.



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