

Getting Organized for e-Discovery and Review

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Experience

- ▶ 1 jury trial, 3 bench trials, 2 arbitrations
 - ▶ 2 bench trials and 2 arbitrations since January 2021
- ▶ Innumerable cases that have settled “on the courthouse steps”
- ▶ Case values ranging from \$100m+ to as little as \$40k
- ▶ Litigation teams of all sizes:
 - ▶ As small as partner, me, paralegal
 - ▶ As large as requiring review team of 25 people + multiple partners
- ▶ Note: usually use e-discovery platform, Relativity;
also, will not be covering preservation of data today
- ▶ What is your experience with e-Discovery?

The opinions expressed in this presentation are my own.

Let's Get Organized!

Question: What kind of case are you working on?

- High stakes, unlikely to settle?
- Low stakes, likely to settle?
 - Something else?

Why Does it Matter?

Case type may determine budget and scope of e-discovery. What follows can be seen as a “menu” of e-discovery options. Pick what works best for your case.

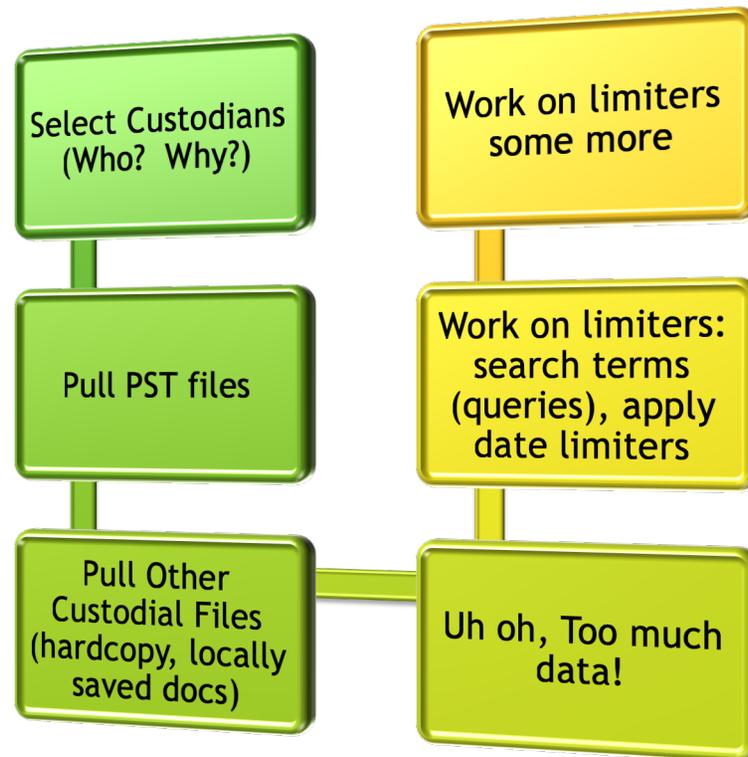
Important:

Discuss goals of e-discovery early, and revisit them throughout the process.

Getting Organized, Step 1: Case Memo

- ▶ Case Management Memo
 - ▶ Are you keeping one?
 - ▶ Whose job is it to update?
 - ▶ What information are you tracking?
 - ▶ Check in with attorneys to see if new information should be added
 - ▶ Items to add/confirm early on:
 - ▶ Who are the key witnesses?
 - ▶ What are the key dates?
 - ▶ What are the key issues?
 - ▶ What are the expected data sources?
- ▶ Why it matters:
 - ▶ Useful for drafting written discovery responses, Rule 26 disclosures
 - ▶ In e-discovery, these inputs will be used for identifying records custodians, searchable date ranges, and in drafting search queries

Getting Organized, Step 2: ESI Collection



Sample ESI Query Work

Assessment of Search Terms Proposed by Plaintiffs' Counsel

<i>Search Term</i>	<i>Comments</i>
a. Sulfur	Could be overbroad; suggest limiter like "sulfur /3 smell"
b. Air pollution	Add " " so that the search looks for the words appearing together
c. Nuisance	Overbroad; suggest limits like "nuisance /6 odor", "nuisance /6 smell", "nuisance /6 air emission"
d. Violation	Overbroad; suggest limits like "violation /3 notice", "violation /3 air emission"
e. Asphalt	Overbroad; suggest limiter like "asphalt /3 smell"
f. Noxious	Overbroad; and likely to pick up false positives like "obnoxious"; suggest limits like "noxious /3 odor", "noxious /3 smell", "noxious /3 air emission"
g. Dust	Overbroad Is this term relevant?
h. Exhaust	Overbroad; and likely to pick up false positives like "exhausted"

Sample ESI Query Meet & Confer

As to the remaining search terms, the parties have met and conferred and reached the following agreement on limiters:

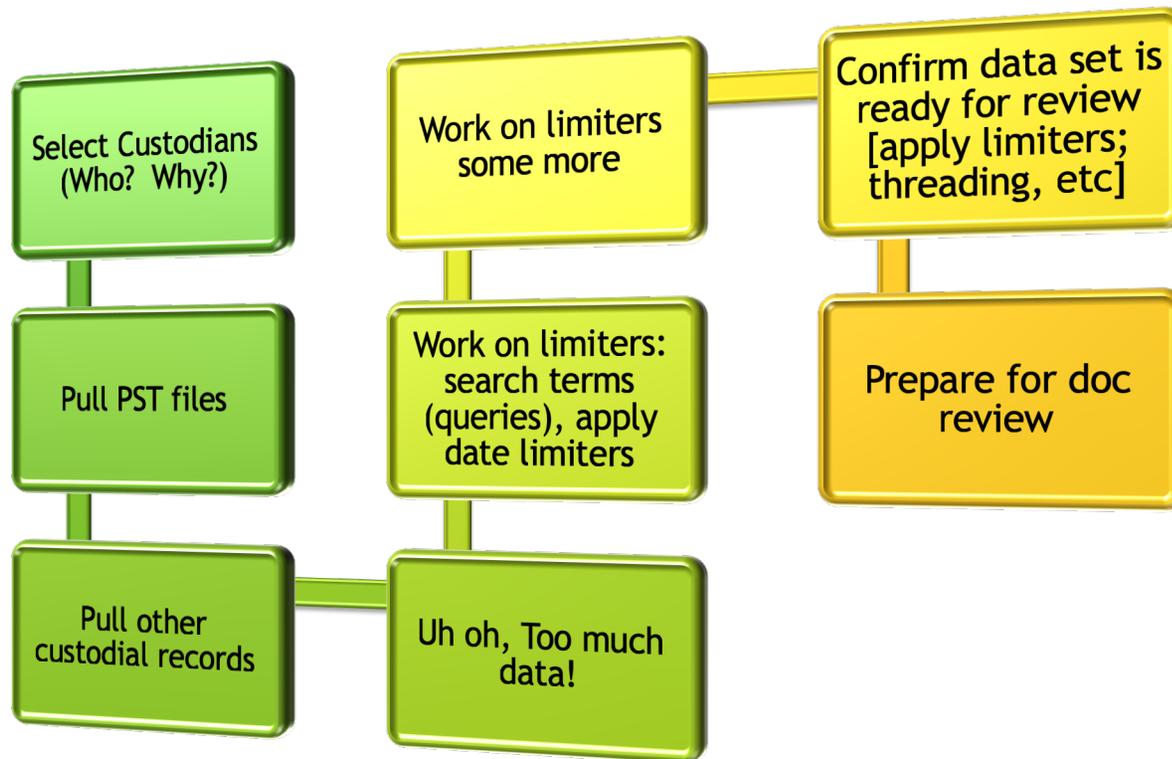
Plaintiffs' Proposed Term	Results without limiters	██████████'s Limiters:	Plaintiffs' Limiters
"Environmental Protection Agency"	6,598 hits		<ul style="list-style-type: none"> • "Environmental Protection Agency" w/3 dust – 2 hits • "Environmental Protection Agency" w/3 odor – 0 hits These limiters are acceptable to ██████████
"Burning"	4,605 hits	<ul style="list-style-type: none"> • Burning w/3 odor – 181 hits • Burning w/3 smell – 23 hits Plaintiff has confirmed these limiters are acceptable.	
"Complaint"	17,856 hits		<ul style="list-style-type: none"> • Complaint w/3 dust – 134 hits • Complaint w/3 odor – 323 hits These limiters are acceptable to ██████████
"Discharge"	42,849 hits		<ul style="list-style-type: none"> • Discharge w/3 dust – 238 hits • Discharge w/3 odor – 15 hits These limiters are acceptable to ██████████
"Dust"	48,155 hits		<ul style="list-style-type: none"> • Dust w/3 odor – 249 hits This limiter is acceptable to ██████████

Sample ESI Query Tracking

Searches that are completed:

<p>RFP 6: Respondent's Internal Communications from May 1, 2020 through and including February 15, 2021 concerning [REDACTED]'s requirement that [REDACTED] bring customer support services back in-house.</p>	<p>[REDACTED] /5 in-house" [REDACTED] /5 requ!" [REDACTED] /5 customer support"</p> <p>Timeframe: May 1, 2020-February 15, 2021</p> <p>We are presently objecting to this request, so it is lower priority for ESI collection/searching</p>	<p>0; 0</p>	<p>This one is done.</p> <p>CONCLUSION – no responsive docs</p>
<p>RFP 10: For the time period of February 1, 2020 through December 31, 2020, documents concerning [REDACTED]'s waiver of performance credits in connection with the COVID-19 pandemic, including documents concerning expectations in connection with the deployment of work-from-home workforces in India and Canada.</p>	<p>"credit! /5 COVID" "work from home /3 India" "WFH /3 India" "work from home /3 Canada" "WFH /3 Canada"</p> <p>Timeframe: February 1, 2020-December 31, 2020</p>	<p>39; 41</p>	<p>RFP 10 Revised Results = 0 (credit* w/5 coronavirus) or (credit* w/4 pandemic) or (credit* w/4 waive*) or (credit* w/4 forego*)</p> <p>CONCLUSION – handful of responsive docs</p>

Getting Organized, Step 2: ESI Collection



Getting Organized, Step 3: Preparing for Document Review

- ▶ Preparing for Document Review:
 - ▶ Can we/should we be using database analytics?
 - ▶ Who is the review team? What will they need for success?
 - ▶ Outside reviewers? (i.e., external to firm)
 - ▶ Attorneys staffed on the case full-time
 - ▶ Reviewers pulled from throughout the firm for limited purpose of the review?
 - ▶ A mix?
 - ▶ How experienced is the team?
 - ▶ What is your role on the team?
- ▶ Why does it matter?
 - ▶ These are additional factors that can change the needs/scope of the document review

Getting Organized, Step 3: Preparing for Document Review

Time to set up the review database ... But First!

1. Ask - What Tags, How Many Tags, Why, How Will They Be Used?
2. Ask - Who will be using the document review work product?
 - ▶ Relatedly, are we in state or federal court?
3. Set Up Review Database
 - ▶ Issue Tags
 - ▶ Witness Tags
 - ▶ Key Docs
 - ▶ Tags for “unsearchable” document types (images, video, audio files)
 - ▶ Privilege (e.g. persistent highlighting of counsel/staff names/law firms)
4. Ask - What does the review team need to stay on track?
 - ▶ Document Review Protocol?
 - ▶ Copy of a protective order?
 - ▶ Copy of the discovery requests?
 - ▶ Dedicated “chat” to surface questions?
 - ▶ Something else?

Sample Review Protocol

MEMORANDUM

ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGE

To:	File	Date:	April 13, 2022
From:	File	File Number:	[REDACTED]
Re:	Document Review Protocol		

I. SCOPE OF REVIEW

- **Proposed Class:** All owner/occupants and renters of residential property residing within one (1) mile of the [REDACTED] ("the Plant") property boundary between three years predating the filing of the Complaint and the present.
- **Date Range:** The requests are limited to April 9, 2018 to the present, and a date filter has been applied on Relativity. If you see a document outside of that date range (that is not part of a chain/attachment), let Taryn know.
- **Categories of Responsive Documents:**
 - All documents relating to odor and air emissions from the [REDACTED] (Plant # 123) only, including:
 - Complaints
 - Mitigation Efforts and Technology
 - Air Monitoring and/or Sampling (potentially work product if in connection with [REDACTED] investigation)
 - Reports and Studies (responsive, but likely privileged/work product)
 - Computer Modeling and Evaluations (responsive, but likely privileged/work product)
 - Permits and Related Correspondence
 - Employee Manuals, Instructions, and Procedures

SMRPH 4895-2878-3932.2

V. PRIVILEGE AND CONFIDENTIALITY

- [REDACTED]
- Privileged
 - Settlement: Discussions to settle fines with the City of [REDACTED].
 - [REDACTED] in-house counsel for [REDACTED]; watch out for privilege.
 - Note: Privilege tagging is not family inclusive – non-privileged attachments should be tagged non-privileged and will be produced.
- Redactions
 - Privacy: Names of companies that purchased [REDACTED], employee injuries/worker's comp.

VI. ISSUE TAGS

- Not asking for a tag on every document; can be more narrow with tagging.
- Tags:
 - Attribution to Other Industrial Actors: The Plant is in a mixed industrial/residential area. Use this tag for any docs suggesting other plants are the source of the odors.
 - Cessation of Complaints and Odors: Odors were only detected in Q4, and early Q1, [REDACTED]. Odors were also reported when the plant was not running. Use this tag for anything related to the timeline of complaints stopping.
 - Complaints
 - Damages or Injury: Only for class members, not [REDACTED] employees. Physical and property damage.
 - Data Sheets: solicited by Plaintiff's counsel. Likely will not need this tag.
 - Investigation –
 - By [REDACTED]

Staying Organized: Document Review

Key Question:

How can we ensure that the review results in useful work product?

- ▶ Meet with/check in with the review team. Make sure the review is moving along.
- ▶ Review team memos
 - ▶ Summaries of custodians, of issues [batch assignments]
 - ▶ Space to identify key docs
- ▶ Other ideas?

Sample Reviewer Memo

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MEMORANDUM

ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT DOCTRINE

To:	FILE	Date:	May 31, 2022
From:	Jennifer N. Le	File Number:	[REDACTED]
Re:	Document Review Summary re [REDACTED]		

I. General Overview/Theme

[REDACTED] ("M. [REDACTED]") was the Senior Associate General Counsel – West Region for [REDACTED] or the "Company"). As part of the Legal Department, [REDACTED] was responsible for handling an array of legal issues for the Company, including various litigation matters, procurement issues and commercial transactions.

II. Categories of Documents

[REDACTED] documents consisted mostly of emails and communications related to:

- Various litigation matters, including environmental and labor issues
 - Please note, the vast majority of [REDACTED] emails related to issues related to other plants. There were very few documents related to the [REDACTED] Facility and/or the instant case.
- Procurement and public contracting matters
- Meeting calendars
- Administrative issues with environmental agencies and local government (including the City of Berkeley and BAAQMD)

ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT DOCTRINE

III. Personnel Interactions

[REDACTED] mostly interacted with the Legal Department personnel. For issues concerning the instant case, she communicated with: Sheppard Mullin (Whitney Roy and Jeff Parker); [REDACTED]

IV. Responsive Documents

From the batches I reviewed, I did not find many responsive or hot documents. Most of Ms. [REDACTED] responsive documents are:

Responsive/not privileged:

- Past NOVs issued to [REDACTED] facility;

Responsive/privileged:

- Past settlement discussions regarding NOVs issued to the [REDACTED] facility;
- Communications with Sheppard Mullin regarding strategy and motions for the instant case;
- Internal discussion/strategizing with personnel regarding [REDACTED] odor allegations (see e.g., CTRL-ECA-00183078);
- Draft response letter to the City of [REDACTED] in response to the City's letter regarding issues about the [REDACTED] facility (see CTR:-ECA-00185438); and
- Internal assessment of the [REDACTED] Complaint (see CTRL-ECA-00185627).

Staying Organized: E-Discovery & Beyond

- ▶ Depositions: Using Witness Tags
 - ▶ Expert depositions?
 - ▶ PMKs?
- ▶ Motion Practice: Using Issue Tags
- ▶ Trial: Using these + Key Docs Tag
- ▶ ASK: What does the user of this work product prefer?
 - ▶ Moving to paper/hard copy
 - ▶ Moving out of a review database to electronic file folders
 - ▶ File naming conventions

Getting Creative: Case Study 1

Other Ideas?

Disclose in written discovery responses that will collect ESI from a subset of potential custodians; apply date ranges; apply search terms

To combat ESI processing costs, set up alternative repository for data; select relevant docs from this repository and have only these processed/reviewed

Case is low stakes in terms of \$\$ at issue; but opposing party threatens to take the case to trial anyway on principle. Client's ESI files are extensive.

Produce all docs from the custodians that hit on a limited set of search criteria (like the party's name or email address domains); conduct only a privilege review; also conduct a review for "bad language"

To combat hosting costs, after making the document production, archive any data you don't expect will be used further in the case

Getting Creative: Case Study 2

Other Ideas?

Collect documents from the most relevant custodians only. Find alternative data hosting platform to reduce hosting costs.

Create a reasonable set of search queries based on the RFPs. Run these on an iterative basis to get to a set of docs that come within scope of the scheduling order. TRACK this process closely. Report efforts to opposing counsel.

The arbitrator has issued a scheduling order that limits discovery (no request can result in more than 500 document hits), but the arbitration agreement incorporates the FRCP. Client also has a huge data set. Case is on fast track to trial.

Create search queries to identify the documents we want to use to prove our affirmative case and defenses. Confirm with client we have what we need. Ask lots of questions.

Review every doc produced by the other side.

Thanks for
joining me
today!

Any questions?

