

# Effective E-Discovery

Florida Bar Approved  
CLE Course # 2569 6

# Outline

- ❑ Part 1: Changes to the rules
  - ❑ Part 2: Preparing for Discovery –  
What can I do now?
  - ❑ Part 3: Phases of Discovery
- Preview: It's all about process

□ Part 1: Changes to the rules

# Changes to the Rules

## Rule 26(f) Conf. of Parties; Planning for Discovery (Meet and Confer)

- 21 Days before a scheduling conference or 21 days before a Rule 16(b) scheduling conference, the parties are to confer...
  - “to discuss any issues relating to preserved discoverable information.:
  - “to develop a proposed discovery plan.”
  - to discuss “any issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced.”
  - to discuss “any issues relating to claims of privilege” including the potential for a “clawback” or “quick peek” agreement to be included in a court order.

# Changes to the Rules

## Rule 26(f)- Committee Note

- “Amended to direct the parties to discuss discovery of ESI during their discovery –planning conference.” Required discussion of ESI should include:
  - Systems and sources
    - Computer systems
    - Persons with special knowledge
    - Scope of e-discovery
    - Sources of information
    - Reasonable accessibility
  - Preservation
  - Privilege
    - Clawback Agreements
    - Quick Peek
    - Does not address waiver by production docs

# Changes to the Rules

## Rule 26(f): Goal of Rule

- Early attention to issues that have given rise to disputes in cases:
  1. A discussion of each sides IT systems—including definitions
  2. Development of discovery plan contemplating each side's systems.
  3. Preservation of ESI
  4. Time frames for production
  5. Accessibility/inaccessibility of data under new Rule 26(b)(2)(B)
  6. Form (or forms) of production
- Forces atty to become familiar with clients IT systems before the conference. Where relevant information is stored such as:
  - Email servers, file servers, application servers, laptops, desktops, CD's, DVD's, thumb drives, backup tapes.

# Changes to the Rules

## Early Preservation Discussion

### Rule 16(b) Pretrial Conf.; Scheduling and Planning

- The judge can enter a scheduling order that provided for disclosure of ESI. The order may include:
  - Provisions for disclosure of ESI
  - Agreements of parties for asserting privilege after production
- Committee Note:
  - Designed to alert the court of possible issues.
- Form 35 Amended to call for a report about the results of the discussions

# Changes to the Rules

## Early Preservation Discussion

### Rule 26(a)(1)(B) Initial Disclosures

- “A party must, without waiting a discovery request, provide to other parties: a copy of or description by category and location of, all documents, electronically stored information....”

### Committee Note:

- This rule recognizes “that a party must disclose ESI as well as documents that it may use to support its claims and defenses.”

# Changes to the Rules

## Production from Accessible Sources

- Production from Accessible Sources- Rule 26(b)2(B) Discovery Scope and Limits (“Data Not Reasonably Accessible”)  
“A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost.”
- Committee Note:
  - The Amendment “is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of ESI.”
  - Considerations may include:
    - Specificity of discovery request,
    - Quantity of information available
    - Failure to produce info is no longer available but suspects should have been
    - Likelihood of finding responsive info not obtained from a readily available source

# Changes to the Rules

## ■ Considerations may include (Continued):

- Predictions as to the importance and usefulness information,
  - Importance of issues at stake,
  - Parties resources
- 
- Identification of source as inaccessible does not relieve the party of duties to preserve.
  - Responding party need not search sources identified as inaccessible
  - Requesting party may require discovery to respond to a claim of inaccessibility.
  - Requesting and producing party may require discovery with respect to good cause.
  - Cost of review for relevance and privilege might counsel against discovery.

# Changes to the Rules

## Production from Accessible Sources

### Rule 26(b)(2)(B): Goal of Rule

- To help curb excessive expense and streamline discovery may allow for cost shifting, data sampling, or other protection from the court.
- Examples of Inaccessible Sources:
  - Back-up tapes.
  - Legacy data stored on obsolete and unused media
  - Database records not programmed to produce output.
  - Deleted data (fragments from drives)
- **Party must ID any inaccessible source** that it does not intend to search and utilize for production. Must provide enough detail so opposing counsel can evaluate burdens and costs in find responsive information.
  - May include category or type of data in disclosure.

# Changes to the Rules

## Form of Production

- Rule 34(a) Production of Documents, ESI...Scope
  - -Expands the term documents to include electronically stored info (ESI).
  
- Rule 34(b) Production of Documents, ESI...Procedure
  - -Requesting party "may specify the form or forms in which ESI is to be produced... If objection is made to the requested form or forms for producing ESI – or if no form was specified in the request – the responding party must state the form or forms it intends to use."
  - -"Unless the parties otherwise agree, or the court otherwise orders... a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonable usable; and a party need not produce the same ESI in more than one form."

# Changes to the Rules

## Form of Production

### ■ Rule 34(b): Committee Note

- -The responding party may not convert ESI “from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party.”
  - For example, if responding party ordinarily maintains the ESI it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removed or significantly degrades this feature.
- Concerns relating to producing docs in their native format will still remain over how to best redact and bates number and as a result, parties may be unwilling to produce data in its native format.

- Part 2: Preparing for Discovery
  - What can I do now?

# Preparing - Organization

- The organization or management structure in which you operate

[Who do you have to deal with?]

# Preparing - Environment

- The company and its organization
- The records and document management / storage
- The systems & technology infrastructure

[What do you have to deal with?]

# Preparing - Resources

- The resources for your discovery team
- Typical discovery stages and responsibilities
  - Large
  - Ordinary matter
- The changes you anticipate in the next
  - Twelve months
  - Twenty-four months

[Do you get any help? Does anybody understand your challenges? Does anybody care?]

# Preparing - Litigation Hold

- ❑ Determining the scope
- ❑ Communicating
  - ❑ Individuals
  - ❑ Department / Custodian of Records
- ❑ Follow-up, verification, tracking
- ❑ Releasing holds
  - ❑ Overlapping holds
- ❑ Supporting application / technology

[How do you do it? Well-oiled machine or breaking rocks in the hot sun? Can it be improved]

# Preparing - Identification

- ❑ Discovery Team
  - ❑ Tasks and responsibilities
- ❑ Coordination with responsible counsel
  - ❑ In-house
  - ❑ Outside
- ❑ Accessible vs. Inaccessible information
- ❑ Re-use / Litigation Repository

[Is this a process or a scene from a Marx Brothers movie?]

# Preparing - 26(f) Discovery Conference

- Preparation
- Meet & Confer Checklist
- Participants
- Standard forms and formats
- Early assessment of data

[Is this a process?]

# Preparing - Gathering

- ❑ Tasks and responsibilities
- ❑ Timelines
- ❑ Tracking and managing
  - ❑ Limiting redundancy / overlapping requests
- ❑ Completeness

[Is it active preparation or responsive reaction?]

# Preparing - Processing for Attorney Review

- Tasks and responsibilities
- Culling
  - Methods and tools
  - In-house first-pass review?
- Tracking
- Conversion
- Quality measurement
- Re-use

[Litigation process or matter / law firm driven?]

## Preparing - Attorney Review

- Corporate involvement with attorney review
- Privilege
- Privacy
- Trade secret

[Litigation process or no control?]

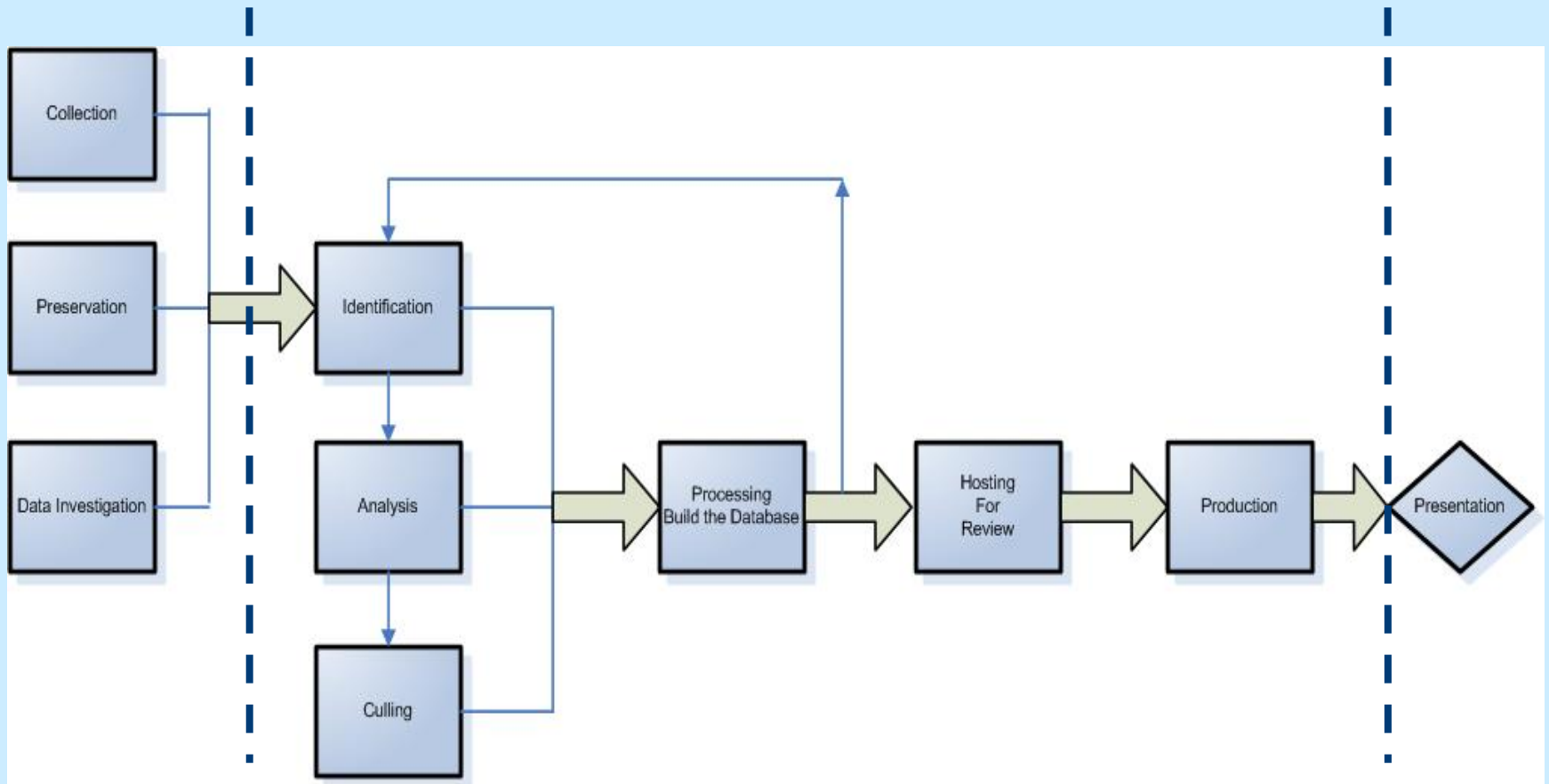
## □ Part 3: Phases of Discovery

# Phases of Discovery

Pre-Discovery

Discovery

Post Discovery



# Phases of Discovery

## ☐ In Anticipation of Litigation

- Preservation
- Investigation
- Collection

## ☐ Action!

- Complaint
- 26(f)
- Request for Production
- Interrogatories

## Processing / Building the Database - Paper

### Prepare for Paper Review

- Track
- Copy
- Label

### Prepare for TIFF Image Review

- Track
- Image
- OCR
- Code

# Processing / Building the Database - Electronic

## □ Electronic

- Linear
  - Native
    - Extract, De-duplicate, Search, Package
  - TIFF Image Review
    - Extract, De-duplicate, Search, Image, Package
- Non-Linear
  - Extract, De-duplicate, Search, Package

# Production

- ❑ Paper Review– copy and renumber
- ❑ Image Review
  - Create subset and renumber
  - Print or package images and data
- ❑ Native Review
  - Native Production - Package selected native files for opposing
  - TIFF Production
    - Perform selected TIFF conversion
    - Number
    - Package images and data

Q & A