# TYPES OF DISCOVERY BASICS REFRESHER AND MORE!

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# PUBLIC RECORDS REQUEST

**Step 1:**

- Figure Out Specific Information Needed
- Figure Out What Agency or Agencies Have the Information

Errors:

- Overly Broad Requests Sent Back

Tips: Keep specific on requests and request from multiple agencies if unsure of location of documents.

# PUBLIC RECORDS REQUESTS (CONT.)

**Step 2:**

- Before making request, search online to make sure information isn't posted on the agency's reading room

Tips:

- There is a lot of public data that is newsworthy but nobody's pored through and written about it

- Searches online help narrow request

# PUBLIC RECORDS REQUEST

**STEP 3:**

- Write down the request in an email or a letter – or the preferred method of the agency (check websites for online request submissions)
- Best contact for agency to reach you (email, phone number, mailing address)
- Preferred method of receiving the records (email, paper, mail)
- Payment of fees for records or request exemption - allow exemption for media if purpose is to disseminate the information or educational purposes
- Include timeframe in which you want to hear back from the agency
- Other Contents:
  - Information requested
  - Dates when it was maintained
  - Other information to narrow search/describe records
  - Other information based on agency requirements and regulations, e.g. “FOIA” needs on both envelope and top of letter

# PUBLIC RECORDS REQUEST

**Step 4:**

- Follow-Up with the agency if do not receive response within your timeframe or regulation timeframe

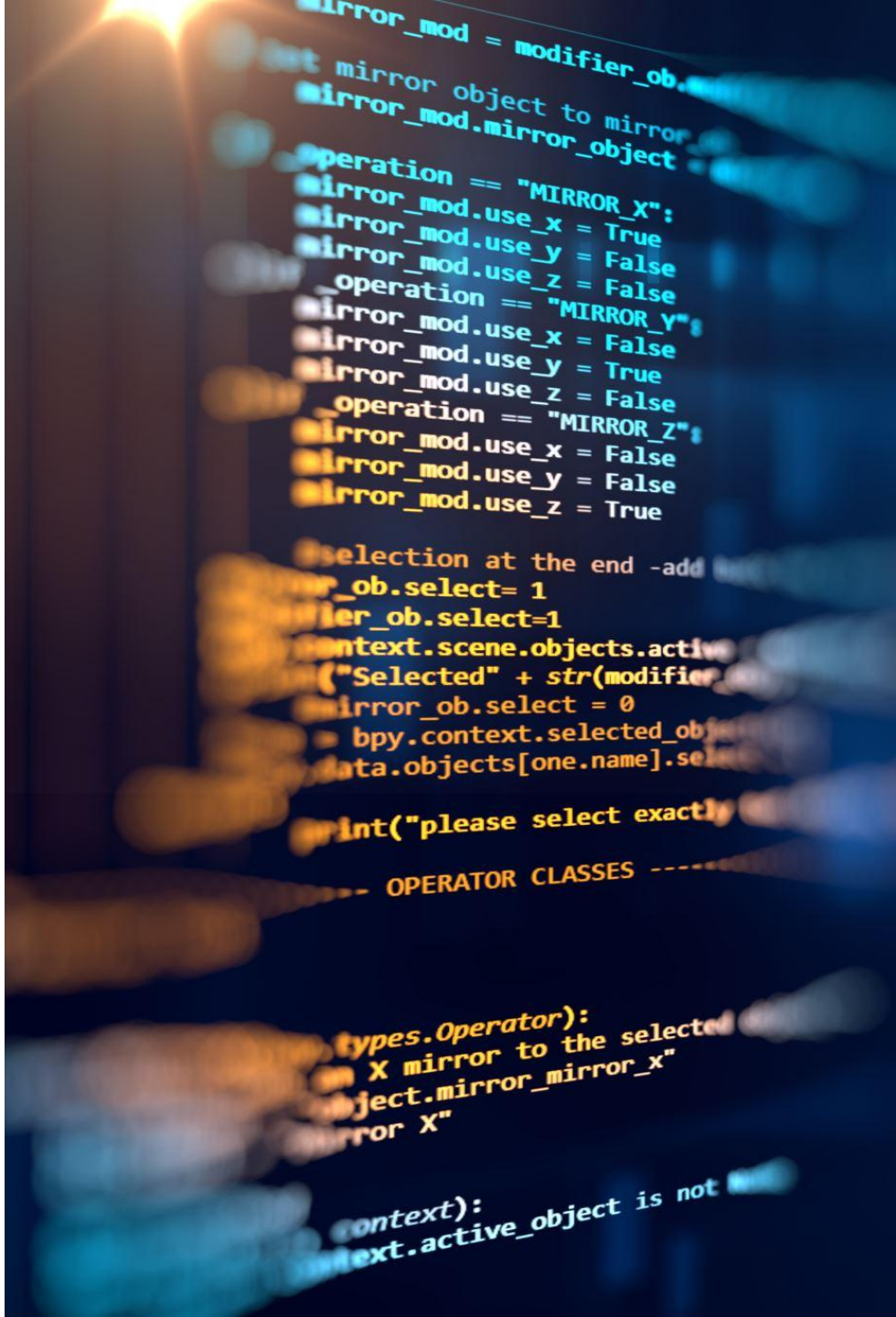
Notes/Roadblocks:

- Most take 20 business days for a response, and agencies often ask for extension of time
- You can request expedited – but not guaranteed
- Information disclosed can be redacted
- Agencies can refuse disclosure based on exemptions,
  - E.g. national security, trade secrets, privileged communications, information that impacts right to fair trial, information related to agency's internal personnel rules, prohibited from disclosure by federal laws, law enforcement techniques, etc.

# PUBLIC RECORDS REQUEST (TOOLS)

Website: IFOIA.org – request generator wizard, database of agencies and offices and resource page

MuckRock – cost $$ - files requests and automates the process



# INTERROGATORIES

- Either answer the questions or object to the questions, e.g. overly burdensome, irrelevant, beyond question limit
- Used against your client at trial
- Keep answers short and simple – only answer the question that is asked – but don't be too evasive
- Response deadline, typically 30 days
- Continuing duty to supplement responses
- Signed under penalties of perjury
- If object, no duty to respond until judge rules on objections but an response and still present objection as well

# REQUEST FOR PRODUCTION OF DOCUMENTS

- No production of documents if have a legal objection
- Produce all documents if no objection
- Produce documents, in part, and others withhold if legal objection(s) for some and/or the inability to comply
- No production of any documents based on inability to comply

**Common Mistakes:**

- Only giving partial incomplete objection – no proper citations, authority
- Depending on jurisdiction – missing mandatory language per rules
- Waiting to the last minute to respond
- Relying solely on your client to provide documents
- Over production of documents because didn't want to review or redact – laziness
- Unorganized documents
- Missing ESI – online requests or other relevant requests
- Preservation errors



# REQUESTS FOR ADMISSION

- Respond to each as Admit – or – deny
- If fail to respond within the allotted time frame, deemed admitted
- Used against your client at trial
- In drafting – single simple statements for each request listed; don't overcomplicate a request.
- Only answer the statement presented

# DEPOSITION REQUESTS/NOTICES

| | |
|---|---|
| Use | Use court forms if available |
| Make | Make sure serve properly under the rules |
| Couple | If want the deponent to bring records, couple with a Subpoena Duces Tecum |
| Send | Send to correct person and address |
| Give | Give requested notice under the Rules |

# DISCOVERY RESPONSE AND DOCUMENT PRODUCTION MISTAKES TO AVOID



# IMPROPER USE OF OBJECTIONS

- **General Objection to all requests and discovery**
  - **Useless but defense attorneys love this objection**
- **Vague, Ambiguous, Argumentative, Overbroad, Unduly Burdensome, Not Reasonably Calculated to Lead to the Discovery the Admissible Evidence**
  - Use sparingly, boilerplate, disfavored by Judges
- **Calls for Legal Conclusion**
  - Use sparingly
  - An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." Fed. R. Civ. P. 33(a)(2).
- **Conjecture/Speculative**
  - Okay for Plaintiff – not plaintiff's job to guess what could happen in alternative universe

# IMPROPER USE OF OBJECTIONS

- **Broad, uncertain, unintelligible**
  - Valid if true, don't overuse
- **Calls for Privileged Information**
  - Attorney-Client Privilege
  - Work Product Doctrine; Attorney Work Product in Anticipation of Litigation
- **Costly/Burdensome**
  - Copying costs, photos, voluminous docs, e-discovery, storage issues
  - Suggest alternative – review at storage location, split costs, requesting side absorb the cost – Fed. R. 26(g)
- **Equally Available Information**
  - Valid if true
- **Compound, Conjunctive, or Disjunctive Question**
  - Alerts opposing counsel that using compound questions to make end run around question limit

# IMPROPER USE OF OBJECTIONS

- **Self-incrimination – 5th Amendment**
  - Valid
- **Harassing, Oppressing, Embarrassing and Annoying Requests**
  - In whole, or in part
  - Irrelevant
- **Seeks Information Not in Possession, Custody, or Control – No Personal Knowledge**
  - Valid
- **Cause Undue Hardship**
  - Increase cost of litigation
- **Exceeds Number of Allowable Interrogatories/Requests etc.**
  - Valid, cite the rule in the objection

# LOCAL/JURISDICTIONAL OBJECTIONS

**Watch Out for Local Objections/Jurisdiction Specific Objections**

If you are a plaintiff's lawyer in Maryland, you must know this rule. If the defendant has surveillance films or Facebook posts of your client and wants to use them as evidence, they must be disclosed AFTER the plaintiff's deposition. So asking a question that covers this will not protect your client from getting blindsided with this impeachment evidence at a deposition.

Shenk v. Berger, 1991, 587 A.2d 551, 86 Md. App. 498 (1991).

# ANSWERING SUBPOENAS: DO AND DON'T

Recipient **MAY**:

- Comply with the subpoena and provide the requested testimony and/or documents.
- Serve written objections to a document subpoena.
- Move to quash or modify the subpoena.
- Move for a protective order.
- Contact the party who served the subpoena to informally resolve the issue.
- Contact an adverse party to the litigation who did not serve the subpoena to have that party exercise its rights against the party who issued it.

(1) Decide potential objections

(2) Present the objections

(3) Compliance

# STEPS TO RESPOND TO SUBPOENAS

# DISCOVERY DEFICIENCIES

| Memorialize | Use | Go through |
| --- | --- | --- |
| Memorialize all in a “discovery deficiency memo” – organized | Use the memo as backbone for motion to compel | Go through the opposing party responses one-by-one |

CONFIDENTIAL INTERNAL MEMORANDUM

To: Attorney
From: Paralegal
Date: November 11, 2018

Subject: Picard v. Picard – Discovery Deficiencies Memo

## Deficiencies with Respect to Answers to Interrogatories

Interrogatory No. 9. For this request for a list of all marital property, including type of property, basis for claim that it is marital, cost of acquisition, and present value, Wife failed to provide an itemized list of furniture, furnishings, art, and appliances in the marital residence and the present value of each item. Husband no longer resides in the marital residence and therefore is unable to compile this list.

Interrogatory No. 10. For this request for information regarding business interests, including nature of interest, percentage of interest, and estimated value of interest, Wife failed to provide her estimated value of her medical practice and the percentage of her interest.

## Deficiencies with Respect to Requests for Production of Documents

Document Request No. 2. For this request for documents reflecting the income, expenses, assets, or liabilities for any business interest, Wife failed to produce partnership income tax returns, balance sheets, profit and loss statements, income statements, or other documents reflecting the income, expenses, assets, or liabilities of her medical practice.

# REVIEW, REDACT, PRODUCTION OVERSIGHTS

**Applying effective redactions is a two-step process:**

- Accurately identifying the information to be redacted in documents to be provided/ released; and

- Applying the redactions to ensure recipients are not able to retrieve the redaction information, be it by simple means or using more sophisticated tools.

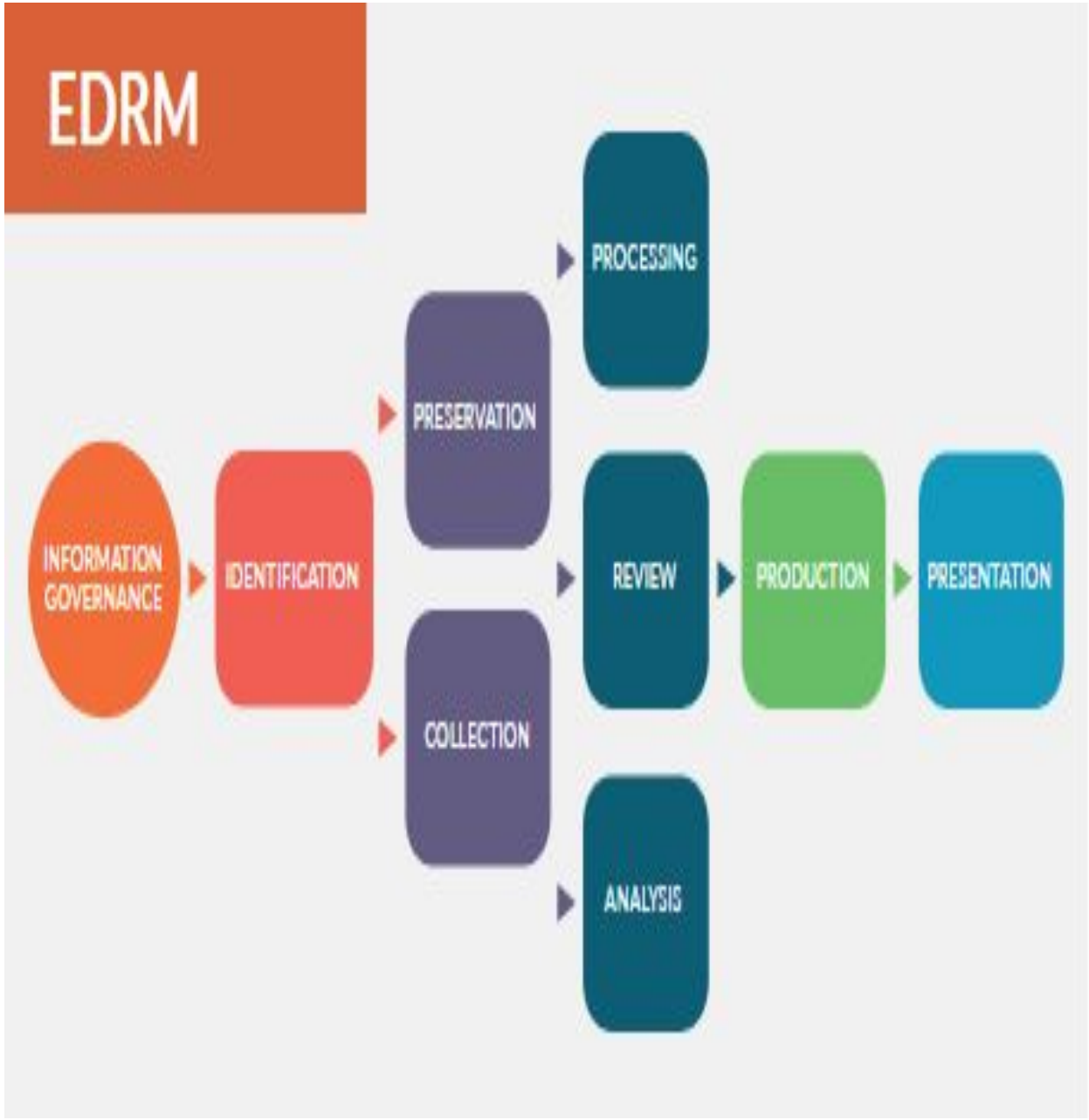
# TOP MISTAKES IN DOCUMENT PRODUCTION

- Ineffective Redaction
- Extra/Orphaned Files
- Not Producing Enough or Too Little
- Failure to Communicate
- Not Organized
- Missing Files – Not Obtaining In Time for Production
- Document Certifications
- Not objecting or producing documents already objected to
- Not reviewing production before it goes out
- Procrastinating



# ELECTRONIC DISCOVERY PITFALLS

# ELECTRONIC DISCOVERY REFERENCE MODEL (EDRM)



# ELECTRONIC DISCOVERY REFERENCE MODEL (EDRM)

**Information Governance (IG):** policies, procedures, processes, and controls implements to manage electronic information in a company. E-discovery is part of the IG and how things are organized, stored, saved, and ultimately produced.

*** **Sidebar: What stuff is easily overlooked?**

**Identification:** litigation foreseeable, parties have a legal duty to preserve relevant ESI. Determining what is relevant falls into this stage. Discovery teams use variety of methods, e.g., review of case facts, interview key players, assess data environment

**Preservation:** protect the information from "spoliation" – legal term for any destruction or alteration of evidence. Most common method is a legal hold, which is a formal communication sent from the legal team to the relevant data owners/custodians instructing them to not delete certain ESI.

*** **Sidebar: What are some common preservation mistakes?**

**Collection**: gather and centralize documents and data. Collection methods and technologies vary. Ensure all contents and metadata (date created, filed size, etc) are not altered as result of collection process.

*** **Sidebar**: **What are some oversights on collection and requests?**

**Processing**: Preparing collected ESI for attorney analysis and review. Typically but use of specialized software, processing might entail extracting files from folders, deleting meaningless system data, or converting certain file formats in preparation for attorney review.

**Review**: Most expensive stage. Evaluate ESI for relevance and attorney/client privilege. Organizations typically outsource review to law firms. Technologies allow in-house legal teams to use artificial intelligence tools to distinguish between relevant, non-relevant, and privileged documents. Time savers and money savers

*** **Sidebar**: **What are some review and production pitfalls?**

**Analysis**: evaluation of the ESI for content and context, including key patterns, topics, people and discussion. This really happens throughout the whole process though.

**Production**: involves electronic evidence is displayed as evidence at hearings, depositions, and trials.

# QUESTIONS ?

