Introduction

In *The Checklist Manifesto*, Dr. Atul Gawande demonstrates how checklists are valuable when undertaking complex tasks, such as performing surgery or flying an airplane. Dr. Gawande explains that a good checklist can help even highly-trained and skilled professionals avoid preventable mistakes.  

Dr. Gawande showed, for example, that by using a checklist during surgery, doctors dramatically improved patient outcomes. The lessons learned in the complex world of surgery are transferable to complexities faced in litigation, in particular to e-discovery. Litigation teams handling e-discovery, like surgical teams performing surgery, need to plan and communicate efficiently at all stages of the process and can benefit from a clear and consistent list of tasks. While the authors are not the first to suggest that litigators could benefit from an e-discovery checklist, there is a need for a concise e-discovery checklist that focuses on the needs and challenges of government personnel. To that end, this article is accompanied by a “Chronological Checklist of E-Discovery Fundamentals for Federal Government Professionals” (“Checklist”) to provide practical guidance to those involved in or anticipating involvement in civil litigation. The authors recognize each case is fact-specific and strongly encourage readers to remember that a checklist should not be a substitute for an attorney’s analysis of the particular facts and law at issue in a case.

Dr. Gawande suggests that checklists can be applied to a wide variety of tasks, including legal work, to avoid errors and to improve performance. Many of the situations that Dr. Gawande explored show why a good checklist could benefit legal professionals in managing e-discovery. Like flying an airplane, litigation can be highly stressful and technical. Litigators and

---

1 The views expressed here are those of the authors alone and do not necessarily reflect the views of the Department of Justice or the Securities and Exchange Commission.

2 Atul Gawande, *The Checklist Manifesto* (2009). The authors wish to thank Daniel Smith, Trial Attorney in the Environmental and Natural Resources Division for referring them to this insightful book.
their teams often handle several projects simultaneously and work under extreme time pressure as a result of multiple deadlines in different cases. Under such pressure, mistakes may occur. As with performing surgery, the e-discovery process brings together many different types of professionals, including lawyers, litigation support personnel, information technology specialists, and records managers, who must coordinate their work to successfully manage discovery. An error by one member of the team can easily lead to a critical failure. Indeed, Dr. Gawande shows that one of the best consequences of a good checklist is that it facilitates communication and teamwork, critical elements to a successful litigation team.

This article will outline each of the fundamental tasks for essential issues or stages in the e-discovery process. It will also explain when in the life of a case certain e-discovery legal strategies or tasks should occur and provide practical guidance for each stage. This article will also provide suggestions on how to manage litigation costs. By focusing on coordination, proactive planning, and communication, this article will show how the Checklist can assist government litigation teams effectively and efficiently manage the e-discovery process.

I. Forming the E-Discovery Team

The first two tasks of the checklist may seem obvious, but they are critical and often overlooked. First, because successful management of the e-discovery process requires that individuals with different types of knowledge and capabilities work together effectively, it is important to begin by forming a capable e-discovery team. Complex cases may require several individuals with unique skills to manage electronic information. However, attorneys often do not think of who should handle electronic information until the time comes to collect the information or until a crisis arises. By this time it may be too late to avoid problems.

Completing the first task of assembling a team may be as simple as designating people with different responsibilities in the process, having them introduce themselves to each other, and letting each person know how his or her responsibilities relate to those of the other team members. If the team identifies any essential knowledge or responsibility gaps of team members, the team can take steps to fill those gaps before gaps can impact the team’s performance. If nothing else, forming the e-discovery team once litigation is filed or reasonably anticipated starts the e-discovery conversation which can prompt people to think proactively about e-discovery issues likely to arise in a case. Including legal support personnel and information technology specialists in team meetings or strategy sessions as the case progresses, even when the meetings are not focused on discovery, can prove beneficial. Among their many purposes, their participation will help the team consider the e-discovery implications of strategy decisions.

II. Consulting the Local Court Rules

The second obvious and essential task is to consult the local rules for the applicable jurisdiction. Attorneys who are used to checking local rules before filing a dispositive motion or

---

3 As titles may vary agency to agency, we use the terms “litigation support personnel,” “information technology specialists,” and “records managers” here and in the checklist broadly to include people with a wide variety of qualifications and job descriptions.

NOT OFFICIAL AGENCY POSITION
in preparing pre-trial materials may not think to consult local rules on e-discovery, particularly before a complaint is filed or at the very outset of a case. The Checklist highlights the need to consult the local e-discovery requirements from the very beginning of the case. This is important because several federal districts have special local rules, forms, or guidelines covering electronic discovery. For example, the District of Kansas has “Guidelines for Discovery of Electronic Stored Information” and the District of Maryland has a “Suggested Protocol for Discovery of Electronically Stored Information.”

Some federal district judges and magistrate judges even have their own individual requirements.

III. Addressing Preservation

After the e-discovery team is formed and the team consults the local rules, the next fundamental task of the Checklist is to address preservation. At least since Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003), a seminal case imposing sanctions for the failure to preserve potentially relevant electronic information, parties who reasonably foreseeable litigation should preserve electronically stored information (ESI) that may be relevant to the case. Once the duty to preserve has been triggered, the e-discovery team must address the appropriate scope of preservation. The scope of the government’s preservation obligation should be based upon the reasonably foreseeable claims and defenses in the anticipated or pending litigation.

The e-discovery team should begin by exploring whether the agency has any applicable preservation records policies, procedures, or guidelines. For instance, potential document custodians may have practices in place for preservation of information when litigation is reasonably anticipated. Even if there are no such policies or procedures, guidelines may exist detailing best practices for litigation holds. Obtaining a copy of any policies, procedures, or guidelines can help the e-discovery team implement proper preservation of relevant documents.

Next, the team needs to address: (1) the time period of potentially relevant information, (2) the subject matter of the potentially relevant information, (3) the identity of individuals who may have possession, custody or control of the potentially relevant information, and (4) the location of systems which may store potentially relevant information. A review of the claims and defenses in the matter should inform this analysis. If litigation is just “reasonably anticipated,” then the subject matter of the electronic information for preservation will be based on the claims and defenses that are reasonably likely given the circumstances that gave rise to the anticipation of litigation. Over time, the nature of the claims and defenses in the case may change, which can affect the scope of preservation so needs should be periodically re-evaluated.

Once the scope of preservation is considered, the team needs to determine the identity of key personnel with possession, custody or control of the ESI and the systems or locations where potentially relevant information may reside. These key individuals would include persons directly or indirectly involved in the events giving rise to the litigation. Key individuals may also include those who had no direct involvement in the events giving rise to the litigation, but who have custody or control of systems which store potentially relevant information. Therefore,

---

4 See e.g., http://www.ediscoverylaw.com/promo/current-listing-of-states-that/
in addition to identifying the key individuals involved in the issues at dispute, it is necessary to
determine the location of systems that may store potentially relevant information, and identify
the key individuals with control of those systems. The e-discovery team also needs to carefully
consider its legal obligations with respect to preservation of potentially relevant information and
determine the steps necessary to identify where that information could be located.

After considering the scope of preservation, the team needs to decide how to implement
preservation and issue a written litigation hold. A “litigation hold” requires notice to the key
individuals who possess potentially relevant information alerting them to save specific
information. A litigation hold also typically necessitates turning off any automatic deletion
program that might destroy potentially relevant electronic information. Additionally, the
litigation hold requires that a party take proactive steps to ensure that the litigation hold remains
in place during the course of the litigation, such as sending periodic reminders to key custodians.
It is important for the team to document preservation decisions during the process as well as the
reasoning behind those decisions.

As part of the preservation task, the e-discovery team should consider if potentially
relevant information may be in the possession of an opposing party or a non-party. The team can
then determine whether it is necessary to take any proactive steps. A litigation hold letter to an
opposing party or potential party may be sufficient to trigger a duty to preserve under certain
circumstances. A subpoena or preservation letter to a non-party may also trigger preservation if
the request is reasonable and sufficiently specific.

IV. Assessing Capabilities Regarding Methods of Search, Collection, and the Form
of Production

In addition to preservation of ESI, the e-discovery team needs to assess capabilities with
respect to methods of search, collection, and form of production. When assessing the different
forms of production and the accessibility of information from different systems, the e-discovery
team should evaluate the costs, burdens and time necessary to search, collect, and process the
information. This evaluation will help the team determine what efforts are needed and
proportionate based on the stakes in the litigation. This analysis is also encouraged by the rules
of civil procedure. Federal Rule of Civil Procedure 34(b)(1)(C) provides that a requesting party
can specify a particular form or forms by which ESI is to be produced. A responding party may
object to the form requested and state the form or forms it intends to produce, Fed. R. Civ. P.
34(b)(2)(D), but if no form is specified in the request, the responding party must produce ESI in
“a form or forms in which it is ordinarily maintained, or in a reasonably useable form or forms.”
Fed. R. Civ. P. 34(b)(2)(E). The form of production of ESI is also one of the topics that the

In the course of identifying the custodians of information, the e-discovery team should
determine how likely it is that the custodian has relevant information, where it is located, and
how easy it is to access. Particularly when information is not readily searchable through
available collection tools, the team should assess whether or not the information is “reasonably
accessible.” The Federal Rules of Civil Procedure provide that a party need not provide
discovery of ESI from sources that are not reasonably accessible because of “undue burden or

NOT OFFICIAL AGENCY POSITION
cost.” Fed. R. Civ. P. 26(b)(2)(B). Because a party making this claim has the burden of proof in response to a motion to compel, the team must determine the costs involved in accessing the information and its potential relevance in evaluating whether to raise this argument.

Determining where the relevant information may exist, how to preserve it, retrieve it, and produce it, requires the coordination of every member of the e-discovery team. Each team member brings unique skills to bear on these assessments. For example, the lawyer can assess the legal requirements and consider the risks and benefits of different courses of action. The information technology specialists can determine the costs and burden of assessing information from various sources and processing it into different forms. Consequently, communications checks are essential in completing this task and the team must carefully document the decisions it makes and the considerations informing those decisions.

V. Considering Issues Regarding Privileges and Personally Identifiable Information and Other Sensitive Information

With the proliferation of ESI, it has become much more challenging for parties to protect privileged and other sensitive information. Not only do individuals and agencies create more information than when it was a paper-only world, but the information is not always readily apparent, such as when it resides in metadata. Therefore, one of the fundamental tasks of the e-discovery team is to determine how to protect privileges and other sensitive information.

Because of the greater potential for disclosure of privileged information during electronic discovery, recent amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence have addressed how a party can retrieve privileged information and be protected from waiving a privilege. The 2006 Federal Rules of Civil Procedure amendments include a procedure whereby a party could “clawback” privileged information that had been released to another party. See Fed. R. Civ. P. 26(b)(5)(B); Fed. R. Civ. P. 45(d)(2)(b). These amendments, however, only provided a procedure for retrieval of privileged information. There was no guaranteed substantive protection from a privilege waiver until enactment of Fed. R. Evid. 502 in 2007. Under Rule 502, parties can agree that a release of privileged information does not constitute a waiver of the privilege. Fed. R. Evid. 502. Further, if the agreement is endorsed by the Court through a Rule 502(d) order, then the release of privileged information should not constitute a waiver even to a person who is not party to the litigation. Significantly for government professionals, Rule 502 applies to the attorney-client privilege and the attorney work-product protection. The government, however, can still enter a clawback agreement with an opposing party which provides that the disclosure of information protected by a government privilege does not waive the privilege.

Consequently, the e-discovery team should determine whether to enter a Rule 502(d) clawback order if there is any significant amount of electronic discovery in the case. Since, a Rule 502(d) order can protect a party from waiver of the attorney-client privilege and the attorney work-product protection, it can impact the extent of pre-production review necessary for protection of those privileges. Because reviewing information for privileges can be extremely

---

5 Rule 502(d) has been applied by analogy to the deliberative process privilege in at least one case. See Sikorsky Aircraft Corp. v. United States, 2012 WL 4018026 (Fed. Cl. Sept. 13, 2012).
costly and time consuming, this is an important consideration. This does not mean that a party can forego pre-production review of information based upon the entry of a Rule 502(d) order. There may be some information that the government does not want the opposing party to see under any circumstances, despite the fact that the information can be clawed back with no risk of waiver.6

The e-discovery team should first assess the potential for privileged or sensitive information to exist within its own data collections. Additionally, because a Rule 502(d) order will usually need to be negotiated with other parties, the team should also make an assessment of the needs of the other parties with respect to protection of privileges and sensitive information. Knowing the other parties' likely positions will help in coordination of mutually beneficial agreements.

In addition to determining the utility of a Rule 502(d) clawback order, the Checklist recommends that the e-discovery team determine the scope, costs, necessity, mechanics, and timing of review of information, with and without a Rule 502(d) order. The team needs to know about the potential existence of Personally Identifiably Information (PII), confidential information and privileged information, as well as the risks of disclosure and the costs and burdens of review. In particular, the team should consider the utility of different types of review and how each can impact risk, burden, and cost. The team may be able to use computer searches and sampling, for example, to streamline the review process. This evaluation will usually require the input of information technology specialists. Only after this analysis can the team know whether to seek a Rule 502(d) order and what type of privilege review will be necessary.

This task also requires the team to determine whether other court orders are needed to protect PII and other sensitive information. For instance, information that is subject to Privacy Act protections, such as addresses and social security numbers, needs to be protected. A protective order that meets the court-ordered disclosure exception of the Privacy Act in 5 U.S.C. § 552, may be sufficient, but the team should also check into whether there are any applicable local court rules.

Importantly, the team should thoroughly explore the costs, risks and benefits of alternative privilege strategies with the proprietor of the information. As part of this analysis, the government may consider the importance of the privilege, the requirements in defending privilege claims, if challenged, and the likelihood of success (as many government privileges are qualified). As with other steps in the e-discovery process, the team should document its decisions.

VI. Preparing for the Rule 26(f) Conference

Addressing preservation, determining capabilities with respect to search, collection, and form of production, and considering privilege issues should all occur prior to, and in preparation for, the Fed. R. Civ. P. 26(f) conference. In fact, Rule 26(f) specifically states that the discovery plan which comes out of the conference and is submitted to the court must state the parties’ views and proposals on “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced,” and “any issues about claims of privilege . . . including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order.” Fed. R. Civ. P. 26(f)(3)(C) & (D). Thus, the parties must address at the Rule 26(f) conference the form of production of ESI and whether they want to pursue a Fed. R. Evid. 502(d) order.

Having considered these issues before the conference, the e-discovery team will be able to determine whether it would be beneficial to have an information technology specialist present at the conference. For instance, an information technology specialist may be the only person who can assess particular capabilities, burdens, and costs raised by the opposing party on-the-spot at the conference if unanticipated issues arise. In addition to having assessed its own ability to produce information, the team should determine what information it needs from other parties, including where potentially relevant information is likely to be located and which form or forms of production will provide access to that information. The Rule 26(f) conference provides an early opportunity to agree to an appropriately proportionate scope of preservation and discovery, potentially saving the government and opposing party substantial costs.

Having already determined the ability to search potentially relevant document repositories, the team can decide whether to pursue agreements with opposing counsel regarding use of specific search technologies, de-duplication, and methods of pre-production review. For instance, an agreement regarding searching and sampling of data can potentially reap great cost savings for all parties by narrowing the volume of documents subject to review and production.

After conducting all of these preliminary analyses, the team should formulate a strategy for reaching agreements with respect to the scope of discovery, the methods for retrieval of information, the form of production, the timing of production, and the protection of privileged and sensitive information. If the team believes that it possesses a large amount of ESI to produce and has limited resources, for example, the team may want to negotiate a rolling or phased production. The team can advocate effectively for this if it has carefully considered the amount of potentially relevant information it may have and the time and cost of review and production.

Each member of the team should understand his or her role and responsibilities in preparation before and during the conference. For example, if the team decides that the information technology specialist should be present at the conference, the team should discuss whether the specialist should be directly involved in negotiations with the other parties or communicate through legal counsel. Effective planning for the Rule 26(f) conference also includes anticipating areas of disagreement and formulating strategies for dealing with those disagreements. The team may need to seek court-ordered remedies for e-discovery disagreements, which can include protective orders, motions to compel, and cost-shifting.
VII. Follow-Up to the Rule 26(f) Conference

The Rule 26(f) conference is likely to produce its own task list as a result of the negotiations. All agreements, such as those regarding scope of preservation, the form of production, the timing of production, and other document matters, should be memorialized in a document production protocol. If the parties have agreed on procedures to protect privileged and sensitive information, then the parties will need to draft, execute, and file the appropriate agreements and protective orders as necessary. Shortly after the conference, the team should coordinate the roles and responsibilities of the team members to accomplish the outstanding tasks.

With respect to areas of disagreement that could not be resolved at the Rule 26(f) conference, the team will need to reassess its strategy and consider next steps. The team may evaluate additional options and seek to reopen negotiations. For some matters the team may decide that it is necessary to seek relief directly from the court. In any event, the parties will need to file a Rule 26(f) Discovery Plan with the court. Fed. R. Civ. P. 26(f)(2) & (3). Finally, the team should consider whether it needs to re-visit prior steps in the process based upon information learned during the conference and decisions made at the conference.

VIII. Considering Cost Savings to the Government

One task that does not neatly fit into the chronological framework of a checklist is considering cost savings. It is placed at the end of the Checklist, but it should be considered at every stage from the beginning of the process. The importance of this task cannot be overstated.

First, the government should seek to negotiate an appropriate scope and phasing of discovery early in the case. Considering the relevant issues in the case and the stakes in the litigation, the government should seek to identify the custodians and data collections most likely to have the information necessary to meet the needs of the litigation as early as possible. Under Fed. R. Civ. P. 26(b)(2)(C)(iii) a court can limit discovery where “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues.” The government should proactively negotiate an appropriate scope of discovery (and thus preservation), so that actions are proportionate to the case.

Additionally, with respect to ESI the rules of civil procedure specifically provide that a party need not produce information that it can prove is not reasonably accessible given undue burden and costs, though the court may nonetheless order discovery if such discovery is justified. See Fed. R. Civ. P. 26(b)(2)(B). The Committee Notes advise that the ability to search “electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties’ discovery needs.” See Advisory Committee’s Notes to Fed. R. Civ. P. 26(b)(2) (2006 Amendment). Thus, a requesting party should evaluate information from reasonably accessible sources before insisting that information be produced from inaccessible sources. Id. The burden
and complexity of discovery should not overwhelm and distract from an appropriate focus on the merits of a case.  

The earlier an appropriate scope of discovery is determined, the more likely the government (and all parties) will avoid incurring unnecessary costs. Thus, if the parties cannot reach an early agreement regarding the scope of discovery, the government should seek early court assistance in placing reasonable, proportionate limits on the scope of discovery.

Another way for the government to save costs is through determining forms of production that make the most economic sense for the case. Certain forms of electronic information are more amenable to computer searching which can reduce costs by facilitating review for responsive, privileged and other sensitive information. Additionally, particular forms of electronic information are more readily subject to “de-duplication,” a process whereby duplicates and near duplicates are organized to help avoid redundant and inefficient review. Thus, early consideration of the form of production can increase efficiencies and save limited resources.

Assessing potential privilege issues early and determining how a Rule 502(d) order can impact privilege review can also help avoid needlessly wasting time and resources. Careful consultation between the litigation team and agency stakeholders regarding the risks and benefits of the different options for protecting privileged and sensitive information will help focus resources on what matters to the litigation in consideration of the government’s other interests and obligations. If thoughtfully employed, Rule 502(d) is a valuable tool for minimizing the government’s costs. The government should also consider how computer searches and sampling can assist in efficiently performing reviews to protect privileged and sensitive information.

Of course, effective early decision-making to improve efficiencies and save government resources cannot occur without consulting the right people during the process. Thus, it is essential that early and frequent coordination occur among people with the necessary expertise to address the issues. For example, counsel can discuss the legal implications of a Rule 502(d) order and information technology specialists can provide information on the effectiveness of computer searches for privileged information. Only working together and with others (such as records managers and privacy counsel), can the e-discovery team determine the most effective and efficient strategy. Consequently, identifying the appropriate expertise for the team early in the case and frequent coordination are essential to ensure that cost savings to the government are considered throughout the process.

IX. Being Attentive to any Change in the Identity of the Parties and the Nature of the Claims and Defenses

The last task in the Checklist is to return to prior steps whenever there is a change in the claims and defenses. This underscores the importance of a periodic re-evaluation and highlights that the e-discovery process is iterative. As the process moves forward, it is often necessary to

---

re-visit earlier steps. During the course of litigation, cases change. Parties may be added or dismissed or claims and defenses may be resolved or added. Information learned during discovery or through motions practice may also expand or contract the list of custodians and what the parties reasonably believe to be the universe of “potentially relevant information.” The e-discovery team needs to be sensitive to the evolving complexity of the case and attentive to any change in the nature of claims and defenses at issue. If there is a change, the team will need to determine whether it affects the scope of information at issue, necessitating reassessment of prior decisions regarding preservation, form of production, and the protection of privileged or other sensitive information. The team may even need to reassess whether it has the right people identified on the team to deal with issues likely to arise. The Checklist encourages revisiting all tasks as the case evolves.

Conclusion

The e-discovery process is filled with complexities and requires close and methodical collaboration among professionals with different areas of expertise. Dr. Gawande stated that a good checklist needs to be tested and modified, as he found when developing the surgical checklist for World Health Organization. The same is true of this Checklist for e-discovery. We do not propose the Checklist as the final solution to navigating the e-discovery process for government professionals. Rather, it is an organic guide to assist government professional when faced with e-discovery challenges. Even highly skilled and experienced professionals can benefit from an outline when creating and maintaining a healthy litigation strategy.