

Discovery in Tax Litigation – Document Processing and Review

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In this post, Desmond and Hlinka discuss best practices for reviewing collected documents during the discovery phase of tax litigation and offer suggestions for avoiding common pitfalls.



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Continuing [our series](#) on [e-discovery](#), the next step is document processing, analysis, and eventually production. You preserved and collected your client's documents and are now ready to start reviewing the documents. But before you can start your review, you need to consider your options. Decisions on storage, processing, filing, tagging, and systemic concerns will dictate how information flows through your process and could save you some major headaches and lost time later. In fact, managing your documents correctly early on can make or break your case.

Setting the Stage Early

Now that you have gathered all documents that you think might be relevant to the claims or defenses in your case, it's time to review the stack of documents (or hard drive) and plan out what discovery you may need in the next step (a preview of the next blog post). But before you dive in to review the documents, there are some decisions you need to make right now.

In district court, the parties are required to develop a proposed discovery plan. See Fed. R. Civ. P. 26(f). As a part of this process, the parties discuss any issues about "disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced." Fed. R. Civ. P. 26(f)(3). In other words, the parties are required to discuss in what format electronic discovery must be produced (native, TIFFs, type of production, etc.). While the U.S. Tax Court does not have an explicit rule that requires developing a proposed discovery plan, arguably

these conversations should still occur as a part of the Tax Court's informal discovery requirements. See Tax Court Rule 70(a)(1), 70(c); see also Tax Court Rule 72(b)(3). At a minimum, the parties should confer early on and exchange e-discovery protocols on the format of productions.

Agreeing on the scope and format of discovery early on allows you to treat your documents consistently in a manner that will meet those requirements. For example, if the parties believe there is no need for native information contained from email, there would be no need to collect or process that data into a produceable format. If your case has a large quantity of physical documents, there may be a need to collect and process those documents (and scanning large quantities of documents can be time intensive and costly). Or if your case has Excel spreadsheets or databases of information (for example, accounting workpapers or information contained in QuickBooks databases), the parties should discuss how to best process, maintain, and produce such materials if there is information in the natives that are important to the case.

Having these conversations early with the opposing party will save the parties collectively hours of time and possibly significant resources that you could direct elsewhere. Recall from the first post in this series that discovery is meant to be proportional to the needs of the case. The best way to achieve this is by communicating with the other side and cooperating (to the extent possible) in the discovery process. You will still likely encounter disputes during the discovery process, but hopefully the parties can focus the disputes on the issues that are more pressing and not the format of the documents sought or produced in discovery.

Processing Documents

When it's time to start processing the documents that you have collected, you have several options to consider for processing and reviewing documents. But before you jump into the actual processing, the first step is organization.

You want to ensure your documents are systemically organized to facilitate easy access and recall when needed. Consider categorizing documents by type, date, or relevance to issues in the case. You also want to ensure that, if applicable, you are maintaining the files in the same electronic file structure they were retrieved from the client's computer system. See, for example, Tax Court Rule 72(b)(3) ("(A) A party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request; (B) If a request does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."); Fed. R. Civ. P. 34(b)(2)(E) ("(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.").

Once the documents are organized, you will need to select a method to review the documents.

Using an e-discovery software. Managing large volumes of documents generally requires the use of e-discovery software. Whether you use Relativity or a similar platform, these sophisticated systems

make the process significantly more streamlined. These tools allow for efficient organization, review, and analysis of documents. These systems allow for tagging of documents to identify key individuals, issues, hot items requiring special attention, and even confidential or privileged information. You can also quickly view the metadata for the documents you collected and focus your review on documents created between Year X and Year Y or between John Doe and Jane Smith. These tools offer automated completion of repetitive tasks, enhanced search capabilities and allow for quick collaboration with your team. Throughout the case, it pays to collaborate with your information technology specialist early and often to set up the workspace in any way that best suits your needs.

Using a “foldering” or manual review. When managing smaller volumes of documents, you may consider using a more manual review, such as reviewing documents locally on your computer. While this may seem more cost-efficient, depending on the type of review that you need to conduct, it may take more time on the back end. It also creates some possible snares for the unwary where you can inadvertently edit metadata or even alter the document itself.

Beyond choosing the right method for processing and reviewing documents, it’s also important to establish a set and consistent process for how you handle information coming into your system. As discovery continues, you will receive a constant stream of documents and data. You want to ensure you have a consistent process for how documents are coming in and processed into your document review system. This includes identifying who you receive documents from (including any passwords), who will receive documents, and how to coordinate uploads to ensure the documents, and their metadata, are loaded properly into your review workspace. If there are specific fields of metadata that you need to make sure are captured during processing, this needs to be flagged before submitting the documents for upload.

Reviewing Documents

After you have organized the documents and processed the documents, you want to conduct a thorough review of the documents. This process is essential to identify what is relevant to your case, what is privileged, and, critically, what is missing from your story. During your review, you will analyze the results of your review of documents. This helps you prepare for your opponent’s discovery requests, including what, if any, additional collection may need to occur, but also helps you strategize what you need to obtain from non-parties or the opposing party.

This may involve identifying patterns, inconsistencies, and looking for sources to corroborate the evidence. For example, say your client regularly completed their tax return with the same preparer every year. When you review the tax preparation workpapers, you see a questionnaire filled out by your client, but for some reason, its missing in two years. Another example could be strange gaps in communication. What if your client was using multiple emails? Other kinds of communication? Do you need to pull text messages from your client’s phone? Lastly, what correspondence did your client receive from the IRS? Before you even start discovery, is there merit to filing a Freedom of Information Act request?

Effective use of review platforms also allows for collaboration with team members (whereas a more manual review may only permit one person to access a document for review at a time and requires cross-referencing that team member's notes when accessing documents). This is particularly true for voluminous or complex cases, where such a large volume of documents inherently carries risks of unintentional disclosure or inadvertent tagging. However, this is also important in smaller cases where it is best practice to allow for second-round review or any privilege, confidential, or production decisions. Regardless, in cases of any size, it's important to develop a consistent process for the intake, processing and review of documents. You want to be consistent and thorough to avoid doing extra work.

Compliance

A robust processing and reviewing procedure will protect you and your client against common issues that arise at this stage. Consistency and an understanding of the documents ensure you are meeting your discovery obligations and prepared to protect what you need to protect.

Sometimes documents do not OCR correctly ("optical character recognition," meaning that the computer did not correctly interpret the text into searchable form). This prevents effective searching within the documents.

You want to ensure that you are maintaining the confidentiality of documents you have obtained from your client. Of course, discovery is inherently an invasive process in which confidential documents are sought, but to the extent necessary, it's required to protect sensitive information with robust security and access controls. You may want to consider whether a protective order is necessary in your particular case. You will also want to confirm privileged information is equally protected. For example, you client may have received an email from an accountant sent containing privileged tax planning information under [section 7525](#), but the document did not have any privilege heading or annotation and it was not marked as privileged.

While it is best practice to continue to monitor productions for such privileged or confidential material, even the best e-discovery professionals will occasionally face errors and challenges in coding and occasionally, unintentional disclosure of protected information happens. This is where Federal Rule of Evidence 502 becomes incredibly relevant. F.R.E. 502; see Tax Court Rule 143 (citing IRC [section 7453](#)). That rule states that where disclosure of privileged material was inadvertently done, the errant party needs to request to clawback the errant material as soon as possible. See generally F.R.E. 502(b) (citing Fed. R. Civ. P. 26(b)(5)(B)). While clawbacks are an unfortunate reality of a modern e-discovery, such a procedure can be an effective safety net to address accidents and should be considered part of a document processing procedure.

Conclusions

Effective document processing and review are crucial to presenting an effective case. By leveraging technology, adhering to best practices, and addressing challenges proactively, legal professionals can ensure that the discovery process is conducted efficiently. Taking such an approach will save you and your client time and money, as well as put you on the road to success.