

DISCOVERY TRAINING



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Today's course

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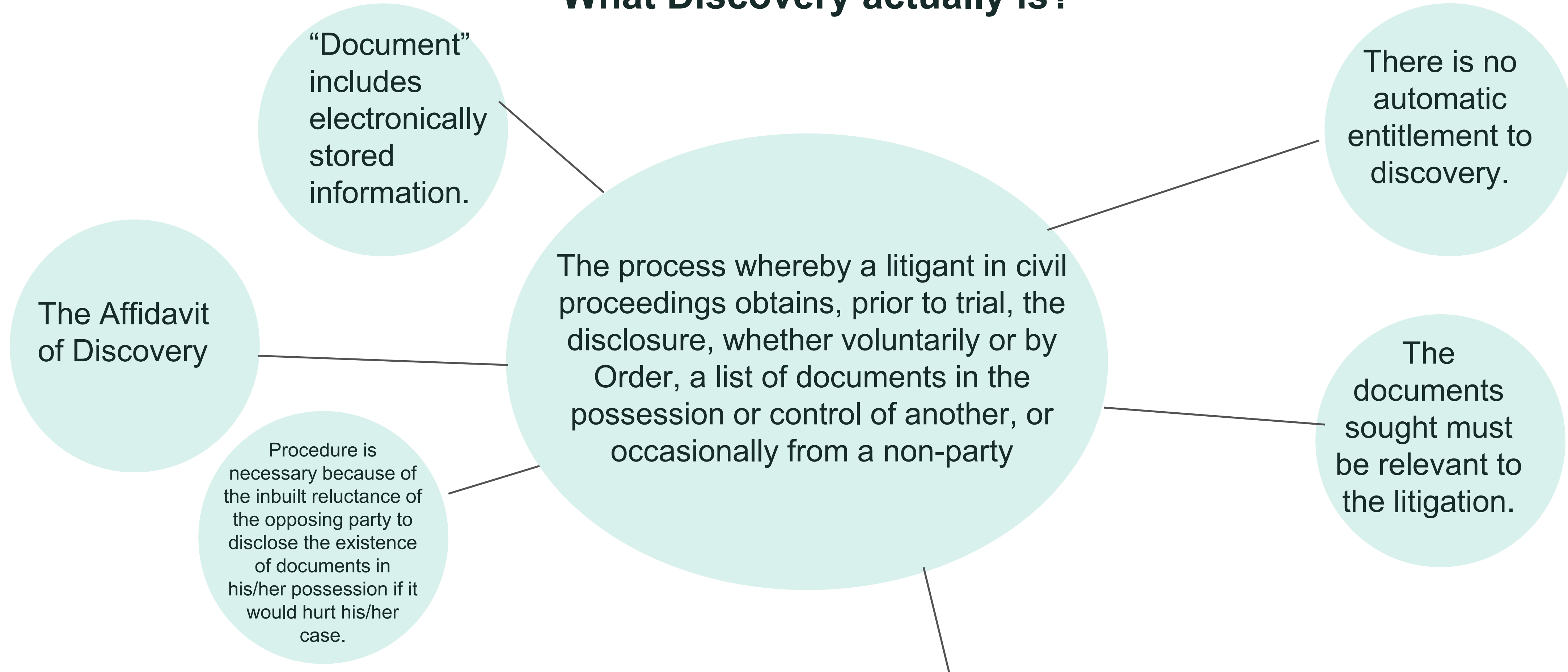
11 Managing State Claims & deadlines

Discovery Fundamentals



DISCOVERY FUNDAMENTALS

What Discovery actually is?



A basic point to be appreciated is that discovery of documents is merely a list of documents. Inspection entitles the party in question to inspect (to actually see) the documents and, if necessary, to take copies thereof.

Where it fits in Irish litigation (High Court/Circuit Court Context)

HIGH COURT

Order 31 of the Rules of the Superior Courts.

An agreement to make discovery has the same effect as an Order.

A request for voluntary discovery shall be made giving the other party reasonable period of time for agreement prior to the issuing a notice of motion. (O31,R12(12))

CIRCUIT COURT

Order 32 of the Circuit Court Rules.

An agreement to make discovery is now the same as an Order. S.I. No. 463/2026

A request for voluntary discovery shall be made at least 21 prior to issuing a notice of motion.

Key terminology

RELEVANCE & NECESSITY

Relevance: The purpose is to ensure that the court has all the relevant information before it when reaching a decision. Relevance arises from the pleadings and proceedings.

Necessity: The aim of discovery is to aid a party in the progress of the litigation and to prevent unfair evidential advantage being taken at trial.

DEPONENT

The person swearing the Affidavit of Discovery.

The Affidavit must comply with the Rules for making Discovery. Parts 1 and 2 of the first schedule, and the second schedule.

Documents in their power, possession or procurement.

CATEGORY

A defined group of documents sought or agreed.

The category must be set out clearly in the voluntary letter and on the notice of motion, with reasons

PRIVILEGE

A recognised basis for withholding inspection or production.

- Legal professional privilege
- Legal advice privilege

Voluntary Discovery vs Motion for Discovery

VOLUNTARY DISCOVERY

Written request detailing the categories sought with reasons supporting the relevance and necessity

HC: O31, R12

CC: O32, R1

EXPLAIN RELEVANCE AND NECESSITY

Clearly identified categories.

Linked back to the pleadings

Justified, reasoned and saving costs

MOTION

Formal application to the Court compelling a party to make discovery of categories set out in the request for voluntary discovery that remain disputed.

COMPLIANCE

Reasonable time (HC) v 21 days (CC)

Agreement to make discovery

Delivering the affidavit

Roles: client, solicitor, barristers, third parties, eDiscovery providers

CLIENT

Needs to identify who or what group are in possession of documents subject to a discovery order.

If any documents are missing, enquires need to be made and set out clearly in Affidavit.

THIRD PARTIES / NON PARTY

Most commonly An Garda Síochána, TUSLA and HSE parties.

Indemnify their reasonable costs incurred in the making of discovery.

SOLICITORS AND BARRISTERS

Identify relevant documents and categories, scope, temporal limit, privilege, preservation and compliance.

Draft voluntary letter and motion.

Ensure Affidavit of Discovery is in compliance with the Rules.

EDISCOVERY PROVIDERS

The term “e-discovery” is generally used to describe the discovery of electronically stored information and the particular issues that arise in the collection, review and eventual disclosure of that information in the litigation process.

Legal Framework & Obligations



Law & Procedures – What’s expected?

LAW

- Rules of the Superior Courts (RSC) [Order 31] provide for discovery of documents “*which are or have been in the possession, power or procurement*” of the deponent.
- In the RSC the pro forma affidavit provides that a deponent should aver that there are no other relevant documents in his or her “possession, power or procurement” or in the “*possession, custody or power*” of his or her solicitor or agent.
- Circuit Court Rules (CCR) [Order 32] provide for discovery of documents “*which are or have been in the possession or power*” of the deponent.
- In the CCR, the pro forma affidavit of discovery further provides that the deponent should aver that there are no other relevant documents in his or her “*possession, custody or power*”.
- District Court Rules (DCR) [Order 45B] both the rules and the pro forma affidavit of discovery provide for discovery of documents in a party’s “*possession or power of procurement*”.

Law & Procedures – What's expected?

PROCEDURE

- Closing of pleadings
- Request for voluntary discovery
- Reminder/warning letter typically issues (not a requirement under the Rules – both RSC and CCR)
- Motion for discovery issues
- Hearing of Motion
- Order - time within which to comply (usually 8-12 weeks)
- Where a party to proceedings fails to comply with discovery ordered (CCR) or ordered/agreed (RSC), the party in default is at risk of having the proceedings/defence struck out for failure to comply.

Core principles of Discovery in Ireland

RELEVANCE AND NECESSITY

The documents must relate to a matter in issue.

Discovery must be necessary for fair disposal or saving costs.

"Fishing Expedition".

PROPORTIONALITY

Obstacle to the fair disposal of proceedings rather than the converse

Once relevance and necessity has been established, it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of the opponent. *Framus Ltd & Ors v CRH plc & Ors* [2004] 2 IR 20

POWER, POSSESSION OR PROCUREMENT

O'Flaherty J in *Bula Ltd v. Tara Mines* [1994] 1 ILRM 111 stated:
A document is within the power of a party if he has an enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else.

ALTERNATIVES

Arises primarily in the context of non-party discovery.

Discovery will only be ordered where there is no realistic alternative (*Beatty v The Military Judge & Anor* [2021] IECA 69)

Obligation: Power, possession, procurement

DOCUMENT

In *McCarthy v. O' Flynn* [1979] IR 127 Henchy J indicated that documents includes any thing which, if adduced in evidence at the hearing of the proceedings, would be put in, or become annexed to, the court file of the proceedings. Further, Kenny J stated that the main characteristic of a document is that it gives information.

POSSESSION AND PROCUREMENT

Goes beyond documents immediately in possession.

It can include documents held temporarily and those held jointly with another or others, such as a director holding company documents.

POWER

In respect of "power" - at [28]-[29] of the judgment in *Thema*, Clarke J accepted the test identified by Lord Diplock in *Lonrho Ltd. v. Shell Petroleum* [1981] 1 W.L.R. 627 as: In that context, Lord Diplock defined the term "power" to mean:-

" ... a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future."

Discovery involving agents and third parties

IDENTIFY RECORDS HELD

By agents, consultants, insurers, contractors, An Garda Síochána, local authorities, and former service providers.

CHECK CONTRACT TERMS, ACCESS

Rights, control and practical ability to retrieve data.

Particularly relevant in workplace related claims.

Alternative mechanisms of obtaining the documentation required – FOI request/GDPR request.

NON-PARTY

If not within the power, possession or procurement of the party requiring the documentation sought, consider the non-party discovery procedures.

DISCRETIONARY

Non-party discovery is discretionary; address burden and costs.

Undertaking to indemnify the non-party for reasonable costs incurred in the making of discovery

Discovery will only be ordered where there is no realistic alternative (*Beatty v The Military Judge & Anor* [2021] IECA 69)

Categories of Discovery

CATEGORIES

Need to be linked to pleaded issue and evidential proposition.

It should be obvious to the reader why the category is sought.

REASONS

Provide a detailed explanation as to why the documents are necessary and proportionate.

The reasons should deal with relevance and necessity separately and expressly.

CATEGORY LIMITATIONS

Specify subject, period, relevant people or systems where justified.

Keep categories reasonable.

Avoid vague requests such as “all documents relating to the dispute”.

ELECTRONICALLY STORED INFORMATION

Where the discovery sought includes electronically stored information, specify whether such party seeks the production of any documents in searchable form and if so, whether for that purpose the party seeking discovery seeks the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested.

DSARs vs Discovery vs Investigations – Clear distinctions



DATA SUBJECT ACCESS REQUEST ("DSAR")

A formal request made by an individual to an organisation asking to see the personal data the organisation possesses regarding themselves.

Typically the manner in which documents are obtained in WRC cases.



DISCOVERY

Discovery derives from the archaic meaning of “discover”, namely “make known, divulge, disclose”:

Occurs within proceedings, by agreement or by Court Order.

Necessary for parties to obtain a fair trial.



INVESTIGATIONS

Internal fact-finding carried out for an organisation’s own purpose.

Not automatically privileged just because lawyers were involved or litigation was possible. Privilege depends on the circumstances and, for litigation privilege, whether the material was created for the dominant purpose of reasonably anticipated or existing litigation.

Internal investigations: O'Keefe & Anor v Rotunda Hospital ([2023] IECA 78)

High Court

Clinical negligence proceedings. The High Court refused the parents' application for disclosure of statements hospital staff had made to an internal risk-management inquiry following their baby's death. The hospital argued the statements were confidential.

Court of Appeal

The Court of Appeal (Allen J.) overturned that decision and ordered discovery of the statements. The hospital had not provided sufficient evidence to justify withholding them on confidentiality grounds. Noonan J. delivered a concurring judgment in which he

Key take aways

Confidentiality must be supported by evidence. The hospital relied on arguments that the statements had been given confidentially and that disclosure would undermine future investigations. However, there was no adequate evidence contained in the affidavits sworn on behalf of the hospital establishing the circumstances in which the statements were obtained, the purpose of the inquiry, or the claimed assurances of confidentiality.

Risks of inadequate discovery – case examples



MCNALLY V MOLEX [2022] IEHC 555 - Inadequate searches and third-party enquiries were heavily scrutinised.

The Court (Heslin J.) held, at para. 60, that:

'In my view, the evidence examined in this judgment thus far allows for a finding that the defendants' approach to their discovery obligations fell well below the standard reasonably expected of parties in their position. In my view, there has been a failure to comply with the Court of Appeal's discovery order in that (a) such searches as were carried out appear to have been materially deficient and (b) other necessary searches do not appear to have been carried out at all. This, in my view, constitutes a negligent approach to discovery obligations on the part of the defendants.'

At para 148, the Court went on to state:

'This judgment should serve as a timely reminder to the defendants, and the solicitors advising them, that searches, however extensive they may appear to be at 'first blush', will be wholly inadequate unless those searches engage thoroughly and comprehensively with the scope of the discovery order to which the defendants are subject and take full account, in terms of searches, of all potential sources.'

Risks of inadequate discovery – case examples

HURLEY V VALERO ENERGY [2022] IEHC 651

The Court held that discovery was inadequate for three main reasons:

1. Relevant documents were not preserved. The Court found that the Plaintiffs had breached their preservation obligation, whether innocently, negligently or deliberately. A six-year business-retention practice did not justify destroying documents that might be needed for litigation.
2. The initial discovery was incomplete. After the defendant brought its motion, further searches uncovered 227 documents that should have been included in the first affidavit of discovery.
3. The Second Schedule did not properly account for documents no longer held. It repeated discovery categories instead of identifying the missing documents or even their types, and did not state when the documents had left the Plaintiffs' possession. The Plaintiffs also gave no specific destruction dates. The Court accepted that at least some documents were destroyed after discovery had been requested and agreed.

The Court directed a further affidavit setting out, as far as possible, when documents were disposed of, their nature and number, and the periods they covered, it did not strike out the proceedings.

Planning a Discovery Project



End-to-end lifecycle of a Discovery project

The managed process of identifying, preserving, searching, reviewing and accounting for documents relevant to litigation. It turns the legal scope of discovery into a reliable, documented process—from defining what is required through to production.

01

SCOPE & SOURCES

Define the pleaded issues, categories, and scope.

02

PRESERVATION

Identify people and systems likely to hold relevant documentation and take appropriate steps to prevent them from being lost or altered

03

PROCESS AND REVIEW

Make collected material usable for review. This may include extracting text, identifying duplicates, grouping, and applying search terms.

04

AFFIDAVIT AND SCHEDULES

Account for documents in the prescribed affidavit under the appropriate schedules and identify any documents withheld on a properly stated basis.

AFFIDAVIT OF DISCOVERY

Documents should be listed in the appropriate schedules and numbered consecutively; a brief description should be provided; and state the date borne by each document, or to be attributed to it.

Schedule 1 – Part 1:

Documents within the categories ordered or agreed **which are within the power, possession or procurement of the deponent.**

Schedule 1 - Part 2:

Documents within the categories ordered or agreed which are within the power, possession or procurement of the deponent **but over which the deponent claims privilege and which he or she, therefore, objects to produce.**

Schedule 2:

Documents within the categories ordered or agreed which were once but are no longer in the possession, power or procurement of the deponent.

Consulting with internal teams

IDENTIFY RELEVANT DOCUMENT HOLDERS

Bring together the people who know the records and the systems that hold them.

Business teams can identify relevant people and information.

IT and records teams can explain where it is stored and how it can be preserved and collected.

Legal and privacy teams can help manage scope, confidentiality and privilege.

Ask each team who holds potentially relevant material, which systems or locations should be checked, how records are retained or deleted, and any practical barriers to access or collection. Record the answers, agreed actions and assign people so the discovery plan is clear, coordinated and can be followed up.

Coordinating early helps ensure relevant material is preserved, searches are properly planned and gaps are identified before review and disclosure.

Scoping: how to avoid over-collection



SET CLEAR BOUNDARIES BEFORE YOU COLLECT

Begin by identifying the issues the discovery process needs to address, then define the relevant custodians, date range, systems and types of material.

Consult the people who know where the information is held, and use targeted search terms rather than collecting entire mailboxes or shared drives by default.

Test searches on a sample of results and refine them to reduce irrelevant material while still capturing what may matter.

Record the scope, assumptions and any exclusions, and revisit them if new information emerges.

Narrowing collection should not mean deleting or disregarding material that may need to be preserved.

Managing tight deadlines



PLAN BACKWARDS AND ESCALATE EARLY PLAN

Work backwards from the agreed or court ordered deadline, with clear milestones for preservation, collection, review and production.

Assign an owner and realistic timeframe to each task, prioritise the most time-sensitive sources and documents, and build in time for quality checks.

Identify any dependencies, such as waiting for data from third parties or specialist IT support and raise any risk to the timetable promptly. If a deadline may not be met, escalate early so the legal team can consider the appropriate next steps.

Keep teams updated and escalate delays or gaps early so the plan can be adjusted without compromising the completeness of discovery.

Budgeting basics – what drives cost

POTENTIAL DOCUMENTS

Volume, number of custodians, systems and date ranges.

EXTERNAL FACTORS

Legacy, mobile, cloud and third-party data collection complexity.

PROCESSING AND PRACTICAL FACTORS

Processing, hosting, reviewer hours, privilege and redaction work.

Delegation for budgetary reasons. Other providers who work for lower hourly rates such as junior barristers, flexible negotiations.

FINALISATION

Quality control, production format and rework.

Choosing and working with eDiscovery providers – When you need one? What to ask? Common Mistakes



COMPLEXITY AND VOLUME

Consider a provider for complex, high-volume or multi-source electronically stored information ("ESI").



SECURITY & COLLECTION

Method, platform, audit trail, pricing and support.



SCOPE, DELIVERABLES & ASSUMPTIONS

Format and change control in writing.



COMMON ERRORS

Engaging late, unclear instructions, and leaving legal decisions to the provider.

Data Preservation – Getting it Right Early



What counts as a “document” (emails, Teams, WhatsApp, drafts, etc.)

- Any written thing capable of being evidence is '*...properly described as a document, and it is immaterial on what the writing may be inscribed*' (*R v Daye* [1908] 2 K.B. 330)
- Includes electronically stored information (O31, R12(13) RSC)
- A sealed envelope (*Daye*)
- A teletext page on a television screen (*Victor Chandler International Ltd v Customs and Excise Commissioners* [2000] 2 All ER 315)
- X-ray plate or photograph (*McCarthy v Flynn* [1979] IR 127)
- Audio tape recordings (*Grant v Southwestern & County Properties Ltd* [1975] Ch 185)
- Computer database or information stored in back-up files (*Keane v An Bord Pleanála* [1997] 1 IR 184)
- Emails (*Dome Telecom Ltd v Eircom Ltd* [2007] IESC 59)
- Microsoft Teams meeting transcripts (Not expressly confirmed but *Dome* confirmed that a saved transcript is recorded electronic information and falls within O31, R12(13))
- WhatsApp transcripts/messages (*A.B. v Children's Health Ireland* [2022] IECA 211)
- Drafts (Not expressly confirmed but *Dome* confirmed that a saved draft is a written or electronically stored record information and falls within O31, R12(13))

Litigation Hold Process – step-by-step

 The Court of Appeal said a party must take reasonable steps to preserve relevant documents, including electronically stored information. Where relevant documents are lost because reasonable steps were not taken, the party should expect criticism. *McNulty v The Governor and Company of the Bank of Ireland* [2021] IECA 182, paras 69–72.

Define the hold's scope, identify the issues, relevant date range, likely custodians and places where relevant information may be held.

Notify the right people.

Pause routine deletion

Record and check compliance Document the preservation steps taken—and any not taken—and the reasons. Track responses, follow up where needed and make sure relevant information remains accessible.

Review and refresh the hold

Drafting a Litigation Hold Notice

DRAFTING

Describe the relevant events in plain language and may require relevant documents and data to be identified and preserved.

INFORM

Tell recipients what to preserve, what deletion processes to pause, and whom to contact.

SCOPE

Explain what deletion, alteration or disposal must stop.

Specify the date range, custodians and likely information sources where known. Refine the scope as the matter develops.

KEEP A RECORD

Record of notices, responses, preservation steps and later changes. Send reminders and exercise caution before narrowing the hold.

Risks of failing to preserve data

PREJUDICE TO A FAIR TRIAL

Evidence may be lost, overwritten or become inaccessible.

Where documents have been deliberately suppressed, the court may draw an inference against the party responsible

ADDITIONAL PROCEDURAL STEPS, COSTS OR MORE SEVERE MEASURES

Inadequate discovery may result in further affidavits and Court Orders. Costs may be awarded and a party may seek for proceedings to be struck out as a result.

THE COURT MAY SCRUTINISE

The explanation, prejudice and steps taken.

The court may require evidence explaining what preservation steps were taken, the organisation's policies and protocols, and why relevant information was lost

Introduction to technical preservation – nontechnical explanation

RETAIN

Protect a copy of the relevant source while preserving context and metadata.

DETAIL

Identify where, when, how and by whom the data was collected.

PROTECT

Restrict access and avoid altering originals.

PROVIDER

Obtain a competent provider where a source needs specialist handling.

Providers such as Grant Thornton Ireland.

Exercise – spot what should be preserved

CASE FILE

Scenario: Northstar alleges concealed software defects; Apex says testing was inadequate.

PRESERVATION TASK

- Sources: email, Teams, WhatsApp, SharePoint, consultant files and Copilot summary.
- Mark what to preserve now, who holds it, and any immediate retention risk.
- Flag privilege, privacy and third-party questions.



WORK

Identify the source, custodian, preservation step and any privilege, privacy or third-party issue.
Preservation is not production.

Use the separate exercise sheet to record your answers.

Collection, Data Mapping & Processing

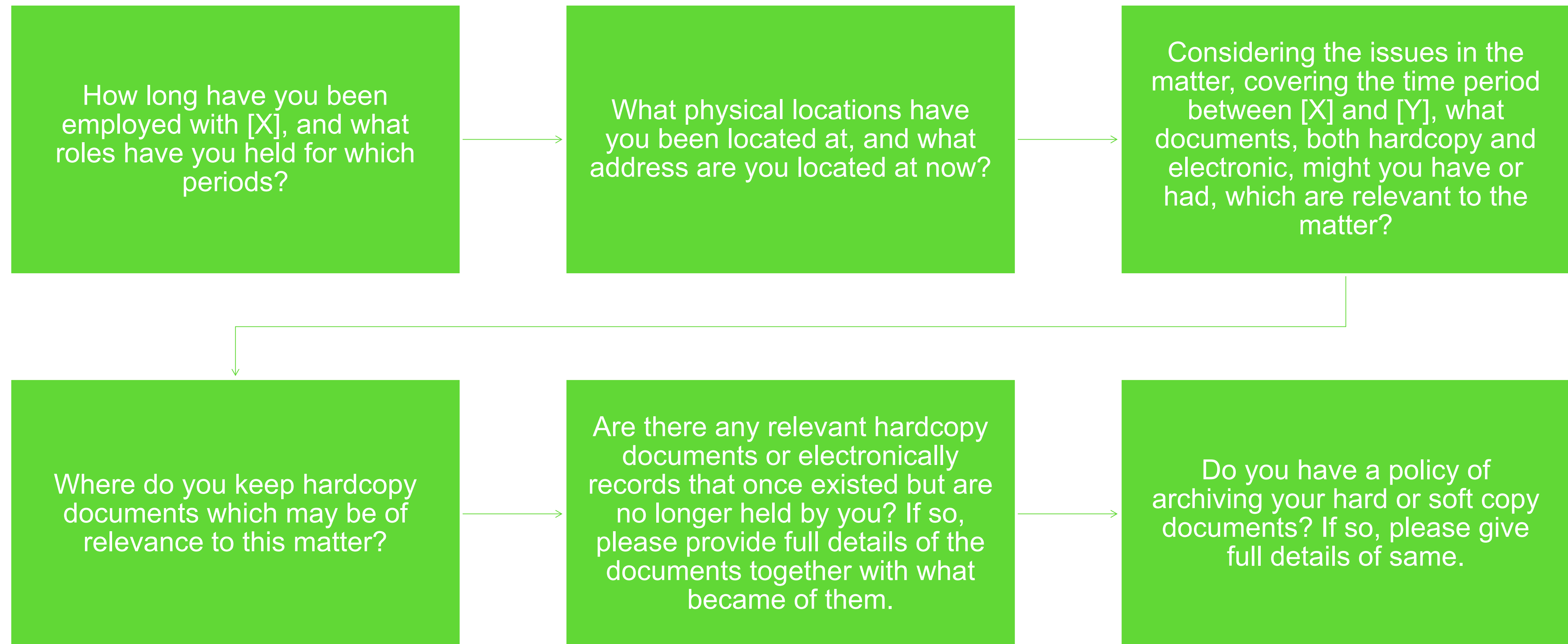


Identifying custodians – examples

- **Project manager** — project records, development decisions, technical documents and team communications relevant to a product or project dispute. 
- **Sales representative** — customer communications, quotations, pricing and negotiation records relevant to a contract dispute.
- **HR officer or manager** — personnel files and communications relevant to an employment dispute.
- **Chief financial officer or finance staff** — financial statements, budgets, transaction records and approval communications relevant to a financial dispute.
- **Administrative assistant** — correspondence, meeting arrangements, minutes and paper files relevant to the events in issue.
- **IT or systems administrator** — relevant system records, archived data, backup information or shared repositories.
- **Former employees, directors, agents or advisers** — potentially relevant documents may remain with people who have left the organisation or acted on its behalf.

The High Court has considered discovery sources including current and former employees, board members, agents and advisers, as well as document systems, email, laptops and mobile devices. *Globoforce Group plc t/a Workhuman v Luxembourg Investment Company 276 and S.à.r.l. & Ors* [2026] IEHC 397.

Using custodian questionnaire



Data mapping – where data lives?

WHAT IS DATA MAPPING?

Map the people, sources and locations that may hold relevant material

WHO AND WHERE

Current and former employees, key witnesses, colleagues, support staff, agents and relevant service providers.

Email and messaging accounts, laptops, mobile or personal devices, shared drives, cloud systems, business applications, archives and hard-copy files.

WHAT SHOULD THE MAP RECORD

Relevant period; source owner and access route; retention or deletion issues; collection/export method; preservation status; and any gap or follow-up required.

KEEP IT LIVE

Update the map as sources are identified and collected; flag sources that no longer exist or cannot be accessed.

Collection pitfalls – (IT, Shared drives, personal devices)

DO NOT ASSUME

Do not assume you know what data exists, where it is stored, or that one source contains everything. Check before drawing conclusions.

CARRY OUT A FULL SEARCH

Search all relevant systems, folders, accounts, and likely data owners. Use variations of names, terms, and date ranges where appropriate.

MAKE INQUIRIES

Ask relevant people or teams where data may be held, how it collected, and whether it stored under another name or system.

KEEP A RECORD

Record what you searched, when, which terms you used, who you asked, and what you found – or did not find.

Processing explained – duplication – email threading – keyword searching



PROCESSING

Processing makes collected data searchable and reviewable.

Thema International Fund plc v HSBC Institutional Trust Services (Ireland) [2012] 3 IR 528; sets out a practical model, not a prescribed process for every case, and the approach should be proportionate to the circumstances.



DUPLICATION AND EMAIL THREADING

Data deduplication reduces identical copies.

Removes repeated copies, while taking care not to discard distinct versions that may matter.

Email threading, groups related email messages, replies, forwards, and attachments into a single, chronological conversation chain



KEYWORD SEARCHES HELP FOCUS

Transfer electronic material into a searchable format, scan and upload hard-copy documents where practicable.



VALIDATE SETTINGS AND REVIEW

Software does not decide relevance.

Have trained legal reviewers assess the selected documents against the discovery categories, classify them and consider whether privilege applies. A further review may help ensure consistency and address difficult relevance or privilege issues. *Thema*, para 2.13.

Review stage – eDiscovery Technology & AI (Copilot)



Review Stage Basics and How Document Review Works

TEAM STRUCTURE

Projects which need a discovery project team should include:

- Main contact person from the client or the party within a business or organisation who will lead the input;
- Project manager from the client or business/organisation;
- Legal representative;
- IT representative.

OBJECTIVE

Have a structured review objective – identify key rights, obligations, deadlines, risks, gaps, inconsistencies and points needing clarification

USE A WRITTEN PROTOCOL

Follow a short, consistent checklist or set review questions. Apply the criteria throughout and distinguish confirmed issues from questions and assumptions.

DEADLINES

Identify each deadline, the event that triggers it and any required notice or action. Flag urgent or uncertain dates for confirmation.

Managing reviewers & consistency – Review Meetings and Quality Control



Train reviewers using the pleadings, categories and sample decisions before they begin to ensure everyone is clear on what documents need to be discovered.



Hold review meetings and clarify coding rules to ensure that everyone is correctly complying with the discovery agreement or Court Order.



Use sampling, second-level review and escalation if necessary.



Record changes and correct patterns of inconsistent coding to help identify and prevent noncompliance.

Privilege

LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege is a rule of evidence that entitles a party to withhold certain confidential documents from inspection in a discovery process or for use in evidence even if they are relevant.

There are two forms of legal professional privilege: legal advice privilege and litigation privilege.

LEGAL ADVICE PRIVILEGE

Confidential information contained in communications between a lawyer and his or her client only where that confidential communication is for the purpose of seeking, giving or receiving legal advice.

Explanations of a legal position as well as advice on courses of action arising out of a legal position are likely to be deemed to be legal advice for the purposes of a claim of legal professional privilege. However, the mere provision of legal assistance such as reciting provisions of a contract will not be deemed to be legal advice.

LITIGATION PRIVILEGE

This sub-category of Legal Professional Privilege allows for the full and frank communication between parties engaged in or preparing for litigation or other adversarial proceedings.

It offers immunity from inspection of confidential communications between a lawyer and client or between one of them and a third party, the dominant purpose of which is for use in the actual or contemplated litigation.

Dominant purpose?

Documents can be created for a number of purposes, which may include apprehended or anticipated litigation. For litigation privilege to apply to a document the dominant purpose for which the document came into being must have been in apprehension or anticipation of litigation. Where one of the purposes for creating the document was apprehended or anticipated litigation but where this was not the dominant purpose, the claim of litigation privilege cannot

Privilege – practical examples

LEGAL ADVICE PRIVILEGE

- A client explaining the background of a dispute to a solicitor, or a solicitor asking follow-up questions to advise on the client's legal position.
- A solicitor asking a client for documents and facts to advise on a potential breach of contract.
- A client confidentially asking a solicitor whether a proposed dismissal would be lawful, and the solicitor advising on the legal position.

LITIGATION PRIVILEGE

- An expert report commissioned subsequent to threatened litigation.
- A witness statement taken to prepare a case.
- A company prepares a confidential chronology for its lawyers to use in conducting an existing or reasonably contemplated case.

Asserting a claim of privilege



EXAMPLE - LITIGATION PRIVILEGE

- *"To dispense with the rule of full disclosure, a party needs to demonstrate that the public interest must weigh in his favour, and therefore he or she **must demonstrate** that the documents were created for the required purpose and in apprehension or contemplation of litigation." Colston v Dunnes Stores [2019] IECA 59 [29]*
- *"**more is required than a bald assertion** made in an affidavit of discovery that a document or documents “were prepared in contemplation of legal proceedings” or were “created in the course of, and for the purpose of, the defence of the within proceedings”" Colston v Dunnes Stores [2019] IECA 59 [30]*
- In the body of the affidavit of discovery, the deponent must explain in as much detail as possible **the nature, genesis and purpose of the documents in issue.**

See also *Artisan Glass Studio Limited v The Liffey Trust Limited & Ors* [2018] IEHC 278

EXERCISE



•The Plaintiff suffered a very significant injury to his back while engaged in the course of his employment with the Defendant on 14 September 2025. The Plaintiff sent his letter of claim on 19 October 2025.

•He alleges in his personal injury summons dated August 2026 that the Defendant had been negligent in the following respects:

- requiring him to lift excessive weights;
- failing to ensure that the task was carried out in a safe and proper manner;
- failing to train the Plaintiff adequately or at all;
- failing to provide adequate assistance and/or equipment to enable the Plaintiff to carry out the task safely;
- requiring the Plaintiff to work excessively long hours and to carry out his work under excessive time constraints.

The Plaintiff seeks discovery of the following categories of documents:

- (a) all safety statements and risk assessments in being at the time of the accident;
- (b) all documents relevant to job rotation and rest periods for three months prior to the date and time of the accident;
- (c) all relevant training and instruction documentation;
- (d) the accident report form (prepared 14 October 2025); and
- (e) all relevant CCTV footage.

Are all the categories discoverable?

Are any of the categories privileged?

Redactions – what, when, how?



***Cooper Flynn v Radió Teilifís Éireann* [2000] 3 IR 344**

In limited circumstances, the courts have been prepared to sanction the editing of documents for production or inspection, so that irrelevant or privileged material can be excluded.

Kelly J. in *Cooper Flynn* envisaged methods to avoid breaches of confidentiality stating: '*...loss of confidentiality can be mitigated by (i) blanking out parts of documents, and/or (ii) limiting the disclosure to legal advisers only*'

Redactions have been ordered for confidentiality – *Personal Digital Telephony Ltd v Minister for Public Enterprise* [2015] 1 IR 124 & *Maye v Adams* [2015] IEHC 530.

Clarke J. recognised in *Prendergast v McLoughlin* [2010] 3 IR 445 that it may be appropriate to redact portions of documents containing privileged legal advice, where the dominant purpose of the document is for legal assistance that does not attract privilege.

In practice, it is not uncommon for parties producing documentation to redact not only those portions of the documents that are confidential or privileged, but also material that is not relevant to the proceedings. Whether this form of redaction is consistent with the obligation to produce documents falling within specified categories remains to be fully considered.

eDiscovery Platforms



What an eDiscovery platform does



Hosts collected data. Stores collected material in one place with controlled access.

Organises the data. Supports deduplication and email threading to help manage repeated documents and related messages.

Supports search and review. Enables searching, filtering and review coding, including coding for privilege and managing redactions.

Tracks and produces documents. Maintains audit trails and supports production exports.

The platform supports the discovery workflow, it does not determine the legal scope of discovery or decide whether a document is privileged.

Before vs after using software – time / cost comparison

BEFORE: MANUAL OR FRAGMENTED WORKFLOW	AFTER: USING AN EDISCOVERY PLATFORM
Documents handled across separate files, systems and email chains.	Collected material brought together in a searchable workspace.
Repeated handling and manual tracking can take time and make it harder to coordinate the review.	Search, filtering, deduplication and email threading can make document handling and review more efficient.
Review progress and decisions may be harder to track consistently.	Review coding and audit trails help coordinate work and record decisions.
Cost: staff time is spent gathering, organising, searching and tracking material.	Cost: software, hosting, provider and reviewer costs must be budgeted.

Bottom line: Software can improve searchability, coordination and auditability, but it does not guarantee lower overall cost. Any time or cost saving depends on the volume and scope of the data, its quality and the workflow used. There is no fixed saving percentage.

Takeaway: The platform can reduce avoidable manual handling, but good scoping, review and quality control still matter.

Demonstration-style walkthrough



AI & Copilot in Discovery – How to reduce manual workload significantly



What AI can realistically do today?



Assist with summaries, extraction, classification and prioritisation.

Support a first pass chronology or theme identification.

Performance depends on data access, configuration, prompts and validation.

Human reviewers remain responsible for legal decisions and verification.

Technology Assisted Review (TAR) & Predictive Coding

TAR USES TECHNOLOGY & PREDICTIVE CODING

TAR uses technology together with human input to help prioritise or identify documents for review

Human input helps prioritise or identify documents.

A DEFENSIBLE PROCESS NEEDS

A clear method, training, validation and oversight.

HOW IT WORKS

Reviewers guide and assess the process, which may involve sample checks and repeated iterations to improve or test results.

THE HUMAN RESPONSIBILITY

TAR assists the discovery process; it does not transfer responsibility. The party remains responsible for discovery

Using tools like Copilot for – Summarising documents – identifying themes – drafting responses

POSSIBLE USES

First-pass summaries

Themes

Chronology drafts

Response structure.

DO NOT LET AI

Generate or alter a witness's evidence.

Ensure that AI generated data is accurate. Hallucinations

Check summaries and quotations against original records.

USE APPROVED TOOLS

Understand data access, storage and retention.

Before using an AI tool, assess the lawful basis and purpose for processing; data minimisation; confidentiality and privilege; access, retention and security; and the provider's handling of prompts and outputs.

Use approved tools and verify the tool's data practices.

The Guide recognises that personal data may be processed for litigation, but requires a valid legal basis and compliance with data-protection principles.

Risks: over-reliance, GDPR, Accuracy

OVER RELIANCE

AI can omit, misread or lose the context of material. Treat its work as a first pass—not a substitute for legal judgment or review.

GDPR & CONFIDENTIALITY

Before using an AI tool, consider privacy, confidentiality, privilege, access controls, and whether prompts or outputs may be retained or discoverable. Use approved tools and understand their data handling.

ACCURACY

Check facts, summaries, quotations, legal authorities and references against the original sources. Do not let AI generate or alter a witness's evidence.

COURT DOCUMENTS

Apply High Court Practice Direction 142 within its stated scope. AI assistance does not transfer responsibility for accuracy or compliance, check the direction's specific requirements for affidavits, witness statements and expert reports.

Production, Affidavits & Common Pitfalls



Production formats – what to agree early

Agree the production protocol before production begins

- **Format:** Produce searchable documents in the format they are held in (usually native format), unless another format is agreed. If not producing in native format, explain the reason and agree it in advance.
- **Searchability and metadata:** Agree the searchable format and the metadata to be supplied, including document name, author, recipient, date created and date last modified.
- **Schedule / load file:** Agree the schedule fields, document numbering and how documents will be matched to the schedule.
- **Emails and attachments:** Agree how email families, attachments and duplicate material will be handled, so documents are not inadvertently separated or omitted.
- **Redactions and privilege:** Agree how redacted documents will be produced and identified; privileged documents are scheduled but not produced, subject to any agreed treatment of partial privilege.
- **Conversion and Optical Character Recognition (OCR):** If a document is converted, preserve its metadata and other relevant information where possible. Agree whether OCR text will be supplied; OCR output may not be complete or accurate.
- **Quality checks and timing:** Allow time to check the production and schedule before delivery. Agree the delivery method and any access or security arrangements.

Production and Inspection of Documents



Notice to Produce governed by Order 31 Rules of the Superior Courts

A party may serve written notice requiring another party to produce for inspection a document referred to in that party's pleadings, affidavit or list of documents, and to permit copies to be taken. The notice is in Form No. 11 in Appendix C. (Order 31, rules 15–16.)

The notice is limited to documents so referred to, it is not a general request for discovery of other documents.

The recipient must respond under Order 31, rule 17, giving the time for inspection or stating any objection and its grounds.

If inspection is refused or no inspection time is given, the requesting party may apply to court under Order 31, rule 18. The court may order inspection only if it considers it necessary for the fair disposal of the proceedings or for saving costs.

If a party does not comply with a notice to produce, it may be barred from putting the document in evidence, unless the court accepts a sufficient excuse. (Order 31, rule 15.)

Discovery Schedule – How it works

FIRST SCHEDULE, PART 1

Documents that are not objected to.

List documents and electronically stored information within the discovery categories that are in the deponent's possession, power or procurement

FIRST SCHEDULE, PART 2

Documents which are possessed but object to being provided as privilege is claimed.

List documents that are held but whose production or inspection is objected to on privilege grounds. Identify each document individually, describe it enough to convey its general nature, and state the broad privilege claimed; a blanket or generic description may be insufficient

SECOND SCHEDULE

Relevant documents formerly held but no longer held.

List responsive documents that the deponent previously had but no longer has in their possession, power or procurement. The affidavit should state when each document was last held, what became of it and, where known, who has it now

Affidavit of Discovery – what goes wrong in practice



1. THE DEPONENT CANNOT EXPLAIN THE SEARCH

A deponent may swear the affidavit without knowing where relevant records are held, who searched for them, or what the searches covered. The affidavit should be grounded in a search process that can be explained, relevant locations and custodians, physical and electronic sources, the searches carried out, and any enquiries made of third parties. The search must reflect both the discovery categories and the potential sources of documents.

2. MISSING DOCUMENTS ARE NOT PROPERLY ACCOUNTED FOR

A bare statement that documents are no longer held—or were never held—may leave important questions unanswered. Documents previously held should be identified in the Second Schedule, with an explanation of when they were last held, what became of them and, where known, who has them now. If their existence or fate is uncertain, explain what steps were taken to investigate.

3. PRIVILEGE IS CLAIMED TOO BROADLY

A general label such as “privileged” or “prepared in contemplation of litigation” does not, by itself, establish privilege. Identify the privilege claimed for each document. For litigation privilege, the evidence should explain the circumstances in which the document was created and support the claim that litigation was reasonably anticipated and its preparation was the document’s dominant purpose.

4. SCHEDULES ARE VAGUE, INCOMPLETE OR NOT VERIFIED

The schedules should identify documents and describe them sufficiently to show their general nature and, where relevant, the privilege claimed. Generic descriptions may prevent the other party and the court from assessing the claim. The affidavit should also make the required sworn averments about the schedules; attaching a schedule without addressing it in the affidavit can leave the evidence deficient.

Avoiding Common mistakes – Over-discovery – Missing documents – Poor documentation

OVER-DISCOVERY

scope without a clear issue or stopping rationale.

MISSING SOURCES

assumed searches, deletion, overlooked devices or third parties.

POOR DOCUMENTATION

no record of decisions, searches, limitations or sign-off.

PRODUCTION

Maintain a proportionate, auditable process from hold to production.

Recent Irish Developments



RECENT IRISH DEVELOPMENTS

Recent Irish Developments - *Hireservices (e) Ltd v An Post* [2020] IECA 120

UNDERLYING MOTION

An Post sought voluntary discovery in 12 categories in November 2012; *Hireservices* agreed in February 2013, and an affidavit of discovery followed in June 2013. In 2017, *An Post* alleged that documents within five agreed categories had not been discovered and also sought three additional categories

IMPORTANCE

The Court of Appeal emphasised the finality of agreed or ordered discovery: a party seeking *additional* discovery under Order 31, rule 12(11) must show a good reason to revisit the existing agreement or order. The fact that further documents are relevant and necessary is not enough

*PARAGRAPH 19

“The default position is that the discovery is as agreed or directed, and that some good reason must be given for revisiting that agreement or order.”

PRACTICAL EFFECT

A party should seek discovery comprehensively at the outset. A later application to add categories is exceptional. The court retains power to make an additional order where it determines that an injustice would otherwise result.

RECENT IRISH DEVELOPMENTS

Recent Irish Developments *Egan v. Castlerea Co-operative Livestock Mart Ltd* [2023] IECA 240 Court of Appeal

BACKGROUND

The plaintiff claimed personal injuries after a bullock injured his leg. His later particulars raised ongoing lower-back and leg pain, with medical evidence suggesting both accident-related injury and L5 nerve-root compression.

DISCOVERY SOUGHT

The defendant sought five years of pre-accident medical records and five months of post-accident records. By the appeal, the dispute concerned the post-accident records; the plaintiff had agreed to provide the pre-accident records.

RULING

The Court dismissed the appeal and upheld discovery of the five months of post-accident medical records. On these pleadings, those records could help assess the overlap between the plaintiff's pre-existing condition and the injuries attributed to the accident, the short period sought was not shown to be disproportionate or unduly burdensome

IMPORTANCE

There is **no general rule against discovery of post-accident medical records**, nor are medical records invariably discoverable simply because a personal-injury claim is brought. Relevance and necessity must be justified in the particular case, by reference to its pleaded issues and the reasons given for each category. Medical confidentiality calls for care, but does not itself bar discovery.

Post-accident medical records – The "*Evidential Indicator*"



At para. 23 Ms. Justice Butler set out that;

The categories of discovery sought in *Power v. Tesco Ireland Ltd* [2016] IEHC 390 covered both pre- and post-accident medical records and it does not appear that any particular distinction was drawn between them. Barrett J. allowed discovery of both categories subject to certain limitations imposed to ensure that the obligation to provide discovery was proportionate and not oppressive. In considering where the boundary lay between medical records which were relevant and necessary and those which were not, Barrett J. suggested that there should be a medical examination of the plaintiff by a doctor on behalf of the defendant prior to any request for discovery being made and that it was only when the medical examiner formed the view that there was a pre-existing condition or there was some other "*evidential indicator*" that the plaintiff's pre-accident history was relevant, that discovery should be ordered. The judgment does not set out how the trial judge regarded those pre-conditions as being satisfied on the facts of the particular case (which are not recorded in the judgment), but as the discovery was ordered, presumably he concluded that they were.

Recent Irish Developments - *Pop v Foristal* [2024] IEHC 179

BACKGROUND

The Plaintiff claimed injuries, including psychological sequelae, following a road-traffic accident. Her particulars referred to PTSD, treatment and counselling, and proposed spinal surgery in Romania. The defendants conceded liability but disputed the alleged injuries and loss

DISCOVERY SOUGHT

The Defendants sought three categories: the plaintiff's GP records; records of treating therapists or counsellors; and medical records and referral letters concerning spinal surgery in Romania

RULING

The Court refused the discovery sought. The defendants had not exhibited the medical reports on which they relied, so the Court could not assess their significance. As to therapy records, the diagnosis—not the detailed session notes—was relevant, and the factual information sought could be pursued through further and better particulars. The stated reason for seeking the spinal-surgery records did not identify a pleaded issue making them relevant or necessary.

IMPORTANCE

Pop applies *Egan's* case-specific approach: a request for medical records must be tied to identified issues in the pleadings, supported by a properly explained rationale, and assessed against the material actually before the court. A party cannot rely on undisclosed reports or broad assertions where the court needs to evaluate relevance and necessity. It should also consider whether a less intrusive procedural route can obtain the information

FAILURE TO COMPLY VS FURTHER AND BETTER DISCOVERY

FAILURE TO COMPLY WITH DISCOVERY

Where there is a failure to make discovery in accordance with an agreement or order for discovery, the appropriate motion to bring is a motion for failure to comply with an order and/or agreement for discovery.

As a rule of thumb, if a document which responds to one of the original categories of documents and therefore should have been discovered but was not discovered, a motion to strike out/judgment in default for failure to comply with an order/agreement for discovery should be brought.

FURTHER AND BETTER DISCOVERY

Where there are documents which are not required to be discovered pursuant to an original agreement and/or order for discovery but appear relevant, a party can bring a motion for further and better discovery or an application to vary the original order for discovery. The courts are generally speaking hostile towards allowing a second application for discovery. Usually, a party seeking additional discovery must satisfy the court that there was a good and sufficient reason as to why the document was not sought initially and why discovery should be granted a second time. Common explanations are that the party did not know of the existence of the new category of documents, e.g. because the existence of same only became apparent after the initial discovery was reviewed. See in particular *Micks-Wallace (a minor) v Dunne* [2020] IECA 282 and *Brahmi v Kelleher Chartered Surveyors Limited* [2021] IEHC 611

Managing State Claims & deadlines



Managing State Claims & deadlines

When State entities such as the HSE, TUSLA, The Irish Prison Service are Respondents to discovery motion:

Negotiations with a view to agreeing terms can be more protracted due to various departmental interactions.

They may be offered longer periods to comply with an Order for Discovery as they may need to troll through voluminous documents, particularly if they are historical cases. In my experience 16 weeks in the High Court.

Be live to if there are any issues with the means of knowledge.

A lot of State Agencies need orders

Thank you
Questions?

