

1. An order from the U.S. District Court for the Western District of Washington granting Defendants a protective order limiting deposition topics proposed by Plaintiffs under Rule 30(b)(6) constituting “discovery on discovery,” finding that Plaintiffs could not inquire about Defendants’ response to and search for records for certain discovery requests but could inquire about Defendants’ retention and preservation of text messages.

In *Adamson v. Pierce County*, 2023 WL 7280742 (W.D. Wash. Nov. 3, 2023), U.S. Magistrate Judge Grady J. Leupold addressed whether Plaintiffs had made a sufficient showing to compel Defendants to provide testimony on their discovery process and retention of text messages.

This action was brought by Sheriff’s Department deputies from Pierce County, Washington, against Pierce County and certain of its employees for alleged deprivation of their civil rights under 42 U.S.C. § 1983 and related state law claims. *Id.* at *1. The court noted a “seemingly contentious relationship between counsel during discovery” and had denied two motions to compel additional discovery by Plaintiffs.

Plaintiffs then served a notice of deposition on Pierce County under Federal Rule of Civil Procedure 30(b)(6). *Id.* at *2. Among other topics, Plaintiffs sought testimony about Pierce County’s search for records responsive to discovery requests and its responses to certain discovery requests, an alleged destruction of text communications beginning in 2019, and text communications and text message policies generally. Defendants filed a motion for a protective order seeking to avoid the 30(b)(6) deposition.

Magistrate Judge Leupold first addressed whether Plaintiffs had violated the meet-and-confer provision of Rule 30(b)(6), which requires that “before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination.” He explained that Plaintiffs did not send Defendants their proposed 30(b)(6) topics before issuing the notice and did not follow up with Defendants as to any response but instead assumed that Defendants did not object to the topics and would produce a witness on the noticed date. However, Defendants did not provide any objections or attempt to schedule any conference until two days before the noticed deposition date. Magistrate Judge Leupold stated that the parties “share a burden to meet and confer regarding the matters at issue in a 30(b)(6) deposition,” and the failure of one party to respond does not absolve the other of its duty to do so. *Id.* at *3. He noted that the “facts here cut against both parties,” and he ultimately concluded that Defendants’ motion for a protective order satisfied the meet-and-confer requirement of Rule 30(b)(6).

Magistrate Judge Leupold then began his analysis on the merits of Defendants' motion by describing the general standards applicable to protective order motions under Rule 26(c)(1)(D), which permits a court to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." He noted that the party seeking a protective order "carries a heavy burden of showing why discovery should be denied."

But Magistrate Judge Leupold also explained that "discovery on discovery" is generally disfavored and, to be both relevant and proportional to the needs of the case, a party seeking it "must show a specific deficiency in the other party's production." *Id.* at *5 (collecting cases). Under this standard, Magistrate Judge Leupold denied Plaintiffs' request for 30(b)(6) testimony regarding Pierce County's search for records responsive to discovery requests and its responses to certain discovery requests. He found that these topics were "impermissibly broad meta-discovery."

But Magistrate Judge Leupold granted in part Plaintiffs' request for 30(b)(6) testimony regarding an alleged destruction of text communications and text message policies generally. He noted that Plaintiffs appeared to have identified a gap in Pierce County's text record production beginning in 2019. Pierce County argued that Plaintiffs' lawyer already had information related to these topics, but it was unclear how any such information would explain the alleged gap in Pierce County's productions. Accordingly, Magistrate Judge Leupold found that Plaintiffs had established an adequate factual basis to allow limited "meta-discovery" regarding text messages and text messaging policies after 2019.

However, Magistrate Judge Leupold limited these topics to permit Plaintiffs to ask about Pierce County's retention and preservation of text messages after 2019, including how Pierce County retained and preserved text messages; the ability of Pierce County employees to delete text messages from work phones; any restrictions implemented by Pierce County or imposed on Pierce County employees to restrict their ability to delete text messages; and whether any metadata exists that would provide information about deleted text messages and what information this metadata provides.