



E-Discovery Best Practices

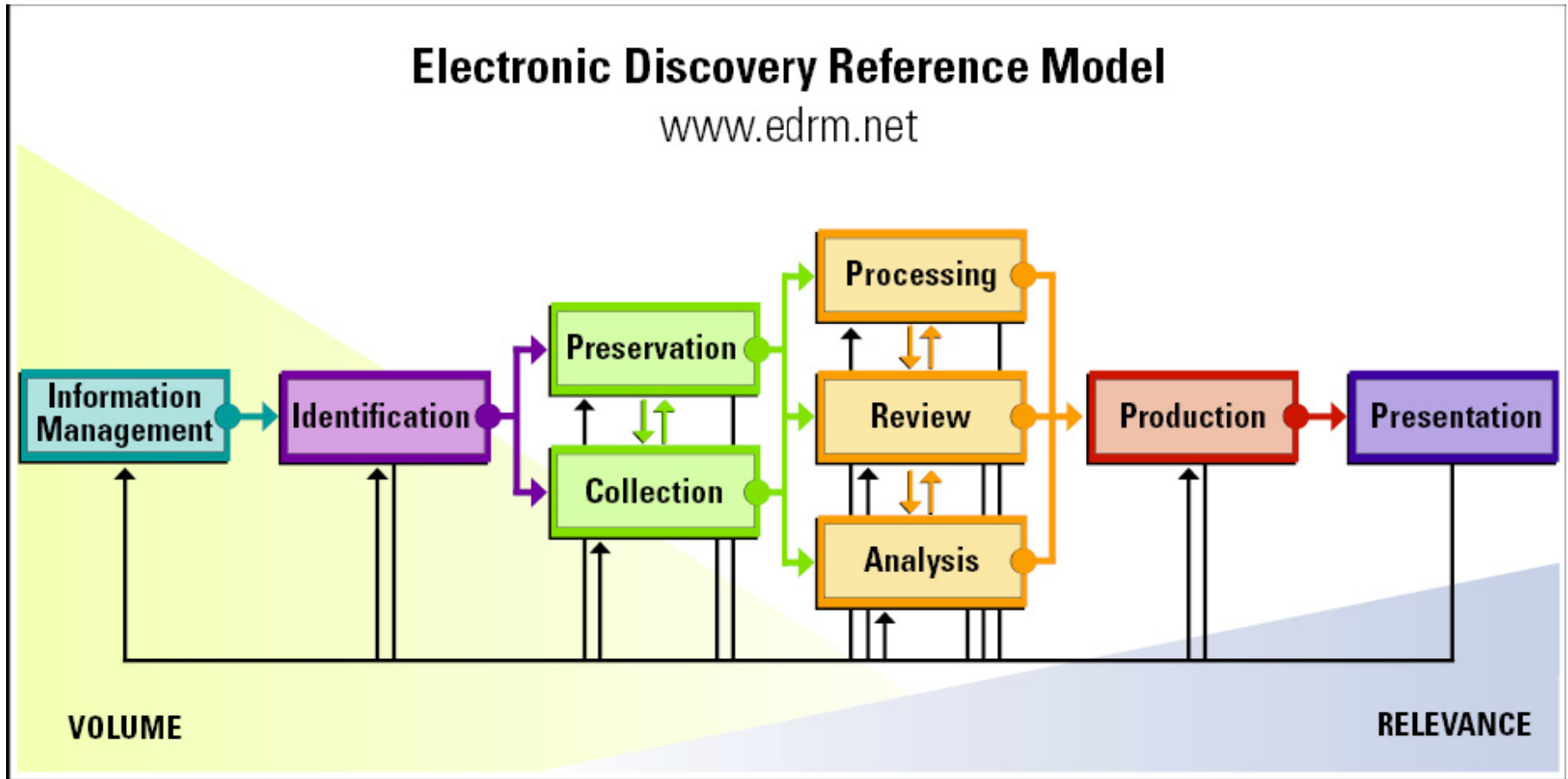
Electronically Stored Information “ESI” vs Traditional Document Discovery

- Volume
- Not Tangible
- Persistent
- Dynamic
- Metadata
- Application Dependent



Electronic Discovery Reference Model

www.edrm.net



FRCP Amendments, December 2006

FRCP Amended Rule 34

Amended Rule 34(a) adds an entirely new category of discoverable information called “Electronically Stored Information” (“ESI”)

- Specifically includes writings, drawings, images and other data or data compilations stored in any medium from which information can be obtained or translated into a reasonably usable form.
- You must produce ESI regardless of whether it is specifically requested.
- For purposes of Production, ESI may be translated to make it “reasonably usable”

Practice Tips

- ✓ Every request for documents in a federal case is a request for *ELECTRONIC DOCUMENTS* as well as for paper documents.
- ✓ You should find out at the onset of the case where and what type of ESI you have.

ESI Production Requests

FRCP Amended Rules 34(b) and 45 (Form of Production)

If document request or subpoena specifies the form of ESI production

- Object or Agree with Request
- If you object you must state the form or forms you intend to use instead
- If the requesting party object to the form you propose, meet and confer prior to filing a Rule 37 Motion to Compel.

Practice Tip

- ✓ Remember that if you can't agree on the form, you must meet and confer prior to filing a Rule 37 Motion to Compel.

Best Practices at Rule 26(f) Conference

Before the Conference	At the Conference	After the Conference/ Report of the Parties
Exchange information on Electronically Stored Information (ESI) prior to the conference	Nature of information systems & custodians	Report any areas where parties have reached agreement
Discuss scope/time frame parameters of ESI	Anticipated scope of requests/tiered production	Report any areas where parties are in disagreement and request intervention by the court.
Discuss internally – ESI Coordinator for both sides	Objections	Specify proposed treatment of privileged information, metadata & proposed order regarding privilege
Litigation Hold	Form of production, (paper and electronic), how organized, Bates stamping and redaction	Specify proposed treatment of sampling or testing of data if appropriate
	Production and cost of metadata	Set out protocol and conditions for on-site inspections of electronically stored information under Rule 34
	Information not reasonably accessible/costs and burdens generally/cost shifting	Proposed preservation order
	Preservation issues/protective orders	Any agreements regarding the need for experts
	Discuss non-waiver agreements (“claw back” “quick peek”) or how privileged information may be handled (subject to FRE 502)	
	Testing or sampling search methodologies	
	30(b)(6) Depositions	

Disclosures and Inaccessible Data

FRCP Amended Rule 26(a)(1)

- **Witnesses**: witnesses provided pursuant to Rule 26(a)(1) may now include IT personnel who will serve as a Rule 30(b)(6) witness
- **Documents**: a description by category and location of all relevant documents and ESI must be provided.
 - ❖ **Inaccessible Data: Cost/Benefits analysis**
 - ❑ Rule anticipates: back up tapes intended for disaster recovery, legacy data, fragmented data
 - ❑ *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (“Zubulake V”) provides a 3 part analysis for cost shifting
 - (1) Court determination of inaccessibility
 - (2) Court must determine what data may be found on inaccessible media. “Sampling” approach.
 - (3) In conducting the cost-shifting analysis, a seven-factor test should be applied with priority given to the first two factors.
 - ❖ **Types of ESI Subject to Discovery are Expanding: *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008)**
 - ❑ Blogs, Social Networking Site, Instant Messaging, Text Messaging

Practice Tips

- ✓ Disclose the existence of both paper and electronic documents
- ✓ Disclose inaccessible data even though it is not subject to production
- ✓ There is a duty to preserve inaccessible ESI
- ✓ For Inaccessible data, identify the category or type of information not produced along with enough information that the requesting party can evaluate burdens and costs.

Zubulake v. UBS Warburg LLC (SDNY). 3-part analysis:

1. Court determination of inaccessibility
2. Court must determine what data may be found on inaccessible media. “Sampling” approach.
3. In conducting the cost-shifting analysis, a seven-factor test should be applied with priority given to the first two factors.

Zubulake Balancing Test:

1. The extent to which the request is specifically tailored to discover relevant information.
2. The availability of such information from other sources.
3. The total cost of production, compared to the amount in controversy.
4. The total cost of production, compared to the resources available to each party.
5. The relative ability of each party to control costs and its incentive to do so.
6. The importance of the issues at stake in the litigation.
7. The relative benefits to the parties of obtaining the information.

Scope of Duty to Preserve – Anticipation of Litigation

- An entity is required to preserve documents and electronic data when it “knows or reasonably should know” that information may be relevant to pending or anticipated litigation.
- Once litigation is anticipated, a party must suspend its routine document retention/destruction policy and put in place a legal hold to preserve what it knows, or reasonably should know, is relevant to the action.

Legal Hold Trigger

- A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.
 - *Zubulake v. UBS Warburg* (“*Zubulake IV*”) 220 F.R.D. 212 (S.D.N.Y. 2003).

Best Practices for Litigation Holds

- ✓ Trigger Considerations
- ✓ Understand Client's Data Storage/Data Map
- ✓ Be Familiar with Client's Document Retention Policy
- ✓ Define Scope of Information that must be Produced
- ✓ Send Unequivocal Legal Hold Letter
- ✓ Communicate with Opposing Counsel
- ✓ Communicate with Key Custodians, IT and Records Management
- ✓ Assure that Information is Preserved in Proper Format
- ✓ Continue to Monitor and Audit Legal Hold Compliance
- ✓ Periodically Re-issue the Hold so that New Employees are Aware of it, and so that it is Fresh in the Minds of all Employees.
- ✓ Seek Court Intervention Early On, If Necessary
- ✓ Keep Detailed Records of Preservation and Production

Trends in Metadata Cases

Aguilar v. United States Immigration & Customs Enforcement Div. of the Dep't of Homeland Sec., 510 F.3d 1 (1st Cir. Mass. 2007)

- Definitive ruling in a federal case involving seizures of immigrants' homes that metadata associated with emails and electronic files must be preserved,

In re Seroquel Prods. Liab. Litig., 244 F.R.D. 650 (M.D. Fla. 2007)

- A federal products liability case where court ordered that specific metadata fields be produced in a multidistrict action by 6,500 plaintiffs who claimed that the antipsychotic drug caused various illnesses.

Lake v. City of Phoenix, 2009 Ariz. App. LEXIS 10 (Ariz. Ct. App. Jan. 13, 2009)

- An unpublished decision in January 2009 in which the Arizona Court of Appeals ruled that metadata is not a public record and the Appeals Court agreed stating that metadata is not a public record.

Practice Tips

- ✓ Metadata MUST be preserved
- ✓ When requesting metadata the need for it must be more than dubious

Sanctions – Rule 37(f) and Zubulake

- Typically for lack of preservation or discovery abuse
- “Safe Harbor” Provision (Rule 37(f))
 - If party fails to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.
- How Outside Counsel can avoid sanctions (Zubulake)
 1. Litigation Hold
 2. Direct Communication with “Key Players”
 3. Instruct Employees
- Good Faith Effort to Comply is Not Enough (In re Intel Corp.)
 - Sanctions For Failure to Comply with a Litigation Hold Even Though Counsel Used Best Efforts and Acted in Good Faith

- *In re Fannie Mae Sec. Lit.*, 552 F.3d 814 (D.C. Cir. Jan. 2009)
- *Mancia v. Mayflower Textile Serv.Co.*, Civ. 1:08-CV00273-CCB (D. Md. Oct. 15, 2008)
- *Advanced Micro Devices, Inc. v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.)*, 2008 U.S. Dist. LEXIS 98898 (D. Del. May 9, 2008)
- *Qualcomm, Inc. v. Broadcom, Corp.*, 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan. 7, 2008)

Practice Tips

- ✓ Even if you are not a party, you can still be ordered to conduct expensive e-discovery.
- ✓ If opposing counsel isn't cooperating with the electronic discovery process, cite to *Mancia* and the Sedona Conference Proclamation as well as rule FRCP 26(g).
- ✓ It is possible to waive privilege even if you act in good faith under *In re Intel*.
- ✓ *Qualcomm* has created tension between outside counsel and their clients so it is good to keep this case in mind when working with your client on e-discovery requests.

***Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 254 (D. Md. 2008)**

- Inadvertent production of 165 privileged electronic documents.
- Applied ***Fidelity & Deposit Co. of Md. v. McCulloch*** five factor test.
 1. How reasonable were the precautions taken to prevent inadvertent disclosure regarding the extent of document production?
 2. How many inadvertent disclosures were there?
 3. What was the extent of disclosures?
 4. Was there a delay in measures taken to rectify the disclosure?
 5. Would the overriding interests of justice be served by relieving the party of its errors?
- Held “reasonableness” of the search protocols is crux of matter and that producing party’s ad hoc approach didn’t meet judicial muster, given the complexity now associated with e-discovery search technologies

Federal Rule of Evidence 502

- Passed into law September 2008
- 502(b) provides that inadvertent disclosure does not constitute a waiver when made in a federal proceeding or to a federal agency when:
 - (1) was waiver inadvertent;
 - (2) the party took reasonable steps to prevent disclosure;
 - (3) attempted to rectify the error.

***Rhoads Indus. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238 (E.D. Pa. 2008)**

First case to interpret FRE 502.

- Different conclusion than Victor Stanley using the Fidelity test.
- Inadvertent production of 800 privileged electronic document.
- Held reasonableness of the privilege review is crux of the dispute.
- In spite of four factors weighing in favor of receiving party, fifth factor was held to be crux of the matter.

ABA Ethics Opinion 08-451, August 5, 2008

- Sending legal work overseas is ethically permissible as long as the lawyer doing the outsourcing takes steps to ensure the protection of client confidences and preservation of attorney-client privilege.
 - Foreign lawyers should be suitably trained and competent
 - Invoices for outsourced work should be reasonable
 - Outsourcing lawyer is still ultimately responsible
 - Outsourcing lawyer must properly supervise offshore attorneys.

Top E-Discovery Trends for 2009

- Increase in Outsourcing of IT Infrastructure**
- Government Investigations Increase in Turbulent Economic Climate**
- Growth in Use of Analytical Tools for Automated Reviews due to passage of FRE 502**
- Growing Demand for Early Data Assessment Tools**
- Corporations Take More Control over eDiscovery**
- Growth in Flat Fees**
- Increase in use of LPOs for Review**