What Every Attorney Should Know About eDiscovery in 2017

Overview

Legal Education Presentation

- Sponsor and Presenter Credentials
- Key Electronic Discovery Terms
- Phases of the Electronic Discovery Life Cycle
- Rules Regarding Electronically Stored Information
- Competency Ethical Duties of Attorneys
- Top Ten Important Cases to the Evolution of eDiscovery Best Practices
- Useful Resources for eDiscovery Continued Education
- Questions and Considerations

Statement

Mandatory Continuing Legal Education

This course has been approved for Minimum Continuing Legal Education credit by the State Bar of Texas Committee on MCLE in the amount of **1.0 credit hours** of which **0.25 credit hours** will apply to legal ethics/professional responsibility credit.

Course No: 928000611

This course has been approved for CLE in Texas ONLY. If applicable, others who attend may choose to apply for out-of-state CLE credit on their own.

CloudNine

Sponsor Credentials

CloudNine empowers legal, information technology, and business professionals with **eDiscovery automation software** and **professional services** that simplify litigation, investigations, and audits for law firms and corporations.

- Founded in 2002 in Houston, Texas
- National Focus with Local Presence
- Direct (End User) and Indirect (Partner) Engagement Model

CloudNine

Presenter Credentials

- **Doug Austin**: Doug is the Vice President of Operations and Professional Services for CloudNine. At CloudNine, Doug manages professional services consulting projects for CloudNine clients. Doug has over 25 years of experience providing legal technology consulting, technical project management and software development services to numerous commercial and government clients. Doug is also the editor of the CloudNine sponsored eDiscovery Daily blog, which has become a trusted resource for eDiscovery news and analysis and is an EDRM Education partner.

- **Karen DeSouza**: Karen is the Director of Review Services, In-House Counsel, and a Professional Services Consultant for CloudNine. Also, Karen helps attorneys with CloudNine's software and Pre-Litigation Consulting Services. Karen is a licensed attorney in Texas and has over 15 years of legal experience. She also has a Bachelor of Science in Legal Studies - American Jurisprudence. Before CloudNine, Karen worked as an E-Discovery Director, Project Manager, and as an Associate at various law firms in Houston area where her primary focus was litigation.

Key Electronic Discovery Terms

- **Claw-back Agreement:** An agreement that protects against waiver of privilege and/or work production protections when inadvertent production occurs. See Federal Rule of Evidence 502. In this order, the return of inadvertently disclosed records is automatic and does not require a showing of reasonable steps to prevent disclosure.

- **Deduplication ("Deduping"):** The process of comparing electronic records and removing or marking duplicates within a data set. Deduplication can be done within custodians, but is most commonly done across the corpus of the data.

- **Duty to Preserve:** Duty arising under state and federal law, upon reasonable anticipation of litigation, to preserve documents, electronic records and data, and any other evidence or information potentially relevant to a dispute.

Key Electronic Discovery Terms

Key Electronic Discovery Terms

- **Electronically Stored Information (ESI):** Information that is stored electronically (regardless of the media or original formatting) as opposed to paper.
- **Family:** Used to identify related documents, typically when referring to emails and attachments. The email is typically referred to as the "parent" and the attachments as the "children".
- **Litigation Hold (or Legal Hold):** Communications issued upon notice of a duty to preserve, and instructing individuals and entities in the efforts required to ensure adequate preservation of potentially relevant evidence.
- **Metadata**: Data (stored electronically) describing the characteristics of specific ESI that can be found in different places and different forms. Practice Note: The duty to preserve includes metadata.

Key Electronic Discovery Terms

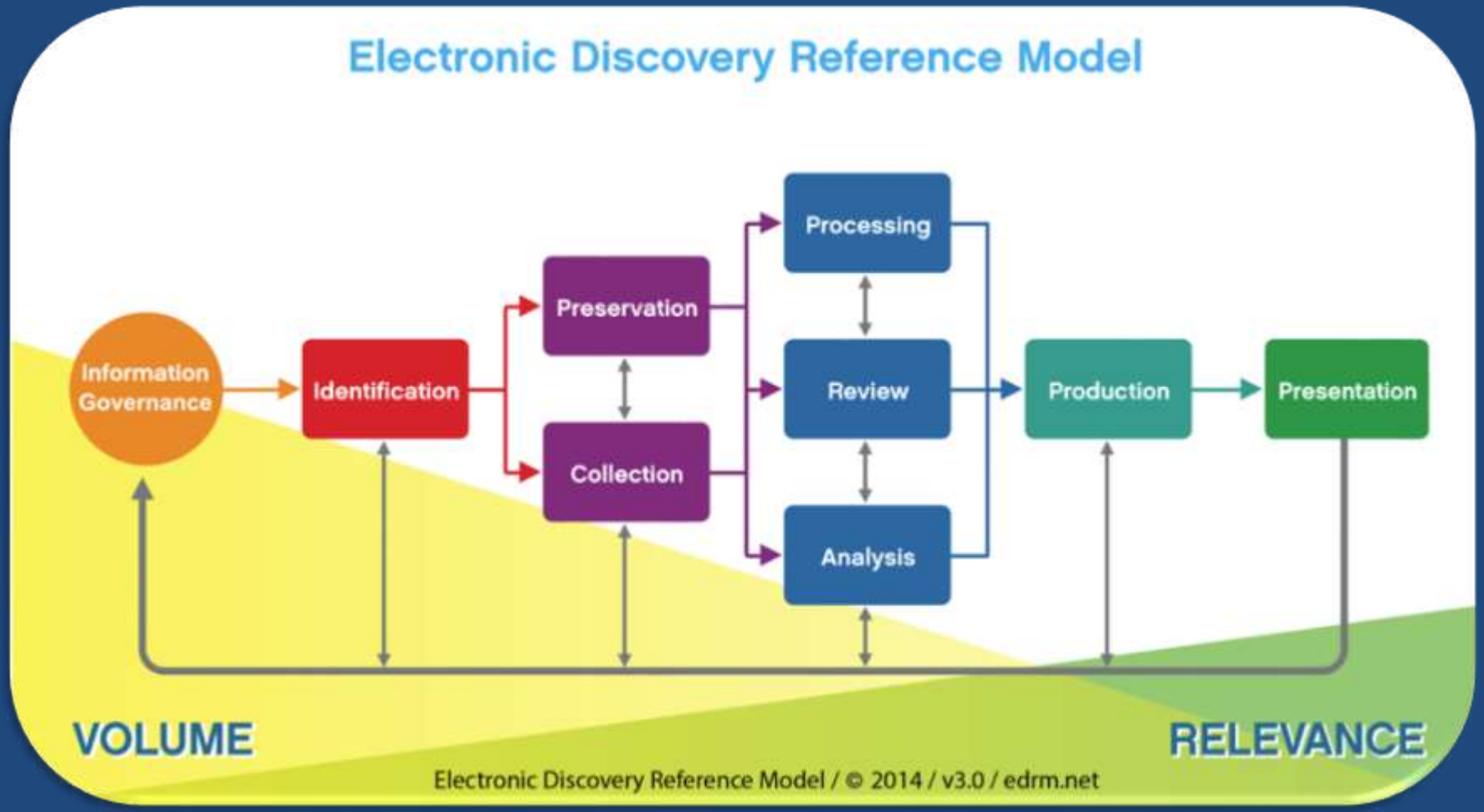
- **Native Format**: An electronic document's original form, as defined by the application that was used to create the document. Sometimes documents are converted from their native format to an imaged format, such as TIFF or PDF. Once converted, the original metadata cannot be viewed.

- **Record Custodian**: Individual responsible for the physical storage and protection of records. Custodian may also refer to various individuals with knowledge and/or possession of, or who created, sent, received and/or stored emails, documents and other data relevant to an ongoing or potential dispute.

- **Spoliation:** The destruction of evidence and information that may be relevant to ongoing or reasonably anticipated litigation, government audit or investigation. Courts differ as to the requisite level of intent required for imposition of sanctions, with fault (possession and failure to preserve) on one end and willfulness on the other.

For more terms, check out the Electronic Discovery: Glossary of 123 Commonly Used Terms by Lane Powell PC.

Phases of the eDiscovery Life Cycle

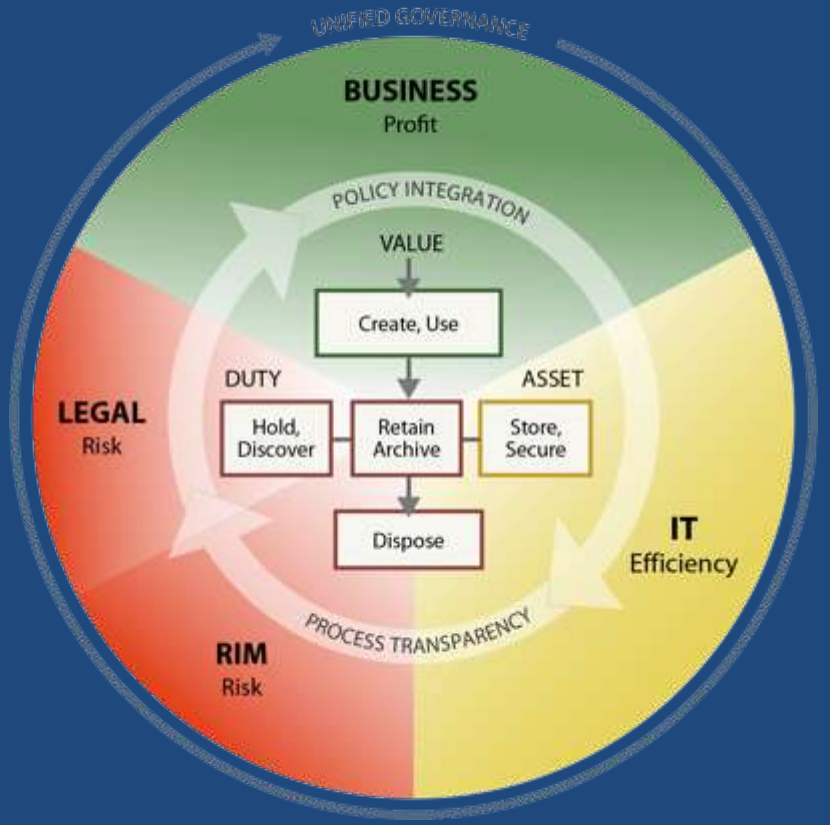


Phases of eDiscovery Life Cycle

Information Governance

The set of multi-disciplinary structures, policies, procedures, processes and controls implemented to manage information at an enterprise level, supporting an organization's immediate and future regulatory, legal, risk, environmental and operational requirements.

Information Governance Reference Model (IGRM)



Sedona Principle #1: Electronically stored information is generally subject to the same preservation and discovery requirements as other relevant information.

Phases of eDiscovery Life Cycle

Information Governance

Why is Information Governance important?

- Every **2 days** we create as much information as we did from the beginning of time until **2003**
- Data is growing faster than ever before and by the year 2020, about **1.7 megabytes** of new information will be created **every second for every human being** on the planet.
- By 2020, our accumulated digital universe of data will grow from **4.4 zettabytes** today to around **44 zettabytes**, or **44 *trillion* gigabytes**.
- We perform **40,000 search queries every second** (on Google alone), which makes it 3.5 billion searches per day and 1.2 trillion searches per year.
- If you burned all of the data created in just one day onto DVDs, you could stack them on top of each other and reach the moon – **twice**

For more facts, check out Just How "BIG" is Big Data Getting? Check Out These Facts – eDiscovery Trends

Phases of eDiscovery Life Cycle

Identification

Identification

Locating potential sources of ESI and determining the **scope**, **breadth** and **depth** of that ESI.

Two main components in Identification include:

- **Early Case Assessment**: Assess case value, strategy, risk analysis, legal hold requirements, etc.
- **Early Data Assessment**: Interview records management personnel, potential custodians and information management personnel to determine potential locations and types of relevant ESI.

Sedona Principle #3: As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.

Phases of eDiscovery Life Cycle

Preservation and Collection

- **Preservation**: Ensuring that ESI is protected against inappropriate alteration or destruction.
- **Collection**: Gathering ESI for further use in the eDiscovery process.

The stages are together in the model because, often, you preserve by collecting.

Sedona Principle #5: The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information.

Phases of eDiscovery Life Cycle

Preservation

Aim: When duty to preserve is triggered, promptly isolate and protect potentially relevant data in ways that are: legally defensible; reasonable; proportionate; efficient; auditable; broad but tailored; mitigate risks.

Goal: Mitigate risks.

Preservation

Phases of eDiscovery Life Cycle

Collection

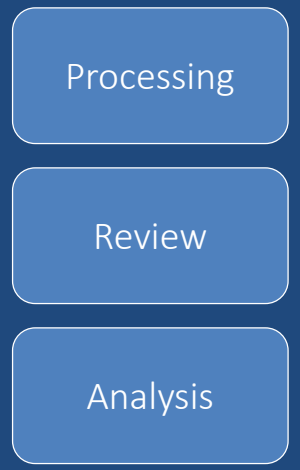
Although represented as a linear workflow, moving from left to right, this process is often iterative.

Collection

Phases of eDiscovery Life Cycle

Processing, Review, and Analysis

- **Processing:** Reducing volume of ESI and converting it to forms suitable for review & analysis.
- **Review:** Evaluating ESI for relevance & privilege.
- **Analysis:** Evaluating ESI for content & context, including key patterns, topics, people & discussion.



The stages are together in the model because they are often inter-related and occurring simultaneously.

Sedona Principle #6: Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

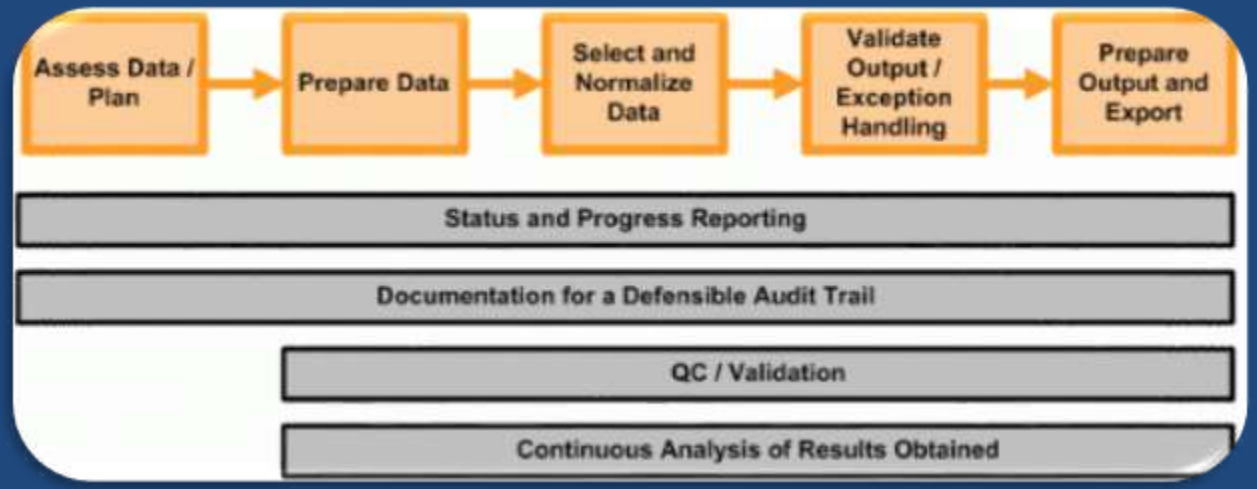
Phases of eDiscovery Life Cycle

Processing

Aim: Perform actions on ESI to allow for metadata preservation, itemization, normalization of format, and data reduction via selection for review.

Goal: Identify ESI items appropriate for review and production as per project requirements.

Processing

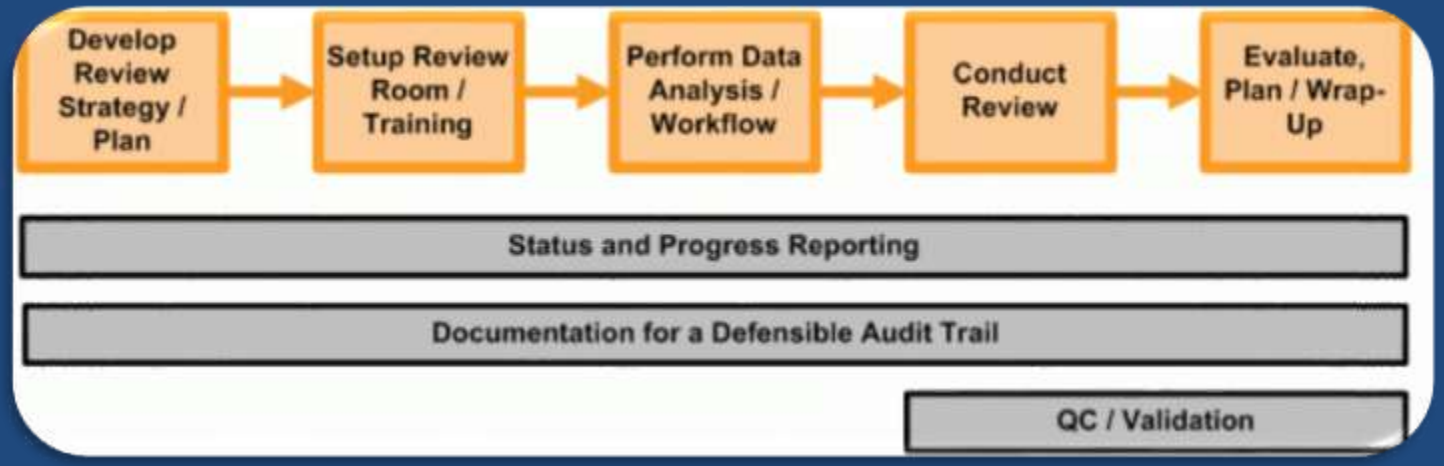


Phases of eDiscovery Life Cycle

Review

Aim: To gain an understanding of document content while organizing them into logical sub-sets in an efficient and cost effective manner. Develop facts, reduce risk, reduce cost, leverage technology, facilitate collaboration and communication.

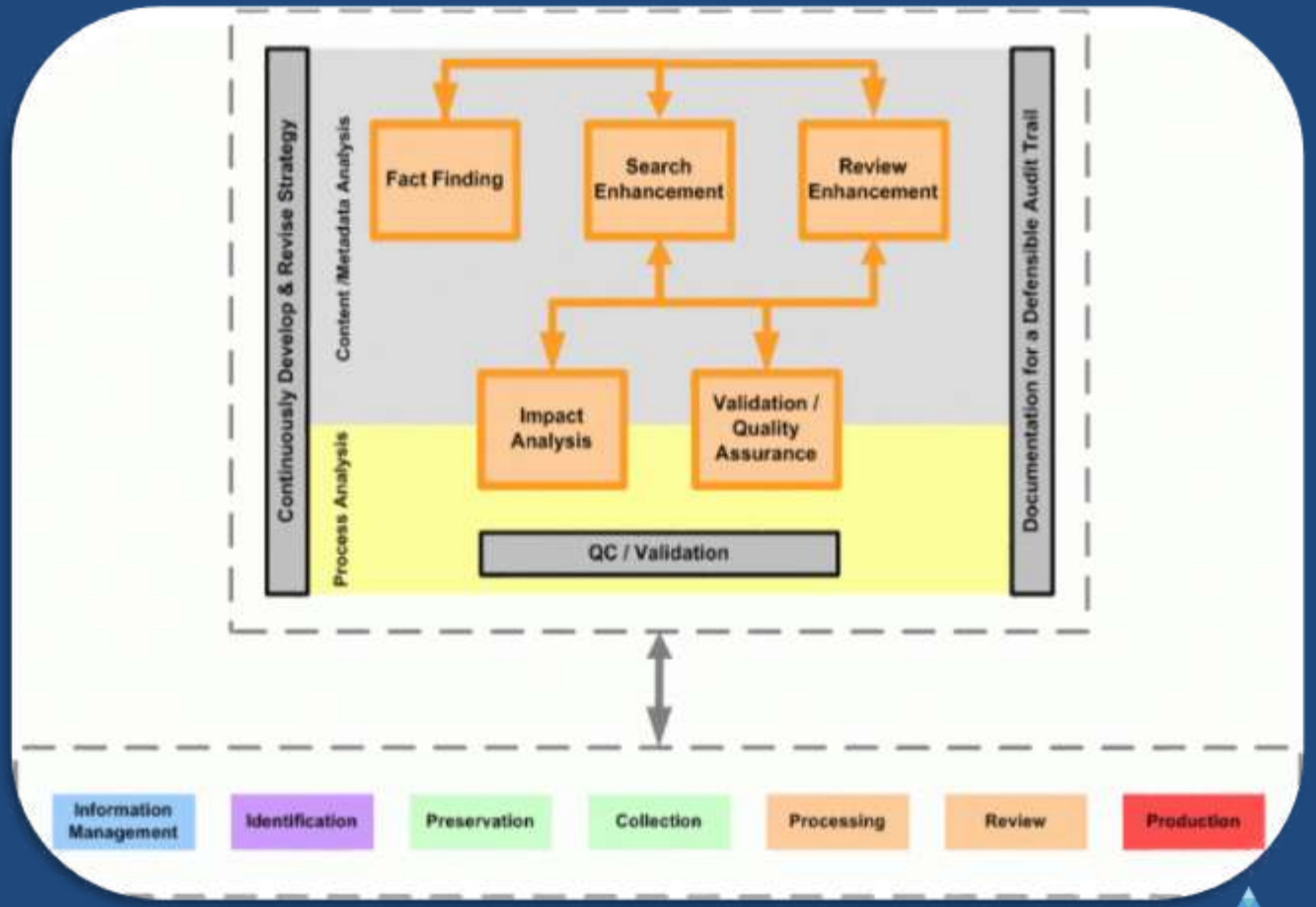
Review



Phases of eDiscovery Life Cycle

Analysis

Aim: For litigation teams to be able to make informed decisions about strategy and scope through reliable methods based on verified data.



Analysis

Phases of eDiscovery Life Cycle

Processing

Review

Analysis

Processing, Review, and Analysis

Review isn't always synonymous anymore with attorneys and other legal professionals manually reviewing all documents (after culling) and making determinations.

Technology Assisted Review (TAR): A method of culling relevant documents for production or review, using algorithms to determine the relevance of documents based on linguistic and other properties and characteristics. It relies on the coding from a human sampling of documents called a "seed set." The seed set allows the computer to identify and evaluate the remaining documents. Also known as Predictive Coding.

Sedona Principle #11: A responding party may satisfy its good faith obligations to preserve and produce relevant electronically stored information by using technology and processes, such as sampling, searching, or the use of selection criteria.

Phases of eDiscovery Life Cycle

Production | Presentation

Production

Production: Delivering ESI to others in appropriate forms & using appropriate delivery mechanisms.

*The **Lawyer's Guide to Forms of Production** by Craig Ball – a complete guide to forms of production and how to request ESI from opposing counsel.*

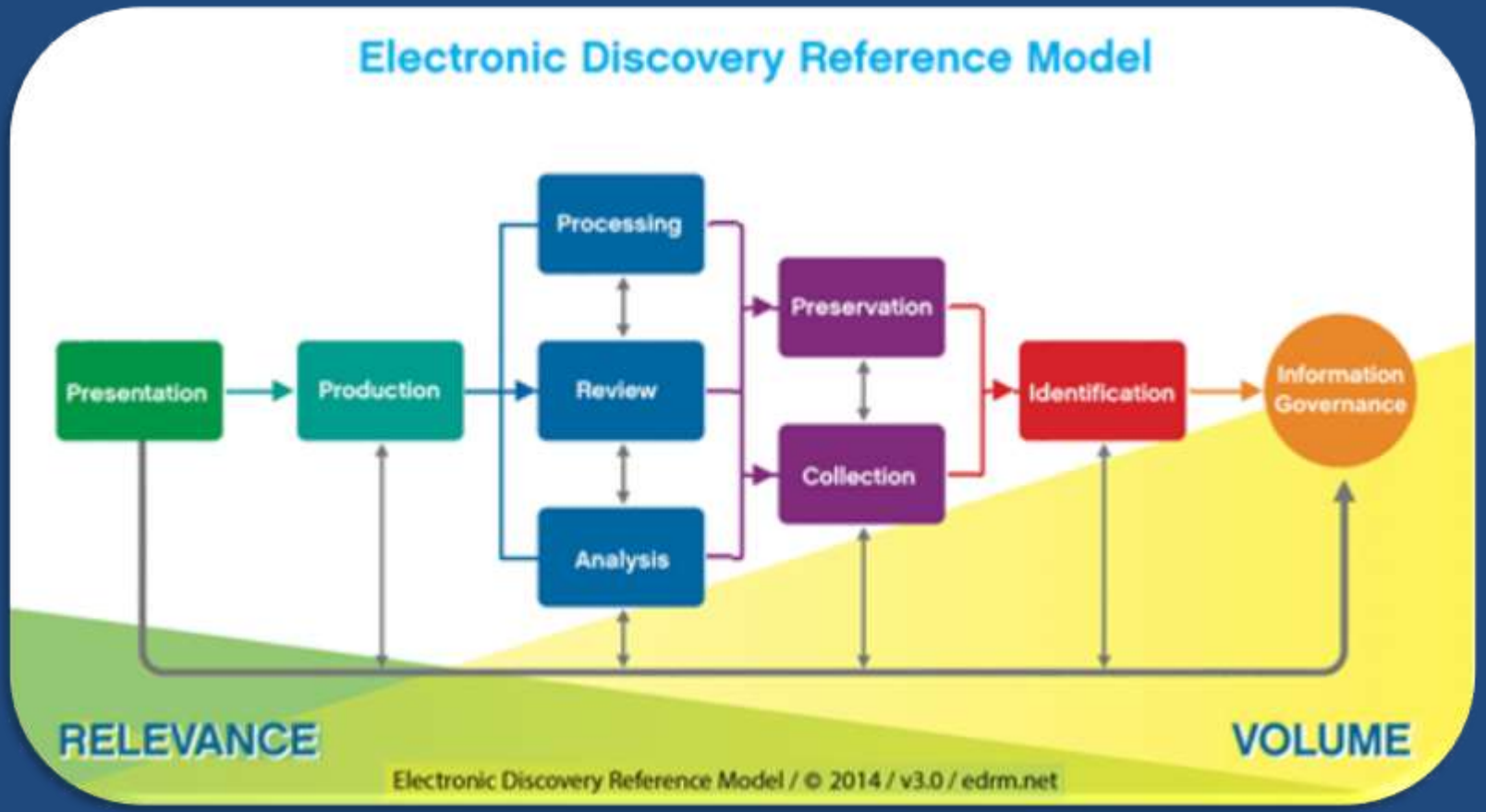
Presentation

Presentation: Displaying ESI before audiences (at depositions, hearings, trials, etc.), especially in native & near-native forms, to elicit further information, validate existing facts or positions, or persuade an audience.

Sedona Principle #12: The production of electronically stored information should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case.

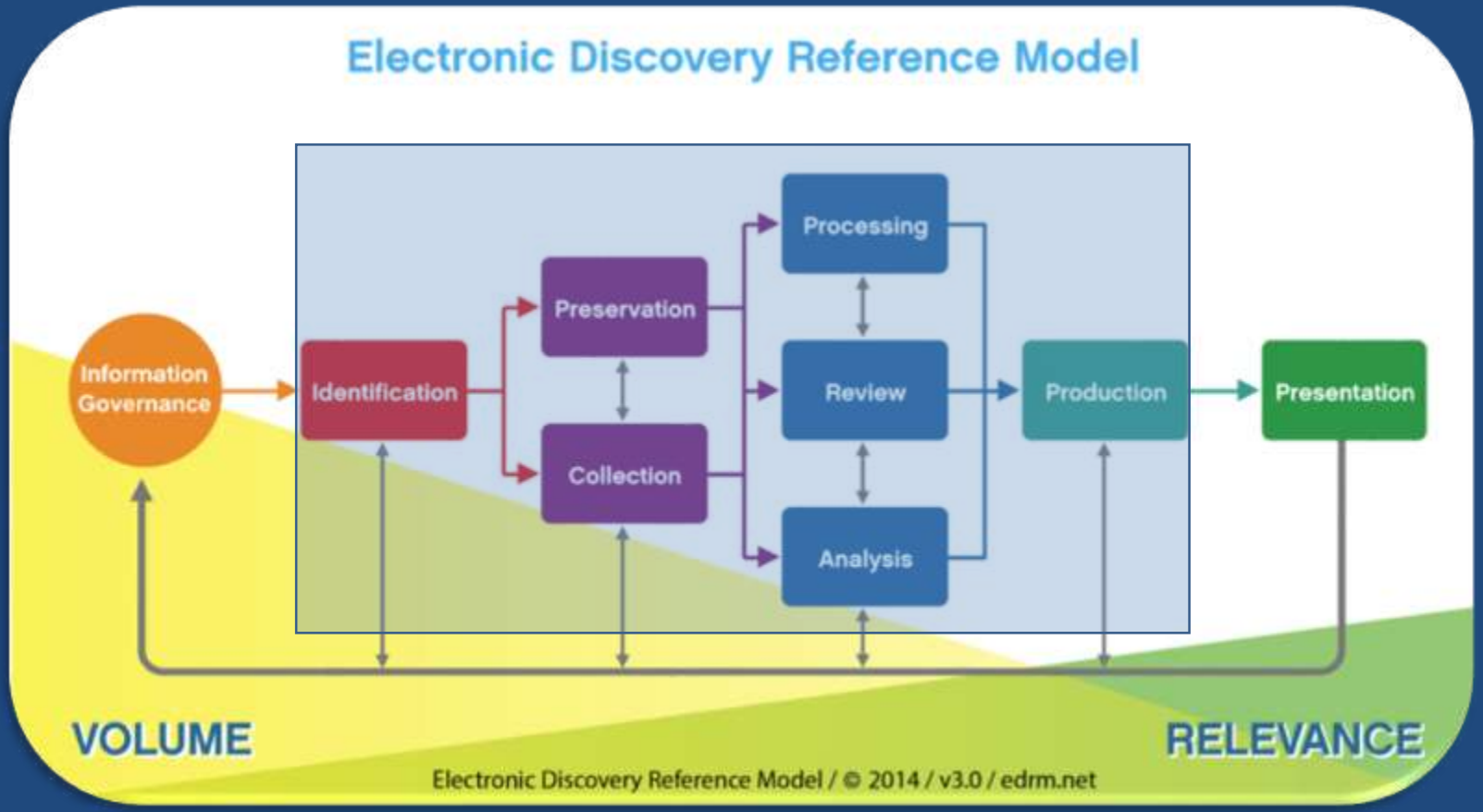
Phases of the eDiscovery Life Cycle

Sometimes, it's best to work backwards…



Phases of the eDiscovery Life Cycle

Illustration of Identification to Production



Rules Regarding ESI

2006 Federal Rule Changes

Rules that were changed on December 1, 2006 include:

- Rule 16
- Rule 26
- Rule 33
- Rule 34
- Rule 37
- Rule 45

Rules Regarding ESI

2006 Federal Rule Changes

Rule 16(b) - The amendment to Rule 16(b) added:

"**provisions for disclosure or discovery** of electronically stored information"

and

"any agreements the parties reach for asserting claims of privilege or protection as trial preparation materials after production" to the **matters that the court may include in the scheduling order**.

Rules Regarding ESI

2006 Federal Rule Changes

Rule 26(a)(1) - Initial Disclosures

The amendment **added** the new category of electronically stored information to the **list of what each party must** disclose during the **opening stages** of a case.

Rules Regarding ESI

2006 Federal Rule Changes

Rule 26(b)(2)(B) - Specific Limitations on Electronically Stored Information

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party seeking the discovery may compel the discovery in question. Note the burden is then on the party from whom the discovery is sought to demonstrate **undue burden or cost**. Also, even though undue burden or cost is shown the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).

Rules Regarding ESI

2006 Federal Rule Changes

Rule 26(b)(2)(C) - Balancing Provisions that Limit Scope of Discovery

When Required. **On motion or on its own**, the court **must limit** the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is **unreasonably cumulative or duplicative**, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had **ample opportunity** to obtain the information by discovery in the action; or

(iii) 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.

Under this rule, a court **may set limits on the permitted scope of discovery or shift some of the production costs to the requesting party.**

Rules Regarding ESI

2006 Federal Rule Changes

Rule 26(b)(2)(C) - Balancing Provisions that Limit Scope of Discovery (Continued)

The Committee Note lists **factors that may be considered by a court trying to balance the costs and benefits of discovery of electronically stored information**. These include: **(1)** the specificity of the request **(2)** the quantity of information available from other and more easily accessed sources **(3)** the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources, **(4)** the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources, **(5)** predictions as to the importance and usefulness of the further information, **(6)** the importance of the issues at stake in the litigation, and **(7)** the parties' resources.

Note: Balancing tests have been used for years. An example is the seven-factor test developed by Judge Scheindlin in her first Zubulake opinion (Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 324 (S.D.N.Y. May 13, 2003))

Rules Regarding ESI

2006 Federal Rule Changes

Rule 26(b)(5)(B) - Claiming Privilege After Production

The procedure through which a party who has **inadvertently produced** trial preparation material or privileged information **may assert a protective claim** as to that material. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party **making the claim may notify any party that received the information of the claim and the basis for it**. After being notified, a party **must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved**; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. **The producing party must preserve the information until the claim is resolved.**

Rules Regarding ESI

2006 Federal Rule Changes

Rule 26(f) - Conference of the Parties and Planning for Discovery

The amendment puts several additional items on the agenda for the planning conference.

Included items are:

(1) discussions of any issues about preserving discoverable information;
(2) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced
(3) any issues about claims of privilege or of protection as to trial-preparation materials, including, if the parties agree on a procedure to assert these claims after production, and whether to ask the court to include their agreement in an order.

Rules Regarding ESI

2006 Federal Rule Changes

Rule 33(d) - Interrogatories to Parties

Rule 33 gives a responding party the right to produce business records in answer to an interrogatory if the **burden** of deriving the answer will be **substantially the same** for both parties. In 2006, the amendment to Rule 33(d) **extended this right to electronically stored information**.

The Committee Note points out that a party that has chosen to respond to a Rule 33 interrogatory by producing electronically stored information may be obligated to provide technical support and even direct access to its electronic information system. This is because the rule obligates the producing party to provide "in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could," and further requires that the party serving the interrogatory be afforded "reasonable opportunity to examine and audit" the records that are identified. This can raise confidentiality or privacy concerns.

Rules Regarding ESI

2006 Federal Rule Changes

Rule 34(a)

- Amendment specifically recognized the category of electronically stored information
- A reviewing party has the right to "**test or sample**" electronically stored information.

Rules Regarding ESI

2006 Federal Rule Changes

Rule 34(b)

- Amendment allows the requesting party to **specify the form or forms in which electronically stored information is to be produced.**
- **If the responding party objects or if no form was specified**, the responding party **MUST** state the form or form it intends to use.
- A party must produce it in a form or forms in which it is ordinarily maintained or in a **reasonably usable form or forms**.
- A party **need not** produce **the same** electronically stored information **in more than one form**.

Rules Regarding ESI

2006 Federal Rule Changes

Rule 37 - Failure to Provide Electronically Stored Information

Absent exceptional circumstances, **a court may not impose sanctions** under these rules on a party **for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.**

Rules Regarding ESI

2006 Federal Rule Changes

Rule 45 - Subpoenas

Amended Rule 45 basically **conforms the procedures for subpoenas to the other discovery rules**, including adding the category of electronically stored information, providing for the form of production, protecting sources that are not reasonably accessible, and setting forth the procedures for claims of inadvertent production of privileged or trial-preparation material.

Rules Regarding ESI

2006 Federal Rule Changes

Rule 45 - Subpoenas (Continued) - Amendment Specifically Added:

- electronically stored information is added as a category of information that may be sought by subpoena.
- testing or sampling may be requested
- the subpoena may specify the form or forms in which electronically stored information is to be produced
- the default form of production for electronically stored information
- the same electronically stored information need only be produced in one form
- electronically stored information from sources identified as not reasonably accessible because of undue burden or cost need not be produced
- the burden to show undue burden or cost is on the party from whom discovery is sought
- if the burden of showing undue burden or cost is met, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C), and the court may specify the conditions upon which such discovery shall proceed;
- a claim of privilege or protection as trial-preparation material may be made after production of discovery material by notice to the receiving party, and the receiving party must then promptly return, sequester, or destroy the specified information and any copies, may not use or disclose the information until the claim is resolved, and, if the information has been disclosed before receiving notice, must take reasonable steps to retrieve the information;
- the receiving party may promptly present the privilege or trial-preparation protection issue for determination and
- the person who produced the information must preserve it until the claim is resolved.

Rules Regarding ESI

2015 Federal Rule Changes

Amendments to Rules effective December 1, 2015 include:

- Rule 1
- Rule 4
- Rule 16
- Rule 26
- Rule 34
- Rule 37

Rules Regarding ESI

2015 Federal Rule Changes

Rule 1 - Cooperation

Rule 1 states ". . . should be construed, and administered, **and employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding."

The Committee Note, states the new language is intended "to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way." The note further states that "Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

Rules Regarding ESI

2015 Federal Rule Changes

Rule 4(m) - Timing Rule

Rule 4(m) **shortens the time period for serving a summons on a defendant from 120 days to 90 days** after a complaint is filed.

Rules Regarding ESI

2015 Federal Rule Changes

Rule 16(b)(1)(B) and Rule 16(b)(1)(A)

Rule 16(b)(1)(B), used to read "after consulting with the parties, attorneys and any unrepresented parties at a scheduling conference by telephone, mail, or other means." The rule now **deletes the words "telephone, mail, or other means."**

The committee note clarifies that the conference may be held by any "**direct simultaneous communication"** and Rule 16(b)(1)(A) still allows a scheduling order to be based on the parties Rule 26(f) report without holding a conference.

Rules Regarding ESI

2015 Federal Rule Changes

Rule 16(b)(2) - Timing Rule

Rule 16(b)(2), requires the judge to issue a scheduling order 90 days after a defendant is served (this is reduced from 120 days) or 60 days after the defendant has appeared (down from 90).

Rules Regarding ESI

2015 Federal Rule Changes

Rule 16(b)(3)(B)

Adds three new topics to the list of permitted contents in a scheduling order.

(iii) provide for disclosure, or discovery, or preservation of electronically stored information;
(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, **including agreements reached under Federal Rule of Evidence 502**;
(v) **direct that before moving for an order relating to discovery, the movant must request a conference with the court**;

Rules Regarding ESI

2015 Federal Rule Changes

Rule 26(b)(1) and Rule 26(b)(2)(C) - *26(b)(1) focuses on limiting the scope of discovery.*

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and **proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. — ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

Rules Regarding ESI

2015 Federal Rule Changes

Rule 26(b)(1) and Rule 26(b)(2)(C) (Continued)

The Committee Note specifies that the changes to Rule 26(b)(1) include returning the proportionality factors from Rule 26(b)(2)(C) back to Rule 26(b)(1), where they resided before 1993. This was done to "restore the **proportionality factors** to their original place in defining the scope of discovery. This change reinforces the obligation of the parties to consider these factors in making discovery requests, responses, or objections." The amendments **also remove the "reasonably calculated" language** from the rule because the phrase created problems.

Rules Regarding ESI

2015 Federal Rule Changes

Rule 26(c)(1)(b) - Protective Orders

The court may, **for good cause, issue an order to protect a party or person** from annoyance, embarrassment, oppression, **or undue burden or expense**, including one or more of the following:

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

Rules Regarding ESI

2015 Federal Rule Changes

Rule 26(d)(2)

Adds Rule 26(d)(2), Early Rule 34 Requests, which would allow a party to **exchange Rule 34 document production request**s to another party **more than 21 days after that party has been served even though the Rule 26(f) conference has not occurred**. Delivery would not be counted as service and the requests would be considered served at the first Rule 26(f) conference.

Rules Regarding ESI

2015 Federal Rule Changes

Rule 26(f)(3) - Preservation and Waiver

Discovery Plan. **A discovery plan must state the parties' views and proposals on: * * * * ***

(C) any issues about disclosure, or discovery, or **preservation** of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, 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 **under Federal Rule of Evidence 502**;

Rules Regarding ESI

2015 Federal Rule Changes

Rule 34(b)(2)(B) and Rule 34(b)(2)(C)

Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection to the request~~ **with specificity the grounds for objecting to the request, including the reasons**. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

Rules Regarding ESI

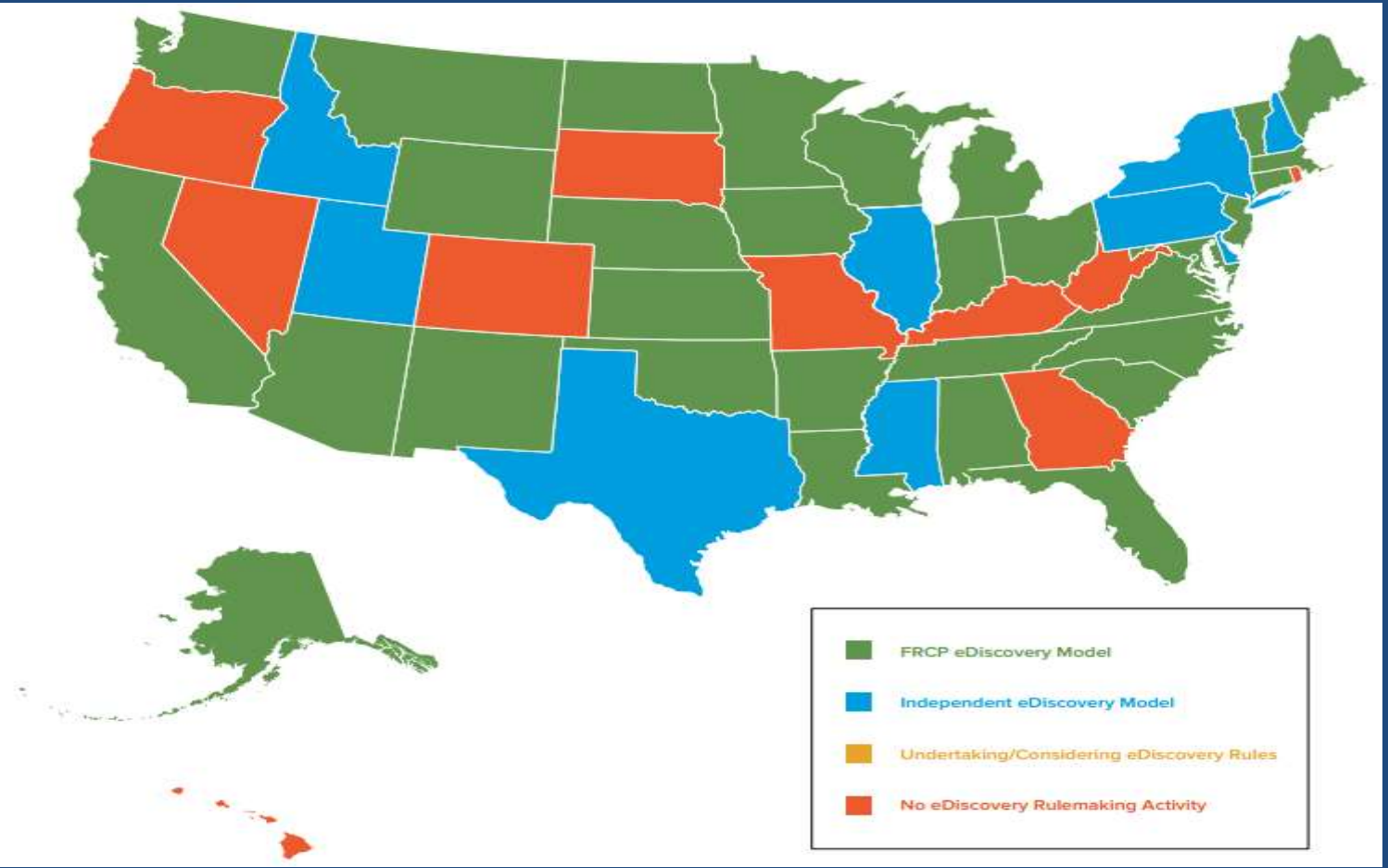
2015 Federal Rule Changes

Rule 37(e) - Preservation and Sanctions

Failure to ~~Provide~~ Preserve Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system~~. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
    (A) presume that the lost information was unfavorable to the party;
    (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
    (C) dismiss the action or enter a default judgment.

Resources for Other State Rules



Competency Ethical Duties

ABA Model Rule 1.1

Rule 1.1 - Competence

A lawyer shall provide competent representation to a client. **Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary** for the representation.

Note: This rule requires lawyers to be competent in representation of their clients, with Comment 8 stating to maintain the requisite knowledge and skill, a lawyer **should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Competency Ethical Duties

California Formal Opinion No. 2015-193

"**Attorney competence related to litigation generally requires**, among other things, and at a minimum, a basic understanding of, and facility with, **issues relating to e-discovery, including the discovery of electronically stored information ("ESI")**. On a case-by-case basis, the **duty of competence may require** a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter and the nature of the ESI . Competency may require **even a highly experienced attorney to seek assistance in some litigation matters involving ESI**. **An attorney lacking the required competence for the e-discovery issues has three options: (1)** acquire sufficient learning and skill before performance is required; **(2)** associate with or consult technical consultants or competent counsel; or **(3)** decline the client representation. Lack of competence in e-discovery issues **also may lead to an ethical violation of an attorney's duty of confidentiality**."

Competency Ethical Duties

Florida Changes - Effective January 1, 2017

Rule 4.1 - Competence

A lawyer ~~shall~~ must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

"The comment to rule 4-1.1 is amended to add language providing that competent representation may involve a lawyer's association with, **or retention of, a non-lawyer advisor with established technological competence in the relevant field**. Competent representation may also entail safeguarding confidential information related to the representation, including electronic transmission and communications. Additionally, we add language to the comment providing that, in order to maintain the requisite knowledge and skill, **a lawyer should engage in continuing study and education, including an understanding of the risks and benefits associated with the use of technology."**

Competency Ethical Duties

Florida Changes - Effective January 1, 2017

Florida is the first state to mandate Technology CLE for Attorneys.

Rule 6-10.3 (Minimum Continuing Legal Education Standards)

We amend subdivision (b) (Minimum Hourly Continuing Legal Education Requirements) to change the required number of continuing legal education credit hours **over a three-year period from 30 to 33, with three hours in an approved technology program.**

Competency Ethical Duties

Example Cases Where Ethical Obligations Not Met

HMS Holdings Corp. v. Arendt, et al., 2015 NY Slip Op 50750(U) (Sup. Ct., Albany County, May 19, 2015)

- Plaintiffs' expert alleged that two defendants (both licensed attorneys and former employees) had intentionally and deliberately destroyed relevant ESI;
- One defendant used Secure Erase wiping software on his laptop six times after the litigation hold had gone into effect and failed to produce a hard drive (where he copied confidential plaintiff business materials the day before he terminated his employment with the plaintiff);
- The other defendant's laptop revealed "shadow copies" showing that relevant documents had been deleted and she failed produce text messages from her iPhone 4, which had been backed up after she claimed it was destroyed;

Result: New York Supreme Court ordered a mandatory adverse inference instruction, awarded attorney fees and reported one of the defendants to the New York State Committee on Professional Standards for attorneys.

Competency Ethical Duties

Example Cases Where Ethical Obligations Not Met

Regulatory Fundamentals Group v. Governance Risk Management Compliance, 13 Civ. 2493 (KBF) (S.D.N.Y. Aug. 5, 2014)

- In response to a discovery request, the defendant revealed that he had canceled his email account with a third-party vendor, which had hosted his corporate defendants' websites and email domains;
- After the plaintiff noticed the defendant for a deposition to investigate the cancellation and he failed to appear, the plaintiff filed a motion for sanctions alleging that the defendant had engaged in spoliation;
- The spoliator here was a graduate of Cornell Law School and a member of the bar of the State of New York;

Result: Judge granted plaintiff's request for judgment against the defendant due to the defendant's "planned, repeated, and comprehensive" destruction of highly-relevant documents.

Competency Ethical Duties

Example Cases Where Ethical Obligations Not Met

Small v. University Medical Center of Southern Nevada, No. 2:13-cv-00298-APG-PAL (D. Nev. Aug. 18, 2014)

- A partial chronology within the Special Master's report demonstrated that the defendant did not issue or put any litigation hold in place until more than 250 days after the plaintiffs initiated the action;
- It was determined that the company issued mobile devices were not put under litigation hold until after a number of the devices were wiped clean and no hold was issued at all for BYOD devices;
- The defendant also failed to identify and preserve network file shares, two laptops belonging to key custodians and work computers used by 24 of the 27 custodians;

Result: Special Master, calling the defendant's widespread failure to preserve data a "mockery of the orderly administration of justice", recommended that the court enter an order of default judgment, along with further sanctions, in favor of the plaintiffs.

Competency Ethical Duties

Example Cases Where Ethical Obligations Not Met

Other Fun (Alleged) Examples:

- This firm marked up reviewer billings over **500 percent** (from the contract attorney's **$40** per hour pay rate to **$245** per hour billed to the client) and that's not the worst part – the contract attorney overbilled his hours too.
- An Arkansas attorney claimed he received trojans included with the document production from opposing counsel – malware designed to steal passwords and other malicious acts (not the other kind of trojan).
- A law firm admitted that it failed to review documents produced in a case that caused its clients to have sanctions granted against them for misleading interrogatory responses, resulting in the clients being ordered to pay over **$85,000** in attorneys' fees to their opponent's lawyers.

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#10: Oracle v. Google

Oracle America v. Google (N.D. Ca. Oct. 20, 2011)

- In a dispute over Java licensing fees, Google inadvertently produced drafts of an email eventually labeled attorney work product that weren't picked up by their search software;
- The email referenced Google's attempts to find alternatives to Java to strengthen negotiating position and avoid litigation;
- California District Judge William Alsup refused to exclude the inadvertently produced emails, his ruling was upheld by the Federal Circuit Court;
- Despite that, Google has won the case – twice
- This case is also notable in that the judge notified the parties to inform the court if they were going to mine for prospective jurors' social media data.

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#9: Pippins v. KPMG LLP

Pippins v. KPMG LLP, No. 11 Civ. 0377 (CM)(JLC), (S.D.N.Y. Oct. 7, 2011)

- Defendant was preserving almost **2,500** hard drives at a cost of **$1.5 million** and sought to preserve only a random sample of **100** hard drives or have the plaintiff bear the cost of maintaining more than 100 of the drives;
- Plaintiffs sought an order requiring production of five of the hard drives for inspection so that the parties could negotiate a resolution to the hard drive preservation issue, defendant filed a motion for protective order to prevent analysis;
- The court denied defendant's motion and directed defendant to preserve all the hard drives, rejecting the proportionality argument primarily because the firm refused to permit plaintiffs or the court to analyze the ESI found on the drives. Without any transparency into the contents of the drives, the court could not weigh the benefits of the discovery against the alleged burdens of preservation.

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#8: Apple v. Samsung (a.k.a. "Patentgate")

Apple Inc. v. Samsung Elecs. Co., Case No.: C 11-1846 LHK (PSG) (N.D. Cal.)

- A 150 page report that included key terms of four Apple license agreements was not fully redacted by Samsung's outside counsel firm [Quinn Emanuel Urquhart & Sullivan LLP] and was inadvertently disclosed to numerous Samsung high ranking executives;
- Samsung and Quinn Emanuel were eventually ordered to pay over **$2 million** for "Patentgate" disclosure;
- Apple was ultimately awarded over **$1 billion** in judgments from Samsung, but a court ultimately refused to ban Samsung products that were found to have infringed on Apple products and the parties continue to litigate on the size of the award.

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#7: Boston Scientific v. Lee

Boston Scientific Corporation v. Lee, 1:13-cv-13156-DJC, (N.D. Cal., Aug 4, 2014)

- Plaintiff issued a subpoena for defendant's laptops, despite defendant's initial provision of forensic info from the laptops and willingness to let an independent vendor review a full forensic image of the first laptop to search for pertinent information;
- California Magistrate Judge Paul Grewal granted the defendant's motion to quash the subpoena, then plaintiff requested a meet and confer;
- Judge Grewal stated that the "time to tap flexibility and creativity is during meet and confer, not after", likening the plaintiff's new request to *Leave it to Beaver* ("Think Eddie Haskell singing the Beaver's praises to June Cleaver, only moments after giving him the business in private.") and noting that allowing the plaintiff to "seek shelter from a fallback position" would "make a mockery of both parties' obligation to meet and confer in good faith from the start".

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#6: Hyles v. New York City

Hyles v. New York City, No. 10 Civ. 3119 (AT)(AJP) (S.D.N.Y. Aug. 1, 2016)

- The plaintiffs requested New York Magistrate Judge Andrew J. Peck, the judge who presided over the first case ever to approve Technology Assisted Review, to order the defendant to use TAR;
- In response to the request, Judge Peck stated "The short answer is a decisive 'NO.'";
- While reiterating his position that "in general, TAR is cheaper, more efficient and superior to keyword searching", Judge Peck refused to order the defendant to use TAR, referencing The Sedona Principles, which state that "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information".

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#5: Pension Committee

The Pension Committee of the Montreal Pension Plan v. Banc of America Securities, LLC, 29010 U.S. Dist. Lexis 4546 (S.D.N.Y. Jan. 15, 2010)

- New York District Court Judge Shira Scheindlin defined negligence, gross negligence, and willfulness from an eDiscovery standpoint;
- Issues that constituted **gross negligence** or **willfulness** include: 1) Failure to issue a written litigation hold, 2) Failure to collect information from key players, 3) Destruction of email or backup tapes after the duty to preserve has attached and 4) Failure to collect information from the files of former employees that remain in a party's possession, custody, or control after the duty to preserve has attached;
- The opinion also addresses the responsibility to establish the relevance of evidence that is lost as well as responsibility to prove that the absence of the missing material has caused prejudice to the innocent party.

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#4: Nuvasive v. Madsen Medical

Nuvasive, Inc. v. Madsen Med. Inc., No. 13cv2077 BTM(RBB) (S.D. Cal. Jan. 26, 2016)

- In this contractual dispute, defendants sought sanctions in the form of an adverse inference jury instruction for plaintiff's failure to preserve text messages from four employees suspected of secret coordination with plaintiff;
- California Chief District Judge Barry Ted Moskowitz granted the defendants' motion for adverse inference sanctions for failure to preserve the text messages;
- After the 2015 Rules changes were adopted, plaintiff sought relief under Rule 60(b) based on the amendment to Federal Rule of Civil Procedure 37(e);
- As a result, Judge Moskowitz, finding the plaintiff did not intentionally fail to preserve the text messages, **reversed** the previous ruling and granted the plaintiff's motion for an order vacating the Court's previous order that granted the defendants' Motion for Sanctions.

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#3: Race Tires Amer., Inc. v. Hoosier Racing Tire

Race Tires Amer., Inc. v. Hoosier Racing Tire Corp., No. 2:07-cv-1294, 2011 WL 1748620 (W.D. Pa. May 6, 2011)

- Pennsylvania District Judge Terrence F. McVerry in Pittsburgh ruled that the winning defendants in an antitrust case were entitled to reimbursement of more than **$367,000** in eDiscovery costs;
- The plaintiff, appealed, arguing that the costs should be disallowed because "electronic document collection, hard drive imaging and indexing and searching, commonly referred to as 'eDiscovery charges,' are not enumerated under Section 1920(4), and thus are not properly deemed recoverable costs";
- Reimbursed costs were reduced to just over **$30,000** upon appeal;
- Awarding reimbursement of costs to prevailing parties is a mixed bag, here are other cases where reimbursement of costs was debated.

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#2: Da Silva Moore

Da Silva Moore v. Publicis Groupe & MSL Group, No. 11 Civ. 1279 (ALC) (AJP) (S.D.N.Y. Feb. 24, 2012)

- New York Magistrate Judge Andrew J. Peck issued the first ruling approving of the use of computer-assisted review, by accepting the defendants' proposal for the review process;
- Judge Peck noted that "[t]he goal is for the review method to result in higher recall and higher precision than another review method, at a cost proportionate to the 'value' of the case", while cautioning that "computer-assisted review is not a magic, Staples-Easy-Button, solution appropriate for all cases";
- Plaintiffs, unhappy with the defendants' proposed plan, took efforts all the way to the Supreme Court to attempt to have Judge Peck recused from the case, but were unsuccessful.

Top Ten Important Cases to the Evolution of eDiscovery Best Practices

#1: Zubulake v. UBS Warburg

Zubulake v. UBS Warburg LLC, 220 FRD 212

- Plaintiff filed suit against her former employer alleging gender discrimination, failure to promote, and retaliation;
- Initially, individual plaintiff produced 100 pages of documents more than the corporate defendant, causing the plaintiff to request the defendant to locate data on backup media;
- New York District Judge Shira Scheindlin issued key rulings that included classification of accessible vs. inaccessible data and a new seven factor balance test for cost-shifting of discovery costs, among other precedents;
- Judge Scheindlin, ruling that UBS had failed to take all necessary steps to guarantee that relevant data was both preserved and produced, granted the plaintiff's motion for adverse inference instruction sanctions. Ultimately, the jury found in plaintiff's favor awarding compensatory and punitive awards totaling **$29.2M.**

Useful Resources

Resources for eDiscovery Continued Education

The Sedona Conference®

- Founded in 1997, The Sedona Conference is a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights.

- Best Practice Commentaries include:
  - The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production
  - Principles Addressing Electronic Document Production
  - Commentary on Proportionality in Electronic Discovery
  - Database Principles
  - Cooperation Proclamation: Resources for the Judiciary
  - Commentary on Ethics & Metadata

  And many more…

Useful Resources

Resources for eDiscovery Continued Education

EDRM®

- In May 2005, EDRM was established to address lack of standards and guidelines in the eDiscovery market.
- In January 2006, the Electronic Discovery Reference Model was published, followed by resources such as:
  - Information Governance Reference Model (IGRM)
  - Computer Assisted Review Reference Model (CARRM)
  - Privacy & Security Risk Reduction Model (PSRRM)
  - Metrics Model
  - Talent Task Matrix
- Since its launch, EDRM has comprised 331 organizations, including 188 service and software providers, 71 law firms, 53 corporations and 8 governmental entities.

Useful Resources

Resources for eDiscovery Continued Education

eDiscovery Daily

- Launched in September 2010, eDiscovery Daily, provided by CloudNine, is a daily eDiscovery blog that provides eDiscovery news and analysis five days a week.
- Since its inception, eDiscovery Daily has published over 1,500 posts regarding eDiscovery best practices, trends and case law.
- Over 500 of those posts have covered eDiscovery case law, involving more than 380 distinct cases.
- eDiscovery Daily is an Education partner of EDRM.

Useful Resources

Resources for eDiscovery Continued Education

Other Useful Sites and Knowledge Bases

- Information Governance Initiative: A cross-disciplinary consortium and think tank focused on advancing information governance.
- Ball in Your Court: Blog by Craig Ball, noted eDiscovery industry thought leader.
- e-Discovery Team®: Blog by Ralph Losey, another noted eDiscovery industry thought leader.
- ComplexDiscovery: Site by Rob Robinson that provides links to other articles and various industry compilations.
- Ride the Lightning: eDiscovery and Information Security blog by Sharon Nelson of Sensei Enterprises.

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CloudNine Reprise

CloudNine empowers legal, information technology, and business professionals with **eDiscovery automation software** and **professional services** that simplify litigation, investigations, and audits for law firms and corporations.

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