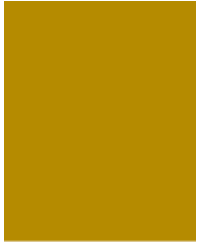


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E-Discovery: The Legal System and its Struggle with Electronically Stored Information

Presentation to the Kettle Moraine Chapter of ISACA

March 19, 2009

Erik Phelps

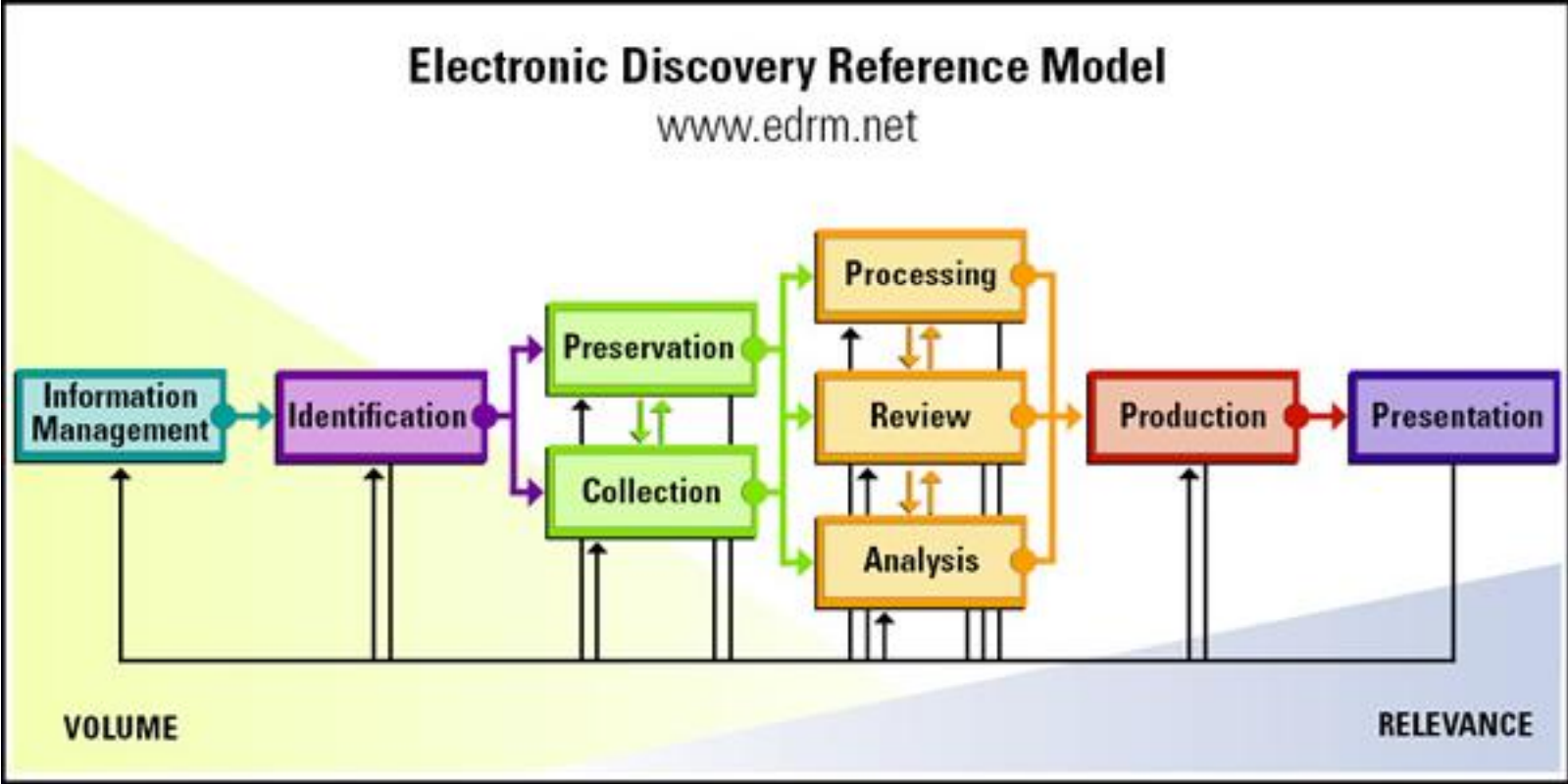
Outline for Today

- Quick timeline of events & overview of process
- Overview of FRCP amendments
- Specific Topical Issues in the Case Law
 - What is Covered?
 - What Is “Reasonably Accessible”?
 - Why does the “Form of Production” Matter to Me?
 - How Important is a “Litigation Hold”
- A Look Forward / Audit-Specific Issues
- Q&A and Open Discussion

A Brief Timeline of Major Events

- March 2003: Sedona Principles
- May 2003-July 2004: Zubulake v. UBS Warburg, LLC I-V
- Sept. 2005: Sedona Conference Guidelines on Records Management in the Information Age
- Dec. 2006: Changes to the FRCP Effective
- Dec. 2006 – Present: The REAL FUN as courts try to figure out what the new rules mean

The Electronic Discovery Reference Model



Some Statistics from Recent Deloitte Study

- Majority of companies: 1-25 discovery requests in past 12 months
- One in five companies: more than 150 requests ! (You should know if this is your company)
- 27% of companies “very or extremely effective in managing the readiness aspect of the discovery
- 90% dealt with a litigation hold BUT 40% said IT guidance was not clear or only somewhat clear

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Federal Rules Amendments Overview

- Federal Rules – don't cover state actions (though at least 15 states now have similar rules with more on the way)
- **Civil** Procedure – govern civil actions only
- Discovery process has become more open with more mandatory disclosure/sharing of information over time
- Discovery of electronic information has been source of much case law, a number of high profile disputes
- Very real consequences for non-compliance with court ordered discovery

FRCP Amendments – Basic Changes

- “Meet & Confer” – Early Attention by Parties on e-discovery Issues
- Form of Production Discussed
- Discovery of Information that is “Not Reasonably Accessible”
- Inadvertent Production & Waiver of Privilege
- “Safe Harbor” – Limit on Sanctions for loss of electronic information

Rule 16 Changes

- Add ESI to the list of subjects to be considered in scheduling and case management conference orders. 16(b)(5)
- Permits inclusion of the parties' agreements regarding non-waiver and "claw back" of privilege material in case management and scheduling orders. 16(b)(6)

Rule 26 Changes

Initial Disclosures

- Must disclose early on documents and “electronically stored information” that you may use to support your claims or defenses in the case

Conference of the Parties

- Parties are directed to discuss e-discovery issues during their discovery planning conference. **Must** discuss issues related to the disclosure or discovery of electronically stored information (preservation, form of production, privilege and clawback)

Rule 26 Changes (cont.)

- Defines the scope of ESI production and the nature of claw back protections. 26(b)(5)
- Requires initial disclosure and production of only “reasonably accessible” data. 26(b)(2)(B)
- Requires the responding party to identify ESI that will not be searched or produced on the ground that it is “not reasonably accessible”
- Requires the requesting party to move for the production of inaccessible data and places the burden of proving production unreasonableness on the responding party

Rule 26(b) Changes (cont.)

- Permits the court to order production of inaccessible data “for good cause” in a manner that presumably balances the costs and burdens of discovery against the need for and relevance of such information
- Permits the Court to specify conditions for discovery such as cost shifting
- Requires the prompt return, sequestering or destruction of inadvertently produced privileged ESI if a request for the same is made within a reasonable time after disclosure

Rule 34 Changes: Form of Production

- Requesting party may specify the form of ESI production;
- If responding party objects to the form of ESI production requested, it must state the form or forms it intends to use;
- If no form of production is specified by requesting party, responding party may produce ESI either:
 - in the form in which it is *ordinarily maintained*; or
 - in an electronically useable form and must also provide notice to the requesting party of the intended form of production.

Rule 37 Changes: Sanctions and Safe Harbors

- 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
- **“Good Faith”** is the test: This doesn’t mean that document retention or deletion policies should remain operable or will protect you under this provision once a litigation hold should be in place

Practical Results of the Changes:

- Discovery planning is front loaded under the amendments to Rule 16 and 26. These changes create deadlines by which a party will now have to stake out your entire plan for conducting electronic discovery in the case, from preservation through production.
- Electronic discovery takes time and costs money; proper planning is essential
- A well-informed attorney can better manage client costs without hurting the client's case

Practical Results of the Changes (Continued):

Lawyer's Concern: Anticipate the type, volume, location and accessibility of potentially relevant data to obtain a discovery schedule allowing sufficient time ***to process and possibly review*** ESI prior to production.

CIO's Concern: Know ***what*** you have, ***where*** you have it, ***how much*** of it you have, what ***format(s)*** it is in, and how ***quickly*** you can get it together, and ***how business-disruptive this will be.***

Practical Results of the Changes (Continued):

- If you don't know, you may end up being bound by some arbitrary time periods decided between the attorneys and the court
- Regardless of the prospective protections afforded by non-waiver or claw back agreements, you can't "unring" a bell— inadvertent disclosure of privileged information like trade secrets could ruin your case, and adversely impact your career
- If costs prohibit a full privilege review prior to production, make sure everyone appreciates the risk being taken

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Breadth: What is Covered & “discoverable”?

Better question: What is NOT discoverable?

- Typical documents, spreadsheets, etc.
- E-mail
- Backups
- Webserver logs
- IDS logs
- Blackberry/PDA
- Source Code libraries
- SAAS/Cloud services
- Instant messaging
- Customer facing systems & databases supporting them
- USB/Flash drives
- Local drives
- Laptops, home computers
- Third parties who hold data
- Voice mail (VOIP)
- Others?

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What is “Reasonably Accessible?”

- Normal, operational system still in use – almost certainly “reasonably accessible”
- Deleted Data?
- What about backup tapes?
- 2 year old backup tapes? 4 year old?
- Tapes designed for Disaster Recovery only?
- Obsolete Systems?

Do you regularly restore from or access the info?
Concrete info on the burden will likely (definitely) be
required to avoid production

What is “Reasonably Accessible?” (cont.)

- National Union Fire Ins. Co. v. Clearwater Insu. Co., 2007 U.S. LEXIS 52770, S.D.N.Y. July 21, 2007; reinsurance dispute over coverage; court would not order the \$400-\$700 estimated per tape cost for 113 old backup tapes (which were supposed to have been overwritten...oops) but would allow plaintiff to pay to restore them and examine them thereafter.
- Major factor: not timely and likely to lead to relevant evidence.

What is “Reasonably Accessible?” (cont.)

- Puckett v. Tandem Staffing Solutions, Inc., 2007 U.S. LEXIS 47287, N.D. Ill., June 27, 2007; court ordered the defendant to restore backup tapes because defendant acknowledged it was ordinary course to maintain the documents sought electronically
- Other major factor: bad behavior and multiple delays and failures to adhere to schedule and order

What is “Reasonably Accessible?” (cont.)

- Haka v. Lincoln County, 2007 U.S. Dist. LEXIS 64480 (W.D. Wis. Aug. 29, 2007) 4 Terabytes of data sitting on an external hard drive, may cost as much as \$27,000 to fully search and analyze, but only \$100,000 at issue.
- Court ordered split of costs and incremental review, starting with email and limited set of search terms only

What is “Reasonably Accessible?” (cont.)

- Mikron Indus. v. Hurd Windows & Doors, Inc., 2008 U.S. Dist. LEXIS 27455 (W.D. Wash., Mar. 28, 2008); party seeks protective order to not have to produce info from backup tapes

“In alleging that continued discovery of their ESI would be unduly burdensome, defendants offer little evidence beyond a cost estimate and conclusory characterizations of their ESI as “inaccessible.”

What is “Reasonably Accessible?” (cont.)

- *Quinby v. WestLB AG*, 2006 WL 2597900 (S.D.N.Y. Sept. 5, 2006); party on notice of a case fails to preserve files in active file space; attempts to shift cost of production to other side
“if a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data”

What is “Reasonably Accessible?” (cont.)

- Proctor & Gamble Co. v. S.C. Johnson & Son, Inc., 2009 WL 440543 (E.D. Tex. Feb 19, 2009)
- Court refused to order cost-shifting for Defendant, who didn't want to have to OCR documents and supplied a \$200,000 cost estimate, but without much detail as to why it would cost that much.

Bad Behavior = Bad Results

“I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten's definition of chutzpah: "that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan.”

JOHN M. FACCIOLA, United States Magistrate Judge, writing in *Disability Rights Council Of Greater Washington v. Washington Metropolitan Transit Authority*, 2007 U.S. Dist. LEXIS 39605

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Why Does the “Form of Production” matter to me?

- “Agreed upon format” is best answer
- Requesting party can request a format
- If no agreement & no specific request, can produce in: (a) form in which data is ordinarily maintained, or (b) electronically useable form w/explanation
- Consider metadata issues, native format issues
- Don’t try to game the system

Form of Production:

Trend to Require Electronic Production when Requested

- *3M Co. v. Kanbar*, 2007 U.S. Dist. LEXIS 45232 (N.D. Cal. June 14, 2007); Court orders documents produced on paper to be re-produced in electronic format, all 600,000 pages of them....
- *John B. v. Goetz*, 2007 U.S. Dist. LEXIS 75457 (M.D. Tenn. Oct. 10, 2007); Court orders broader electronic production and makes defendants pay for a “monitor” to monitor the electronic discovery disputes
- *Auto Club Family Ins. Co. v. Ahner*, 2007 U.S. Dist. LEXIS 63809 (E.D. La. Aug. 29, 2007); Court orders a *non-party* to produce in electronic format

Be Careful about What and How you Produce

- Privilege Waiver issue measured in large part by the reasonableness of precautions taken
- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2008 U.S. Dist. LEXIS 42025 (D. Md. May 29, 2008); waived privilege after producing documents that were keyword searched and produced automatically

Consider “claw-back” agreement at outset
Understand who “owns” discovery issues

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Litigation Holds & Preservation Obligations

- Doe v. Norwalk, 2007 U.S. Dist. LEXIS 53217 (July 16, 2007)
- Teacher sued college & another teacher for Title IX violations related to alleged sexual assault
- Hired a forensic expert & sought an order to inspect college's electronic records, which the Court granted
- Two hearings; testimony (and cross-examination!) required of two college IT employees; wide-ranging inquiries on policies and actual actions taken related to the case

Doe v. Norwalk, cont.

- Computer of an employee that left was:
 - “imaged” says IT employee
 - “scrubbed” says Plaintiff expert
- State Library policy had 2-year electronic correspondence retention requirement
 - IT employee 1 says he didn’t even know of policy
 - IT employee 2 says he didn’t follow policy for “normal computer usage,” “former employee computers” and “transitory email”
- New employee says never asked to do a records search
- Head of HR says she has never heard the term “litigation hold”

Can you see where this is headed?

Doe v. Norwalk: The Court says

- Litigation hold obligation arose when the college was aware of the sexual assault allegation (not even a formal complaint); all routine document destruction (including re-imaging of machines) should have been suspended; failure to do so = no “safe harbor”
- “the defendants’ failure to place a litigation hold and to preserve emails and hard drives relevant to Doe’s allegations in this case [is] at least grossly negligent if not reckless”
- Defendants claimed “neutral retention” and “limited resources”
- Order includes costs and, worse yet, an adverse inference instruction (i.e., the “settle quickly” sanction)

Record Retention Policies *May* Save You

- Is the Policy Documented?
- Has it been communicated effectively?
- Recently?
- To new employees?
- Is it actually followed?

If so, the Rule 37 “safe harbor” may be available in routine, good faith mistake context

Practical Recommendations – Other final thoughts

- Scrutinize ANY automatic process that would result in automatic deletion of current files/records – know how you will stop it if put on a litigation hold
- Consider other proactive measures; can you do this while doing DR?
- Plan for a litigation hold / discovery project – how will you execute it?
- If you don't know, understand what types of suits you may face and how they would impact your discovery obligations.
- Get used to working with discovery firm and outside litigation counsel

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A Look Forward / Audit-Specific Issues

- Increasing focus on records management – the “mouth of the snake”
- Automating steps in the discovery process will require additional technology assistance
- Metadata issues will continue to rise in importance
- More data, more distributed, more ubiquitous = more challenges; SAAS, ASP, Google, foreign language, voice/audio, video, GPS

A Look Forward / Audit-Specific Issues

- Admissibility & reliability issues will start to surface
- Audit may play a significant role here – when it comes to authentication, issues associated with reliability and ability to document how documents are maintained in various systems becomes very important
- Forensics is also becoming more critical

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