



eDiscovery and Electronically Stored Information (“ESI”)

Orange County Paralegal Association
2017 Educational Conference
October 7, 2017

Chris Garber, CEDS
Certified eDiscovery Specialist
eDiscovery Manager





eDiscovery



Overview

- Background
- CEDS Exam
- Offices
- Forensic Lab
- eDiscovery Summit

Introduction

> "

Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically-stored information."

Zubulake v. UBS Warburg LLC

229 F.R.D. 422, 440 (S.D.N.Y. 2004)

Introduction

- Electronically stored information (“ESI”) grew at the rate of 30% annually from 1999 to 2002
- Sheer volume is astounding
- A major corporation can have 10,000 tapes or more
- One tape can store as much as 1 terabyte of information (200-mile high stack of paper)
- Biggest addition is transitory in nature (email)

Electronic Data Overview/Metrics

- Global Electronic Data – 95%
- Growth Rate – 40% electronic data
- 2.7 Zetabytes exist in the digital universe today
- Doubling in size every two years
- Global Communications – 93% are electronic
- Today, there are 3.7 billion email users
- 269 billion emails sent and received each day
- More than five billion people are calling, texting, tweeting and browsing on mobile phones worldwide
- More than half the world uses a smartphone
- Almost two-thirds of the world's population has a mobile number
- More than one in five of the world's population shopped online in the last 30 days

Electronic Data Overview/Metrics Unstructured Data

- YouTube users upload 48 hours of new video every minute of the day
- 571 new websites are created every minute of the day
- 100 terabytes uploaded daily to Facebook
- 465 Twitter accounts with 175 million tweets each day
- 30 billion pieces of content shared on Facebook every month
- Data production will be 44 times greater in 2020 than in 2009

Electronic Data Overview/Metrics Cont'd

- Megabyte (MB) = 1,024 kilobytes (873 pages of text)
- Gigabyte (GB) = 1,024 kilobytes (894,784 pages of text)
- Terabyte (TB) = 1,204 gigabytes (916,259,689 pages of text)
- Petabyte (PB) = 1,024 terabytes
- Exabyte (EB) = 1,024 petabytes
- Zettabyte (ZB) = 1,024 petabytes
- 2016 Allergan Metrics
 - 44 matters, 717 custodians, 884GB
 - 1GB = 100k email files = 1.5 average pages
 - 65k Word = 9 average pages
 - 166k Excel = 50 average pages

Introduction

- Amendments to FRCP took place in 2006 and again in 2015
- Primarily on how discovery is performed
- There to help court and litigants with guidance on how to meet new challenges
- 26(f) conference
 - Discuss issues over ESI
 - Create a discovery plan
- Rule 26 Discovery Plan
 - Subjects of discovery
 - Format of production
 - Claims of privilege including inadvertent disclosure and waiver
 - Begin negotiations of custodians, date ranges and search terms

eDiscovery

- Internal Counsel
- External Counsel
- Internal Paralegal
- External Paralegal
- eDiscovery Manager
- Project Manager
- Computer Forensic Technician
- Custodians/Witnesses
- Joint Defense Groups
- Technology Partners





eDiscovery



Matter Types

- Patent Infringement
- Commercial
- Products Liability
- Investigations, Subpoenas
- Others



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Courts



- Federal Court
- State Court
- Courts of Appeal
- Supreme Court
- Arbitration/Mediation



eDiscovery



Stages of Litigation

- Pre-Pleading
- Pleading
- ***Discovery***
- Motions Practice
- Trial
- Appeal
- Settlement



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Discovery



- Interrogatories
- Document Requests
- Requests for Admission
- Depositions
 - Individuals
 - Persons Most Knowledgeable
- Subpoenas



eDiscovery



Important Discovery-Related Issues

- Legal Hold
- Identification of Witnesses
- Attorney-Client Privilege
- Document Creation
- eDiscovery

Custodian-Based ESI

- Office computer
- Home computer
- Computer of personal assistant/staff
- Smartphones/tablets
- Company smart phones
- SharePoint sites
- BOX accounts
- File shares
- Thumb/flash drives
- Personal or ad hoc backups
- Replaced/removed drives
- CDs/DVDs and other legacy media (floppy disks)

Custodian-Based ESI

Messaging Systems

- E-mail
- Email archive
- Text messages
- Electronic calendaring
- Voice mail
- Instant messaging
- Cloud computing

Custodian-Based ESI

- Word processing programs
- Spreadsheet programs
- Social Media
- Database programs
- Web browsers
- Graphical presentation programs
- Document publishing programs
- Sales and personal contact programs



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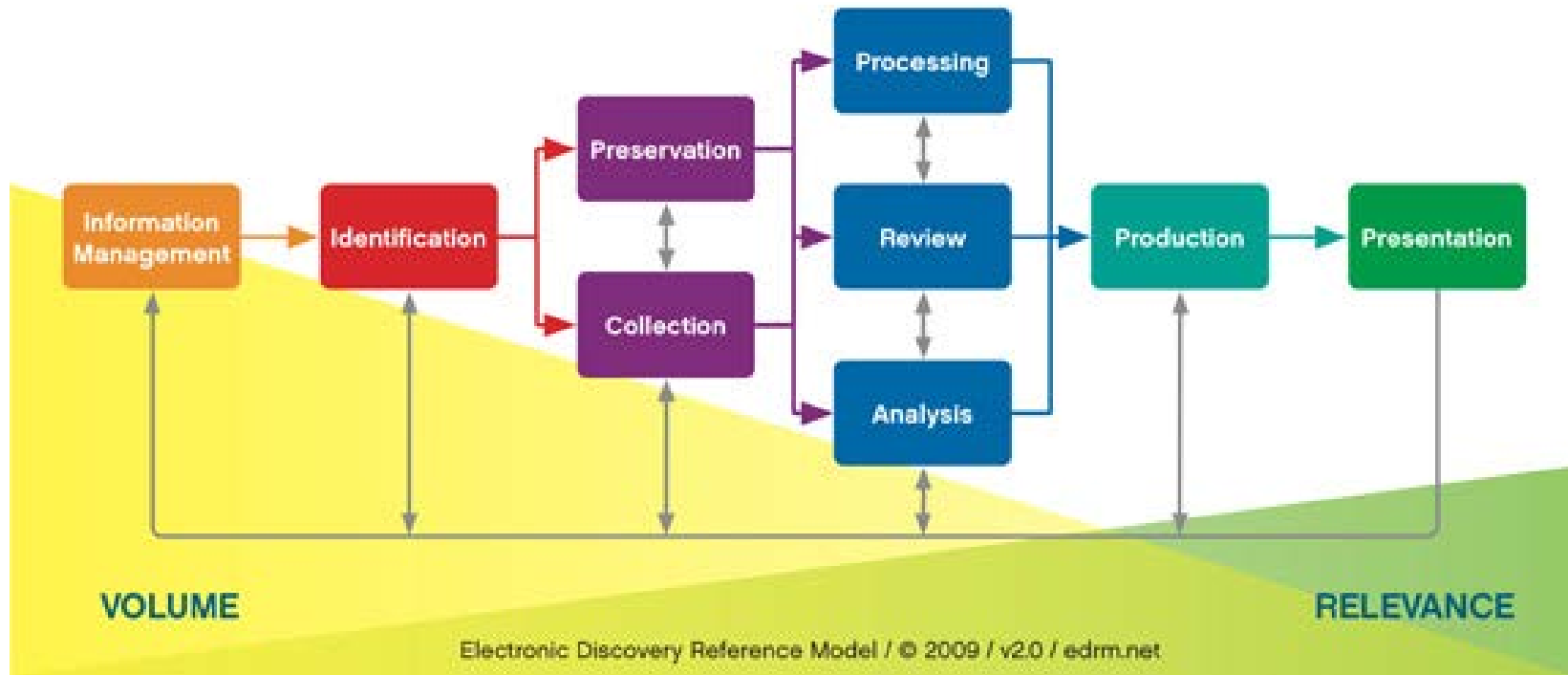
Non-Custodial ESI

- Enterprise-based ESI
- Organization specific applications
- Databases
- Generic enterprise applications
- Accounting

eDiscovery

EDRM Model

Electronic Discovery Reference Model



EDRM Model

- *Information Management*
 - Getting your electronic house in order to mitigate risk and expenses should e-discovery become an issue.
 - Records management/record retention
- *Identification*
 - Locating potential sources of ESI & determining its scope
- *Preservation*
 - Ensuring that ESI is protected against inappropriate alteration or destruction. Legal hold.
- *Collection*
 - Gathering ESI for further use in the e-discovery process
- *Processing*
 - Reducing the volume of ESI and converting it to reviewing format

EDRM Model

- *Review*
 - Evaluating ESI for relevance & privilege
- *Analysis*
 - Evaluating ESI for content & context, including key patterns, topics, people & discussion
- *Production*
 - Delivering ESI to opposing counsel in appropriate form & using appropriate delivery mechanisms.
- *Presentation*
 - Displaying ESI at depositions, hearings, trials

eDiscovery Manager

- Also a Corporate Records Manager
- Manage all aspects of a lawsuit as it relates to custodian electronic data
- Manage early case assessment
- Manage key words/search term list (with business unit & external counsel)
- Attend meet & confer with external legal counsel
- Manage e-discovery requirements (timing, resources)
- Manage document review strategy (collection, assignments, productions, document searching, document filtering, data sets, etc.)
- Manage/monitor document review practices of external counsel and monitor fees/costs relating to third party vendor platforms
- Participate in hands-on preservation/collection activities for cases or custodians
- Manage resources that will preserve and collect ESI
- Manage litigation hold, chain of custody and ESI collection/production
- Manage/drive policy development and implementation
- Manage litigation profile
- Manage training on document creation and litigation hold procedures

Case Study

- Court Order 11/13 20 days = 12/3 all custodians in relevant areas (RA, SM, 850+)
- Started to ID relevant custodians, plaintiffs rejected
- Motions for Relief – 11/25
- EDT continued to work, negotiated with plaintiffs, search terms, custodians, production schedule
- 12/2 reached an agreement – rolling 12/4 to 1/20
- Case Metrics
- 261 = 758 GB
- 6.6m pages, 415k docs
- \$662k

Qualcomm, Inc. v. Broadcom Corp. -Southern District of California

- Qualcomm brought patent infringement suit against its competitor Broadcom.
- Email concealment by Qualcomm.
- Qualcomm ordered to pay Broadcom's attorneys' fees in excess of \$8.5 million.

Zubulake v. UBS Warburg, LLC -Southern District of New York

- Sex discrimination case.
- \$29.3 million verdict for the plaintiff after the judge issued five separate opinions on a range of e-discovery issues.
- UBS was sanctioned for destroying relevant emails during the litigation.
- Plaintiff was allowed to pursue additional discovery and the Court issued a jury instruction permitting a negative inference to be drawn from missing evidence.



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Questions?



Chris Garber

chris.garber@allergan.com

Direct: 714/246-4198

Mobile: 949/466-0605