

Current Issues in e-Discovery

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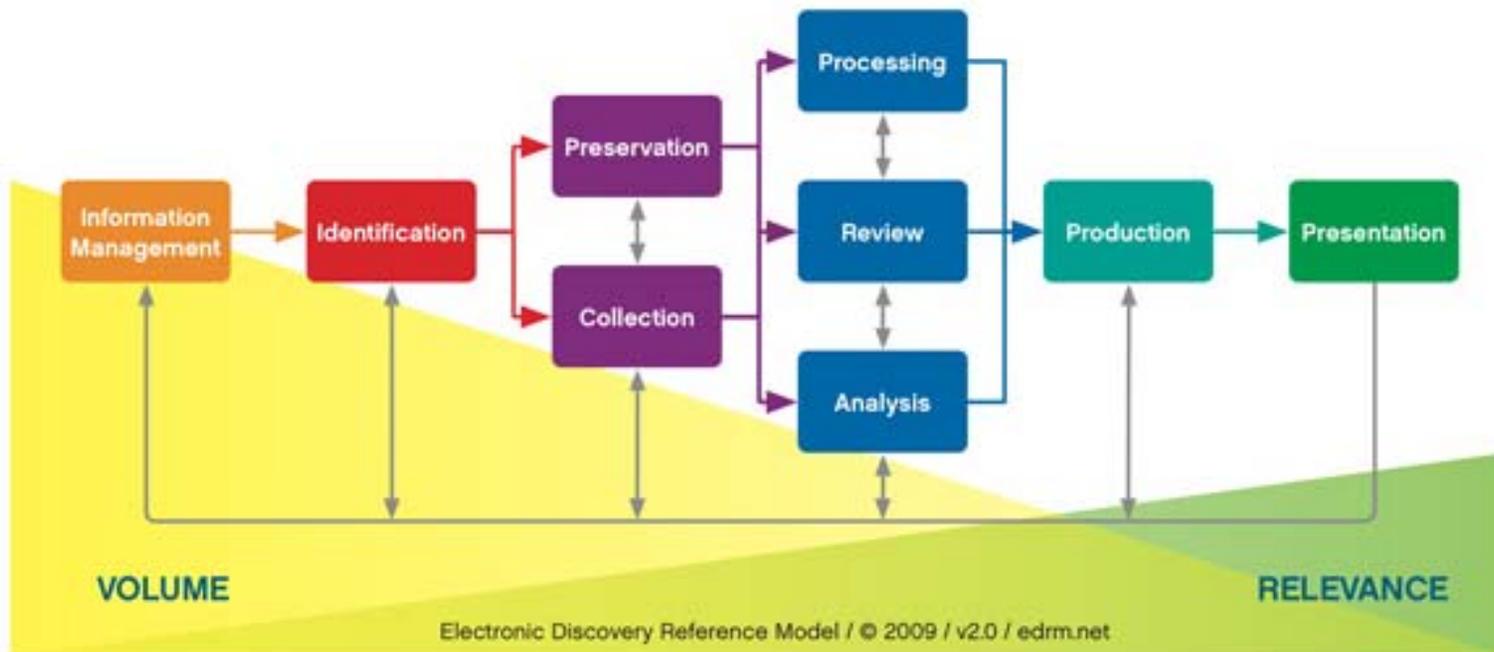
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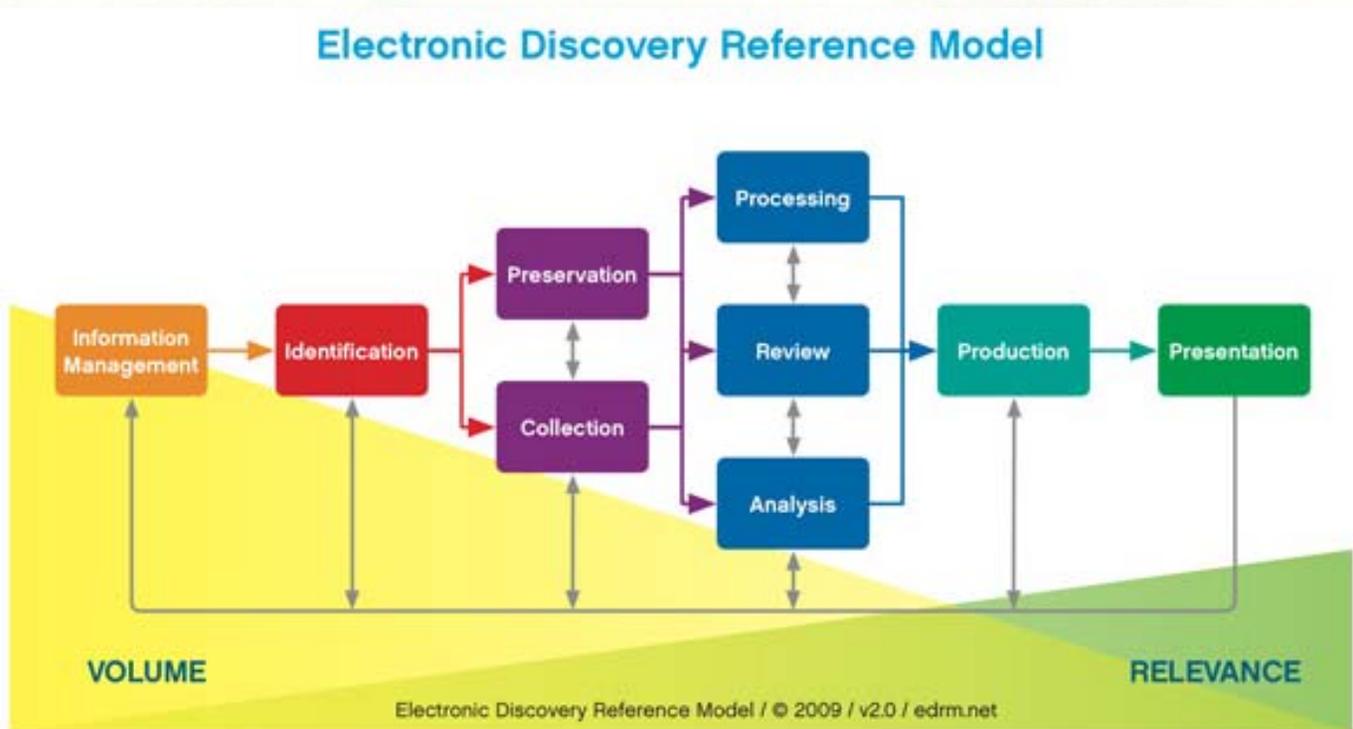
The EDRM: An Academic Overview (*yawn*)

Electronic Discovery Reference Model



Source: <http://www.edrm.net/resources/edrm-stages-explained>

The EDRM as (some) Lawyers & Vendors See It

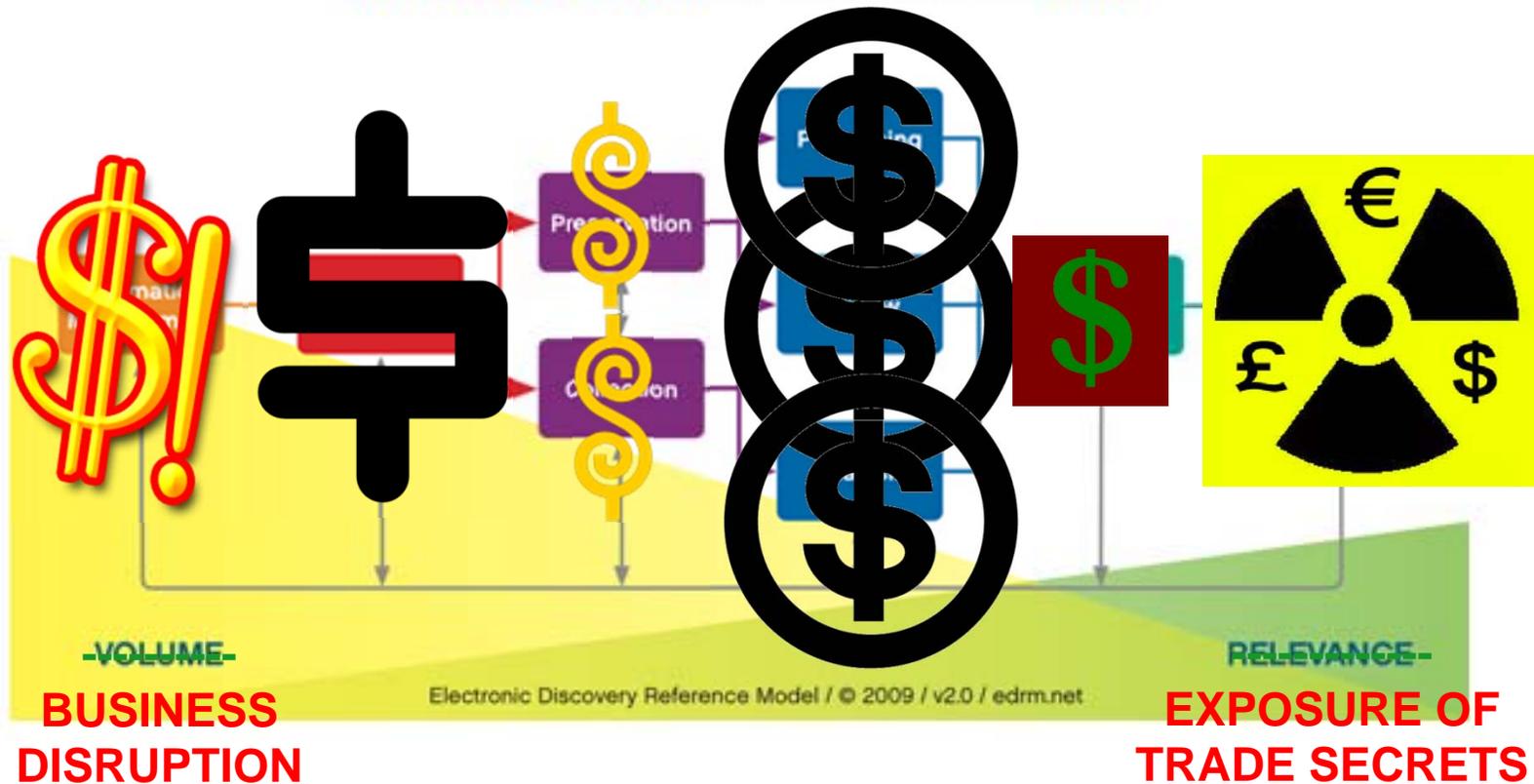


Source: EDRM (edrm.net)

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The EDRM as Foreign (and US) Clients See It

The Nightmare of US Discovery ~~Electronic Discovery Reference Model~~



Source: <http://www.edrm.net/resources/edrm-stages-explained>



Computer-Assisted Review

General Concepts

- De-NISTing
- File types
- De-duplication
- Near de-duplication or email threading
- Indexing, OCR, and keyword searching
- Computer-Assisted Review

Computer Assisted Review

- What is it?
 - Computer Assisted Review is the process of having computer software electronically classify documents based on input from expert reviewers in an effort to expedite the organization and prioritization of the document collection
- How does it work?
 - Batches of documents are reviewed by attorneys to “train” the system, which then categorizes later documents in batches based upon likely relevance
- When to use it?
 - Early in the process and generally with a large document population

Questions for Use of Computer-Assisted Review

- Do you need an agreement?
- Will the production be challenged?
- Will a *Daubert* analysis apply?
- Will work product be turned over?
- What is the cost? Who bears the cost?
- Will it work—will all relevant documents, and only relevant documents, be turned over?

Decisions of Interest—Computer-Assisted Review

- *Moore v. Publicis Groupe*
 - No. 11 Civ 1279(ALC)(AJP), 287 F.R.D. 182 (S.D.N.Y. Feb. 24, 2012), *aff'd* 2012 WL 1446534 (S.D.N.Y. April 26, 2012)
 - Fully embraced use of CAR with requirements of significant involvement of senior attorneys and transparency of process
- *Global Aerospace Inc. v. Ladow Aviation, L.P.*
 - Consolidated Case No. CL 61040 (Va. Cir. Ct.—Loudon County) (slip order)
 - Court approved use of CAR over objection
 - Explicitly permits parties to later raise issues re: completeness of production and ongoing use of CAR

Decisions of Interest—Computer-Assisted Review

- *In re Actos (Pioglitazone) Products Liability Litigation*
 - No. 6:11-md-2299, Dkt. No. 1539 (W.D. La. July 27, 2012)
 - Court approved use of CAR on Equivio platform with a detailed protocol and training done by each party
- *EORHB, Inc. v. HOA Holdings LLC*
 - No. 7409-VCL (Del. Ch. Oct. 15, 2012) (hrng tr.)
 - Court *sua sponte* ordered the use of CAR:

THE COURT: Thank you. Why don't you all talk about a scheduling order for the litigation on the counterclaims. This seems to me to be an ideal non-expedited case in which the parties would benefit from using predictive coding. I would like you all, if you do not want to use predictive coding, to show cause why this is not a case where predictive coding is the way to go.

Decisions of Interest—Computer-Assisted Review

- *Harris v. Subcontracting Concepts*
 - Civ. No. 1:12-MC-82, 2013 WL 951336 (N.D.N.Y. March 11, 2013)
 - Rejected burdensomeness argument because the documents were largely in electronic format and “[w]ith the advent of software, predictive coding, spreadsheets, and similar advances, the time and cost to produce large reams of documents can be dramatically reduced.”

Decisions of Interest—Computer-Assisted Review

- *Kleen Products, LLC v. Packaging Corp. of America*
 - No. 1:10-cv-05711, (N.D. Ill. 2012)
 - Keyword Searching (Def.) v. CAR (Pl.) dispute
 - Expert testimony in multiple hearings regarding: (1) identification of custodians and search terms; (2) confidence level of search terms and quality control procedures; (3) reliability of keyword searching; (4) industry best practices; and (5) precision and recall rate of predictive coding-type practices (Hearing Transcripts, Feb. 21 and March 28, 2012)
 - Resolved largely by agreement (Stipulation and Order Relating to ESI Search, August 21, 2012)



Ethical Considerations and Elevated Standards

“Zebulake Revisited”

- *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) (Amended Order)
 - “A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent.” (Amended Order at 464)
 - “[T]he failure to issue a written litigation hold constitutes gross negligence.” *Id.* at 465.
 - “The failure to obtain records from all employees (some of whom may have had only a passing encounter with the issues in the litigation)... constitutes negligence .” *Id.*
 - “[T]he failure to take all appropriate measures to preserve ESI likely falls in the negligence category.” *Id.*

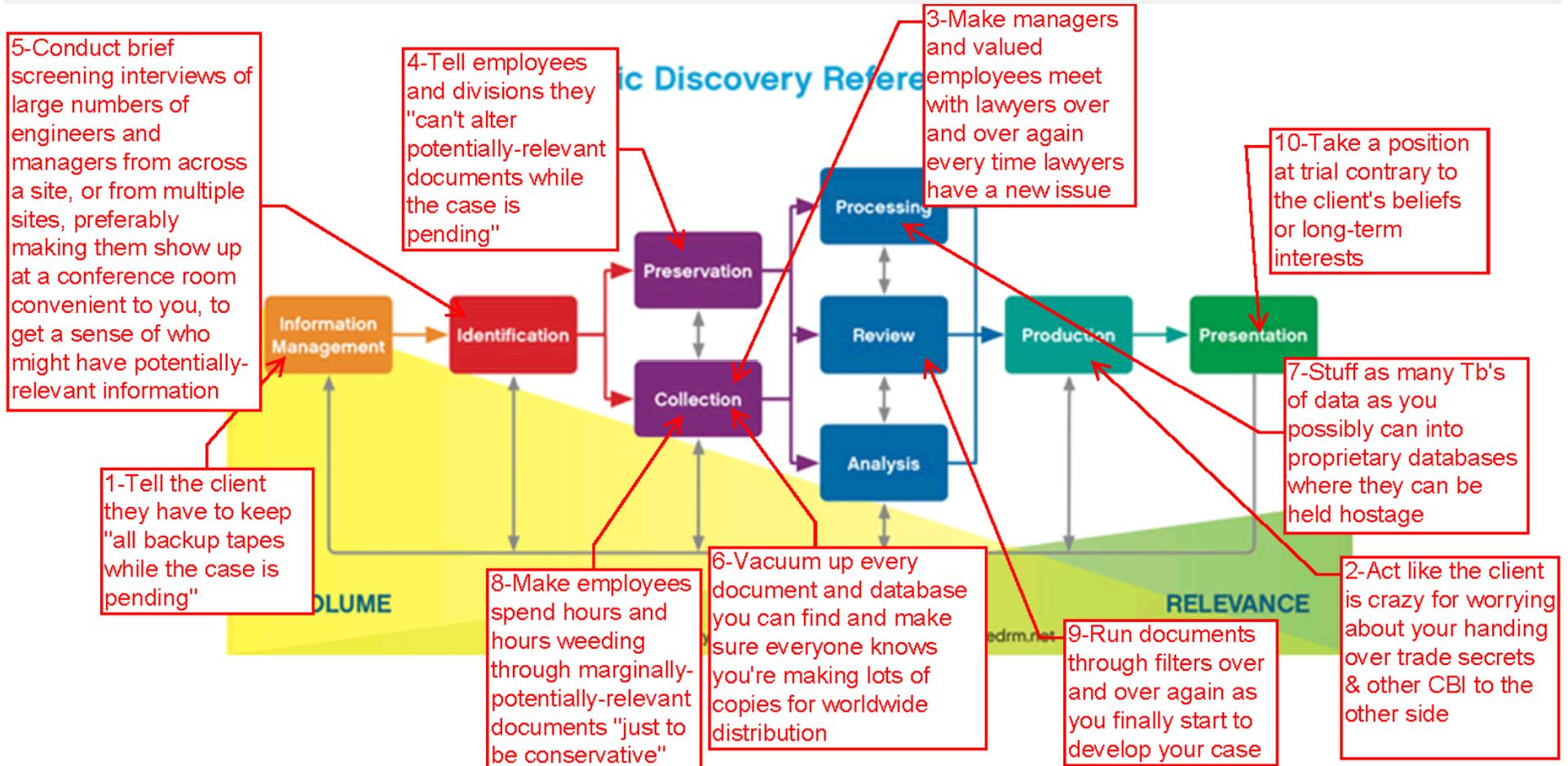
Gordian Knot I—Lawyer Advises Conservatism



Alexander cuts the Gordian Knot (Jean-Simon Berthélemy)

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Gordian Knot II—The Top Ten Ways to Get Fired



There Is No Easy Answer

- Type I and Type II Error in the “Top Ten” slide
- How Clients See Your Discovery Style:
 - Busy, Important Professional—or Gonzo Cowboy?
 - Wise Brahmin—or Nervous Nellie?
- Do you do your client a favor by forcing them to make the hard choices and disregard your overly conservative advice?
- Being conservative may not be necessary—or sufficient—or ethical
 - Expensive
 - Impossible
 - Illegal

Recent Decisions of Interest—Ethical Issues

- Cannot simply rely on custodians or vendor to fulfill discovery obligations:
 - *National Day Laborer Organizing Network v. United States Immigration & Customs Enforcement Agency*
 - 877 F. Supp. 2d 87 (S.D.N.Y. July 13, 2012)
 - Finding government had made inadequate searches by failing to search all custodians, overrelying on custodians acting without direction or supervision, and failing to adequately document search sources and terms
 - *Peerless Industries, Inc. v. Crimson AV, LLC*
 - No. 1:11-cv-1768, 2013 WL 85378 (N.D. Ill. Jan. 8, 2013)
 - Granting motion for sanctions where deposition of corporate representative revealed that corporation relied entirely on third-party vendor for document collection and production and did not have knowledge or control over the process
 - “Such a hands-off approach is insufficient.”

Recent Decisions of Interest—Ethical Issues

- Cannot simply rely on client to fulfill discovery obligations:
 - *Branhaven, LLC v. Beeftek, Inc.*,
 - Civ. No. WDQ-11-2334 (D. Md. Jan. 4, 2013)
 - Magistrate judge sanctioned plaintiff's attorney for wrongfully certifying the completeness of an e-discovery production they did not perform, review, or supervise.
 - The lawyers for Branhaven, one of whom was a partner with 25 years of litigation experience, simply delegated the collection and review of documents to their client and trusted it to produce all relevant materials.
 - In fact, upon signing off on the production, the plaintiff had turned over only 388 of more than 112,000 pages of electronically stored information (ESI) it would eventually identify as responsive.

Recent Decisions of Interest—Ethical Issues

- E-discovery requires diligence and transparency:
 - *Gross Constr. Ass’n. v. Am. Mfr. Mutual Ins. Co.*
 - 256 F.R.D. 134 (S.D.N.Y. 2009)
 - Requires “careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or ‘keywords’ to be used to produce emails or other electronically stored information.”
 - “Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of “false positives.” It is time that the Bar – even those lawyers who did not come of age in the computer era – understand this.”

Recent Decisions of Interest—Ethical Issues

- **Sedona Conference Cooperation Proclamation (July 2008):**

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests - it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.

- **Fifth Circuit Endorsements:**

- Hon. Andrew W. Austin
U.S. District Court for the Western District of Texas
Austin
- Hon. Eldon E. Fallon
U.S. District Court for the Eastern District of Louisiana
New Orleans
- Hon. Sally Shusan
U.S. District Court for the Eastern District of Louisiana
New Orleans
- Hon. Jerry A. Davis
Retired
Aberdeen



International Dimensions of E-Discovery in a Nutshell:

“Routine, commonplace, and mandated e-discovery practices in the United States *may amount to criminal conduct if conducted abroad*. Counsel must consult knowledgeable local authorities before engaging in any international e-discovery related activities.” ACEDS Exam Preparation Manual (Nov. 2010) (emphasis supplied)

The Gordian Knot III—A Tangle of Facts

- Electronic Data Is Like a Fluid
 - Outsourcing
 - Call centers & data processing centers
 - Cloud Services/Virtual servers (unspecified, remote location)
 - Mirroring
 - Internet Protocol—packetized, multi-route transportation
- How should the law handle a fluid?
 - Rule of Capture (O&G), Prior Appropriation (Water)
 - Prorationing (O&G), Riparian (Water)

Legal Dimensions

- Who is a lawyer/what do lawyers do? (US circuit split)
 - Patent Agents (“Patent Attorneys”) etc.
 - The Status of In-House Counsel
 - The Predominant-Purpose Test
 - Variance in certification and licensure requirements
- Export-Control Laws (actual and deemed)
- Availability and use of US discovery vendors & technologies
 - Not a lot of locals sympathetic to, or willing to run risks of, US discovery
 - Problematic in those few circumstances (employee fraud, M&A) where jurisdictions may be generally aligned and sympathetic
- Are discovery issues substantive or procedural?
 - US: Procedural, so depends on forum
 - Elsewhere: Substantive, so depends on locus of data & witnesses
 - But it’s always US forum and foreign data & witnesses

The Gordian Knot IV—A Tangle of Laws

“When elephants fight, the reeds get hurt.” (Swahili proverb)

- Foreign privacy laws target US discovery. US discovery laws target foreign privacy.
- Conflict of Law analysis: *In re Holocaust Victim Assets*, Master Docket CV-96-4849 (E.D.N.Y. 1999)

Rest (2d.) Confl. Laws §6	US	CH
Relevant policies of the forum & of other interested states	Π	Δ
Relative interests of different states in the issue <ul style="list-style-type: none"> • Locus of harm? • Vital national interest? • Deference to executive branch? • Strong public sentiment? 	Π	Δ
Basic policies underlying particular field of law	Π	Δ
Certainty, predictability and uniformity of result	?	?
Ease in determination & application of the law to be applied	?	?

The Gordian Knot V—A Perfect Ethical Storm

Sedona Conference International Principles on Discovery, Disclosure & Data Protection [with food for thought]

- 1. [US] Courts and [hostile, opposing] parties should... respect... [foreign] Data Protection Laws... and... [those] subject to or benefit[ing] from [them]
- 2. Where [there is] a conflict, a party's conduct should be judged [after the fact and with US 20-20 hindsight]... under a standard of good faith and reasonableness.
- 3. Preservation or discovery of Protected Data should be limited in scope to that which is relevant and necessary [as defined by US courts]....
- 4. Where a conflict [of laws] exists... a stipulation or court order [that foreign authorities will later disregard when commencing criminal proceedings] should be employed to protect Protected Data and minimize the conflict.
- 5. ~~A Data Controller subject to [US Courts]~~ US in-house counsel... should be prepared to demonstrate that data protection obligations have been addressed and... protection safeguards... instituted.
- 6. ~~Data Controllers~~ US in-house counsel should retain... Data only as long as necessary... [and] with appropriate... safeguards [even if they have no authority].



Special Considerations in Different Forums

Privilege & EC Administrative Discovery

- EC (European Commission)—Antitrust responsibility
- Duties of disclosure before administrative bodies
 - Compare USPTO—patent application & examination
 - Compare US government pressure on companies to perform internal investigations and waive privilege
 - Expectation of disclosure of legal analysis to assist Commission
- Common-law vs civil-law jurisdictions
 - Without a principle of allowing discovery...
 - ... there is a limited need for a principle of privilege

FTC Administrative Discovery

- 16 C.F.R. § 2.7(c)
 - Authorizes staff to negotiate and approve terms of satisfactory compliance with subpoenas and CIDs
- 16 C.F.R. § 3.37
 - Production of ESI in adjudicative proceedings
- FTC Standard Instructions on Electronic Productions
 - Microsoft Access, Excel, or PowerPoint in native format with extracted text and metadata
 - Other electronic documents in image format with extracted text and metadata
 - Prior permission needed for de-duplication or e-mail threading software

FTC Position on ESI Review Techniques

- Arguments regarding burdensomeness must address ESI and detail why advanced analytics and predictive coding do not sufficiently reduce the burden
 - *Wyndham Hotels & Resorts LLC* (April 11, 2012)
 - *W.L. Gore & Assocs.* (June 27, 2011)
- Agreements to permit keyword searching are relied upon by the Commission to overrule objections such as vague, overbroad, and unduly burdensome
 - *Samsung Telecommunications America, LLC*, (Sept. 7, 2012)

FTC Enforcement Actions

- *FTC v. Boehringer Ingelheim Pharmaceuticals, No. 1:09-MC-00564 (D.D.C.)*
 - FTC claimed respondent had inadequately searched ESI due to failure to turn off auto-delete e-mail feature and subsequent refusal to search 7 years of back-up tapes
 - Legal standard applied was not FRCP 26(b)(2)(B); Court held that a respondent must show that the requested production of ESI would “threaten to unduly disrupt or seriously hinder normal operations of business”
 - Court noted that 7 years would have been burdensome and FTC had agreed to narrow to 4 months, which Court found reasonable
 - Court ordered meet and confer on appropriate searching method



Recommendations for ESI Discovery Production in Federal Criminal Cases

Primary Purpose

- “[P]romote the efficient and cost-effective post-indictment production of electronically stored information . . . and to reduce unnecessary conflict and litigation over ESI [electronically stored information] discovery”
- Facilitate best practices for post-indictment ESI discovery.
- Achieve best practices through predictable, cost-effective, efficient management of ESI discovery.

Application and Applicability

- The Protocol applies only to:
 - Disclosure of ESI under Federal Rules of Criminal Procedure 16 and 26.2
 - Materials that the government is obligated to produce in litigation, under case law emanating from *Brady* and the Jencks Act.
- Though the DOJ specifically excludes application of the protocol to criminal investigations, it will likely give structure to DOJ's production requests through subpoenas and other investigative mechanisms.
- In order to meet ESI obligations at trial, DOJ will, by necessity, have stronger incentives to ensure that investigative materials are produced to DOJ in "trial ready" formats.

Application and Applicability

United States v. Briggs,

No. 10-CR-184-S (W.D.N.Y. Sept. 8, 2011)

- “[A]s technology becomes more prevalent, the Government and defendants will come to produce more and more ESI (as the original source for evidence, such as in crimes involving computers, or as a means to compile evidence) along with other, traditional forms of discovery.”

ESI Core Principles

- Protocol is based on core e-discovery principles rooted in civil discovery procedures:
 - All lawyers have a responsibility to have an adequate understanding of e-discovery;
 - Parties should approach ESI production collaboratively with mutual and interdependent responsibilities; and
 - Parties should raise issues and problems with the court early, preferably after good-faith meet and confer sessions.

ESI Guidelines

- Knowledge/Competency;
- eDiscovery Liaison;
- Meet & Confer;
- Production Formats;
- Court Notification of Issues;
- Transmission of ESI;
- eDiscovery Coordinator;
- Good Faith Resolution;
- Limited Access to ESI and Security; and
- Checklist.

Additional Considerations

- **Technology Assisted Review:** “[T]he volume of ESI in many cases may make it impossible for counsel to personally review every potentially discoverable time, and, as a consequence, the parties increasingly will employ software tools for discovery review.”
- **Processing Free-of-Charge:** “[W]here a producing party elects to engage in processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.”
- **Skilling Productions:** Equivalent to a “data dump.” Protocol expressly endorses *Skilling* productions.



QUESTIONS?