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Information Law Topics: eDiscovery and Privacy

By Corey Reitz and Rusty Elliott

How did we get here?

- Sandia's attempt to effectively address unique challenges at the intersection of law and technology
- eDiscovery
 - FRCP 2006 amendments to formally address electronically stored information in discovery
- Privacy
 - IT/Cyber protecting data
 - Potential issue arose with personal information
 - No uniform legal guidance for dealing with the issue
- Goals for this presentation
 - Bring to your attention things you might have not have thought about...
 - Expose you to the day-to-day steps that might be taken to be in compliance in these legal areas
 - Provide some tips for initiating or improving your efforts.

Sandia's IT and Cyber Security Foundation Sandia National Laboratories

- Corporate eDiscovery Team
 - Corporate Governing and Problem-Solving Body for eDiscovery
 - Made up of attorneys, paralegals, IT professionals, & hybrids
- Chief Privacy Office/CPO role
 - Sets the direction for the company to address privacy issues
- Legal Technology Solutions Team
 - Mission-“Be a mission enabler for Sandia by leveraging/developing capabilities to bridge the gap between information technology and regulatory/legal requirements to create defensible and repeatable solutions.”
 - Influences the direction of the Chief Privacy Office and Corporate eDiscovery Team
 - Performs day-to-day operations for eDiscovery, privacy, and waste/fraud/abuse.
 - Always working to address new challenges posed by creative uses of technology within the ever-changing legal framework

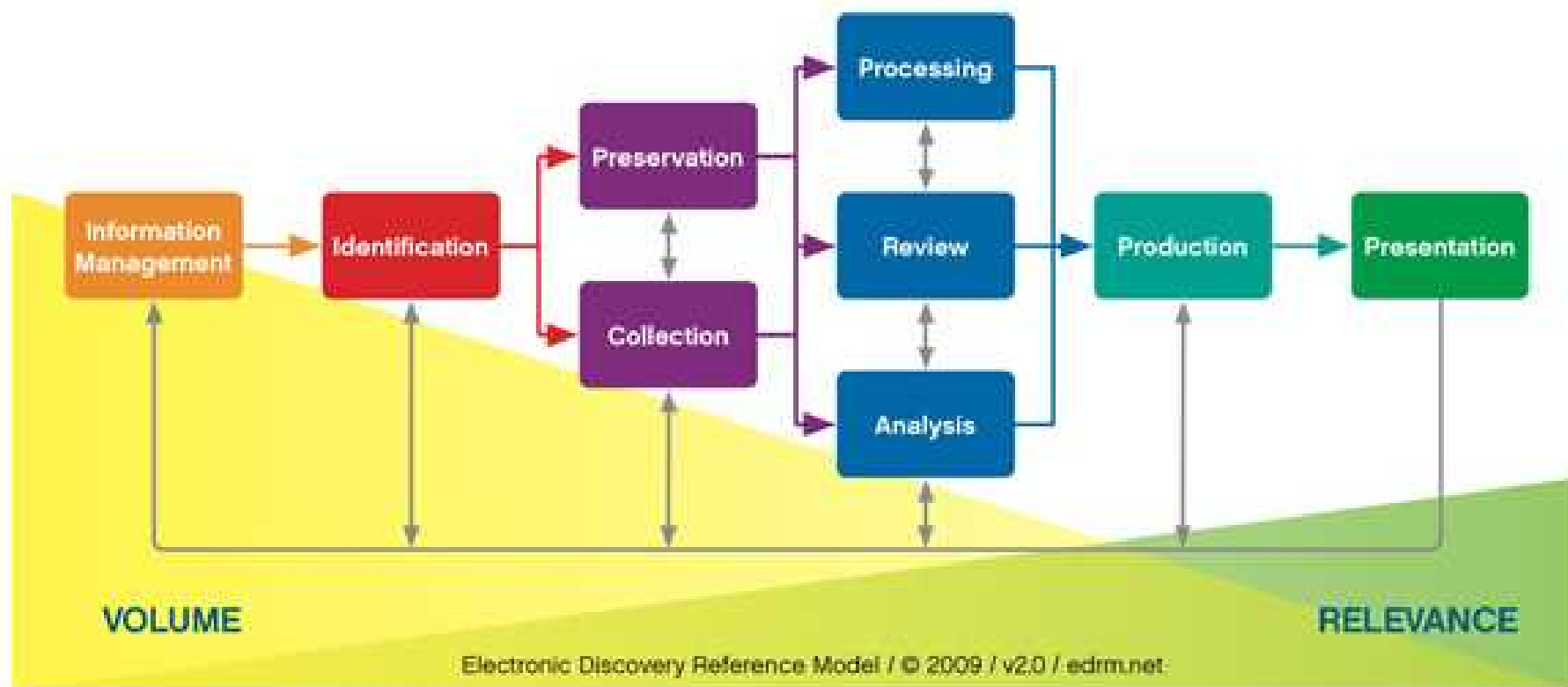
- **Challenge:** Large companies create a tremendous amount of ESI per Fed. R. Civ. P. 34(a)(1)(A), & the Scope of discovery under Fed. R. Civ. P. 26(b)(1) is very broad.
- **Goal:** A consistent, repeatable, and defensible end-to-end eDiscovery approach that engages people, processes, and tools to effectively meet the demands of litigation by addressing & leveraging the state and federal rules of civil procedure, rules of evidence, and case law.
- **Touch points:**
 - “Secure the just, speedy, and inexpensive determination of every action and proceeding” Fed. R. Civ. P. 1
 - Limit the frequency or extent of discovery where the “burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case” Fed. R. Civ. P. 26(b)(2)(C)(iii)
 - Limit sources of discovery where they are “not reasonably accessible because of undue burden or cost” Fed. R. Civ. P. 26(b)(2)(B)
 - Avoid spoliation

People, Processes, and Tools

- Focus on three areas:
 - People
 - Cross-functional team of legal, IT, and hybrid professionals
 - Invest annually in legal and technology training
 - Processes
 - Written processes (what to do) and procedures (how to do it)
 - Consult the Electronic Discovery Reference Model (EDRM)
 - Consider incorporating the advice of the Sedona Conference publications
 - Regularly evaluate changes & trends in eDiscovery case law & adjust processes accordingly
 - Continuous improvement efforts
 - Consider the value of self assessments (confirm that you do what you say)
 - Close out meetings/lessons learned (identify areas for improvement)
 - Software tools
 - Legal hold
 - Collection and processing
 - Document review

EDRM Model

Electronic Discovery Reference Model



eDiscovery: Preservation

- Duty to Preserve Trigger: “Once a party reasonably anticipates litigation”
Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003).
 - Determine what meets the trigger, be consistent, document exceptions & why
 - Determine what initiates the e-discovery process within your organization
- Litigation Hold- Written v. Verbal?
 - “The failure to issue a *written* litigation hold constitutes gross negligence”
The Pension Comm. of the Univ. of Montreal Pension Plan et al. v. Banc of Am. Sec., LLC et al., 685 F.Supp.2d 456, 2010 WL 184312 (S.D.N.Y. 2010).
- Steps to ensure custodians understand their duty to preserve
 - Follow up phone calls, e-mail, in-person kick-off meetings
- Legal Hold Software- Reminder notifications sent via e-mail, electronic acknowledgement
 - On-line interviews can be sent and tracked by a software tool
 - Escalation feature
 - Across matter reporting
- Processes to ensure preservation
 - How to place corporate systems on notice of litigation?
 - Verification process so that the duty to preserve is being met

eDiscovery: Collection & Processing

- What do you collect? It depends...
 - Collecting everything can get expensive, but it is the most conservative approach
 - Collecting less than everything requires a plan that considers the nuances of the matter and requires consulting with custodians
- When do you collect? It depends...
 - If you collect early, counsel can review some of the evidence, but this can come at the cost of storage/software tools, when many cases never get litigated and a lot of the data is never used.
 - Early case assessment can prepare the attorney for the Fed. R. Civ. P. 26(f) Meet and Confer
 - If you wait to collect, how do you keep track of people and data sources when people leave and machines break or get old and are replaced?
 - Iterative collection is a middle of the road approach, focusing first on people and data sources that are most likely to have relevant information. Broaden as needed...
- Best case: parties agree to scope of preservation & collection
 - Capture agreement at 26(f) meeting, include in rule 16(B) scheduling order
 - Requires parties to understand what they have prior to the meet and confer

eDiscovery: Collection & Processing

- How do you collect?
 - Rely on custodians to provide related data, perform objective collections on their behalf, or take a combined approach
 - “[M]ost custodians cannot be ‘trusted’ to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA contexts is not part of their daily responsibilities.” *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, No. 10 Civ. 3488 SAS, 2012 U.S. Dist. LEXIS 97863 (S.D.N.Y. July 13, 2012).
 - Relying on custodians can be difficult to defend if challenged
 - Each custodian’s approach will be different, even when provided with instructions.
 - To prove that each custodian’s searches were all performed in a reasonable way is challenging.
- Technical challenges when processing data
 - Encryption- File, E-mail, Hard drive, etc.
 - Corrupt files, password protected files, files that the tool kicks out, etc.
 - File types that are not searchable (picture files, image PDFs, audio, video, etc.)
 - Scan and OCR paper to create one repository of all matter data

eDiscovery: Doc Review & Production Sandia National Laboratories

- Document Review- Create Categories within the software based on key issues
 - Be careful with the number of categories due to human limits
 - Create a category for documents that require a second look
- Sample reviewed documents for accuracy on a regular basis and regularly share lessons learned with review team to improve results
- Leverage internal capabilities of software tool to ensure consistency
 - Documents should not be marked both as 'responsive' and 'non-responsive'
- Reviewing and producing a large number files can lead to mistakenly producing privileged documents. Protect yourself and your clients
 - Fed. R. Evid. 502(b) there is no subject matter waiver of inadvertent (mistake or error) disclosure if:
 - Reasonable steps were taken to prevent disclosure
 - Prompt steps were taken to notify the other side & rectify the mistake
- Always get a Fed. R. Evid. 502(D) order to bind all other parties (present and future in state & federal court), no reasonableness requirement!

Some Additional Key Cases & Rules

- Commitment to effective 26(f) Meet and Confer
 - *Cartel Asset Management v. Ocwen Financial Corp.* slip op., 2010 WL 502721 (D.Colo., Feb. 8, 2010).
- Computer Assisted Review is acceptable for searching for ESI in some cases
 - *Da Silva Moore, et al., v. Publicis Groupe & MSL Group*, 868 F.Supp.2d 137 (S.D.N.Y., June 15, 2012).
- Admissibility of ESI
 - *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md., 2007).
- Counsel responsibility to monitor e-discovery
 - Fed. R. Civ. P. 26(g)(1)
 - *Cache La Poudre v. Land O Lakes Farmland Feed*, 244 F.R.D 614 (D. Colo., 2007).
- Sanctions for E-Discovery Violations-Contains helpful sanction law reference
 - *Victor Stanley, Inc. v Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md., Sept. 9, 2010).
- Federal District of New Mexico eDiscovery sanction cases
 - *Atlas Resources, Inc. v. Liberty Mut. Ins. Co.*, ____ F.R.D. ____, 2011 WL 10563364 (D.N.M., Sept. 30, 2011).
 - *U.S. ex rel. Baker v. Community Health Systems, Inc.*, Slip op., 2012 WL 5387069 (D.N.M., Oct. 03, 2012).

Privacy: Legal Approaches Vary

- US: Sector-based (e.g., HIPAA, GLBA, Wiretap, Privacy Act 1974)
- Europe: Human rights based (e.g. EU Data Protection Directive, e-Privacy Directive)
- Other countries: a mix, but many are following the EU model
- US states: Hybrid (ranging from CA [human rights model] to NM [no comprehensive data breach or privacy law])
- Enforcement: depends on the law (FTC, state attorneys general, agencies, private cause of action)

Privacy: Risks

- Differing legal standards: breach/notification requirements, definitions of PII, data security obligations
- Data loss (breach): hacking, inadequate access controls, loss of computers and mobile devices
- Evolving, larger, new data repositories:
 - customer information, PHI, HR,
 - social media, mobile devices, Big Data

Privacy: Risk Avoidance & Mitigation

- Privacy assessment (data types, quantity, security)
- Applicable laws (Federal, state, international)
- Defensive measures: policy & procedures, privacy officials (some legally required, e.g., under HIPAA), breach response, technical measures (e.g. data loss prevention tools), *education & awareness*

Privacy Recent Developments

- Changes in the law
- Enforcement
- In the news
- More information – International Association of Privacy Professionals (IAPP) – www.privacyassociation.org

Questions & Answers

