



# Electronic Discovery

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Digital Transactions  
Week #14  
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# What is Electronic Discovery?

Electronic Data Discovery (“EDD”) is any process in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal legal case.



# Recap of FRCP

- Chapter 1: Scope of the FRCP (Rules 1 and 2)
- Chapter 2: Commencement of Suits (Rules 3-6)
- Chapter 3: Pleadings and Motions (Rules 7-16)
- Chapter 4: Parties (Rules 17-25)
- Chapter 5: Deposition & Discovery (Rules 26-37)
- Chapter 6: Trial (Rules 38-53)
- Chapter 7: Judgement (Rules 54-63)
- Chapters 8-11: Remedies, Special Proceedings, etc.



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# Discovery

- Rule 16: Pretrial Conferences; Scheduling; Management
- Rule 26: General Provisions Governing Discovery; Duty of Disclosure
- Rule 33: Interrogatories to Parties
- Rule 34: Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes
- Rule 37: Failure to Make Disclosures or Cooperate in Discovery; Sanctions
- Rule 45: Subpoena



# Overview



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- Existence of Electronic Information



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- Duty to Disclose



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- Duty to Notify



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- Duty to Meet and Confer



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  - Computer-based information in general



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  - Deleted information
  - Back-up and archival data
  - Costs
  - Format and media
  - Privileged material



# Guiding Principles



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- Organizations must properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.



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  - amount in controversy.



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- Parties should:
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  - seek to agree on the scope of each party's rights and responsibilities.



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- Discovery requests should make as clear as possible what electronic documents and data are being asked for.
- Responses and objections to discovery should disclose the scope and limits of what is being produced.



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- The obligation to preserve electronic data and documents requires:
  - reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation.
- However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.



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  - methodologies, and
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- ... appropriate for preserving and producing their own electronic data and documents.



# Guiding Principles

- The requesting party has the burden – on a motion to compel – to show that the responding party's steps to preserve and produce relevant electronic data and documents were inadequate.



# Guiding Principles

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- The primary source of electronic data and documents for production should be active and information purposely stored in a manner that anticipates future business use and permits efficient search and retrieval.
- Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh cost, burden and disruption of retrieving and processing data from such sources.



# Guiding Principles

- Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual data or documents.



# Guiding Principles

- A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.



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  - searching, or
  - use of selection criteria
- ... to identify data most likely to contain responsive information.



# Guiding Principles

- Unless it is material to resolve the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.



# Guiding Principles

- Absent a specific:



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# Guiding Principles

- Absent a specific:
  - objection,
  - agreement of the parties, or
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- ... the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party.



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  - Unless the information sought is not reasonably available to the responding party in the ordinary course of business.



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- Exception to the cost rule...
  - Unless the information sought is not reasonably available to the responding party in the ordinary course of business.
- If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the cost of retrieving and reviewing such electronic information should be shifted to the requesting party.



# Guiding Principles

- Sanctions, including spoliation findings, should only be considered by the court if, upon a showing a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data and that there is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.



# Duties for Counsel



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- Counsel is to be informed about client's electronically-stored information



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- Counsel is to be informed about client's electronically-stored information
  - includes knowledge of client's information management systems and their operations.



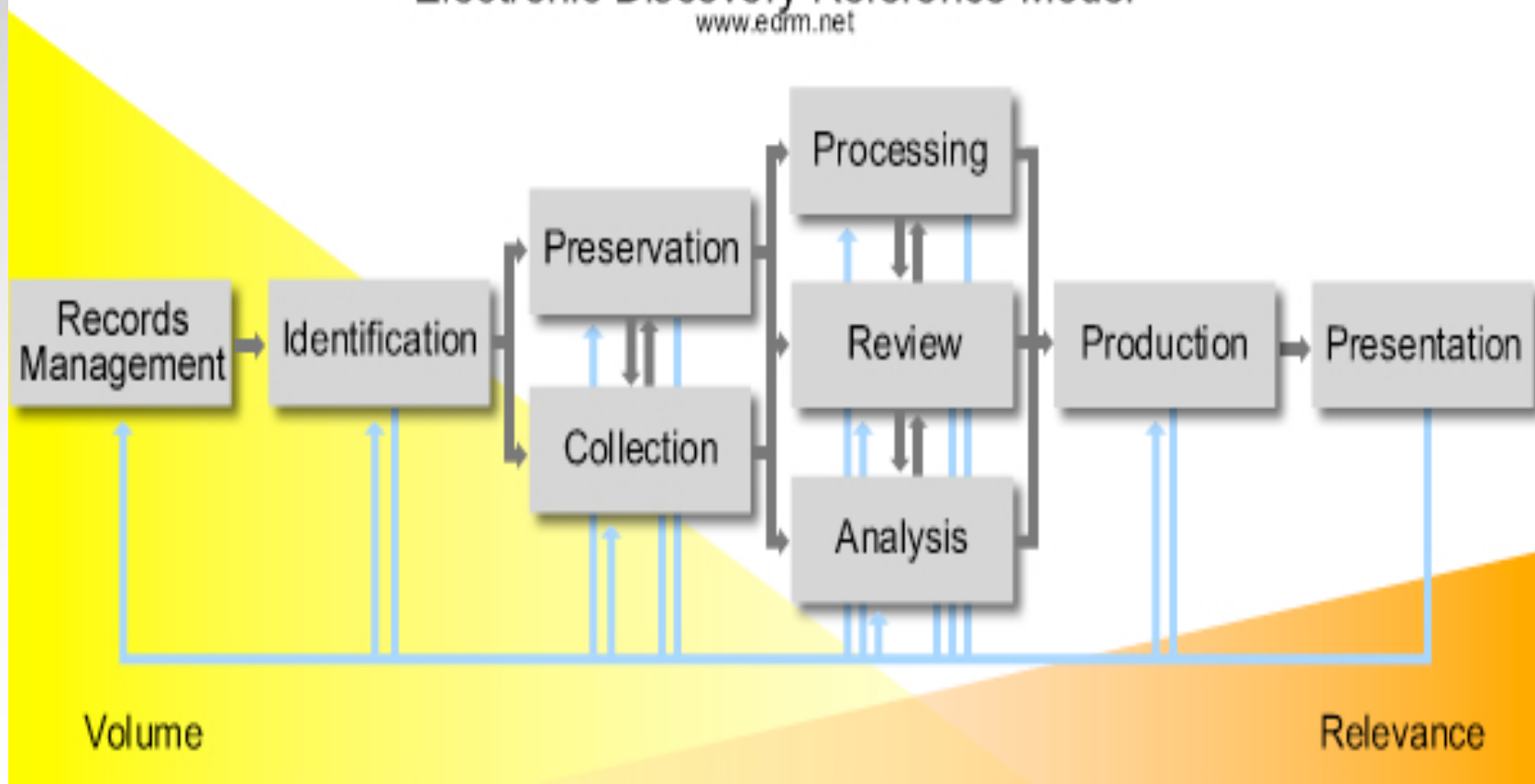
# Duties for Counsel

- Counsel is to be informed about client's electronically-stored information
  - includes knowledge of client's information management systems and their operations.
  - includes knowing how information is stored and retrieved.



# Electronic Discovery Reference Model

[www.edm.net](http://www.edm.net)





# Varieties of Electronic Experience

- Email
- Word Processing Docs
- Spreadsheets
- Presentation Docs
- Graphics
- Animations
- Audio/Visual
- Voicemail
- Instant Messages
- Backups
- Tapes, discs, drives, cartridges and other storage media



# Varieties of Electronic Experience

- Desktop computers
- Laptop computers
- PDA
- Databases
- Networks
- Servers
- Legacy Systems (HW/SW)
- Archives
- Back ups or disaster recovery systems
- Home computers
- Internet data
- Handheld wireless devices
- Mobile phones
- Paging devices
- Audio systems

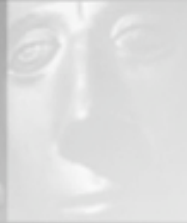


# Computer Forensics



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  - Image drives only
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- Decide (early) if you need it
  - Image drives only
  - Perform additional analysis (e.g., find deleted files)
- Be sure that you find a competent computer forensic examiner
  - Certifications/Experience/“Trialability”



# Cases Fall Into Eight Categories

- Data Preservation and Spoilation
- Scope of Electronic Discovery
- Records Management
- Form of Production
- Use of Experts
- Costs and Cost Allocation
- Privacy and Privilege
- Rule 37 Sanctions



# Data Preservation and Spoilation

- *Zubulake v. USB Warburg* (“Zubulake V”), 2004 WL 1620866 (S.D.N.Y. July 20, 2004).
  - Motion for sanctions for defendant's deletion of e-mails succeeded. The court found that:
    - contrary to instructions from both outside counsel and in-house lawyers, USB employees deleted relevant e-mail.
    - USB also failed to preserve backup tapes on which copies of the destroyed e-mails might have been found.
    - Adverse-inference jury instruction and award of costs.
    - Sanctions based in *willful* destruction, not negligence.



# Scope of Electronic Discovery

- *Bethea v Comcast*, 218 F.R.D. 328 (D.D.C. 2003) (employment discrimination suit)
  - Defendant stated it made a “diligent search” but found no documents response to a RFP.
  - Disbelieving plaintiff moved to inspect plaintiff's computer systems.
  - Court rejected motion because the plaintiff was relying on mere speculation and could not demonstrate the relevance of compelling discovery.



# Records Management

- *In re Cheyenne Software, Inc., Securities Litigation*, WL 714891 (E.D.N.Y. Aug. 18, 1997)
  - Court held that recycling of computer storage media must be halted during discovery when that is the most reasonable means of preserving available data.
  - Court did not give adverse jury instruction (no prejudice shown), but did order defendant to pay \$15,000 in fees and fines.



# Form of Production

- *Hagemeyer North America v. Gateway Data Sciences Corp.*, 222 F.R.D. 594 (E.D. WI 2004)
  - Plaintiff requested defendant search backup emails
  - The court, citing *Zubulake*, ordered sample of backup tapes be taken to determine “whether the burden or expense of satisfying the entire request is proportionate to the likely benefit.”



# Use of Experts

- *Simon Property Group, L.P. v. mySimon Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000). (TM suit.)
  - Plaintiff sought to compel discovery of hard drive.
  - Court directed that plaintiff choose an expert to image the drive and furnish the imaged drive to defendant's counsel, who would identify and redact any documents that were privileged.
  - The plaintiff would have access to all material that was not privileged.



# Costs and Cost Allocation

- *Computer Associates Intl., Inc. v. Quest Software, Inc.*, 56 Fed.R.Serv. 3d (West) 401 (N.D. Ill. 2003) (Copyright/Trade Secret Inf.)
  - Plaintiff requested imaging of six hard drives
  - Defendant spent ~\$40K to remove privileged emails and to make a privilege log, moved to shift costs.
  - Court reviewed the eight *Rowe* factors and determined that none of them favored costs shifting (analogous to prep. costs for attorney review).



# Rowe Factors

- *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002)
  - Racial discrimination suit against talent agencies
  - Plaintiff requested emails from defendant's backup media
  - Defendants objected, citing high cost estimates for retrieval and attorney review (for relevance and privilege)
  - Court allowed cost shift except for attorney review.



# *Rowe Factors*



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# Rowe Factors

- The specificity of the discovery request
- The likelihood of discovering material data
- The availability of those data from other sources
- The purposes for which the responding party maintains those data
- The relative benefits to the parties of obtaining those data
- The total costs for production of those data
- The relative ability and incentive for each party to control its own costs



# Rowe Factors

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- The likelihood of discovering material data
- The availability of those data from other sources
- The purposes for which the responding party maintains those data
- The relative benefits to the parties of obtaining those data
- The total costs for production of those data
- The relative ability and incentive for each party to control its own costs
- The resources available to each party



# *Zubulake* Factors

- The extent to which the request is tailored to discover relevant data
- The availability of those data from other sources;
- The total cost of production, relative to the amount in controversy
- The relative benefits to the parties in obtaining those data
- The total cost of production, relative to the resources available to each party
- The relative ability and incentive for each party to control its own costs
- The importance of the issues at stake in the litigation



# *Wiginton* Factors

- The likelihood of discovering critical information
- The availability of such information from other sources
- The amount in controversy as compared to the total cost of production
- The parties' resources compared to the total cost of production
- The relative ability of each party to control costs and incentives to do so
- The importance of the issues at stake in the litigation
- The importance of the requested discovery in resolving the issues at stake in the litigation
- The relative benefits to the parties of obtaining the information



# Privacy and Privilege

- *United States v. Rigas*, 281 F.Supp.2d 733 (S.D.N.Y. 2003) (Criminal case of Adelphia)
  - Government accidentally provided privileged material along with required discovery material.
  - Government petitioned to have the file returned.
  - Defendants argued that gov't waived privilege.
  - Court adapted a four-part test to gauge fairness of waiving privilege:



# Privacy and Privilege

- *United States v. Rigas*, 281 F.Supp.2d 733 (S.D.N.Y. 2003) (Criminal case of Adelphia)
  - The reasonableness of the precautions taken to prevent inadvertent disclosure of privileged docs.;
  - The volume of the discovery versus the extent of the specific discovery at issue;
  - The length of time taken by the producing party to rectify the disclosure; and
  - The overarching issue of fairness.



# Privacy and Privilege

- *In re Currency Conversion Fee*, 2003 WL 22389169 (S.D.N.Y. Oct. 21, 2003)
  - “Functional equivalent” exception to the corporate attorney-client privilege applies, even though the communications disclosed went to a third party – if that third party is functional equivalent to employee
  - The “functional equivalent” exception does not apply to otherwise privileged documents processed by outsourced data processing firm.



# Rule 37 Sanctions

- *Zubulake v. USB Warburg LLC* (“Zubulake IV”), 220 F.R.D. 212 (S.D.N.Y. 2003)
  - After restoring backup tapes to locate missing emails, defendant found certain relevant tapes missing.
  - Plaintiff moved for sanctions and spoliation-inference jury instruction.
  - Court held that if malicious intent shown, adverse inference was allowable, but if absent, sanction limited to awarding costs of extra depositions.



# Gathering/Retaining Evidence

- Document Retention Policies



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- Backup Policies



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- Backup Policies
- (Anti-) Spoilation Orders



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# Electronic Discovery

Questions?