

Electronic Discovery

Answers to life's enduring
questions

Electronic Discovery

1. Requirements: What do courts expect?
2. Potential consequences of missteps?
Sanctions and unnecessary expense
3. Solutions:
 - a. Nine step discovery plan
 - b. System design suggestions

Discovery Glossary

- Identification
- Preservation
- Collection
- Review
- Production

1. What Do Courts Expect?

2010 was the year of “preservation”

- *Pension Committee v. Banc of America*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010)
- *Rimkus v. Cammarata*, 07-cv-00405 (S.D.TX. Feb. 19, 2010)
- Ninth Circuit
- State of Alaska

Pension Committee

- Securities litigation filed by a group of 96 investors.

Defective hold

- Plaintiffs' outside counsel "telephoned and emailed plaintiffs" requesting copies of relevant documents to help draft the complaint.
- Counsel's communications "did not meet the standard of a litigation hold" because
 - failed to direct employees to preserve all relevant records;
 - failed to create a mechanism for collecting records;
 - did not instruct employees to suspend the destruction of potentially relevant records.

Pension Committee

Defective preservation

- By demonstrating gaps in the timeline of documents received, defendants showed that a number of plaintiffs “clearly failed to preserve and produce relevant documents.”
- Defendants made a request to the court for declarations describing plaintiffs’ preservation efforts.
- The court found that the declarations submitted by some plaintiffs were deliberately vague, lacked detail seemingly to mislead defendants and the court, or were prepared by someone lacking sufficient knowledge of preservation efforts.

Pension Committee - Holding

- Court said the case does not involve “any egregious examples of litigants purposefully destroying evidence.”
- Found that some Plaintiffs were negligent (loss or destruction of relevant information), and others were grossly negligent.
- Gross negligence:
 - Fail to issue a written litigation hold;
 - Fail to identify all key players and ensure preservation of electronic and paper records;
 - Failed to preserve and discontinue the deletion of records of former employees;
 - Failed to preserve backup tapes that are the sole source of relevant information or relate to key players.

Pension Committee - Holding

- A party seeking an adverse inference must establish:
 - 1) the obligation to preserve,
 - 2) that the records were destroyed with “a culpable state of mind,” and
 - 3) that the destroyed evidence was relevant to the party’s claim.
- Relevance and prejudice may be presumed when the spoliating party acted in bad faith *or in a grossly negligent manner....*
- In the case of gross negligence, the burden of proof was shifted [to the spoliating party] to rebut the presumption of relevance and prejudice caused by the missing documents.

Rimkus v Cammarata

- Group of employees left and sued for release from non-competes. Rimkus countered that they had violated noncompete and taken trade secrets
- Reasonableness of the production effort must be considered, i.e. is the response proportionate.
- Some degree of culpability is required.
 - Bad-faith and prejudice for dispositive sanctions
 - Bad faith for adverse inference instruction

Ninth Circuit Precedent

Ninth	<p>Duty to preserve potentially relevant evidence in party's possession <i>Leon v. HDV Systems Corp.</i>, 2004 WL 5571412, at *3 (W.D. Wash 2004), <i>aff'd</i>, 464 F.3d 951 (9th Cir. 2006).</p> <p>Duty extends to key players. <i>Hous. Rights Ctr. v. Sterling</i>, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005).</p>	<p>In <i>Hous. Rights Ctr. v. Sterling</i>, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005), the court quoted <i>Zubulake II</i>, 220 F.R.D. at 220 (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”), and found that defendants’ “[d]estruction of documents during ongoing litigation was, at a minimum, negligent.”</p>	<p>Bad faith not required <i>Dae Kon Kwon v. Costco Wholesale Corp.</i>, No. CIV. 08-360 JMSBMK, 2010 WL 571941, at *2 (D. Hawai‘i 2010); <i>Carl Zeiss Vision Intern. GmbH v. Signet Armorlite, Inc.</i>, No. 07CV0894 DMS(POR), 2010 WL 743792, at *15 (S.D. Cal. Mar. 1, 2010), <i>amended on other grounds</i>, 2010 WL 1626071 (S.D. Cal. Apr 21, 2010).</p>	<p>Willfulness, bad faith, or fault <i>Dae Kon Kwon v. Costco Wholesale Corp.</i>, No. CIV. 08-360 JMSBMK, 2010 WL 571941, at *2 (D. Hawai‘i 2010) (requiring that party “engaged deliberately in deceptive practices”)</p> <p>“‘[D]isobedient conduct not shown to be outside the control of the litigant’ is all that is required to demonstrate willfulness, bad faith, or fault.” <i>Henry v. Gill Indus.</i>, 983 F.2d 943, 948 (9th Cir. 1993).</p>	<p>Bad faith or gross negligence <i>Karnazes v. County of San Mateo</i>, No. 09-0767 MMC (MEJ), 2010 WL 2672003, at *2 (N.D. Cal. July 2, 2010).</p> <p>Bad faith not required <i>Otsuka v. Polo Ralph Lauren Corp.</i>, No. C 07-02780 SI, 2010 WL 366653, at *3 (N.D. Cal. Jan. 25, 2010).</p>	<p>This issue has not been addressed.</p>	<p>When spoliation substantially denies a party the ability to support or defend the claim <i>Henry v. Gill Indus.</i>, 983 F.2d 943, 948 (9th Cir. 1993).</p>	<p>The Court’s research has not located case in which the court granted an adverse inference instruction and stated what the instruction would be.</p>
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Alaska Precedent

Alaska Spoliation Sanctions

Alaska Case law	Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	Culpability and prejudice requirements				What constitutes prejudice	Culpability and corresponding jury instructions
			for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance		
Alaska	<p>Attorney and client responsible – if either engages in unreasonable, groundless or obstructionist conduct, or fails to make required disclosures or responses, court may impose fees and costs, among other sanctions. Alaska Ct. R. 37(e), (d), (g).</p> <p>No difference between the intentional destruction or alteration of evidence and the intentional concealment of evidence until it is destroyed by natural causes. <i>Allstate Ins. v. Dooley</i>, 243 P.3d 197, 203 (Alaska 2010).</p>	<p>Willfulness not required to impose fees and costs as sanction. <i>SAC v. Lot 3, Block 1, Evergreen</i>, 902 P.2d 766, 777 (Alaska 1995).</p>	<p>The trial court has "broad discretion" but must consider (A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose; (B) the prejudice to the opposing party; (C) the relationship between the information the party failed to disclose and the proposed sanction; (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and (E) other factors deemed appropriate by the court or required by law. Alaska Ct. R. 37(b)(3); <i>Cartee v. Cartee</i>, 239 P.3d 707, 720-21 (Alaska 2010).</p>	<p>Willfulness required. Alaska Ct. R. 37(b)(3).</p> <p>To order litigation-ending sanctions for discovery violations, a trial court must find that (1) the noncompliant party willfully violated the order at issue, (2) nondisclosure of that information will prejudice the opposing party, and (3) the dismissal is sufficiently related to the violation at issue. In addition, before a trial court may impose litigation-ending sanctions for discovery violations, the record must clearly indicate a reasonable exploration of possible and meaningful alternatives to dismissal. <i>Whittle v. Weber</i>, 243 P.3d 208, 214 (Alaska 2010)</p>	<p>Unclear, but court has broad discretion. Alaska Ct. R. 37(b)(3); <i>Cartee v. Cartee</i>, 239 P.3d 707, 720-21 (Alaska 2010).</p>	<p>Unclear, but court has broad discretion. Alaska Ct. R. 37(b)(3); <i>Cartee v. Cartee</i>, 239 P.3d 707, 720-21 (Alaska 2010).</p>	<p>Sliding scale – e.g., decisions to exclude evidence under this rule involve a complex balance of interests and objectives. The trial court must evaluate matters such as the effects of delay, the reasons offered for noncompliance with time deadlines, the importance of the testimony sought to be rebutted, the nature of the offered rebuttal, and the nature of the claimed prejudice. <i>Cartee v. Cartee</i>, 239 P.3d 707, 721 (Alaska 2010); Alaska Ct. R. 37(b)(3)(B).</p>	<p>We have not located a jury instruction on point.</p>

2011 – The Year of “Production?”

- *National Day Laborer Organizing Network v. US Immigration* (S.D.N.Y Feb. 7, 2011) (J. Scheindlin)
- Government’s response to FOIA request must include metadata. Static, unsearchable images without accompanying load files were not acceptable under Rule 34

2. Potential consequences of missteps?

Sanctions and unnecessary expense

- 401 cases analyzed – 230 awarded sanctions
- Most common basis – failure to preserve
- Sanctions of attorneys – 7 cases in 2009 (\$500 - \$500,000)
- 2009 – 70% of all sanctions motions granted
- 2010 – 55% of all sanctions motions granted
- Increasing focus on relevance of missing evidence and resulting prejudice, and concern about sanctions motions being used inappropriately

3. Solutions:

- a. Nine step discovery plan
- b. System design suggestions

Nine Step Discovery Plan

1. Documented Hold – Consider Litigation Hold Notification Software or Service.
2. Document Systems – Map of IS/IT physical systems data storage locations.
3. Documented Assessment of Custodians – Interviews by counsel regarding operations and particularities specific to subject matter.
4. Documented Preservation – Checklist of systems in which data is not routinely saved (voicemail) or having programmed retention (email). Determination to hold in place or collect.
5. Documented Negotiation of process with requesting party (claw back provision, backup and archive exclusion, scope for range of file dates, custodians, file types, search methods, de-duplication method, method of review).
6. Documented Collection – consider using inexpensive software that will generate a listing of the file name, location and “hash” from source to target. Separate and contemporaneous log of activities maintained by operator. Separate Chain of Custody for media containing data. Chain of custody for working copies.
7. Documented Preprocessing – filter to exclude system files, duplicates, dates out of range, perform word list search.
8. Documented Review (use the right platform and reviewers)
9. Documented Production.

Documented Hold

- Suspend backup tape rotations and other routine destruction.
- Initial hold notice to custodians including documented receipt by custodian of hold notice - Litigation Hold Notification Software or Service.
- Develop a checklist of systems in which data is not routinely saved (voicemail) as well as systems with programmed retention (email).
- Determine if systems are adequate to manage a hold in place such that it can remain in its location without being modified or destroyed.

Document Systems

- Identify existing legal holds.
- Guideline: The Sedona Conference “Jumpstart Outline”
- Document Systems – Data map of IS/IT physical systems data storage locations. Critically evaluate the result and ask about external sources of data including external data sources.
- Collect policies governing computer use, information systems management and records management. Include contingency plans and emergency processes such as disaster recovery.
- Evaluate disparities between policies and practices.

Documented Assessment of Custodians

- Conduct interviews of custodians by counsel informed of operations and particularities specific to subject matter.
- Understand how each custodian created and managed data relevant to the matter.
- Understand what external data sources exist.
- Prepare written inventories.
- Revisit question of hold and preservation, evaluate all systems for processes that impact preservation and data destruction and update hold notice as required.

Documented Preservation

- Detail all steps taken.
- Include logs of all data identified and preserved.
- Identify technology used to preserve data.
- Destruction index identifying all nonrelevant data that has been destroyed in accordance with normal retention policies.

Documented Negotiation

- Prepare for negotiation of process with requesting party.
- Seek to narrow the scope of requests for data.
- Provide for schedule of production:
- Claw back provision,
- Method of data collection,
- Seek exclusion of backups and archives,
- Agree to key custodians,
- Set scope for date ranges,
- Limit file types to exclude system files,
- Agree on method to search for relevant data,
- Agree on process to filter and de-duplicate,
- Form of production including metadata.

Documented Collection

- Develop a procedural plan for how electronic data will be collected.
- The plan should identify the sources of data to be collected, the location of the sources.
- The plan should prioritize key data.
- Determine who will participate in the collection process.
- Documented Collection – inexpensive software that will generate a listing of the file name, location and hash from source to target.
- Separate and contemporaneous log of activities maintained by operator.
- Separate Chain of Custody for media containing data.
- Chain of custody for working copies.

Documented Preprocessing

- Based on process negotiated with requesting party.
- Careful and defensible data culling and filtering techniques can significantly decrease the volume of ESI for processing and review.
- Keyword searches.
- Document de-duplication.
- File type exclusion.

Documented Review

- Ideally use a platform that will:
- Document the process.
- Not limit the number of users.
- Provides for review in native file format.
- Provide efficient management.
- Provide efficient search.
- Provide efficient tools for review such as tagging palette.

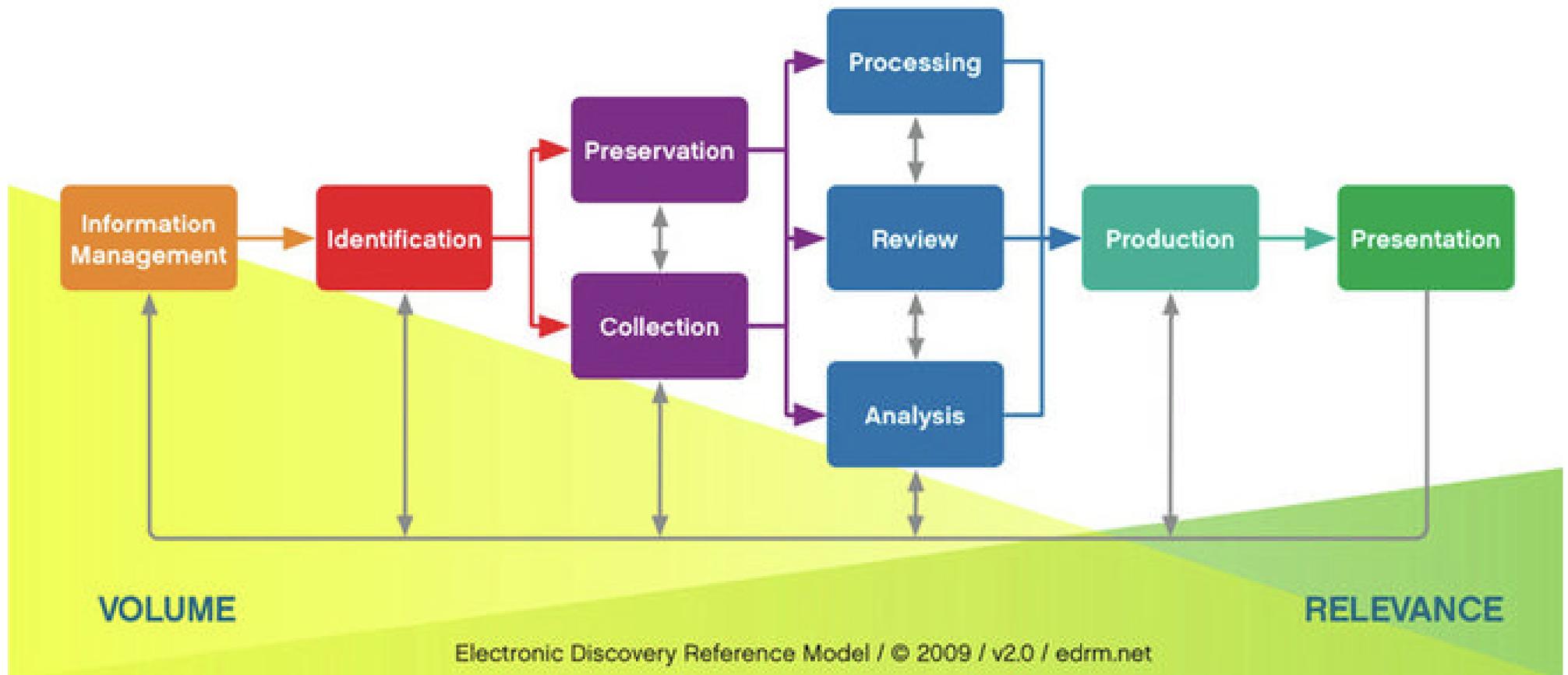
Documented Production

- Negotiated form of production.
- Manage redactions.
- Produce in image file format.
- Petrify files, burn in Bates.
- Extracted metadata.
- Production log.
- Privilege log.

System Design Suggestions

- Ideally a complete system will provide for each step presented in the EDRM.
- Reality is often a compromise.
- Implementation of enterprise systems generally involves a “going forward” management process in which archive data is sequestered, active files are indexed and newly created files are managed by the system.
- Access control – manages and logs user activities for every file.
- Centrally administered, maintains documented process and functionality to identify, preserve, collect, pre-process, review and produce.
- Evaluate existing systems against the EDRM and learn from IT what existing systems cover and what is missing.

Electronic Discovery Reference Model



Resources

- The Sedona Conference (www.thesedonaconference.org)
 - Non-profit organization of legal and technology professionals focused on legal and technical issues related to electronically stored information. “Working Group” series of publications and white papers address best practices and procedures that are periodically updated by volunteer working group members.
- EDRM (www.edrm.net)
 - Publishers of the “Electronic Discovery Reference Model” this is a non-profit organization of legal technology professionals and vendors in the legal technology industry who volunteer to develop measures and interoperability standards for technology designed to manage electronically stored information.
- ARMA (www.arma.org)
 - Not-for-profit organization publishes authoritative resources, guides, manuals and standards for Records Management and its role in information management across the enterprise including electronically stored information issues.

Resources

- Law Technology News (www.ltn.com)
 - Publication widely recognized by the legal technology industry and law firm IT decision makers. Up to the minute legal technology information.
- Craig Ball (www.craigball.com)
 - Author of popular Law Technology News article “Ball in your Court”. Craig is a trial lawyer and a certified computer forensic examiner. Craig gets high marks for translating technical issues between attorneys and the technology people. One of the few experts in the industry who has seriously engaged the issues and options for “shoe string” budget EDD management.