



Enterprise Content Management

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Outline

- Definitions
- Discovery of Electronically Stored Information (ESI)
- Steps organizations can take to minimize discovery burden
- Questions





Definitions

Document: Paper documents, computer files, recordings, databases or compilation of the above

Business record: A document that records a business dealing

Record Custodian: The individual or department responsible for the disposition of the record

Life cycle: Every document should have a life cycle. This spans from creation to final disposition

Disposition schedule: Defines how long categories of documents need to be preserved

Litigation Hold: Suspends normal disposition schedule and requires the preservation of relevant material





What is Electronic Discovery?

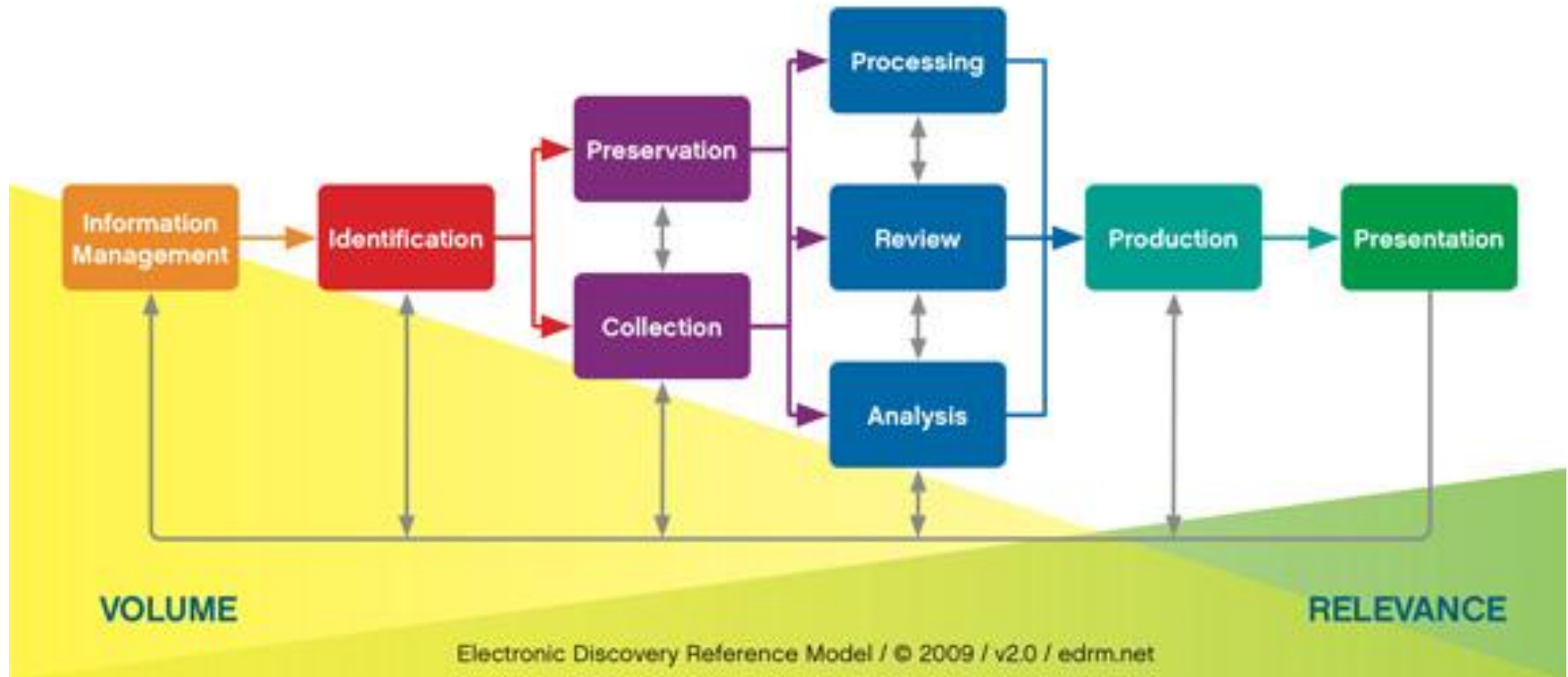
- The identification, preservation, collection, review, and production of electronically stored information (ESI) relevant to a legal or regulatory matter
- A new and very expensive part of litigation





Electronic Discovery and Beyond

Electronic Discovery Reference Model





General concepts

Preservation is a broadly-defined duty to retain, in the form it is kept by the organization, all documents which may potentially be relevant to the litigation.

Collection is the aggregation of documents likely to be related to the litigation and requiring either production or attorney review to determine their responsiveness.

Production is a more narrow obligation to produce documents responsive to a specific demand or subpoena. The form of the production is either as the documents are kept in their ordinary course of business or pursuant to meaningful production categories.





Case law

- Failing to preserve
 - Zubulake*, 229 FRD 422 (2004)
 - Pension Committee of the University of Montreal*, 2010 U.S. Dist. LEXIS 4546
- Failing to produce
 - Qualcomm Inc.*
 - Pension Committee of the University of Montreal*, 2010 U.S. Dist. LEXIS 4546
- Failing to produce timely
 - Phoenix Four*, 2006 U.S. Dist LEXIS 32211
- Who Should Pay
 - Federal – Usually the producing party
 - State – Varies. NY, e.g. requestor pays.





The Pension Committee of U. Montreal

As updated May 28, 2010

Judge Scheindlin (Author of Zubulake):

"By now it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably lead to the spoliation of evidence."

and

"By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to just the key players, could constitute negligence."





Preservation

Pension Committee of the University of Montreal v. Banc of America Securities, 2010 WL 184312; (S.D.N.Y. Jan. 15, 2010); **Phoenix Four, Inc. v. Strategic Resources Corp.**, 2006 WL 1409413 (S.D.N.Y. May 23, 2006); **Zubulake v. UBS Warburg, LLC et al.**, 229 F.R.D. 422 (S.D.N.Y. 2004) (“Zubulake V”)

- The first step in any discovery effort is to preserve upon reasonable anticipation of litigation
- Failure to preserve constitutes negligent, and sometimes, grossly negligent or willful conduct
- Must become fully familiar with her client's document retention policies, as well as the client's data retention architecture
- Suspend routine document retention/destruction policies and put in place a litigation hold to ensure the preservation of relevant documents
- Identify and place “on hold” all potentially relevant information by talking to IT people and all relevant custodians
- Communicate properly with the client to locate, track down, and search for all sources of relevant information





Preservation (cont.)

Pension Committee of the University of Montreal v. Banc of America Securities, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010); **Phoenix Four, Inc. v. Strategic Resources Corp.**, 2006 WL 1409413 (S.D.N.Y. May 23, 2006); **Zubulake v. UBS Warburg, LLC et al.**, 229 F.R.D. 422 (S.D.N.Y. 2004) (“Zubulake V”)

- Track down and search for all information repositories, even ones that are defunct and within all (active and inactive) parts of an organization
- Talk to IT people in order to understand system-wide backup procedures, and the actual implementation of the firm's recycling policy
- Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place
- A diligent inquiry will also involve communicating directly (by interviews) with the "key players" in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto, in order to understand how they stored information





Ongoing Preservation/Monitoring Compliance

Pension Committee of the University of Montreal v. Banc of America Securities, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010); **Zubulake v. UBS Warburg, LLC et al.**, 229 F.R.D. 422 (S.D.N.Y. 2004) (“Zubulake V”)

- A litigation hold is just the beginning when it comes to discovery obligations; the hold must be periodically re-issued
- Counsel must oversee compliance with the litigation hold, and must not merely accept client’s representations, especially generalized and conclusory ones
- Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched (where contents are unknown)
- Counsel must communicate directly with key players, especially re the preservation duty. Remind key players of hold periodically
- Counsel is responsible for coordinating her client's discovery efforts—although counsel need not supervise every step of the document production process
- Ongoing communication is critical. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party





Review/Production

Pension Committee of the University of Montreal v. Banc of America Securities, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010); **Zubulake v. UBS Warburg, LLC et al.**, 229 F.R.D. 422 (S.D.N.Y. 2004) (“Zubulake V”)

- Instruct all relevant employees to produce electronic copies of their relevant active files
- Depending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, maybe even grossly negligent or willful
- Counsel must also assess the accuracy and validity of selected search terms
- Failure to collect records from key players constitutes gross negligence or willfulness, as does the destruction of email or certain backup tapes after the duty to preserve has attached
- Failure to obtain records from non-key but relevant employees as opposed to just the key players, could constitute negligence
- Once responsive information is produced, Rule 26 duty to supplement keeps alive production burden





Sanctions for Failing to Produce

**Pension Committee of the University of Montreal
v. Banc of America Securities**, 2010 WL 184312
(S.D.N.Y. Jan. 15, 2010)

- Sanctions can include further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions)
- Sanctions motions which will be increasingly sought by litigants





Preservation obligations for documents

Before litigation is reasonably anticipated

- Government regulations (tax returns, HR files, etc)
- Requirements of trade associations
- Existing retention schedules
- Specific needs of the individuals or departments
- Documents may be preserved in any useful format.

After litigation is reasonably anticipated

- All of the above plus....
- All documents reasonably related to the subject matter of the litigation must be retained in their native format until the hold is released – regardless of the retention schedule
- Suspend routine or automatic purging of relevant information





Why does it cost so much?

- Low cost data storage results in the over retention of electronic information
- Regulations may require electronic communication retention
- Few organizations have a disposition schedule tied to their ESI.
- Collecting, processing, hosting, and reviewing costs. (Eighty percent of eDiscovery cost, according to some analysts, is incurred during the legal review process)





Special Challenges

Databases

- Contain information which may cover more than one retention period.
- Difficult to purge information subject to destruction unless initially designed for this function.
- Difficult to centrally manage from an ECM application unless designed for this purpose.
- Databases are not really documents in any real meaning of the term—they allow for the creation of documents.

Emails and voice mail systems

- Many of the same challenges as databases
- Unstructured
- Users may create personal archives.

Isolated equipment (copiers, security systems, etc.)





Meeting preservation obligations

Identify Custodians

- Organization charts
- Interviews
- key word searching to identify owners of relevant documents
- Analysis of emails for recipients and authors

Identify Documents

- Computer searching to identify potentially-relevant documents
 - Key words – Boolean
 - Concept searching – Linguistic or Basian
- Repositories identified during custodian interviews



Preserving documents

Preserve in place

- Identify documents and either suspend write or delete privileges or ask users to comply.

Sequester/Collect

- Identify documents and copy them to a secure location in such a way as to preserve metadata.

Organization and documentation are the keys to success:

- Relate collections to a custodian.
- Log the rationale for the collection.
- Ensure chain of custody so they remain admissible.
- Keep a RAIL of what, when and why each repository was collected.
- Don't underestimate the time it takes to effect a collection.





How do you save on electronic discovery costs?

- Collect only the smallest legally defensible data set
- Control the growth of ESI in your organization (discard old and obsolete data that the company is no longer required to retain, especially backup tapes)
- Organize storage resources better
- Use various culling techniques to reduce the amount of data collected/processed/hosted
- If requesting documents, tailor your requests to eliminate the production of irrelevant information
- Appoint a IT contact point
- Know your data repositories and custodians
- Use Special Masters (Comment 10c, The Sedona Principles for Electronic Document Production)
- Take proactive steps to understand your data before your meet and confer





Life Cycle

Documents should have a life cycle:

- Creation → Retention → Destruction

Benefits:

- Company only keeps relevant documents
- Increases consistency and accuracy of information
- Minimizes IT infrastructure burden
- Minimizes risk of misinformation and litigation exposure

Risks:

- You might later discover a need for a deleted document





Development of ECM

Most organizations see a need for ECM, but some have trouble accomplishing the goal.

“I don't have time to figure out which files should be kept and if so for how long. Do you know how many emails I get each day!?”

“Even if I wanted to, how would I know how to find stuff once it reached the end of its life cycle?”

"These are **my** files and I will decide when I don't need them."

"Those rules may be fine for everyone else, but they don't apply to **me**."

"I will copy all **my** files to somewhere no one in IT can ever find them."





Addressing an organization's ESI.

- Top level acceptance of a need for ECM associated with electronic files.
- Computer files are treated with at least the same sensitivity as paper files.
- Documents are indexed and locatable.
- Every record or repository has a custodian.
- Every record is associated with a disposition schedule.
- Every record is unique and contains non-duplicative information.
- Records are purged as they reach the end of their life cycle, pursuant to a disposition schedule unless subject to a hold.
- Employees are educated as to the purpose and benefits of adhering to a disposition schedule.
- Excellent communication between Legal, IT and Records
- Sensitivity to the user population





Solutions

Corporate commitment: Has to be a management priority with a tone set from the top.

Software driven by users: Must have User "buy in."

Education: Communicate legal and functional benefits to life cycle management.

Responsiveness: Be prepared to change and adapt.

Team: IT, Legal and RM. Ensure *ad hoc* members from the various key business lines.





Solutions—Continued

1. Establish milestones and measures of success:

- Budget—time and cost
- Implementation dates
- Anticipated document reductions
- Tolerable user impact or benefit
- What are objectives—reduction in volume; deletion of stale documents; user ease; minimizing change; litigation hold; reducing electronic discovery fees

2. Set modest goals:

- Big Bucket preservation schedules
- Start with one or two business lines
- Start with one or two application environments
- Consider treating existing data differently from new data
- Consider a culture shift to even think about document disposition a success.





ECM Options

- Free range approach: Documents come and go at the discretion of any user
- User managed: Users select both retention period and the disposition schedule for documents and are responsible for effecting both
- Managed disposition: Users select the retention period but, once assigned, the ECM system effects the disposition automatically
- Fully automatic: Computer assigns both the retention period and the disposition





Operational challenges

Where is the data stored?

- Interviews
- Disaster plans
- Data Maps
- Capital Budgets
- Institutional knowledge
- Searching

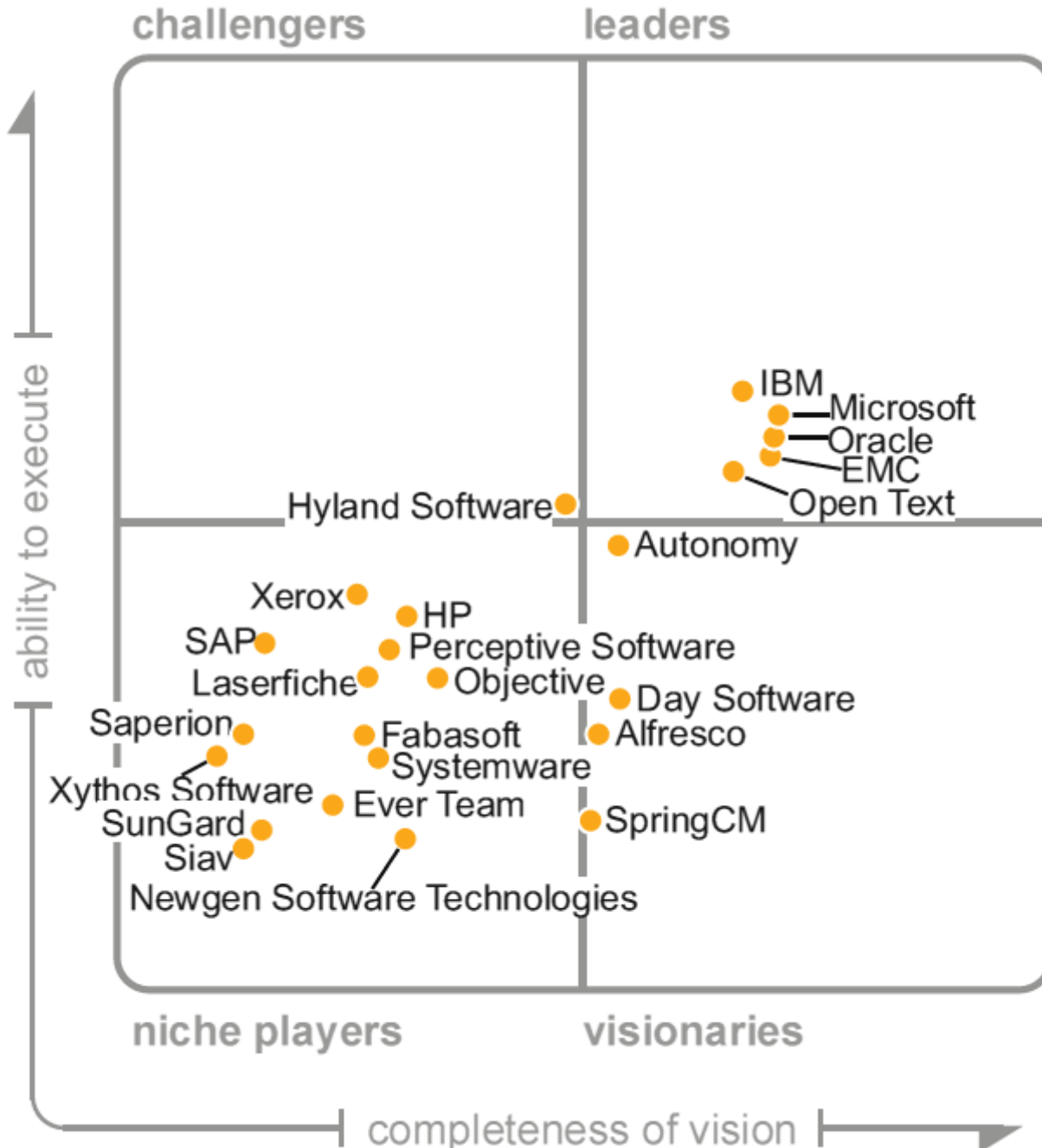
Identifying redundant data repositories

- Usually there is overlap of information stored in different locations

Specialized applications too expensive to replace or modify



Gartner – October 2009





Some vendor links

www.alfresco.com

www.autonomy.com

www.day.com/day/en.html

<http://www.emc.com/products/category/enterprise-content-management.htm>

www.ever-team.com/en

www.fabasoft.com/folio/products

www.filetek.com

<http://h71028.www7.hp.com/enterprise/w1/en/software/information-management-trim.html>

www.hyland.com

<http://www-01.ibm.com/software/data/content-management/>

www.laserfiche.com/rio

<http://sharepoint.microsoft.com/Pages/Default.aspx>

www.newgensoft.com/ecm.asp

www.objective.com/products/enterprisecontentplatform

<http://opentext.com/2/global/sol-products/sol-pro-open-text-ecm-suite.htm>

<http://www.oracle.com/technetwork/middleware/content-management/overview/index.html>

www.imagenow.com

www.sap.com/platform/netweaver/index.epx

www.saperion.com/en/products/enterprise-content-managment.html

<http://www.siav.it/home.aspx?LANG=ENG>

www.springcm.com

www.sungard.com/exp

www.systemware.com/index.php?page=products&sub=swcsuite&pid=64

<http://docushare.xerox.com/>

[www.xythos.com/products/enterprise document management suite.html](http://www.xythos.com/products/enterprise_document_management_suite.html)





Observations and cost saving tips

- Reduce the review and production burden by only keeping necessary documents (i.e., institute RM!)
- Identify a discovery czar from IT.
- Preservation is inexpensive.
- The cost of failing to preserve are staggering.
- Production and review are very expensive.
- The cost of failing to produce are minimal—if the documents exist to be produced.
- Process and review only the collections and documents likely to have relevant information.
- Consider a new category of legal service, document counsel to conserve costs, minimize exposure and increase efficiency.
- Start your preservation and collection efforts right away.





Thank You!

Questions?

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