eDiscovery Demystified

KUTAK ROCK LLP

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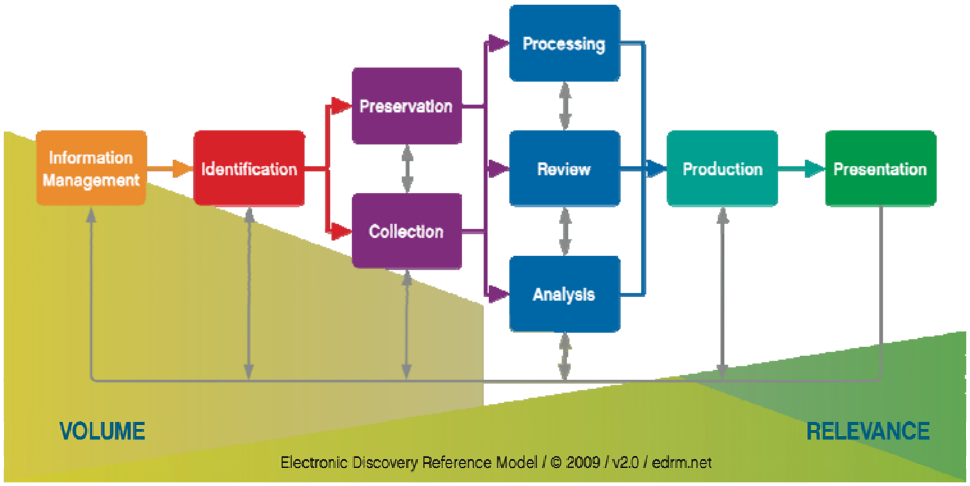
Why Kutak Rock's eDiscovery Practice Exists

- Every case, regardless of size, has an eDiscovery component
- Clients benefit from advice that comes from an authority with the required legal experience to guide and counsel them throughout the discovery process
- The stakes are high – it takes just one mistake for a firm and its client to make the news – and it doesn't need to be a large case (*e.g. Zubaleke*)
- Rule 26(g)-mandatory sanction provision
  - The required oversight is needed

eDiscovery Practice in A Nutshell

- We provide internal and external legal advice on all things electronic data related. This includes:
  - Legal Holds and Preservation Issues
  - Data Search and Collection Strategies
  - Review & Data Filtering Strategies
  - Production Format
  - ESI Protocol and Discovery Plans
  - Protective Orders and Motion Practice
  - eDiscovery Depositions (prepare, take and defend)
  - Appear at Rule 16 hearings
  - Serve as national eDiscovery Counsel or as eDiscovery Liaisons
  - Educate internally and externally on eDiscovery Issues

Electronic Discovery Reference Model



Identification

- **Identify and Locate Electronic Data**
  - What types of data exists?
    - (Word documents, email, CAD files, audio files, text messages)
  - Where is the data located?
    - (cloud storage, databases, mobile devices, social media, in vehicles)
- **Conduct Interviews**
  - Information Technology
  - Key Custodians

Preservation

- When is it triggered?
- Does a legal/preservation hold need to be in writing?
- Who sends it? (legal department, manager)
- Who receives It? (everyone, management, only individuals involved in the matter)

Collection of Electronic Data

- **How should data be collected?**
  - Search terms applied first?
  - All raw data collected?
- **Who should collect it?**
  - Client?
  - Law firm?
  - Vendor?

Self-Collection Risks

- Lose metadata
- Not systemized
- Different criteria and search techniques employed by different custodians
- Counsel cannot be certain of its accuracy
- If going to allow a client to self collect, the attorney must:
  - Monitor compliance
  - Take affirmative steps to communicate and work with key employees
  - Identify gaps in collection and go back and re-collect as warranted

Document Review

- Must a review be done?
- Who Does the Review?
  - The client
  - Kutak Rock attorney (Partner, Associate)
  - Contract attorney
  - Offshore review
- What is predictive coding? TAR?
- Do you search before or after the collection?
- Do you need to disclose your review process to opposing counsel?

Rule 26. Duty to Disclose; General Provisions; Governing Discovery

Rule 26(b)-Discovery Scope and Limits

26(b)(1) ***Scope in General***. …Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

26(b)(1)-Scope in General, cont'd

[what was deleted?]…including relevant to any parties claims or defense ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location or persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

Rule 26(c)-Protective Orders

(1) ***In General***. A party or any person from whom discovery is sought may move for a protective order…The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one of the following:

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(B) specifying terms, including time and place or the allocation of expenses, for the disclosure of discovery;

***

Rule 26(f)-Conferences of the Parties; Planning for Discovery

(3) ***Discovery Plan***. A discovery plan **must** state the parties' views and proposals on:

(C) any issues about disclosure, ~~or~~ discovery or preservation of electronically stored information, including the form or forms in which it should be produced.

(D) any issues about claims of privilege…if the parties agree on a procedure to assert these claims after production–whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

***

What is a Clawback/502(d) Order?

- A clawback order, also commonly referred to as a Rule 502(d) order, is an order that determines how inadvertently produced privileged documents will be treated.
- Federal Rule of Evidence 502(d) (Orders) and (e) (Agreements)
  - 502(d): "[a] Federal court may order that the privilege or protection is not waived by disclosure…in which event the disclosure *is also not a waiver in any other federal or state proceeding*" (emphasis added).
  - 502(e): "[a]n agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, **unless it is incorporated into a court order**" (emphasis added).

You Need a 502(d) Clawback Order

- Otherwise….
  - Federal Rule of Evidence 502(b)– inadvertent production
    - requires a showing of reasonable steps to prevent the disclosure
    - promptly took reasonable steps to rectify the error.
  - Without a **502(d) Order**, inadvertently produced documents may **lose** their **privilege protection** in **other unrelated** proceedings.

502(d): Cautionary Note

- Parties' 502(d) Order only included protection if a document was produced as a mistake or inadvertently.
- *New Mexico Oncology v. MV/GBW*, Case No. 1:12-cv-00526-MV-GBW (D. N.M. Feb. 27, 2017)
- Make sure your 502(d) Protective Order has language that says, "inadvertent or otherwise"

Rule 34. Responses and Objections

Rule 34(b)(2)-Responses and Objections

Rule 34(b)(2)(B) ***Responding to Each Item*****.** For each item or category, the responses must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reason. The responding party may state that it will produce copies of the documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or another reasonable time specified in the response.

Responses and Objections

Rule 34(b)(2)(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

Recent Cases

- *Fischer v. Forrest*, 14 Civ. 1304, 14 Civ. 1307, 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017)
- *Sprint Communications Co. v. Comcast Cable Communications,* Case No. 11-2684-JWL, 2014 WL 545544, at *2, 2014 WL 1569963, at *3 (D. Kan. Feb. 11, 2014 and Apr. 18, 2014).
- "**Subject to and without waiver of the foregoing objections…Sprint will produce non-privileged responsive documents…**"

Courts Give Teeth to Mandatory Sanctions Provision of Rule 26(g)

Rule 26(g)-Signing Disclosures and Discovery Requests, Responses and Objections

- **26(g)(1): Signature Required; Effect of Signature.** Every disclosure…and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented…By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a **reasonable inquiry:**
  - (A) [W]ith respect to a disclosure, it is **complete and correct** as to the time it is made; and
  - (B) [W]ith respect to a discovery request, response, or objection, it is:
    - (i) [C]onsistent with these rules and…existing law…
    - (ii) [N]ot interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
    - (iii) [N]either unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Rule 26(g)-Signing Disclosures and Discovery Requests, Responses and Objections, cont'd

- **26(g)(2) Failure to Sign.** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or the party's attention.
- **26(g)(3) Sanction for Improper Certification.** If a certification violates this rule without substantial justification, the court, on motion or on its own, **must impose an appropriate sanction** on the signer, the party on whose behalf the signer was acting, or both
  - The sanction may include an award for expenses and attorney fees
- This Means:
  - No discretion afforded to the court
  - No requirement for bad faith or intent
  - Sanctions must be imposed upon proof of violation

Mandatory Sanctions Provision of Rule 26(g)

- *Mancia v. Mayflower Textile Services Co*., 253 F.R.D. 354 (D. Md. 2008) written by then magistrate Judge Grimm (now an Article III Judge) exposed Rule 26(g) and called it the most underutilized and misunderstood rule in the book.
- *Branhaven LLC v. Beeftek, Inc.*, 288 F.R.D. 386 (D. Md. 2013).
  - Counsel has an affirmative duty to ensure that their client responds completely and promptly to discovery requests.
  - The duties of counsel under Rule 26 cannot be delegated.
  - Lawyers must supervise all discovery, especially complicated eDiscovery responses.
  - By signing the attorney certifies that he has made a reasonable inquiry in response to the discovery request.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Old Rule 37(e)

- Rule 37(e) — Failure to Provide Electronically Stored Information.

  "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

- Problems with the Old Rule:
  - Gives courts inherent power to do what they want.
  - No showing of prejudice needed.

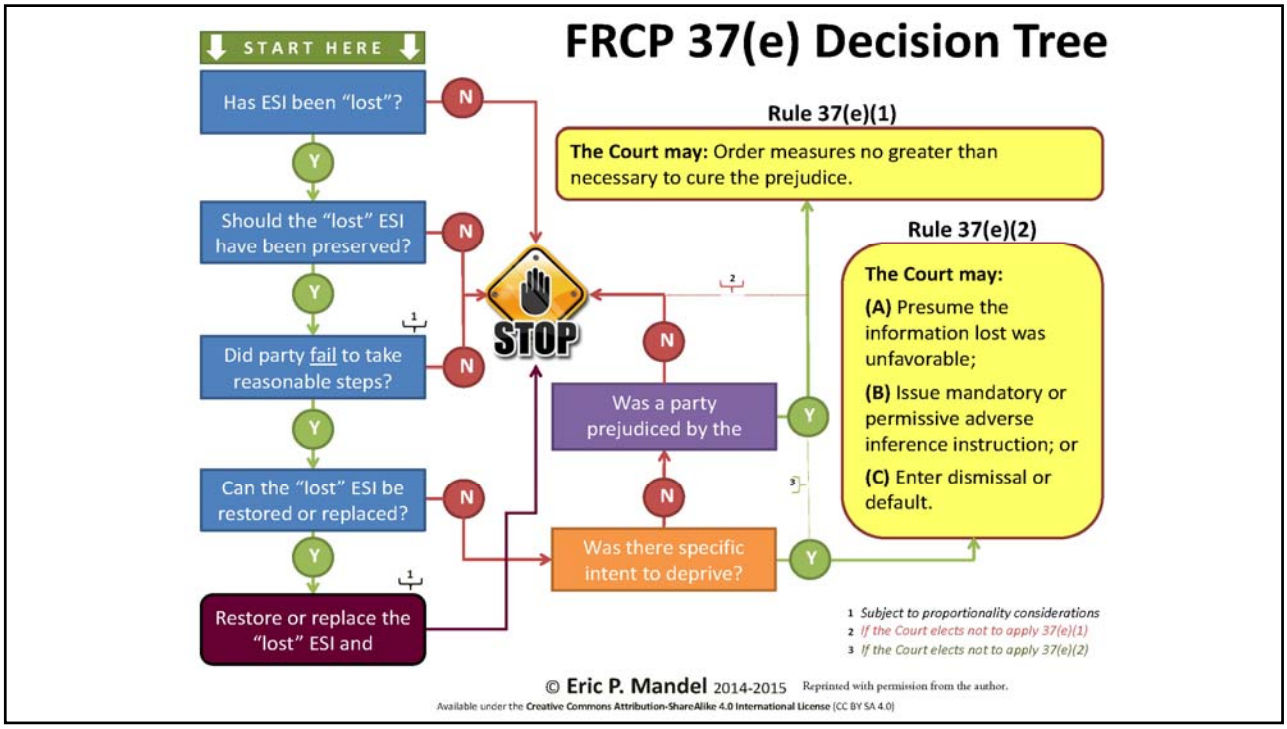
Stated Reason for Changing Rule 37(e)

- To prevent over-preservation based on fear of sanctions.
- Set uniform preservation sanctions (limit inherent powers of the courts).
- Add in a prejudice requirement.
- Requires the court to impose the least severe sanction needed to repair the prejudice resulting from loss of information.
- "[L]itigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts." Advisory Committee on Rules of Civil Procedure, Nov. 2012

New Rule 37(e)

Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
   - (A.) presume that the lost information was unfavorable to the party;
   - (B.) instruct the jury that it may or must presume the information was unfavorable to the party; or
   - (C.) dismiss the action or enter a default judgment.



Current eDiscovery Trends

- Courts expect cooperation
- Shifting of eDiscovery costs
- Predictive coding will be the norm
- More sanctions for boilerplate objections
- More sanctions for overly broad discovery requests
- Limits on discovery

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From her days litigating tobacco, pharmaceutical and medical device products cases when eDiscovery was still in its infancy, to her stewardship of Kutak Rock's eDiscovery Practice, Ms. Stewart has pioneered the development of efficient, practical and effective approaches to address the explosion of electronically stored information's use in modern litigation. Today, Ms. Stewart is recognized by her peers, judges, competitor firms, service professionals and think tanks as a global expert on electronic discovery, digital evidence and attendant issues.

She is appropriately credited with the creation, development and ongoing success of the National eDiscovery Leadership Institute ("NeLI"). NeLI is a preferred venue for cutting-edge thought leadership, a recognized platform for top-tier judicial scholarship, and an accessible setting for practitioners and service providers to share their insights with the bench and bar on all things eDiscovery related. Through Ms. Stewart's leadership, NeLI has attracted the best and brightest minds in the eDiscovery world and brought them to NeLI every year. Due to Ms. Stewart's leadership of NeLI, it has become one of the leading eDiscovery seminar brands and a magnet for professionals in the eDiscovery area. Ms. Stewart also serves on the ESI Rules Committee for the United States District Court Western District of Missouri and is an active member of the Sedona Conference Working Group 1 which works tirelessly to create a common framework for the discussion and resolution of eDiscovery disputes. These Sedona Principles, which she helped draft, are often considered and cited by the judiciary in rendering its decisions on electronic discovery disputes.