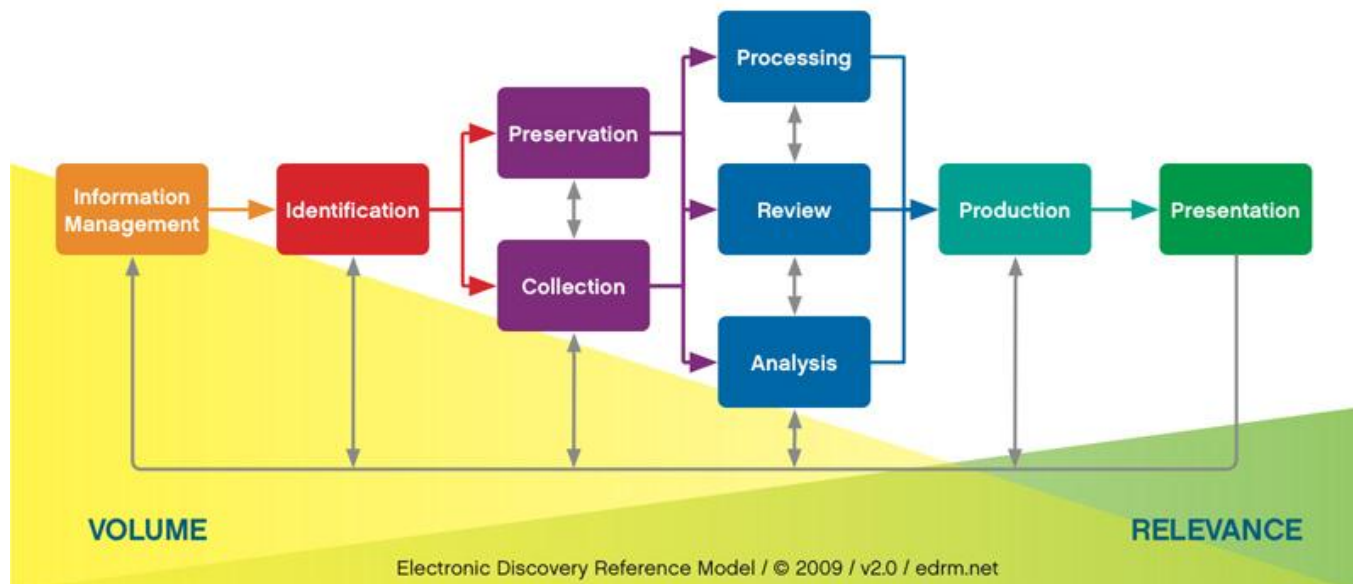# GIBSON DUNN

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E-Discovery Basics:
The E-Discovery Life Cycle

This is the second in a series of brief introductory guides to practical issues in electronic discovery. If you would like to subscribe to future installments E-Discovery Basics, please click here.

Understanding the life cycle of electronically stored information ("ESI") through the electronic discovery process is imperative for companies and their counsel to successfully navigate the substantial risks and mitigate the frequently high costs associated with electronic discovery.

The Electronic Discovery Reference Model ("EDRM")—an organization dedicated to developing practical guides for managing electronic discovery, improving quality and reducing costs—has created this useful framework for understanding how ESI proceeds through the electronic discovery process:

Electronic Discovery Reference Model

Information Management → Identification → Preservation / Collection → Processing / Review / Analysis → Production → Presentation

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Electronic Discovery Reference Model / © 2009 / v2.0 / edrm.net

The EDRM framework is not the only way to approach electronic discovery, but it provides a good structure for understanding and approaching the electronic discovery process from beginning to end. It begins with information management, even before litigation or an investigation is commenced or anticipated. It then proceeds to identification, preservation and collection of potentially relevant ESI after the duty to preserve is triggered. That is followed by processing the ESI so that it can be loaded into a review application, reviewing the processed ESI for relevance and responsiveness to discovery requests, and analyzing the relevant and responsive ESI. Finally, the life cycle finishes with production and then with presentation of relevant ESI in a hearing or trial. As ESI proceeds through the electronic discovery life cycle, the expectation is that its volume will decrease and its relevance will increase. The stages in the EDRM framework are described in more detail below.

Information Management: Companies should consider implementing information and records management policies and procedures that address ESI, including the retention, preservation and destruction of electronic information and records. Without such policies and procedures, a company's retention and destruction of records can be inconsistent and could result in the retention of records that are not needed for business purposes and not required to be preserved by regulation or law. Retaining unnecessary records can significantly increase the burdens, complexity and costs of electronic discovery.

Identification: The identification phase begins when the duty to preserve relevant information for litigation or an investigation is triggered. It involves developing and implementing a plan to identify sources of potentially relevant records. These sources may include business units, people, information systems, portable devices and paper files. Identifying the location of potentially relevant information is necessary to implement an effective legal hold. Identification may necessitate interviewing key players as well as IT and records management personnel to determine how and where the relevant data is stored, what inaccessible data exists, and what tools may be available to assist in the identification process.

Preservation: The preservation phase involves protecting potentially relevant data in ways that are legally defensible, as well as reasonable, efficient, auditable, and that mitigate risks. Information that should be preserved may include e-mails, text and instant messages, structured data (*i.e.*, information in dynamic databases), and other files, including associated metadata. It may reside on the company's servers, shared drives, employees' work and home computers, external media, backup tapes, cell phones, PDAs such as Blackberries, and voice mail systems. Increasingly, companies are also making use of external "cloud" storage. Moreover, in addition to active data, which is readily accessible, the company may need to preserve inactive, archived, residual or legacy data that is more difficult to identify and preserve. In preserving potentially relevant data, it may also be necessary to suspend processes that automatically delete or change ESI.

Collection: The collection phase entails gathering potentially relevant ESI and its metadata in a manner that is legally defensible, targeted, proportionate to the matter, auditable and efficient. In collecting the ESI, businesses may consider a number of methods, including employee self-collection, IT-assisted collection, collection by an outside service provider or specialist, or a combination of different approaches. To make informed decisions, businesses should understand the risks involved and whether courts or requesting governmental agencies will find an approach acceptable.

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Processing: Processing involves formatting collected ESI so that it can be culled and searched in a review tool. It is performed using specialized software, typically by litigation support personnel or an outside e-discovery service provider. The nature of the processing differs with different applications. Typical processing tasks include extracting files from folders (*e.g.*, .pst, .zip and other compressed formats), separating attachments, converting files to formats the review tool can read, extracting text and metadata, removing system and application files that do not contain user-generated data and have no evidentiary value, and de-duplicating identical files either within or across custodians.

Analysis: According to EDRM, analysis involves evaluating collected ESI to determine relevant summary information, such as key topics, critical players, specific vocabulary and jargon, and highly relevant documents. This information is useful at the outset before detailed review is conducted to help with important early decisions about strategy and to improve productivity. Analysis should be performed throughout the remainder of the process as new information is obtained and the case evolves.

Review: Document review is a critical component of most litigation and investigations, as it is the means of identifying responsive documents to produce and privileged documents to withhold. It is the phase when the legal team can begin to gain a greater understanding of the factual issues and when legal strategies can emerge and begin to evolve based on the information that is uncovered. EDRM recognizes that, inevitably, different strategies will be appropriate in reviewing documents for different purposes, *e.g.*, for an early assessment of the merits of a case or investigation; in preparation for production to an opposing party or investigating agency; or to review documents produced by an opposing or other party. The common thread, according to EDRM, however, is the need to (a) understand the scope of the review, (b) put in place supervision and procedures for managing the review team, and (c) select the appropriate provider, tools and platform for the review.

Significant improvements in data storage, database and search technology, and review application functionality are providing increasingly efficient options for handling the volume of data and streamlining the review process. In addition, emerging search technologies that use concept-based searching, linguistic pattern recognition and other techniques that move beyond traditional keyword searching are now being offered for initial culling of data as well as to provide supplemental search capabilities for different stages of the document review. A general knowledge of tools and trends can be helpful in developing an appropriate strategy for the document review.

Production: With the extraordinary increase in the volume of ESI that is created and stored, there has been a corresponding increase in focus on how the data that has been collected and reviewed is ultimately produced in civil litigation and regulatory investigations. Because of the complexity, the potential costs and the significant risks associated with producing electronic data, this topic has been addressed in the Federal Rules of Civil Procedure, many state court rules, and a growing number of judicial opinions. FRCP 34, for example, requires the production of ESI either in the form in which it is "ordinarily maintained"— *i.e.*, in its "native" format—or in a "reasonably usable form," which has been held by some courts to include the production of at least certain important metadata fields.

Presentation: In the EDRM model, presentation refers to how ESI will be presented in depositions, hearings, trial or other contexts. In the past, exhibits were presented in paper form. Technology has developed, now making it easier to present exhibits in near-paper or "image" format. Due to the nature of ESI and the increase in native and near-native document productions, some cases now require the legal team to present exhibits in native format. The team should identify exhibits, develop and

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implement a presentation strategy, prepare and test the exhibits, present them and then store or maintain them until a lawsuit is ended (*e.g.*, until all appeals are exhausted and the judgment is final). In developing a presentation strategy, the legal team needs to pay particular attention to the evidentiary requirements for the ESI to be admissible. For example, authentication and chain of custody issues can pose particular challenges when dealing with ESI. It is best to consider these requirements early and throughout the discovery process to ensure that the information is admissible at trial.

In future installments of the E-Discovery Basics series, we will discuss in greater detail phases in the electronic discovery lifecycle.

Gibson Dunn is a member of EDRM. For more information, visit the EDRM website at http://www.edrm.net.

*Other installments in our E-Discovery Basics series are available **here***.

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Lawyers in Gibson Dunn's Electronic Discovery and Information Law Practice Group can assist in implementing defensible and proportionate approaches at all stages of the e-discovery process. For further information, please contact the Gibson Dunn lawyer with whom you work or any of the following Chairs of the Electronic Discovery and Information Law Practice Group:

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