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Project Management in Electronic Discovery, Chapter 1

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Chapter 1

Legal Organizational and Environmental Factors

One of the most important things any project manager in any industry must understand is the body of work within their industry. That is, the nature of the work performed by project teams and stakeholders and the outcomes, services or results of that work – known as "deliverables." In the legal business, this means having more than just passing knowledge of the legal process—the work that lawyers do, how the courts and government work, and the necessary phases or parts of a litigation. Does this mean one must be a lawyer or paralegal or have a legal education to succeed as a project manager in a legal environment? Not necessarily, but comprehension of the legal framework and the organizational and environmental factors present within a legal setting are critical to the success of the project manager in a litigation support role. The chapter examines some of the factors.

Several aspects of project management in a legal setting are unique, and tend to differentiate it from project management as applied to, say, manufacturing turbines or designing and building a new automobile. It is important to understand the differentiators. First, work performed in the legal industry is less predictable and less precise. In a legal setting, many stakeholders with different influences and people outside the project organization sometimes dictate the nature and course of a project. Judges, for example, may not be viewed as traditional stakeholders, but the fact is that they have some say in the course of a litigation. Likewise, opposing parties—or even third parties—each have their own concerns and may have individual interests that could influence the outcome of a project. In the end, human beings are involved in legal disputes, together with their various personalities, agendas, and perspectives. Of course, there are rules, and they must be followed, but even the rules can become the subject of debate in a legal dispute. Deadlines are often set, then renegotiated or seemingly arbitrarily moved up or back. The measurements and precision required in, for example, manufacturing, are simply not present in litigation.

Chapter 2

The Discovery Process

Much of the work of lawyers involves drafting legal documents, performing research, meeting with clients, developing case strategy and dispensing legal advice. Lawyers investigate facts, interview key players, and appear as advocates for their clients in court, at depositions, or other formal proceedings. But the most resource-intensive aspect of civil litigation is discovery.

Discovery, also known as disclosure, is the phase in a litigation or lawsuit in which lawyers and their clients have an obligation to share information, documents, tangible items, and the identities of persons who may have information relevant to the lawsuit. Parties to a litigation may obtain discovery of any relevant, nonprivileged information relating to the claims and defenses in the case. Included in these discovery obligations is the requirement that parties identify, collect, review, and produce documents and electronically stored information to a case. The purpose of exchanging this information during discovery is to avoid surprise at trial.

Discovery occurs in civil litigation, government inquiries and investigations, during transactional and bankruptcy matters and in antitrust litigation. Discovery is compulsory in criminal cases (at least for the government),[5] and it takes place in domestic relations matters, trust and estate matters, and even in tax disputes. In short, anytime there are adverse parties, the discovery process may be invoked to gain access to information that may be relevant to the case. And although not technically discovery, the need to gather and review documents and ESI may also arise during internal corporate investigations.

The largest single contributor to the explosion in the volume of discoverable information is the development of technology and the use of that technology to create and store electronic information.

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[5] Discovery in criminal cases is governed by different, more stringent rules of procedure. Constitutional and statutory provisions guarantee a defendant in a criminal case the fundamental right to inspect and confront all evidence against them, and the government is obligated to disclose to the defendant not only incriminating evidence, but also any exculpatory evidence.

Thus, discovery has become electronic discovery. Given all the moving parts involved in discovery, the resources needed, the people, and the large volumes of data—not to mention skyrocketing costs—it makes perfect sense to apply project management principles to discovery projects. First, it is important to understand some of the discovery process and how technology has impacted discovery.

Technology Transforms Discovery

Discovery is governed by formal rules in both state and federal jurisdictions, which seek to ensure that the process of exchanging documents and information during discovery is fair, efficient, proportional to the case or amount in controversy, and that the information exchanged remains relevant. Emerging technologies are, however, changing the discovery process. The advent of technology has disrupted the American litigation process that had existed for hundreds of years, especially as it relates to discovery.[6] Formerly, parties engaged in large-scale discovery projects poured through boxes and boxes of paper documents, made multiple copies of those documents, and transmitted them to other parties via courier van or truck. Today, in a world where nearly all documents are created on a computer, parties still exchange documents, but they do so on CDs, DVDs, or external hard drives, or transfer them over secure FTP sites and view the documents in a database on a computer screen. Boxes and expanded folders have been replaced by databases and electronic folders in a Windows-based file directory structure. Attorneys now search for and designate or code documents "responsive" on a computer rather than following manual processes and using the colored Post-it flags they once used to affix to documents. Technology and the need for litigants to access and organize electronic documents efficiently have given birth to an entire industry, known as litigation support.

Some argue that discovery today, and electronic discovery in particular, threatens the integrity of the legal process because the costs put smaller firms and organizations with fewer resources at a distinct disadvantage. Whether this is true is not the point; rather, the point here is that applying project

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[6] Large-scale discovery and disclosure of information before trial is a uniquely American litigation trait. In most other countries, whether common law or civil code states, the notion of gathering and disclosing millions of pages of documents is unusual.

management principles and adhering to some basic organizational concepts enables any organization to meet their discovery obligations in a cost-effective and efficient manner.

Given that discovery plays such a large role in the civil system of jurisprudence, one would imagine that the processes involved would be more standardized and uniform across cases. But the fact is, both large and small organizations that create and maintain documents and electronically stored information do so in remarkably disparate ways, across very different systems, and each has its own procedures for responding to discovery requests. There is no one-size-fits-all in the creation, storage and disposition of ESI.

The Federal Rules of Civil Procedure (FRCP) have been in place since the 1930s to govern the course and conduct of discovery. But, like most rules, the FRCP can be a two-edged sword. When the rules were amended in 2006 to specifically authorize discovery of electronically stored information, it became clearer to attorneys and to the legal industry as a whole that a new form of discovery was emerging. At the same time, the rules were noticeably silent on some important aspects of electronic discovery; for instance, the rules do not require a company or its attorney to implement a litigation hold to preserve electronic documents. A *litigation hold* is a notice circulated to appropriate personnel within an organization that directs them not to delete, alter, or destroy documents. This requirement is instead governed by the common law or court decisions, which require a party to a lawsuit to preserve any potentially relevant evidence.

Notwithstanding the FRCP, lawyers have conducted discovery in very different ways and for different purposes for many years. Some operated with impunity and, instead of being a tool in the litigator's arsenal for learning the facts of a case, they propounded expansive discovery requests seeking every shred of paper and electronic information remotely relevant to the claims in a case. Discovery, in some instances, became pure sport and an effort to impede and overwhelm opposing counsel by either burying them in overly broad document requests or dumping enormous volumes of documents on them. The small company and solo practitioner could indeed be said to be at a disadvantage.

Discovery-related projects are the one area of civil jurisprudence where technology and the law collide directly with the business need to identify, collect, review, and produce documents, sometimes on a very large scale. And so, the discovery process has become known as the *electronic* discovery process, mostly because the vast majority of discoverable material is now stored electronically. But it is important to emphasize that, while it is called *electronic discovery*, the process of discovery itself has not changed; only the sources of the discoverable information and the forms in which it is produced have changed.

Given these changes in discovery and the development of technological tools to assist in discovery, it make sense that a new framework for discovery has emerged.

The Electronic Discovery Reference Model

Attorney George Socha and technologist Thomas Gelbmann developed the Electronic Discovery Reference Model (EDRM). The pair had worked together at a law firm, and later formed a consulting firm. They produced the well-known Socha-Gelbmann Survey, an annual review of software and service providers in the electronic discovery industry.

In 2003, while preparing their annual survey, Socha and Gelbmann began to realize that providers across the country were each claiming to be the only proficient providers offering "real" electronic discovery services. What emerged was a widespread lack of consensus on standards, which, in turn, led to confusion among buyers of legal support services, including law firms, who were struggling at the time with this new concept of electronic discovery.[7] By 2004, no organization had addressed the lack of standards in electronic discovery. A national think tank comprised of mostly lawyers and jurists called The Sedona Conference had issued some guiding principles for practitioners, and the *Zubulake* cases—, which were among the first high-profile court decisions to address electronic discovery requirements—

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[7] The earliest known instance of electronic discovery –that is, the exchange of digital information in litigation—is said to have taken place in the late 1970s, when information from an IBM computer was exchanged. What followed, in the 1980s, with the adoption of the PC computer, was small-scale discovery of just a handful of electronic documents copied from computer hard drives. In the 1990s, email—although still somewhat primitive—and the ubiquitous use of computers in office settings, led to a natural desire to seek electronic documents and information created on these machines.

had been decided, but there was no solid, uniformly accepted process framework. Electronic discovery in the early 2000s was indeed the Wild, Wild West.

In 2005, Socha and Gelbmann brought together representatives from law firms and corporate legal departments with the businesses who were offering the various forms of electronic discovery software and services. Corporations and law firms were the ultimate consumers of these offerings, so it made sense that they have a seat at the table in the development of standards in this emerging area. The goal was simply to discuss standardization in the electronic discovery industry.[8]

The first meeting of the EDRM membership took place in May of 2005, and this set in motion the development and design of the EDRM. The EDRM membership has been meeting semi-annually since 2005 to review and update its standards and to plan and undertake new initiatives.

FIGURE 2: THE ELECTRONIC DISCOVERY REFERENCE MODEL

Electronic Discovery Reference Model / © 2014 / v3.0 / edrm.net
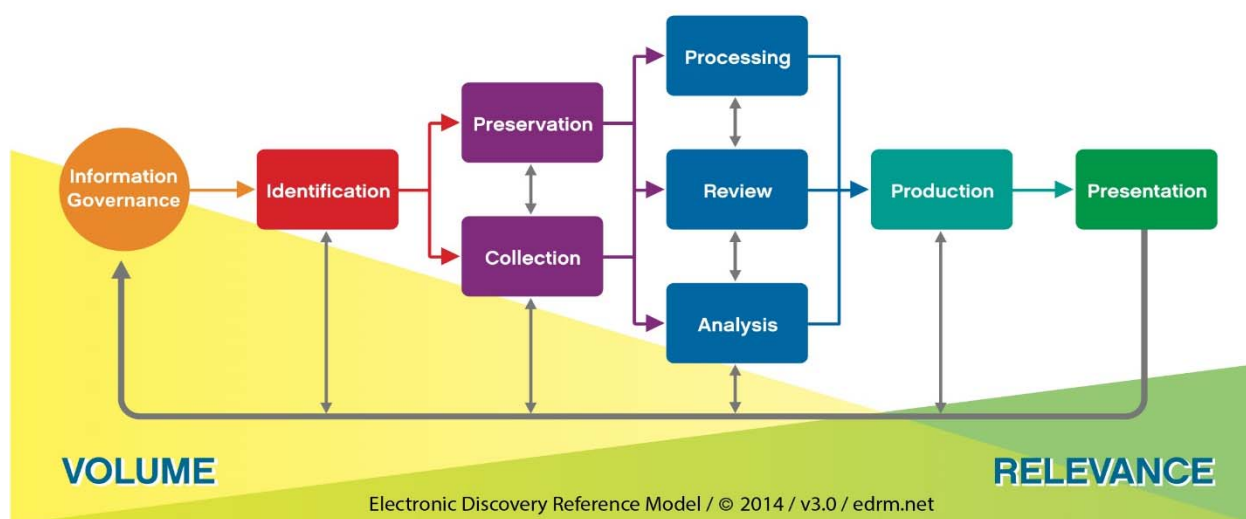
The beauty of the EDRM is that its model framework predates the 2006 amendments to the FRCP, so those rules played little or no role in the development of the EDRM. This is important because, rather than focus on complying with rules, EDRM members focused on developing a process framework

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[8] George Socha (co-founder and principal of EDRM), in discussion with author, June 2013.

specifically related to the handling of electronic discovery projects. The spirit of the federal rules is very much present, however. Workflow, organization, and standardization were primary goals of the EDRM.

What precise role does the EDRM play, and how does a project manager use this framework to manage a discovery project? The answer to those questions are discussed in detail in the chapters that follow. For now, it is important to understand the basic component parts of the EDRM.

Information Governance

All corporations, nonprofits, government entities, businesses, and individuals create and store information. Indeed, due to federal statutes such as the Sarbanes-Oxley Act of 2002, the Dodd-Frank Act of 2010, the Stored Communications Act of 1986, and a maze of federal and state regulations, publicly traded corporations and companies in heavily regulated industries such as finance or insurance are required by law to create and maintain certain information. The *information governance* node of the EDRM, then, relates to the manner in which an entity creates, stores, organizes, manages, secures, and disposes of information created in the course of its business operations.[9]

Every business is responsible to develop and maintain records and information management (RIM) policies. Such records could be paper documents, electronic documents, data in an accounting database, or personnel files in the human resources department. Across the world, nearly all information is created on a computer or other electronic device and, given the volume of such data, it is in the best interest of every business to have information governance policies in place that guide and control the retention, security, and disposition of its business records. Additionally, companies in highly regulated industries have formal compliance procedures. The way in which an organization creates, stores, and manages this information can be critical to the success or failure of a discovery pr oject.

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[9] Definitions of "information governance" abound. The Information Governance Initiative (IGI), a cross-discipline organization and think tank focused on advancing information governance, defines information governance as "the activities and technologies that organizations employ to maximize the value of their information while minimizing associated risks and costs." Other organizations have similar, broader and narrower definitions, and some include e-discovery within the broader definition of information governance. This book discusses information governance only insofar as it relates to the role of the project manager working on an e-discovery project.

While the responsibility to develop RIM and information governance policies within a client organization may not lie directly with a project manager working at a law firm, it is important that the project manager and the attorneys involved understand the client's policies, or lack thereof. After all, it is the client's information that will be subject to discovery and, therefore, the project manager and attorneys are obligated to have a firm understanding of the client's policies so that they may work with the client to identify and collect potentially discoverable materials.

Identification

The identification phase of the EDRM is where a project manager's work typically begins on a discovery project. The goal is to identify potentially relevant ESI in the clients' possession, custody, and control. RIM policies within a client organization will aid in this process, and a project manager should first inquire whether the organization has such a policy. But whether a RIM or information governance policy exists or not, it is still the project manager's responsibility to work with attorneys and the client organization—particularly their IT personnel—to identify the locations of, the people who possess, and systems that contain relevant documents and ESI. Although it can vary widely from one organization to another, and it is difficult to develop an exhaustive list because technology is constantly changing, the project manager should identify the sources and locations of ESI potentially relevant to the matter, including the names of custodians, the data assets involved, and a date range or other limiting characteristics.

Preservation and Collection

Once an organization has notice of or reasonably anticipates legal action, the obligation arises to not only identify potentially relevant documents and ESI, but also to preserve that information. Preservation implicates several responsibilities. First, the necessary personnel must be notified via a *litigation hold notice*, or memorandum instructing them that documents and ESI may not be altered or deleted. Second, the organization should suspend any records disposition policies, cease any automatic deletion policies, and stop backup media rotation if such processes affect preservation. Third, the

potentially relevant documents and ESI need to be preserved in place, physically sequestered, or collected

in order to preserve them as they are maintained for further use later in the case.

Collection is the process of physically gathering unaltered copies of documents and ESI identified

as relevant. The importance of proper collection procedures cannot be understated. When paper

documents are collected, no one writes on them. Electronic documents and other ESI should likewise be

collected in a way that preserves the metadata associated with those documents. Electronic data can be

preserved with software and tools that prevent writing to the individual files while they are being copied.

To collect ESI otherwise runs the risk of altering the metadata, and this may invite claims that the ESI has

been spoliated during collection.

Processing, Review, and Analysis

Processing ESI involves converting electronic documents to a uniform format so that they may be

analyzed and reviewed. During processing, specialized software is used to extract and index the metadata

and text of documents; this renders the documents searchable. Next, a combination of dates, keywords, or

file type extensions may be used to search for or filter out documents that may not be relevant.

Deduplication, or removal of duplicate documents, also typically takes place during processing. System

files are also usually removed from the document collection during processing.

Once processed, documents are most commonly loaded to a document review platform, which is

a database that stores either the *native file*—the format in which a document was originally created or last

saved—or a tagged image file format (TIFF) rendering of each page of a document and the metadata and

text associated with each document. Review and analysis is an iterative process that involves reviewing

the documents and making determinations regarding their relevance. Documents may be coded

responsive or *nonresponsive* to a particular document request or subpoena, or they may be coded

privileged, which means the document will not be produced because it contains privileged attorney-client

information. During the review, attorneys usually evaluate the documents and their relative importance to

the case, or they may discover a new fact or learn about additional personnel whose documents may be

relevant. Through this iterative process of review and analysis, the attorneys determine which documents need to be produced, or decide that further investigation of the case is necessary.

Production

Producing documents involves physically exchanging the responsive, nonprivileged documents with the other parties to a litigation. Preferably, the parties agree in advance to the format of the production, but the most common format for production of electronic documents is TIFF, with appropriate image load files. This is so because TIFFs are static, smaller than native files, and difficult to alter. TIFF is also preferred because of the ease with which most document review platforms allow for the redaction of images and the endorsement of Bates numbers on each page for later reference. An image load file and a delimited data file, which separates fields of metadata—such as author, recipient, and date—by comma or semicolon, may also be delivered if the parties have agreed to exchange metadata.

Presentation

During trials, arbitrations, depositions, and court hearings, or while preparing for any of these proceedings, documents may need to be displayed. Digital presentation is more efficient than lugging numerous boxes with multiple copies of each document for distribution in the courtroom. More and more courtrooms are equipped with projectors, screens, or monitors to enable the judge, jury, and the parties to view evidence in a digital form.

Generally, presentation of documents, graphics, or other digital information involves materials that were exchanged in discovery. Typically, production documents are exported from the document review platform to a presentation software, where they may be renumbered as deposition or trial exhibits. A trial technician may be engaged to prepare the documents for presentation, although litigation support project managers or the attorneys themselves often perform this function.

Conclusion

Knowledge of the discovery process is essential to the work of project managers working in a litigation support environment. Technology has impacted legal discovery more than any other area of the law, and the growth of the volume of ESI has changed the way technology is used in legal practice. The

EDRM outlines the typical stages of a discovery project. The framework functions as a lifecycle for discovery projects in much the same way that the project management process groups discussed in the coming chapters guide all projects. At each successive stage, the project manager must bring to bear the appropriate project management tools to make the identification, preservation, collection, processing, review, production, and presentation of documents more efficient.

Chapter 2 Summary

KEY POINTS

- *Discovery* is the process of opposing parties sharing of information in order to avoid surprise at trial.
- The discovery process is the most resource-intensive and costly aspect of litigation.
- The use of technology to create and store documents has caused an explosion in the volume of information parties must share during litigation.
- Electronic discovery is the result of the collision between technology, the law, and the business and legal requirement to produce information in litigation.
- The *Electronic Discovery Reference Model (EDRM)* is a process framework for the discovery project lifecycle.
- Managing information and identifying, preserving, collecting, processing, reviewing, producing, and presenting that information is the standardized lifecycle of a litigation discovery project.