

# E-Discovery & InfoGov Essentials

Ethical Obligations, Defensibility & Cost Control



**HADA** SEMINAR



# Daniel M. Braude

Wilson Elser Moskowitz Edelman & Dicker LLP

New York Metropolitan Offices:

150 East 42nd Street  
New York, NY 10017  
Tel 212-490-3000

1133 Westchester Avenue  
White Plains, NY 10604  
Tel: 914-323-7000

[daniel.braude@wilsonelser.com](mailto:daniel.braude@wilsonelser.com)

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Dan Braude, chair of Wilson Elser's e-Discovery team and a member of the firm's Information Governance Leadership Committee, concentrates

his practice on complex litigation involving product liability and commercial disputes. In addition, Dan counsels clients on challenges associated with changing technology, cloud computing, and related data privacy and information security issues. Dan is a Certified Information Privacy Professional (CIPP/US) and he serves as an adjunct professor at the Elisabeth Haub School of Law at Pace University where he teaches a course on e-Discovery.



**HADA** SEMINAR





# Smoking Gun Picture.JPG Properties

General Security **Details** Previous Versions

Property	Value
Digital zoom	
EXIF version	0221
<b>GPS</b>	
Latitude	41; 6; 35.82000000000070062
Longitude	73; 43; 33.1500000000023141
Altitude	142.197478991596626
<b>File</b>	
Name	Smoking Gun Picture.JPG
Item type	JPG File
Folder path	C:\Users\D\Desktop
Date created	12/9/2019 9:50 AM
Date modified	11/20/2016 10:17 PM
Size	1.59 MB
Attributes	A
Availability	
Offline status	
Shared with	
Owner	DB3\DB
Computer	DB3 (this PC)

[Remove Properties and Personal Information](#)

OK

Cancel

Apply

# Smoking Gun Word Document.docx Properties

General Security **Details** Previous Versions



Smoking Gun Word Document.docx

Type of file: Microsoft Word Document (.docx)

Opens with: Word 2013

Change...

Location: C:\Users\D\Desktop\Desktop Materials\Smoking Gu

Size: 27.2 KB (27,922 bytes)

Size on disk: 28.0 KB (28,672 bytes)

Created: Friday, September 16, 2016, 10:08:05 AM

**Modified: Saturday, September 3, 2016, 3:44:45 PM**

Accessed: Friday, September 16, 2016, 10:08:05 AM

Attributes:  Read-only  Hidden

Advanced...

OK

Cancel

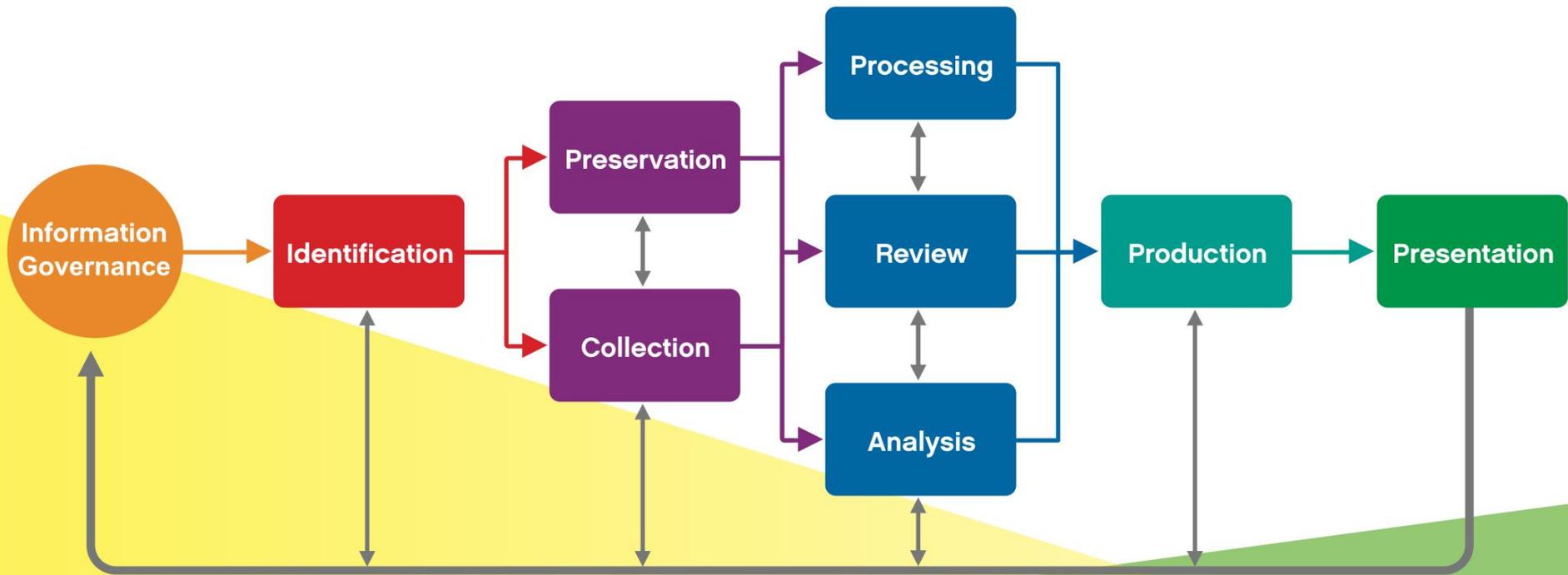
Apply

“A litigation cost differential may sometimes enable plaintiffs’ attorneys to engage in practices that resemble extortion.”

– Prof. John C. Coffee, Jr. (1987)

# The Columbo Approach (?)

# Electronic Discovery Reference Model



**VOLUME**

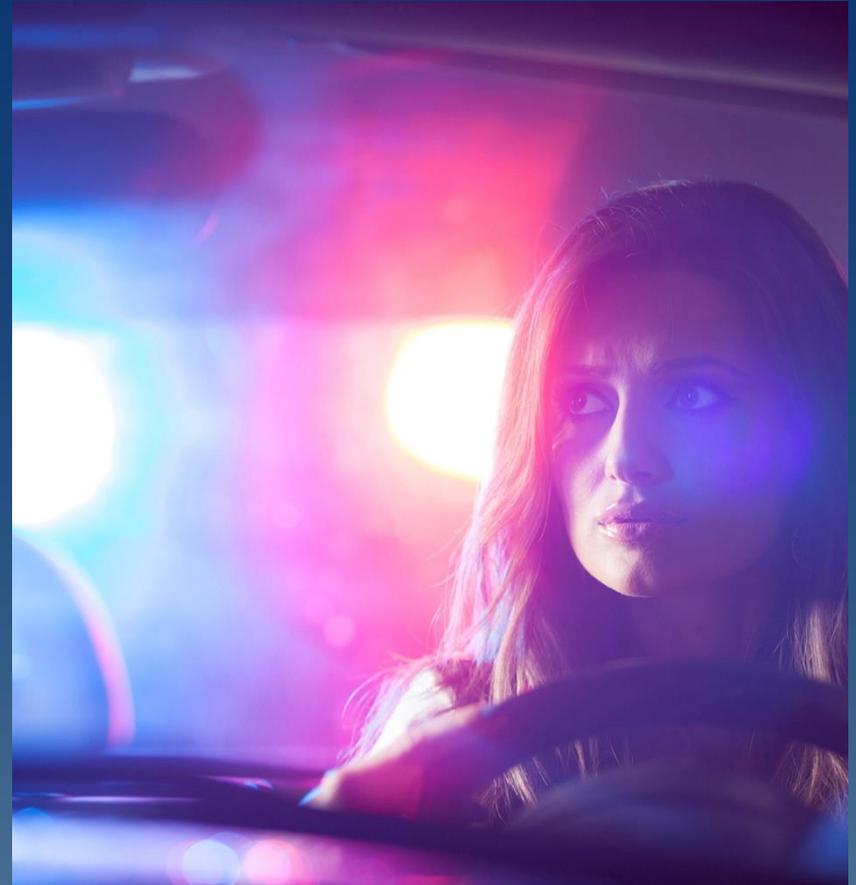
**RELEVANCE**

# E-Discovery Goal No. 1

Stay Out of Trouble



ESI Preservation  
Practices



## E-Discovery Goal No. 2



Control Costs



Minimize Document  
Review Efforts

Competence & Cooperation

Scope & Proportionality

ESI Preservation

Collections & Metadata

Search & Review

E-Discovery Vendors

Social Media

Information Governance



# ABA Model Rule 1.1 – Competence

A lawyer shall provide **competent representation** to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [8]. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

# State Bar of California

An attorney lacking the required competence for e-Discovery issues has three options:

- (1) acquire sufficient learning and skill before performance is required;
- (2) associate with or consult technical consultants or competent counsel; or
- (3) decline the client representation.

State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Op. No. 2015-193 (June 30, 2015)

# Cooperation – Amended Fed. R. Civ. P. 1

## *Scope and Purpose.*

These rules . . . should be construed, ~~and~~ administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

# Cooperation – Amended Fed. R. Civ. P. 1

## *Advisory Committee Note.*

Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.

# Cooperation

“Cooperative efforts between counsel regarding the production of ESI allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and generally get to the litigation’s merits at the earliest practicable time.”

*Bailey v. Brookdale Univ. Hosp.* (E.D.N.Y. 2017)  
See also The Sedona Conference Cooperation Proclamation

Competence & Cooperation

Scope & Proportionality

ESI Preservation

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## Scope of Discovery – Amended Rule 26(b)

~~Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.~~

. . . Information within this scope of discovery **need not be admissible** in evidence to be discoverable.

# Scope of Discovery – Amended Rule 26(b)

“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.”

# Scope of Discovery – Amended Rule 26(b)

“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:**

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Competence & Cooperation

Scope & Proportionality

**ESI Preservation**

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To: Michael C. Odom  
Date: 10/12/2001 10:53 a.m.  
From: Nancy A. Temple  
Subject: Document retention policy



Mike,

It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.

Nancy





# What Triggers a Duty to Preserve?

## Reasonable anticipation of litigation or investigation

### Possible triggers

- Catastrophic incident
- Specific demand to preserve
- Notice of litigation or investigation
- Receipt of cease and desist letter
- Supervisors discussing an instance of harassment
- Escalation of a dispute to legal department

### Fact-sensitive assessment

The duty may arise before claim letter or lawsuit!

# Legal Holds

Written internal notice from counsel

Discussion of relevant allegations

To document “custodians” and IT personnel

Instructions to preserve & cease routine deletion

Description of categories of docs to preserve

Scope → Possession, custody or control

# Spoliation Sanctions (not “spoliation”)

Destruction or loss of evidence

Balance culpability against relevance / prejudice

Potential sanctions

- Fees or Costs
- Additional Depositions
- Evidentiary Sanction
- Adverse Inference
- Dismissal or Default Judgment

“**Intent to deprive**” standard for Rule 37(e)

Case Law!

# *Zubulake v. UBS* (SDNY 2003-2005)

“Routine” employment discrimination case

Production of emails

- UBS: 120 emails
- Zubulake: 400+ emails

**Sanctions:** Adverse inference instruction & costs

\$29.3 Million Verdict!

- \$9.1 Million Compensatory
- \$20.2 Million Punitive

“A party cannot reasonably be trusted to receive the ‘litigation hold’ instruction once and to fully comply with it without the active supervision of counsel.”

-- Hon. Shira Scheindlin

# Preservation – Active Supervision!

Confirm issuance of a legal hold

Identify key players and ESI locations

Custodian & IT interviews

Confirm suspension of routine deletion

Monitor compliance with the legal hold

Amend & re-issue the hold when appropriate

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# *Apple v. Samsung* (N.D. Cal 2012)

## Patent Infringement Litigation

### Samsung's Dual Email Systems

- **mySingle**: 14-day auto-delete, manual steps to save
- **Outlook**: No routine deletion, use of auto-archiving

### Preservation Issues

- Routine Deletion not disabled on mySingle
- Late issuance of legal hold

# *Apple v. Samsung* (N.D. Cal 2012)

## Key Employees: **mySingle**

- R&D Senior Manager: 0 emails
- Head Galaxy S Designer: 0 emails
- Head of Sales & Marketing: 16 emails
- Head of Galaxy Design Group: 0 emails
- Senior Wireless Business Manager: 2 emails

## “Similarly Situated” Employees: **Outlook**

- Key Engineer: 7,594 emails
- Key R&D Employee: 6,005 emails

## *Apple v. Samsung* (N.D. Cal 2012)

“The court cannot ignore the statistical contrast.”

“Samsung ‘**consciously disregarded**’ its obligation to preserve relevant evidence.”

Adverse inference sanction (both parties!)

Competence & Cooperation

Scope & Proportionality

ESI Preservation

Collections & Metadata

Search & Review

E-Discovery Vendors

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# Collection Approaches

## Broad Collection by Forensic Expert

- Greater defensibility
- Collection of metadata

## Targeted “Self-Collection”

- Risk of having to re-collect
- Risk of preserving-in-place
- Risk of higher overall costs and spoliation claims
- Less defensibility and no metadata collection

# Collection Approaches

## Broad Collection by Forensic Expert

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# Production of Metadata – See FRCP 34(b)(2)(E)

**Principle 12:** The production of electronically stored information (ESI) should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the ESI and the proportional needs of the case.

**Comment 12.a:** Special characteristics of ESI (metadata and non-apparent / undisplayed data) may be pertinent to the form in which ESI should be preserved and produced.

The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production (2018)

# Common Metadata Fields for Production

- To
- From
- CC
- BCC
- Date Sent
- Time Sent
- Subject
- Date Received
- Time Received
- Attachments
- Custodian
- File Name
- Source Device
- **Source Path**
- Production Path
- Modified Date/Time
- Doc ID / Identifier
- Extracted Text
- Bates Beg / Attach Beg
- Bates End / Attach End

# Form of Production

## Native Format

- Word Processing, Spreadsheets, Databases
- Images & Audio Files
- **Metadata Retained** (if forensically collected)

## TIFF Files

- Static Images → Doc review platform required
- Load Files with **Limited Metadata**

## PDF Files

- Searchable text (potentially)
- Possibly more useable than TIFFs (?)
- Possible Load Files with **Limited Metadata**

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# Negotiate Scope → Reduce the Volume

Search Terms

Limits on Custodians

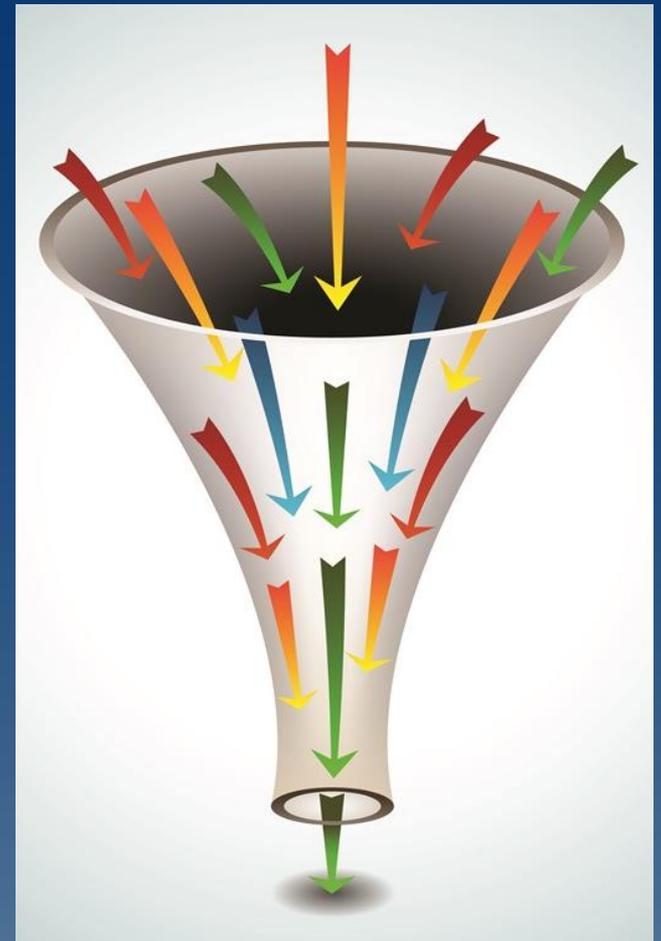
Date Range Culling

File-Type Culling

Sampling & Phased Discovery

Deduplication & Email Threading

Predictive Coding (“TAR” / “AI”)



# Predictive Coding / Technology Assisted Review

Manual review of a small percentage of docs

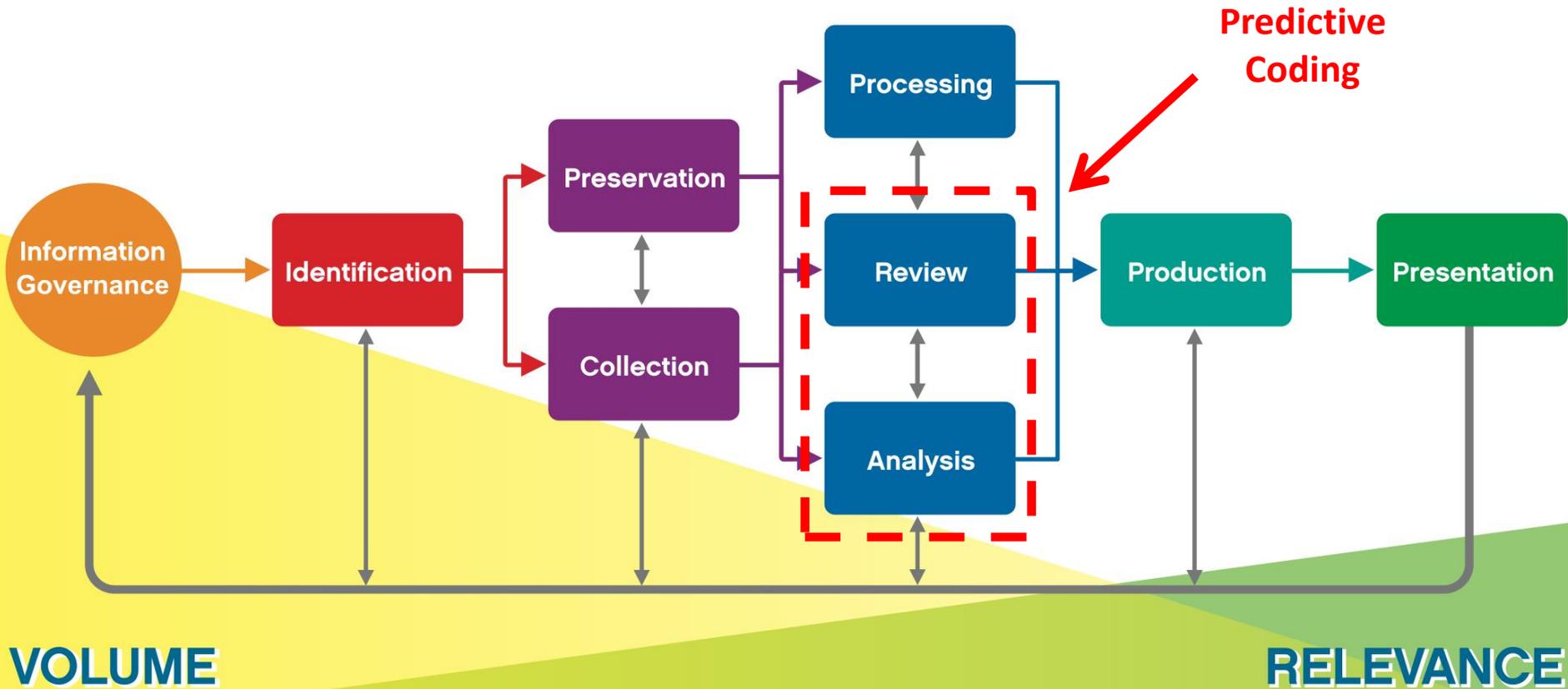
High level attorney reviewers, not contract attys

Possible use of a “seed set” of relevant docs

Algorithms used to predict responsiveness

Predictive coding **after** keyword filtering (?)

# Electronic Discovery Reference Model



# Doc Review Workflow – Traditional Approach

## Level 1

- ~50 documents per hour
- Review by law firm associates

## Level 2

- Re-review of “responsive” documents
- Focus on privilege and confidentiality

# Doc Review Workflow – Cost-Effective Approach

## Level 1

- ~50 documents per hour
- Review by ~~law firm associates~~ **contract attorneys**
- **Possible use of predictive coding / TAR**

## Level 2

- Re-review of “responsive” documents
- Focus on privilege and confidentiality

# Judicial Endorsement of TAR

## *Da Silva Moore v. Publicis Groupe* (S.D.N.Y. 2012)

“Computer-assisted review can now be considered **judicially approved** for use in appropriate cases.”

## *Rio Tinto v. Vale S.A.* (S.D.N.Y. 2015)

“[I]t is now **black letter law** that where the producing party wants to utilize TAR for document review, courts will permit it.”

## *Hyles v. New York City* (S.D.N.Y. 2016)

“[T]he Court believes that for most cases today, **TAR is the best and most efficient search tool**. . . . There may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR. We are not there yet.”

“Responding parties are best situated to evaluate the procedures, methodologies and techniques appropriate for preserving and producing their own electronically stored information.”

Principle 6 of The Sedona Principles  
for Electronic Document Production

## FRE 502 (b) – Clawback

Rule 502(b): Inadvertent Disclosure in a Federal Proceeding does not operate as a waiver of privilege or work product protection if:

- 1) The disclosure is inadvertent
- 2) Reasonable steps taken to prevent disclosure
- 3) Prompt & reasonable steps to rectify the error

Other Factors: Extent of disclosure & Fairness

## FRE 502 (d) – No Waiver

Rule 502(d): Controlling Effect of a Court Order.

A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

## FRE 502 (d) – Model Order

The production of privileged or work-product protected documents, electronically stored information (“ESI”) or information, **whether inadvertent or otherwise**, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).

Nothing contained herein is intended or shall serve to limit a party’s right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness, confidentiality and/or segregation of privileged and/or protected information before production.

Competence & Cooperation

Scope & Proportionality

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# Vendor Costs

ESI Collection	Hourly	\$15,000 (?)
Processing	Per GB	\$25,000 (?)
Data Analytics	Per Doc or GB	\$5,000 (?)
Review Hosting	Per GB	\$15,000 (?)
Review Staffing	Hourly	\$100,000 (?)
Project Mgt	Hourly	\$35,000 (?)
Production	Per Page or GB	\$5,000 (?)

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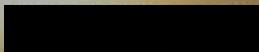
Social Media

Information Governance





# **Alleged Neck, Back, Clavicle, Shoulder and Hip Injuries**



Works at Gold's Gym International, Inc.  
Attended SUNY College at Cortland  
Lives in East Northport, NY 11731, United States

+ Follow

8 followers | 47,785 views



**[Redacted]** changed her profile photo.  
Shared publicly - Jun 16, 2014



**[Redacted]** Shared publicly - Jun 16, 2014

### What A Personal Trainer Can Do For You?

Do you need help losing weight? Are you confused with the process of building lean muscle? The changes I can make as your  
[Read more](#)

### What A Personal Trainer Can Do For You?

Do you need help losing weight? Are you confused with the process of building lean muscle? The changes I can make as your personal trainer can be measured not only by the

+1



Add a comment...

### In her circles

50 people



Men's Health

+ Follow



POPSUGAR Fitness

+ Follow



MarksDailyApple

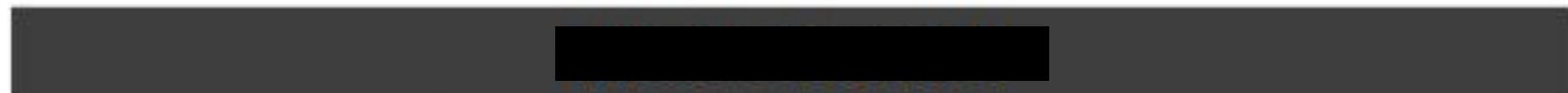
+ Follow

### Have her in circles

8 people



# BODYBUILDER PROFILES



Name [REDACTED]

## Participated in the following shows\*

Contest	Place	Pics?
2014 OCB Big East Natural	4th	
2014 OCB Big East Natural	4th	
2014 OCB Big East Natural	6th	
2013 NPC Eastern USA	7th	
2013 NPC Eastern USA	7th	

# **Alleged Left Shoulder Injury**



# **Alleged Neck & Back Injury**







QFWF&K

Queller, Fisher, Washor, Fuchs & Kool, LLP

Sep 16, 2016

# 14 Social Media Do's and Don'ts: A Guide for Personal Injury Plaintiffs

**Suspend your Facebook and Twitter accounts** – Although this is the easiest way to help prevent information from being used against you, some may not feel comfortable getting rid of it completely.

Sep 16, 2016

# 14 Social Media Do's and Don'ts: A Guide for Personal Injury Plaintiffs

**-check your preferences** – Facebook's default privacy settings allow people who live in your area or network to see your information, even if you're not friends. Change this right away.



QFWF&K

Queller, Fisher, Washor, Fuchs & Kool, LLP

Sep 16, 2016

# 14 Social Media Do's and Don'ts: A Guide for Personal Injury Plaintiffs

**Monitor photos** – Keep a close eye on photos that you post or are tagged in. If you feel any of these could incriminate you, untag yourself or ask the person who posted it to delete it right away.

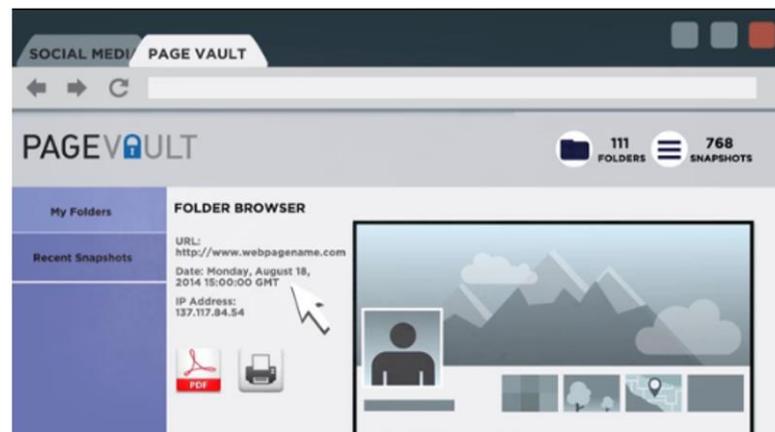
# X1 Social Discovery™

Social Media and Internet-Based Data Collection



X1 Social Discovery™ is the industry-leading solution for law enforcement, law firms or legal consultants who need to collect and search data from social networks and the internet.

# PAGEVAULT



Our intuitive software automates in-house captures of social media and webpages for law firms.

## CONSOLIDATED SEARCHING AND COLLECTION ACROSS MULTIPLE FACEBOOK AND OTHER SOCIAL MEDIA ACCOUNTS.

Manage Collections Search Facebook - Accounts Clear All Save Tags Metadata Export Record Map It Print

All Social Media All Indexed Items

Facebook

- All Facebook
- Public Information
- WE Discovery Examiner Account
  - Accounts
    - Scott Felixson (1000067500107...)
      - User Info
      - Posts
      - Album Items
    - Scott Felixson (1268708888)
      - User Info
      - Posts
      - Album Items
    - HeliumHead-movie Scott Felixson
      - User Info
      - Posts
      - Album Items
  - Pages
    - Felixson Law Office: Take ME...

Scott Felixson NY

1/2/2014

Virginie Papadatos cool pic 1/3/2014 11:55 AM

Scott Felixson

The Henry Street Alehouse in Brooklyn Heights. Look at the beer they have on their menu: Bombardier. I ordered the pumpkin ale because it's "superior". Bartender gave me a sample. An English bitter. Pretty f'n delicious I gotta admit. But the same aftereffects: now my shoulder hurts.

1/2/2014

Scott Felixson NY NY NY!

Home Profile From: Scott Felixson Link

Scott Felixson

The Henry Street Alehouse in Brooklyn Heights. Look at the beer they have on their menu: Bombardier. I ordered the pumpkin ale because it's "superior". Bartender gave me a sample. An English bitter. Pretty f'n delicious I gotta admit. But the same aftereffects: now my shoulder hurts.

Comments

IRON TAP  
SUNNIDER NY  
OLD SPECKLED HEN  
SLY FOX PALE ALE  
FULLERS ESB  
DOCSIDER  
KEENTHET HARBOUR  
ED TAIL ALE  
TERHOUSE  
TER STOUT  
LEAF PILE PUMPKIN  
BOMBARDIER  
BELHAVEN  
HUMBOLDT  
GROWN  
SCHONRAMER  
BALLAST PT IPA

998 items indexed 17 of 455 Active Case collection is on

Everything

All Social Media

All Indexed Items

Twitter

All Twitter

Public Information

Twitter.com

@WEDiscovery Examiner Account

Location Stream



Anonymous Followees

@FelixsonLaw

Following

Followers

Facebook

All Facebook

Public Information

WE Discovery Examiner Account

Accounts

Scott Felixson (1000067500107...

User Info

Posts

Twitter and Facebook

Sour...	Da...	Name	Body	Location Geo	MD5 hash
Facebook	5/28/2013	Scott Felixson	Small quaint town on the wa...	39.741592438399, -105.5187289...	5DB9BABDED018F9E67014A23B69A08A4
Facebook	5/30/2013	Scott Felixson		39.7392, -104.984	A1A74B804E0E5509D0E3BD2BC67D3E20
Facebook	5/30/2013	Scott Felixson		39.7392, -104.984	1B48CD06EA746862442976D3538CE525
Facebook	5/30/2013	Scott Felixson		39.7392, -104.984	9DD7384F753581CFE6D6B7F692B6030A
Facebook	5/30/2013	Scott Felixson		39.7392, -104.984	2F2611D42D73180E8200FBB919987096
Facebook	5/30/2013	Scott Felixson		39.7392, -104.984	05EEAD7D4F4CD4B00436A2899501AD4B
Facebook	5/30/2013	Scott Felixson		39.7392, -104.984	FB2D6BFA121D44404ADB868F8AF3814E
Facebook	5/30/2013	Scott Felixson	They had me at "a lot of assis...	39.7392, -104.984	EE6FDD326B97BF13CFB0549A636C8946
Facebook	5/27/2013	Scott Felixson	My mother — at Washington...	39.7090399698, -104.971359951	C2C8737B03C7FE07AFA2C91DF6D4914E
Facebook	5/28/2013	Scott Felixson	At Washington Park, Denver,...	39.7, -104.97055555556	86F53B95D59FA8E672869E7E5172CA70
Facebook	5/27/2013	Scott Felixson	My cousin's wedding — at W...	39.7, -104.97055555556	E48A6A1B0565907F4FD65C22C5C5183F
Facebook	5/28/2013	Scott Felixson	At Washington Park, Denver,...	39.7, -104.97055555556	F0FA36CC81CEF0192EA3E703CB79BE0D
Facebook	5/28/2013	Scott Felixson	My mother with my cousin b...	39.7, -104.97055555556	5CD2C9691BAE7ABA205945CAE07CA99A
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	69FD6385A4884E62EF1C4A94E991341F
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	11722F762F27CF491CE8F3A4421D89AF
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	953E0FF0E4175EC53503F2895AC8B4E3
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	DBDB1683C0E1191431A9B2250F937091
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	EDB1D47DF9FD31DF661E7B213FCBA21A
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	A290D0FC63E9E3490C7AA746EE636302
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	0851950E987A4CD2312E13932390416C
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	EF32E258ADF087BFA46A7F9D214933A
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	EC6169E6DD583D29EDBF9651C20F504F
Facebook	5/29/2013	Scott Felixson	Before... — at Pine Junction,...	39.4711257418, -105.396954995	AB00CF1D29EEA67F6FA4ACDE2C64142C

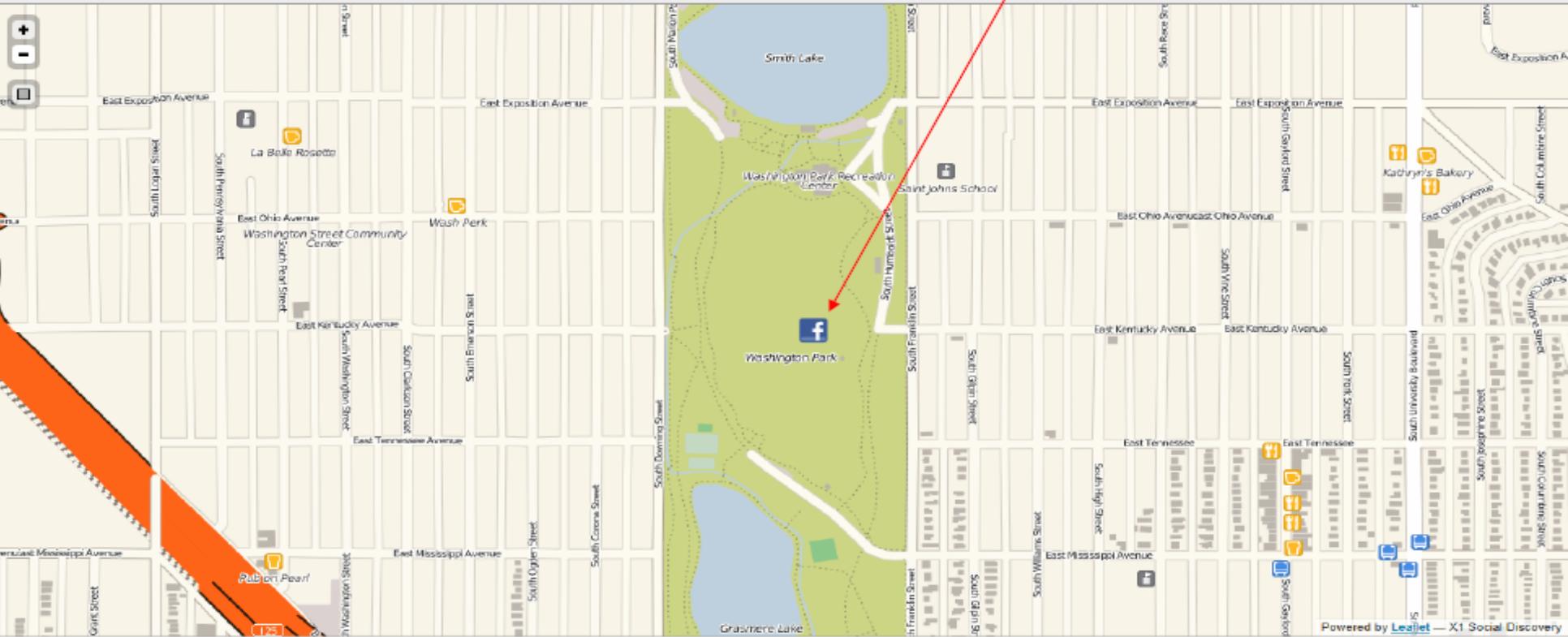


**ON VACATION IN COLORADO IN MAY 2013. IS THIS CONSISTENT WITH PLAINTIFF'S ALLEGATIONS???**

### Location-Based Search

Choose the rectangle select tool to refine your search by geographical location.

Snapshot Clear



Map It

Done

**INDICATION THAT PREVIOUSLY COLLECTED POSTS  
WERE SUBSEQUENTLY DELETED BY PLAINTIFF.**

The screenshot shows a web-based interface for viewing a Facebook album. At the top, there is a search bar with the text "Search Facebook - Album Items" and buttons for "Clear All" and "Save". Below the search bar, there are navigation options: "Manage Collections", "All Social Media", and "All Indexed Items".

The main content area displays a Facebook album for "HeliumHead-movie Scott Felixson". The album cover features a group of people in a field. Below the cover, there are several comments from users: Brandy Brennan, Liz Grammet, and Scott Felixson. Each comment has a red circle around the date "4/8/2013".

On the right side of the album, there is a sidebar with a list of comments. The bottom-most comment in this list is partially visible and reads: "Last time when these items were scanned Facebook". A red arrow points from the text above to this comment.

At the bottom of the interface, there is a status bar showing "998 items indexed", "1 of 4", and "Active Case collection is on".

**HERE'S THE PLAINTIFF MARKETING HIS LEGAL PRACTICE.**

Manage Collections Search Facebook -... Clear All Save Tags Metadata Export Record Map It

All Social Media All Indexed Items

Facebook

- All Facebook
- Public Information
- WE Discovery Examiner Account
- Accounts
  - Scott Felixson (100006750010763)
    - User Info
    - Posts
    - Album Items
  - Scott Felixson (1268708888)
    - User Info
    - Posts
    - Album Items
  - HeliumHead-movie Scott Felixson (100006753272655)
    - User Info
    - Posts
    - Album Items
- Pages
  - Felixson Law Office: Take ME to Court - Legal Services (387840321229398)
    - Posts

Felixson Law Office: Take ME to Court - Legal Service

6/19/2012 12:59 AM

Felixson Law Office: Take ME to Court - Legal Service

2/24/2012 9:08 PM

Felixson Law Office: Take ME to Court - Legal Service

Profile Pictures  
Album (3 photos)

2/24/2012 9:08 PM

Home Profile From: Felixson Law Office: Take ME to Court - Legal Service



Competence & Cooperation

Scope & Proportionality

ESI Preservation

Collections & Metadata

Search & Review

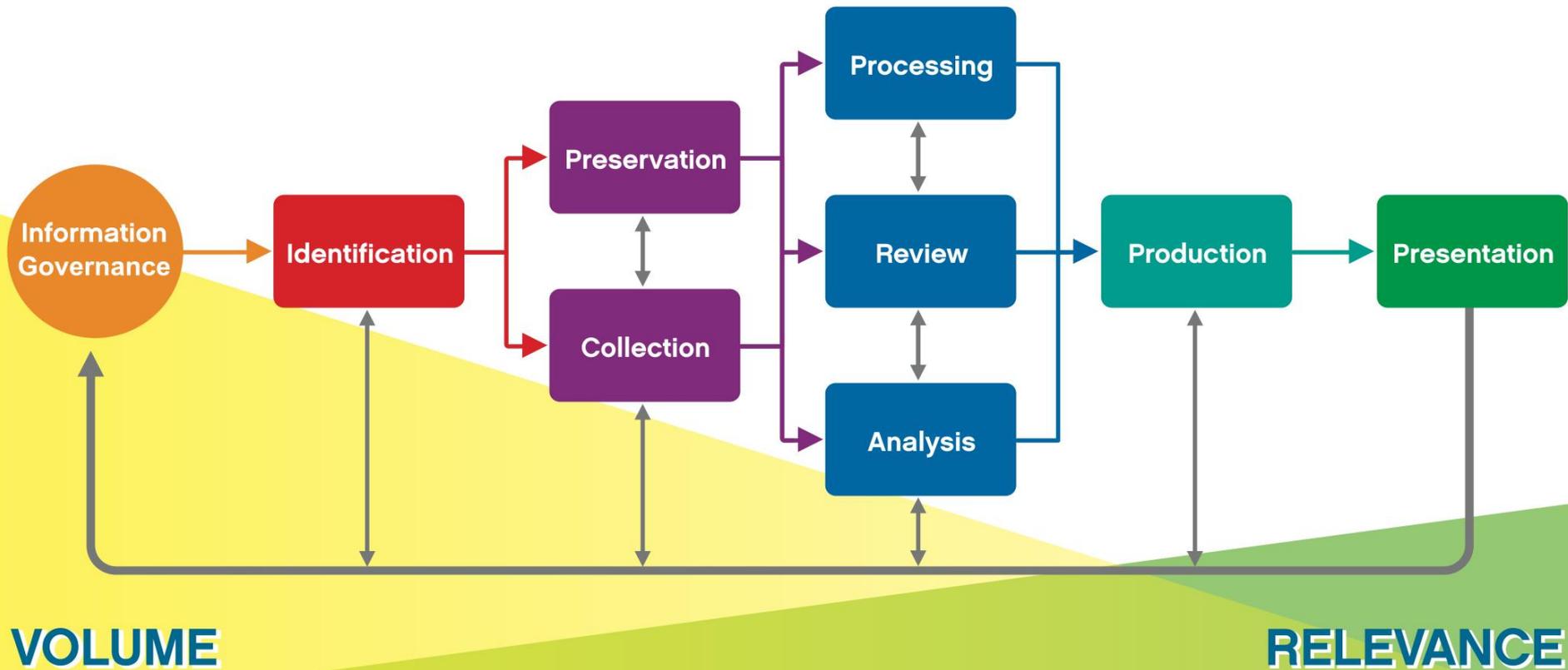
E-Discovery Vendors

Social Media

Information Governance



# Electronic Discovery Reference Model



# INFORMATION GOVERNANCE

PROACTIVE

Records Retention &  
Litigation Readiness

Information Security

Permissible Use &  
BYOD / COPE Policies

Social Media Policies

Copyright / IP Concerns

Privacy Laws

Business Considerations

E-Discovery

Breach Response

Regulatory  
Investigations

REACTIVE

# Data Minimization

# Three Reasons to Retain Documents

1. Regulatory / Statutory Requirements
2. Legal Hold Obligations
3. Business Needs

# Data Minimization

## Reduction of Risks

- E-Discovery
- Cyber Security
- GDPR / CCPA / Other Data Privacy Laws

## Policies vs. Practices

TYPE OF RECORD	RETENTION PERIOD
Loss of Classified Material Report	5 Years
Manlifts (as required by OSHA 1910.68)	5 Years
Mechanical Power Presses (as defined By OSHA 1910.95)	5 Years
Occupational Safety & Health Administration Form 101	5 Years
Occupational Safety & Health Administration Log #200	5 Years
Powered Platforms Inspection and Maintenance (as required by OSHA 1910.66)	5 Years
Receipts for Classified Material -- Top Secret or Special Access	5 Years
Receipts for Classified Material -- Secret	5 Years
Release Approval Request	5 Years
Reproduction Reports -- Secret	5 Years
Reproduction Reports -- Top Secret or Special Access	5 Years
Respirator Inspections (as required by OSHA 1910.134)	5 Years
Restriction of Hazardous Substances (RoHS)	Indefinite (Review Every 5 Years)
Safety Incident Reports	5 Years
Safety Inspections/Meetings	5 Years
Safety Training, Audits & Committee Minutes and Records	5 Years
Security Awareness Bulletin	5 Years
Security Infraction Reports	5 Years
Subcontractor Facility Inspections	5 Years
Visitor Registers	5 Years
Waste Electrical and Electronic Equipment Directive (WEEED)	Indefinite (Review Every 5 Years)
Welding Equipment and Maintenance (as required by OSHA 1910.252)	5 Years
Blood Borne Pathogen Medical Records	30 Years
Clearance Terminations -- Non-disclosure Agreement (Standard Form 312)	50 Years
Crane & Equipment Inspections (as Required by OSHA 1910.180 and 1910.184)	Current + Previous Inspection
Forging Machines (as required by OSHA 1910.218)	Current + Previous Inspection
Inventory for all Class I Liquid Storage (as defined by OSHA 1910.106)	Current + Previous Inspection
Employee Identification Badges	Duration of Employment
Occupational Noise Exposure -- Audiometric Hearing Exam Information (as defined by OSHA 1910.95)	Duration of Employment + 5 Years
Employee Medical, Exposure, and Monitoring (as defined by OSHA 1910.1020) -- Medical	Duration of Employment + 30 Years
Worker Compensation	Indefinite (Review Every 10 Years)

## Area: Human Resources

Record Type	Retention	Authority	Trigger
<b>Affirmative Action Files</b> <i>Includes job descriptions and work force analysis.</i>	2 Years	29 CFR 1620.32	Closed
<b>Benefit Folder</b> Official documentation for employees' enrollment in medical, insurance and 401K plans. Includes beneficiary cards, designation records, outplacement benefit notices, statements of health benefits, contributions, cobra records.	6 Years	29 USC 1027	Closed
<b>Disability Records</b> <i>Includes short-term and long-term disability.</i>	6 Years	29 USC 1027	Date of Claim
<b>Drug Screening Records</b> <i>Includes testing results and reporting.</i>	3 Years	29 CFR 1627.3	Terminated
<b>EEO Compliance Records</b> <i>EEO-1, EEP-2 and annual affirmative action reports.</i>	10 Years	Legal Consideration	Calendar Year
<b>Medical Files</b> <i>Includes medical records, doctor notes, authorization for treatment.</i>	5 Years	29 CFR 1904	Terminated

# Achieving Policy Compliance

# People – Process – Technology – Controls



Change the Culture

# People – Process – Technology – Controls

## Area: Human Resources

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EASY TO UNDERSTAND.  
ENABLES ENFORCEMENT.

BEST PRACTICE RETENTION.  
NO GUESSWORK

INDUSTRY STANDARDS  
PROVIDE DEFENSIBILITY.

CLEAR DIRECTIONS  
ENABLE COMPLIANCE.

Focus on Business Needs

People – Process – Technology – Controls



Avoid “Rules Without Tools”

# People – Process – Technology – Controls



## Human Resources

RECORDS

NON-RECORDS

### Record Libraries

	Affirmative Action Files	
	Benefit Folders	
	Benefit / Pension Plans	← 6 Years
	Disability Records	
	Drug Screening Records	← 3 Years
	EEO Compliance Records	
	Medical Files	

180 Days

### Personal Libraries

	Charlie Smith
	John Creceles
	Kevin Doyle
	Mark Provo
	Mike Winkler
	Ross Cotton
	Tyler Green

Avoid “Rules Without Tools”

People – Process – Technology – Controls



Employee Training & Compliance Monitoring

# Final Thoughts

# Discovery Counsel

## Significant One-Off Cases: Consider Discovery Counsel

- Permits lead attorney to focus on merits
- Discovery counsel handles defensibility & cost control
- Properly defined roles to avoid duplication of efforts

## Related Cases: Consider National Discovery Counsel

- Reduces case-by-case duplication of efforts
- Obvious economies of scale benefits
- Maintenance of single database
- Reuse of relevancy & privilege coding across files



# **E-Discovery & InfoGov Essentials**

Ethical Obligations, Defensibility & Cost Control