

# Mastering Electronic Discovery

Practice Tips and Traps for the Unwary

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**Huron**Legal

# We Want to Make This Fun, But.....

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*"I need someone well versed in the art of torture—do you know Powerpoint?"*

# The Panel

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- Hon. Susan Burke – Hennepin County District Court Judge
- Brett Tarr, Esq. – Counsel, Litigation & E-Discovery – Caesars Entertainment Corporation
- Jonathan Fountain, Esq. – Of Counsel – Lewis Roca Rothgerber LLP
- Chris Marzetti, Esq. – Senior Director - Huron Legal
- Michael Pontrelli, Esq. – Managing Director – Huron Legal

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# Electronic Discovery

## What You Don't Know Can Hurt You

# Electronic Discovery – What You Don't Know Can Hurt You

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- "New" Federal Rules in effect since December 2006 (and more amendments under consideration)
- Varying state rules (E-Discovery Resource Database)
- Courts have become more knowledgeable about e-discovery (Federal Judicial Center)
- The "Cooperation Proclamation" issued by the Sedona Conference in 2008 has hundreds of judicial endorsements

# Electronic Discovery – What You Don't Know Can Hurt You

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- Courts are no longer tolerating lack of proficiency in preservation and e-discovery
  - *William A. Gross Constr. Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009)
  - "This opinion should serve as a wake up call to the Bar in this District about the need for careful thought, quality control, testing & cooperation with opposing counsel in designing search terms to produce emails or other ESI."
- *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. 2008)
  - \$9.26 million sanctions
  - Patents held unenforceable
  - Attorneys referred for disciplinary proceedings

# Electronic Discovery – What You Don't Know Can Hurt You

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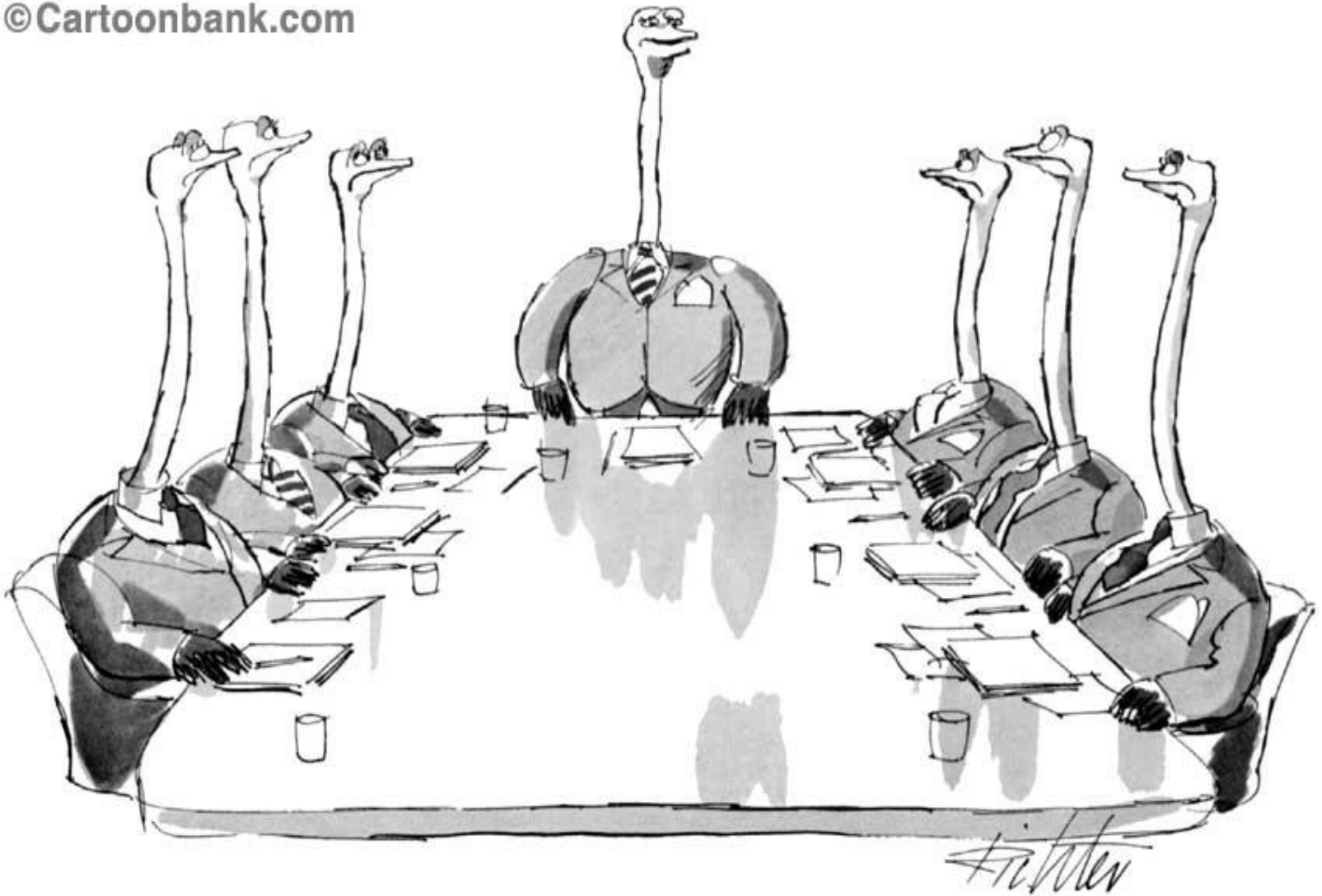
- *Swofford v. Eslinger, et al.*, 671 F. Supp. 2d 1274 (M.D. Fla. 2009)
  - Failure to issue legal hold; failure to preserve
  - General Counsel of Defendant Sherriff's Office held personally liable for monetary sanctions
- *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Amer. Secs. LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010)
  - Plaintiffs have a duty to preserve
  - Sanctions imposed included adverse inference instruction, monetary fines, and backup tape searches
- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, (D. Md. 2008)
  - Waiver of attorney-client privilege as to 165 documents

# Electronic Discovery – What You Don't Know Can Hurt You

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- *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 259 F.R.D. 568 (M.D. Fla. 2009)
  - Failure to object to specified form of production = waiver
  - Failure to produce in specified format
  - Sanctions against B&G and counsel
- *In re A&M Florida Properties II LLC*, 2010 WL1418861 (S.D.N.Y. April 7, 2010)
  - Counsel "failed in his obligation to locate and produce all relevant documents in a timely manner."
  - Monetary sanctions against party and counsel





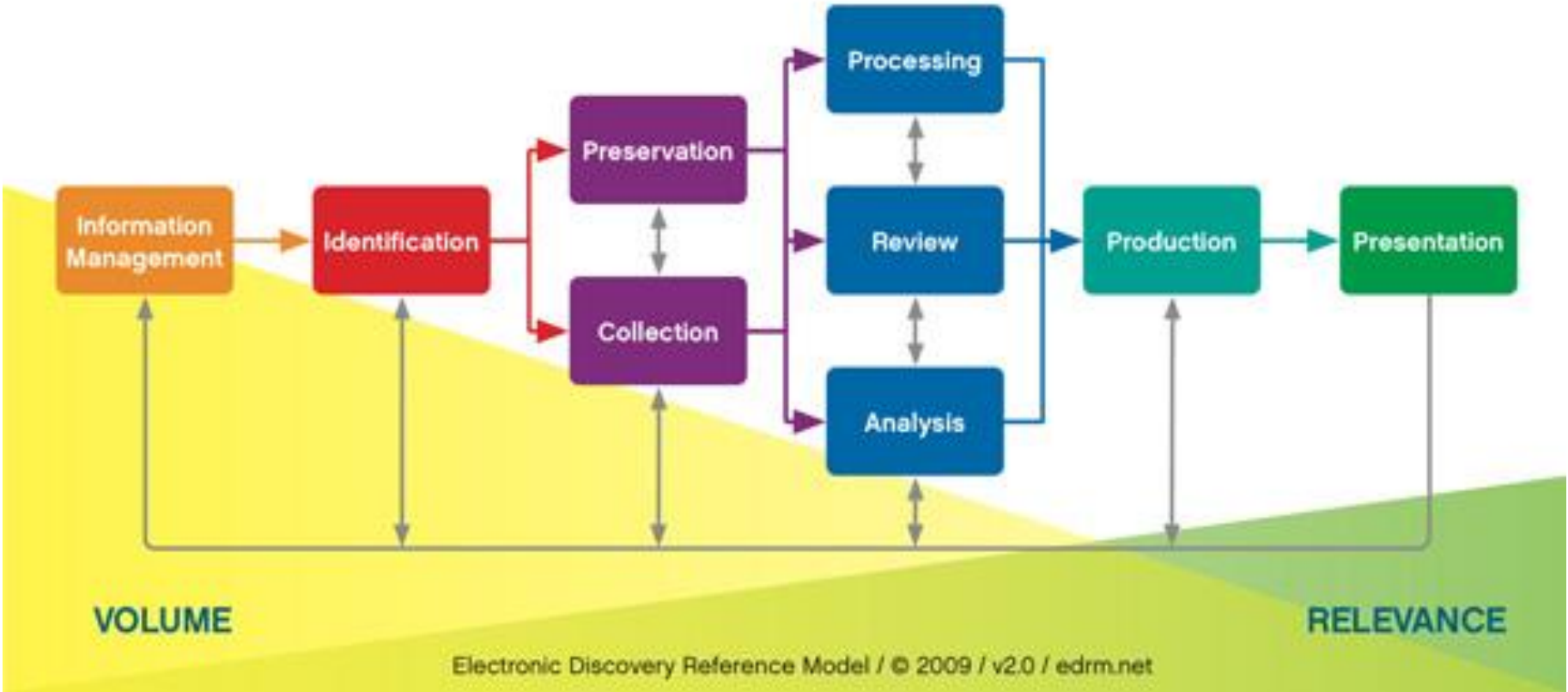
**“The Motion has been made and seconded that we stick our heads in the sand.”**

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# eDiscovery Process

# eDiscovery Process – In Pictures

## Electronic Discovery Reference Model



# eDiscovery Process – In Words

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- **Information Management**
  - Create and retain ESI according to an enforceable electronic records retention policy
- **Identification**
  - Locate potential sources of Electronically Stored Information (ESI), identify relevant data, and paper that did not originate in electronic format
- **Preservation**
  - Protecting ESI from being altered or destroyed
- **Collection**
  - Gathering ESI for use in the e-discovery process
- **Processing**
  - Process and filter results reducing the volume of ESI by dates, file types, & eliminating duplicates
  - The less data that moves to the next stage in the e-discovery process the lower the costs

# eDiscovery Process – In Words

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- **Review**
  - Identifying which ESI is relevant or privileged (i.e. attorney client, work product, personal info)
  - Review process filters out irrelevant, duplicate, or privileged info
- **Analysis**
  - Evaluating ESI for strategy & trial planning at multiple stages of the process
- **Production**
  - Delivering relevant, non-privileged ESI to your opponent for them to review and use
- **Presentation**
  - Displaying ESI at depositions, hearings, trials, etc.

# Types of Electronically Stored Information

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## Electronically Stored Information (ESI)

- Structured Data
- Email (Google, Outlook, Lotus Notes)
- Word Documents
- Spreadsheets (Excel, Google Docs)
- Cell Phones and Tablets
- Audio, Video and Voicemail (VoIP)
- USB drives, hard drives, voice recorders
- Social Media Sites
- Cloud based storage
- Call Centers
- Social Media Sites
- Paper

# eDiscovery Process – Basic Terminology

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- Computer Forensics
- Targeted Collection
- Database
- Search
- Metadata
- ECA (Early Case Assessment)
- EDA (Early Data Assessment)
- Native
- Near Native
- Image
- Review Application
- Predictive Coding
- CAR/TAR Computer/Technology Assisted Review
- Analytics

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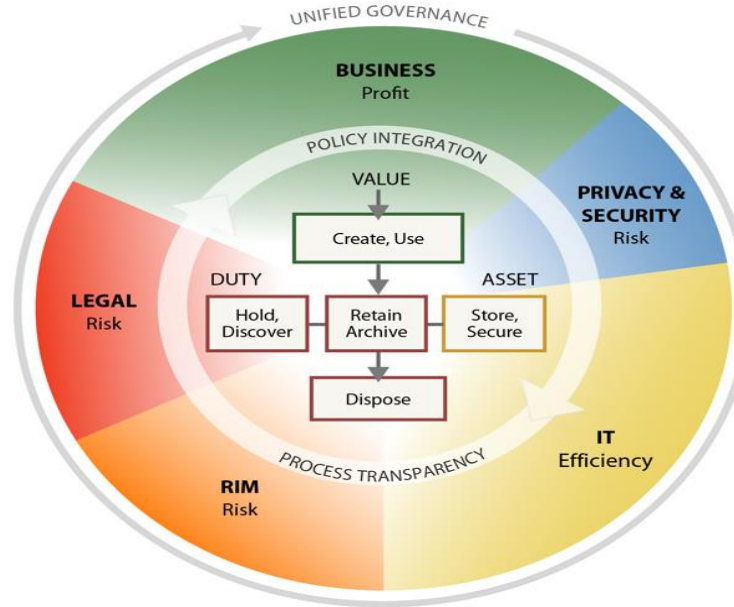
# Information Governance



# Information Governance – The Big Picture

## Information Governance Reference Model (IGRM)

Linking duty + value to information asset = efficient, effective management



**Duty:** Legal obligation for specific information

**Value:** Utility or business purpose of specific information

**Asset:** Specific container of information

Information Governance Reference Model / © 2012 / v3.0 / edrm.net

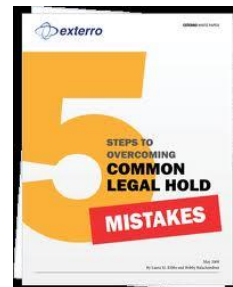
# The Importance of Preservation

## Why Does Preservation Matter?

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**KEY** issue in discovery process, ensuring that potentially relevant data is collected in a way to ensure no modification, selective deletion, or 'mass shredding' of ESI or paper-based information related to matter in controversy

- Spoliation is the legal term for evidence that has been altered, destroyed, or otherwise compromised
- Court finding of spoliation can generate 6-figure monetary sanctions
- *Apple/Samsung sanctioned combined >\$1M for preservation failures*



# eDiscovery Process - Legal Holds

- How Do Parties Preserve Evidence?
  - A Legal Hold is the term for when a company identifies potential evidence and warns employees not to alter, delete, or destroy any data in case it needs to be used in court as potential evidence
- Issuing a Legal Hold Notice
  - The legal team and IT teams within the organization work together to identify any people or departments that may POSSIBLY be linked to a particular lawsuit
  - Legal team will send out an email called a LEGAL HOLD NOTICE to everyone identified above and ask those people to stop deleting or erasing any old information/emails related to the case

Active Legal Holds	
Legal Hold Name	Matter Name
Hold on SEC Investigation	SEC Investigation
Insider Trading-Germany	Chicago unit employees bonus ...
Claims of property contamination legal hold	1100 West, LLC v. Red Spot Paint...
Labor dispute hold notice	Jorels vs Soft Tech
Legal hold on civil rights violations	FDA Matter



# eDiscovery Process - Legal Holds

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- Act quickly
- Issue comprehensive written hold notice
- Require acknowledgement by recipient
- Follow up with interviews of key players
- Issue periodic reminders
- Document, document, document

# eDiscovery Process - Legal Holds

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## **Preservation of nonemployee data**

- Terminated employee data
  - Identify at outset of hold and preserve
  - System/procedure to monitor/preserve going forward
- Third parties/Outside Directors
  - Issue Legal Hold Notice or preservation request
  - Do not rely on self-collection by directors

## **Client/custodian self-collection**

- alteration/loss of metadata
- can be difficult to document or defend

# Consequences of Failed Legal Hold

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- Spoliation Sanctions
  - If evidence that the opposing party requested has been accidentally deleted or someone failed to follow a legal hold notice, the company can be fined by the court
  - Spoliation sanctions have exceeded \$5 Million in some cases
- Adverse Inference
  - If a company/person fails to produce evidence that the opposing party has requested because of accidental deletion or failure to follow legal hold notice, the court can instruct the jury to PRESUME that the company intentionally deleted the requested information because it proved the opposing party's claim
  - Even if this is not true, the jury is entitled to act as if it were because the evidence is unavailable due to failure to execute legal hold
- Dismissal of Claim
  - In extreme cases, failure to preserve key evidence can lead to a court completely dismissing a lawsuit
- Summary Judgment
  - The opposite is also true, where failure to preserve key evidence can lead the court to rule for the plaintiff without a full trial

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# Data Collection

# Collection Plan

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- **How Done**

- Files vs. disc images; active vs. forensic collection
- Local vs. remote vs. network collections
- Preserving metadata (e.g., file date vs. last modified)
- Devices (laptops, phones, flash drives, etc.); cloud accounts; social media (e.g., Google, Dropbox, Facebook, LinkedIn)
- Need for case-specific data mapping: by custodian & data source, to handle completely and cost efficiently



# How To Collect the Data

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- **Who Collects**

- Custodian Self Collection
  - Not favored and increasingly difficult to justify
  - ‘Fox guarding the hen house’; competence issues
- Internal IT
  - Removal from actual custodian; increased competence
  - May not have much real experience in eDiscovery
  - Question if have sufficient time and if can meet deadlines
- Service Provider
  - More experience
  - Generally more expensive

# Problems With Data Collection

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- **Potential Problems**

- Failure to ID key custodians & map ESI early
- Lack of good collection methodology (e.g., forwarding evidentiary emails, drives collected without documentation of who, what collected)
- Under-collection
- Over-collection
- Custodian self-collection

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# Forms of Production

# Get a Handle on Forms of Production

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Form of Production - follow the rules

- Specify the form of production in your request
- Produce ESI in "reasonably usable" form - depends on agreements, data, particular case, circumstances of the parties
- Always specify in the response the form in which you will produce ESI

# Get a Handle on Forms of Production

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- Rules Requirements
  - FRCP 34(b)--ESI must be provided in a form in which it is ordinarily maintained or a form that is reasonably usable. If the requesting party specifies a different form, the producing party can object and propose its own form.
  - TRCP 196.4--requesting party must specify form and responding party may object
- Considerations
  - Main forms used are native (near-native), PDF, TIFF
  - ESI usually must be processed; metadata extracted
  - Exceptions and use of placeholder files
  - Use of "Blended Productions" (TIFF or PDF and native)

# Get a Handle on Forms of Production

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- Native Files
  - What is it
    - Saved as designated by the original application used to create it (e.g. a DOC or DOCX file created by Microsoft Word)
  - Advantages
    - Most accurate approximation of what custodian saw and used
    - Minimal size expansion
    - All metadata available
  - Disadvantages
    - Need applications for all file types
    - Can increase attorney review time if no paginated equivalents
    - Processing still needed
    - No redaction capability
  - Notes
    - Often must produce in addition to other formats
    - Increased privilege and confidentiality issues

# Get a Handle on Forms of Production

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- Load File
  - What is it
    - Structured text or database files that reference documents files, pages, metadata or other info
  - What can be included
    - File and email metadata
    - Document breaks (for TIFF productions)
    - Mail family associations (attachments)
  - Common formats
    - DAT (Concordance and many other systems)
    - DII (Summation)
    - LFP (iPro)
    - XLSX (Lexbe proprietary format)
  - Notes
    - Parties usually negotiate load file formats.

# Get a Handle on Forms of Production

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- PDF
  - What is it
    - Natives converted to PDF from native or scanned and OCR'd
  - Advantages
    - Familiar and easy to use; Does not require review platform
    - Retains color; Minimal file size expansion
  - Disadvantages
    - Some review platforms may not support well
    - A complex format which can present corruption issues
    - Careful with redactions in Adobe
  - Notes
    - Different types of PDFs (Image-only, Text-based, Text-under, PDF portfolio)
    - Extracted metadata and load file still best practice



# Privilege Logs

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- Jurisdictional requirements?
- Be careful with email chains
- General Categorization versus Specificity versus Hybrid
- ***Other Points, e.g. expert witness communications / work product?***

# Common Additional Pitfalls

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- Data Privacy Laws
  - More and more clients with overseas data
  - Pre-collection analysis required
  - Potential criminal sanctions
  - Safe Harbor may be in question
- Underestimating time requirements; failure to QC
  - production errors
  - redaction issues
  - privilege waiver
- Social Media
- Not calling an expert when you need help

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# Costs

# Understanding eDiscovery Costs

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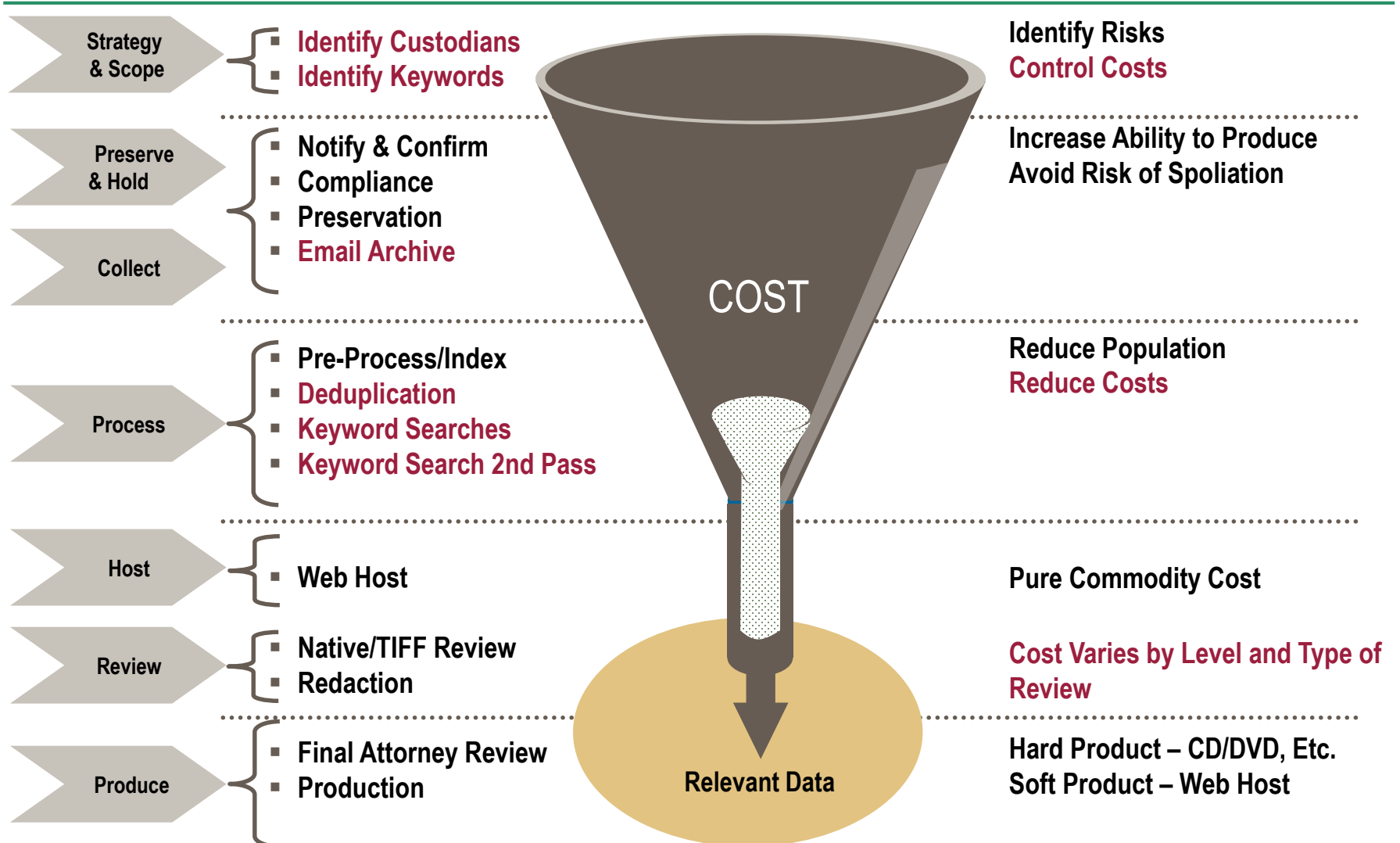
## □ Key Cost Components

- **Collection costs** – 8% of total discovery costs
- **Processing costs** – 19% of total discovery costs
- **Document review** – 73% of total discovery costs

## □ Impact of Cost Components

- To achieve significant cost reductions, focus on document review segment of process
- Legal departments are taking more control over the review process, with more of the “first pass” review function being outsourced to document review vendors, with outside counsel providing second level review oversight function.

# Understanding eDiscovery Costs



# Understanding eDiscovery Costs

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## □ Impact of Cost Components

- Technology is the key, but standing alone, it is not a silver bullet
  - Early Case Assessment
  - Email Thread Consolidation
  - Predictive Coding
  - Concept Clustering & Searching
  - Outside Vendor Review Technology: Providing Counsel Daily Detailed
  - Review Strategy –sampling v linear review; privilege strategy

# 3 Key Points To Successfully Managing Litigation Costs

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- ❑ Developing a coordinated solution to the electronic discovery process:
  - Workflows and processes are the key to success
  
- ❑ Team development and strategic planning. The team should be made up of:
  - Policyholder's internal resources
  - IT, legal team, data security, records management
  - Electronic Discovery and Document Review vendor(s)
  
- ❑ Cross functional team works together to develop an overarching plan for each case:
  - Preparation for 26(f) conference and meet and confer sessions
  - Sources of data, preservation, and collection planning
  - Processing the data – reducing data to smallest responsive subset
  - Developing the search terms – unilateral vs. collaboration with opposing counsel
  - Choice of technology for review – linear review vs. TAR/Predictive Coding

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# Challenges



# eDiscovery Challenges

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- **Data Security Issues**

- Includes ePHI, PII, PCI data, maintaining privilege
- Policies around security, HIPAA compliance
- Is the law firm compliant? Are vendors being **PROPERLY** vetted for security?

- **Failure to understand data architecture and locate sources of ESI**

- Results in delays and increased expenses
- **LONG TERM CASE STRATEGY – PRESENTATION, PRODUCTION**
- Turn around and throughput

- **Sanctions Cost All of Us Money**

- Judges no longer have patience for companies that say they have too much data to properly preserve for every legal case
- Courts have issued spoliation sanctions against large companies ranging up to several million dollars

# eDiscovery Challenges

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- **Adverse Inference/Summary Judgment Means We Lose**
  - Failure to produce key evidence in a case because of an improperly executed legal hold can lead to an adverse jury instruction
  - Judges can issue a ruling for one party without ever going to trial and hearing evidence because of the inability to produce key information that was either lost or deleted because employees ignored legal hold requests.
- **Proportionality & Reasonably Accessible Defense**
  - Where ESI is involved, there are also practical limitations due to the volume, complexity, and impact of on-going preservation requirements
  - Each of these factors necessarily implicate the proportionality principles found in Rule 26(b)(2)(C)(iii) (focus efforts on impacting review costs (70% of all eDiscovery costs). This will create a more efficient process at the onset. Not only about using contract reviewers but culling dataset set)

# eDiscovery Challenges

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- **New technologies increase complexity and volume of discovery**
  - Peripheral devices, smartphones, tablet, social media, archived email and loose file data, backup data on some applications to a cloud service
- **Choosing the right vendor partner**
  - Level of experience with industry/subject matter
  - Availability of process documentation
  - Approach to communication and case team development
- **Choosing the right technology**
  - What is the right fit for a particular case
  - How does technology impact cost, timing, and staffing
  - Jurisdictional issues – how have individual courts addressed these issues

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# Solution

# FRCP 26(f) Meet and Confer is Your Friend

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**Practice Tip: Don't miss this opportunity early in your case to save time and money and avoid unnecessary discovery disputes.**

- **21 days before a scheduling conference or 21 days before a R.16(b) scheduling order, the parties are to confer . . .**
  - to discuss any issues relating to preserving discoverable information
  - to develop a proposed discovery plan. . .
  - to discuss any issues related to disclosure or discovery of electronically stored information (ESI), including the form or forms in which it should be produced
  - to discuss any issues relating to privilege claims, including the potential for a claw back agreement to be included in a court order

# Rule 26(f) Meet and Confer is Your Friend

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- **Preservation - define the universe of what must be preserved**
- **Search Protocols**
  - custodians
  - data types/locations to search (or not search)
  - date range
  - search terms - and a process to reevaluate if terms hit too much ESI
  - Deduplication

# Help!

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- [www.TheSedonaConference.org](http://www.TheSedonaConference.org)
- [www.EDRM.net](http://www.EDRM.net)
- [www.abanet.org/litigation/discoverystandards/ 2004civildiscoverystandards.pdf](http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf)
- CCJ Guidelines [www.ncsconline.org](http://www.ncsconline.org)
- The Speakers

See Things Differently.

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