



# Making eDiscovery Work for your Next Case

—  
**A Woman-Powered Guide to  
Mastering eDiscovery**

Alliance of Women  
Trial Lawyers  
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# Electronic Discovery: Do I really need to understand this stuff?? (Hint: Yes!)

- ❖ ABA Model Rule 1.1: Duty of competence amended in 2012 to include a duty to know about relevant technology
- ❖ The federal rules and federal courts are leading the law in eDiscovery with many states following the federal lead
- ▶ ❖ Most states have enacted some statutes, rules, or ethical opinions regarding eDiscovery (see, e.g., <https://www.ediscoverylaw.com/state-district-court-rules/>)



# As California eDiscovery Goes, So Goes the Nation...

2016 State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193 requires attorneys handling electronic discovery to be competent in the following:

- ❖ initially assess e-discovery needs and issues, if any;
- ❖ implement/cause to implement appropriate preservation procedures;
- ❖ analyze and understand a client's ESI systems and storage;
- ❖ advise the client on available options for collection and preservation;
- ❖ identify custodians of potentially relevant ESI;
- ❖ engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- ❖ perform data searches;
- ❖ collect responsive ESI in a manner that preserves the integrity of that ESI; and
- ❖ produce responsive non-privileged ESI in a recognized and appropriate manner.

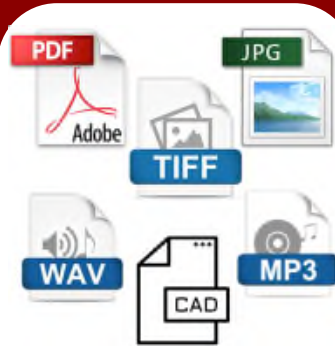




**Email**



**Office Documents**



**Other Files and Images**



**Structured Databases**

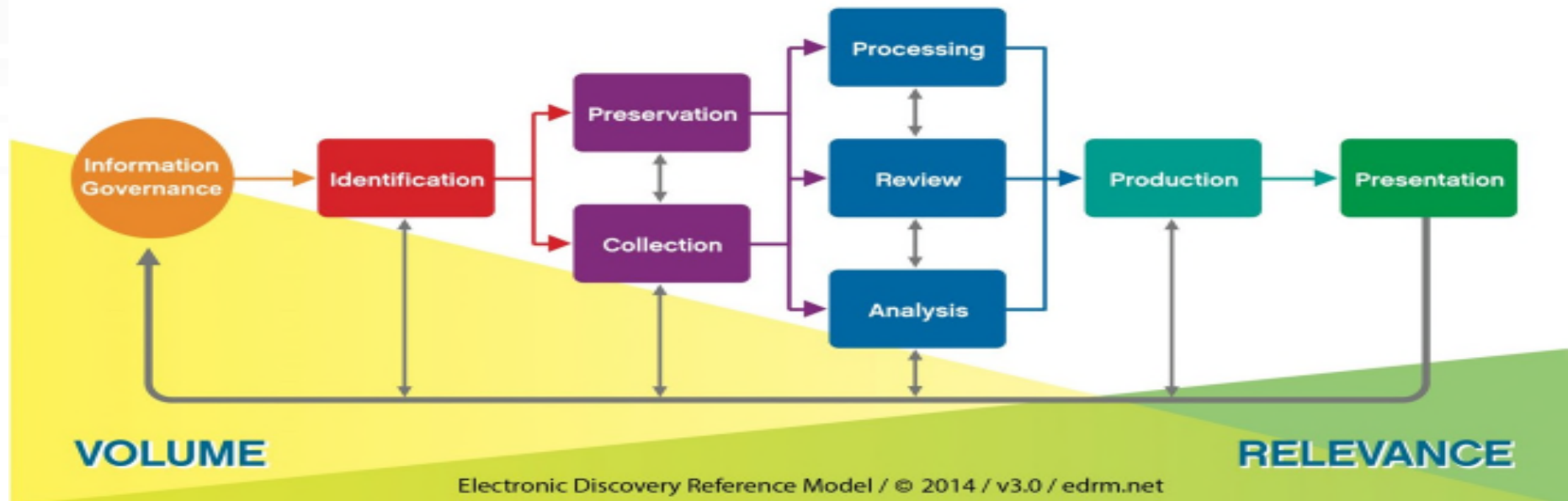


**Websites,  
Social Media &  
Mobile Devices**

▶ **What is Electronically Stored Information (“ESI”)?**

# The eDiscovery Life Cycle (All discovery is eDiscovery today - even paper documents!)

## Electronic Discovery Reference Model



# David v. Goliath: Strategic Decisions re Defendant's Discovery

- ❖ Early document preservation letter for defendants and third parties
- ❖ Negotiate an ESI protocol (alternative: state ESI format in RFPs)
- ❖ FRCP 26(f) or equivalent conference to discuss preserving discoverable information and developing a discovery plan
- ❖ Coming out strongly in initial ESI discussions can positively change case dynamics
- ❖ The Sedona Conference recommends a spirit of cooperation regarding eDiscovery (but cooperation does not mean capitulation!)



## ESI Format – Does it matter?

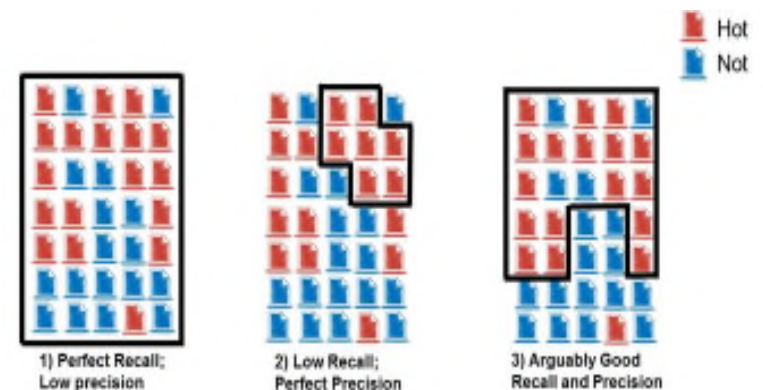


- Short answer: Yes! Don't accept when Defendants offer quick non-searchable PDFs!
- Standard: TIFFS with extracted text and an ESI load file that shows family relationship and provides select metadata fields; native files for spreadsheets (Consider fighting for PowerPoints, Word files, PDFs, and color files, including images)
- Trend toward full native production; cheaper to produce but resistance due to redaction issues
- ❖ Okay to accept deduplicated productions (but ask for metadata re duplicative custodians)
- ❖ Resist defendant request to email thread a production before producing!
- ❖ Metadata fields are especially important in large cases to help search and analyze ESI (see sample metadata protocol)



# Getting the Good Documents: Search Terms and Technology Assisted Review

- Search terms are often unreliable but are still the most frequently used tool to narrow document universes
- Consider statistical validation process to “test” the terms
- Technology Assisted Review (“TAR”) (i.e., Predictive Coding) – the “Pandora” of document review; increasingly used cooperatively on large cases and behind the scenes by corporate parties
- TAR can potentially yield many more documents (but transparent training is key)
- Growing judicial support for use of TAR although no court has ordered it; see Judge Peck’s decision in *Rio Tinto PLC v. Vale, S.A. et al*, No. 1:2014cv03042 (S.D.N.Y. 2015)
- Increasingly parties looking for participation by opposing counsel in TAR process with both parties cooperatively reviewing documents and performing validation together







## Odds & Ends: Proportionality, Spoliation, Privilege Logs, Authentication & Joint Review Platforms

- Proportionality → 2015 amendment to FRCP 26(b)(1): discovery must be relevant and *proportional* to the case needs, while taking into account the parties' access to relevant information and available resources, the importance of the discovery in resolving the matter, and whether the burden or expense outweighs its likely benefit
- Spoliation → revisions to Rule 37(e) established new framework for spoliation sanctions requiring intent to deprive other party of the information required (i.e., acted in “bad faith”)
- Privilege log trends: Trend in decisions and law reviews etc. re need to handle privilege claims in new and more efficient ways (e.g., category logs) – but how can Plaintiffs' lawyers protect their client's interests?
- Authentication of ESI → standard witness with knowledge will do; counsel also can stipulate to authenticity/chain of custody
- Joint review platforms? Recent buzz around this idea as an ESI cost-saver but can they be effective for both parties?





## But What About my Client's Data?

- ❖ Recommendation: Send a preservation early AND make sure your client understands it and signs it (consider periodic reminders re preservation obligations!)
- ❖ Preserve broader than will be discoverable (duty to preserve triggered when litigation reasonably anticipated)
- ❖ Consider recommending ceasing all social media posts
- ❖ Conduct thorough collection interviewing and documentation → document all decisions (including when you decide NOT to collect something)
- ❖ Your goal: to make a defensible and reasonable collection and produce the relevant data
- ❖ Be careful regarding client discarding cell phones and computers (it happens more than you would think)
- ❖ Careful with ESI protocols (and be ready to comply with whatever Defendant agreed to do re production format!)
- ❖ Proportionality arguments and burden arguments can come up for Plaintiffs in different ways (e.g., in mass torts)
- ❖ Confidentiality 101 → over-marking as confidential has risks too
- ❖ Pros and cons re self-collecting vs. forensically collecting





## For Further Reading

- ❖ The Electronic Discovery Reference Model (Duke Law's Center for Judicial Studies) - <http://www.edrm.net>
- ❖ The Sedona Conference: <https://thesedonaconference.org/>
- ❖ Northern District of California eDiscovery guidelines - <https://www.cand.uscourts.gov/eDiscoveryGuidelines>
- Seventh Circuit Electronic Discovery Pilot Program - <https://www.discoverypilot.com/>
- ILS's ESI case law summaries: <http://esicaselaw.com>
- Craig Ball's Blog: <https://ballinyourcourt.wordpress.com/>



“YOU DON'T HAVE TO BE GREAT TO START, BUT YOU HAVE TO START TO BE GREAT.”





THANK YOU!

