

RIM Implications of Legal Holds & Litigation

**Presented to ARMA Triangle &
ARMA Madison Chapters
March 17, 2022 1:00-2:00 PM EDT**


Discussion Leaders



Jennifer Chadband, JD,
CRM, IGP, ECMp
Sr. Analyst / Licensed
Attorney



Rick Surber, JD, IGP, CRM
Sr. Analyst / Licensed
Attorney

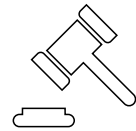


The information provided in this presentation is not legal or other professional advice and should not be construed as an advertisement for legal or professional services; instead, all information presented is for general informational purposes only. Opinions are from the presenters, and do not represent the views of Zasio.

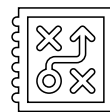
Roadmap



Legal Holds



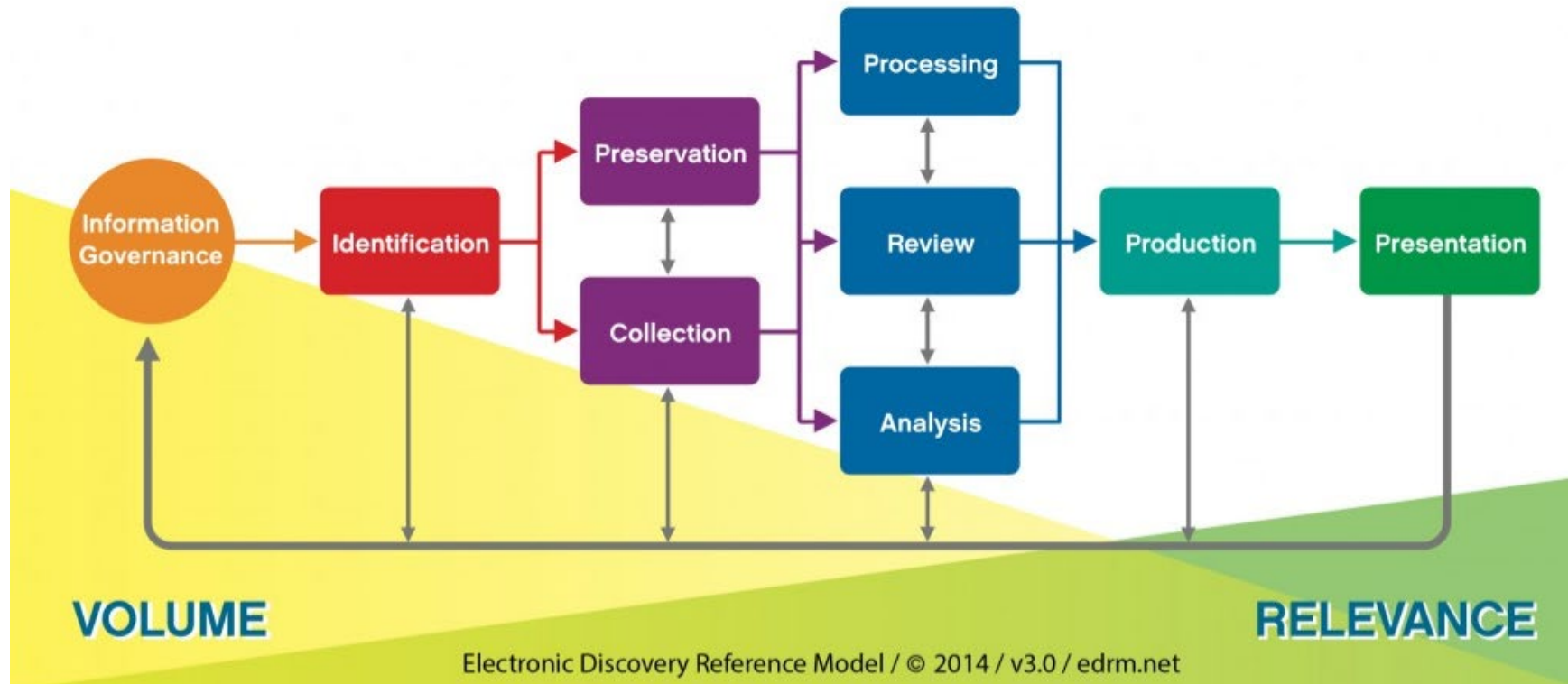
Discovery



Building IG/RIM for Litigation

Legal Holds & Discovery Roadmap

Electronic Discovery Reference Model



Federal Rules of Civil Procedure (37)(e)

e) Failure to **Preserve** Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

Reasonable Anticipation of Suit

Obvious:

Suit filed, or serious/genuine threat of suit presented

Red Flags

Internal Complaints, Rumored Actions

Who and What to Target for the Hold

- Databases
- Network drive files
- Paper files
- Email Accounts
- Messenger Accounts



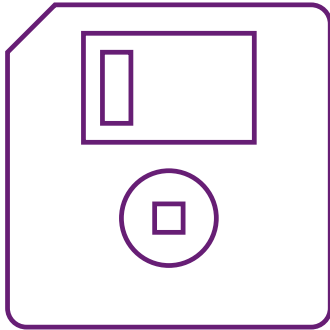
Federal Rules of Civil Procedure

(26)(b)(1): Proportionality

Rule 26. Duty to Disclose; General Provisions Governing Discovery
(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.

How to Preserve Information



- Notice – In writing, identify the reason for the hold, prohibit the destruction of relevant documents, and should identify what sort of information is considered relevant.
- Reminders
- Custodian Interviews
- Full disk imaging

Discovery Spend

60% of fees and expenses in litigation attributable to discovery, with 50-60% of those costs tied to e-discovery.

Source: Paul Meyer and John Rosenthal, ACC Presentation on Managing the Risks and Spend of E-Discovery (2017)

Only a fraction of preserved data is ever collected. On average across all survey respondents, slightly less than half of all preserved data is ever collected, processed, and reviewed. Even less is produced or eventually used in litigation.

Source: William H.J. Hubbard, Preservation Costs Survey Final Report, Electronic Discovery Law (Feb. 18, 2014)

Discovery Statistics and Costs

Almost 2/3 of medium to large-sized businesses have more than 25 legal and regulatory matters per year.

Source: Paul Meyer and John Rosenthal, ACC Presentation on Managing the Risks and Spend of E-Discovery (2017)

In a survey, that included cost trends for legal fees and discovery costs in “major” closed cases (defined as cases with litigation costs greater than \$250,000), results disclosed that the ratio of pages discovered to pages entered as exhibits in litigation is as high as 1000/1.

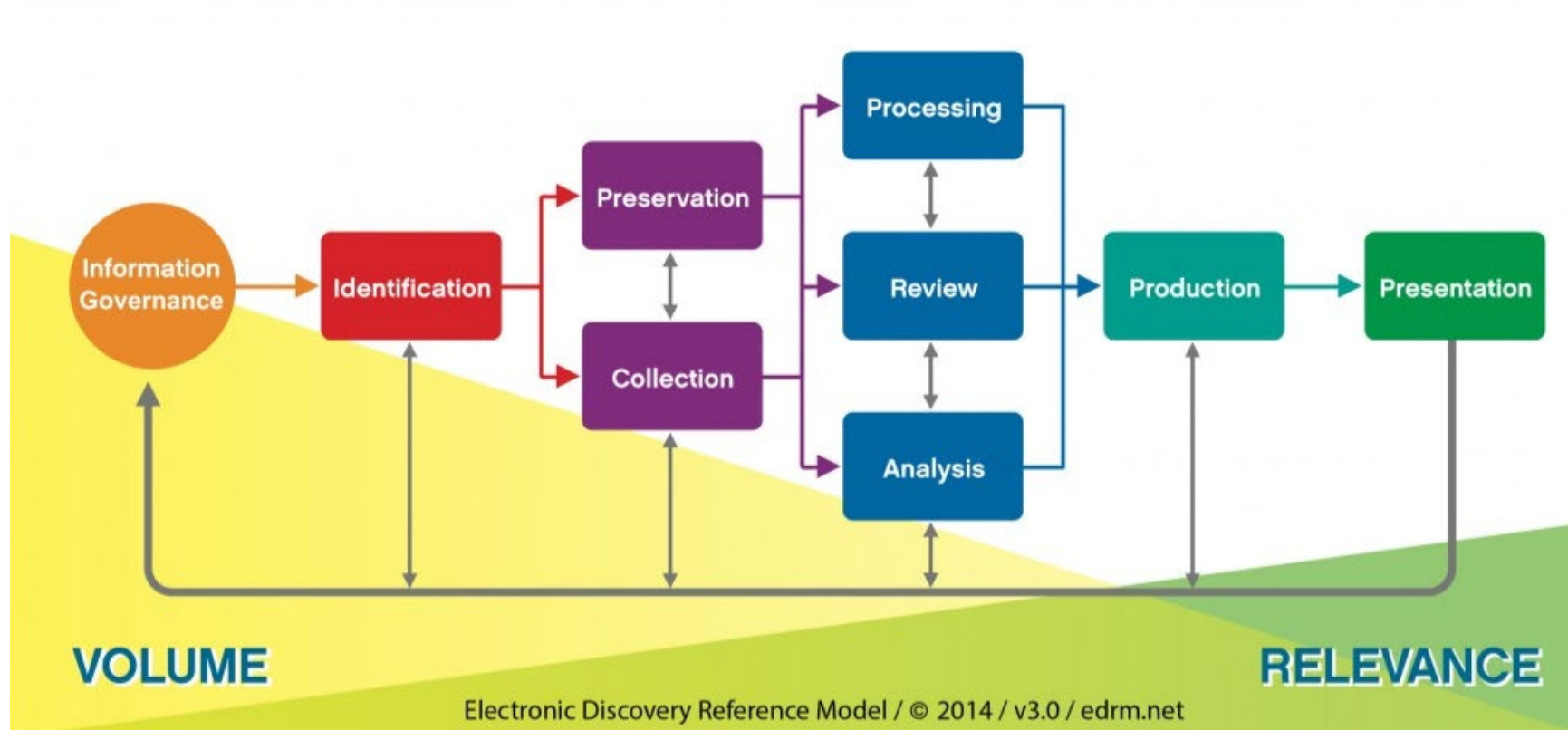
Source: Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies Presentation to Committee on Rules of Practice and Procedure Judicial Conference of the United States* (May 10-11, 2010)

Rule 34. Producing Documents, Electronically Stored Information...

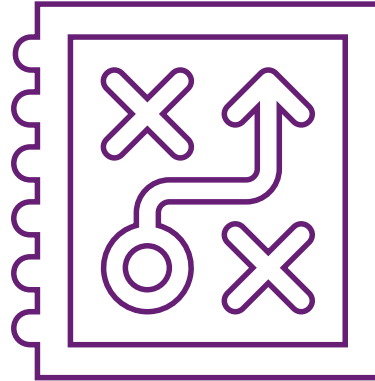
- (b) Procedure.
- (2) Responses and Objections.
- (E) *Producing the Documents or Electronically Stored Information*. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
 - (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
 - (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
 - (iii) A party need not produce the same electronically stored information in more than one form.

Discovery Process Review

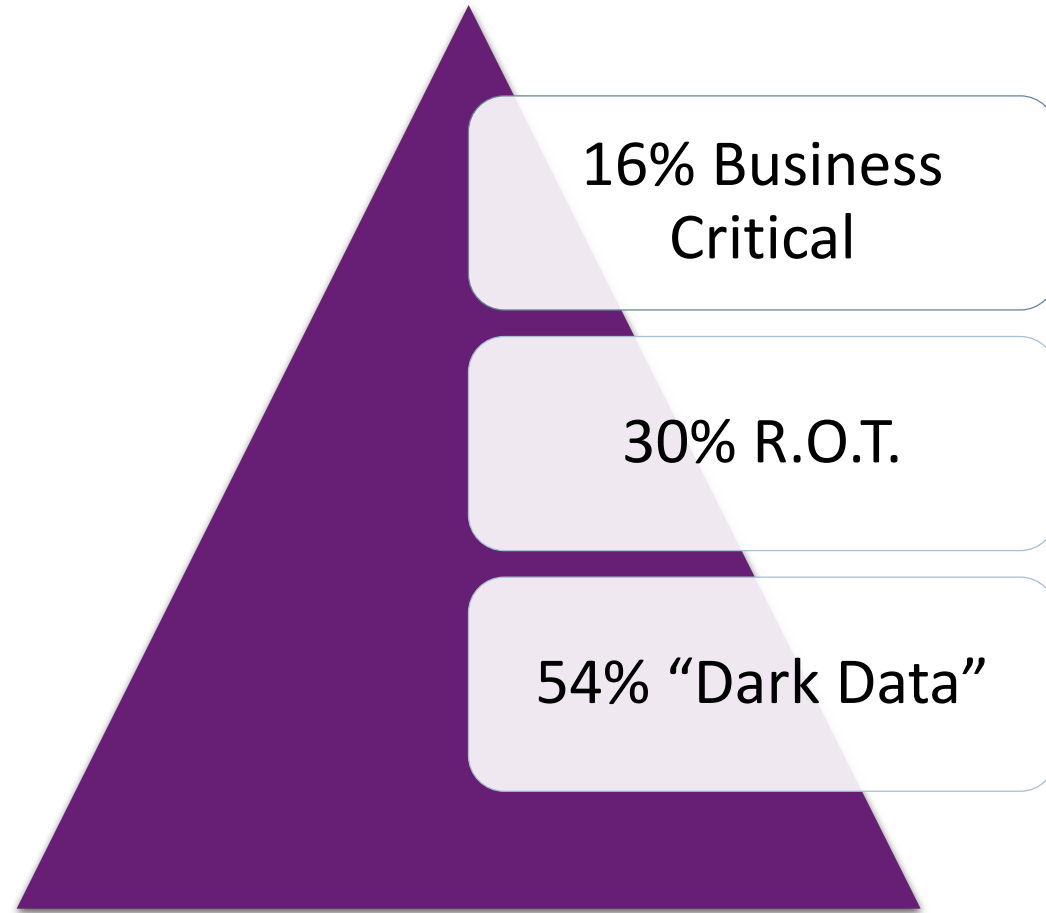
Electronic Discovery Reference Model



Building RIM/IG for Litigation



Data Breakdown



Source: Veritas Technologies, *The Databerg Report: See What Other Don't See Identify the Value, Risk and Costs of Your Data* (2016).

Defensible Disposition

The more information an organization maintains and the longer information is retained, the more it will cost to identify, preserve, search, and produce that information in the event of litigation, investigation, or any other instance of compulsory process.

Source: The Sedona Conference, *Sedona Conference Principles and Commentary on Defensible Disposition* (August 2018).

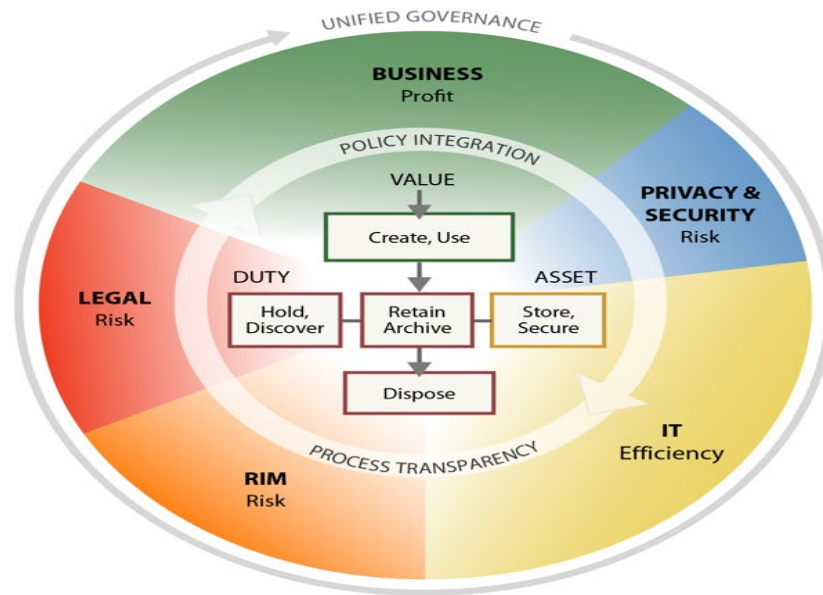
RM & Litigation



IG & Litigation

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

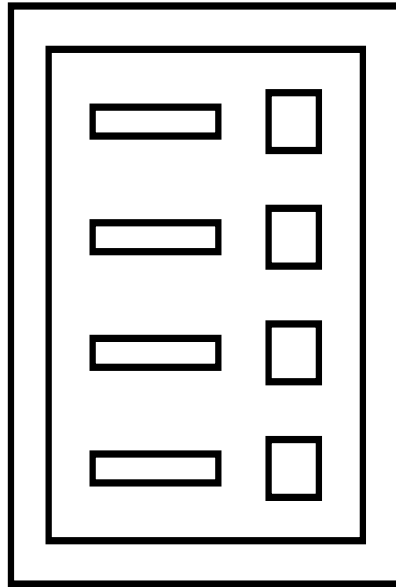
Asset: Specific container of information

RIM & Legal

- Leverage
- Disposition Oversight



Records Management Policy



Records Retention Schedule (RRS)



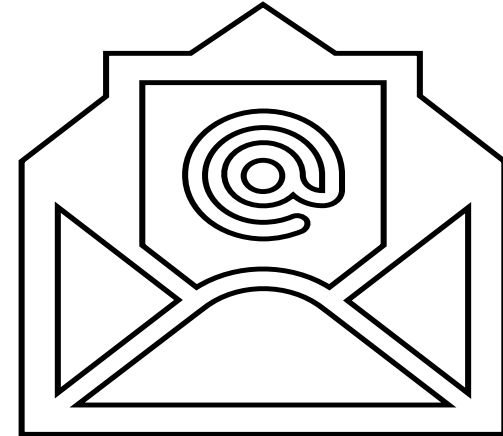
Legal Requirements

- Business functions
- Evidentiary considerations
- Jurisdictions



Implementation

- Training
- Procedures & Processes
- Auditing & Metrics
- *DR Distributors, LLC v. 21 Century Smoking, Inc.*



Find & Retrieve

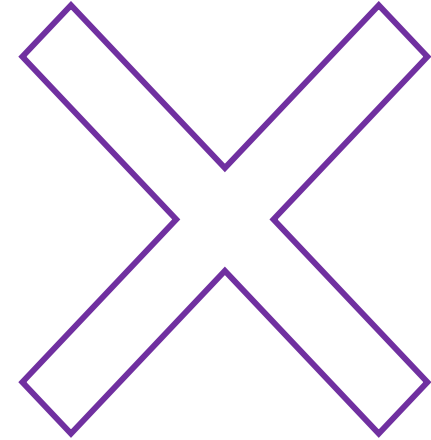
- Data Map
 - Rule 26(a)(1)(A)(ii)

Find & Retrieve

- Under Federal Rule of Civil Procedure 34, a party is required to produce documents (1) “as they are kept in the usual course of business or must label them to correspond to the categories in the requests” - Fed. R. Civ. P. 34(b)(2)(E)(i)
- *Charter Communications v. Optymyze*

Records Disposition

- Preservation
- Compliance
- Accountability



Questions



Presenter Contact Information



Jennifer Chadband, JD, CRM, IGP, ECMp
Sr. Analyst / Licensed Attorney
Jennifer.Chadband@Zasio.com



Rick Surber, JD, IGP, CRM
Sr. Analyst / Licensed Attorney
Rick.Surber@Zasio.com