



Data from Cradle to Grave: How Lawyers Can Help Clients Make Sense of Data

ACBA Annual Bench-Bar Conference
June 16, 2023

THE EVIDENCE. THE BACKSTORY.
THE INTELLIGENCE. **WE GET IT.** SM

Agenda

Corporate Records – Why Should Lawyers Care About Them?

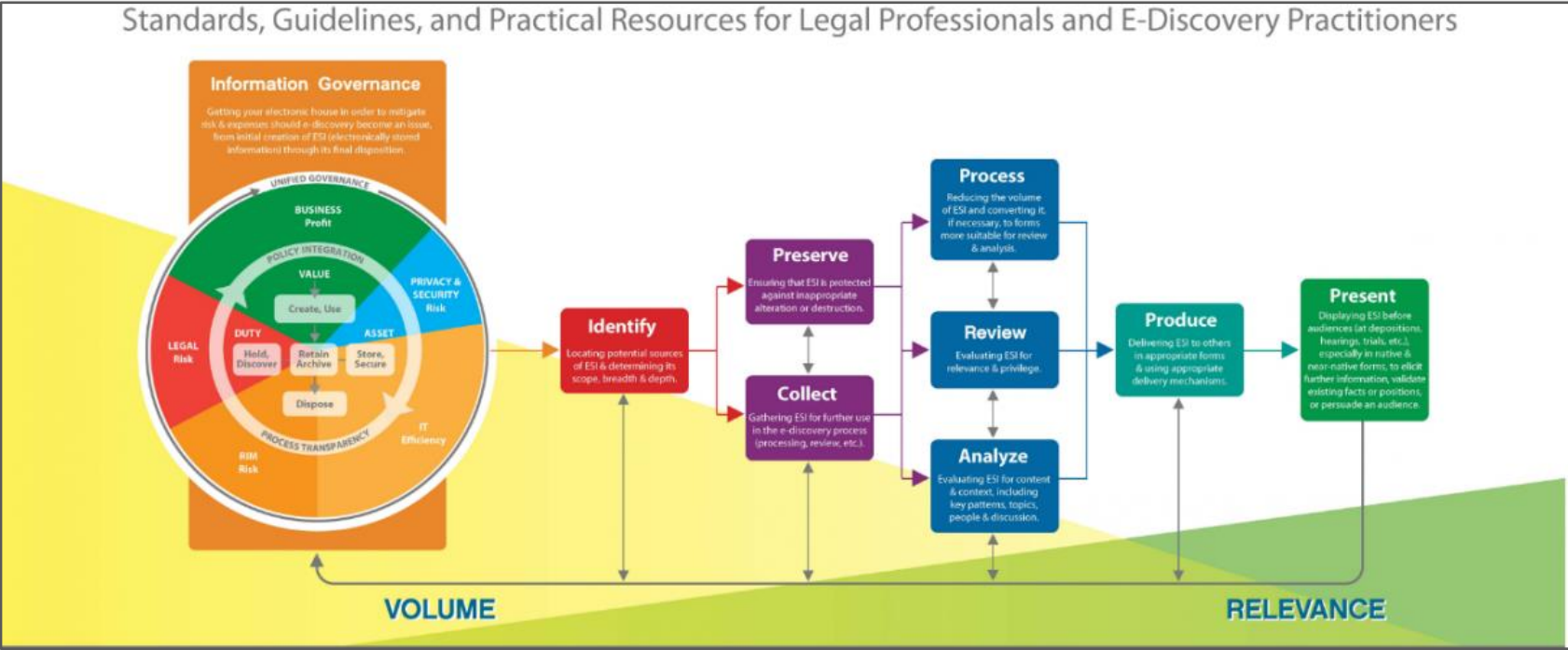
Legal Holds – Preserving Critical Evidence

Defensible Data Collections

Review and Artificial Intelligence

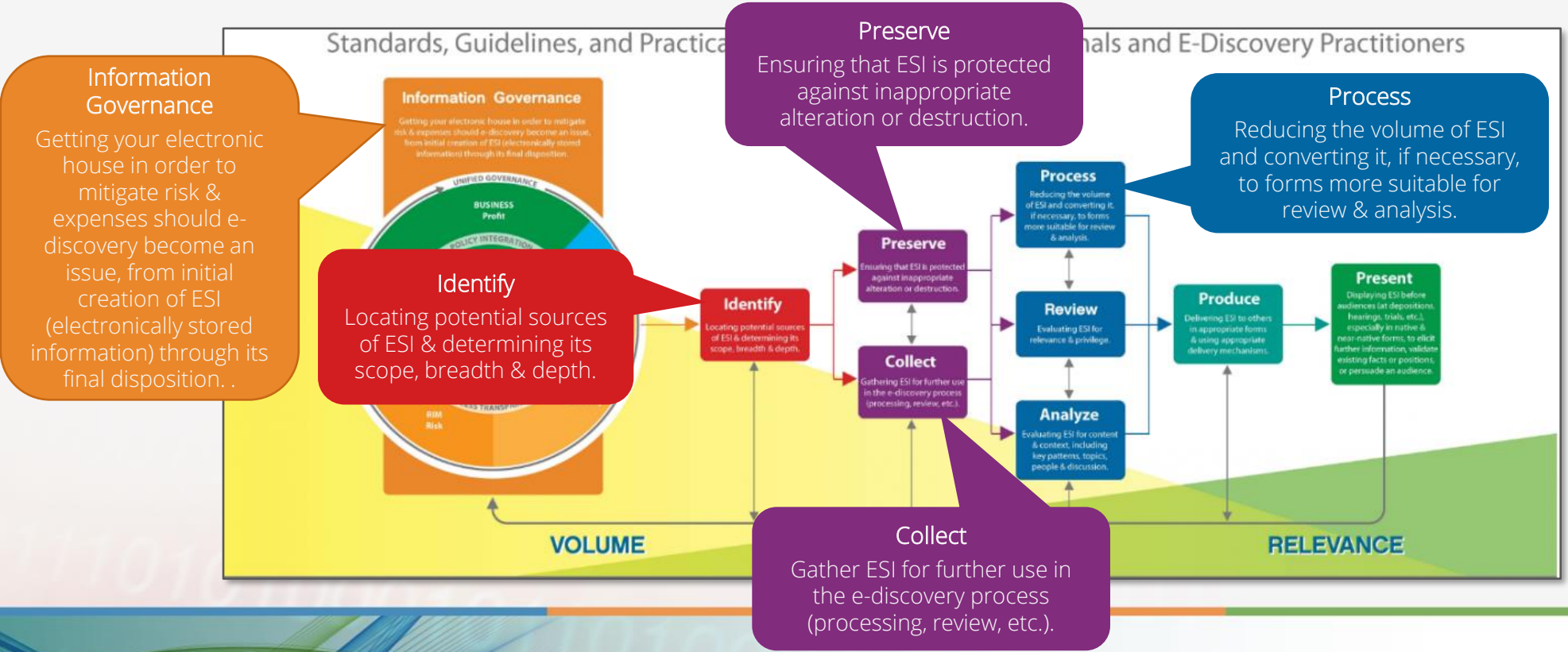
EDRM Workflow

Electronic Discovery Reference Model (“EDRM”) -- evidence identification, collection, processing, review and production



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What Do We Mean by Information Governance ?

Information governance is the discipline of identifying what qualifies a “business record,” where those files should (and should not) be stored, and how long those records should be retained.



Core Concepts: Information Governance

What is a “record,” anyway?

- Business
- Legal
- Regulatory
- Financial
- Historical

What is typically NOT a record?

- Drafts
- Copies
- Non-core documents (e.g., public documents)



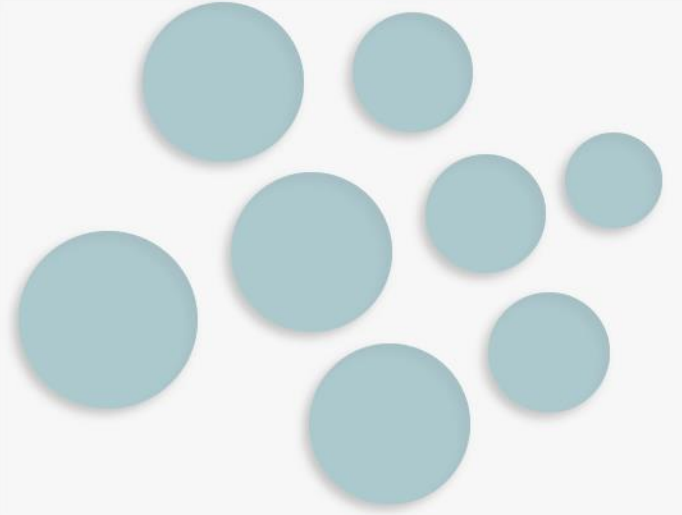
“Systems of Record” – Safeguard Your Information

- Key Attributes
 - Centralized
 - Secure
 - Retention settings
- Examples:
 - SAP
 - WorkDay
- Exceptions
 - PC Desktop
 - Outlook Account

Retention and Disposal Schedules

- How Long Should a Record Be Retained?
 - Usually a discussion between legal, HR, IT and the business
 - Not “one answer” for all record types
 - Training is key (buy in from leadership)
- When/How Can We Destroy a Corporate Record?
 - Defensible deletions
 - EXCEPTION: Legal Holds
- Why Should Litigators Care About Information Governance?





Legal Holds



Anticipating a Suit?

- Triggering Event
 - Reasonable anticipation of litigation – whether receive a threat or not
- A Lawyer's Duty
 - Records, non-records and expired records
 - “Reasonable” anticipation – even a teddy bear might count



How Can Lawyers Help?

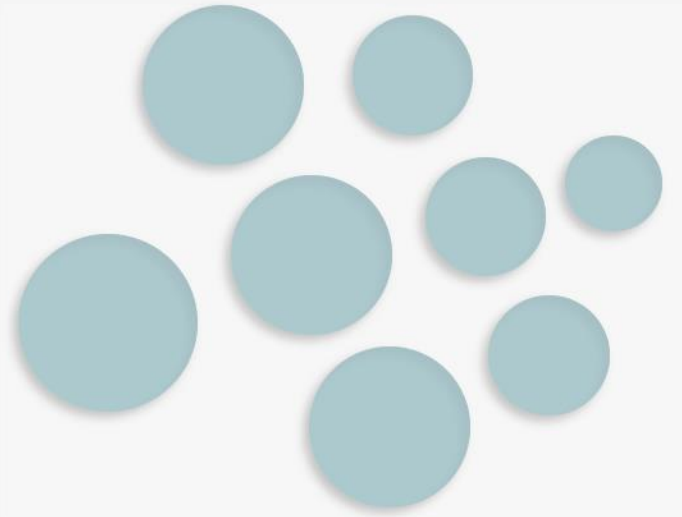
- Key Stakeholders
 - Custodian
 - Management
 - IT, HR
- Ensuring compliance
 - Work with IT on Practical Solutions
 - Make a Business case
 - Testimony – Mock Depos



What's the Worst that Can Happen?

- Third Circuit Caselaw – failure to issue
 - Evidence within the party's custody, access or control
 - Relevant to the matter
 - Bad faith in failing to preserve/produce
 - Preservation duty reasonably foreseeable
- Range of sanctions (prejudice and intent to deprive)
 - Adverse Inference Instruction - *Shin Da Enters, Inc. v. Young*, 2022 WL 17178299 (E.D. Pa. 2022)
 - Limitation of Evidence at Trial – *Solera, LLC v. Lubrizol*, 2023 WL 2187481 (D. Colo. 2023)



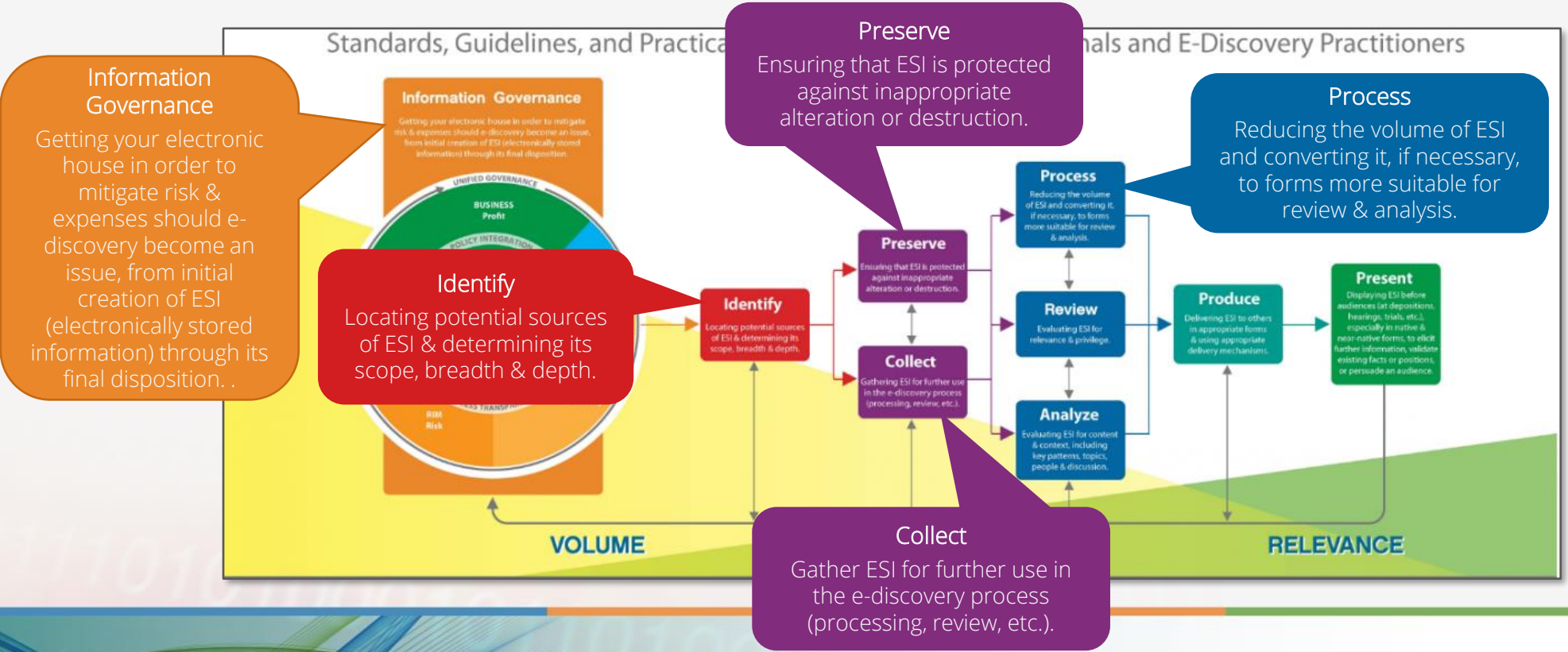


Where Is My Client's Data?



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Electronic Discovery Reference Model (“EDRM”) -- evidence identification, collection, processing, review and production



Data Maps – Critically Important

- Personal Computers
- Company-Issued Mobile Devices
- Personal Mobile Devices
- Cloud Storage
- Corporate/Shared Networks
- External Storage Devices
- Social Media



Personal Computers

- Forensic tools can recover metadata unknown to the user
 - Deleted content
 - File(s) accessed and internet search history
 - Whether external storage devices were connected
- The model may dictate how the image can be created successfully



The image features four teal-colored silhouettes of hands holding mobile devices. Two hands at the top are shown from a top-down perspective, one holding a smartphone and the other a tablet. Two hands at the bottom are shown from a side-on perspective, one holding a smartphone and the other a tablet. The background is white with a faint, light blue pattern of binary code (0s and 1s) at the bottom.

Company-Issued Mobile Devices

- Company-issued mobile devices often have a mobile device management tool (“MDM”) installed
 - Restricts backups/collections without the help of IT
 - MDM policy may need to be changed
 - MDM app may need to be removed
- MDM does not help with data collection from mobile devices

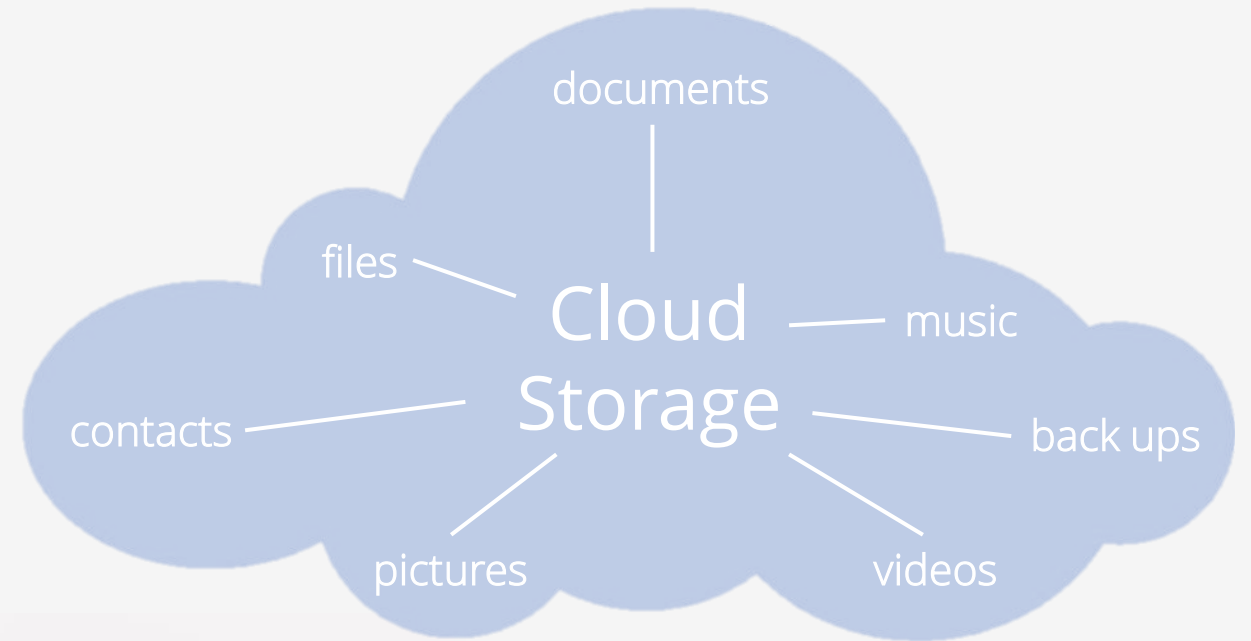
Social Media/Messaging Apps

- Slack, Teams, Facebook, Instagram, LinkedIn, etc., are commonly used by employees for both sharing work and basic communications
- eDiscovery “purpose built “ tools (4IG, Onna, X1) do exist for some of the most popular platforms
- BEWARE: M365 eDiscovery licenses may have limits



Cloud Storage Systems

- Cloud storage may not be company-sanctioned
- Collection steps will be dictated by the cloud storage app
- Business-class cloud storage accounts typically have additional logging available
- Extremely large volumes (hundreds of GB) of data could take weeks to collect



Corporate Network Locations

- Often considered “systems of record”
- Data Mapping: be sure to ask your client about:
 - How their corporate networks are structured?
 - Who has network access?
 - Any automated deletion cycles that may apply?

USB or External Hard Drives

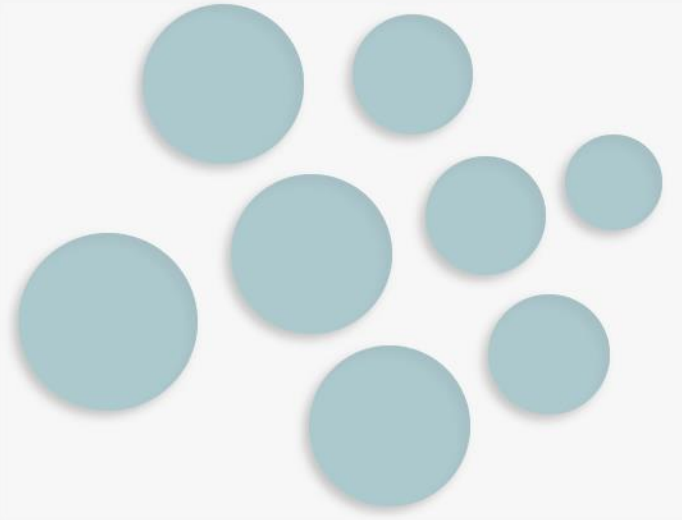
- Employees may be relying on external storage due to convenience or inability to connect to the company's network storage
- In a remote-imaging situation, the devices may be able to be plugged into the computer being collected (case specific – not a good idea for a defense case involving trade secrets theft)





Key Takeaways

- Information governance is not just a task for risk management or IT—lawyers can and should add value.
- Planning and proactive involvement mitigates the last place a litigator wants to be: explaining to a court that you can't find evidence, or that it's gone.
- Technology (systems of record, data processing and AI) are a lawyer's friend, not a foe.
- Avoid "litigation over litigation"/spoliation claims.

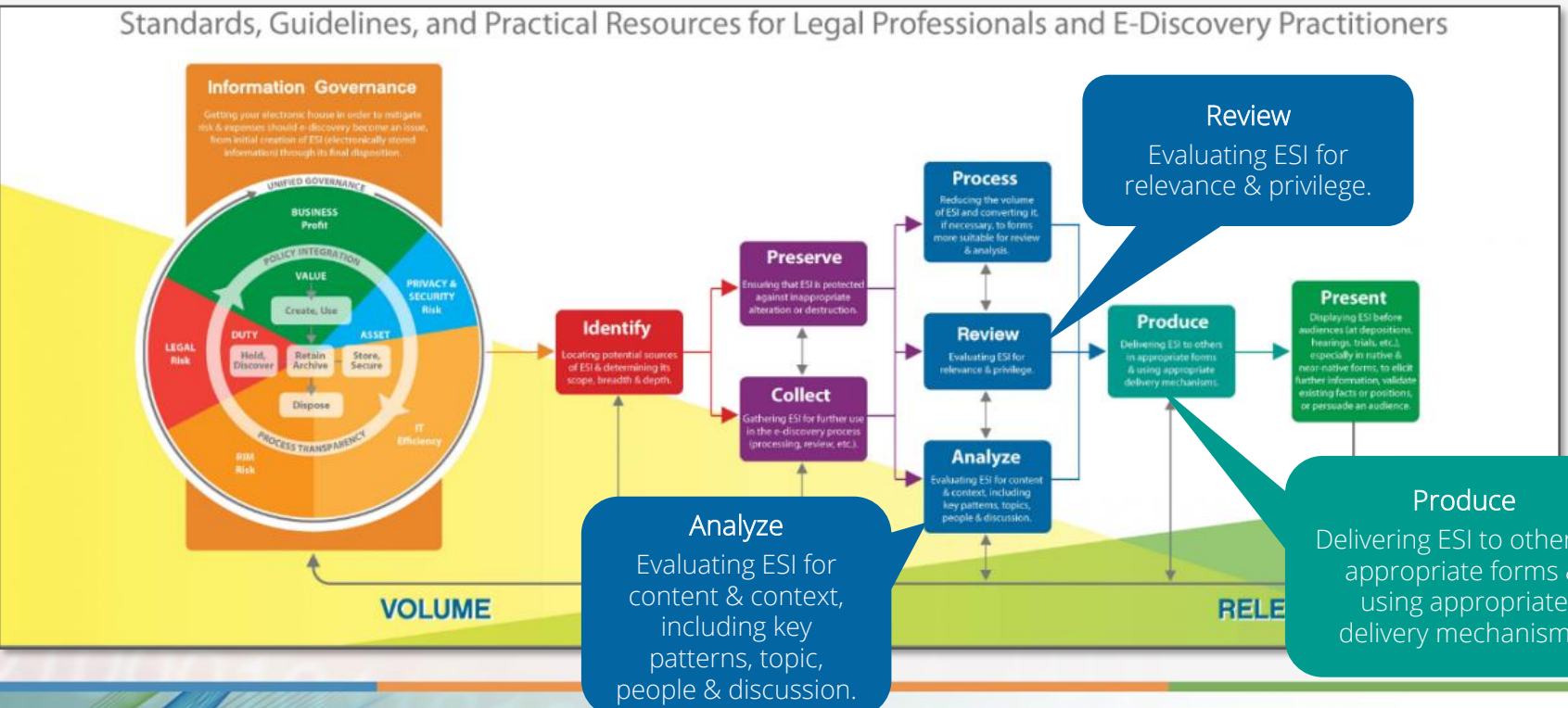


Review and Analysis



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eDiscovery Technology



Relativity Analytics – utilize AI to optimize & speed review



Relativity - Conceptual & Structural Analytics

Conceptual



Clustering



Concept Searching



Visualization

Structural



Email threading



Name normalization



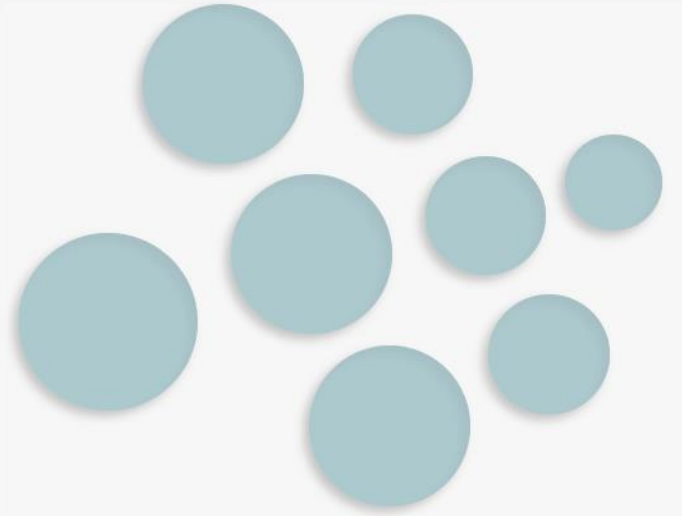
Textual near duplicate



Language detection



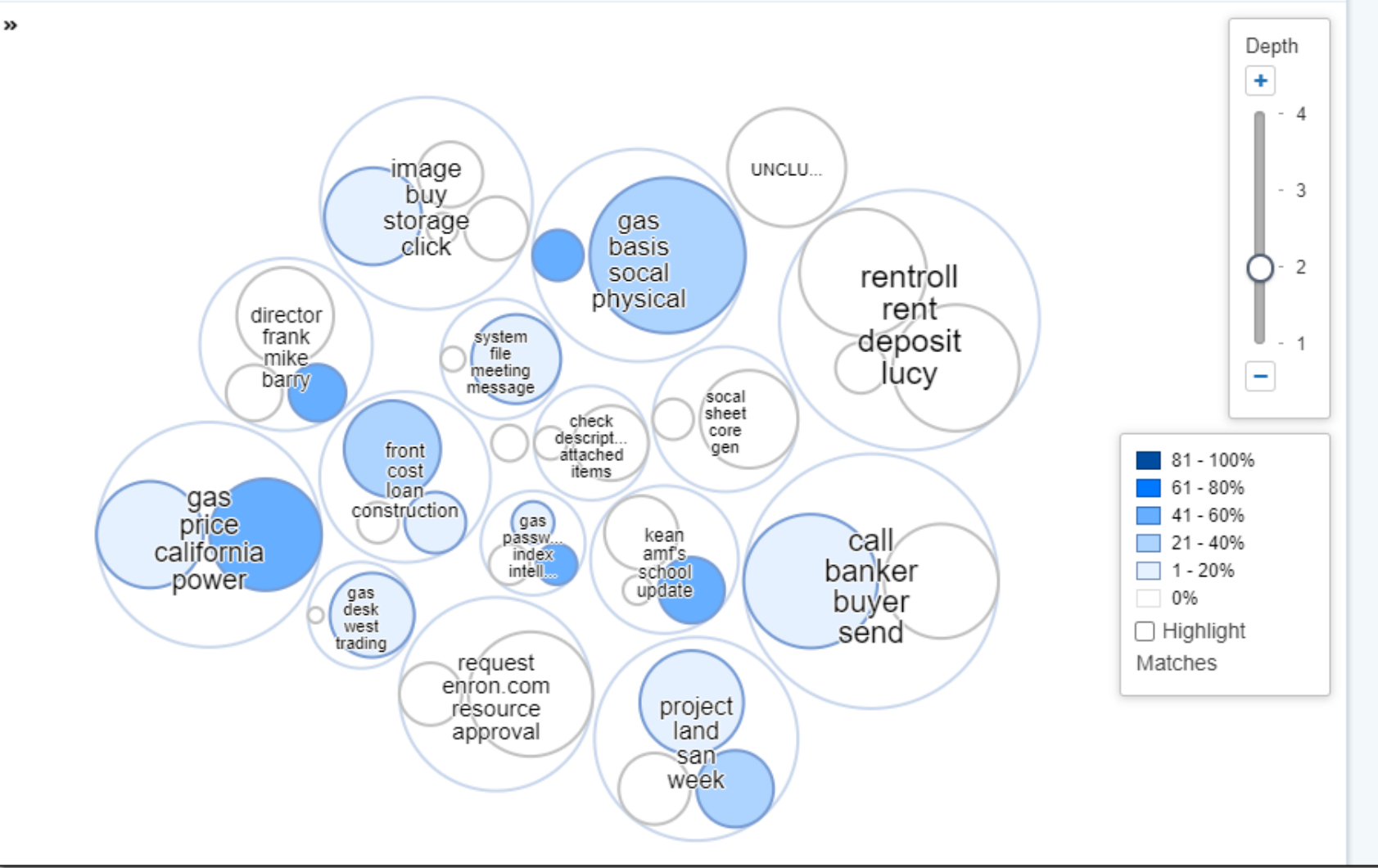
Active learning review

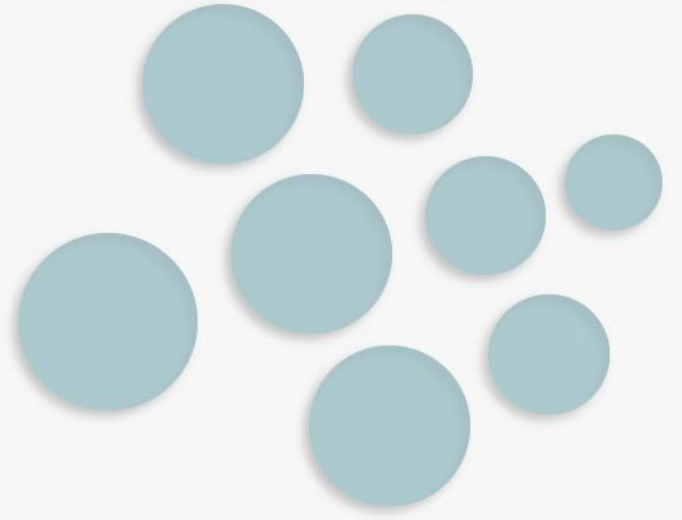


Conceptual Analytics



Cluster :: Cluster Set 2





Structural Analytics



Value of Continuous Active Learning

Matter: DOJ Subpoena Issued to Energy-Related Tech Company (involving overseas transactions)

Problem:

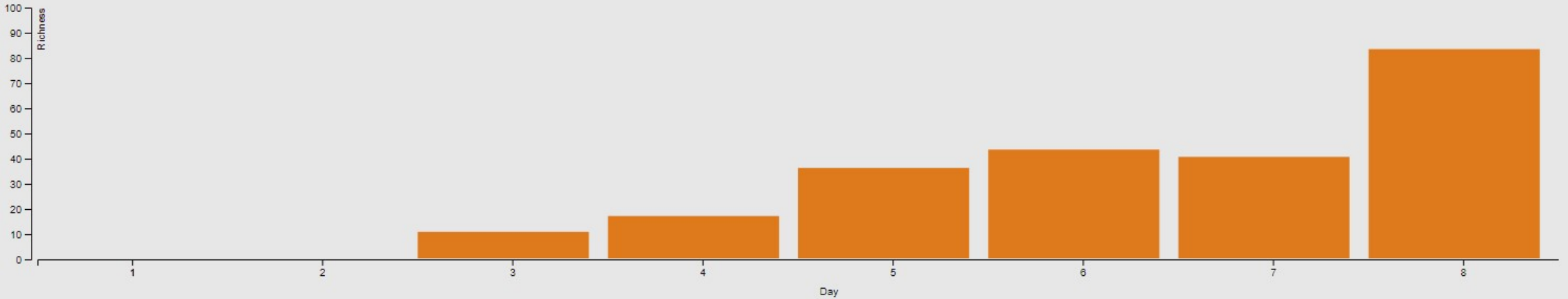
- ESI document collection of approximately 34,000 documents, resulting from key word searching.
- Only 10% of the documents were determined to be relevant and responsive (benchmarked by a random sample). Absent the use of analytics, the reviewers thus would have had to review ten documents to find one that was relevant.

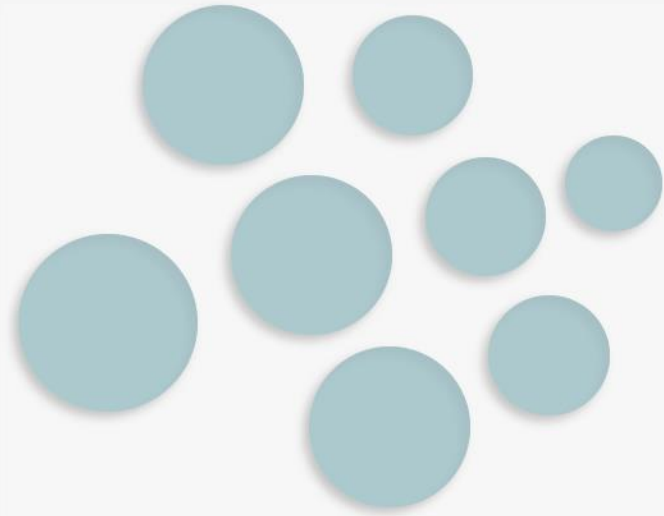
Solution:

- “Continuous Active Learning” analytics noted the attorney reviewers’ relevance decisions and then continuously identified more and more relevant documents.
- After reviewing only 550 documents, the percentage of relevant documents presented to the reviewers increased from 10.9% to 43.6%, and then to 83.5% after reviewing only 2,144 documents. (That’s less than 1 banker’s box, in old-school terms.)

Value of CAL (continued)

| Day | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|--------------|----|----|-------|-------|-------|-------|-------|-------|
| Reviewed | 0 | 0 | 64 | 209 | 295 | 808 | 307 | 461 |
| Relevant | 0 | 0 | 7 | 36 | 107 | 352 | 125 | 385 |
| Richness (%) | 0% | 0% | 10.9% | 17.2% | 36.3% | 43.6% | 40.7% | 83.5% |





What Do Courts Think About AI-Assisted Review?



Judicial Acceptance

- First blessed by a court in 2012
 - *Da Silva Moore v. Publicis Group*, 287 F.R.D. 182 (S.D.N.Y. 2012)
 - Sex discrimination case against large advertising firm
 - Defendant sought to use AI to reduce massive ESI volumes for review, parties had dispute over methods
 - “Statistics clearly show that computerized searches are at least as accurate, if not more so, than manual review.” (*Id.* at 190)
 - “While . . . computer-assisted review is not perfect, the [FRCP] do not require perfection.” (*Id.* at 191)

Judicial Acceptance: Advanced Analytics

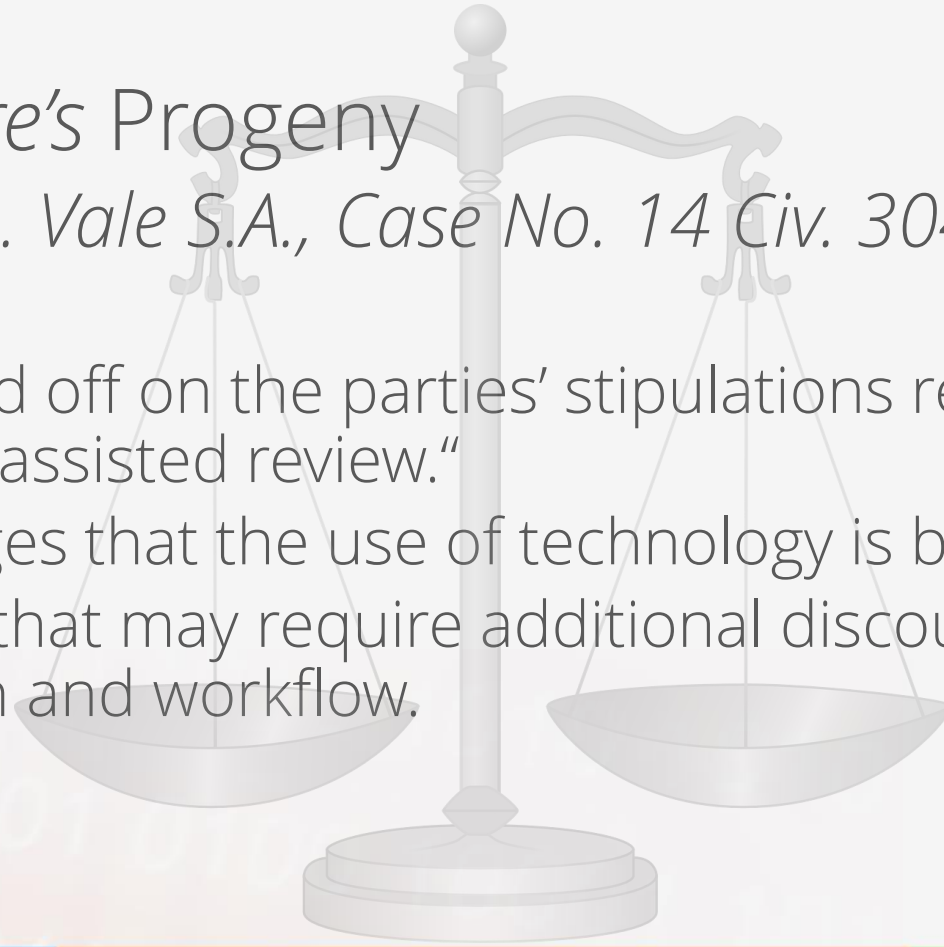
- *Da Silva Moore's Progeny*
 - *Global Aerospace Inc. v. Landow Aviation, L.P.*, 2012 WL 1431215, No. CL 61040 (Va. Cir. Ct. Apr. 23, 2012)
 - 250 GB of ESI to be reviewed in commercial litigation
 - Defendants permitted to use predictive coding over plaintiffs' objections
 - Observed that analytics "is capable of locating upwards of seventy-five percent of the potentially relevant documents . . . at a fraction of the cost and in a fraction of the time of linear review." (*Id.* at *1)

Judicial Acceptance: Advanced Analytics

- *Da Silva Moore's Progeny*
 - *Federal Housing Finance Agency v. HSBC North America Holdings, Inc.*, 2014 WL 584300 (S.D.N.Y. Feb. 14, 2014)
 - Court denied a request for reconsideration of a discovery order permitting the use of analytics
 - Defendants permitted to use predictive coding over plaintiffs' objections
 - "The literature that the Court reviewed . . . Indicated that predictive coding had a better track record in the production of responsive documents than human review[.]" (*Id.* at *3)
 - "[N]o one could or should expect perfection from the discovery process. All that can be legitimately expected is a good faith . . . commitment to produce . . . responsive documents." (*Id.* at *2)

Judicial Acceptance: Advanced Analytics

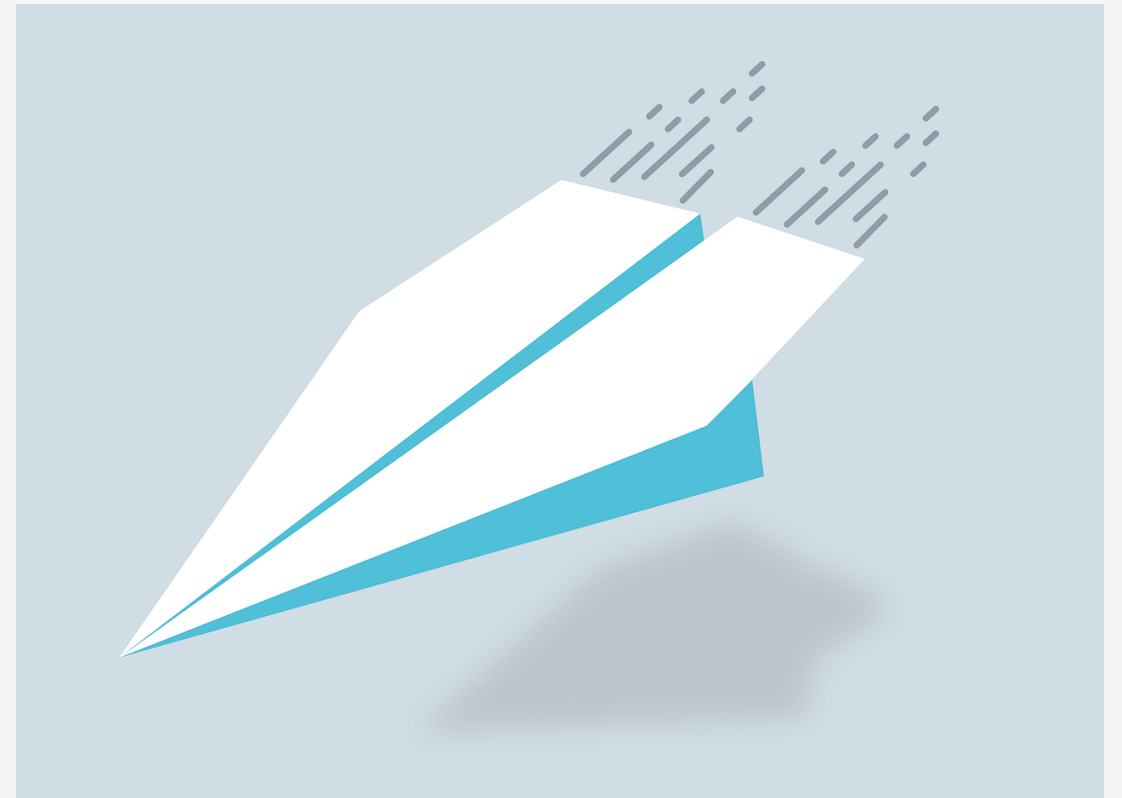
- *Da Silva Moore's Progeny*
 - *Rio Tinto PLC . Vale S.A., Case No. 14 Civ. 3042* (S.D.N.Y. Mar. 3, 2015)
 - Court signed off on the parties' stipulations regarding the use of technology-assisted review."
 - Acknowledges that the use of technology is black-letter law.
 - Core areas that may require additional discourse: transparency, cooperation and workflow.



New Huntsman v. SW Airlines Co.,

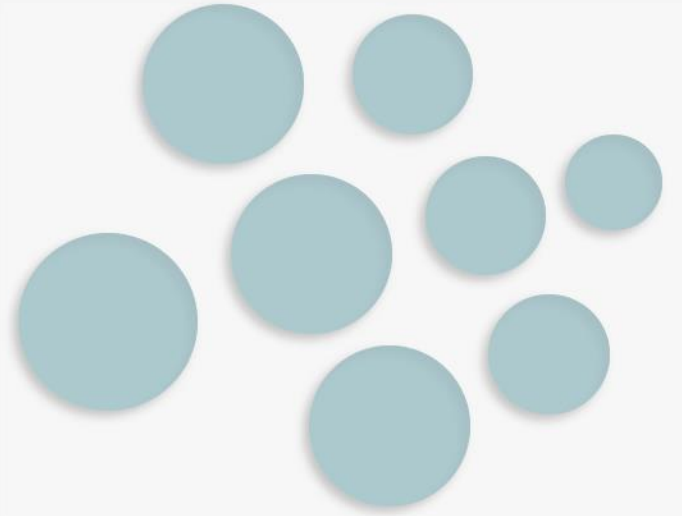
No. 19-cv-00083-PJH, 2021 BL 301052, 2021 US DistLexis 150170
(N.D. Cal. Aug. 10, 2021)

- “Southwest's approach to using keyword searches and technology-assisted review in tandem does not offend the court's expectation that the parties conduct a reasonable inquiry as required by the rules.”



In re: Diisocyanates Antitrust Litig., 2021 WL 4295729 (W.D. Pa. Aug. 23, 2021)

- Plaintiffs filed a motion to require Defendants to use certain search terms and TAR methodologies to identify responsive documents. Defendants cross-moved for a 26(c) protective order to allow them to use their own search terms and TAR methodology
- Special Master: parties should continue to meet and confer on the areas of dispute using the provided guidance as a roadmap
 - “Transparency transcends cooperation. It does not mean merely that parties must discuss issues concerning the discovery of ESI; it requires that they disclose information sufficient to make those discussions, as well as any court review, meaningful.”



Questions/Comments



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Thank You for Attending