

# Navigating Information Governance and eDiscovery

Implementing Processes & Technology to  
Reduce Downstream eDiscovery Cost and Risk

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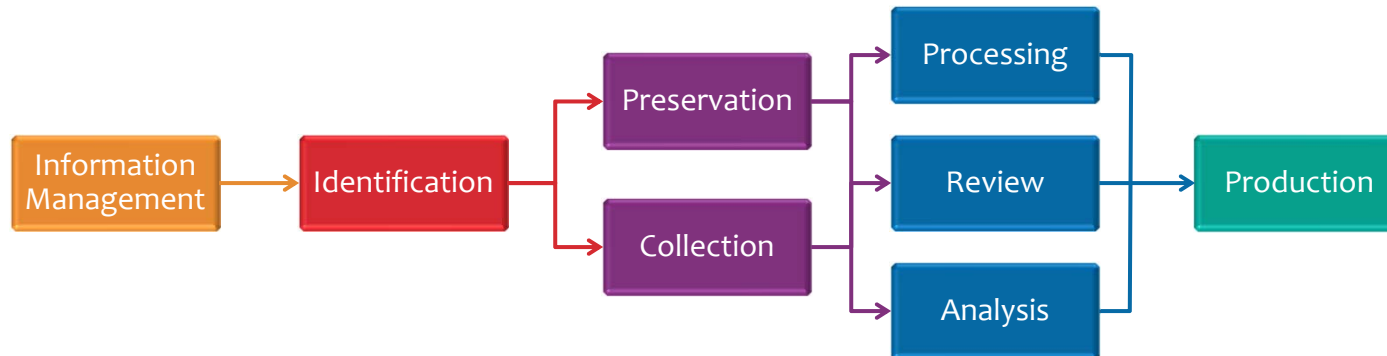
# Agenda

- 1 Overview of eDiscovery Processes & Standards
- 2 How Does Information Governance Impact eDiscovery?
- 3 Proactive Information Governance for Improved eDiscovery
- 4 Timely Topics in eDiscovery
- 5 Q&A

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# Electronic Discovery Reference Model



# Phases of eDiscovery

Information  
Management

Policies and processes that govern the management of data within an organization

Identification

Identify key players, custodians, and locations of data

Preservation

Isolate and protect potentially relevant data to prevent spoliation

Collection

Acquire information defined during the Identification phase

Processing

Prepare, assess, and select data for analysis

Analysis

Examine the data to further understand facts and identify relevant records

Review

Determine which responsive documents to produce and which privileged documents to withhold

Production

Prepare and export data for delivery to third party

# Legal Standards

## Information Management

**ABA Rule 1.1 of Professional Conduct** – lawyer shall provide competent representation to a client

## Identification

**FRCP Rule 37 (e)** – semi-safe harbor where destruction is carried out in good faith and in the routine operation of an electronic system (see *Hynix Semiconductor, Inc. v. Rambus, Inc.* and *Micron Technology v. Rambus*)

## Preservation

**FRCP Rule 37 (f)** – parties must participate in good faith in developing a proposed discovery plan as required by 26(f)(3)

**Common law duty** to preserve responsive data. (see *Stevenson v. Union Pacific R.R.* and *Zubulake IV*)

## Collection

**FRCP Rule 26(f)(3)(C)** – parties must develop a discovery plan addressing subject matter, timeframes, and any ESI issues including production format

# Legal Standards

## Processing

**FRE 901(a)** – evidence must be properly authenticated with supporting chain of custody documentation

## Analysis

**Seventh Circuit Principles Relating to the Discovery of Electronically Stored Information, Principle 1.02** - An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions. (see also *The Sedona Conference Cooperation Proclamation*)

## Review

## Production

**FRCP Rule 26(b)(2)** – ESI that is not reasonably accessible because of undue burden or costs need not be produced but party must identify sources it does not intend to search or from which discovery will not be made

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# Information Governance

Information governance is

- \* the set of multi-disciplinary structures, policies, procedures, processes and controls
- \* implemented to manage information on all media in such a way that it
- \* supports an organization's regulatory, legal, and operational requirements.



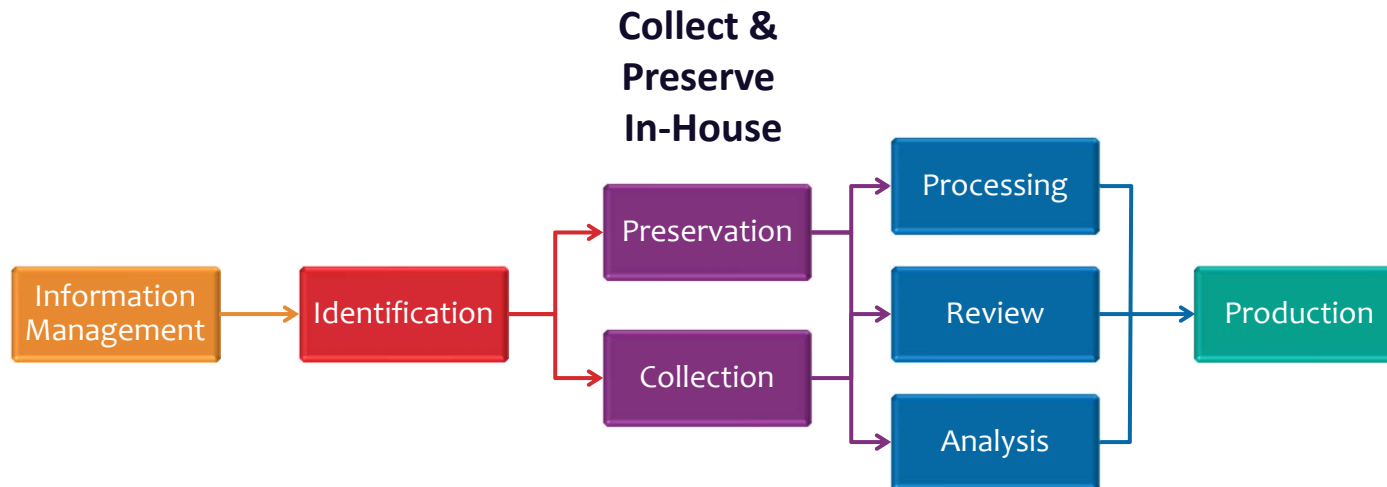
**An effective information governance program should balance risk, value, and efficiency.**

# How Mature is your IG Program?

- \* **Level 1 (Sub-standard):**
  - \* recordkeeping concerns are either not addressed at all, or in a very ad hoc manner
  - \* should be concerned that their programs will not meet legal or regulatory scrutiny
- \* **Level 2 (In Development):**
  - \* developing recognition that recordkeeping has an impact on the organization, and that the organization may benefit from a more defined information governance program
  - \* still vulnerable to legal or regulatory scrutiny since practices are ill-defined and still largely ad hoc in nature.
- \* **Level 3 (Essential):**
  - \* defined policies and procedures, and more specific decisions taken to improve recordkeeping
  - \* may still be missing significant opportunities for streamlining business and controlling costs
- \* **Level 4 (Proactive):**
  - \* information governance issues are integrated into business decisions on a routine basis
  - \* easily meets its legal and regulatory requirements; should begin to consider the business benefits of information availability in transforming their organizations globally
- \* **Level 5 (Transformational):**
  - \* integrated information governance into its overall corporate infrastructure and business processes to such an extent that compliance with the program requirements is routine
  - \* recognized that effective information governance plays a critical role in cost containment, competitive advantage, and client service

ARMA Maturity Model for Information Governance

# Traditional eDiscovery Model



\$ Per GB to process

\$ Per GB per month to host

\$ Per GB/hour to review

# When a Triggering Event Occurs

- What types of records do we have?
  - How long are those records retained?
  - Where are the records stored?
  - How can we preserve these records?
  - What tools can we use to search for responsive records?
  - What tools can we use to eliminate non-responsive records?
  - What tools can we use to identify privileged & sensitive records?
- Document retention policy
  - Document retention schedule
  - Data map
  - Archiving & ECM solutions
  - eDiscovery solutions
  - Data archiving & backup policies
  - Data classification – end user-applied and automated

# Preservation & Collection Challenges

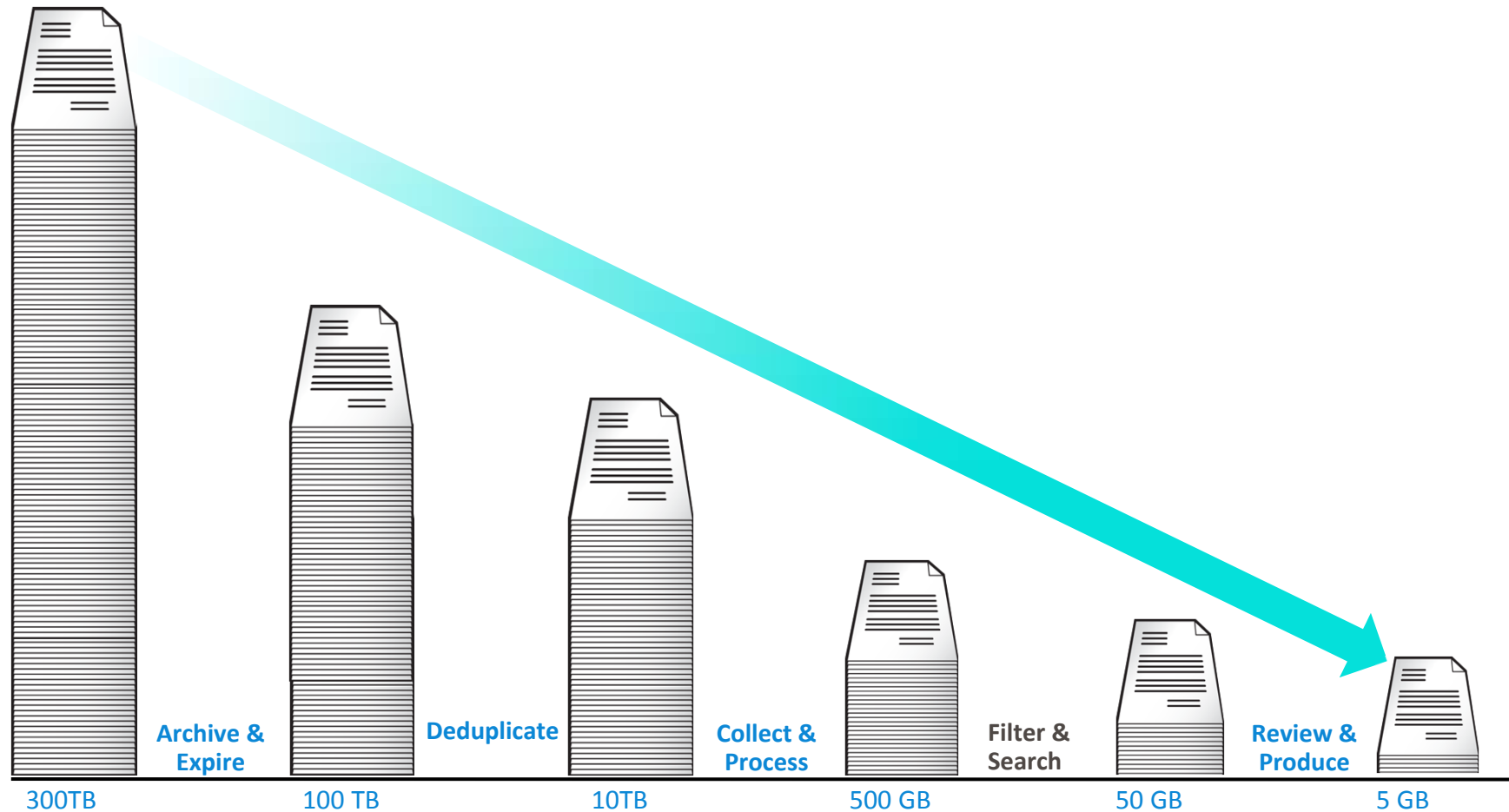


**On Premise / Hosted Systems**



**Cloud Storage and Applications**

# Data Reduction as a Primary Function of eDiscovery



# Consequences of Poor Info Gov Program

- Increased data volumes difficult to manage and sift through
- Inability to prep for Rule 26 Meet and Confer
- Preservation efforts difficult to execute
- Incomplete collection or risk to authentication
- Increased review costs
- Risk of producing privileged or sensitive information

Ultimately resulting In

- Monetary sanctions issued by the court – punitive, attorneys fees
- Negative inference / adverse jury instruction
- Dismissal of case or summary judgment in favor of opposing party

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# Laying the Groundwork

## POLICY & PROCESS

- Document retention policy
- Document retention schedule
- Data map
- Data archiving & backup policies
- Litigation Readiness Plan

## LEVERAGING TECHNOLOGY

- Archiving & ECM solutions
- eDiscovery solutions
- Data classification – end user-applied and automated

# Developing Retention Policies & Schedules

- \* Develop and document consistent policies
- \* Provide employees with initial and follow up training
- \* Develop audit mechanism to determine retention success rate

## Email Retention Policy

### 1. Policy

- 1.1 The purpose of the Email Retention Policy is to guide employees in determining what information sent or received by electronic mail (email) should be retained and for how long. COMPANY employees shall retain all emails and attachments that are considered Business Records in accordance with the COMPANY Email Retention Schedule (see Attachment A).

### 2. Definitions

- 2.1 **Business Records.** An email or an attachment is considered a Business Record if it is made within the regular course of business and records information related to COMPANY's business operations. Examples might include an email that contains information about patient treatment or an employee matter. Other examples might include an attached document containing financial data or legal correspondence.
- 2.2 **Email Retention Schedule.** The Email Retention Schedule shows the folder names and retention periods for most of the Business Records that are either sent or received via email. The retention period determines how long an email and/or attachment will be kept.
- 2.3 **Transitory Records, Working Documents, and Drafts.** Some email messages are NOT considered Business Records and are transitory in nature. Examples of Transitory Records include out of office replies, meeting notices, general announcements, etc. Similarly, Working Documents are messages and attachments that you may refer to frequently in transacting daily business but are not considered Business Records. Draft emails and attachments.

### 3. Procedures

- 3.1 The information covered in this policy applies to all Company Business Records that are either sent or received via email.
- 3.2 COMPANY employees should classify emails and attachments by moving them (drag & drop) to the appropriate retention folder. Because not every type of Business Record type can be explicitly listed in the Email Retention Schedule or because multiple record types may apply to the same email or attachment, employees should contact their Department Supervisor for assistance. If further clarification is required, an employee may contact the Records Management or Legal Department.

# Retention Schedules

Function	Record Type	Record Category Description	Record Type Examples	Paper	Electronic	Files	Email	Application(s)	Recommended Retention Period (Years)
Administration	Committee Records								6 years
Administration	Committee Records	Related to business of various committees	Meeting Agenda	x	x			Word	
Administration	Committee Records		Meeting Meetings	x	x			Word	
Administration	Committee Records		Meeting Attendee List	x	x			Word	
Administration	Departmental Records								6 years
Administration	Departmental Records	General administrative records for each dept	Department meeting minutes	x	x			Word	
Administration	Departmental Records		Staffing patterns		x			Excel	
Administration	Departmental Records		Department budget		x			Word/Excel?	
Administration	Departmental Records		Daily & weekly census for nurse staffing		x		x	Cerner	
Administration	Departmental Records		Patient acuity Reports		x			Evalsys	
Administration	Departmental Records		Performance Service Agreements with outside vendors	x	x		x	Word, Outlook	
Administration	Departmental Records		Appointment books, department logs & registers	x	x			Cerner	
Administration	Departmental Records		Departmental audit reports	x	x			Excel	
Administration	Departmental Records								Indefinite
Administration	Departmental Records	Departmental personnel records	Personnel attendance and time records				x	ActiveStaffer	
Administration	Departmental Records		Personnel records					Word, Outlook	
Administration	Departmental Records		Training (attendance, course outlines, and exams)	x	x			Word	
Administration	Licenses & Permits								Indefinite
Administration	Licenses & Permits	Government licenses & certifications required for general	Business permits						
Administration	Licenses & Permits	hospital business	Alcohol & narcotics permits						
Administration	Licenses & Permits		Department of Public Health Licenses & Certifications						

# Retention Schedules

Function	Record Type	Record Category Description
<b>Administration</b>	<b>Committee Records</b>	
Administration	Committee Records	Related to business of various committees
Administration	Committee Records	
Administration	Committee Records	
<b>Administration</b>	<b>Departmental Records</b>	
Administration	Departmental Records	General administrative records for each dept
Administration	Departmental Records	
Administration	Departmental Records	
Administration	Departmental Records	

# Retention Schedules

Record Type Examples	Paper	Electronic Files	Email	Application(s)	Recommended Retention Period (Years)
					6 years
Meeting Agenda	x	x		Word	
Meeting Meetings	x	x		Word	
Meeting Attendee List	x	x		Word	
					6 years
Department meeting minutes	x	x		Word	
Staffing patterns		x		Excel	
Department budget		x		Word/Excel?	
Daily & weekly census for nurse staffing		x	x	Cerner	
Patient acuity Reports		x		Evalisys	
Performance Service Agreements with outside vendors	x	x	x	Word, Outlook	
Appointment books, department logs & registers	x	x		Cerner	
Departmental audit reports	x	x		Excel	

# Consolidated Retention Categories for Email

Default / Exception	Function	Record Folder	Record Type Examples	Recommended Retention Period (Years)
Default	Administration	Business Emails - Default	Policies & procedures; General departmental records; General correspondence; Working files; Strategy & planning	6 years
Exception		Buildings, Plant & Property	Blueprints & designs; construction documents; deeds & titles; leases	Permanent
Exception		Organizational Records & Contracts	Business contracts; Board Meeting minutes & resolutions; Bylaws; Historical records (awards, photos, etc),	Permanent
Exception		Compliance Records	Incident reports; Patient complaints; HIPAA records, CADHS records, JCAHO records	Permanent
Exception		Facilities - Purchasing & Receiving	Purchase requisitions; Requests for proposals, etc	6 years
Default	Finance	Business Emails - Default	General correspondence; Regular financial statements; Budgets; Working files;	7 years
Exception		Tax & Permanent Financial Records	Annual financial statements; Financial statements to the IRS or states; OSHPAD Disclosures;	Permanent
Exception		Payor Relations	Claim correspondence with payors & medical groups; Payor agreements; Monthly reports	10 years
Default	Human Resources	Business Emails - Default	General correspondence; Internal employee announcements; Training Materials;	6 years
Exception		Personnel Matters	Manager records; Evaluations; Termination files; Disciplinary issues	Permanent
Exception		Occupational Health & Safety	L&I claims; Accident logs and reports; OSHA Reports & Statistics, Workers comp matters; HazMat reports;	Permanent
Default	Information Technology	Business Emails - Default	General correspondence; Policies & procedures; Support Requests	6 years

# Consolidated Retention Categories for Email

Default / Exception	Function	Record Folder
Default	Administration	Business Emails - Default
Exception		Buildings, Plant & Property
Exception		Organizational Records & Contracts
Exception		Compliance Records
Exception		Facilities - Purchasing & Receiving

# Consolidated Retention Categories for Email

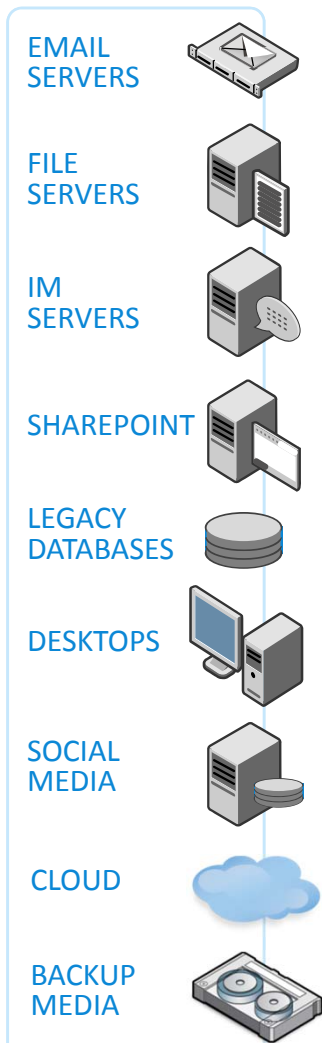
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Purchase requisitions; Requests for proposals, etc	6 years



# Data Mapping – Information to Include

- Application name
- Application description
- Access profile
- Data formats
- Onsite/Hosted
- Server names
- Record Types & Examples
- Backup method & retention policy
- Archiving method & retention policy
- Business Custodian(s)
- IT Custodian(s)
- Scope – number of users, number of files/servers, volume of data stored
- Date range of data stored
- Application Status – vendor, current status, predecessor system, replacement system
- Reasonably accessible / non-accessible & why
- Hold procedure

# Intelligent Information Governance



- Leverage existing infrastructure using **federated search tools**
- **Common classification** for litigation, compliance and business
- Information **security complements retention and discovery**
- **Integrated products** help implement controls, protect information and enforce policies
- A **modular approach** enables organizations to respond to today's critical business needs

# Gartner Magic Quadrant

## Archiving & eDiscovery



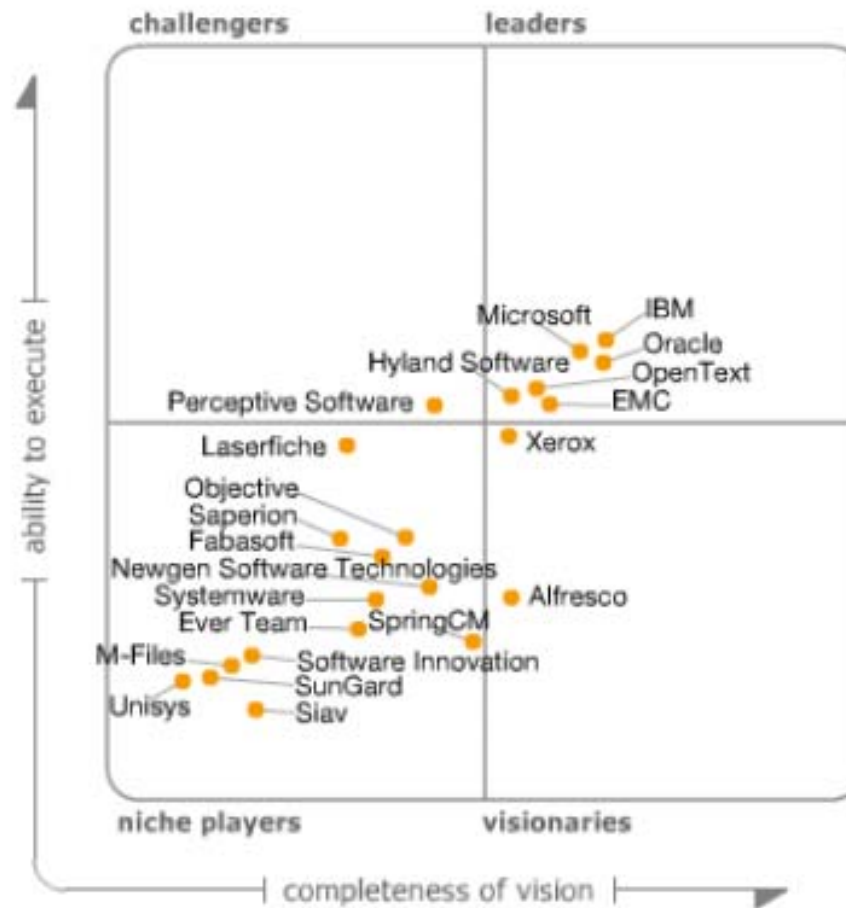
Source: Gartner, Inc., Magic Quadrant for Enterprise Information Archiving, Dec 2012



Source: Gartner, Inc., Magic Quadrant for eDiscovery Software, May 2012

# Gartner Magic Quadrant

## Enterprise Content Management



Source: Gartner, Inc., Magic Quadrant for Enterprise Content Management, Nov 2012

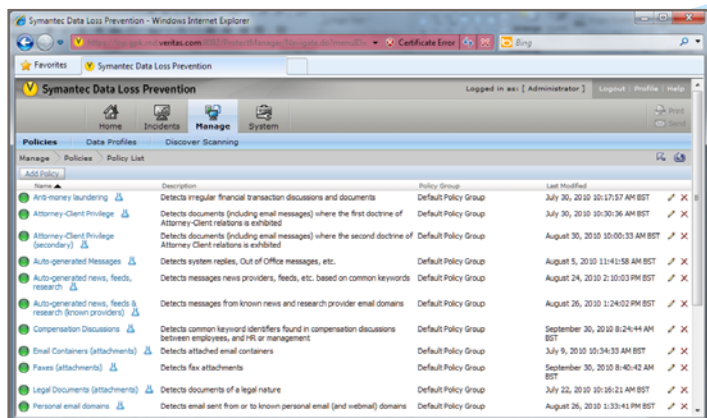
# Data Classification

## Policy Driven Classification

- Archive decision, retention, tags
- Reduces the cost of reactive Discovery
- Prioritizes items for supervisory review

## What does it do?

- Analyzes content and metadata during archiving
- Decides on an archiving and retention strategy
- Assigns searchable classification tags



**General**

Name: Attorney-Client Privilege

Description: Detects documents (including email messages) where the first doctrine of

Policy Group: Default Policy Group

Status: Active [ suspend ]

Policy Actions: ☐ Enable Classification Test Mode  
Maximum for Classification Test Mode Events: 100

Last Modified: 9/14/10 2:59 PM by Administrator

**Detection** Groups Response

Add Rule Add Exception

Rules:

- **Attorney-Client language tags (Keyword Match):** Match "capital" + Keyword Proximity Match.  
Severity: High. Count all matches. Look in envelope, body, attachments. Case insensitive. Match on whole words only.

Exceptions:

This policy contains no exceptions.

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# Social Media has Fundamentally Changed Communication

- \* 2/3 of the global internet population visits social media networks  
Source: Nielsen, Global Faces & Networked Faces, 2009
- \* 86% of Financial Service professionals use social media - up from 73% the previous year  
Source: American Century Investments 2011

- \* Social network users surpassed email users in July 2009  
Source: Morgan Stanley's "Slow death of email"
- \* By 2014 20% of companies will use Social Media as the primary vehicle for communication replacing email  
Source: Gartner



500 Million active users



200 Million active users



490 Million users



5 Billion Photos



100 Million active users



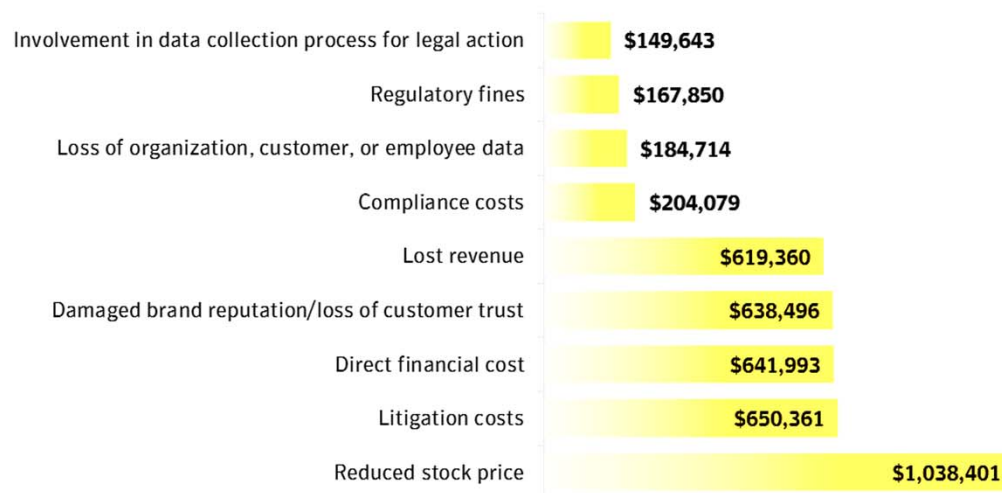
10 Million Users



# What Does a Social Media “Incident” Cost?

- Cost of social media incidents (past 12 months): \$4,292,897
- Biggest costs:
  - Reduced stock price = \$1,038,401
  - **Litigation costs = \$650,361**
  - Direct financial cost = \$641,993
  - Damaged brand/trust = \$638,496
  - Lost revenue = \$619,360

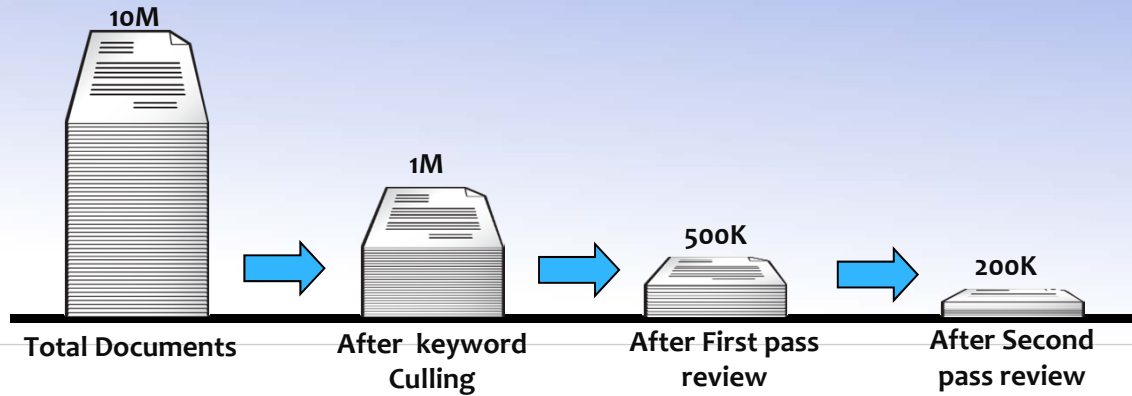
## Average Costs Over the Last Year





# Predictive Coding (CAR, TAR)

## LINEAR REVIEW WORKFLOW



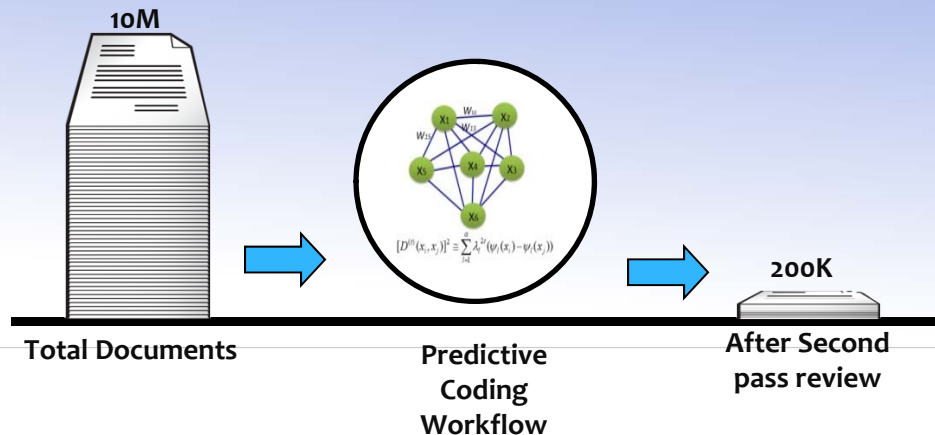
### TYPICAL COST

Total \$1.5M

### TYPICAL TIME INVESTMENT

Total 9,450 hrs.

## PREDICTIVE CODING WORKFLOW



### EXPECTED COST

Total \$550K

### EXPECTED TIME INVESTMENT

Total = 550 hrs.

# Predictive Coding Case Law

## **Monique Da Silva Moore, et al., v. Publicis Groupe SA, No. 11 Civ. 1279 ALC (AJP) (S.D.N.Y. 2011)**

- Issue in question: could Defendant use predictive coding technology to evaluate 3M emails gathered from custodians by Defendant. District judge referred the case to Magistrate Judge Peck to rule on ediscovery issue.
- Defendant proposed detailed methodology that included disclosures to Plaintiff and opportunities for feedback
- Plaintiffs agreed to accept the use of predictive coding in theory but claimed Defendant's methodology lacked adequate validation mechanisms and transparency
- Court ruled in favor of Defendant on the basis that Plaintiff could challenge the method if and when actual issues arose.
- Plaintiff moved to recuse Judge Peck; District Court upheld Judge Peck's decision not to recuse himself (Nov. 7, 2012)

# 2012 Case Law Highlights- Preservation

## [Brigham Young University v. Pfizer, 282 F.R.D. 566 \(D. Utah 2012\)](#)

- Plaintiff university had pressed for sanctions as a result of Pfizer's destruction of key documents pursuant to its information retention policies.
- The court rejected that argument because such a position failed to appreciate the basic workings of a valid corporate retention schedule. The court reasoned, "evidence may simply be discarded as a result of good faith business procedures."
- Takeaway: importance of implementing a defensible deletion strategy to rid themselves of data stockpiles.

## [Apple, Inc. v. Samsung Electronics Co., Ltd, — F. Supp. 2d. — \(N.D. Cal. 2012\)](#)

- Court first issued an adverse inference instruction against Samsung to address spoliation charges brought by Apple. In particular, the court faulted Samsung for failing to circulate a comprehensive litigation hold instruction when it first anticipated litigation
- Ironically, however, Apple was subsequently sanctioned for failing to issue a proper hold notice. Just like Samsung, Apple failed to distribute a hold until several months after litigation was reasonably foreseeable.
- Takeaway: importance of issuing timely litigation hold notices – key players, key data sources

## 2012 Case Law Highlights – Proportionality & Cooperation

### [Pippins v. KPMG LLP, 279 F.R.D. 245 \(S.D.N.Y. 2012\)](#)

- The court ordered the defendant accounting firm (KPMG) to preserve thousands of employee hard drives but KPMG argued cost was too high in proportion to the value of the ESI stored on the hard drives. KPMG wished, instead, to use a sample set of the hard drives.
- The court rejected Defendant's argument around proportionality because they refused to let the plaintiffs or the court analyze the data on the sample hard drives and, thus, the court was left to speculate about the nature of the ESI on the drives and reasoned the data on the drives was at the heart of Plaintiffs claims.
- Court observed that Defendant may have very well obtained the relief it sought had it participated in good faith negotiations regarding preservation with Plaintiffs.
- Takeaway: Parties seeking to leverage proportionality arguments must engage in reasonable, cooperative discovery conduct.

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Title

Questions?

# About Globanet



- Portfolio of products and services designed for effectively managing large volumes of data
- Premier provider of onsite archiving and ediscovery solutions – technology and human resources
- Consulting team comprised of engineers and attorneys
- First Symantec Partner authorized to deliver professional services for Clearwell
- Experienced development team able to build custom solutions
- In business since 1996, headquartered in LA with offices in NYC and Orlando

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