

Project Records Retention in the Digital Age

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GBA Practice Alert 37

“Project Records Retention”

October 2007

FOR MEMBERS ONLY

NUMBER 37

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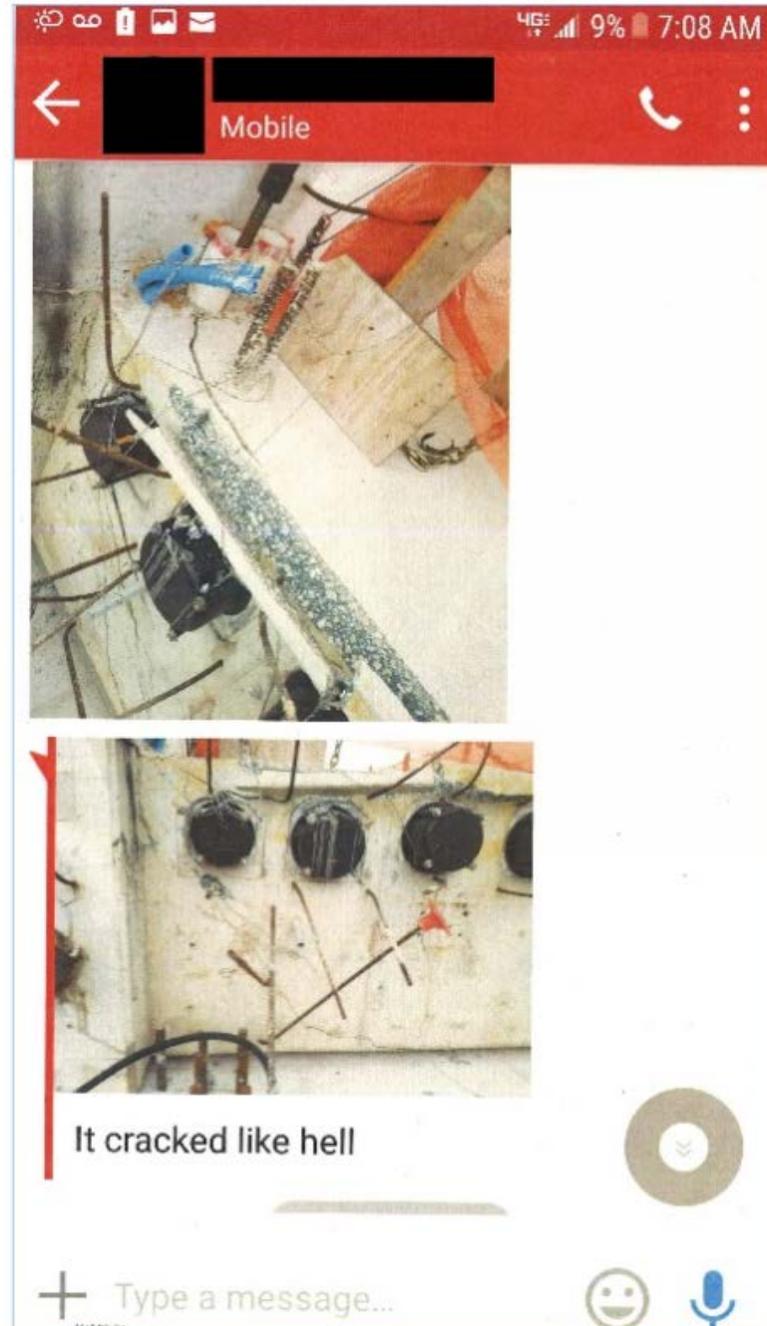
Accurate records are critically

Not having the information y

This is much more difficult than you think!

- Text messages
- Social media
- Voice mail
- Instant messaging
- Employees' personal smart phones
- Deleted files are still accessible!

What about your employees' personal social media?



The ominous message...

- **Derek Bowman: Monday 7/15/2019 3:46 PM:**
hey steve, can i get you on a call this afternoon
regarding potential litigation



Where is the project file?

- Scattered on the servers of six different offices.
- In the emails and hard drives of over 60 employees
- Hard copy files: a few files in two offices
- Two of the six offices involved 5 years ago are now closed: where did those files go?

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eDiscovery Update: Common Pitfalls & Practical Tips

By: Alison Grounds

October 2019

Data Explosion



Mueller v. Manafort: Is It about Gates — or a Mountain of Documents?

By ANDREW C. MCCARTHY | August 16, 2018 6:30 AM



The prosecution wants the jury to focus on Manafort's document trail.

The New York Times

Wells Fargo Accidentally Releases Trove of Data on Wealthy Clients

Texts Between Christie Senior Staff Show The Governor Lied About Bridgegate

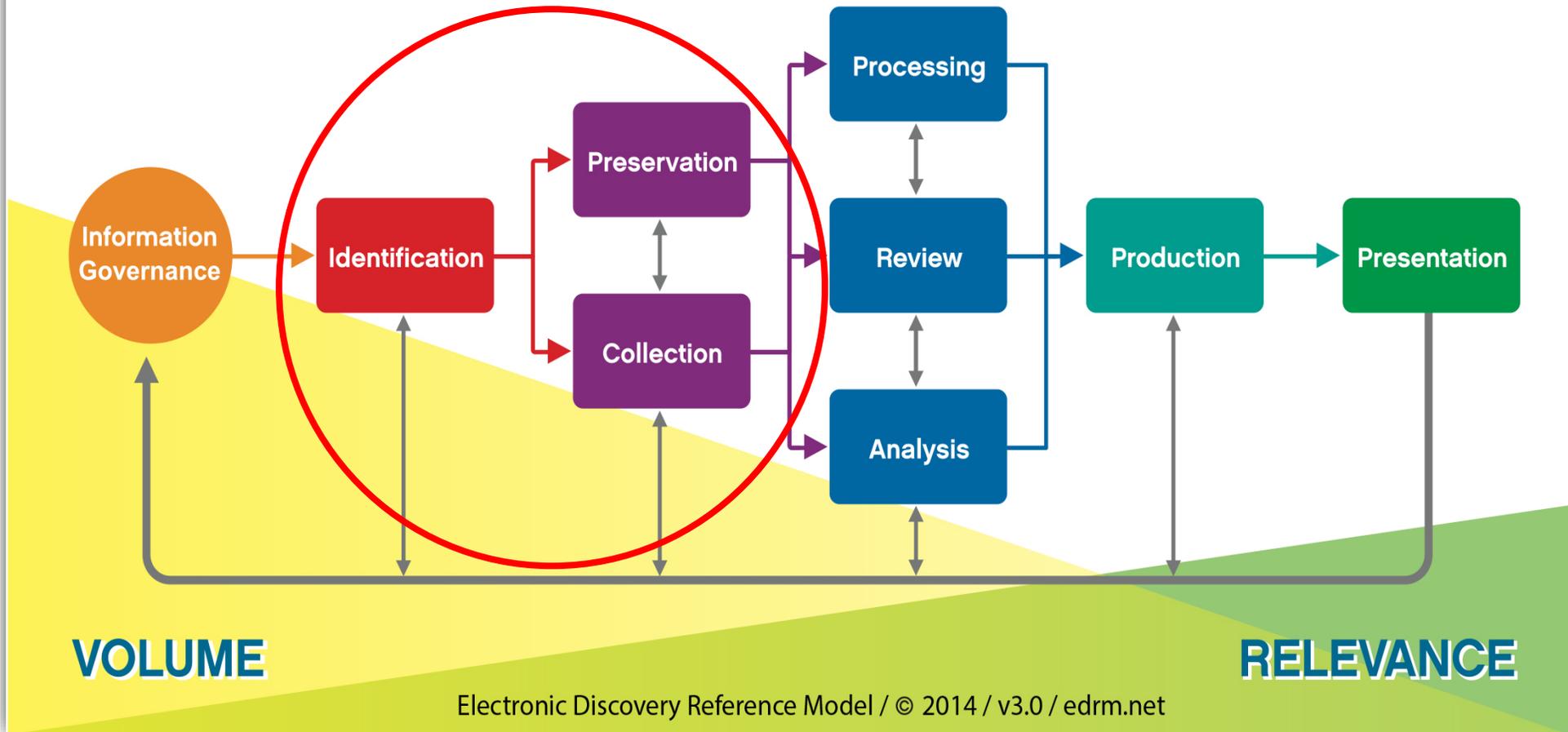
And they alluded to emails that might prove it.

ADAM PECK | AUG 10, 2016, 4:54 PM

No, Hillary Clinton's Emails Will Never Go Away

Smash it, shred it, wipe it: the Tom Brady guide to destroying text messages

Electronic Discovery Reference Model

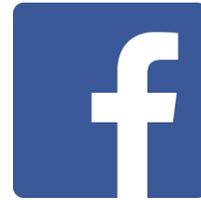
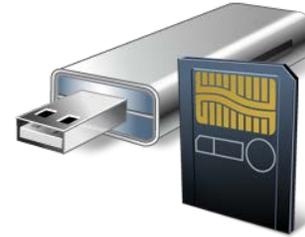


Electronic Discovery Reference Model / © 2014 / v3.0 / edrm.net



IDENTIFICATION BASICS
FIND. DATA.

Identifying Sources & Types of “ESI”: Electronically Stored Information



Real World Examples of eDiscovery Issues

- Former project manager's "missing" emails
- Baggage fees, forensics, and sanctions
- Construction arbitration and discovery battles involving multiple parties



Judicial Insights



Counsel admonished for...

- failing to uncover...basic information about an electronically stored database of information (salesforce.com);
- taking no steps to preserve integrity of data in database;
- failing to learn of the existence of certain documents until a year after they were requested; and
- making false and misleading statements to the court and opposing counsel and as a result of these failures which caused increased time and costs for discovery.

-- *Brown v. Tellermate*

Avoiding Identification Errors

- Involve appropriate technical people & data owners
- Educate counsel
- Understand how data is created, stored, and used
- Ask. Ask Again. Confirm.
- Consider case specific sources
- Document the process for defensibility





PRESERVATION PRINCIPLES LEGAL HOLDS

When is Preservation Required?

The duty to preserve relevant information is triggered when litigation is “reasonably anticipated.”

Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 612-613 n. 7 (S.D. Tex. 2010).

“Reasonable anticipation of litigation” = when a party knows there is a credible threat that it will become involved in litigation.

The duty to preserve evidence arises “when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”

Zubulake IV, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003)

What is a “Legal Hold”?

- Communication + Preservation Plan
- Ensuring that potentially relevant ESI and other documents are not deleted or altered
- Should involve legal hold, custodian involvement, and back-end measures
- Requires understanding of systems as well as substantive facts of case



Potential Legal Hold Triggers

- Notice of litigation
- Contemplation of bringing litigation (hiring counsel?)
- Government investigation
- Administrative proceeding (EEOC?)
- Subpoena for documents
- Preservation demand
- Demand letter – threat of litigation
- Similar lawsuits



“Reasonable Steps”?



Best Practices For Legal Holds

- Issue and track acceptances of written notice
- Involve outside counsel
- Involve IT staff
- Include explicit language that preexisting destruction policies (including the automatic deletion of files and e-mails) must be stopped immediately
- Provide detailed description of what is must be preserved – categories and data sources
- Give instructions for how to avoid deletion or modification of ESI that is tailored to your systems
- Send reminders & track process



Common Preservation Pitfalls

- Assuming “everything is saved”
- Failing to notify IT
- Missing sources or custodians
- Failing to account for case-specific needs of hold (former employees, unique data sets, etc.)
- Inadvertently altering metadata – opening and viewing ESI that is not write-protected
- Relying on individuals to take affirmative action
- Failing to revise/update as case proceeds
- The hold is just one piece of a preservation plan

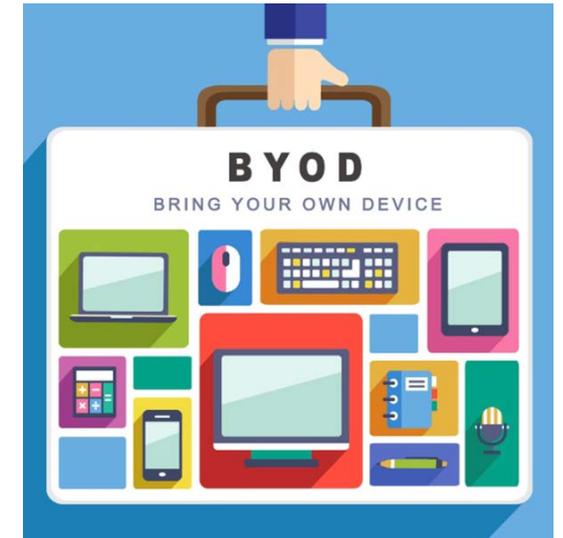




COLLECTION CONCERNS METADATA MATTERS

BYOD Key Discovery Principles (Sedona WG1)

- Employee-owned devices that contain unique, relevant ESI should be considered sources for discovery.
- An organization's BYOD policy and practices should minimize the storage of – and facilitate the preservation and collection of – unique, relevant ESI from BYOD devices.
- Employee-owned devices that do not contain unique, relevant ESI need not be considered sources for discovery.



Questions



When will you eMerge?

consult@tsemmerge.com