



## An Overview of Electronic Discovery in Employment Law Understanding and Planning for eDiscovery

# Understanding and Planning for eDiscovery

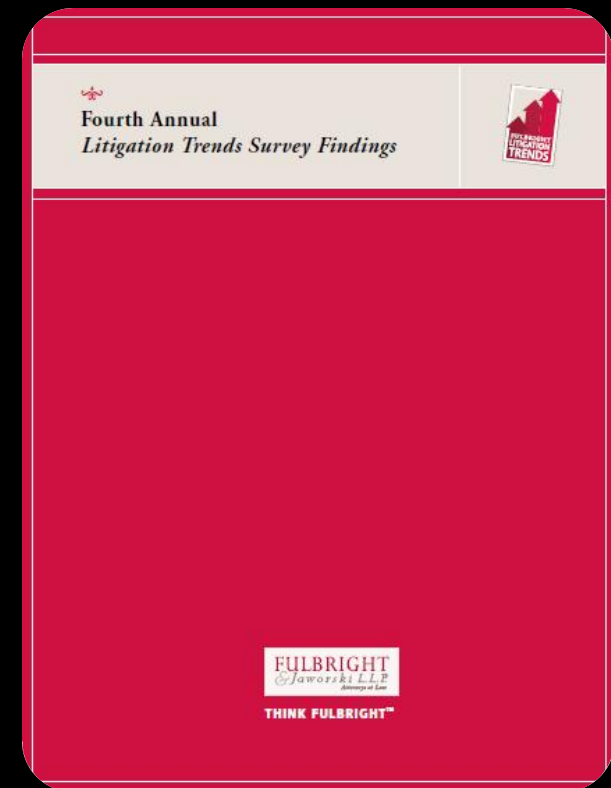
## Considering Electronic Discovery in Employment Law

- Why consider eDiscovery in employment law?  
*Elements and Examples*
- How can you proactively prepare for eDiscovery?  
*Procedures and Practices*
- Why consider eDiscovery as opposed to paper discovery?  
*Resources and Risks*

# Why consider eDiscovery in employment law?

When asked the three most numerous types of matters pending against their companies in the past year, the respondents' answers generally coincided with their concerns about the future.

In the U.S. it was labor/employment, contracts, and personal injury. \*



\*Fulbright & Jaworski: Fourth Annual Litigation Trends Survey - <http://www.fulbright.com/litigationfindings>

# Why consider eDiscovery in employment law?

## Elements and Examples of Employment Law Records\*

- Employee Screening and Selection

*Recruitment Documents, Resumes/Applications, Interview Records, Pre-Employment Testing, Verification/Reference Checks*

- On-Boarding

*Government Forms, Benefit Forms, Emergency Notification Forms*

- General Employment

*Wage/Salary Info, Wage Garnishments, Appraisals, Promotions, Transfers, Disciplinary Records, Job Related Medical Records*

- Separation Records

*Exit Interviews, Separation Checklists, COBRA Notices, Correspondence, Reference Statements*

- Claims and Litigation

*Unemployment, Worker's Compensation, State or Federal EEO, OSHA, Affirmative Action, Records for Litigation*

\* Shifting HR Resources from Records Management to Strategic Initiatives - <http://www.aiim.org/pdfdocuments/37069.pdf>

# How can you proactively prepare for eDiscovery?

## Procedures

### Understand Client Retention, Disposal, and Litigation Hold Procedures

#### Audit

- Does the client have a formal document retention policy?
- Does the client have a formal document disposal policy?
- Does the client have a formal litigation hold policy?

#### Evaluate

- Is the document retention policy compliant with employment policy (internal) and law (external)?
- Is the document disposal policy compliant with employment policy (internal) and law (external)?
- Is the litigation hold policy compliant with legal requirements?

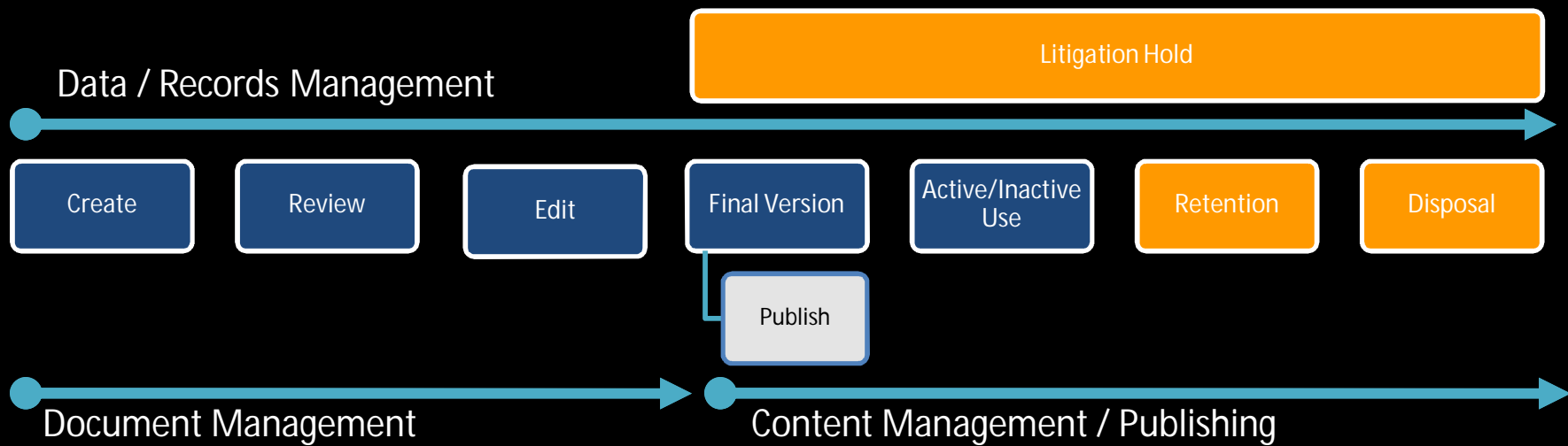
#### Update

- Do procedures need to be written?
- Do procedures need to be adjusted?
- Do the procedures need to be tested?

# How can you proactively prepare for eDiscovery?

## Procedures

Understand Client Data/Records Management Procedures



# How can you proactively prepare for eDiscovery?

## Practices

### Understand Litigation Hold Trigger Point

Zubalake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (Zubulake IV)

“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”

Zubulake IV, 220 F.R.D. at 217 - a party need not “preserve every shred of paper, every e-mail or electronic document, and every backup tape” before or during actual or threatened litigation.

Trevino, supra, 969 S.W.2d at 957 – a party must preserve “what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, [or] is the subject of pending discovery sanction.”

# How can you proactively prepare for eDiscovery?

## Practices

### Proactive Preparation Tasks - Step

1

- Document Data/Time/Reason for Trigger Event
- Temporarily Suspend Document Destruction Policies
- Meet with Litigation Hold Planning Team\* to Establish Litigation Hold Strategy
- Review Document Retention Plan and Procedures
- Review Litigation Hold Procedures

\* Minimum of Matter Lead (Legal), eDiscovery Team Lead, IT Team Lead, Records Management Team Lead.



# How can you proactively prepare for eDiscovery?

## Practices

### Proactive Preparation Tasks - Step

2

- Identify Potentially Relevant Custodians (By Name and By Role)
- Identify Legal And Technology Leads for Specific Litigation Hold Effort
- Prepare and Disseminate Litigation Hold Letters to Relevant Custodians\*
- Adjust/Amend Document Destruction Policies as Appropriate
- Follow Up with Potentially Relevant Custodians (Name/Role) to Confirm Understanding of Hold Letter

\* Send Copy To Opposing Counsel if Opposing Counsel Activated "Trigger".

# How can you proactively prepare for eDiscovery?

## Practices

### Proactive Preparation Tasks - Step

3

- Determine where the data to be preserved is located.
- Determine the size of the accessible volume of data to be preserved.
- Determine what resources may be needed to collect accessible data.
- Determine the need for access to inaccessible data.
- Estimate the potential resources that may be needed to collect inaccessible data.

# How can you proactively prepare for eDiscovery?

## Practices

### Proactive Preparation Tasks - Step

4a

Determine whether to implement a paper or digital approach to document discovery.

#### **Hard Copy Approach**

*Application of a traditional hard copy methodology (digital to print) generates tremendous effort /costs.*

#### **“Imaged” Hard Copy Approach**

*A hard copy methodology is forced onto the electronic review environment.*

#### **e-Paper Approach**

*The “first generation” e-discovery process.*

#### **Document Analytic Approach**

*Keeps docs native to limit conversion costs and applies concept advanced search technologies to expedite the review.*

<sup>1</sup> Document Analytics Allow Attorneys to be Attorneys, Chris Paskach and Vince Walden, *Digital Discovery & E-Evidence* (2005).

# How can you proactively prepare for eDiscovery?

## Practices

### Proactive Preparation Tasks - Step

4b

Determine follow-on steps based on:

- Step 1-4a (Effectiveness, Exposure, Economics)
- Actual Status of Real or Perceived Need to Implement a Litigation Hold
- Recommendations of Legal Counsel and Litigation Hold Planning Team\*

\* Minimum of Matter Lead (Legal), eDiscovery Team Lead, IT Team Lead, Records Management Team Lead.

# Why consider eDiscovery as opposed to paper discovery?

## Resources and Risks

### Advantages of Digital vs. Paper Discovery

- Collection
- Analytics
- Processing
- Review
- Production
- Archiving

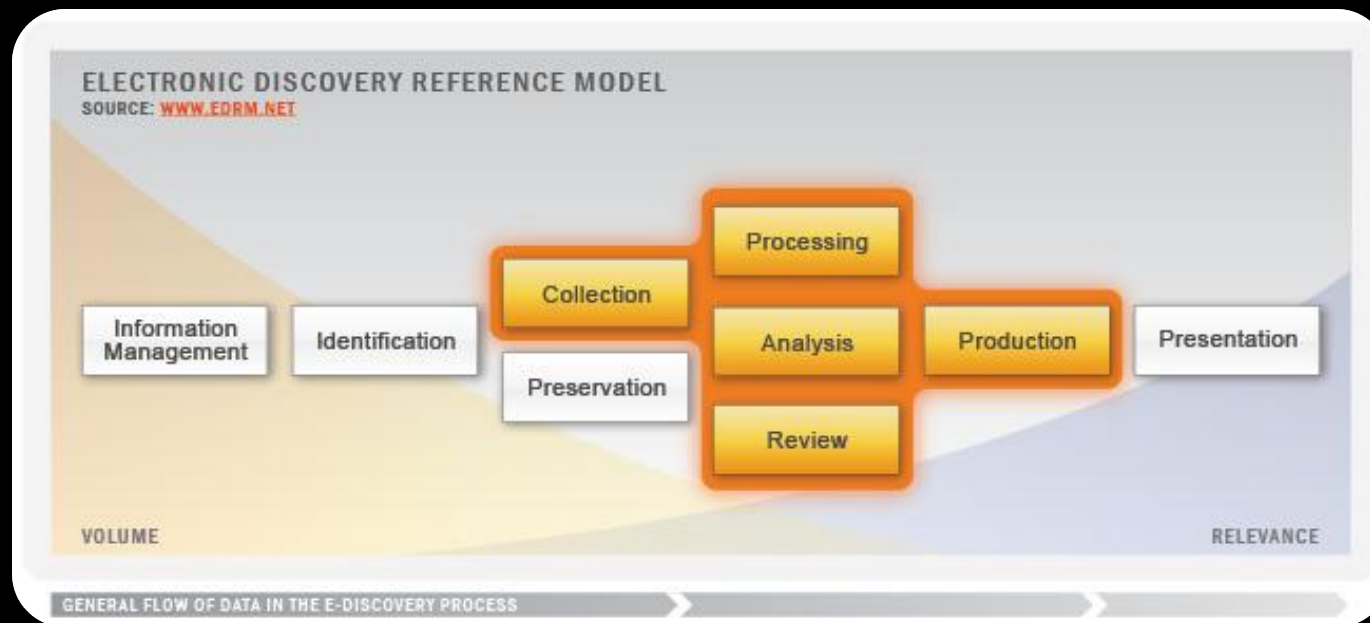


↑ Speed | ↓ Cost | ↓ Risk

# Why consider eDiscovery as opposed to paper discovery?

## Resources and Risks

The Electronic Discovery Reference Model (<http://www.edrm.net>)



He who knows when he can fight and  
when he cannot, will be victorious..

*Sun Tzu*

Good for you.  
Great for your clients.



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