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# Managing Costs in Responding to Government Investigations

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# Overview

1. Investigations Response: Key Considerations
2. Costs and Burdens
3. Electronic Discovery Planning
4. Conferring with the Government
5. Privilege Review and Production
6. Handling the Prospect of Parallel Proceedings and Subsequent Civil Litigation



# Investigations Response: Key Considerations

# Enforcement Environment

- Continued increase in the number of government investigations and enforcement actions, and in the size of financial settlements
- Increased funding for fraud investigations
- Enhanced penalties for violations
- Increased focus within, and coordination among, federal agencies
- Greater involvement by, and collaboration among, the states

# Critical First Steps

- Quickly discern the nature of the allegations
- Identify relevant employees and sources of documents and data
- Document preservation and retention
- Confer with the government
  - Address scope of subpoena and related issues
  - Obtain information about focus of the investigation
  - Set the proper tone
  - Obtain control of the process
- Develop effective document collection, review, and production strategy
  - Including identifying an individual within the company, and an individual outside the company, to oversee document management

# Overarching Principles

- Not a run of the mill discovery request
- Perceptions matter
- Conducting a thorough and objective investigation to determine what happened, who was involved, and why it occurred
  - Demonstrates cooperation and that company is taking the allegations seriously
  - Bolsters company's (and counsel's) credibility
  - Is critical to developing successful defenses
- Privilege issues often intertwined with underlying facts
- Spoliation and obstruction of justice

“It is crucial to understand that deliberately ignoring preservation requirements could result in prosecution for obstruction of justice”

- United States Attorneys' Bulletin, May 2008



# Costs and Burdens

# Costs and Burdens

## Verizon/MCI Merger

- Dept. of Justice 2<sup>nd</sup> Request
- Documents collected from 83 employees in 10 states
- 1.3 Terabytes of data
- 2.4 million documents
- Original review team consisted of 150 attorneys
- Production was 150,000 documents (0.078%)
- Initial privilege review cost: \$7,775,998
- Relevance review cost: \$5,822,874
- Total cost: \$13,598,873

# Costs and Burdens

Costs impact budgets and earnings:

- Allergan, Inc. Q2 2009 earnings statement reported non-GAAP adjustment to operating costs and expenses.
- “External costs of approximately \$7.4 million associated with responding to the U.S. Department of Justice (DOJ) subpoena announced in a company press release on March 3, 2008”

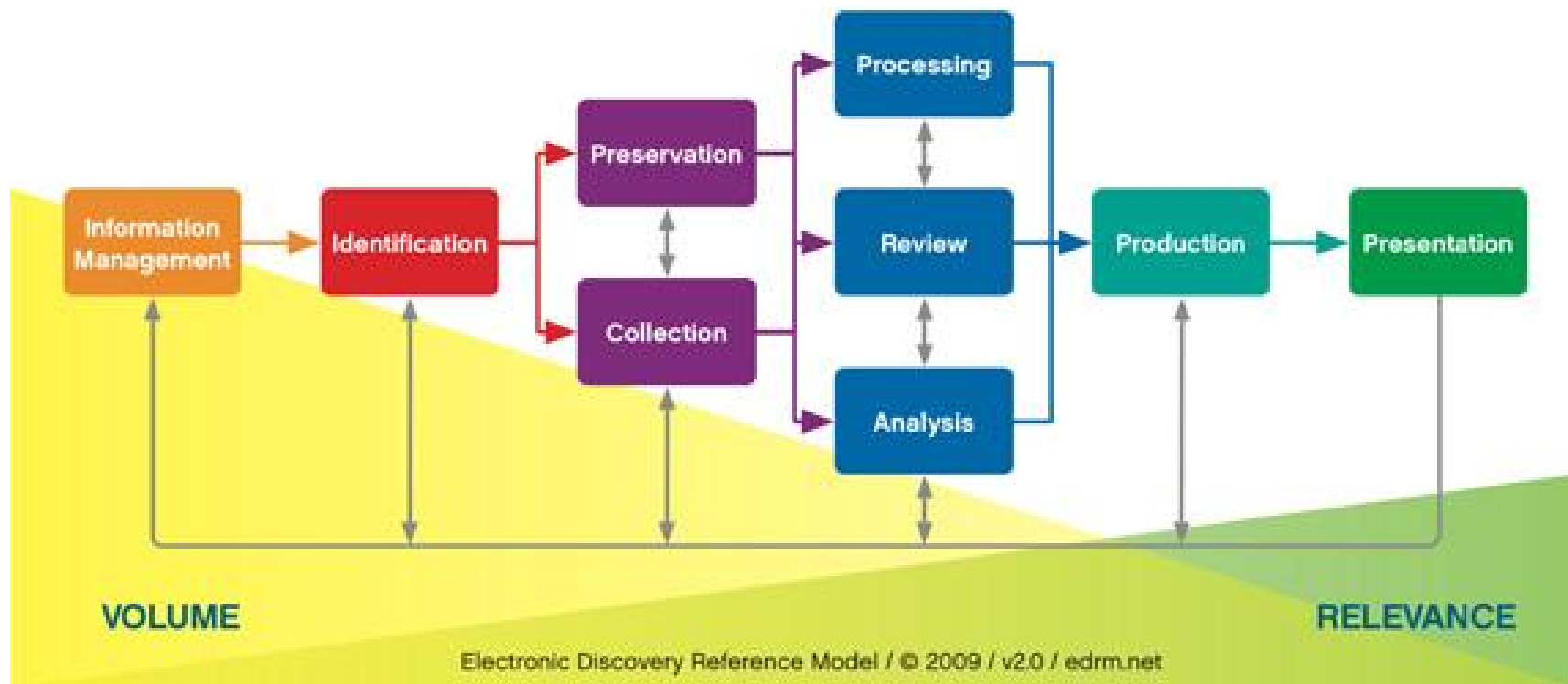




# E-Discovery Planning

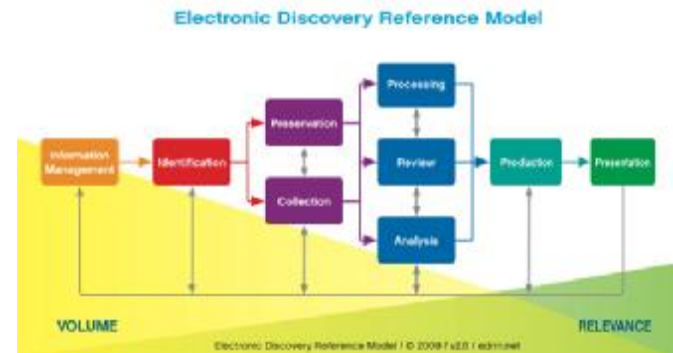
# Electronic Discovery Planning

## Electronic Discovery Reference Model



# eDiscovery Planning & Assessing Your Capabilities

- Document a plan and follow
- Assign roles and responsibilities
  - #1 critical skill - Project Management!
  - Legal – General Counsel
  - Information Technology
  - Records Management
  - Human Resources
  - Outside law firm
  - Vendors
  - Electronic Data Review
- Establish cost estimates and monitor
  - Extremely difficult!



# Collecting and Processing Enormous Amounts of Electronic Data

- Conduct a data inventory
- Determine collection methodology
  - Forensic vs. Targeted
- Develop a collection plan and schedule
- How much data can be filtered or eliminated?
- Develop search terms
- Who will be filtering and culling?
- Leverage your outside counsel

# Preparing Data For Electronic Review

- Engage a vendor for processing of collected/filtered data
  - Leverage outside counsel's preferred EDD processing relationships
- Communicate subpoena requirements for metadata
- Determine type of electronic review
  - Native
  - Image
- Build enough time into your plan to allow for processing



# Conferring with the Government

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# Negotiations Regarding Production Scope and Formatting

- Can certain types of data be left off the collection list?
- Can the time period be narrowed?
- Can the custodian list be narrowed?
- How to handle production of redacted data?
- How to handle privilege data?

# Conferring with the Government

- No criminal equivalent of Fed. R. Civ. P. 26(f) meet-and-confer process.
- However, still critical to engage government in dialogue regarding key preservation and production issues.
- Goals:
  - Manage scope
  - Understand expectations/deadlines
  - Gain insight into government's case/evidence

# Conferring with the Government

Target topics for discussion:

1. Scope of custodians for preservation and production (this may result in a “tiered” custodian strategy)
2. Scope of applicable business units/entities
3. Geographic scope
  - DOJ Antitrust Division typically requires that foreign documents are preserved – but not necessarily produced
  - Note foreign privacy and data protection laws (particularly within European countries)

# Conferring with the Government

Target topics for discussion (*cont.*):

4. Date range limitations
5. Use of search terms/analytical technologies
6. Treatment of particular types of ESI
  - Voicemail; call logs
  - Mobile devices (text messages, etc.)
  - Complex databases
7. Form of production
  - Note agency/department-specific standards



# Privilege Review and Production

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# Privilege Review and FRE 502

- Overview of FRE 502
  - 502 (b): Inadvertent production of privileged documents
  - 502(e): Clawback provisions
  - 502(d): Court orders applying non-waiver limitations to parallel proceedings
    - Difficulties in obtaining court orders in the criminal context

# Privilege Review

- Assemble the review team
  - Will internal counsel participate in review?
  - Contract attorneys (off-shore vs. on-shore)
- Develop and communicate the review protocol
- Set review expectations in terms of documents per hour
- Monitor reviewer progress daily
- Evaluate using a hosted review application
- Understand your outside counsel's electronic review capabilities:
  - Technology & Resources
  - Reporting
  - Technical support

# Production

- Follow form of production requirements identified by the agency
  - Single page TIFF or PDF
  - All metadata (data about the data)
  - Load file and OCR text
- Ensure vendor and/or outside counsel understands production requirements
- Determine what will be produced
- Follow production schedule
  - Typically “rolling”
- Give yourself enough time for “gotchas”



# Handling the Prospect of Parallel Proceedings and Subsequent Civil Litigation

# The Risks of Parallel Proceedings

- Different government agencies may investigate the same allegations
  - May involve parallel civil and criminal proceedings
  - May be simultaneous or sequential
  - May need to seek a stay of the civil proceedings or a protective order precluding the disclosure of civil discovery to criminal investigators or the grand jury

# The Risks and Potential Costs of Subsequent Civil Litigation

- Government investigations often result in substantial follow-on litigation, including class action litigation and state attorney general actions
- Documents produced to the government during the course of an investigation may be discovered in subsequent civil litigation
  - Beware of providing privileged information to the government
- Follow-on litigation may seek a broader range of documents than what was produced in the government investigation

# Minimizing Discovery Costs in Follow-On Litigation

- The subject matter of the subsequent civil litigation is often the same as, or closely related to, the subject of the government investigation
- Significant cost savings can be achieved by reproducing the documents collected in the government investigation, with appropriate modifications, in subsequent civil proceedings
- Should take care during the government investigation to
  - document all sources from whom information was collected and produced
  - document all search terms, date restrictions, and other collection/production criteria, and any variations from custodian to custodian
  - use document review and management systems that facilitate cost-effective storage and reproduction

# CLE Information

**Attendance CLE Verification CODE:**

**NPCLE 2.18.10**

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# Questions?



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