Agenda & Topics

- Discovery vs. E-Discovery

- What do I need to know about ESI?

- How important is ESI?

- Breaking down EDRM.

- How do we successfully approach E-Discovery?

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Discovery vs. E-Discovery

- Discovery is "the act or process of finding or learning something that was previously unknown… The primary discovery devices are interrogatories, depositions, request for admissions and requests for production." (Black's Law Dictionary)

- E-discovery is "the process of identifying and producing relevant, electronically stored information (ESI) in litigation." (NALA)

What do I need to know about ESI?

- ESI is "any type of information that is created, used, and stored in digital form and accessible by digital means."

- Sources of ESI include email, computer hard drives, server networks, cloud-based storage, team collaboration tools (Slack, Microsoft Teams), text messages, voice and meeting recordings (Zoom, Google Meet), social media accounts, and in some circumstances partial, deleted, fragmented or corrupted files.

Characteristic	ESI	Paper
Greater volume	✓	
More duplicative	✓	
More permanent	✓	
Easily changeable	✓	
Contains metadata	✓	
More frequently usable in native form		✓
Efficient search capability	✓	

- Native file – the true, original document, i.e. Word, Excel or Outlook file as opposed to a printed or PDF copy of the original document. **A few of the many common ESI file types are**:
    - Word processing files (e.g., .docx, doc., .rtf, or .wpd)
    - Text files (e.g, .txt or .asc)
    - Presentation files (e.g., .ppt, .pot or .pps)
    - Email and other Outlook-type application files (e.g., .pst, .ost, .pab, or .nsf)
    - Database extracts or reports (e.g., .csv, .xls or .rpt)
    - Image files (e.g., .pdf, .tiff, .jpg)
    - Web files (e.g., .html, .xml)
    - Compressed files (e.g., .zip)

- Metadata is the data details of the native file. (It is the data about the data).

- ESI includes **hash values** which are like the fingerprints on electronic files-unique numeric value for every record.

- In today's world, virtually all data is stored electronically.

- ESI is analogous to the filing cabinets of the 1990s – except _way_ more fun! ESI allows you to see everything about the document, not just what is in print.

- ESI is crucial to the efficient and effective understanding and piecing together of your case.

- This is has been a rapidly developing area over the last 15 years or so.

- Evolution of the Federal Rules of Civil Procedure [2006 and 2015] and Electronic Discovery Reference Model [2006 and 2014] to navigate ESI issues within litigation.

- For most mass tort cases, there is an MDL (federal court) overseeing the litigation. Knowing the Federal Rules of Civil Procedure is key to your success. Rule 26 governs discovery.

- BONUS: Review Rules 4, 12 and 26 prior to filing. Also, remember to review the Case Management Orders (CMOs). _Refer back frequently._

Understand **Rule 26, Federal Rule of Civil Procedure**: General Provisions Governing Discovery
- (b)(1): Discovery requests should be reasonable and proportional to the needs of the case
- (f)(1-3): Conferring with the opposing party & planning for discovery (the parties must confer – at least **21 days before** a scheduling conference is to be held or a scheduling order is due)

Rule 26 of Federal Rules of Civil Procedure requires parties to keep their discovery requests reasonable and proportional to the matter at hand. If you reduce the scope of discovery, you can drastically reduce the burden. Courts expect parties to work out a plan (protocol) regarding discovery and move toward a resolution based on that plan.

An **ESI Protocol** is a negotiated agreement between parties that **governs how relevant electronic documents will be identified, preserved, collected, processed, reviewed, and produced to the opposing party.**
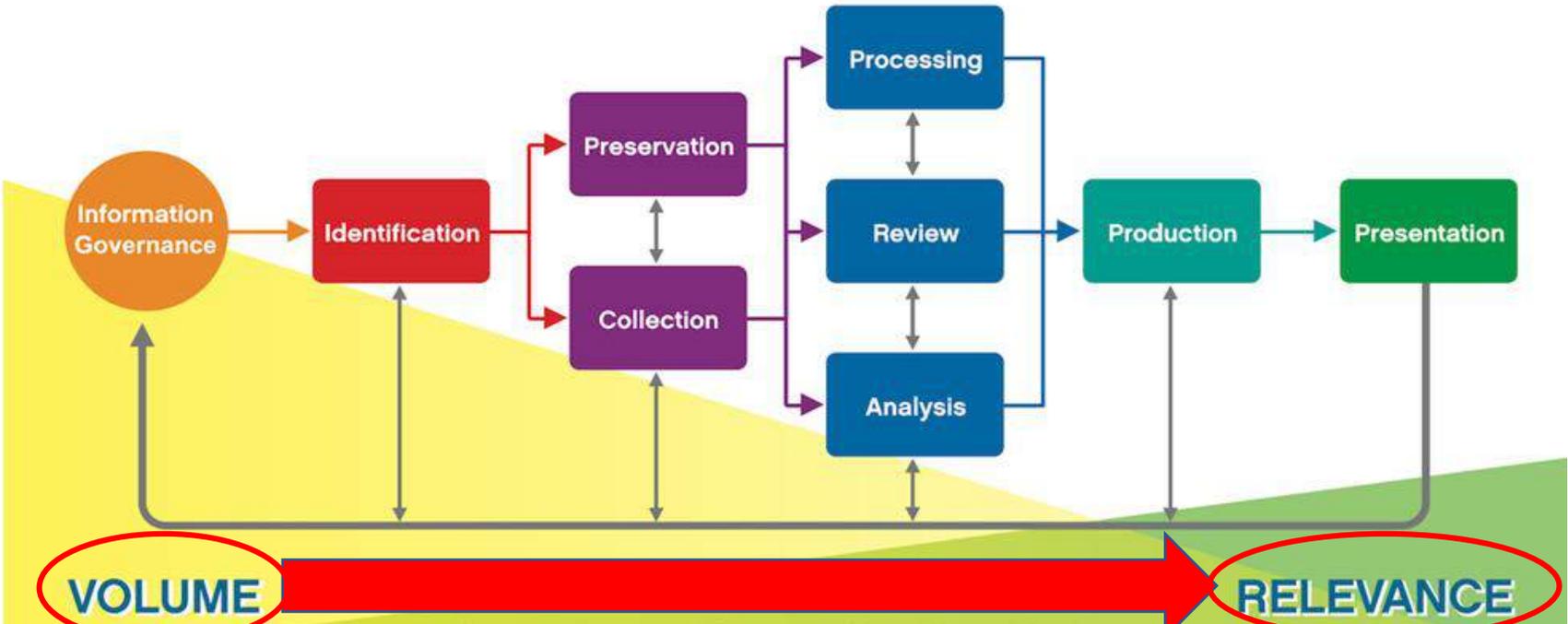
- MDL leadership often negotiates an agreed ESI protocol. Know what the agreement says (& what it doesn't say). If you think revisions are needed, speak up! If the attorney disagrees, you will learn something.

- Whenever possible, communicate and collaborate with the attorney *before* the (26f) meet and confer to discuss the scope of discovery:
  - Keywords/filters garnered from the case facts
  - Review and production requirements

- Carefully review discovery requests and responses for any clues about new or missing information.

- As discovery progresses, you will learn more about the case and if additional information is needed. Share with your attorney/team what you are finding. It is easy to overlook significant points if we aren't comparing notes.

Breaking down the EDRM

Electronic Discovery Reference Model

Information Governance → Identification → Preservation / Collection → Processing / Review / Analysis → Production → Presentation

VOLUME → RELEVANCE

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

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To process ESI effectively, information must first be captured and stored properly.
Begin with corporate procedures, processes, and policies for data management.

Spoliation can occur here

Electronic Discovery Reference Model

Information Governance

Identification

Preservation

Collection

Processing

Review

Analysis

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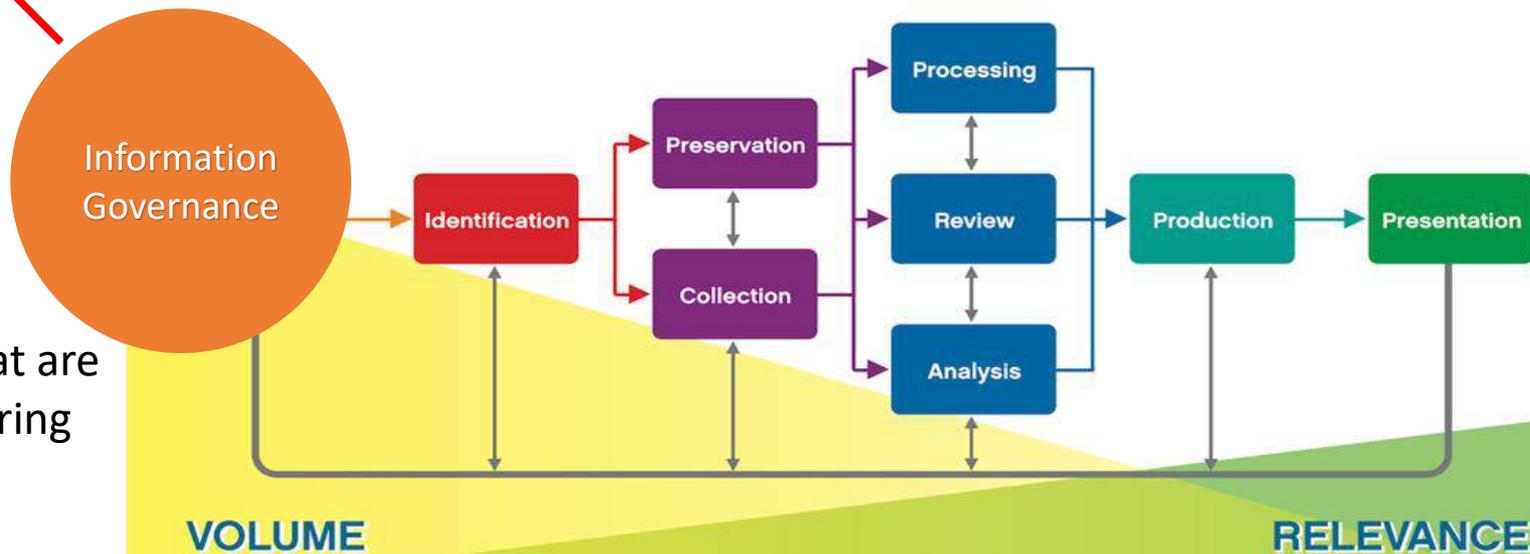
Spoliation:
Documents that are unavailable during the discovery process.
(Retention policies)

Identification includes any activities—such as case reviews, ROG responses and interviews—that assist in identifying key pieces of electronic information that are likely to be important to a case.

ASK:

Who (Custodians/custodian interviews)

What (doc types or categories/search terms)

When (date ranges)

Where (sources of ESI) in addition to hard copies

TIP: Proper identification will help you target the collection.

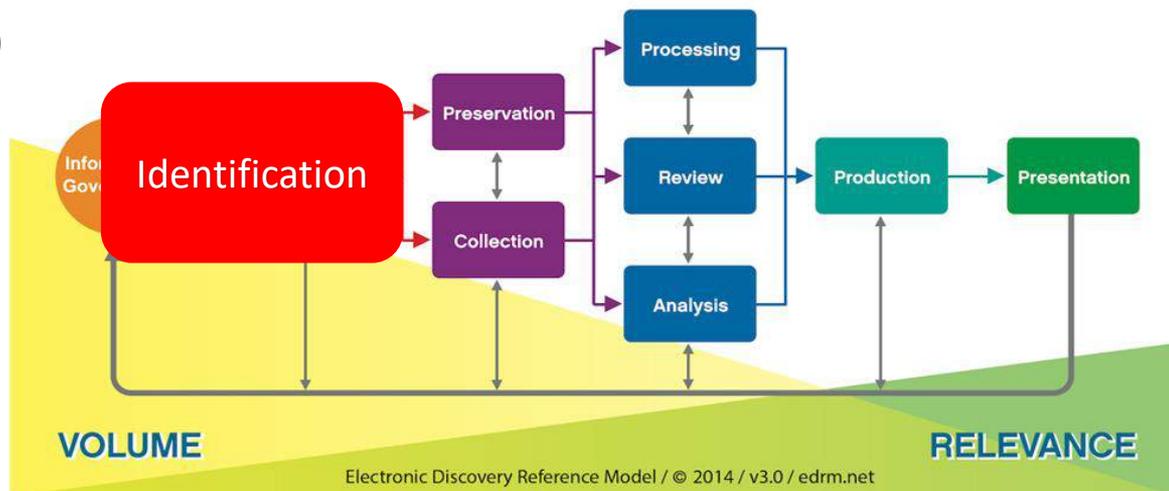Electronic Discovery Reference Model / © 2014 / v3.0 / edrm.net

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COLLECTION METHODS:
- Self-collection
- IT-assisted
- Remote
- Outside provider

CONSIDER:
- How much data is involved?
- How many sources?
- How accessible are the sources?
- Are expert collection tools required?
- Is the data encrypted?
- Are IT resources available to you?
- Are there deadlines?
- Is this a civil or criminal matter?

TIP: Having clients forward emails to you is NOT eDiscovery best practice.

Collect & present in a way that preserves metadata

Spoliation occurs here

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PROCESSING:

"Cleaning up" the collection by de-duping, email threading, de-NISTING, converting files into a reviewable form

*ECA: Early case assessment
*STR: Search term report

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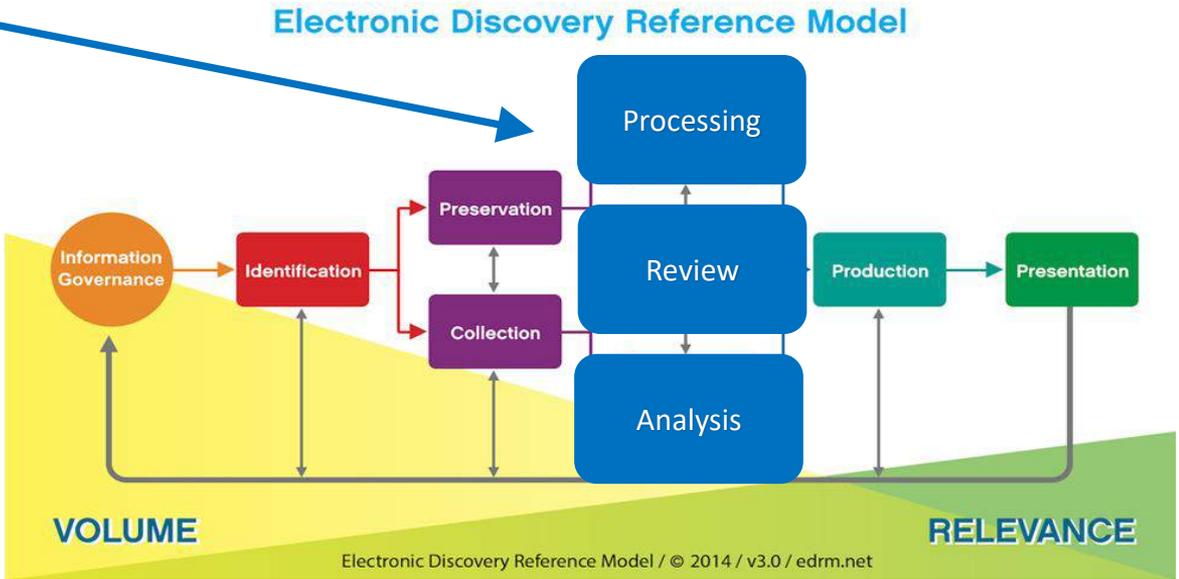
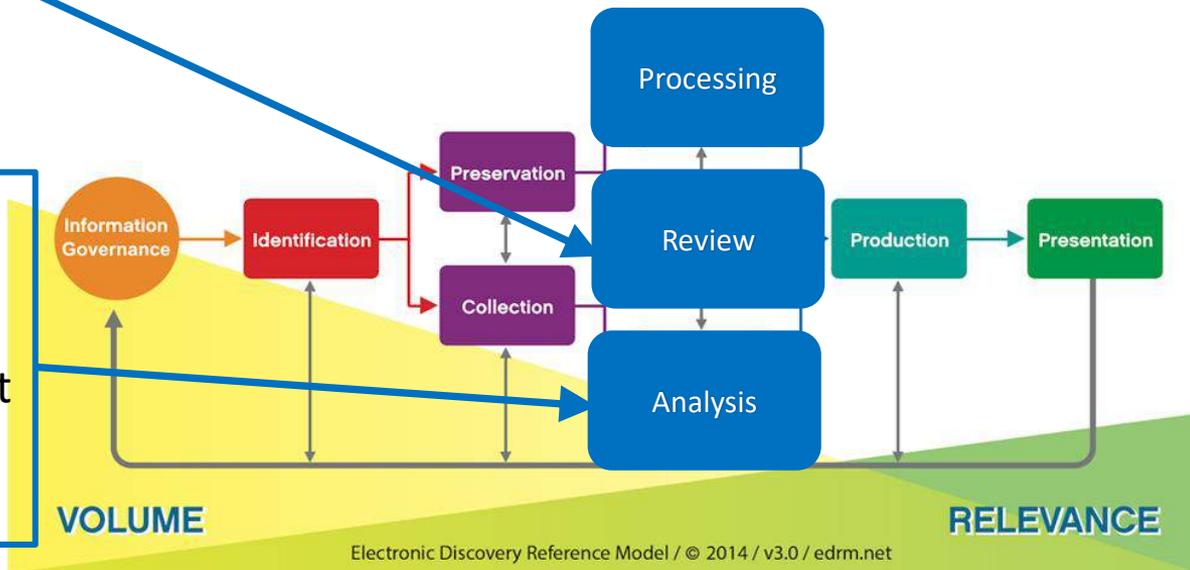Electronic Discovery Reference Model / © 2014 / v3.0 / edrm.net

REVIEW:
This is one of the most important and most expensive phases. (Reviewers and database/vendor charges.)
Important project/cost management skills come in.

ANALYSIS:
Evaluating ESI for a particular use during a legal matter means looking at the content and context to identify key patterns, topics, people & discussions.

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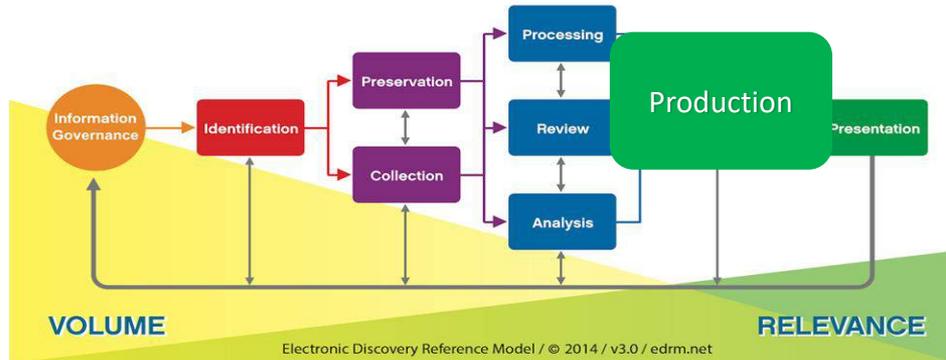
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Puzzling tips:

- Find your boundaries (Understand the scope)

- Sort/organize (Reduce volume to relevance)
  - Coding/Tagging
    - Redactions
    - Privilege
  - Booleans/ parameter searching

Electronic Discovery Reference Model

Processing

Preservation

Production

Presentation

Identification

Review

Information Governance

Collection

Analysis

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TIFF Production:

Native files are converted to a "picture" for each record, document level text. This is accompanied by either an image (.opt) load file or metadata (.dat) load file.

Image production with accompanying .opt or .dat load files allows for view ability & search ability. Consider the format based on the needs (such as stamping and redacting).

PRO TIP:

Producing ESI in native format only or reducing/ converting to image only is NOT best practice.

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Greater volume	✓	
More duplicative	✓	
More permanent	✓	
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More frequently usable in native form		✓
Efficient search capability	✓	

Paper production:
Easily stamped & redacted
Inefficient review, lacks metadata

Native production:
No conversion
Least expensive
Original format
Cannot stamp or redact

Text/Searchable PDF:
Converted, OCR'd natives
OCR is really helpful, but imprecise
May be requested when reviewing outside of a review tool

Converted natives (TIFF/PDF)

Any natives not converted [ppt/xls (protocol)]

DAT file
Contains metadata & mapping to Native and Text folders.

Opticon (OPT) file
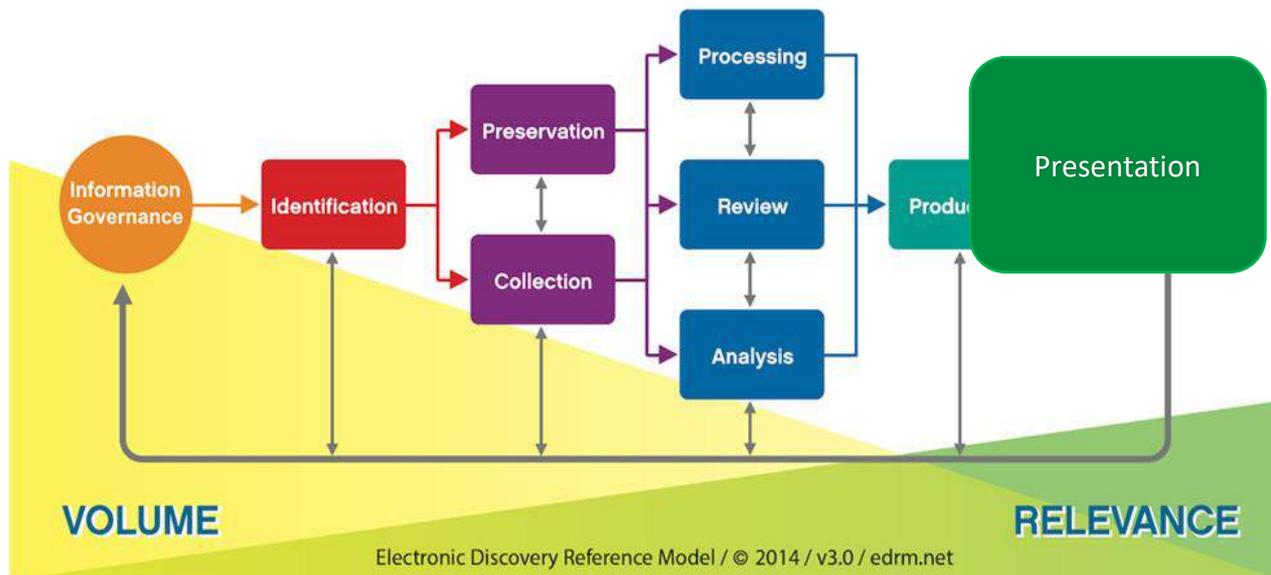Provides links to image files that have associated entries in the accompanying load File (DAT).

Common metadata fields:
Hash
From
To
CC
BCC
Subject
DateSent
DateReceived
HasAttachments
AttachmentCount
Attachment Names
FileName
FileExtension
FileSize
FilePath
DateCreated
DateAccessed
DateModified
DatePrinted
Title
Subject
Author

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Electronic Discovery Reference Model

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<u>Trial or Deposition</u>
Just as ESI is dominating the discovery process, presentation has shifted from paper to digital.

<u>Examples</u>
LitSoftware
- TrialPad
- Transcript Pad
TrialDirector
Oncue (video cuts)

How do we successfully approach E-Discovery?

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▪Remember to begin with the end in mind
▪Understand where in the model your case is and your role in the overall process

Things to consider:
Time to change perspective?
Are you competitive or collaborative?
Are you task-oriented or big picture?
Are you a problem solver?
Are you always asking "why"?
Are you inquisitive?
How flexible are you?
Are you overthinking or overworking?
Is there a hybrid approach?

OLD WAYS WON'T OPEN NEW DOORS

PRO TIPS:
Read/research the topics
Read/research tools
Find a mentor
Don't get hung up on titles