

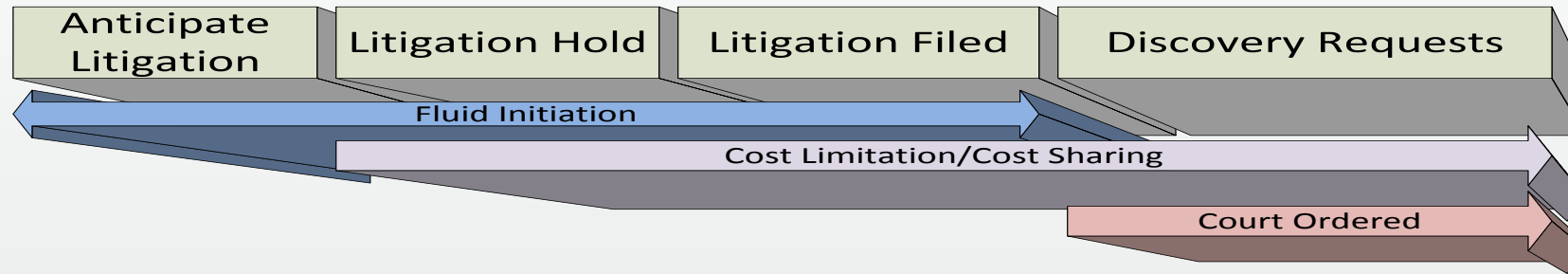


Costing E-Discovery

Projecting and Controlling the Costs of Discovery

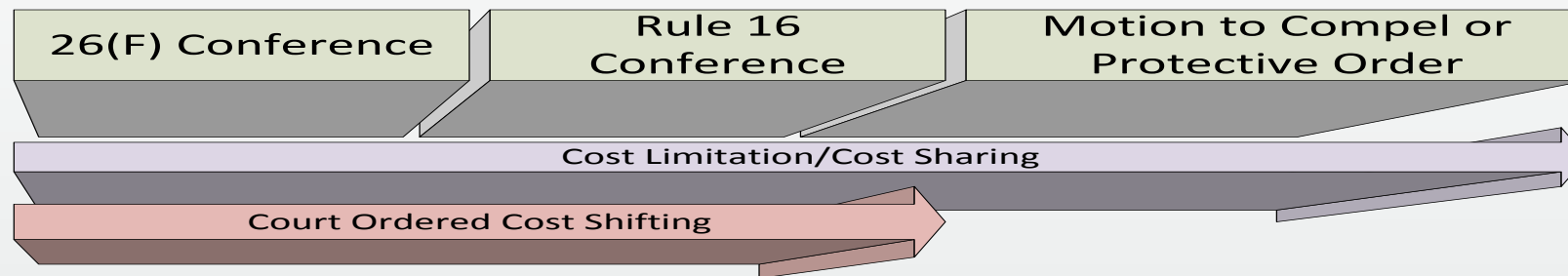
The following presentation reflects only the views of the presenters and does not represent the position of any government agency or Georgetown University. All specific data included is presented in sample format and is for illustrative purposes only.

Costs: Limiting, Sharing, Shifting



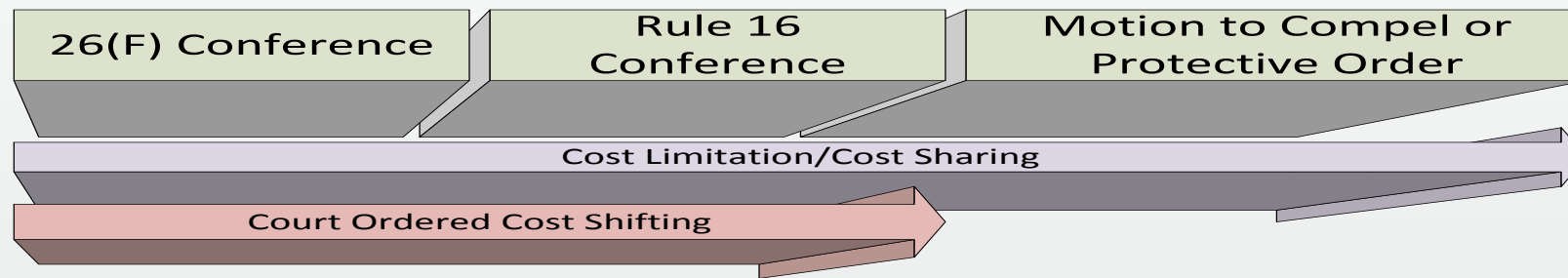
- Limiting Scope of Discovery
 - Custodians, date range, file type, accessibility, etc.
 - Cost sharing/shifting (e.g. cost of vendor, hosting platform, etc)
- Practical and Legal Limits on cost sharing/shifting
 - ADA – prohibition on “gifts”
 - Ability to monetize the costs
 - Ability to sell your proposal to the opposing party

Cost Shifting/Court Ordered



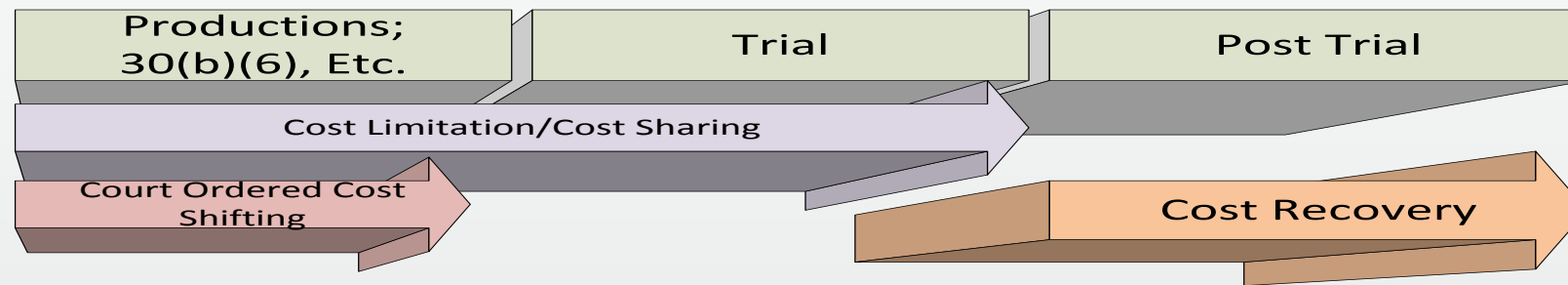
- Court Ordered Limits or Cost Shifting
 - Common Law “Tests” Applied
 - FRCP 26(c), 26(b)(2)(B), 26(b)(2)(C)
 - But consider:
 - Cost of motion practice
 - Timing – court will work from *status quo*

Court Ordered



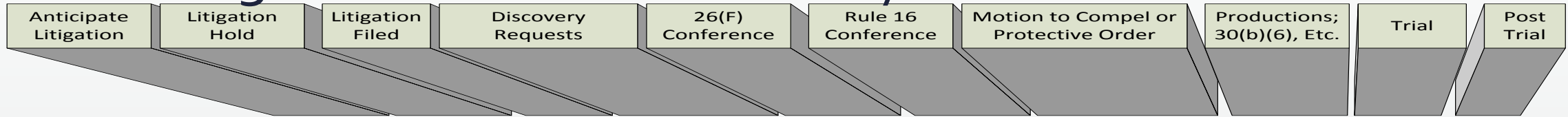
- Costs that courts will often agree to shift to requesting party
 - Restoration of inaccessible data
 - Search (type and scope)
- Costs that many courts will not shift to requesting party:
 - Preservation
 - Processing/production
 - Review for privilege/confidentiality
 - Forensic examination of computers.

Cost Recovery



- Post-trial Recovery Limited
 - FRCP 54(d) – only “prevailing party” can recover enumerated costs
 - 28 USC 1920(4) – often limited to costs of “exemplification”
 - 28 USC 1920(3) – printing and witnesses

Legal Cost Control Summary



Potential Cost Control/Recovery

- Your greatest ability to control costs is at the beginning of the case.
- There are real costs to seeking court intervention.
- The willingness and ability of the court to limit/shift costs decreases the further along the parties are in the discovery process.
- "What is good for the goose is usually good for the gander."
- Post-trial ability to recover discovery costs is very limited

Finding the Costs of E-Discovery



Changing the direction of e-discovery costs



Increased clarity through
defined processes and
understood costs

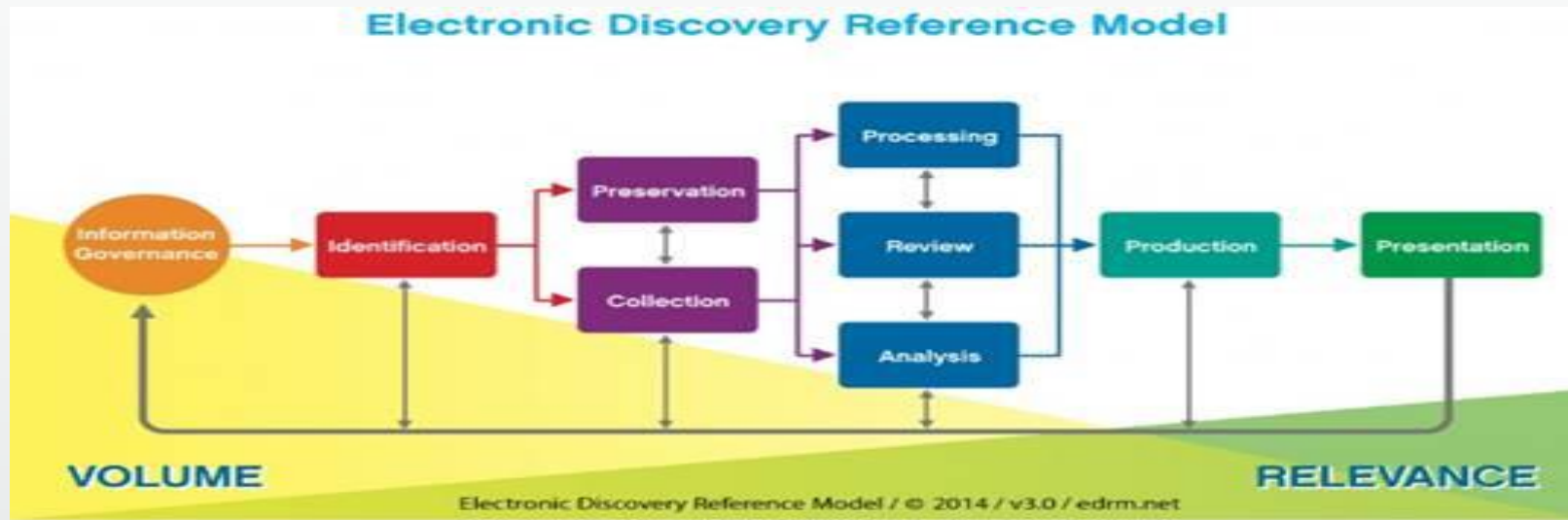


Reduced project costs
through technology, case
strategy, and cooperation

Finding the Costs of E-Discovery

- Three strategies, one goal: Develop the tools to define costs, reduce costs, and facilitate cost-shifting to reduce an Agency's financial e-discovery burden
- Define costs:
 - Define the workflow
 - Define the process
 - Define the intended result
 - *Assign value to each step*

Design the Workflow



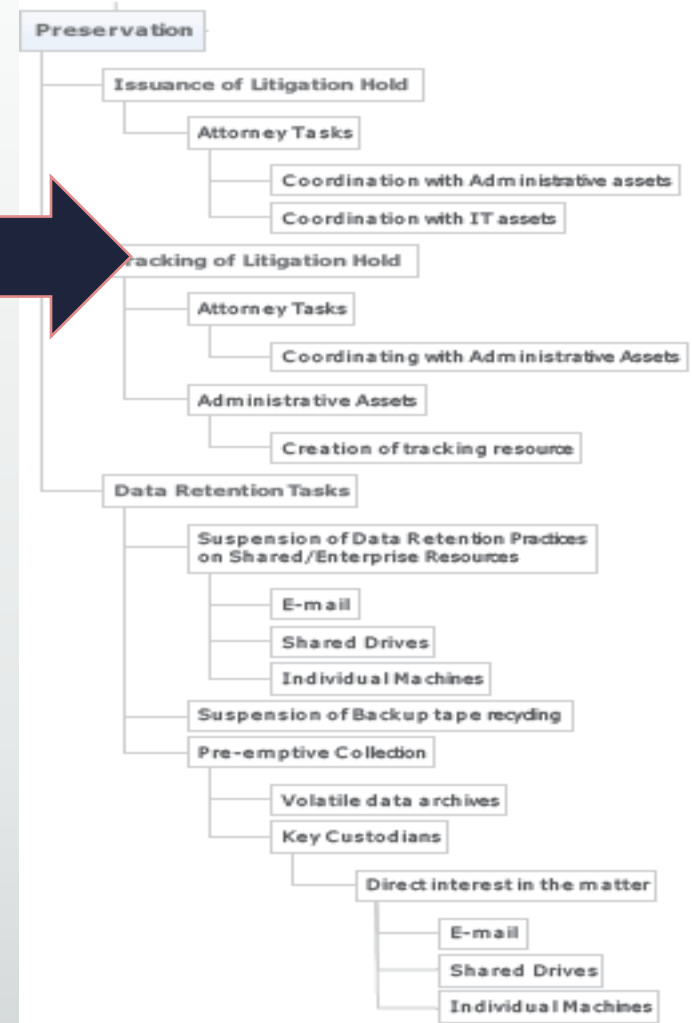
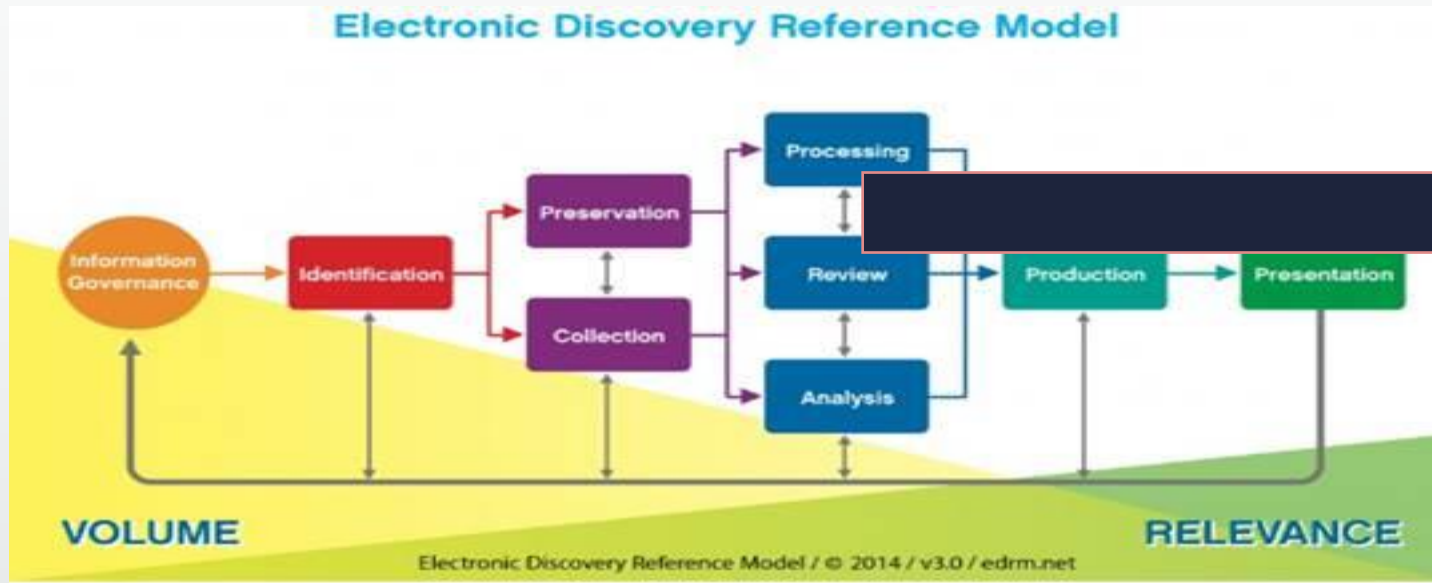
~~Define the workflow~~

Define the process

Define the intended result

Assign value to each step

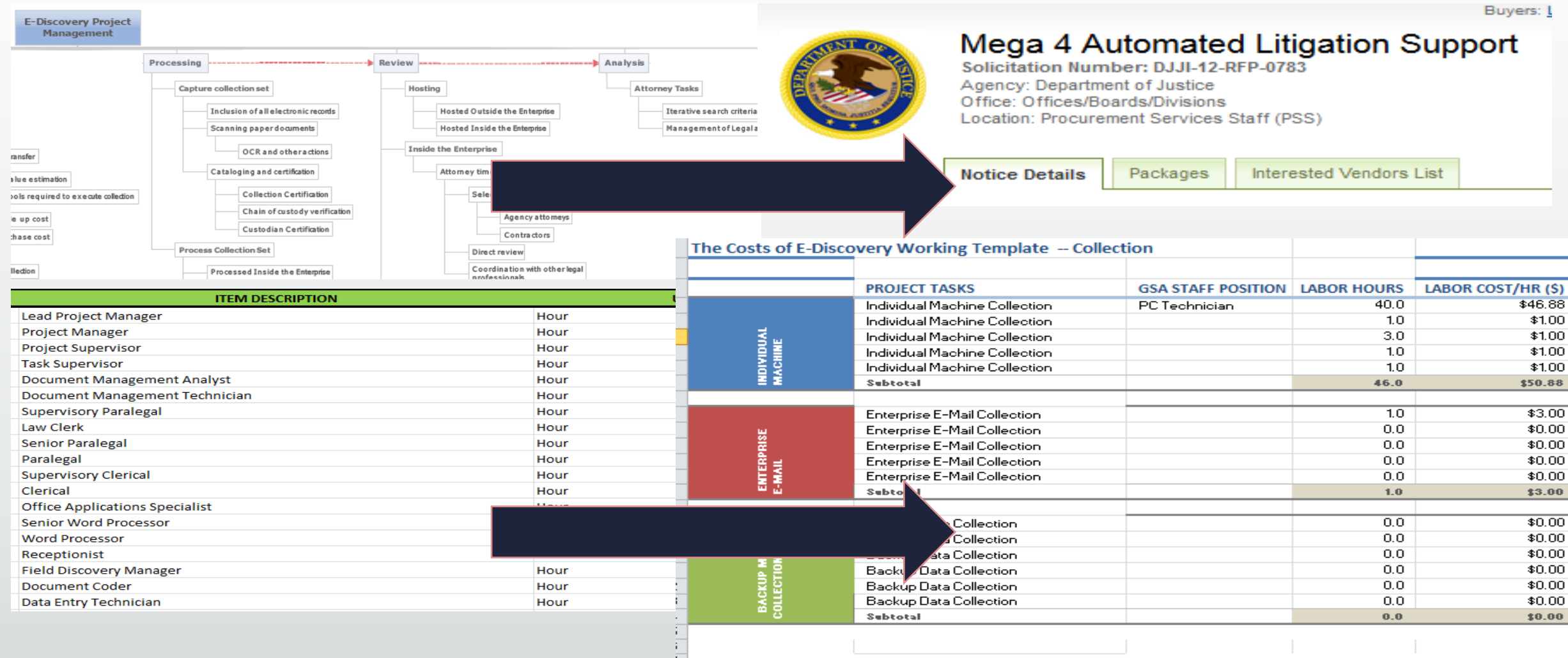
Design the Process: Theory into Practice



Define the Intended Result

- Individualized to the project and the mission
 - E-Discovery
 - FOIA
 - Investigations
 - May develop or change over time
 - Posture may be offensive or defensive
- **Objective:** Shared vision with legal, IT, and other stakeholders

Assign Value to Each Step



Disclaimer: The rates and numbers are hypothetical and used purely for illustrative purposes.

Workgroup Deliverable (Cost)

The Costs of E-Discovery Working Template – Collection							
	PROJECT TASKS	GSA STAFF POOR HOURS	R COST/HR (\$)	RIAL COST (\$)	EL COST (\$)	ER COST (\$)	L PER TASK
INDIVIDUAL MACHINE	Individual Machine Collection	PC Technician	40.0	\$46.88	\$1.00	\$1.00	\$1,878.02
	Individual Machine Collection		1.0	\$1.00	\$1.00	\$1.00	\$4.00
	Individual Machine Collection		3.0	\$1.00	\$1.00	\$1.00	\$6.00
	Individual Machine Collection		1.0	\$1.00	\$1.00	\$1.00	\$4.00
	Individual Machine Collection		1.0	\$1.00	\$1.00	\$1.00	\$4.00
	Subtotal		46.0	\$50.88	\$5.00	\$5.00	\$1,896.02
ENTERPRISE E-MAIL	Enterprise E-Mail Collection		1.0	\$3.00	\$0.00	\$0.00	\$3.00
	Enterprise E-Mail Collection		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Enterprise E-Mail Collection		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Enterprise E-Mail Collection		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Enterprise E-Mail Collection		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Subtotal		1.0	\$3.00	\$0.00	\$0.00	\$3.00
BACKUP MEDIA COLLECTION	Backup Data Collection		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Backup Data Collection		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Backup Data Collection		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Backup Data Collection		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Backup Data Collection		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Subtotal		0.0	\$0.00	\$0.00	\$0.00	\$0.00
TECH COSTS	EFF - Intake and Process to Load Files	GB VOLUME	0.0	\$224.34	\$0.00	\$0.00	\$0.00
	Monthly Hosting		0.0	\$26.32	\$0.00	\$0.00	\$26.32
	Third-Party Vendor Interface		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Interface to Other Internal Departments		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Configuration Management		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Quality Assurance		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Overall Project Management		0.0	\$0.00	\$0.00	\$0.00	\$0.00
	Subtotal		0.0	\$251.66	\$0.00	\$0.00	\$251.66

- Fully-automated and adjustable spreadsheet
- Uses market costs of common EDD tasks
- Predicts cost based on size and complexity of the matter
- Defensible in court or with other parties in negotiating the costs and scope of discovery
- Useful to predict costs as a first step toward their shifting or reduction

Disclaimer: The rates and numbers are hypothetical and used purely for illustrative purposes.

Process in Action

- USDA developing in-house resources to execute e-discovery projects
 - **Objective:** Create cost savings with efficiency and predictability
 - **Challenge:** Balancing single investment vs. on-going costs
 - **Solution:** Mix methods of the market and the Department
 - Mega 4 contract vs. Enterprise-level investments and vendor relationships
 - Labor costs in house
 - Managing the costs for long-term vs. short-term matters

The One TB, One Million Record Case

- Assumes Agency Used Internal Resources For Identification, Preservation & Collection
- Processing
- Imaging
- Hosting
- Near Duplicates & E-Mail Threading
- Analytics Indexing
- Review
- 10% For Project Mgmt, Productions, Security Clearances, Supplies, Rework, & Unknowns

One TB, One Million Record Case

Product/Service	Unit	Rate	Volume	Cost
Processing	GB	96.97	1024	\$99,297.28
Create Images	Page	0.032	3,500,000	\$112,000.00
Near-Duplicate & E-mail Threading	Document	0.06	1,000,000	\$60,000.00
Analytics	GB	191.43	1024	\$196,024.32
Hosting	GB Month	20.45	12288	\$251,289.60
Review (Contract Law Clerk)	Hour	59.46	20000	\$1,189,200.00
Subtotal				\$1,907,811.20
Project Management and Other Direct Costs (10%)				\$190,781.12
Total				\$2,098,592.32

Disclaimer: The rates and numbers are hypothetical and used purely for illustrative purposes.

Where to Begin?

My Agency Doesn't Have The:

- Funding To Respond To Discovery
- Human Capital To Respond To Discovery
- Expertise To Respond To Discovery
- Technology To Respond To Discovery
- People Who Are Responsible For Responding To Discovery
- Lines Of Authority Between Counsel and IT For Responding To Discovery
- Commitment To And Recognition That Responding To Discovery Is Mission Critical

So How Do We Manage?

What Can Counsel And IT Do To Control Costs

- Advocating For Information Management Policies
- Strategies For Limiting Scope
- Advocating For In-House Resources
- Effective Oversight Of Contract Vendors
- Effective Application Of Available Technologies

Information Management

- **Have Established Information Management Policies For Employees**
 - Project Folders For Both E-Mail and Loose Files
 - Project Based vs. User Based
- **Manage Unique User Generated Information**
 - Should Not Reside On The Desktop (PC), Home Systems Or Mobile Devices
- **Discovery by Design**
 - Employ E-Mail Archiving and Document Management Systems
- **Life Cycle Management Solutions**
 - Auto-Tagging Of Records
 - Single Instance Storage
- **Analytics** On Data In Place?

Information Management (continued)

Sound Information Management Enables Collection of Source Data That Is:

- Clear In Composition And Right Sized
- Thoughtfully Organized
- Differentiated
- Centrally Administered

Enabling Narrow, Appropriately Focused Data Collection Will Provide More Savings Than Any Downstream Legal or Technical Strategies **Combined**.

Data Custodians

Establish Effective and Timely Process

- Key Custodians
 - **Every Custodian Represents A Cost**
 - Basis for Inclusion/Exclusion From COR List
 - Every Person That Can Reasonably Be Removed From List Represents Immediate Savings
 - Consider Use of Custodian Tiers To Allow Appropriate Scope and Process On Per Tier Level

Processing & Hosting

The Arguments for Bringing Processing and Hosting “In House”

- Hardware and Software Investment Usually Pays For Itself From The First Large Project
- ENRD Provided Over \$10 Million In E-Discovery Products And Services For Less Than \$1 Million In Labor
- Ensures All Projects Receive The Same Repeatable And Defensible Treatment
- Multi-use Investment
 - Discovery, FOIA And Other Information Requests

Utilizing Contract Vendors

If Your Agency Does Not Regularly Face Large Discovery Consider Using a Vendor (Don't Try To Do It Yourself)

- Hold Competitions
- Negotiate Hard
- Time & Material Vs. Product
- Image Only What's To Be Privilege or Produced
- Be Aware of Average Pricing
 - GSA, MEGA Contract good sources.

Review Strategies

Have A Solid Methodology For Training Review Staff And Stay Involved Daily

- Helps When Need To Ramp Up Review Staff
- Avoids Constant Back And Forth Questions
- Ensures Consistency
- Measure Review Progress
- The more documents reviewed in an hour will have an enormous impact on cost

Takeaways

- Get Control Of And Understand Your Agency's Information
- Use All Available Strategies To Limit The Scope/Volume Of Data In Every Case
- Use In-House Processes or Effectively Manage Contract Vendors Through Competitions, Negotiation, Knowledge and Oversight
- Take Advantage Of Text Analytics Technologies To Make Your Reviewers As Efficient As Possible