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ARBITRATION  
ASSOCIATION®

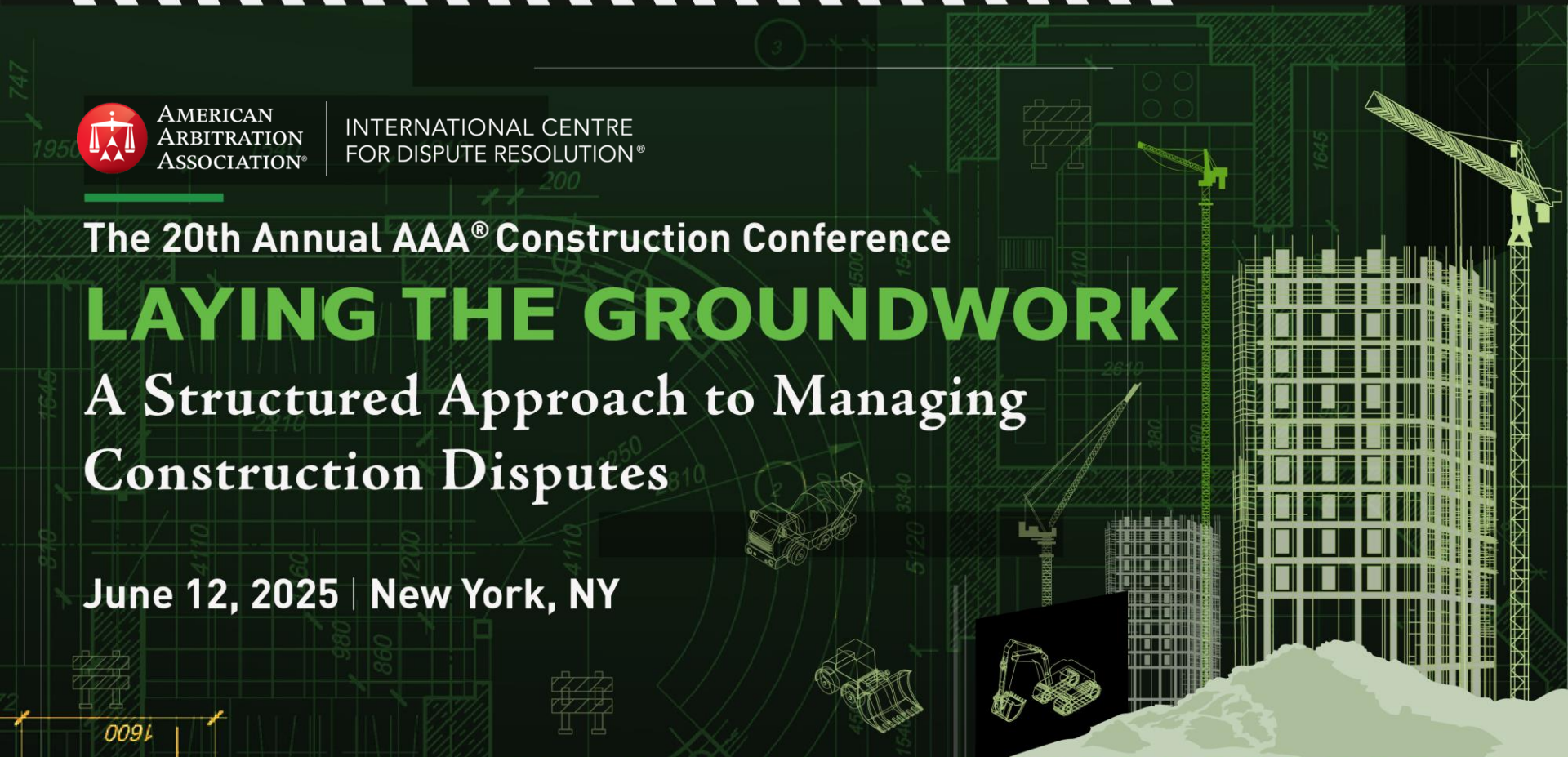
INTERNATIONAL CENTRE  
FOR DISPUTE RESOLUTION®

The 20th Annual AAA® Construction Conference

# LAYING THE GROUNDWORK

A Structured Approach to Managing  
Construction Disputes

June 12, 2025 | New York, NY



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Construction Management Association of America  
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National Association of Surety Bond Producers  
National Society of Professional Engineers



**June 12, 2025**

**1:30-2:45 PM**

# **Data, Documents, and Discovery: Maximizing Efficiency with eDiscovery Tools**



**DATA, DOCUMENTS,  
AND DISCOVERY:**

**MAXIMIZING EFFICIENCY WITH  
EDISCOVERY TOOLS**

# Meet Our Panelists

## MODERATOR



**Rod Toben**

Regional Vice President,  
American Arbitration  
Association  
*Dallas, TX*



**Cat Damico**

Assistant General Counsel,  
Kiewit Corporation  
*Omaha, NE*



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Partner,  
Cozen O'Connor  
*Boston, MA*





# Data, Documents, and Discovery: Maximizing Efficiency with eDiscovery Tools

## 2024 This is what happens in an INTERNET MINUTE

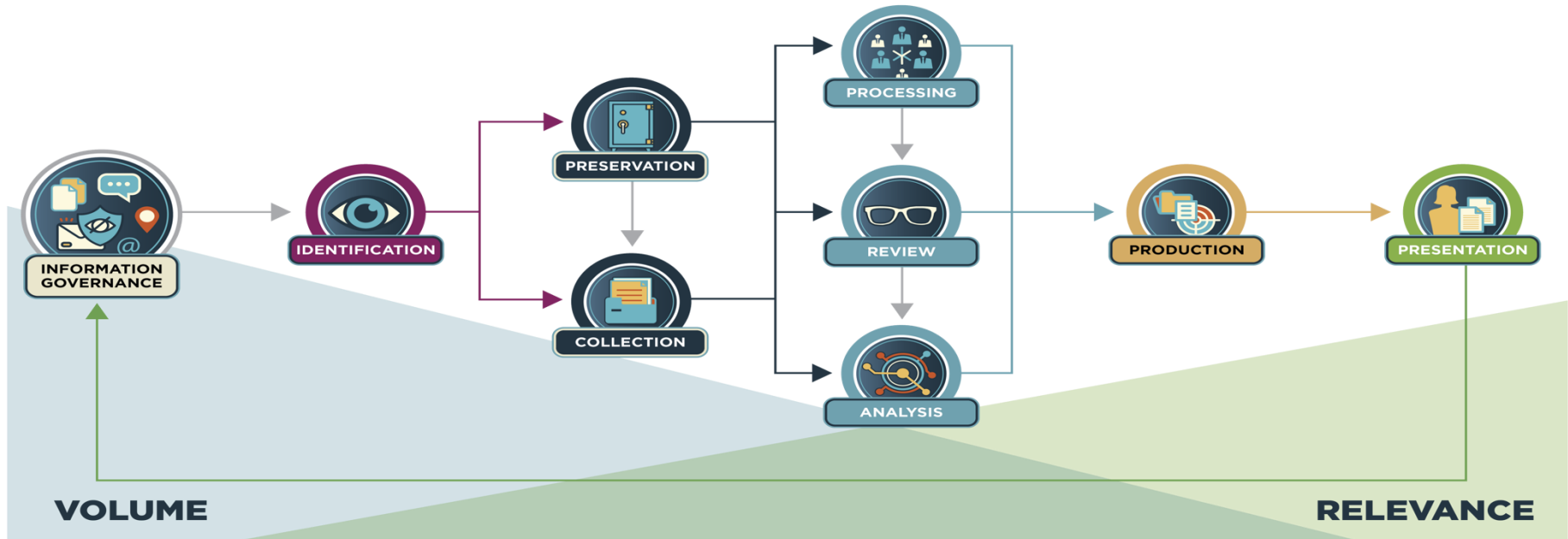
**251.1 Million *Emails Sent***

**18.8 Million *Texts Sent***



# Data, Documents, and Discovery: Maximizing Efficiency with eDiscovery Tools

## EDRM – Electronic Discovery Reference Model





## MODERN CONSTRUCTION DATA SOURCES



### Communications

- Emails
- Instant Messages
- Text Messages
- WhatsApp
- Slack
- Gchat
- Teams



### Misc

- Diaries
- Meeting Recordings



### Project Server

- Network Server
- Box.com
- ProCore
- Newforma
- SmartApp
- BlueBeam
- BIM360
- Aconex



### Local Drives

- Personal drives
- Laptops
- Department specific drives



### Paper

- Printouts
- Boxes

Office 365 Email Limitations & Best Practices:

**X Do not have IT run keywords before export**  
**Do have IT apply a date cut only**



# Data, Documents, and Discovery: Maximizing Efficiency with eDiscovery Tools

## Let's Talk Proportionality

### AAA Construction Arbitration Rule R-24. Pre-Hearing Exchange and Production Information

- (a) *Authority of arbitrator*: The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute...
- (b) Documents: The arbitrator may, on application of a party or on the arbitrator's own initiative:
  - iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents

### AAA Construction Arbitration Rule R-25. Enforcement Powers of the Arbitrator

- The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules...and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation
- (b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;
  - (c) allocating costs of producing documentation, including electronically stored documentation;



# Data, Documents, and Discovery: Maximizing Efficiency with eDiscovery Tools

## Let's Talk Proportionality

### American Arbitration Association E-Discovery Considerations for Construction Arbitrations

#### *Statement of Intent:*

The purpose of this document is to highlight for arbitrators and parties the need to actively manage the e-discovery process from the outset of the proceeding to achieve the sometimes competing goals of fair, efficient, and economical dispute resolution (CIAR R-23(b)) and safeguarding each party's opportunity to fairly present its claims and defenses (id. R-24(a)). All arbitration participants should be committed to an e-discovery process that is fair and transparent, allows discovery of relevant and material electronically stored information ("ESI") commensurate with the size and scope of the case, and consistent with the hallmark benefit of arbitration: efficient and cost-effective dispute resolution.

#### Core Principles:

- Relevance
- Materiality
- Proportionality



# Data, Documents, and Discovery: Maximizing Efficiency with eDiscovery Tools

## Let's Talk Proportionality (cont.)

FRCP 26(b)(1) Scope of discovery must now be "relevant to parties' claim or defense and **proportional** to the needs of the case considering:

- importance of issues at stake
- amount in controversy
- parties' relative access to relevant info
- parties' resources
- importance of discovery to resolving the issues; and
- whether burden or expense of proposed discovery outweighs its benefit

Advisory Committee notes:

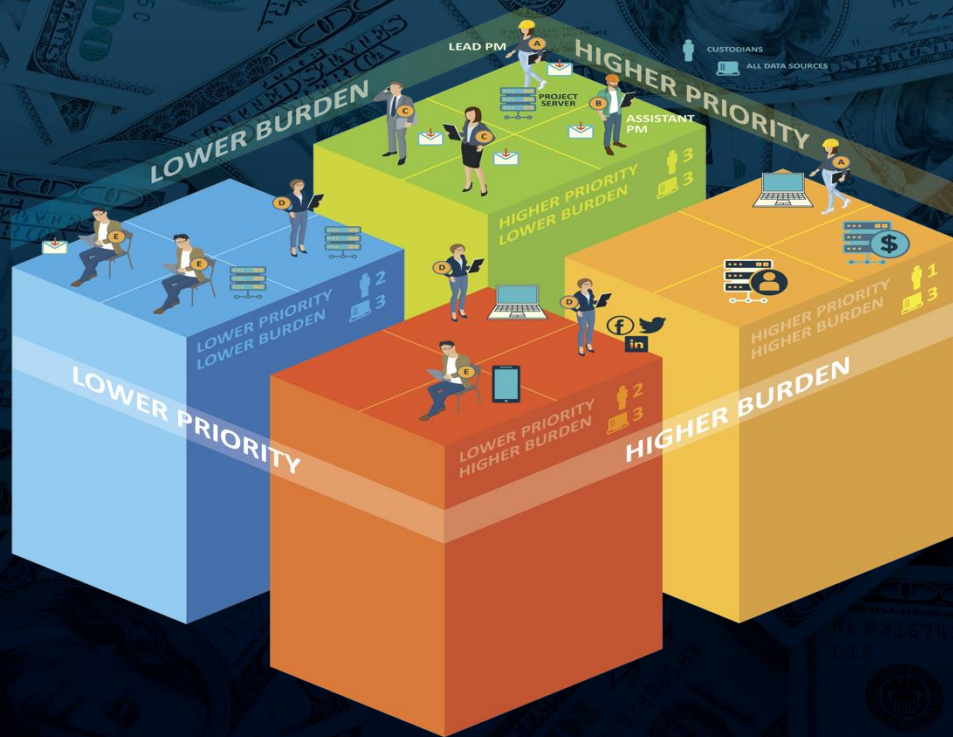
Gone is the "reasonably calculated to lead to the discovery of admissible evidence" language because it has been used "incorrectly, to define the scope of discovery."

"As the Committee Note to the 2000 amendments observed, use of the 'reasonably calculated' phrase to define the scope of discovery 'might swallow any other limitation on the scope of discovery.'"



## COST OF EDISCOVERY: Use Protocol to Prioritize Data Collection and Production

### Not All Data is Equally Relevant



## COST OF EDISCOVERY: Use Protocol to Limit Scope and Costs

### GW Discovery Proportionality Model - Judicial Detail Review

STAGE	Hosted email (5GB)	File Share (4.5GB)	Computer/ Laptop (30GB)	Mobile Device (8GB)	STAGE TOTAL
GB Collected	5.0	4.5	30	8	69.75
GB Produced	0.44	0.11	0.79	0.21	1.59
Collection	750.00	1,150.00	600.00	750.00	3,750.00
Pre-Processing	450.00	1,200.00	600.00	600.00	4,650.00
Processing	436.54	108.31	1,195.49	164.08	1,925.61
Hosting	827.33	514.14	1,166.16	612.95	3,565.79
Review	29,500.20	6,076.01	42,804.80	19,524.30	102,160.61
Production	233.89	171.23	301.67	191.00	1,055.23
Management/Support	1,295.53	1,295.53	1,295.53	1,295.53	6,477.64
DATA SOURCE TOTAL	\$33,493.48	\$10,515.21	\$47,963.65	\$23,137.85	\$123,584.87





## ESI PROTOCOL: YOUR FIRST AND GREATEST OPPORTUNITY TO DEFINE SCOPE & PROTECT THE COMPANY



**Limitations on Scope**



**How Documents Will be Identified for Production**



**Production Format**



**Privilege & Confidentiality**



## Things to Include in an ESI Protocol

- Definition of terms
- Agreements on what data will be preserved—and what data won't be preserved
- Temporal scope
- Custodians and data sources
- Transparency in the use of search terms—or TAR, or a combination
- Right to review for responsiveness and privilege
- Mechanics of filtering
  - De-NISTing
  - Deduplication
  - Threading
  - Exception files
  - For TAR, methodology, process, system training and validation
- Form of production—with specifications for the load file
- File types to be produced natively
- Confidentiality designations (if needed)
- Privilege log form and structure; and
- FRE 502(d) privilege clawback (if not in another document signed by the court)



## STICKING TO THE BUDGET:

Strategies for Review

1. What Can Go Straight to Production
2. High Priority Review
3. Review for production vs Review for issues/depo prep



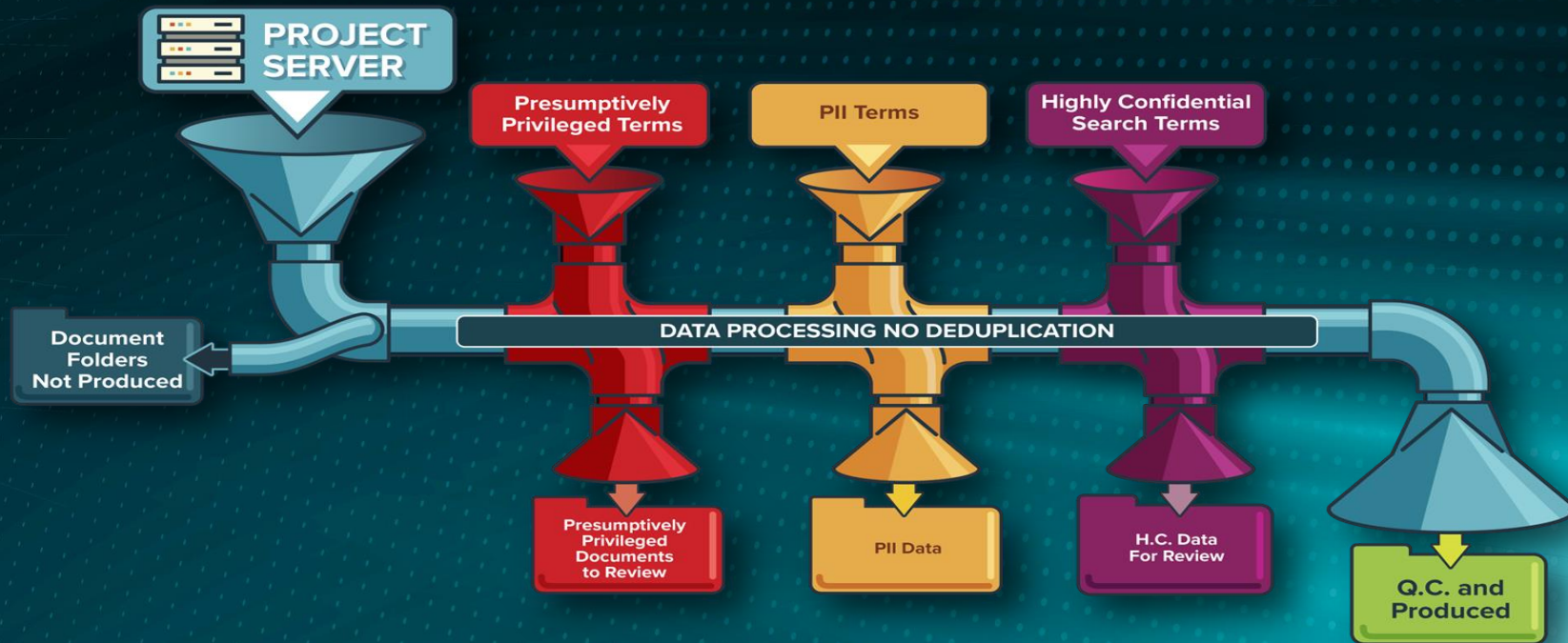
## EXCLUSIONS + MACHINE LEARNING = COST SAVINGS

### DOCUMENT REDUCTION FUNNEL





## Project Server Pipeline



## Selective Archiving

Keep Hosting Costs Down & Focus On What You Need

Ensure all work product remains intact and can be brought back online quickly

Examples:

- Archive project files produced while counsel focuses on email review/production = reduction in monthly hosting costs
- Continuous archiving as scope narrows through the arbitration = cost savings





# THANK YOU



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