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Early Case Assessment: The Ticket to Reducing Costs & Increasing Defensibility

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- Fellow of the American College of Trial Lawyers
- Defends manufacturers in products liability matters, including fire cases and recreational product cases
- Frequently counsels business clients on document, data retention and e-discovery issues
- Member of a joint bench-bar electronic discovery committee for e-discovery in the United States District Court for the District of Maryland



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- Client Relationship Manager for Kroll Ontrack
- Provides information and advice on a range of legal technology issues that span the EDRM
- Former litigator, with 10 years of experience in complex civil litigation and alternative dispute resolution
- Assists Top 200 law firms and Fortune 500 corporations with discovery strategy and best practices
- Frequent speaker at conferences and CLEs



Discussion Overview

- What *Really* is Early Case Assessment?
- Using ECA to Reduce Costs & Increase Defensibility
- Key Elements of Success: People, Process & Technology
- Power of Topic Grouping, Conceptual Searching & E-Mail Analytics



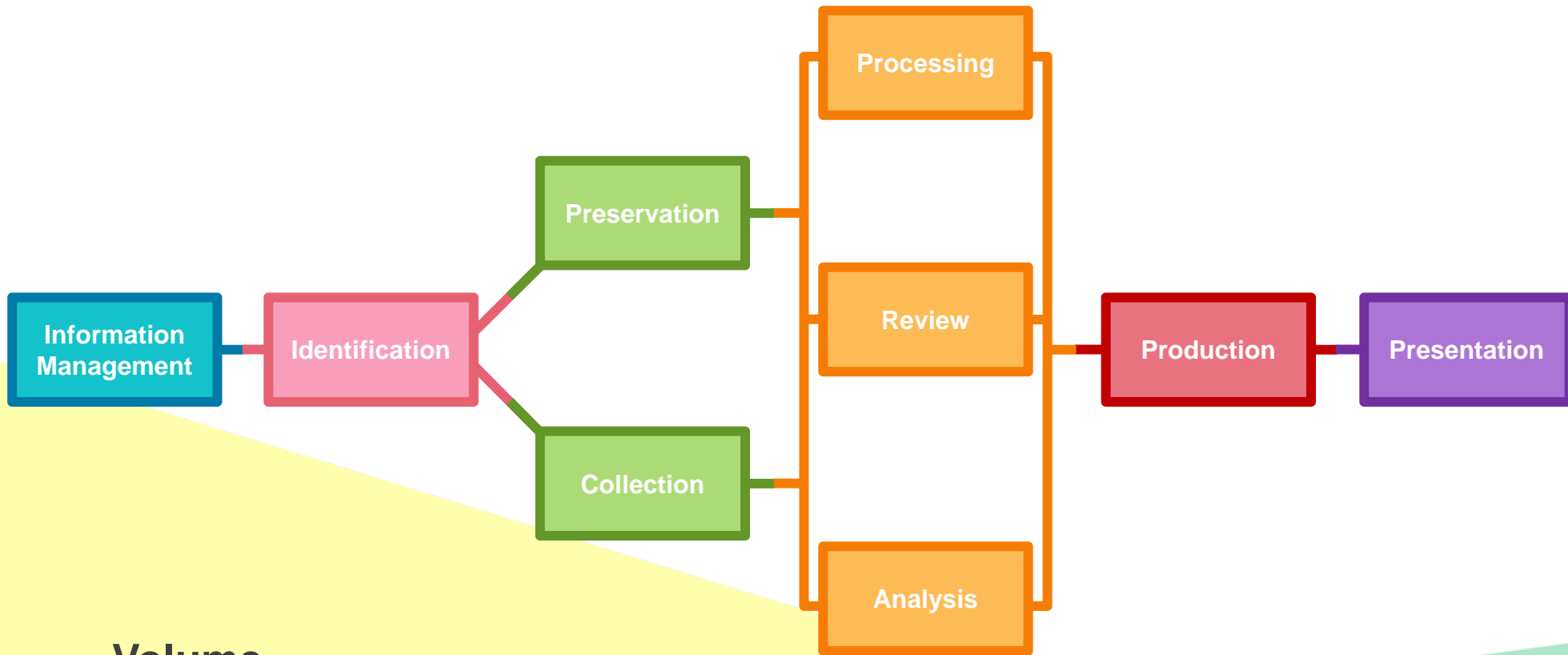
What *Really* is Early Case Assessment?

The ESI Environment: Volume

- Mountainous volumes of ESI make e-discovery costly and inefficient
- E-mail is ubiquitous in the business world and personal lives, and is often overwhelming in discovery



The Electronic Discovery Reference Model ('EDRM')



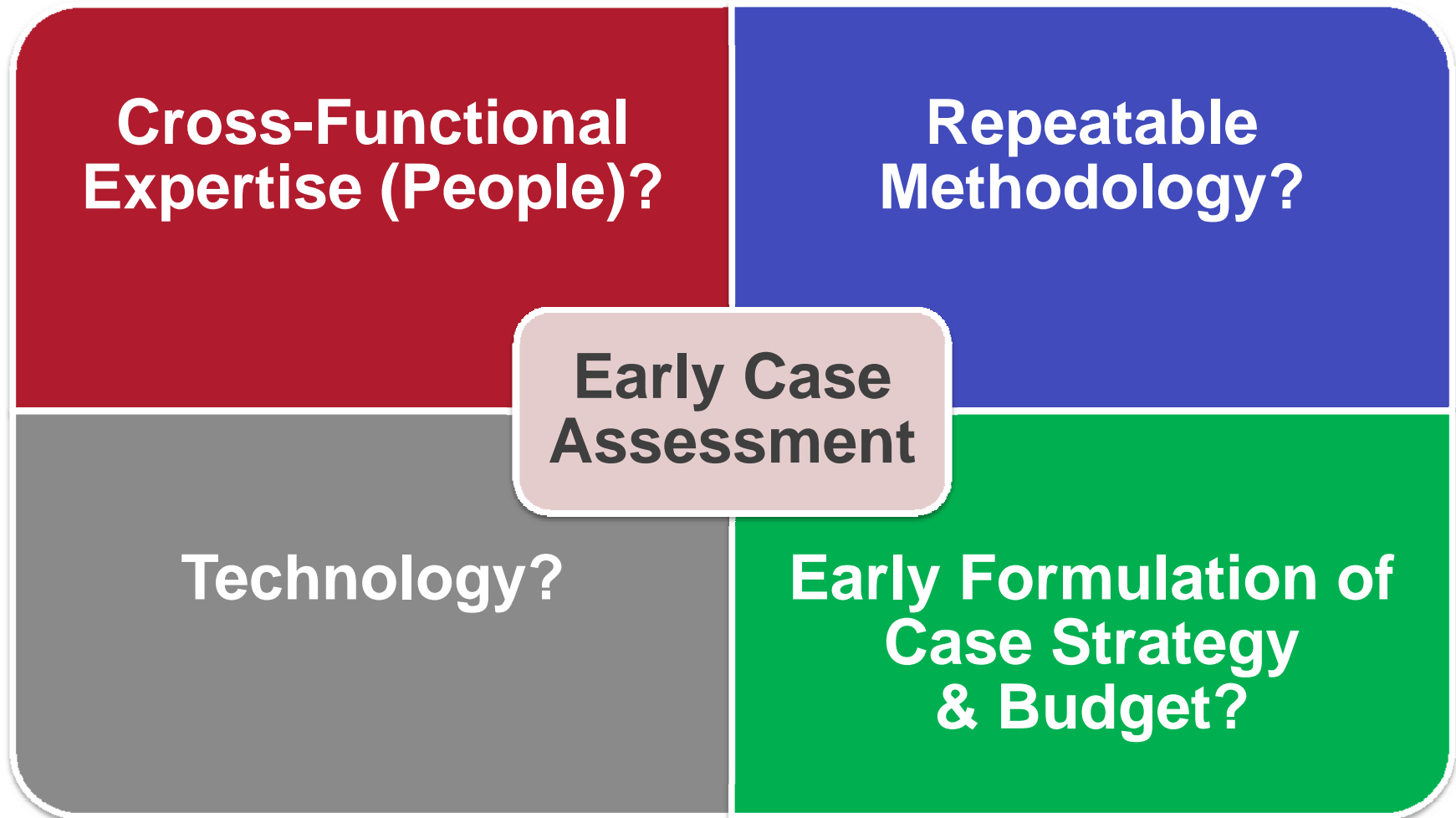
Volume

Relevance

Early Case Assessment: A Primer






- Document review is consistently the largest component of overall litigation costs
 - Estimates provide that document review costs can comprise anywhere from 50-90% of total expenditure
- Using ECA to greatly reduce data sets to be reviewed can significantly reduce costs
- ECA provides an in-depth view of the quality of a case prior to the incurrence of massive document review costs
- **So what is Early Case Assessment?**

What is Early Case Assessment?



What is Early Case Assessment?

Vital first step: narrows scope of potentially relevant data prior to e-discovery processing

- | | |
|--|---|
| • Reduces number of custodians |  |
| • Determines the strengths and weaknesses of the case |  |
| • Provides a look into custodians and data early on with minimal spend |  |
| • Tests search terms early on (improves defensibility & effectiveness) |  |
| • Early case resolution may be most effective option looking at the data |  |

The Benefits of ECA

- Early Window into Liability and Damage Assessment
- Early Window into Discovery Scope and Expense Forecasting
- Reduce Costs
- Increase Defensibility
- Promote Collaboration
 - Among parties
 - Among clients and counsel
- Other?

What Cases Are Best Suited for Early Case Assessment?

- Criteria to consider when determining whether ECA makes sense:
 - Data Volume
 - Data Type
 - Timeline
 - Maturation of Case Strategy
 - Value (liability)
 - Costs of processing and review
 - Key Players/ Fact Witnesses Identified
 - Other?





Using ECA to Reduce Costs & Increase Defensibility

Using Early Case Assessment to Strengthen Defensibility



Sanctions

Poor Searching Techniques

Failure to Identify Fact Witnesses

Improper Discovery Practices



Defensibility

Risk Mitigation Tool

Promotes Collaboration

Saves Money

Use ECA to Prepare for Rule 26(f) Conference

- Early case assessment creates clearer picture of the data at issue
 - Knowing the data fosters clearer communications between opposing counsel
- Visualization and search features can be used to create a budget
 - May be used to argue reasonableness and undue burden
- Visualization features can be used to identify and prioritize custodians for discovery
 - May be used to argue for or against the necessity of preservation of data held by certain custodians

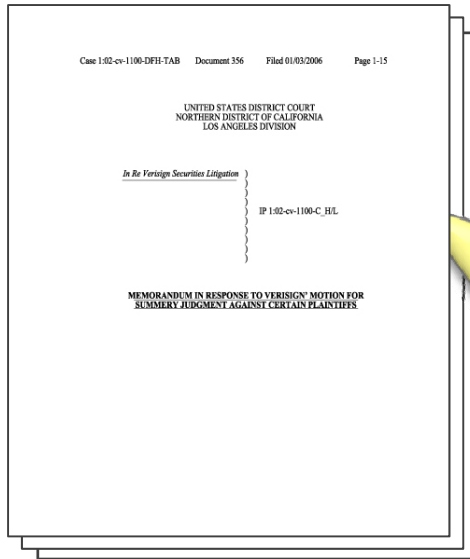
Use ECA to Prepare for Rule 26(f) Conference

- Search features can be used to test keywords to gain a general idea of how certain searches react
 - May be used to argue for or against keyword selection
 - “Practice Point 2. Success in using any automated search method or technology will be enhanced by a well-thought out process with substantial human input ***on the front end.***” (emphasis added)
 - The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery

Search Defensibility

- **Early case assessment strengthens search protocol defensibility**
 - Parties can work together more easily and collaborate on search terms early on
 - Validates quality of search terms: both hits and non-hits
 - E-mail analytics can validate that all relevant custodians have been identified and accounted for

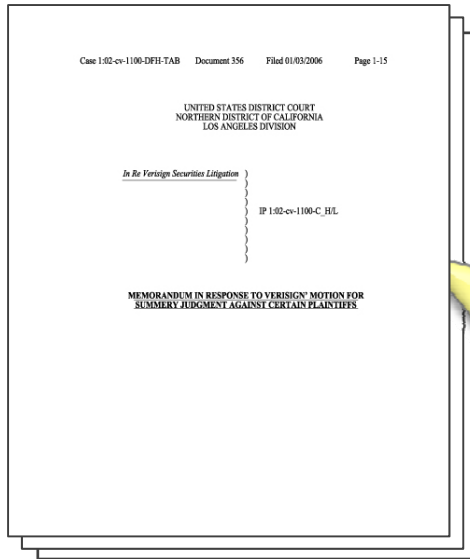
Judicial Trend to Require sound Basis for Keyword Selection



- In this production dispute over search term selection, the court issued a "wake-up call" to attorneys about the need to effectively design search terms used in e-discovery.
- Court referred to parties' conduct as the "latest example of lawyers designing keyword searches in the dark, by the seat of the pants"

-*William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 2009 WL 724954 (S.D.N.Y. Mar. 19, 2009).

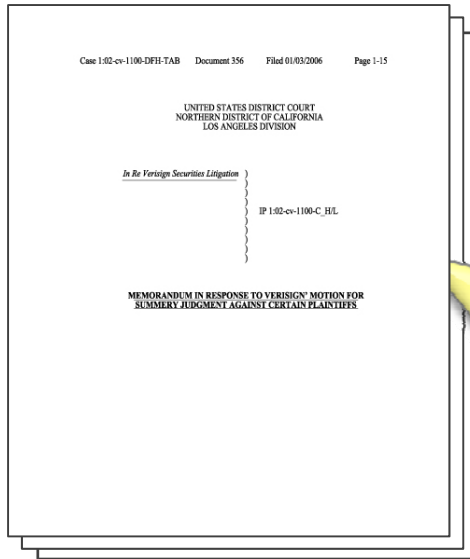
Judicial Trend to Require Sound Basis for Keyword Selection



- **“Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread. This topic is clearly beyond the ken of a layman”**

*-United State v. O’Keefe, 2008 WL 449729
(D.D.C. Feb. 18, 2008)*

Judicial Trend to Require Sound Basis for Keyword Selection



- In this discovery litigation, the court noted that the dispute over production “forced the court into the mysteries of keyword search techniques and the efficacy of various methods used to search electronically stored information.”

-Eurand, Inc. v. Mylan Pharm., Inc., 2010 WL 1458442 (D.Del. Apr. 13, 2010)



Key Elements of Success:
People, Process & Technology

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- **People**

- Make sure the right people are involved, such as an attorney who *really* knows the case

- **Process**


- Process must be well-planned and tailored to each case's specific needs

- **Technology**

- Important features of technology, such as reporting, will help facilitate the process and improve defensibility

- **Note: Simply having the technology alone is insufficient!**

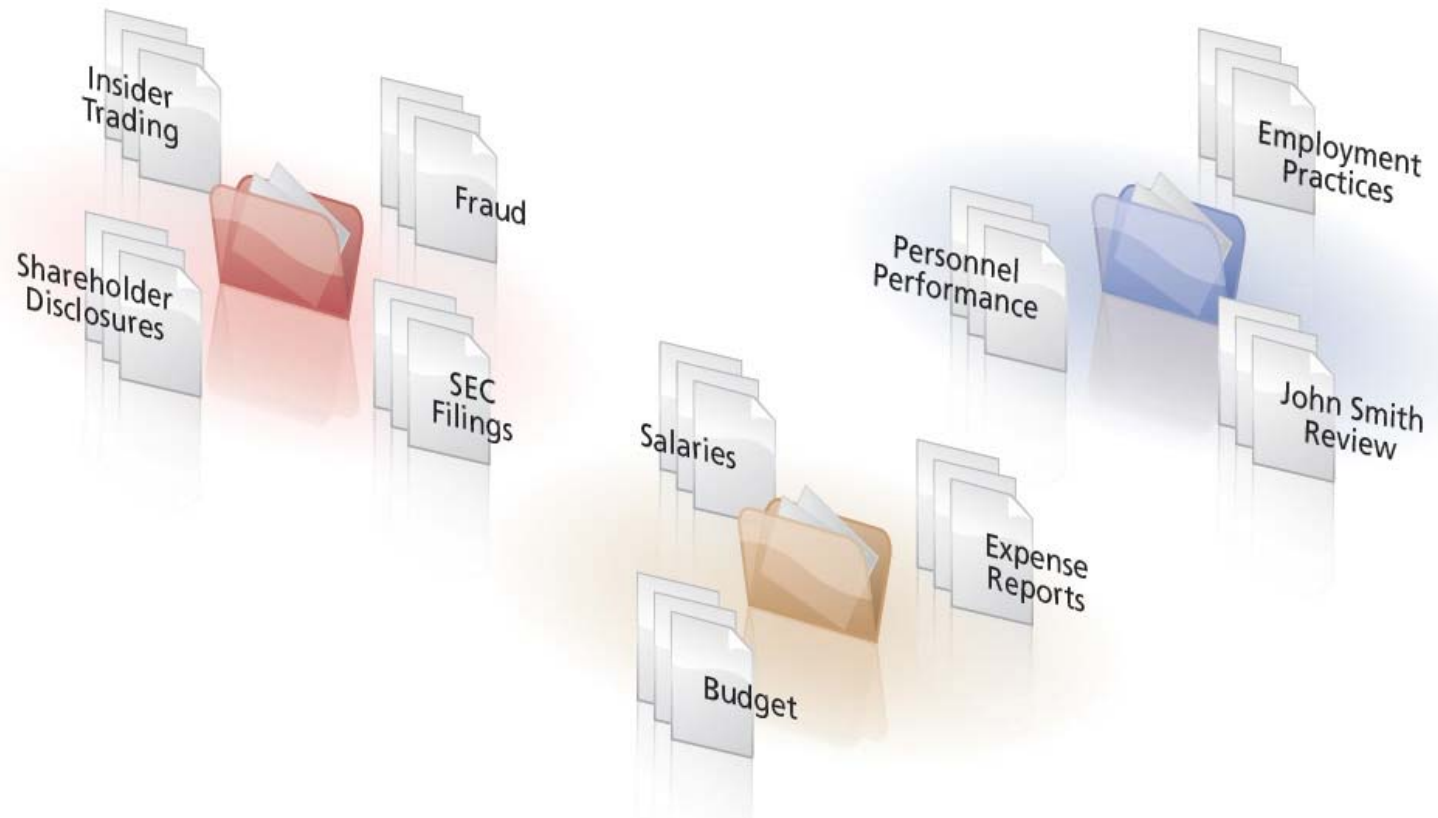
- The best technology in the world cannot compensate for the lack of the right people and process



Power of Topic Grouping, Conceptual Searching & E- Mail Analytics

Topic Grouping

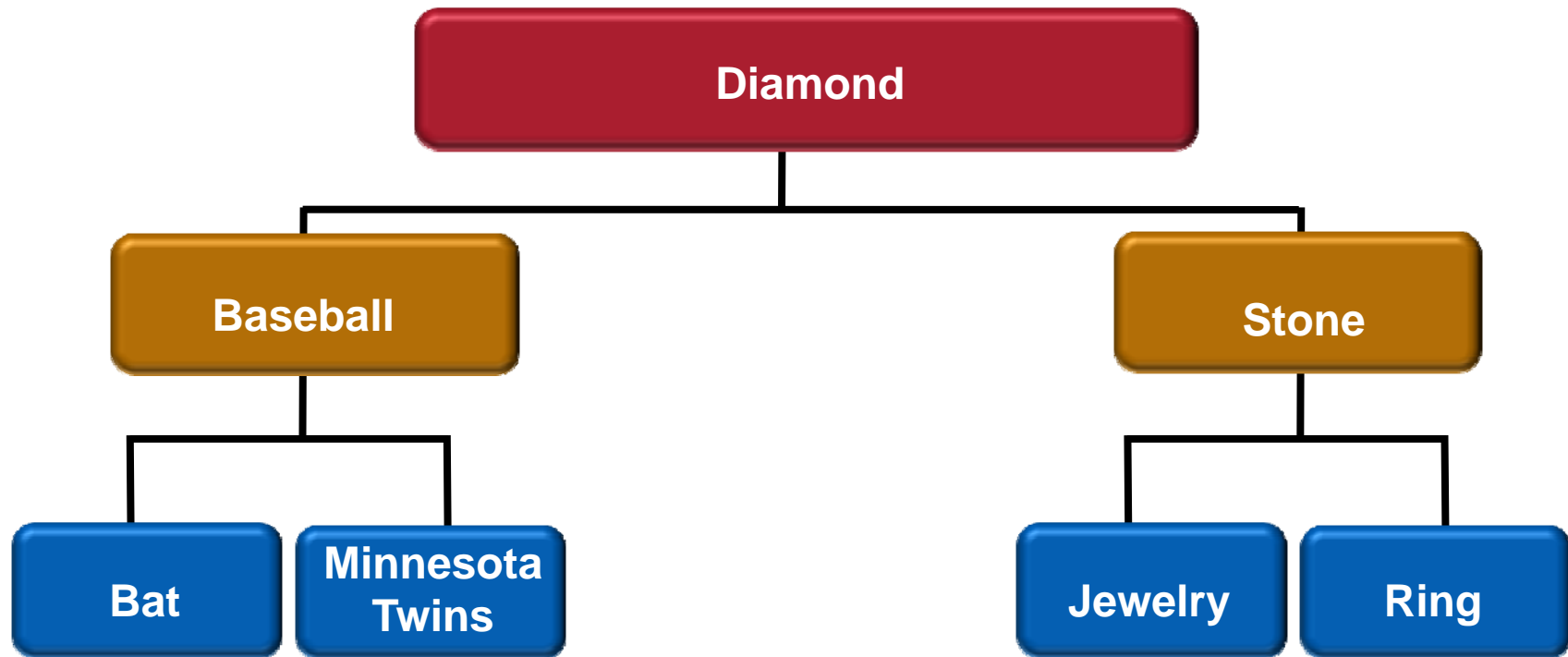
- Topic grouping will group similar documents and label them for quick identification
- Users do not need to “seed” the processing engine by providing keywords



Conceptual Searching

What is it?

- Returns pertinent “hits” even if they do not share any words or phrases with the query
- Statistical Method allows users to build searches using terms that actually exist in your data set



E-Mail Analytics in Early Case Assessment

- A technology-enabled process where e-mails in your document set are organized and analyzed
- Recognizes and visually represents relationships between people, events, timelines and communication patterns through advanced visualizations
- Allows all players with e-discovery responsibilities to analyze e-mails, form legal case strategy, investigate internal incidents and intelligently collect data in preparation for discovery

The Power of Analytics: Who Was Talking to Whom?

The screenshot displays the Ontrack Inview Email software interface. On the left, a sidebar shows a tree view of 'Topic Groups' and 'Document Reviewers' for a user named 'demo56kris'. The main window is divided into a table of email records and a communication network diagram.

File Name/Subject	Control # Start	From	To	CC
Launch Celebration	300001	Nelson, Jamie [/O=0...	Nelson, Jamie;Develo...	
Pricing for Widget 3000	300002	Nelson, Jamie [/O=0...	Nelson, Jamie;Accoun...	
Widget Inc. in the News	300003	Secretary, Sally [/O=...	All Widget	
Widget Inc. in the News	300004	Secretary, Sally [/O=...	All Widget	

Below the table, a communication network diagram shows six nodes representing individuals: President, Patrick; Secretary, Sally; Director, Darla; Accountant, Archie; Boardmember, Boyd; and Controller, Christine. The nodes are connected by lines representing communication. The connections are color-coded: blue for high communication and grey for low communication. President, Patrick is connected to Secretary, Sally (high), Director, Darla (low), Accountant, Archie (high), Boardmember, Boyd (high), and Controller, Christine (high). Secretary, Sally is connected to Director, Darla (low) and Controller, Christine (high). Director, Darla is connected to Controller, Christine (low). Accountant, Archie is connected to Boardmember, Boyd (low). Boardmember, Boyd is connected to Controller, Christine (low).

On the right side of the diagram, there is a legend for 'Nodes' and 'Node Communication'. The 'Nodes' legend includes Custodian Nodes (Email, Calendar), Internal Nodes, and External Nodes. The 'Node Communication' legend shows High (red, yellow, blue) and Low (grey) communication levels. Below the legend is a 'Key' section with buttons for Custodians, Internal Contacts, and External Contacts.

At the bottom of the interface, a status bar shows 'Document 1 of 1031', '1 document(s) selected', 'Page 1 of 1', and 'Current Folder: Priv Term Search'.

The Power of Analytics: What Were the E-mails Talking About?

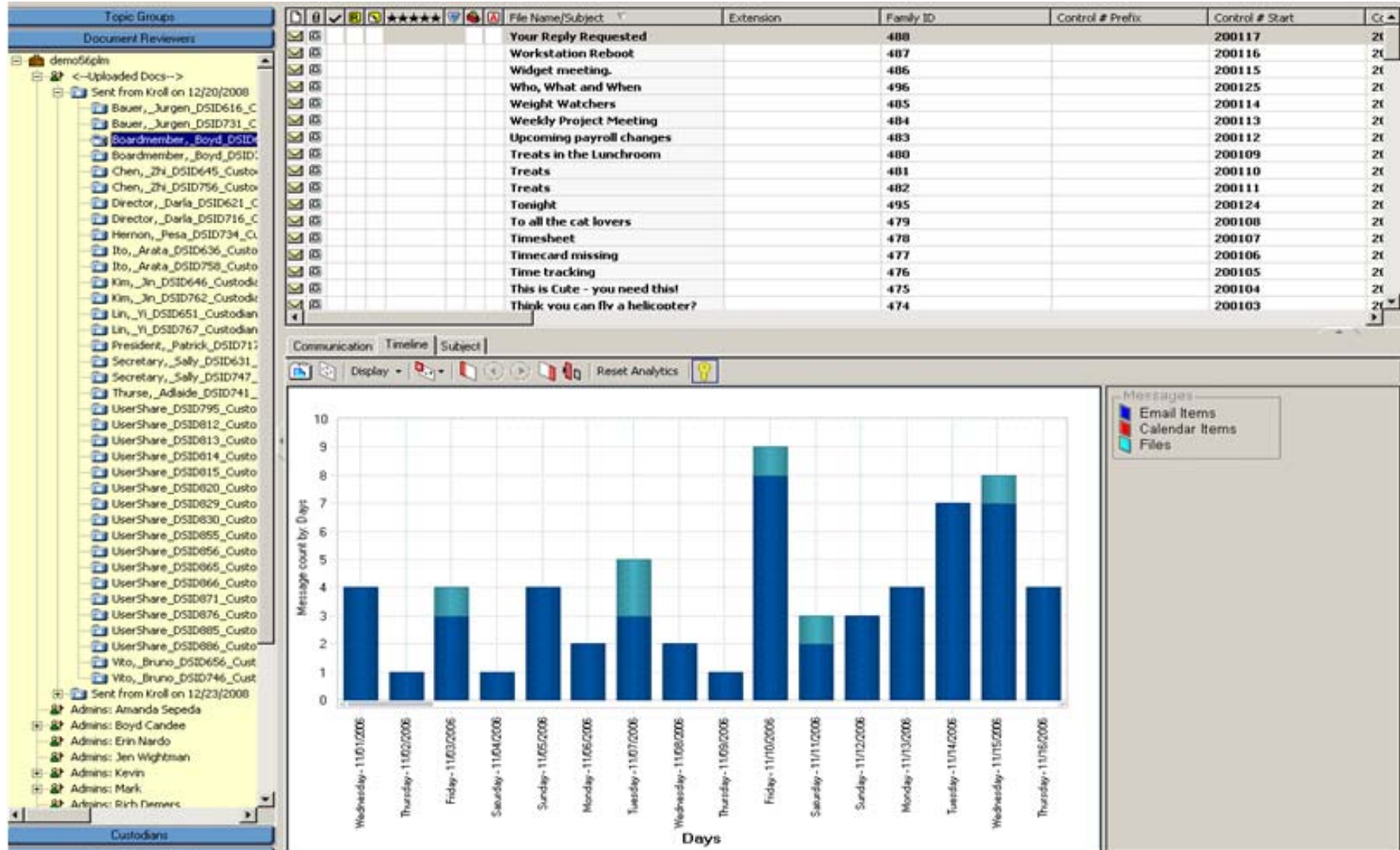
The screenshot displays the Kroll OnTrack interface. On the left, a tree view shows a folder named 'demo56.plm' containing a sub-folder 'Sent from Kroll on 12/20/2008'. This folder contains a list of email subjects, many starting with 'UserShare_DSID...'. Below this, a list of administrators is shown, including Amanda Sepeda, Boyd Candee, Erin Nardo, Jen Wightman, Kevin, Mark, and Rich Demers.

The main window shows a table of email messages with columns for File Name/Subject, Extension, Family ID, Control # Prefix, Control # Start, and Cc. The subjects listed include 'Your Reply Requested', 'Workstation Reboot', 'Widget meeting.', 'Who, What and When', 'Weight Watchers', 'Weekly Project Meeting', 'Upcoming payroll changes', 'Treats in the Lunchroom', 'Treats', 'Tonight', 'To all the cat lovers', 'Timesheet', 'Timecard missing', 'Time tracking', 'This is Cute - you need this!', and 'Think you can fly a helicopter?'.

At the bottom, a 'Subject' analytics bar chart shows the frequency of various subjects. The x-axis represents 'Message counts' from 0 to 5. The y-axis lists subjects. The chart shows that 'Enrollment reminder' has the highest count at 4, followed by 'stock' at 3, and 'Announcement' at 3. Other subjects like 'Who, What and When', 'Treats', 'Lights on in Parking Lot', 'Widget Inc. in the News', 'cBlank Subject', and 'Monthly Communications' each have a count of 2.

Subject	Message counts
Enrollment reminder	4
stock	3
Announcement	3
Who, What and When	2
Treats	2
Lights on in Parking Lot	2
Widget Inc. in the News	2
cBlank Subject	2
Monthly Communications	2

The Power of Analytics: When Did the E-mail Communications Occur?

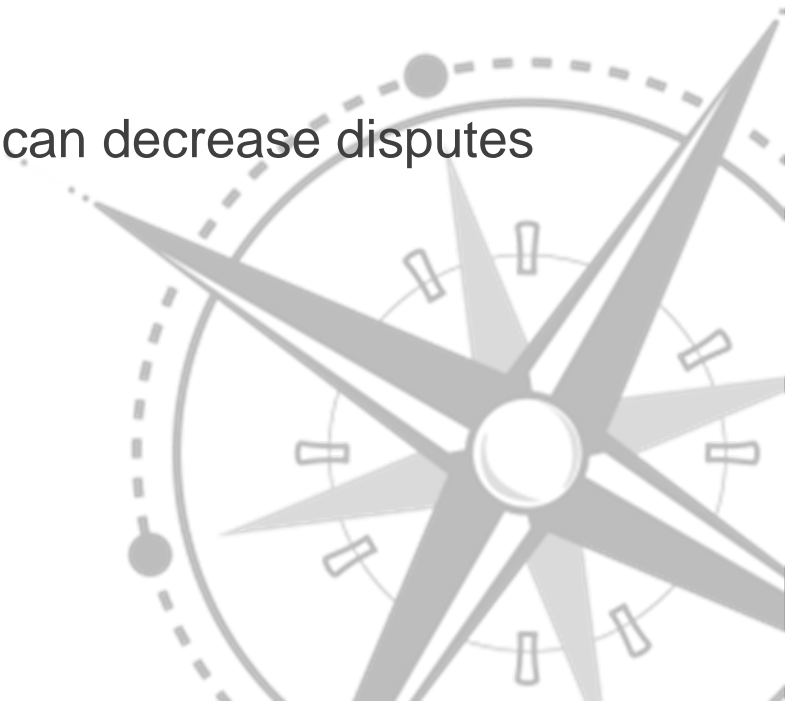




Parting Thoughts

Parting Thoughts

- Search features can be used to decrease volume of e-mails for processing and review early on by weeding out clearly irrelevant e-mails and custodians
- Greater understanding of the data in your case will lead to more correct and defensible decisions regarding preservation, retention, search parameters, etc. in discovery, which will lead to a decreased likelihood of sanctions
- Strong presentation at Rule 26(f) conference can decrease disputes and associated attorney costs



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