



## Ediscovery Behind the Scenes

*An E-discovery Primer: The Technical and Practical*

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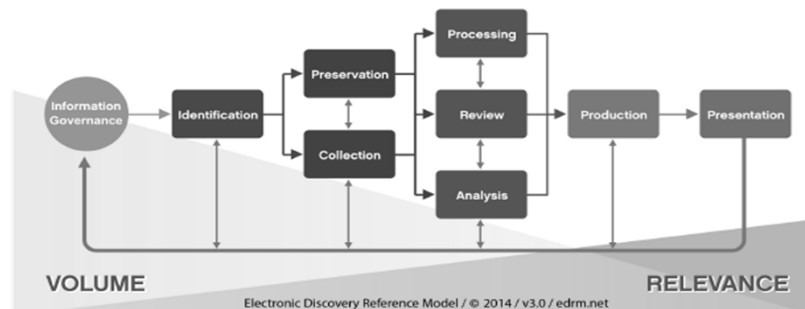
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## Process Steps

### Electronic Discovery Reference Model



Home (<http://www.edrm.net>) » Frameworks & Standards (<http://www.edrm.net/frameworks-and-standards/>) » EDM Model

## **Assessing the Scope of the Collection**

- Must e-mail be collected?
- Number of custodians
- Time Frame
- Search terms
- Deduping
- Dethreading
- Technology assisted review

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## **The Process is Time Consuming**

- Witness interviews
- Assessing all sources
- Collecting data from those locations
- Processing/indexing/loading data
- Setting up tags and layouts for the review
- Reviewing and tagging the documents
- Quality control
- Creating productions and “conflict searches”
- Privilege logs

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## Data is Typically Scattered Everywhere

- E-mail
  - Outlook account
  - Psts on hard drive or network drives
  - Archiving systems
  - Document Management Systems
- Databases
  - Fielded data can be voluminous and complicated to extract
  - Underlying documents (often linked, creating complications in collection)
- Shared Drives, SharePoint Sites, Intranet Sites

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## Maturity and Proportionality

E-Discovery Maturity Model				
Level ↗	Focus	Strategy	Expertise	Costs
5 Integrated and Optimizing	Automate and Integrate	Legal and IT Manage In-house with Strategic Vendor Use	Expert Team of Legal and IT	Shared Costs, Mainly with IT
4 Semi-Integrated	Reduce Costs	Legal Manages Blend of Vendor and In-house Resources	Single Expert in either Legal or IT	Targeted Reductions
3 Standardized	Standard, Repeatable Process	Vetted and Trusted Vendor(s)	Expert at Trusted Vendor	Controlled
2 Managed	Plan and Manage	Outside Counsel Manages Many Vendors	Expert at Outside Counsel	Overruns, Unexpected Costs
1 Ad Hoc, Chaotic	Just Get It Done	Individual Heroics	None	Surprising

<http://www.edrm.net/papers/the-e-discovery-maturity-model/>

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## Impact of the Changes to the Federal Rules

- Adding proportionality to Rule 26 and removal of “reasonably likely to lead...” has had a positive impact in the process
  - *Gilead Sciences, Inc. v. Merck*, N.D. Cal. January 13, 2016
  - *Maochun Ye v. Cliff Veissman*, N.D. Ill. March 7, 2016
  - *Pertile v. General Motors*, D. Colo. March 17, 2016
- The North Carolina Business Court has adopted similar principles of proportionality in Rule 10.3(a)
- Similar changes may be considered for the NC Rules of Civil Procedure. But even without the new language, other NC courts can apply the same general principles under Rule 26 (b)(1a), and the specific limitations set out in Rule 34(b)

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## Common Issues that Lead to Slowdowns and Needless Disputes

- No movement forward while stalled in negotiations
- Failure of the lawyers to understand process and volume
- Negotiating search terms in a vacuum
- Failure to tie the data to the document requests
- Spending too much time negotiating long detailed ediscovery protocols in the case with provisions not relevant to the case
- Unreasonable preservation demands and disputes regarding preservation before discovery has started

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## Scope and Proportionality

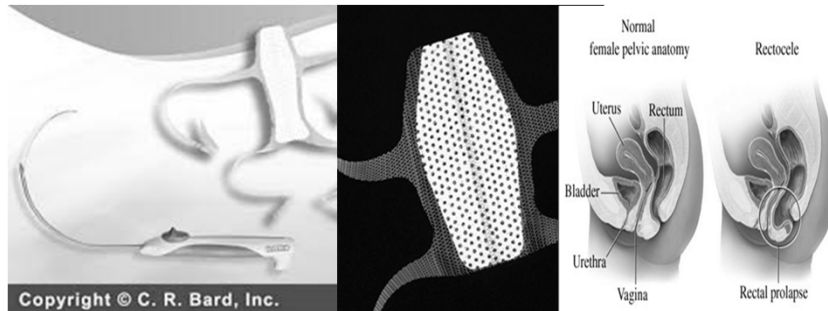
- Balancing Interests
  - Nature of case
  - Identification of parties
  - Sophistication of parties



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## Scope and Proportionality


- First bellwether case went to trial in the summer of 2013
  - Cisson v. C.R. Bard



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## Scope and Proportionality

Case 2:10-md-02187 Document 789-1 Filed 02/20/14 Page 2 of 10 PageID #: 10718

 **Material Safety Data Sheet**

**SECTION 1. PRODUCT AND COMPANY IDENTIFICATION**

**Marlex® Polypropylene (All Grades)**

**Product Use:** Extrusion and Injection Molding  
**Sample:** Plastic

**Product CAS No.:** Mixture

**Company Identification:**  
Phillips Samika Polypropylene Company  
1500 East First Drive  
The Woodlands, TX 77380

**Product Information:**  
MSDS Requests: 1-800-850-8226  
Technical Information: 1-800-850-8223  
Hazardous Spill/ Product Safety Group  
Email: mds@phillips.com

**Chemical:** Phillips Chemicals International N.V.  
E-3000 Oostvliet  
Bilthoven

**24-Hour Emergency Telephone Numbers:**  
U.S.A.: Phillips Chemical Emergency Information Center: 888-445-8828 (From Abroad) and 1-800-813-4884  
International: Phillips Emergency CHEMTRAC: 800-451-8881 or 703-527-2887  
Telephones:  
ASIA: +1 703-527-2887  
EUROPE: 800-20-14-8884 (1) and/or 30-14-8884 (2) (after)  
SOUTH AMERICA: 020-0111-767  
Outside Brazil: 05-18-2467-1800

**MEDICAL APPLICATION CAUTION:** Do not use the Phillips Samika Polypropylene Company material in medical applications involving permanent implantation in the human body or permanent contact with internal body fluids or tissues.

Do not use the Phillips Samika Polypropylene Company material in medical applications involving brief or temporary implantation in the human body or contact with internal body fluids or tissues unless the material has been approved specifically for use by the Phillips Samika Polypropylene Company under an agreement which expressly acknowledges the Company's approval.

Phillips Samika Polypropylene Company makes no representation, promise, express warranty or implied warranty concerning the suitability of its material for use in implantation in the human body or in contact with internal body fluids or tissues.

Revision Number: 5.10      1 of 1      Marlex® Polypropylene (All Grades)  
Revision Date: 02/13/2014      MDS: 142510

CONFIDENTIAL - PRODUCED PURSUANT TO PROTECTIVE ORDER      AVAZE1281058

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## Scope and Proportionality

- Bard internal emails

... directly from Shakespeare, which is made from the same Phillips Marlex resin as in Bard mesh. Genzyme and Secant know that we are "vertically integrated" with respect to PP monofilament extrusion but DO NOT KNOW that Red Oaks is our extrusion supplier (captive with Davol owned assets) or that Red Oaks purchases the Phillips Marlex resin without Phillips knowledge for its use in a medical device. We need to keep this proprietary

IMPORTANT these suppliers will likely not be interested in a medical application due to product liability concerns. We purchase our polypropylene monofilament from an extrusion supplier who purchases the resin directly from the resin manufacturers. Thus, it is likely that they do not know of our implant application. Please do NOT mention Davol's name in any discussions with these manufacturers. In fact, I would advise purchasing the resin through a 3rd party, not the resin supplier to avoid a supply issue once the medical application is discovered.

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## Cost Considerations

E-Discovery	Unit of Measure	Vendor A Rates	Vendor B Rates	Vendor C Rates
Collections - Forensic Data Collection Services	\$ per hour	\$275	\$275	\$295
Collections - Forensic Data Analysis Services	\$ per hour	\$275	\$275	\$295
Data Ingest: File Type/ Date Range Filters	\$ per GB	\$30	\$30	\$25
Data Ingest: Native File Processing - Full Text/ Keyword Searches	\$ per GB	\$125 per GB	\$125 per GB	\$120 per GB
Technology Assisted Review (TAR)	\$ per GB	Included	\$0.04 per doc	\$0.04 per doc
General Consulting	\$ per hour	\$175	\$175	\$175
Technology Assisted Review Consulting	\$ per hour	\$175	\$250	\$295
Analytics - Concept Clustering, Near DeDup, Email Threading	\$ per GB	\$0.04 per doc	\$0.04 per doc	\$0.04 per doc
Data Export (Native)	\$ per GB/Hour	\$175	\$175	\$295
Data Export (Tiff)	\$ per GB/Hour	\$175	\$175	\$295
Hosting of Processed Data	\$ GB per month	\$30	\$9	\$12
Near-line Hosting of Non-Review Data	\$ GB per month	\$5	\$5	\$5
Database Users Reviewer Platform Licenses	\$ per user/ month	\$50	\$75	\$75
Data Loading	\$ per GB or per hour	\$175	\$175	\$175
Tiff Conversion for Production	\$ per page	\$0.02 per page	\$0.02 per page	\$0.03 per page
Native productions	\$ per page	\$0.05 per page	\$0.05 per page	\$175 per hour
OCR	\$ per page	\$0.01 per page	\$0.02 per page	\$0.01 per page
Branding and Endorsing (Bates Numbering - per Bates)	\$ per page or per hour	\$0.02 per page	\$0.01 per page	\$0.01 per page
Scanning	\$ per page	Market	\$0.14 per page	\$0.10 per page
Scanning (Glass Work) Manual unusual sizes	\$ per page	Market	\$0.20 per page	\$0.17 per page
Media HDD	\$ per unit	Cost	\$200	\$175
DVD Master	\$ per unit	Cost	Cost	Cost
CD Master	\$ per unit	Cost	Cost	Cost

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## Complications Added by Personal Devices and Social Media

- Privacy issues
- Technical complications
  - Exporting data in a format that is similar to native can be difficult
  - Expensive to image and extract
  - Vendors have to keep up with constantly changing technology
- Preservation issues
- Scope of discovery requests often too broad

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## How the Court Can Help

- Define the relevant scope of discovery
  - Which requests call for e-mail? Which can be answered by more targeted collections
- Are there legal disputes that do not require discovery or require minimal discovery that could be decided first and may shape the scope of the case/settlement
- Prevent discovery from overtaking the case before key motions have been decided (e.g, motions to dismiss)
- Avoid requirements of detailed, filed ediscovery protocols

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## Discovery on Discovery

- “Discovery on discovery” can lead to expensive and time consuming discovery on issues unrelated to the merits of the case
- Many courts are blocking such discovery under Rule 26
  - *Miller v. York Risk Services Group*, No. 2:13-cv-1419 JWS (D. Ariz. 2014)
  - *Martin v. Allstate Ins. Co.*, 292 F.R.D. 361, 363-64 (N.D. Tex. 2013)
  - *In re Jemsek Clinic, P.A.*, 2013 WL 3994666 (Bkrtcy.W.D.N.C. 2013)

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## Questions



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