

Legal Information Management: Preservation, Destruction, Production and Presentation

Presented by Martin Felsky, PhD, JD
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- Partner, Harrington LLP (2010)
- Ontario Bar 1985
- Board of Directors, CanLII
- JTAC, Canadian Judicial Council (since 1987)
- Sedona Conference Canada WG- 7 (to 2011)
- E-Discovery Subcommittee, Task Force on The Discovery Process in Ontario
- Nova Scotia Courts, Amended Civil Procedure Rules
- McCarthy Tétrault, Legal Technology Counsel 1988-1995
- Commonwealth Legal 2000-2009
 - Co-founder, CEO



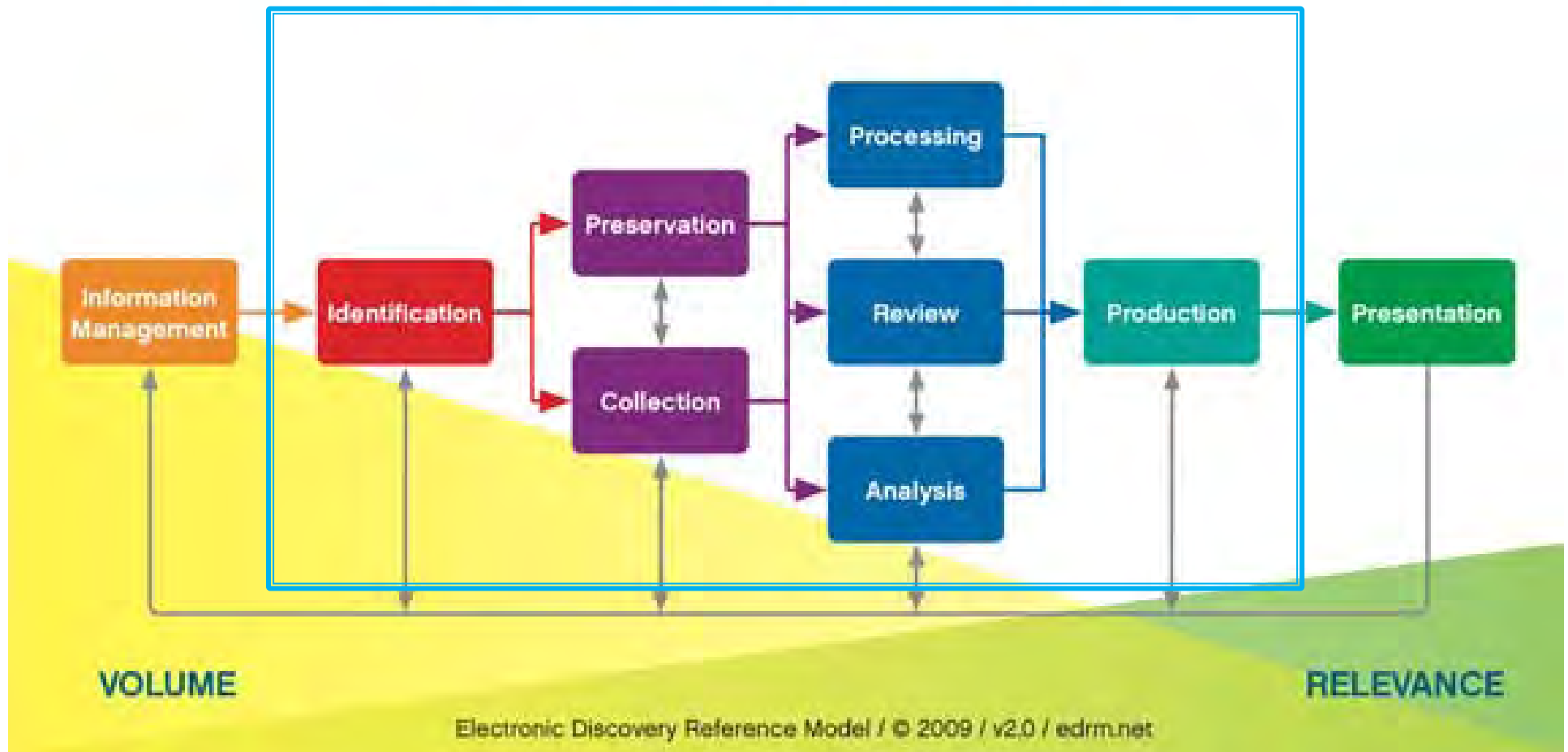
**INFORMATION
GOVERNANCE
LAWYER**

Sedona Canada Key Principles

- ESI [Electronically stored information] is discoverable (1)
- Proportionality (2)
- Early preservation (3)
- Meet & Confer (4)
- Reasonableness (3), (5)
- Use of technology (7)
- Agree on format (8)
- Each party bears own costs (12)

Compliance - Electronic Discovery

Electronic Discovery Reference Model



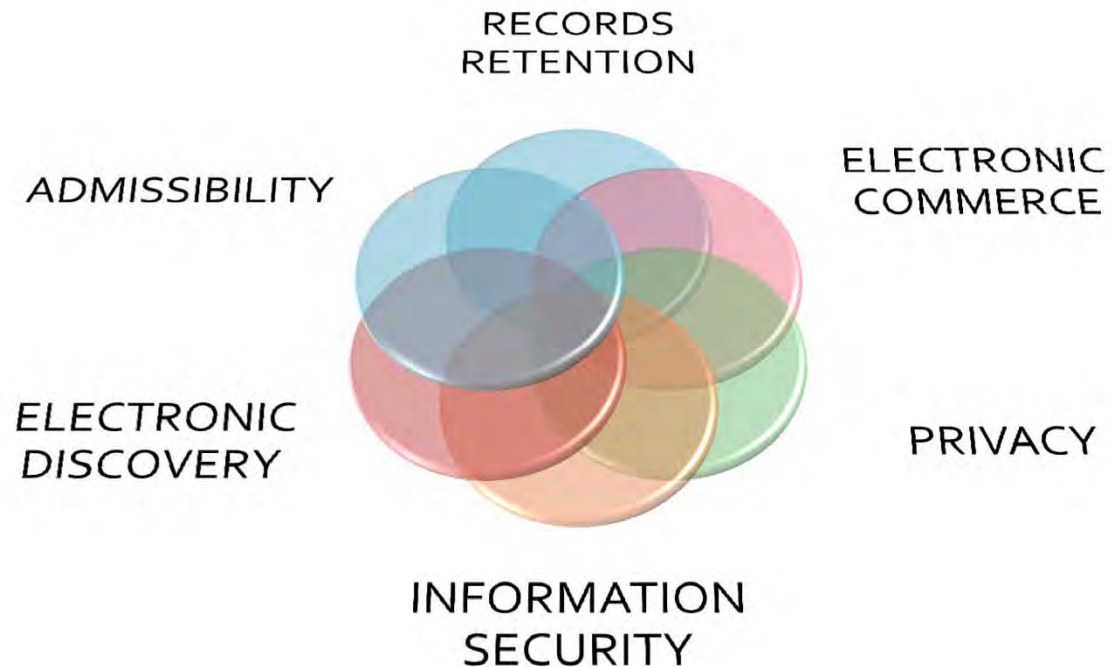
Five Types of Documentary Records at Law

1. Hard copy original paper
2. Born digital
3. Relied-upon paper printout from digital source
4. Image scanned or microfilmed from paper
5. Records created through EDI (eCommerce)

Consider status:

1. Tape backup copy of email message in a database
2. Handwritten notes on a hard copy of page two of a Word document
3. Embedded formulas in an Excel spreadsheet
4. Etc.

Scope of Records and Evidence Management Law





Standards for Records Management

- ISO 15489-1 Information and Documentation – records management
- “An organization seeking to conform to this part of ISO 15489 should establish, document, maintain and promulgate policies, procedures and practices for records management to ensure that its business need for evidence, accountability and information about its activities is met.” s. 6.1.

Key challenges of electronic records management

- Volume and cheap storage
- Transitory and persistent
- Metadata – audit trail
- Decentralized
- No inherent security
- Multiple devices
- Machine readable
- Obsolescence
- **Admissibility**



Challenge 1 – Records Retention

- How long does an airline or hotel have to keep a record of reservations? When can it be deleted?
 - In the normal course of business?
 - When they realized they were going to be sued?
 - Who decides?
- Can they keep all electronic records forever?
- Relevance – information v. records
- Litigation hold override

Compliance - Records Retention

- Laws of general application
 - Statutory retention periods
 - Common law and statutory limitation periods
- Specific laws by sector or industry
 - Regulated industries
- Records management standards

Challenge 2 - Privacy

- My reservations contain Personal Information
 - How is it protected?
 - Was it collected with my consent?
 - Can it be shared without my knowledge?
 - What if it contains incorrect information?
- Social networking
- Employee rights

Compliance - Privacy

- Legislation
 - Canada: Federal, Provincial Privacy, access and freedom of information
 - Public and private sector
 - Special legislation – e.g. health
 - European Community *Directive*
 - US *Patriot Act*
- Case law
- Privacy Commissioner decisions

Challenge 3 – E-Commerce

- Is a web-based reservation or receipt valid in law?
- If so, when and where was the contract made?
- What if legislation says records must be kept “in writing”?

All Mail - Mozilla Thunderbird

File Edit View Go Message Tools Help

Get Mail Write Address Book Tag kim

Reply Reply All Forward Delete Junk Print Stop

Back Forward

All Mail

All Folders

- martin@felsk...@felsky.com
 - Inbox (3)
 - [Gmail]
 - Drafts
 - Sent Mail (60)
 - All Mail (2012)
 - Spam
 - Trash
 - Starred (1)
 - 01 Filed PDF (1)
 - 05 Personal
 - 156 Square One
 - APS 2010
 - Blakes
 - Blood
 - CWL
 - cwl.com
 - Deleted Messages
 - ESAI ats KEC
 - Faskens
 - JTAC
 - Lerners
 - Litsup (507)
 - Mississauga Inquiry
 - NS Rules
 - Sotos
 - TRC
 - WCIG
 - Local Folders

Quick Filter: Unread Starred Contact Tags Attachment

From	Subject
Air Canada	Air Canada - 27-Sep: Toronto - Montreal (booking ref: P46MSA)
Air Canada	Air Canada - 21-Sep: Toronto - Ottawa (booking ref: LBILLV) - seat se
Air Canada	Air Canada - 21-Sep: Toronto - Ottawa (booking ref: LBILLV)
Air Canada	Air Canada - 10-Aug: Toronto - Minneapolis (booking ref: LDAQKZ) -
Air Canada	Air Canada - 10-Aug: Toronto - Minneapolis (booking ref: LDAQKZ)
Air Canada	AC178 Edmonton-Yeg to Toronto-T1 Electronic Boarding Pass
Air Canada	AC154 Edmonton-Yeg to Toronto-T1 Electronic Boarding Pass

from Air Canada <confirmation@aircanada.ca>

subject **Air Canada - 27-Sep: Toronto - Montreal (booking ref: P46MSA)**


to mfelsky@felsky.com

***** PLEASE DO NOT REPLY TO THIS E-MAIL *****

Itinerary/Receipt

Your booking is confirmed. Please print/retain this page for your financial records (for taxation, expense claim or credit card reconciliation purposes). We thank you for choosing Air Canada and look forward to welcoming you on board.

[Learn what you can do with this barcode](#)



Looking for Travel Insurance? Protect yourself and your family against unforeseen circumstances.

Need a hotel in Montreal? Competitive room pricing guaranteed. Earn Aeronplan Miles for every purchase.

Your Radisson Hotels & Resorts Reservation Confirmation - Mozilla Thunderbird

File Edit View Go Message Tools Help

Get Mail Write Address Book Tag

Search all messages... <Ctrl+K>

Reply Reply All Forward Delete Junk Print Stop

Back Forward

All Mail Search Your Radisson Hotels & Resorts R...

Quick Filter: Unread Starred Contact Tags Attachment


From	Subject
Radisson Hotels & Resorts	Your Radisson Hotels & Resorts Reservation Confirmation
Radisson Hotels & Resorts	Your Radisson Hotels & Resorts Reservation Confirmation

from Radisson Hotels & Resorts <reservations@radisson.com>

subject **Your Radisson Hotels & Resorts Reservation Confirmation**

to MFELSKY@FELSKY.COM

This is a post only e-mail. Please do not reply.



Radisson Hotel Edmonton South
 4440 GATEWAY BOULEVARD
 EDMONTON, AB CANADA T6H5C2
 780-437-6010

Reservation Summary for Confirmation Number: 7S5WLLK

Reservation for:	Dr Martin Felsky
Number of people:	1 Adult 0 Children
Arrival Date:	Sun Jul 25 2010
Departure Date:	Tue Jul 27 2010
Hotel Check-In time:	3:00 PM
Hotel Check-Out time:	NOON

Compliance - E-Commerce

- Electronic Transactions Legislation
 - Validity in place of a “written” record
 - Location and timing of transactions
- Electronic signatures
- Confirming identity

Challenge 4 – Rule against hearsay

- Business records are hearsay
 - Document as proof of a statement made by someone not in court

Compliance – Rule against hearsay

- Business records to be admissible must be shown to be made in the “*usual and ordinary course of business.*”
- Same rule for electronic business records.

Challenge 5: Best Evidence Rule

- In the absence of an “original”, is a copy admissible?
- What is an electronic “original” anyway?

Compliance – Best Evidence Rule

- A printout of an electronic record that has been relied upon and used as the record, satisfies the best evidence rule
- The integrity of an electronic record may be proved by evidence of the integrity of the electronic records system

Challenge 6 – Authentication

- Is the proffered evidence what it purports to be?
- Was there authority to issue the record as an official business record?
- Who is the “author”?

129387298465961374098175984
2194632875389234596276
8374689178923459665865
37239878923459632139
12892345960101010102389
923459623432
553589234596
556892345966
555892345963
64564565v465
758923459694
589234596832
392345968486
578923459659
348923459662
408923459698
509328409380
403284328409
766487236487
625345343459
435345923648
493489232345
374621864876
774293874982
534545344323
354545963434
554354489285
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3543354364345252332467329873274
324347323525454932749326



ACCESS APPROVED



THE LAW

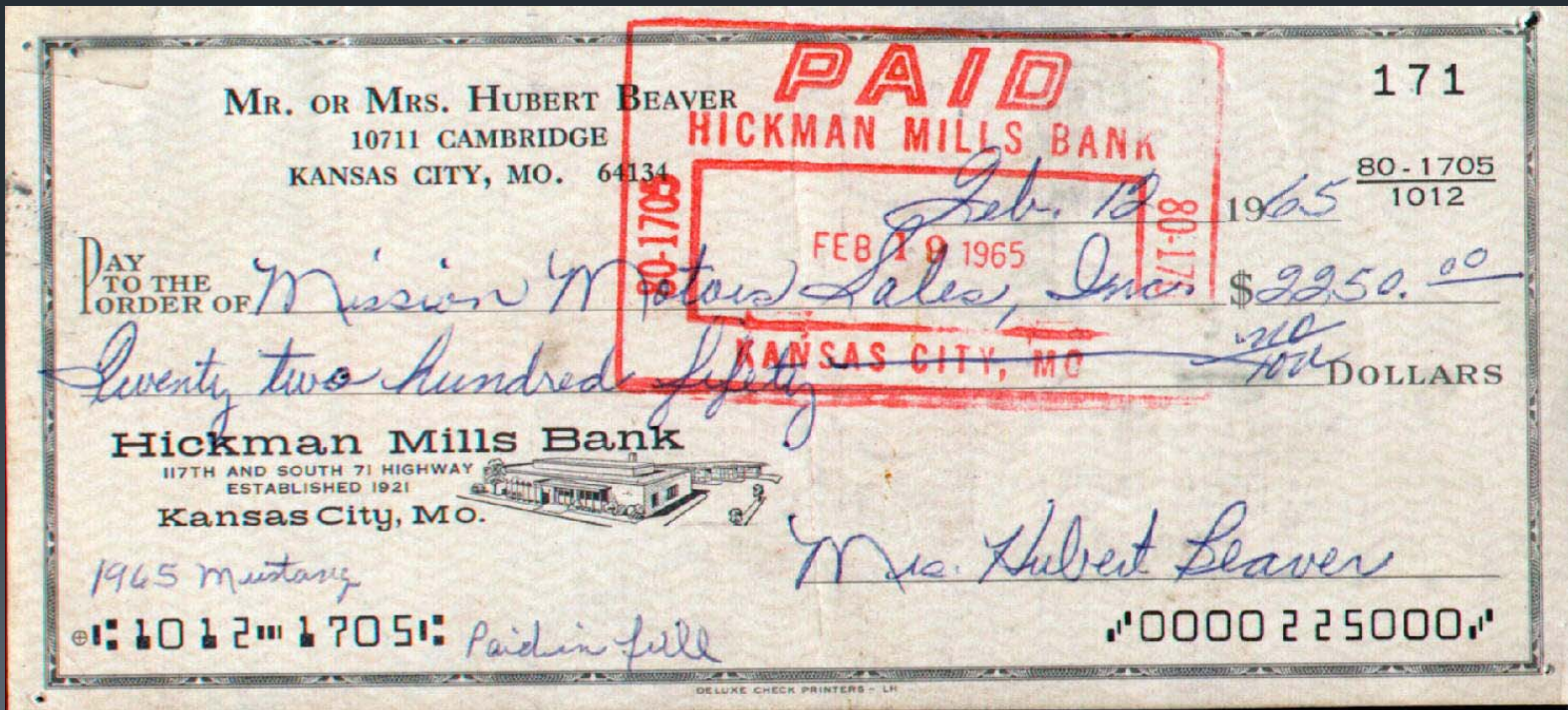
Authentication

■ “Before any document can be admitted into evidence ... it must be authenticated in some way by the party who wishes to rely on it. This authentication requires testimony by some witness; a document cannot simply be placed on the bench in front of the judge.” *R. v. Schwartz*, [1988] 2 S.C.R. 443 at para. 58.

LOADED DATA

354335242329873274
24234233423473232749326
45424234233425353
2423465464566564233423454
545242342334235454532
534242342534534534636
34242345463476576

Proof of payment - paper





Authentication is the most challenging evidentiary problem in the Internet age.

Pay Bills
3 of 3

February 04, 2011 at 04:07pm Eastern time

Ref. #	Payee	Account	Amount	Payment Date
6326	UNIV OF GUELPH - STUDENT FEES (0604319)	[REDACTED]	\$1,491.47	Feb. 04, 2011

Time received: February 04, 2011 at 04:07pm Eastern time

If you would like to be notified about the status of your postdated bill payments, sign up for [Postdated Bill Payment Alerts](#).

Please note:

- Payments will be processed in the order in which they appear.
- A bill payment can be deleted until 9:30 p.m. eastern time on the day it's scheduled to be made. To delete a bill payment, select "View Upcoming and Past Payments."
- Payments to your CIBC Credit Cards Account(s) cannot be cancelled because they are considered to be account transfers and are processed immediately.
- For postdated and recurring bill payments, funds must be available in your account 1 business day before the scheduled payment date; otherwise, the transaction may be cancelled without notice to you.
- Transactions submitted after **6 p.m.** eastern time will be processed in **2** business days.

Key questions



1. If we scan the cheque to PDF, is the PDF admissible as evidence?
2. If we scan the cheque to PDF and shred it, is the PDF admissible as evidence?
3. What if we don't use cheques at all? How can we prove an electronic payment?
4. Is a print-out of a web page evidence of payment? If not, then what is?

Compliance - Authentication

- “The person seeking to introduce an electronic record has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.”
- = Rebuttable presumption
- Test: “Circumstances of the making of the record”

Compliance - Admissibility

- Advisable to use all three tests for electronic records management:
 - Ordinary course of business (hearsay)
 - Integrity of the system (best evidence)
 - Circumstances of the making of the record (authentication)
- Implement National Standards
 - CGSB 72-11 – Scanned images as evidence
 - CGSB 72-34 – Electronic information as evidence

CAN/CGSB 72.11

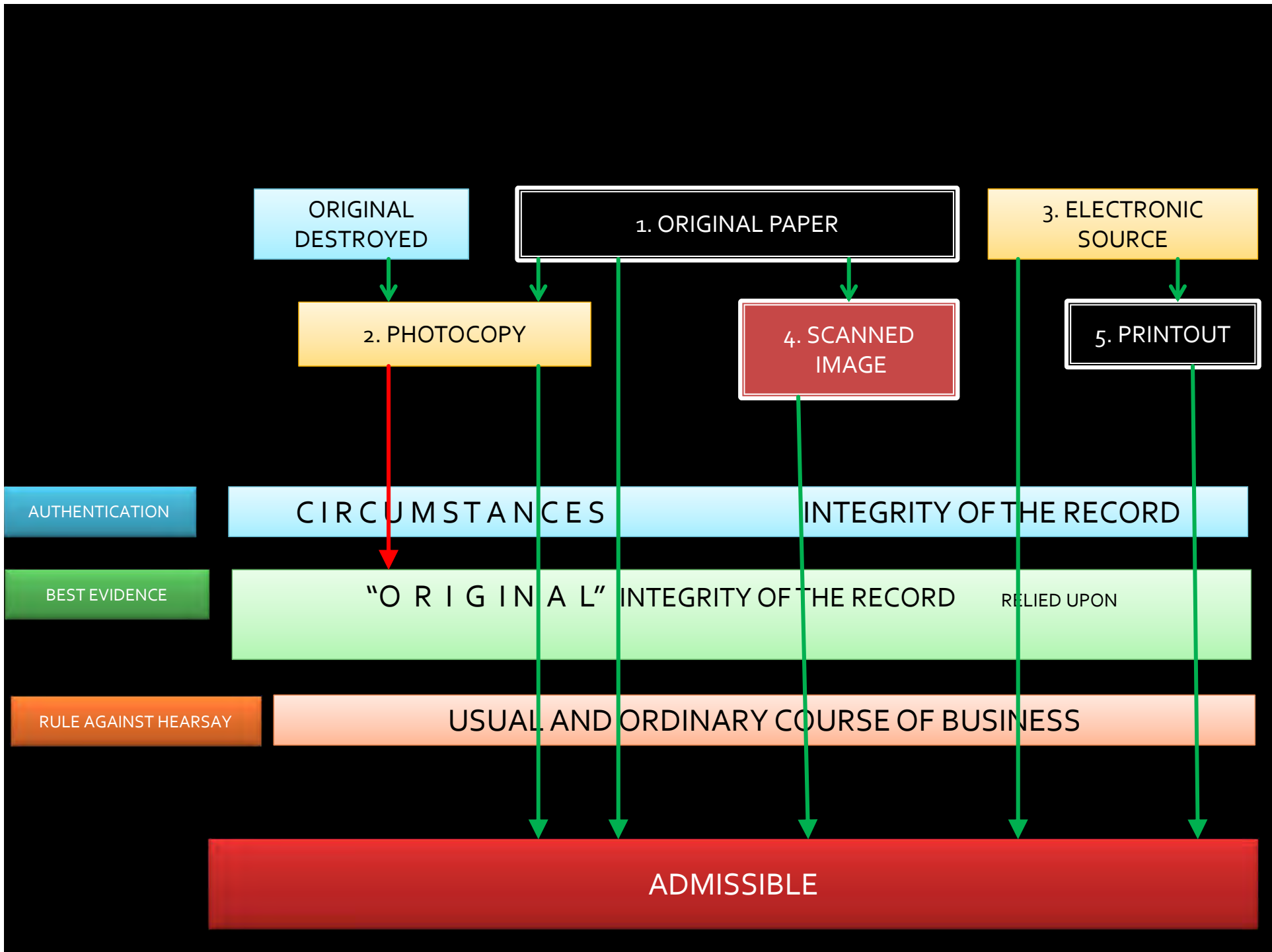
Overview of key provisions

1. Policy must authorize the establishment of an **Electronic Image Management program** [next slide]
2. Written procedures manual describing the EIM program
3. Source records prepared for capture in accordance with ANSI/AIIM MS52
4. Basic control objectives of **Completeness – Accuracy – Authorization - Maintenance**
5. Images must not be lost or damaged through accident or omission
6. Bibliographic, biographic information must be captured completely
7. Biographic information for locating and retrieving images must have the following to be complete: **Capture date - Capture device ID - Any details on modifications - Cross-references**
8. If electronic images subject to the same rules that apply to all other computer-produced records (cf .CGSB 72.34).

CAN/CGSB 72.34 - 2005

Overview of key provisions

1. Authorized system to effectively manage electronic records (including email, databases, websites, etc.)
2. Software that helps hold, identify, collect, cull, and review electronic records *in situ* as part of an electronic RMS
3. Use/collect data from reliable sources
4. Reliable operating and application software
5. Track system changes and upgrades
6. Validate data entry and processing procedures
7. Create source records soon after the event
8. Make business decisions in reliance on our own electronic records
9. Create records routinely in the ordinary course of business
10. Implement RIM industry standards
11. Run a secure system
12. Segregate or otherwise protect privileged and private information



Challenge 7 - Security

- Supports privacy, authenticity and integrity
- How do I know the evidence has not been tampered with?
 - Deliberately or Inadvertently?
- Who had access to the reservation online?
- Who had access before production and trial?
- Cloud computing
- How accurate and trustworthy is the reservation software?
 - Was it programmed properly and monitored?
Validated?

Compliance - Security

- ISO/IEC 27002 ISO/IEC 27002:2005 provides best practices for information security management. Information security is defined in the context of the **C-I-A** triad:
 - **Confidentiality** (ensuring that information is accessible only to those authorized to have access)
 - **Integrity** (safeguarding the accuracy and completeness of information and processing methods) and
 - **Availability** (ensuring that authorised users have access to information and associated assets when required).
- Canadian Government Security Policy
- *Blueprint for the Security of Judicial Information*
- Policies v. implementation and audit

Challenge 8 – E-Discovery

- How can we find all the relevant information?
- How do we minimize the cost?
- How do we filter out private, privileged and irrelevant information?
- How do we produce a database, or a website?
- Can the plaintiff be allowed to search in a database?
- How is a reservation record to be presented in court?

Compliance - Electronic Discovery

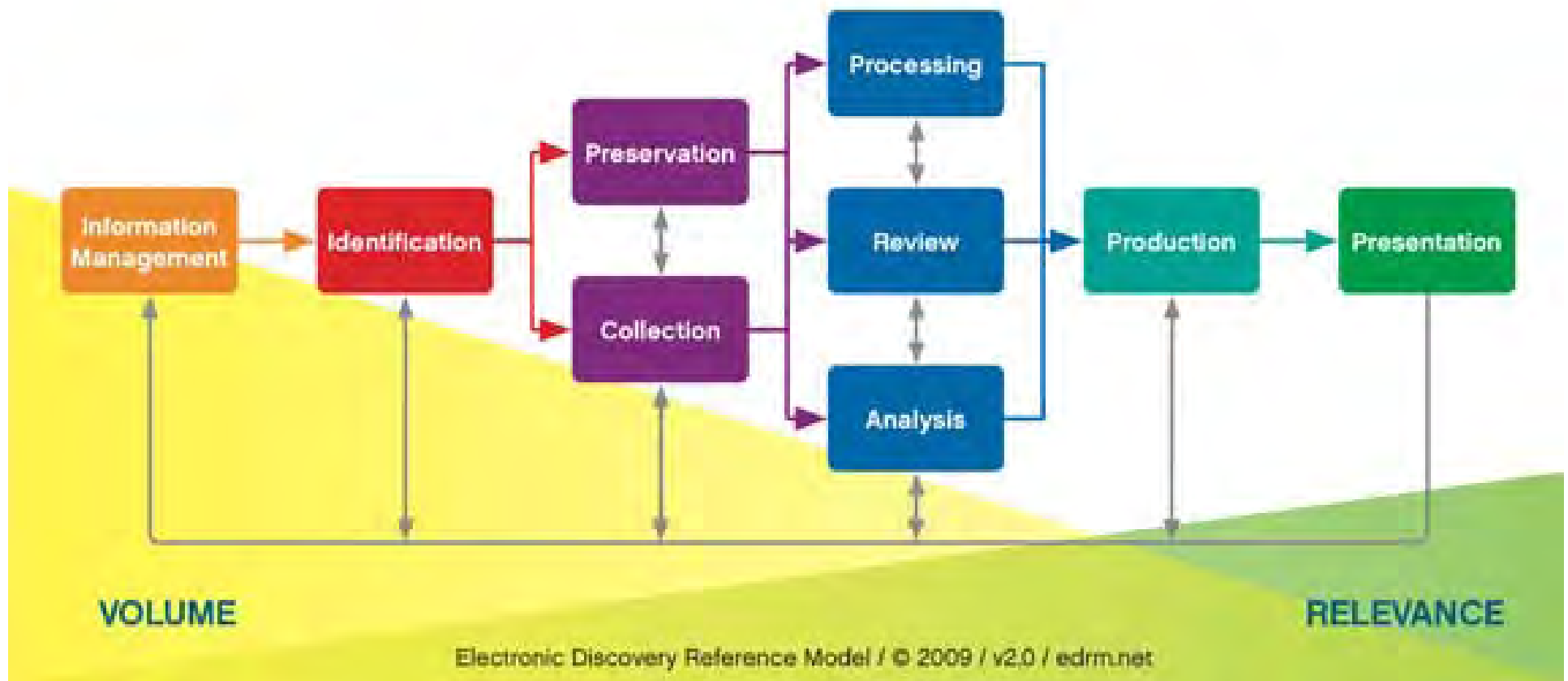
- Rules of Civil Procedure
- Rules of Practice:
 - Tribunals, Commissions and Inquiries
- Sedona Canada Principles
- Court Practice Directions
- National Model Practice Direction (JTAC)
- Case law

Sedona Canada Key Principles

- ESI is discoverable (1)
- Proportionality (2)
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Compliance - Electronic Discovery

Electronic Discovery Reference Model



Key Issues in Records and Evidence Management Law

Records Retention

- What to keep and for how long?

Electronic Commerce

- Validity of transactions

Privacy

- Protection, consent, notice and access

Information Security

- Authenticity, integrity, privacy assurance

Electronic Discovery

- Access, cost, relevance, completeness

Admissibility

- Proof of contents

Presentation: E-Courts and E-Trials



Australian E-Courtroom

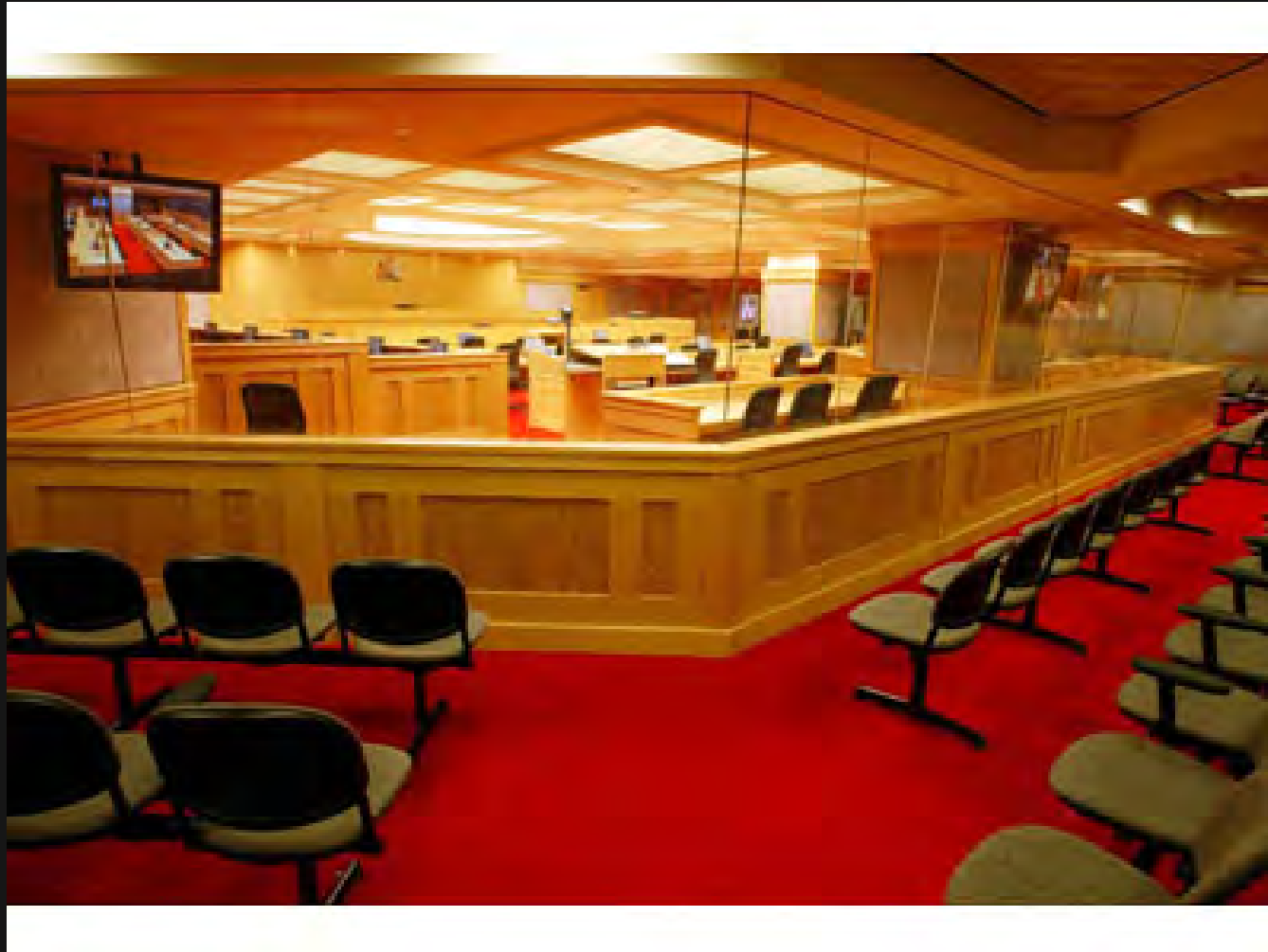


Montreal CyberCourt



\$7.1 million E-Courtroom

Air India Courtroom 2002



\$3,000 E-Courtroom

All Hardware Re-Usable



Examining
counsel's
laptop with
exhibits
\$1,970

19" LCD Monitors,
\$250 each



4-way video
splitter \$60



The Essential Steps for Counsel

- Develop a pre-trial protocol
- Involve the trial scheduling office, when a trial date and judge are first assigned
- Settle and provide:
 - the courtroom hardware and software
 - equipment and training for the trial judge
 - don't forget the registrar & court reporter
- Agree on any pre-filed materials
- Agree on how the "record" will be entered and maintained at trial

Developing a Pre-Trial Protocol

- Counsel should agree in writing on
 - courtroom hardware and software
 - back-up and security measures
 - how to create and maintain the “record”
 - any electronic materials to be pre-filed.
- Anticipate any problems the court may have and provide solutions in advance
 - Consider the Registrar and court reporter, as well as the trial judge

Recent Retainers – Information Governance

1. Alberta oil company scan and shred
2. Alberta public pension company ERMS compliance
3. Private companies - Privacy and Information Security compliance
4. Ontario real estate firm public inquiry
5. Ontario Energy company mega-project litigation readiness
6. Ontario plaintiff-side class actions

Thank you/Merci

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