

Get Invited to Discovery- Management Meet-and-Confer Meetings with No Regrets

Industry experts with an aggregate of over 50 years of experience will share what they have witnessed during meet-and-confer meetings: terrified, hurling bodies — and a mess to had to clean up.

Get Invited to Discovery- Management Meet-and-Confer Meetings with No Regrets

Ming the Merciless once said:

“Pathetic earthlings. Hurling your bodies out into the void [of knowledge about meet-and-confers], without the slightest inkling of who or what is out here. If you had known anything about the true nature of the universe [of discovery management issues and dangers], anything at all, you would've hidden from it in terror.”

The Panelists

Earthling	Mission	Contact
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The Agenda: **Seven** ***Deadly Sins of 26(f)*** *(meeting-and-conferring)*

- ◆ Rule 26 in Context
- ◆ Opportunities and pitfalls
- ◆ End-in-Mind: Cooperate, Confound, Constrain or Impose
 - ◆ Cooperate re: Documents (ESI): Sources, Content, Format, Media and Duration
 - ◆ Confound: Instill Fear, Uncertainty and Doubt; maybe even extort settlement
 - ◆ Constrain or Impose Risks: Over-committing, Over-producing (re “claw backs”), Avoiding sanctions

Burden: “Extortion by Discovery”

“Before the civil rules became law in 1938... Committee raised concern that expanded discovery would force settlements for reasons and on terms that related more to the costs of discovery than to the merits of the case.”

Advisory Committee Notes to Amendments to Federal Rules of Civil Procedure citing Subrin, *Fishing Expeditions Allowed*, 29 Boston Coll. L. Rev. 691, 730 (1998).

“Extortion by Discovery”

1. Requesting party ask for extraordinarily expensive discovery
2. Producing party marshals evidence of \$1.5 Million in costs
3. Requesting party offers:
 - Will “forgo the questioned discovery requests upon payment by [Producing Party] of 66% of the alleged cost, \$1 Million....”
 - “This would result in a savings to [Producing Party] based upon their sworn affidavits of \$.5 Million dollars”

Walter M. Jones, III, Esq.
Quoting Plaintiff’s letter in a
Brief to the Supreme Court West Virginia (96-C-175)

“Extortion by Discovery”

	Producing Party	Requesting Party
Scope	Limit it	Expand it
Timeline	Extend it	Shorten it
Format	Unsearchable	Searchable with metadata
Relevant Search Terms	Employ them as definitively	Obtain Responsive documents regardless of terms employed

“Extortion by Discovery”

Attorney	Year	Quote
Law Firm	1989	“If I wanted to know about computers, I’d have gone to computer school”

“Extortion by Discovery”

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“Extortion by Discovery”

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Law Firm	1989	“If I wanted to know about computers, I’d have gone to computer school”
Law Firm	2012	“If I want to bill my time, I’ve go to learn something about computers”
In-House Managing	2013	“I’ll be damned if I’m going to let (outside) counsel make bone-headed commitments that cost the company money or me sleep”

Avoid the *Seven Deadly Sins of the Rule 26(f)*

Deadly Sin #1: Failure to Set the Agenda.

Be prepared and work to have opponent prepared

- Agenda, including topics and lists
- If the opposition shows up at the conference “empty handed:”
 - Forewarn that will inform the court
 - Reschedule immediately

Rule 26. Duty to Disclose; Provisions Governing Discovery
(f) Conference of the Parties; Planning for Discovery

[Rules' text edited to meet space and time restrictions]

Rule 26. Duty to Disclose; Provisions Governing Discovery

(f) Conference of the Parties; Planning for Discovery

- (1) **Conference Timing.** [T]he parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference

- (2) **Conference Content; Parties' Responsibilities.**
 - Consider, discuss and arrange:
 - The nature and basis of their **claims and defenses**
 - Possibilities for promptly **settling** or resolving the case
 - Arrange Rule 26(a)(1) disclosures including:
 - (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things in its possession, custody, or control it may use to support its claims or defenses
 - Any issues about **preserving** discoverable information
 - Attempting in **good faith** to develop a **proposed discovery plan**

Rule 26. Duty to Disclose; Provisions Governing Discovery

(f) Conference of the Parties; Planning for Discovery

(3) Discovery Plan. A discovery plan must state the parties' proposals:

(A) Rule 26(a) disclosures

(B) Discovery

- **Subjects** on which discovery may be needed
- When discovery should be **completed**
- Whether in **phases or focused** on particular issues

(C) **Electronically stored information** (forms of production)

(D) Claims of privilege or for protection of trial-preparation materials
(and claw-backs)

(E) Changes and **limitations to discovery**

(F) Any orders that the court should issue (e.g. **protective orders**)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(f) Conference of the Parties; Planning for Discovery

(4) Expedited Schedule. If necessary, courts may change deadlines for conference or discovery schedule

Evidence Management Challenges: Defining ESI (Electronically Stored Information)

- A. Volume:** Unlike paper, no physical constraints
- B. Form:** Communication now primarily electronic
 - 1. Dispersed:** across organization and elsewhere
 - 2. Hidden:** metadata and imbedded information
 - 3. Dynamic:** changes even without knowledge of author
 - 4. Perishable:** devolves toward inaccessibility over time
 - 5. Easily fragmented** defying completeness
 - 6. Easily duplicated** multiplying instances
- C. Peculiarity:** If separated from source system may be impossible to comprehend

Evidence Management Challenges: Defining ESI (Electronically Stored Information)

1. Sources

2. Content

3. Format

4. Media

5. Duration

Definitions useful at:

- ESI-related meet-and-confer
- Agreements regarding discovery
- Orders re discovery disputes...

Evidence Management Challenges: Defining ESI

1. **Sources:** Custodians and systems

- **Internal key and others**
- **“Controlled” external** (e. g., accounting firms)

2. **Content:**

- **Evidentiary value:** “Corporate record” vs “convenience memo”
- **Current vs archived:** “online” vs “backed-up”
- **Threshold of completeness:**
 - data sprawl; file/document boundaries
 - Metadata
 - Imbedded data
 - Deleted and slack artifacts.

Evidence Management Challenges: Defining ESI

- 3. Format:** How produce ESI “reasonably usable” even when in ordinary course of business they are stored inaccessibly?
- In the ordinary course of business they are stored “incomprehensible when separated from the system that created it.”
 - Enterprise-wide databases (PeopleSoft, SAP, custom built)
 - Vendor developed and maintained (ADP, “cloud computing”)
 - Legacy / obsolete systems
 - Identify lowest common denominator system

Evidence Management Challenges: Defining ESI

4. Media:

- “Paper” vs “Plastic” (CDs, DVDs, hard drives...tapes)
- Usable format
- Verifiable delivery and admission

5. Duration:

- Preserve retrospectively or prospectively
- Refresh frequency
- Address other similar matters, document retention policy.

Avoid the *Seven Deadly Sins of the Rule 26(f)*

Deadly Sin # 2: Failure to Manage Preservation.

Disclose and defend your preservation decisions at the Rule 26(f) conference.

- If unpreserved data suddenly becomes relevant, your initial disclosure will help you avoid or minimize judicial sanctions.
- Demand the same from your opponent. Their data is part of your case. Make sure it is secured.

Key ESI Hazard: Preservation Hold

1. Legal duty to preserve, generally

2. Current legal action evidence

- Parties, their subsidiaries/affiliates, project names, relevant transactions
- Legal issues / theories of the case
- Key facts regarding the dispute

Key ESI Hazard: Preservation Hold

3. Types of information must be preserved and protected.

- Paper or in electronic files or systems
- Examples: E-mails and their attachments, Shared folder's documents, Databases, Calendars...

4. Sources of information

- Wherever they are stored
- Examples: Servers, PCs, laptops, Internet / Intranet site, CDs / DVDs, hand-helds...

Key ESI Hazard: Preservation Hold

5. Required actions

- **Identify**

- Evidence ESI sources by chronology, life-cycle states, organization chart, or other scheme
- Other employees or agents

- **Confirm**

- Read this notice and understand it by...
- Advise us what evidence of which you are aware by...
- Conform to prescribed steps to insure that evidence is not lost/spoiled/dislodged by...
- Advise us of key terms that relate to this matter by...

- **Do not discuss this matter with 3rd parties**

Key ESI Hazard: Preservation, Defining Scope

Pippins v. KPMG No. 11 Civ. 337 (S.D.N.Y. 2012)

It is “nonsense” to view as “key players” only the named parties and to preserve only their data.

Absent tendering sample of drives, court could not rule of prospective cost shifting.

All drives throughout organization to be preserved until sampling shows no relevant data on drives.

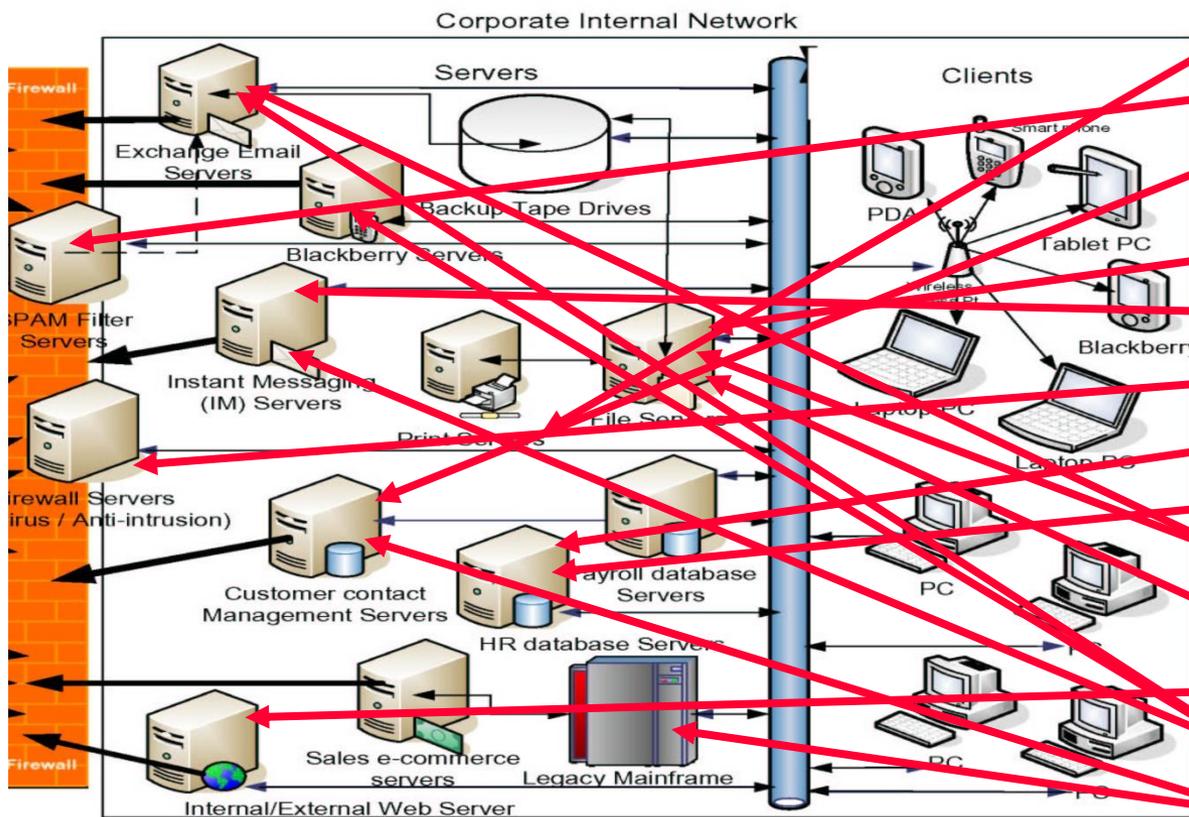
Key ESI Hazard: Defining Scope

“Produce all e-mails drafted and transmitted by any attorney, paralegal, employee or agent relating to client...”

E-mail	ESI System	Duration
Received	1. E-mail routing vendor	30 days after transmit
Filed	2. E-mail Boxes 3. E-mail Boxes backup tape(s)	90 days after delete
Deleted	4. Dumpster	7 days after delete
Copied to DMS	5. DMS 6. DMS Backup tape(s)	90 days after delete
Exported to pst	7. Pst file stored anywhere 8. Any storage locations' backup tape(s)	90 days after delete

Key ESI Hazard: Defining Scope

“Produce all documents relating to Plaintiff’s employment including hiring, work history and performance...”



1. Job Application
2. Resume
3. Drug screening results, references
4. Hire letter
5. Payment history
6. Benefits history
7. Vacation / sick
8. Performance reviews
9. Complaints
10. Compliments
11. Internet usage
12. E-mails, IM
13. Enterprise Database



Avoid the *Seven Deadly Sins of the Rule 26(f)*

Deadly Sin # 3: Failure Limit and Phase E-discovery.

Present a sensible plan to define the scope

- Flexible, rolling e-discovery plan
- Disclose the locations of electronically stored information that you consider not reasonably accessible (FRCP 26(b) (2) (B)).
 - Defend your claims
 - Confront their claims

Phase	Rule	Requirement
Preserve	26(f)	<ul style="list-style-type: none"> • Identification and Preservation • Meet and confer
Collect	26(b)(2)	2 tier: accessible vs. (self-designated) inaccessible
Produce	34(a), 45	<ul style="list-style-type: none"> • Requesting party designates • Producing party objects
	26(b)(5), FRE 502	Devise protocols re: inadvertent disclosure: Limited protections
Manage	16, 26(a), Form 35	<ul style="list-style-type: none"> • Meet and confer • Initial disclosure, Scheduling order
Identify sanctions	37(e)	Demonstrate good faith operation of routine systems: False “Safe Harbor”

Duty to Produce

Accessible vs Inaccessible

Group	Sample File Formats	Review	
Industry standard	<p>Word = .doc PowerPoint = .ppt Text = .txt, .dat, .log Images = .jpg, .tif., .gif,</p> <p>Excel = .xls Web = .htm E-mail: .nsf, .msg</p>	Read via standard software though doing so imperils content	
Customized	Access = .mdb	Some insights but not authoritative Requires special knowledge, tools	
Proprietary	Custom-built		
Legacy	Obsolete custom	Varies	Requires luck or high initial cost
Virus Infected	Almost any (primarily Microsoft)		Set aside (Quarantine), clean
Password Protected	Almost any may be encrypted		Remand to client: user opens or crack password (Corp policy?)
Artifact	Fragments of any file extracted via forensic acquisition		Qualified forensic expert may help decipher and develop into evidence
Corrupt	Almost any file		

Duty to Produce

Accessible vs Inaccessible

Group	Speros Accessibility Scale	Review
Industry standard		Read via standard software though doing so imperils content
Customized		Some insights but not authoritative
Proprietary		Requires special knowledge, tools
Legacy		Requires luck or high initial cost
Virus Infected		Set aside (Quarantine), clean
Password Protected		Remand to client: user opens or crack password (Corp policy?)
Artifact		Qualified forensic expert may help decipher and develop into evidence
Corrupt		evidence

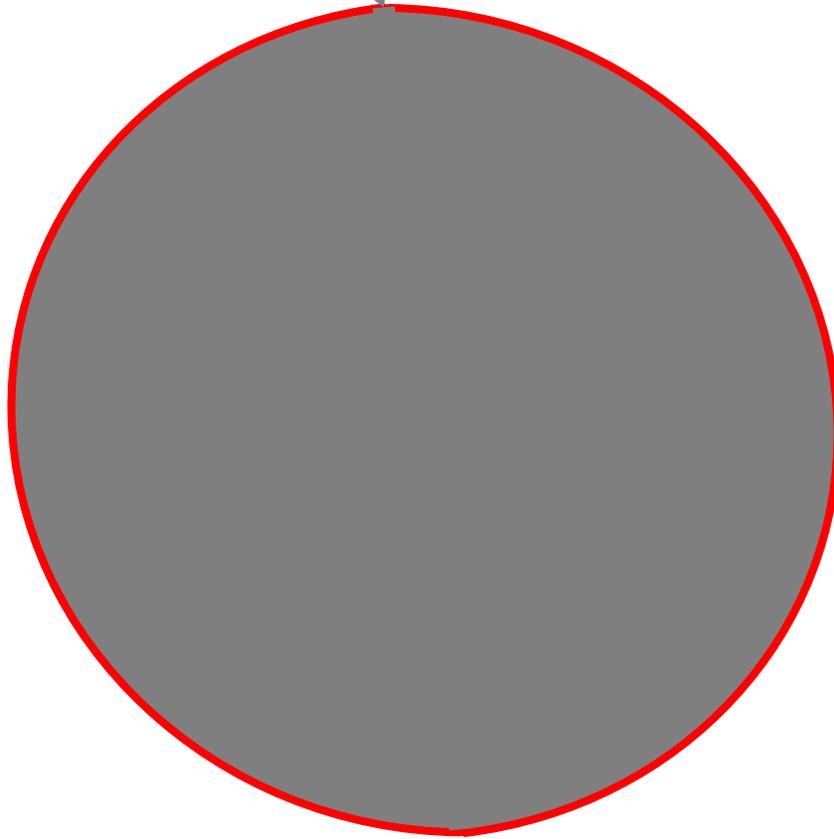
Avoid the *Seven Deadly Sins of the Rule 26(f)*

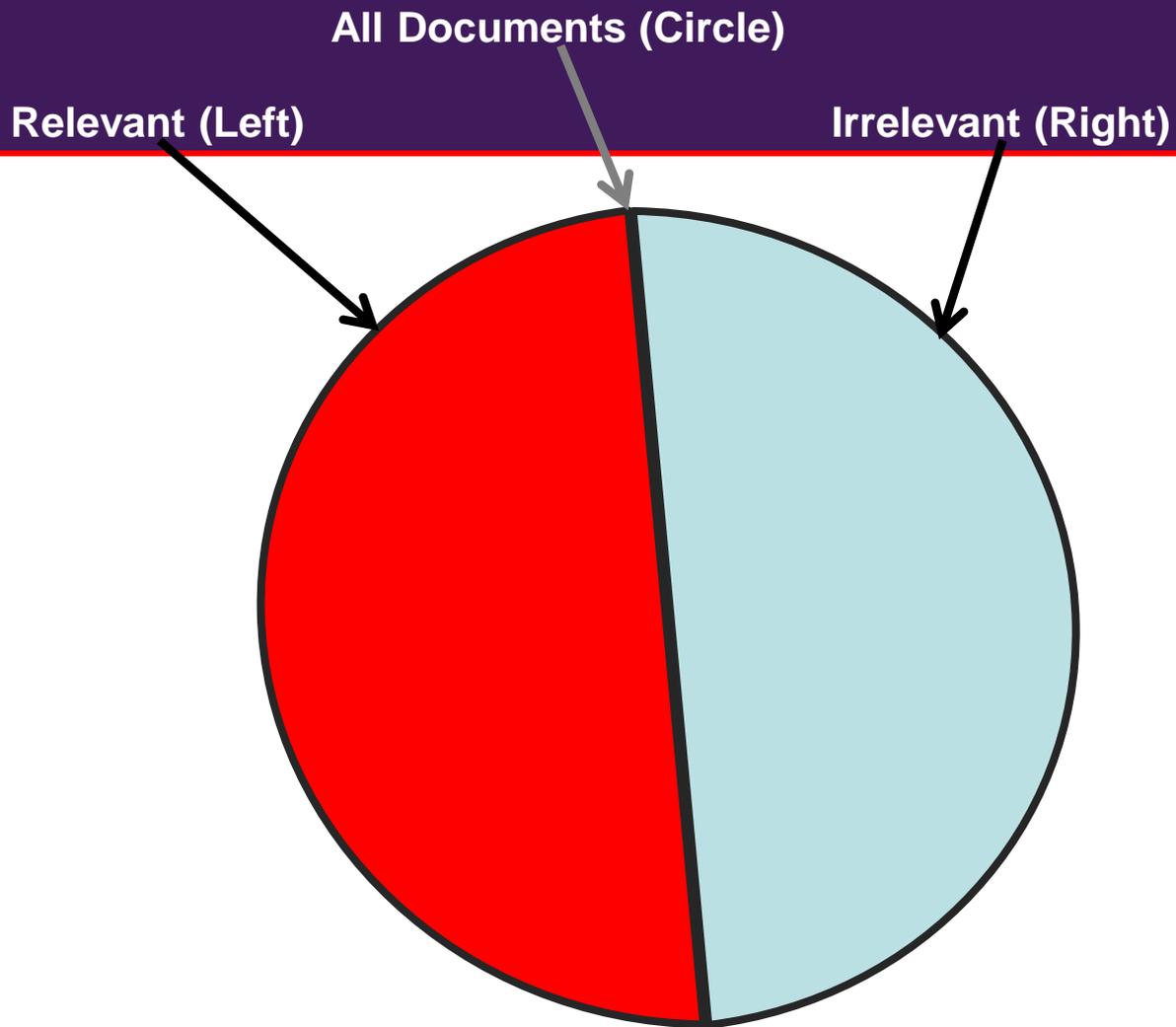
Deadly Sin #4: Failure to Set Search Expectations.

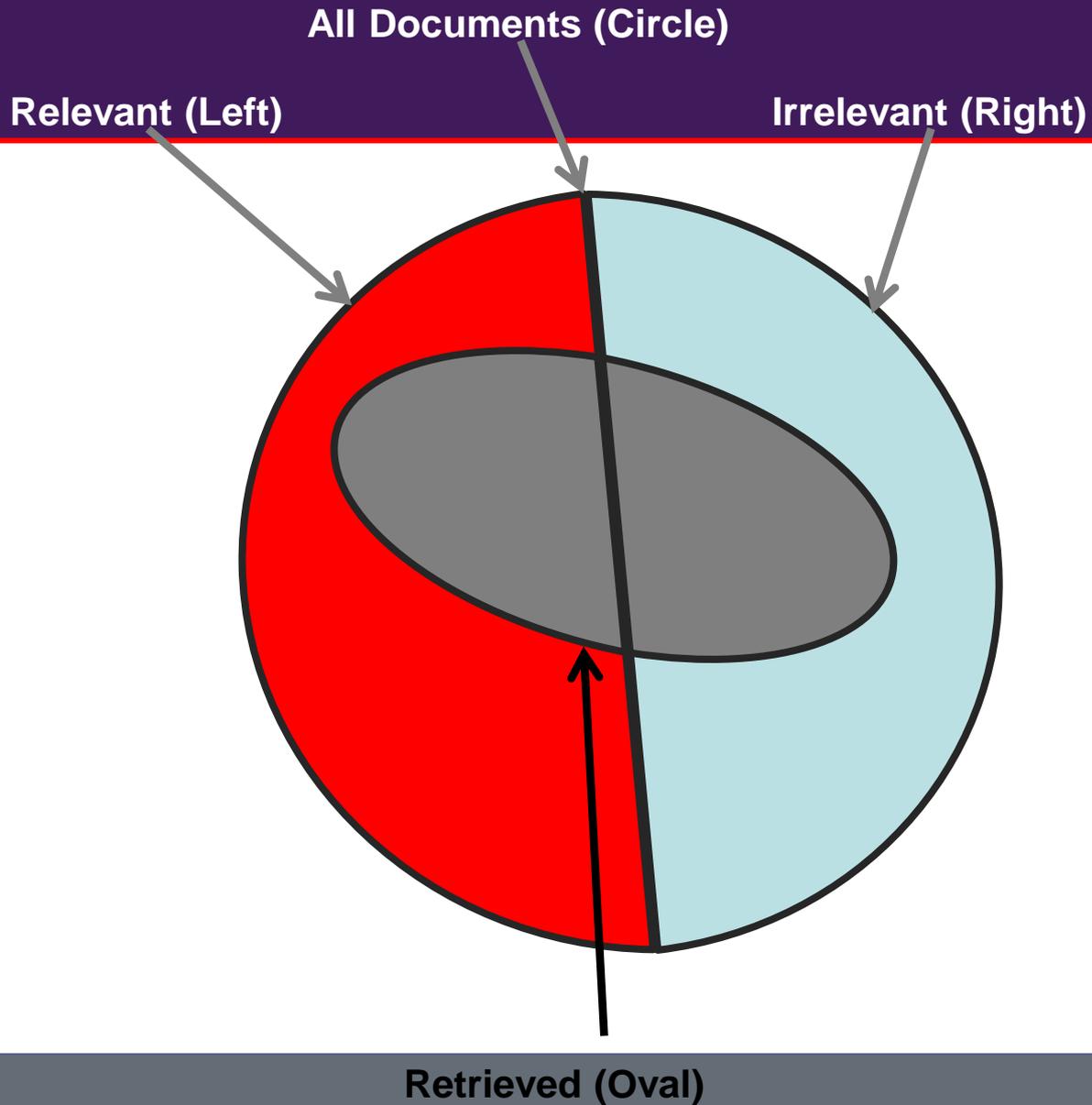
Emphasize search quality and demonstrable, statistically valid recall

- High recall means the search is pulling most, if not all, the responsive documents and not pulling false positives, unresponsive documents.
- Determine how opponent will review documents:
 - Linear review
 - Keywords
 - Automated concept search/clustering tools

All Documents (Circle)







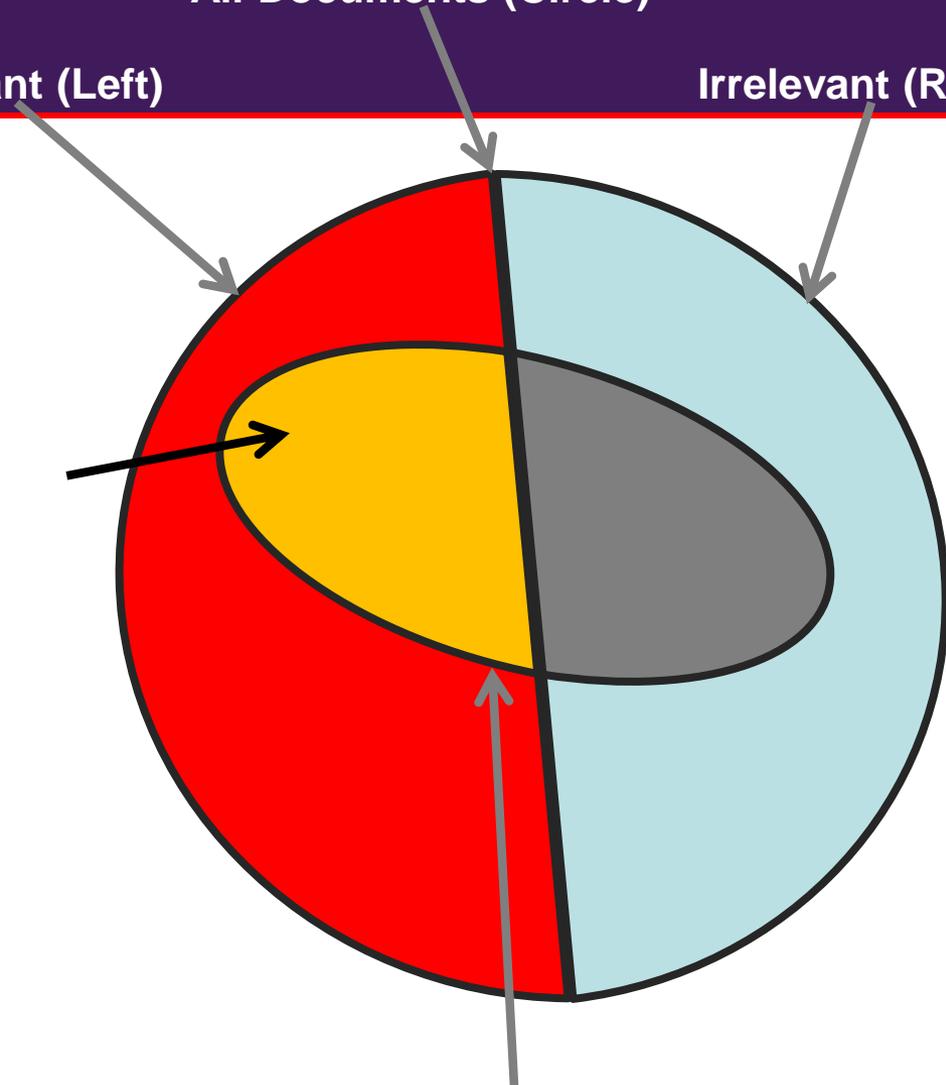
All Documents (Circle)

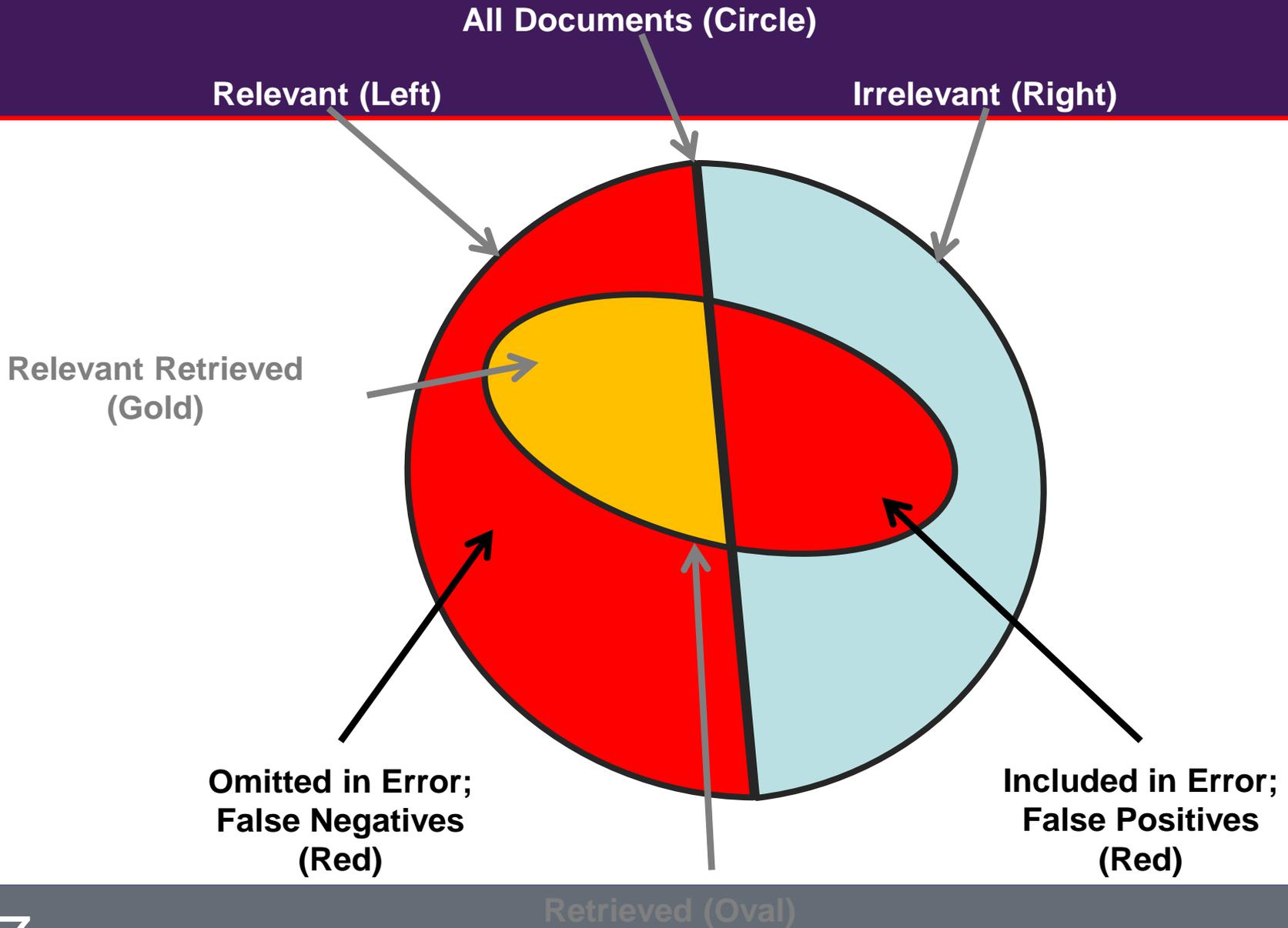
Relevant (Left)

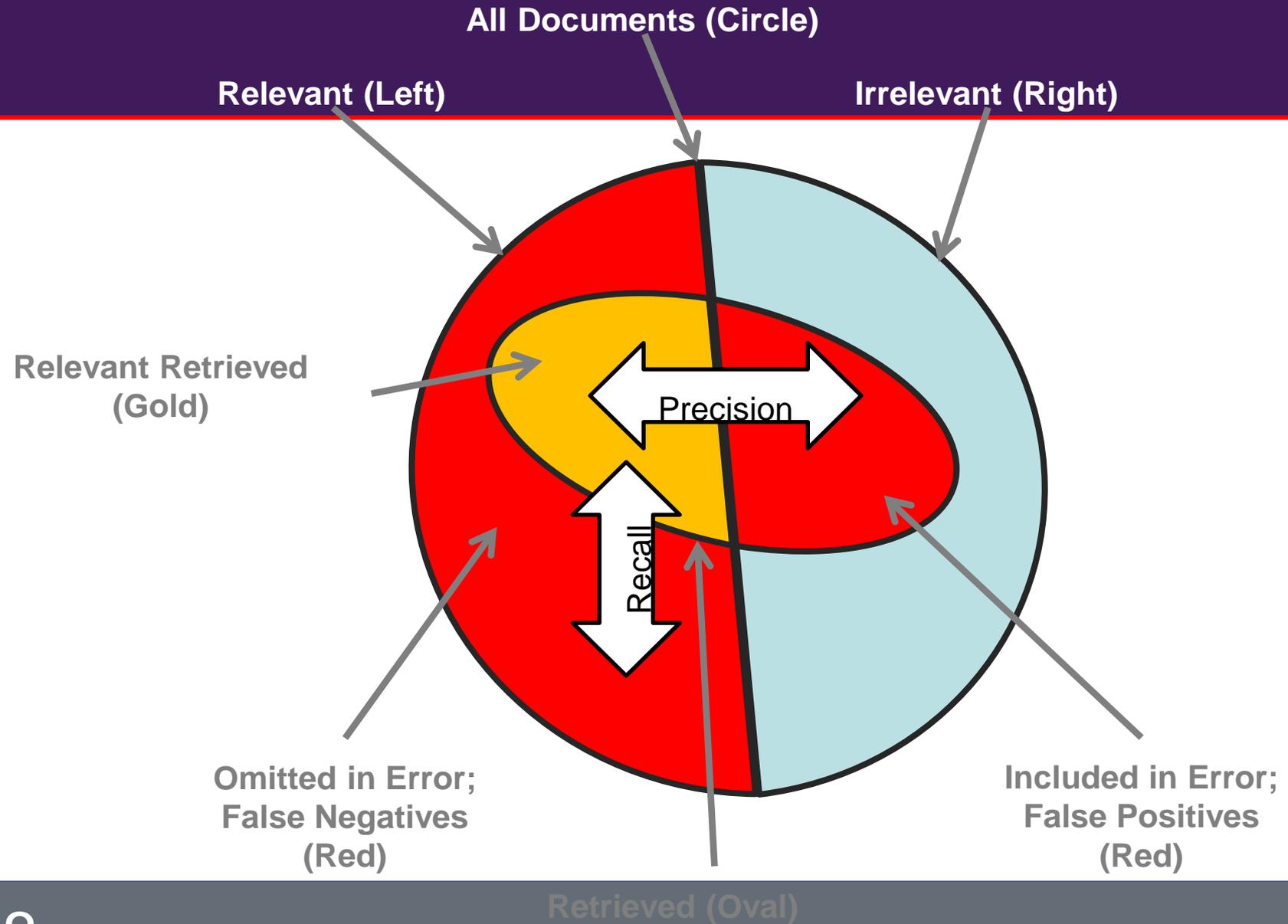
Irrelevant (Right)

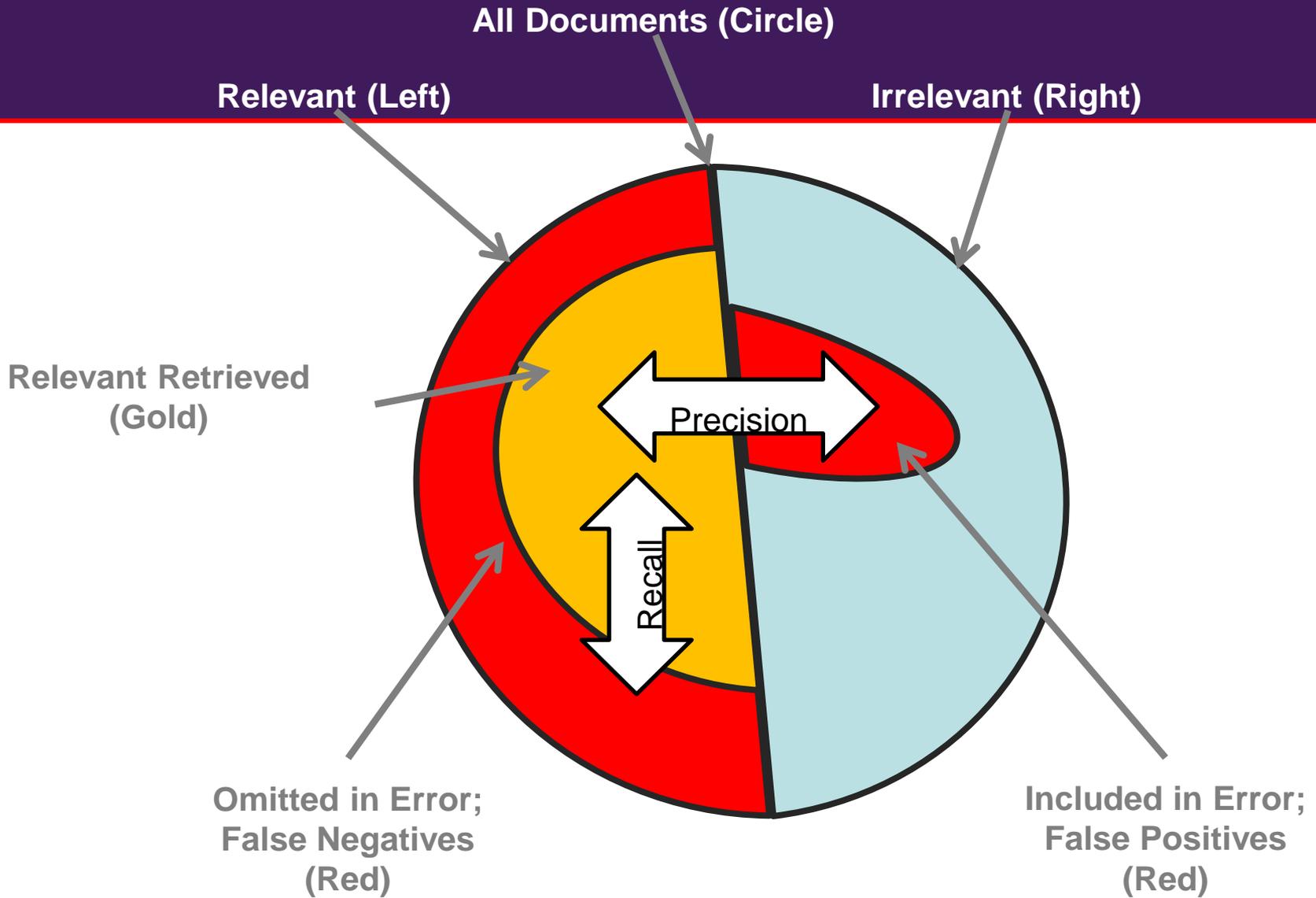
Relevant Retrieved
(Gold)

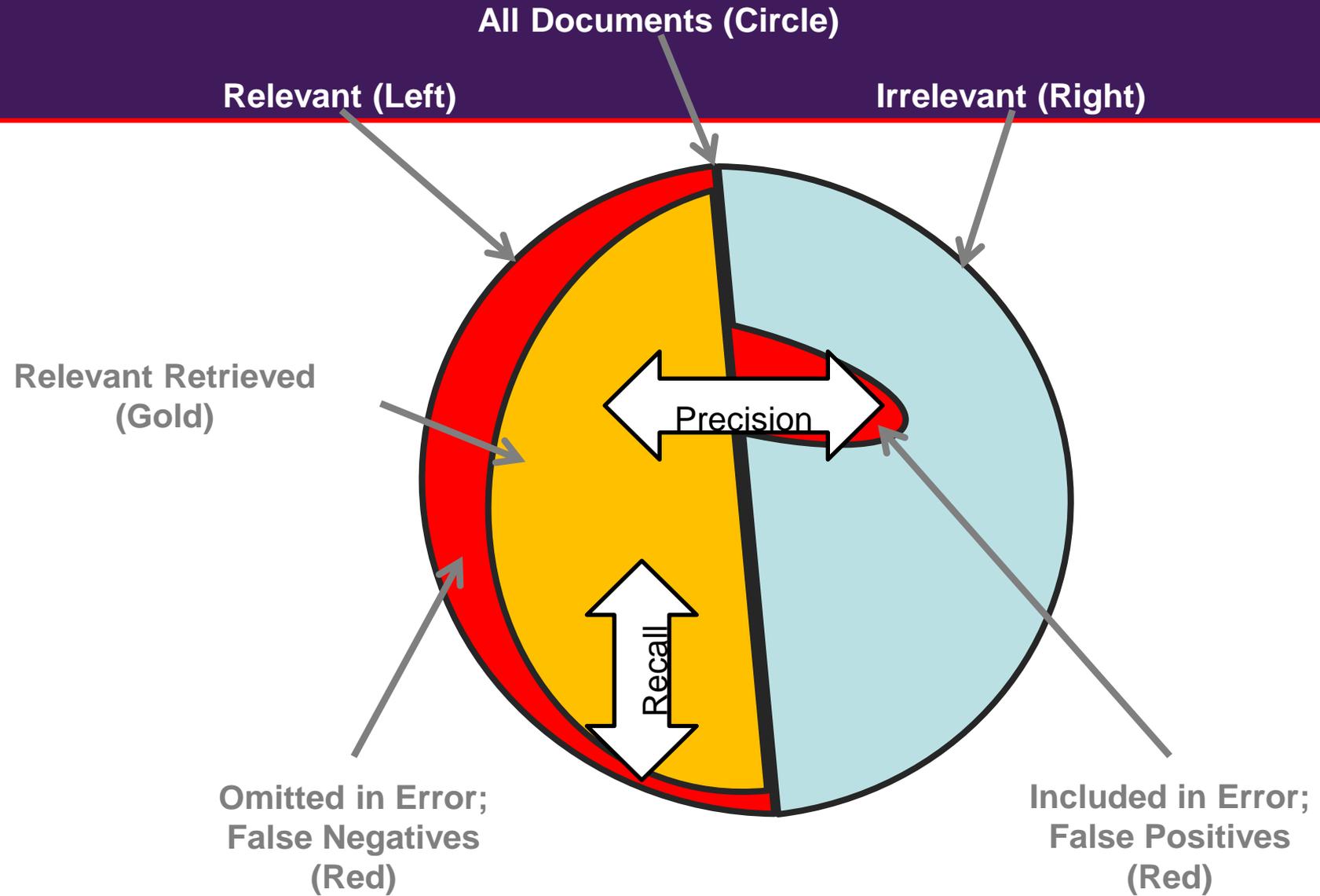
Retrieved (Oval)







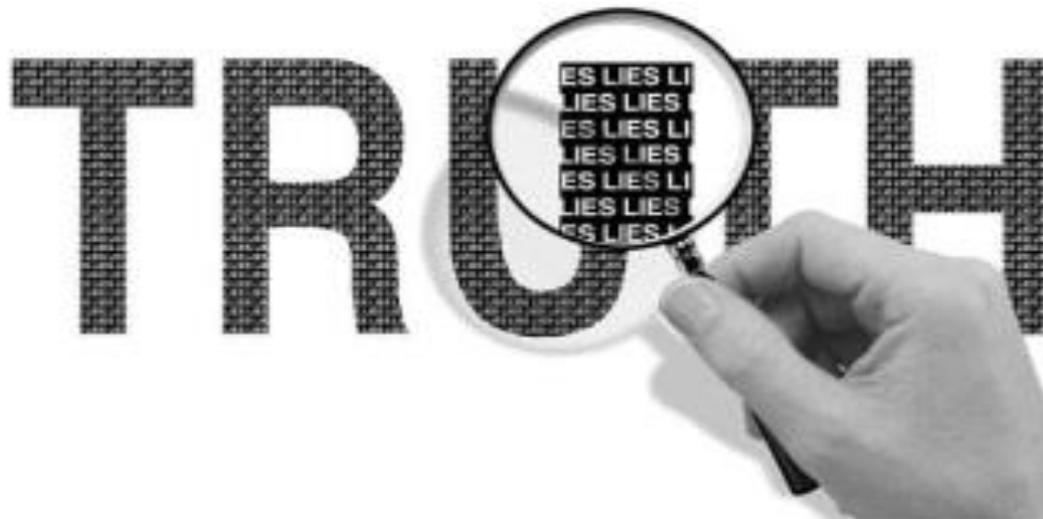




“Predictive Coding’s Erroneous Zones Are Emerging Junk Science”

Published as guest contributor to Ralph Losey’s E-Discovery Team Blog Site:

<http://e-discoveryteam.com/2013/04/28/predictive-codings-erroneous-zones-are-emerging-junk-science/?shareadraft=517d80048f827>



“Predictive Coding’s Erroneous Zones Are Emerging Junk Science”

1. “PBS’ Frontline’s ***Forensic Tools: What’s Reliable and What’s Not-So-Scientific*** dispelled the infallibility, and in some instances, the validity, of analytical techniques long relied upon by our legal profession.”
 - bite mark analyst
 - fire cause analyst
 - fingerprint analyst
2. “Even if those techniques were not botched or biased, their validity ranges from bought-and-paid-for infomercials to, at best, an approximation.”

“Predictive Coding’s Erroneous Zones Are Emerging Junk Science”

- “Back then attorneys and judges (and experts and vendors) did with those junk sciences just what we are doing now with respect to **predictive coding: allowing claims, however unjustified and erroneous, to form the basis of our practices, to influence our precedent and to accrue authority.**”
- **Feedback**
 1. “Straw man...”
 2. “Golden goose...”
 3. “But *my emperor is wearing* clothes...”
 4. “We do kill messengers...”
 5. “You’ve got to fight fire with fire (so even if you are saying that statistics doesn’t apply to a qualitative problem you have to say it statistically)...”
 6. “As bad as you say it is it is really *worse*...”

“Predictive Coding’s Erroneous Zones Are Emerging Junk Science”

Erroneous Practice #1:

Using a full-text search to identify prospectively responsive documents and then employing predictive coding to eliminate those that are not responsive.

Is Erroneous because:

- A. Over-relies and under-delivers:
presumed arrogance or clairvoyance
- B. It arbitrarily places documents out-of-sight and, therefore, out-of-mind:
likelihood that responsive documents will ever be produced but dumbing-down the predictive coding intelligence



“Predictive Coding’s Erroneous Zones Are Emerging Junk Science”

Erroneous Practice #2:	Pulling a random sample of documents to train the initial seed set.
Is Erroneous because:	<p>A. Looks for relevance in all the wrong places: Thoughtful researchers don’t try learn about relevant documents by examining irrelevant ones.</p> <p>B. It turns a blind eye to what is staring you in the eye: denies that attorneys know what they are paid to know: where to look and what to find.</p> <p>C. Measures the wrong stuff:</p> <ul style="list-style-type: none">• Constrained and circular definition of “like”• Prevalence vs Relevance vs Probativeness

“Predictive Coding’s Erroneous Zones Are Emerging Junk Science”

Erroneous Practice #3:	Identifying “magic numbers” of minimum: <ul style="list-style-type: none">• “Iterations”• Responsive documents within a randomly accumulated set
Is Erroneous because:	<p>A. You may not be able to get there from here: Don’t know either starting point or ending point</p> <p>B. You don’t know what isn’t yet known: Cannot predict alternative paths</p>

Avoid the *Seven Deadly Sins of the Rule 26(f)*

Deadly Sin #5: Failure to Specify the Production Format.

Establish the production format that complies with your litigation support review system and specify treatment for:

- Native files: Common vs peculiar
- Metadata
- Images
- Full-text
- Load files
- Redactions

Avoid the *Seven Deadly Sins* *of the Rule 26(f)*

Deadly Sin # 6: Failure to Protect Privilege

Waiver from Inadvertent Production.

Make sure to agree and obtain entry of a court order (Federal Rules of Evidence 502), protecting from inadvertent disclosure of privileged documents

Bi-Direction (in-bound and out-bound) duties

Avoid the *Seven Deadly Sins* *of the Rule 26(f)*

Deadly Sin # 7: Failure to Document.

Confirm in writing all the agreements and understandings at a level of detail akin to a settlement agreement or a contract.

Rule 26. Duty to Disclose; Provisions Governing Discovery

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

Signature Required; Effect of Signature.

- Signatures certify that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
 - **Disclosure:** Complete and correct as of the time it is made
 - **Discovery request, response, or objection:**
 - Consistent with these rules and warranted by existing law or by a non-frivolous argument for modifying existing law
 - No improper purpose: harass, cause unnecessary delay, or needlessly increase the cost of litigation
 - **Neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action**
- Appropriate sanctions for improper certification

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