



Electronic Data Discovery –

Electronic Discovery –

In-House Counsel and

Managing Electronically Stored Information

Presented by:

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IKON National Technology Advisor





AGENDA



- 1. Introduction: Electronic Data Discovery**
- 2. Retention: Creating an E-Discovery Management Plan**
- 3. Challenges: Use of Technology for Disclosure and Discovery**
- 4. Concluding Remarks**



Background —

Joseph C. Bartolo, Esq.,

- **Instructed computer programming classes – 1982 to 1985**
- **B.A. Degree- New York University - 1989**
- **J.D. Degree – Rutgers-Newark Law School - 1992**
- **Member of New York State Bar – 1993 to present**
- **Litigator in New York State from 1993 to 1998**
- **Special Master Assistant to New York County Supreme Court 1995 to 1998**
- **Sales Consultant to various “Fortune 1000” Corporations 1998 to 2005**
- **Certified Professional Sales Representative – Arizona State University 2003**
- **Digital Account Manager – New York City – IKON – 2005 to 2006**
- **Participant – Legal Tech Conference – New York City – 2005 to present**
- **Electronic Data Discovery Instructor – IKON - 2005 to present**
- **Participant/Group Leader – EDRM National Conference 2005 to present**
- **Active member – B-Discovery group – 2005 to present**
- **CLE Instructor – Instructed over 100 Sessions in 7 States – 2005 to present**
- **National Technology Advisor – IKON – 2006 to Present**
- **Member – Association of Litigation Support Professionals – 2007 to present**





AGENDA



1.) Introduction – Electronic Data Discovery



What is E-Discovery Anyway?

- E-Discovery refers to the discovery of “native” electronic documents and data.
- The typical EDD process is a semi-automated process that takes different types of electronic files and converts them to a common image format for legal review and/or production.





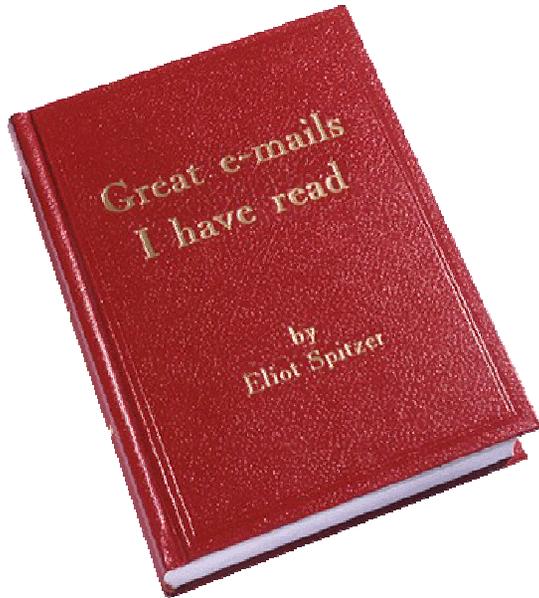
The problem with ESI: Too much data for humans to review

- **“E-Discovery” is NOT the future**
 - **Too much data now to gain insight from manual review**
 - **Soon, too much data to review at all**
- **92% of new information created today is electronic (UC Berkeley)**
- **Growing from 30% (UC Berkeley) to over 50% per year (Horizon Info)**
- **5.7-GB per employee in 2006 (Meta)**



Growing Importance of ESI – Compliance is Not Optional

- Sanctions
- Fines
- Penalties
- Loss of shareholder value
- Adverse publicity
- Litigation
- Class-action lawsuits
- Potential criminal charges
- Prison terms for executives



“In the wake of scrutiny resulting from corporate scandals and accounting fraud, it stands to reason that regulated firms are going to do everything they can to show that they’re playing by the rules.”





Sitting Duck

Simply
WIN!



- Chain of Custody
- Concept Searching
- Conversion
- Cost Shifting
- Culling
- Custodian
- Database
- De-Duplication
- Digital Review
- EDD
- E-Mail
- Encryption
- ESI
- File Extension/Type
- Forensics
- Gigabyte
- Harvesting
- Hash Value (MD-5)
- ICR
- Images
- I.T.
- Keyword Searching
- LAN
- Load File
- Media
- Metadata
- Native File Format
- Native Review
- OCR
- OMR
- Password Cracking
- Preservation
- Processing
- QC
- Records Management
- Sedona Principles
- Server
- Spoliation
- Terabyte
- TIFF
- Track Changes
- WAN
- Web Archive
- Web Repository

OS/2oons

by Harry Martin



"Well...So much for trying Windows 95 on the navigation computer!"

Simply
WIN!



What is Metadata?

Metadata is said to be “Data about the Data”

Merriam-Webster's Collegiate Dictionary.

Metadata (noun): data that provides information about other data.

Wikipedia:

Document Metadata is particularly important in legal environments where litigation can request this sensitive information (metadata) which can include many elements of private detrimental data. This data has been linked to multiple lawsuits that have got corporations into legal complications.





Metadata

- Three Types of Metadata:
 - **System Metadata** – Created by the computer application automatically.
 - **Substantive Metadata** – Created by the user when edits and changes are made to a file.
 - **Embedded Metadata** – Created by the user when entering text, content, information, numbers, data, and/or formulas into a native file.



Metadata: Electronic vs. Paper Documents

- All information in a paper document is displayed on its face, there is no metadata associated with paper documents.
- Not so with electronic documents.
- Paper shows what a document said or looked like.
- Metadata tells where the document went and what it did.





Various Fields of Metadata Exist...

Import Multiple Files - Map Fields

Click a Collection field to map it to the imported field.

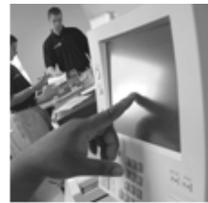
Imported Fields	Collection Fields
Title	Title
Subject	Subject
Description	Description
Creator	Creator
Publisher	Publisher
Contributors	Contributors
Date	Date
Type	Type
Format	Format
Identifier	Identifier
Source	Source
Language	Language

Back Next Cancel



Metadata

- One of the most important examples is the metadata embedded in E-mail.
- Carries information about its author, creation date, attachments, recipients, cc's and bcc's.
- As email “conversations” take place, the email accumulates a conversation thread: replies to the sender, to the other recipients, and forwards.
- The history becomes part of the message's metadata, allowing reviewers to trace a message or reconstruct an email conversation.



Why Should I Care about E-Discovery and ESI?

The ABA Digital Evidence project and National Law Journal Report in 2006 found:

- **Over 30 Billion E-mails sent daily Worldwide. (Gartner estimates 60 Billion Daily)**
- **Over 90% of all information is now electronic, and 70% of that data is never printed.**
- **1 in 5 – U.S. Companies employee E-mail's have been subpoenaed**
- **Average Fortune 500 company – 125 ongoing litigations with 75% of those requiring E-Discovery**

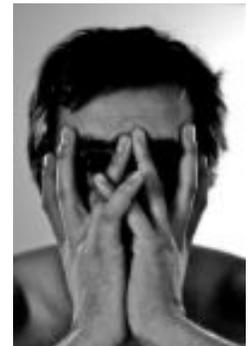




Why Should In-House Counsel Care About Metadata?

- **Embarrassment**
- **Damage to your employer**
- **Finding yourself in court and/or disbarred**
- **Possible legal malpractice claims**

(Law firms have been sued over the consequences of Metadata transmission.)





Metadata can cause some headaches...

Your company was billed for 2 hours but metadata shows document was worked on for 30 minutes.

Your company was billed at partner rate but document shows an associate prepared the document.

Your company received a document and metadata shows it was a document used by outside counsel in other matters.

Your company receives a document where the metadata shows it was originally prepared by an attorney that doesn't work for your outside counsel's firm.

Metadata discovery was essential in the trial of Merck & Co. and the litigation involving the painkiller Vioxx. Through tracked changes that were accidentally left in a document and later discovered by the New England Journal of Medicine, it was asserted that the manufacturer knew of the potential heart problem side effects two years before marketing the drug.....OOOPS!



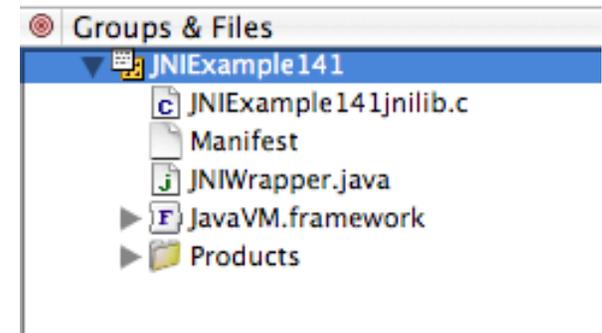
What Can Substantive Metadata Information Reveal?

- **Generally Substantive Metadata can yield more surprises**
 - **In Word or Excel, metadata can track/capture:**
 - **changes made**
 - **reviewers' name**
 - **order in which changes made**
 - **Embedded data not necessarily revealed**
 - **when the creator/modifier opens the file**
 - **BUT CAN BE revealed if:**
 - **Creator/modifier did not accept/reject tracked changes; OR**
 - **Even if Track Changes used properly, deleted text still in file**
 - **Copied-and-pasted part of Excel file embeds whole worksheet**
-



Native File

- Native File means ESI in the electronic format of the application in which such ESI is normally created, viewed and/or modified. Native files are a subset of ESI.





What is ESI?

- **Electronically Stored Information, this includes E-mail messages and any attachments, as well as other data stored on a computer, network or storage media. Also includes “behind the scenes” information that sheds light on an electronic document’s history (Metadata). In addition, this includes Voice Mail information, and other types of electronic information.**





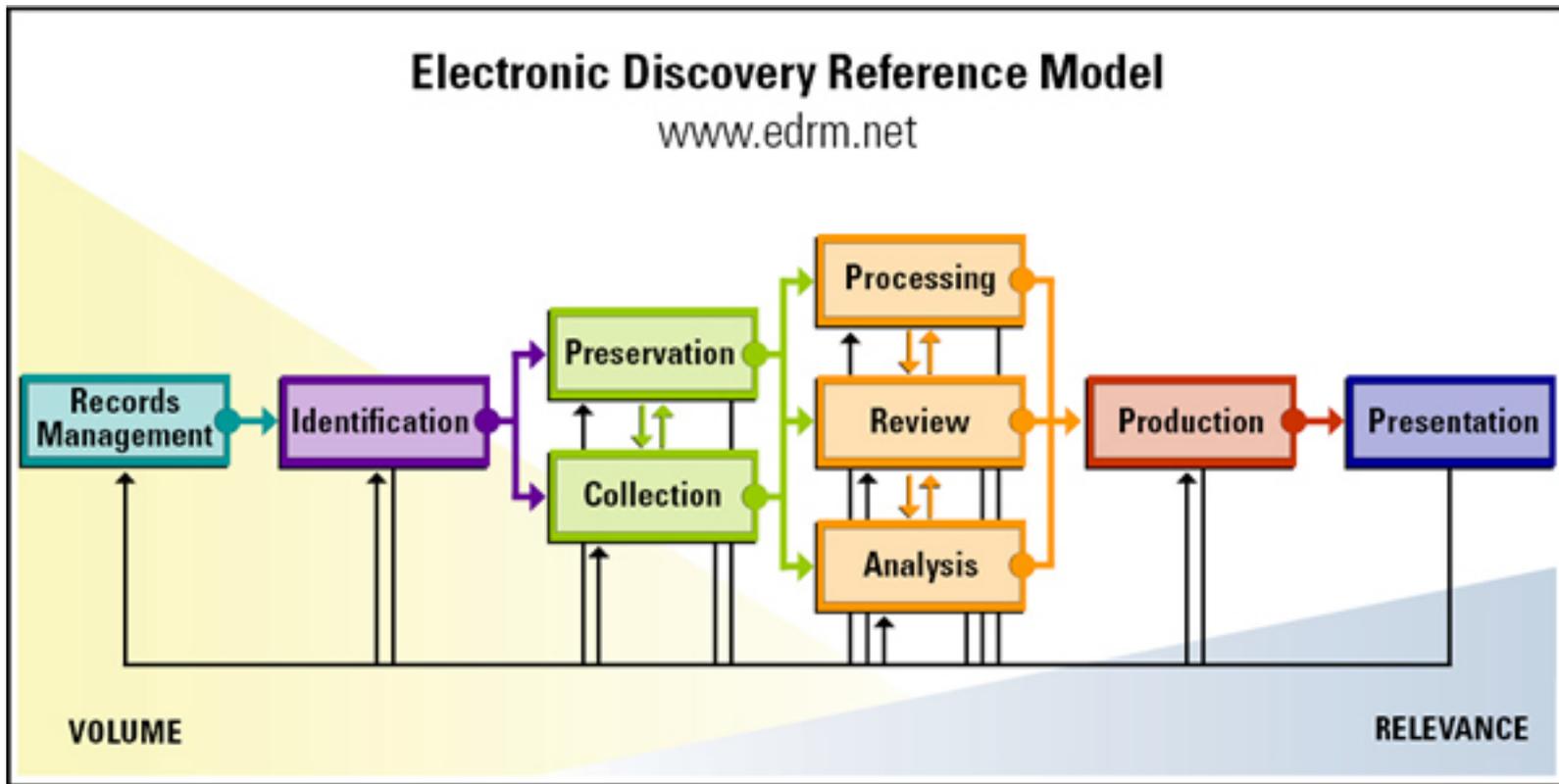
AGENDA



2.) Creating an E-Discovery Management Plan

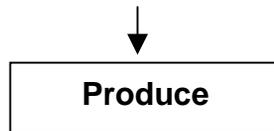
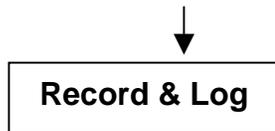
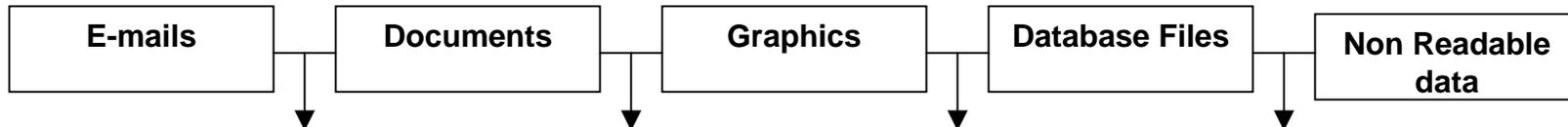


What Is E-Discovery? EDRM Model





TYPES OF DATA



The 5 P's Of EDD

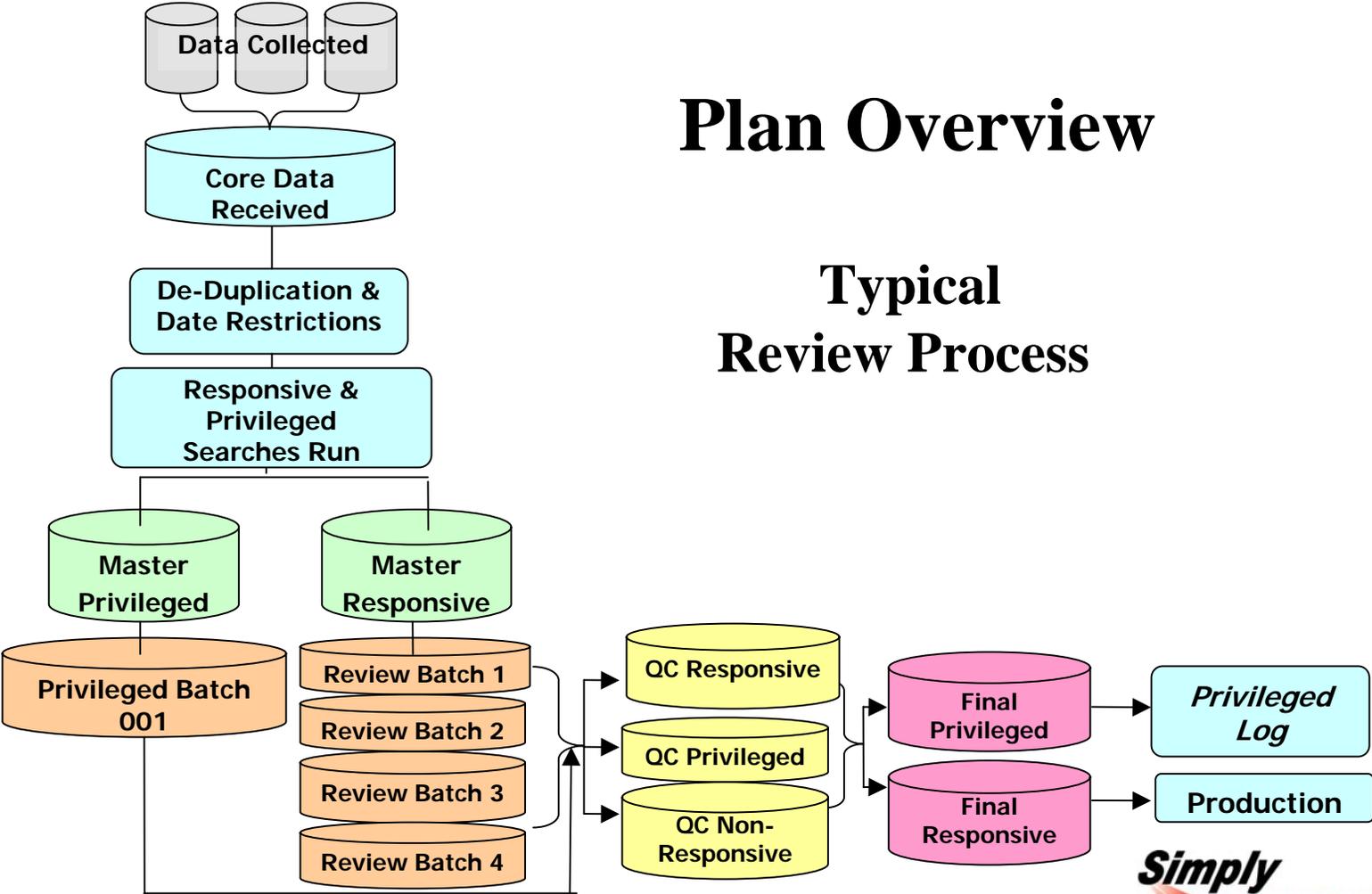
- Preserve
- Pare
- Process
- Produce
- Prepare



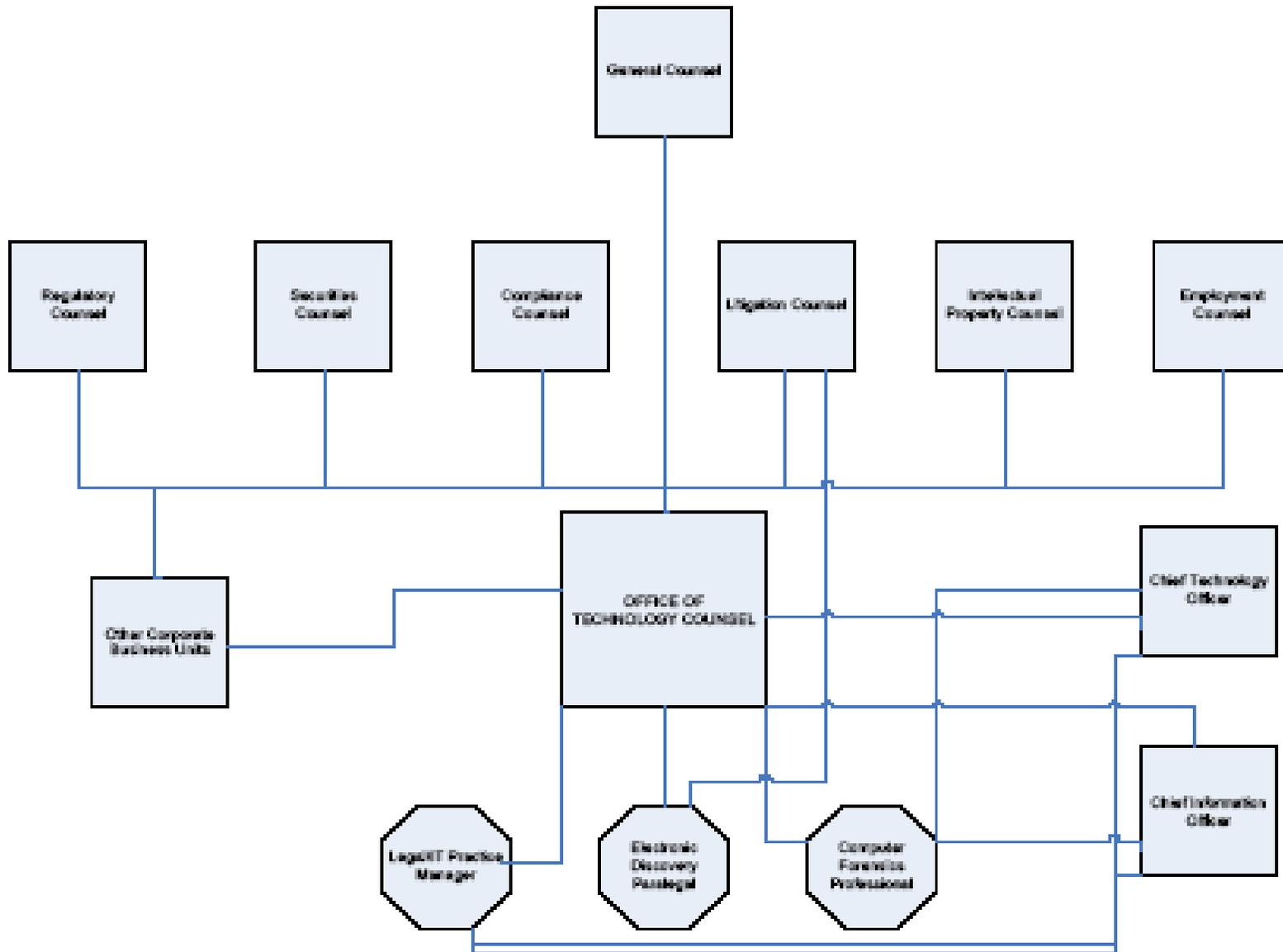


Plan Overview

Typical Review Process



TECHNOLOGY COUNSEL

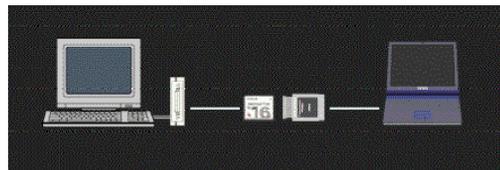
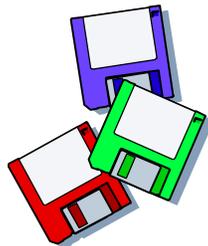
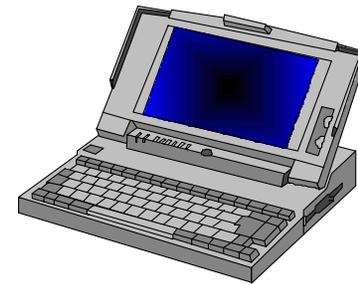
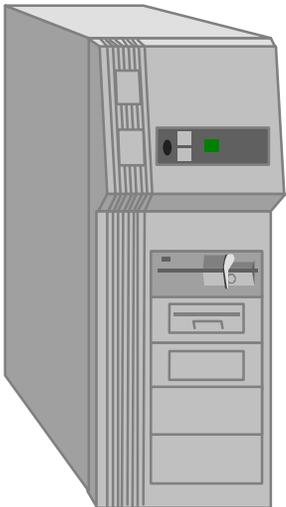




Sources of Electronic Information

a k a

Weapons of Mass Disclosure





Harvesting Data - Data Sources:

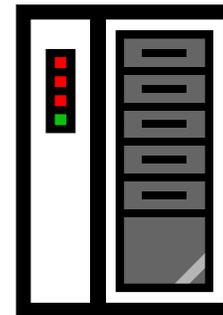
Where can electronic data be harvested from?

- Desktop computers
- Laptop computers
- File servers
- CDs/DVDs/Floppy disk
- “BlackBerry”/PDA’s/Cell phone/Voice Mail system
- Back up tapes
- Cost recovery systems
- Internet Service Providers
- Emergency Communication systems in vehicles
- Voice Mail Systems
- Instant Message Systems
- GPS





- **Computer Forensics is the use of specialized techniques for recovery, authentication, and analysis of electronic data when a case involves issues relating to reconstruction of computer usage, examination of residual data, authentication of data by technical analysis or explanation of technical features of data and computer usage.**
- **Computer Forensics requires specialized expertise that goes beyond normal data collection and preservation techniques available to end-users or system support personnel.**





Harvesting Data

- **“*Harvesting*”, or acquiring data, is the process of gathering data from the required sources.**
- **Harvesting may be performed by the client, or by expert’s recommended by client’s outside counsel (or appointed by the Court)**
- **The purpose of harvesting is to gather all of the required files, without any changes, while preserving all of the metadata.**





Harvesting Data

- **Every program produces different amount and types of metadata.**
For example:
 - **Each individual email in Outlook 2000 has 43 different metadata fields, while each contact has 49.**
 - **Every Word 2000 document has 63 fields of metadata, plus the text of the document and possibly deleted text.**





Proper Forensic Techniques...

- **Corporations and their outside counsel should comply with “Sedona Conference” guidelines regarding “EDD Best Practices”;**
- **Only “Legally Defensible” methods regarding EDD practices, including the provision of detailed exception reports regarding any files that do not convert, should be utilized.;**
- **Only forensically sound methods should be used so that the proper foundation of ESI evidence can be presented in Court, if the validity of the evidence is brought into question.**





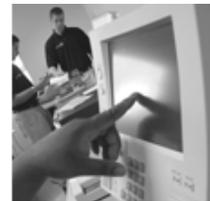
Proper Forensic Techniques...

- **Record information on individuals who:**
 - occupy the office or room where the original evidence is found;
 - have access to the office or room where the original evidence is found;
 - actually use the system.
- **Record information on the computer:**
 - Location in the room or office;
 - State (power on/off), Data on screen;
 - Time/Date from system BIOS;
 - Network/Modem connections
 - Serial #, Model, make of computer, drives and components
 - Peripherals attached
- **Digital photos:**
 - Return system to its exact state prior to forensic duplication
 - Capture current configuration



International Principles International Organization on Computer Evidence

- Take actions not to change seized evidence.**
- Only a forensically competent professional should access original digital evidence, when necessary.**
- All activity relating to the seizure, access, storage, or transfer of digital evidence. must be fully documented, preserved and available for review.**
- An individual is responsible for all actions taken with respect to digital evidence while the digital evidence is in their possession.**
- Any agency that is responsible for seizing, accessing, storing or transferring digital evidence is responsible for compliance with these principles.**



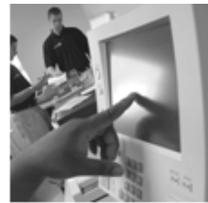
The Federal Rules of Civil Procedure:

The Federal Rules of Civil Procedure were revised in December 2006. The revised rules impact what types of data must be harvested, and provide guidance regarding sanctions for improper handling of ESI.

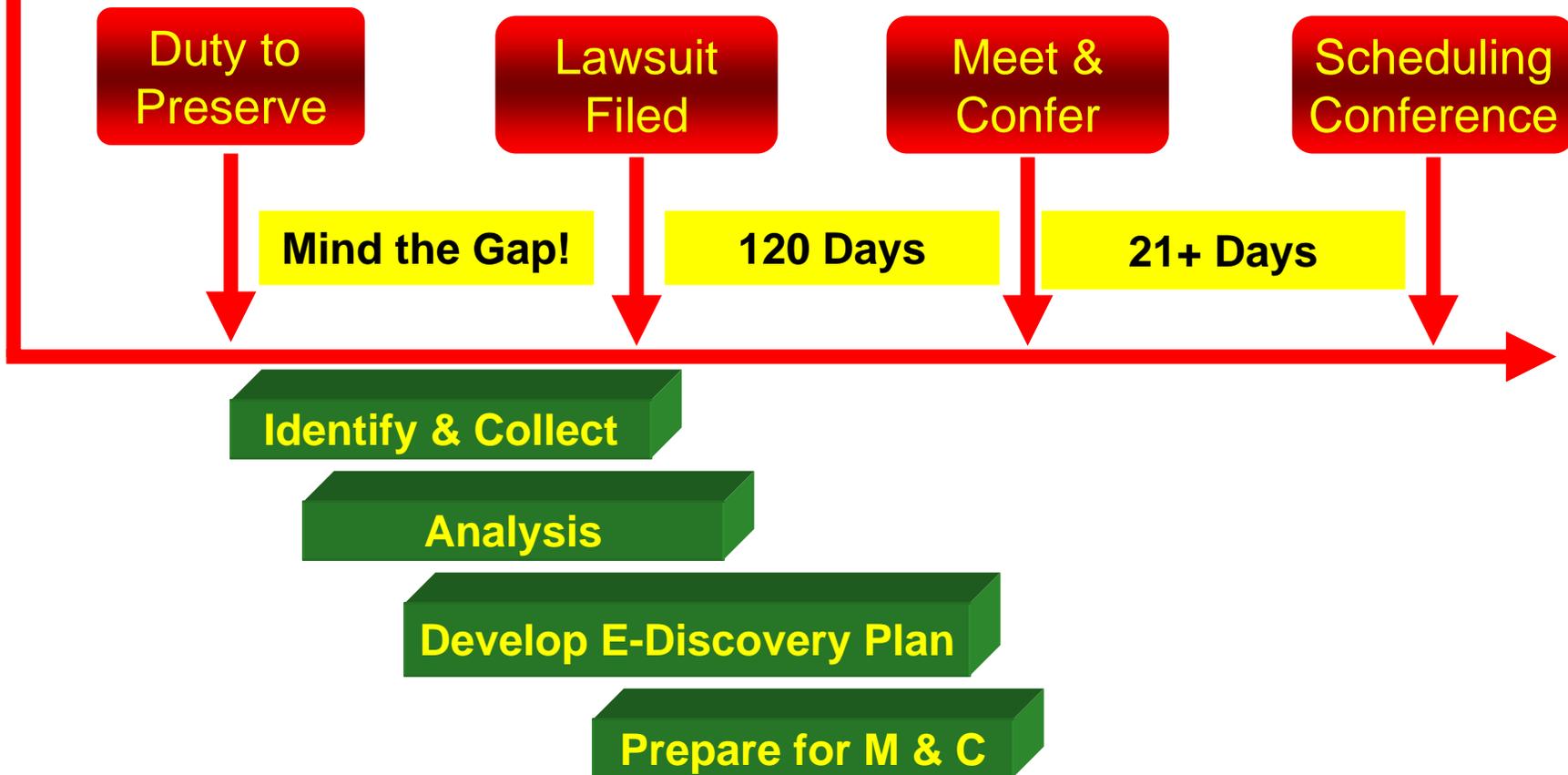
The following Rules were revised:

- | | |
|-------------------|------------------------------|
| a. Rule 16 | Initial Conference |
| b. Rule 26 | Meet and Confer |
| c. Rule 33 | Interrogatories |
| d. Rule 34 | Form of Production |
| e. Rule 35 | Expert Testimony |
| f. Rule 37 | Sanctions |
| g. Rule 45 | Non-Party Information |





SHORT TIMEFRAMES





Federal Rule of Civil Procedure (FRCP) – Rule 26

Rule 26(b)(2) has added language which allows the parties to object to disclosing electronic information that is not readily accessible. A similar change will be made to Rule 45(d)(1)-C.

What is inaccessible data?

The Zubulake case provides a discussion regarding the “accessibility” of data.

Inaccessible Data is defined as.....:

- Backup Tapes created for disaster recovery purposes;
- Legacy Data remaining from obsolete systems;
- Deleted data remaining in a fragmented form; and
- Customized databases designed to produce data in a certain way.



Federal Rule of Civil Procedure (FRCP) – Rule 26

- **Under the new rules the Meet and Confer is more important than ever!**
- **Discuss all issues pertaining to evidence, including ESI.**
- **If possible, assist your outside counsel...try and help provide them information to request meaningful ESI from your opposition. For example, what computer systems are used by your opposition, what e-mail platform, and where are the computers located?**
- **Ask about other sources of evidence. Does your company use Blackberrys? Do the employees access e-mails from home as well as work?**
- **Discuss Form of Production.**
- **Discuss Clawback Agreements for accidental disclosure of privileged information.**





Federal Rule of Civil Procedure (FRCP) Rule 34

Rule 34(a) requires that computer generated evidence must be translated into reasonably useable form.

Rule 34(b) requires that documents that are produced must be provided as they are kept in the usual course of business.





Requirements under Federal Rule of Civil Procedure Rule 34

Williams v. Sprint/United Management Co. (D. Kan. 2005)

Excel spreadsheets were produced by the defendant but the metadata had been scrubbed, and certain cells were locked. the Court held that under Rule 34(b), and in accordance with the principles of the Sedona Conference (Principles 9 & 12 and Comment 12-a) that if the Court holds that electronic documents should be produced as they are kept in the ordinary course of business, and the producing party is aware of relevant metadata, then they should include intact metadata unless the producing party provides a timely objection or requests a protective order.

Metadata is part of the document under Rule 34's definition.





Federal Rules of Civil Procedure (FRCP) Rule 37

Safe Harbor Provisions:

Parties are protected by sanctions for failure to produce electronic evidence if:

- 1.) Information was lost through routine operation of a computer system; and**
- 2.) The party took reasonable steps to preserve, and**
- 3.) The party did not violate a preservation order.**

This only helps your company if you have a legally defensible document retention policy in place





The digital “Chain of Custody” for all ESI must be maintained at each stage of the process, in order to provide the proper foundation that is required to make the evidence admissible.;

Certain projects may require a team of computer forensic specialists, which can be made available to testify as expert witnesses regarding the practices and procedures that have been employed to handle evidence. ;

Extract and preserve all available fields of metadata from electronic files, to prevent claims of “Spoliation” before reviewing the data.





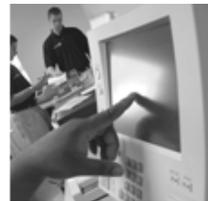
Various Review Tools Available...

If In-House Counsel is Conducting a First Pass Review

Outside Counsel Should be Made Aware of the Process...

- **Law**
- **Introspect**
- **Attenex**
- **Stratify**
- **Docuity**
- **Cataphora**
- **Concordance**
- **Summation**
- **Ringtail**
- **Discover-E**
- **Digit**





E-Discovery Management Plan

Suggested ESI Protocol – U.S. District of Maryland

The parties should meet to discuss all issues pertaining to ESI. Disclosure or discovery of electronically stored information should be handled as follows:

- 1. Areas where the parties have reached agreement – the Court’s approval should be requested.**
- 2. Areas where there is disagreement – the Court’s intervention should be sought.**





E-Discovery Management Plan

- **If the parties have agreed to a plan that proposes a “clawback” or “quick peek” agreement they should specify the manner in which privileged information and work product will be treated.**
- **Unless otherwise agreed to, the report of the agreement between the parties should be filed with the Court.**



**Simply
WIN!**



E-Discovery Management Plan

Prior planning and preparation is essential for a conference of parties Pursuant to Federal Rule of Civil Procedure 16, and 26(f). counsel that is opposing or seeking to limit disclosure of ESI bears the primary responsibility for taking the planning actions. Failure to reasonably comply with the planning requirements of the Rules in good faith may be a factor considered by the Court in imposing sanctions.



**Simply
WIN!**



E-Discovery Management Plan

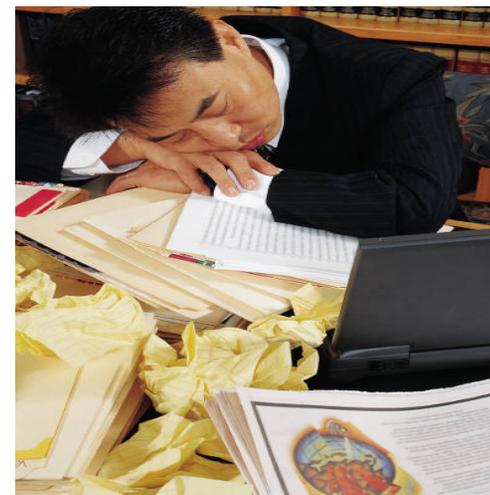
A reasonable request for prior exchange of information may include:

- **Information relating to network design, the types of databases, database dictionaries, the access control list and security access logs and rights of individuals to access the system and specific files and applications**
- **The ESI document retention policy**
- **Organizational chart for information systems personnel, or the backup and systems recovery routines, including but not limited to, tape restoration and destruction/overwrite policy**



E-Discovery Management Plan

To the extent practicable, the parties should, prior to the Federal Rule of Civil Procedure Rule 26(f) conference of the parties, discuss the scope of discovery of ESI, including whether the time parameters of discovery ESI, or for subsets of ESI, may be narrower than the parameters for other discovery.



Simply
WIN!



E-Discovery Management Plan

Prior to the conference under Federal Rule of Civil Procedure

Rule 26(f) counsel should address with their clients and each other who will participate in the conference. This discussion should include whether one or more of the participants should have an ESI “coordinator” involved.

Note – Keep in mind an I.T. System Administrator can be called as a deposition witness under Federal Rule 30 (b) 6.





E-Discovery Management Plan

Prior to a meet and confer under Federal Rule of Civil Procedure Rule 26(f) a law firm must advise it's client regarding the obligations pertaining to the preservation of data.

- **A determination of the categories of discoverable information to be segregated and preserved must be made.**
- **Discussion of the nature of issues in the case is required with the client.**
- **Is ESI relevant to some or all of the claims?**
- **Identify the “key persons” that are involved in the litigation.**
- **What is the relevant time period of the “Litigation Hold?”.**



E-Discovery Management Plan

- An analysis of what ESI needs to be preserved should be done by outside counsel.
- The extent to which metadata, deleted data, or fragmented data will be subject to a litigation hold must be determined.
- Are there paper documents that are exact duplicates of electronic files?
- Is there preservation required of ESI that has been deleted but not purged?



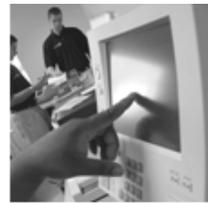


E-Discovery Management Plan

- **Counsel must determine where the ESI that is subject to the litigation hold is maintained.**
- **Issues that should be addressed include: the format, location structure, and accessibility of active storage, backup and archives; servers, computer systems, including legacy systems; remote third-party locations; and back-up media for archive vs. back-up media for disaster recovery.**

Note: As In-House counsel you must work to educate your outside counsel regarding your Information Systems





E-Discovery Management Plan

Litigation Hold - Who to notify.....

- **Parties and potential witnesses;**
- **Persons with records that are potentially discoverable;**
- **Persons with control over discoverable material;**
- **Third parties that provide I.T. services.**





E-Discovery Management Plan

What instructions should a “Litigation Hold” notice provide?

- There should be no deletion, modification, or alteration of ESI that is subject to the hold;
- Notice by the recipient should be provided if there are specific categories of ESI that require special actions;
- Loading of new software must be approved in writing;
- If deleted metadata that is not purged must be provided, what systems maintenance practices should be suspended?;
- Reasonable safeguards must be put in place to preserve ESI on portable media;
- Data, including legacy systems data, from hardware that is removed from the active system must also be preserved.



E-Discovery Management Plan

Compliance with the notification of litigation hold must be monitored.

- **The contacts responsible for monitoring compliance should be identified;**
- **A determination of the data belonging to “key persons” that requires special handling should be identified;**
- **Periodic checks of the logs or memorandum used to track compliance should be undertaken;**
- **“Litigation Hold” needs to be periodically re-issued.**



**Simply
WIN!**



E-Discovery Management Plan

- **In-House Counsel should become familiar with the I.T. systems of their corporation...outside counsel should become familiar with their client's systems and also the systems used by the opposing client;**
- **Be aware of ESI erasure, modification or recovery mechanisms, such as metadata scrubbers, and the policies regarding the use of such processes and software;**
- **Policies regarding records management, including the retention or destruction of ESI prior to a client receiving knowledge that a claim is reasonably anticipated;**
- **What policies are in place when a "Litigation Hold" is commenced, and what date was the hold begun in the specific case.**



E-Discovery Management Plan

For the Federal Rule of Civil Procedure Rule 26 Meet and Confer

**The parties should be ready to discuss issues that pertain
to the following types of data:**

**Email systems; blogs; instant messages; short message systems (SMS);
Word processing; spreadsheet and database systems; system history files;
Cache files; cookies; graphics; animation or document presentation
Systems; calendar systems; voice mail systems; internet and intranet systems;
And electronic bulletin boards.**





E-Discovery Management Plan

Federal Rule of Civil Procedure Rule 26 Meet and Confer (Cont.)

There are several other types of ESI detailed by the U.S.

**District of Maryland Suggested protocol that counsel should
be reasonably familiar with such as:**

**Storage systems; back-up and archival systems; event data records;
current and historical website information; communication systems;
records management technology; erasure devices; the identity of
vendors and subcontractors that provide ESI services for
the data.**





E-Discovery Management Plan

**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

**At the Meet and Confer conference the parties should be prepared to address
the following issues:**

- **The scope of the requests for production of ESI, and any objections to the request for the production of ESI.**
- **The form of production of ESI should also be discussed.**



**Simply
WIN!**



E-Discovery Management Plan

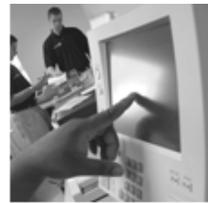
**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

**At the Meet and Confer conference the parties should be prepared to address
the following issues:**

**With respect to the form of production, if the parties are unable to agree, the
following procedure should be followed:**

- **Static images (TIFF or PDF) should be provided, while the native files are preserved for possible future production.;**
- **If paper production is permissible to the parties, paper can be produced.;**
- **If native files are to be produced, the integrity of the native file must be preserved.**





E-Discovery Management Plan

**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

At the Meet and Confer conference the parties should be prepared to address the following issues:

- **If metadata is being produced, the volume of files (including the volume of the metadata) and the estimated costs for review and production should be provided to the opposition.**
- **The costs pertaining to the preservation of ESI, without limitation, and also the possible applicability of the “Safe Harbor” provisions of the Federal Rule of Civil Procedure Rule 37 should be discussed.**





E-Discovery Management Plan

For the Federal Rule of Civil Procedure Rule 26 Meet and Confer (Cont.)

At the Meet and Confer conference the parties should be prepared to address the following issues:

- **If a preservation order is sought, the parties should attempt to agree to the terms of the order.**
- **If no agreement regarding a proposed preservation order can be reached, the parties should each draft their own version of a narrowly tailored preservation order, and each proposed order should be submitted to the Court for consideration.**



E-Discovery Management Plan

For the Federal Rule of Civil Procedure Rule 26 Meet and Confer (Cont.)

At the Meet and Confer conference the parties should be prepared to address the following issues:

For purposes of possible preservation of rights against an inadvertent waiver of privilege, the parties should discuss the “post production” assertion of privilege, and also discuss the use of a “clawback” or “quick peek” agreement.





E-Discovery Management Plan

For the Federal Rule of Civil Procedure Rule 26 Meet and Confer (Cont.)

At the Meet and Confer conference the parties should be prepared to address the following issues:

- **The methods of identifying documents and pages should be addressed.**
- **If native files are being produced, a discussion regarding the re-naming of the files to a “Bates” number, or other identification number, is appropriate.**
- **If redactions of portions of a file are anticipated, a discussion of the method of redaction should be undertaken.**





E-Discovery Management Plan

For the Federal Rule of Civil Procedure Rule 26 Meet and Confer (Cont.)

At the Meet and Confer conference the parties should be prepared to address the following issues:

- **The nature of the Information Systems that are involved in the discovery should be discussed. A possible list of relevant custodians of data should also be addressed.**
- **The types of software used in the ordinary course of business should be provided.**
- **Specific facts that relate to the burden and cost of preserving and retrieving data should be referenced.**





E-Discovery Management Plan

**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

**At the Meet and Confer conference the parties should be prepared to address
the following issues:**

- **The parties should discuss the identification of all potential sources of relevant ESI, and also discuss whether such sources are “accessible” or “inaccessible” types of data.**
- **The costs and efforts anticipated to retrieve all types of ESI should be referenced.**





E-Discovery Management Plan

**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

**At the Meet and Confer conference the parties should be prepared to address
the following issues:**

- **Cost Shifting arguments should also be discussed. The presumption that the producing party must pay the costs of “accessible” data should be followed. If “inaccessible” data is involved, there should be a presumption that some cost sharing is likely.**
- **The searching methodology that will be used should be an important topic of discussion.**

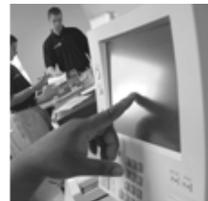


E-Discovery Management Plan

**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

**At the Meet and Confer conference the parties should be prepared to address
the following issues:**

- **There should be information provided regarding Information Technology contacts that might be required to appear for a deposition.**
- **A possible 2 tiered approach to discovery should be discussed, which envisions an initial production of data, and then a subsequent production that would be more comprehensive in scope.**



E-Discovery Management Plan

**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

**At the Meet and Confer conference the parties should be prepared to address
the following issues:**

- **Protective orders and confidentiality orders should be addressed, if any might be required.**
-
- **If there is a request for a “sampling” of data to be provided as an initial undertaking, the proposed “time, manner and scope” of such a sampling should be discussed.**
- **If the parties agree to retain a Court appointed expert to assist with ESI issues, they are permitted to make such an agreement.**



Early Meet and Confer

DOESN'T ANYBODY JUST TALK ANYMORE?



E-Discovery Management Plan

**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

At the Meet and Confer conference the persons that appear should be:

- **Lead counsel, and 1 additional representative of each party;**
- **Others can also appear, such as the parties ESI coordinators,
or I.T. Systems managers;**
- **If a party is not reasonably prepared for the conference,
this can be a factor in support of a motion for sanctions.**



E-Discovery Management Plan

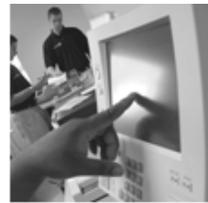
**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

At the Meet and Confer conference:

**If an objection is made that certain data is not “accessible”, such
objection must be made with particularity under
Federal Rule of Civil Procedure Rule 26(b)(2)(B).**



**Simply
WIN!**



E-Discovery Management Plan

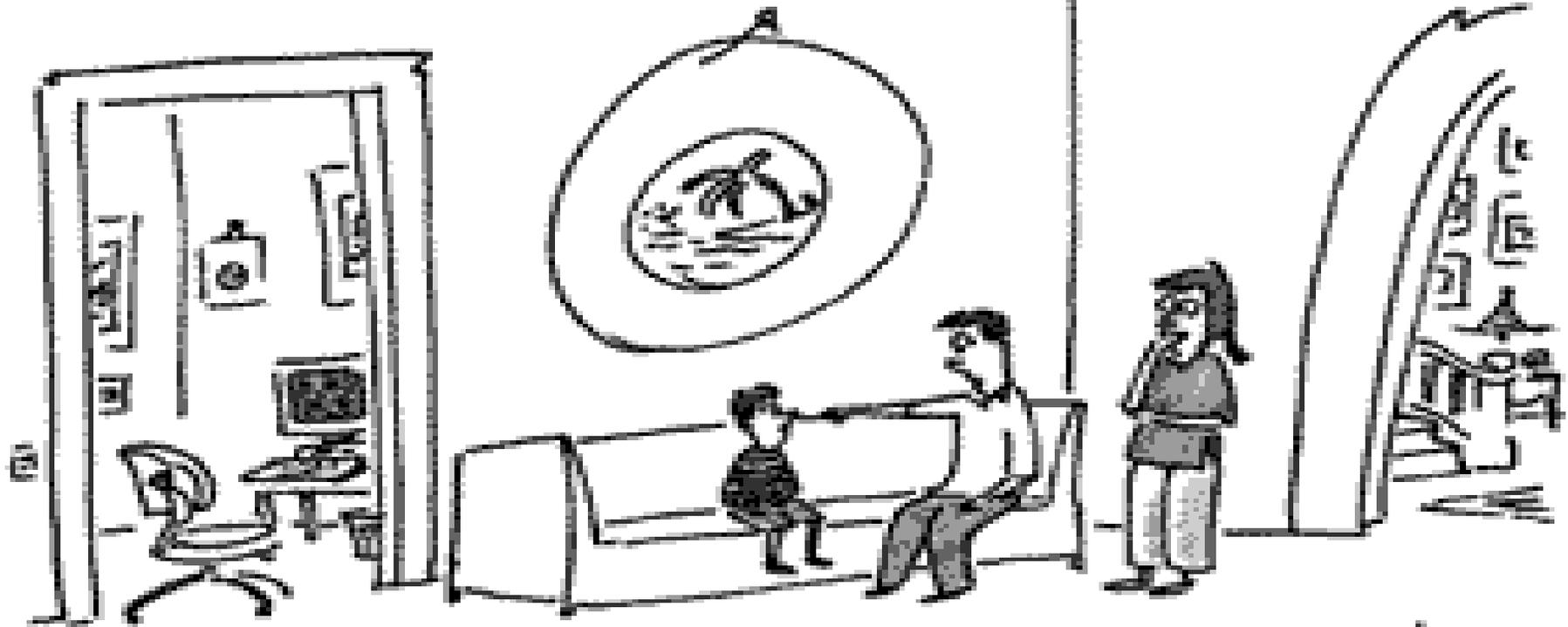
**For the Federal Rule of Civil Procedure Rule 26 Meet and Confer
(Cont.)**

At the Meet and Confer conference:

**If metadata is being requested for production the following
information should be discussed:**

- a) Cost Shifting might be applicable for metadata production under
Federal Rule of Civil Procedure Rule 26(b)(2)(C);**
- b) What type of metadata is sought? System; Substantive; or Embedded?**
- c) Certain metadata might not be subject to production;**
- d) If the producing party is providing ESI without some or all of the
associated metadata, they must inform the opposition in writing
prior to the production.**
- e) Embedded metadata is likely to require production, the other forms
of metadata might not require production.**





makin

"It's very important that you try very, very hard to remember where you electronically transferred Mommy and Daddy's assets."



AGENDA



3.) Strategies for Disclosure and Discovery



Institute of Certified Records Managers

Document Retention, Record Management and Litigation Holds

PART 1
MANAGEMENT PRINCIPLES AND THE RECORDS AND INFORMATION
(RIM) PROGRAM

PART 2
RECORDS CREATION AND USE

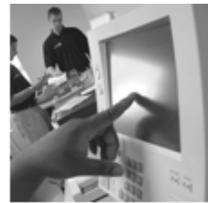
PART 3
RECORDS SYSTEMS, STORAGE AND RETRIEVAL

PART 4
RECORDS APPRAISAL, RETENTION, PROTECTION AND
DISPOSITION

PART 5
TECHNOLOGY, EQUIPMENT AND SUPPLIES

www.icrm.org





Strategies for Disclosure & Discovery – Issues of Concern

- **Inexpert Handling**
 - **Accidentally Missed ESI**
- **Inadequate Chain of Custody**
- **Spoliation of Evidence**
 - **ESI Modified**
 - **ESI Not Properly Preserved**
- **Missed Deadlines**
 - **Not Scalable**
- **No Expert Witness**
 - **IT or Paralegal on Witness Stand**
- **Inflexible Processing and Output**
- **Non-Billable Infrastructure Costs**





Preservation of Data – Issues of Concern

- **How long should email be kept?**
- **How should voice mail messages that are received as email be handled?**
- **How should spam email be handled?**
- **How should privileged email be handled?**
- **Where might there be “gaps” in a corporate infrastructure?**



Preservation of Data – Issues of Concern

- **How do litigation hold policies effect the preservation policies?**
- **How are user-generated documents (Word, Excel etc.) handled?**
- **How are document management systems used to assist with retention?**
- **How are instant messages handled?**
- **Is management allowed to supervise email and other e-messaging?**
- **What issues pertain to international emails and e-docs?**



Preservation of Data – Issues of Concern

- **Information Security - Maintaining business information electronically increases the potential to lose control over that information. Newspapers are rife with instances in which employees, competitors, and others have gained unauthorized access to electronically stored information.**
- **In the recent past, employees have stolen corporate trade secrets using e-mail, hackers have infiltrated sensitive computer systems and publicly disclosed confidential business information, and viruses have corrupted irreplaceable data.**





Preservation of Data – Issues of Concern

- **Document Management – electronic Documents must be stored so that they are readily accessible and complete. Integrating electronic documents, particularly e-mail, into the corporate knowledge base presents a significant challenge for most businesses.**
- **While informal methods of organizing electronic information may be appropriate for small businesses, automated document management systems are all but mandatory for larger organizations. These automated systems assist businesses in creating and managing electronic documents.**



Preservation of Data – Issues of Concern

- **Legal & Regulatory issues - A number of legal and regulatory issues are implicated by the transition to the electronic workplace. Certain types of agreements and notices must be provided in or reduced to "writing."**
- **Information stored electronically may be rendered inadmissible in litigation if it is deemed "unreliable", based on the method that was used to preserve and/or collect it.**
- **Various state and federal laws require businesses to retain certain types of information for specified "retention periods."**
- **Integration of archive systems with a records management solution is a plus.**
- **Outsourcing I.T. is an option short-term or long-term.**





Preservation of Data – Issues of Concern

- **Continued development of new technologies will assist handling the complex ESI matters that litigants are faced with.;**
- **The establishment by corporations of legally defensible “Document Retention” policies and strategies, will continue to encourage the use of technology as a component of such practices.**
- **The Sedona conference and EDRM conference will continue to be proactive in order to evolve with the ever changing issues that effect the Legal profession, and the regulations that are enforced against corporations.**



Preservation of Data – Issues of Concern

Litigation Hold Archives & Email Archives...

- **Implementing and maintaining an effective “Litigation Hold”**
- **Has to be in the top echelon of corporate priorities**
 - **Will require significant reallocation of corporate resources**
 - **Can no longer be a collateral duty**
- **Two new “four” letter words added to the lexicon of electronic discovery**
 - **Spoliation**
 - **Sanctions**



Preservation of Data – Issues of Concern

Have a first line of defense against spoliation and adverse inferences...

Litigation Hold Archives & Email Archives...

- **System can be set up in a bifurcated configuration**
 - 100% of all docs can go into a primary archive**
 - Designated custodians or documents are duplicated real time into a litigation hold archive**
- **Primary archive can be pruned as per the company's document retention policy**
- **Litigation hold archive is perpetual for the life of the litigation pending a deletion confirmation from corporate counsel**



Preservation of Data – Issues of Concern

Proper Litigation Hold Procedures...

- **Litigation hold can be implemented in 3 ways**
 - **Entire enterprise or mail server**
 - **By group or distribution list**
 - **By individual's custodian**
- **Litigation hold methodology**
 - **All e-mail communication is held in RFC822 format in message attachment groups**
 - **All electronic documents are held in native format**
 - **All message attachment groups and native electronic documents are hashed to ensure single instance storage**
 - **MySQL database maintains custodian order of single instance storage**





Preservation of Data – Issues of Concern

Litigation Hold...Continuation of Normal Business Processes...

- **Corporate messaging systems**
 - **Regardless of location of the mail store, all messages traveling “over the wire” are captured: inbound, outbound and inter-company messages**
 - **Corporate electronic documents**
 - **Documents can be archived from shared servers regardless of Operating System**
 - **Documents can be archived from PCs regardless of the Operating System**
 - **Documents can be search filtered prior to archival**
- **Smart-Filter**
 - **All corporate electronic documents are hashed and compared against corporate message attachments to ensure single instance storage**
 - **Allows normal corporate backup and deletion process for messaging systems and electronic document systems to continue after implementation**





Survey Says....

THE FEDERAL RULES OF CIVIL PROCEDURE

Revised in December 2006

- **A recent survey of the General Counsel's of the Fortune 1000, taken by M.I.T. in November 2006, found that only 7% of corporations felt they were ready to comply with the New Federal Rules, and 44% of the General Counsel's did not know the Rules were changing.**



Simply
WIN!



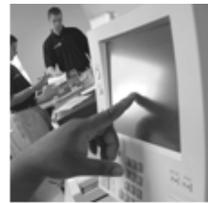
Survey Says....

THE FEDERAL RULES OF CIVIL PROCEDURE

Revised in December 2006

- **Of the 76 people surveyed by Lexis-Nexis at the Association of Corporate Counsel's annual meeting in 2006, 44 percent said that their companies had not been prepared for the new rules. Although 61 percent said they were now very or somewhat confident that they were fully compliant, 30 percent still said that they were not very confident and 5 percent not at all confident.**





Survey Says...

THE FEDERAL RULES OF CIVIL PROCEDURE

Revised in December 2006

- **Twenty seven percent of respondents to a litigation trends survey released earlier this year by Fulbright & Jaworski said that the rules have made handling of e-discovery issues in federal litigation more difficult. Eighteen percent said they have made the process at least somewhat easier. The remainder detected no change.**





Survey Says...

- **Almost 55 percent of the 140 in-house counsel surveyed by the e-discovery consultant Lexakos said their companies needed to spend more time developing e-discovery and litigation readiness plans. Fifty two percent agreed that they had to improve their litigation hold procedures, which require companies to preserve all data that may relate to a legal action involving the company and almost half expressed the need to develop a process to segregate privileged communications and thus avoid high document review costs.**





Survey Says....

- **Twenty-five percent of companies terminated a worker for violating e-mail policies, up from 22 percent last year, according to a recent E-Policy Poll. Instant Messages are a problem because people tend to think because that window disappears and because the message goes so quick, they can write anything they want. It's simply not true. Your employer may be monitoring and retaining messages, or your recipient may be retaining those messages.**

CBS Market Watch – June 2004



**Simply
WIN!**



Survey Says...

- **\$4.6 Billion** - amount that US companies spent internally in 2005 to analyze emails
- **50 – 100%** - of all discoverable evidence now comes in the form of email
- **25 – 30 Million** – the number of outside emails that Microsoft Corp receives each day
- **59%** - companies that do not have an email retention policy
- **10%** - of corporate lawyers report that their companies settled a case rather than incur the cost of e-discovery





dB Organizer Deluxe - Database: DocumentSimple

File Print Search Options Move Advanced Record Update Web dB Server Web Help

Entry Order NONE All Records

TITLE	CATEGORY	LINK
Employee Eva	Employment	C:\MSWord Files\
Purchase Ord	Accounting	C:\primadata\MS
Construction	Engineering	C:\MSWord Files\
Construction	Engineering	C:\MSWord Files\

Read/Write Access RD Blank

Document Description Notes View Browser

TITLE
Employee Evaluation Form

NUMBER
EEF001

AUTHOR
Human Resources

DATE
10/21/2005

LINK
Employment.doc

CATEGORY
Employment

KEYWORDS
evaluation, employee, form

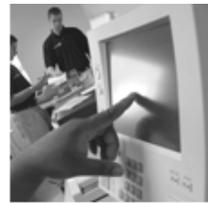
First Prev PgDn Next Last

Find Replace Options Print Table HTML New Load Exit

Standard Advanced

Electronic
Document
Management
Software





Shared Documents - Microsoft Internet Explorer provided by Not connected to Internet

Address: http://ms-0091/sites/demo0009/Shared%20Documents/Forms/AllItems.aspx

Welcome Denis Dehenne | Help | Send Feedback

ADatum > Shared Documents

Share a document with the team by adding it to this document library.

View: All Documents

	Modified	Modified By
	4/21/2006 6:18 PM	MS-0091\$

- Edit in Datasheet**
Bulk edit items using a datasheet format.
- Open with Windows Explorer**
Drag and drop files into this library
- Connect to Outlook**
Synchronize items and make them available offline.
- Export to Spreadsheet**
Analyze items with a spreadsheet application.
- View RSS Feed**
Syndicate items with an RSS reader.
- Alert Me**
Receive e-mail notifications when items change.

Document Management

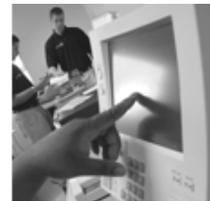
Microsoft Sharepoint



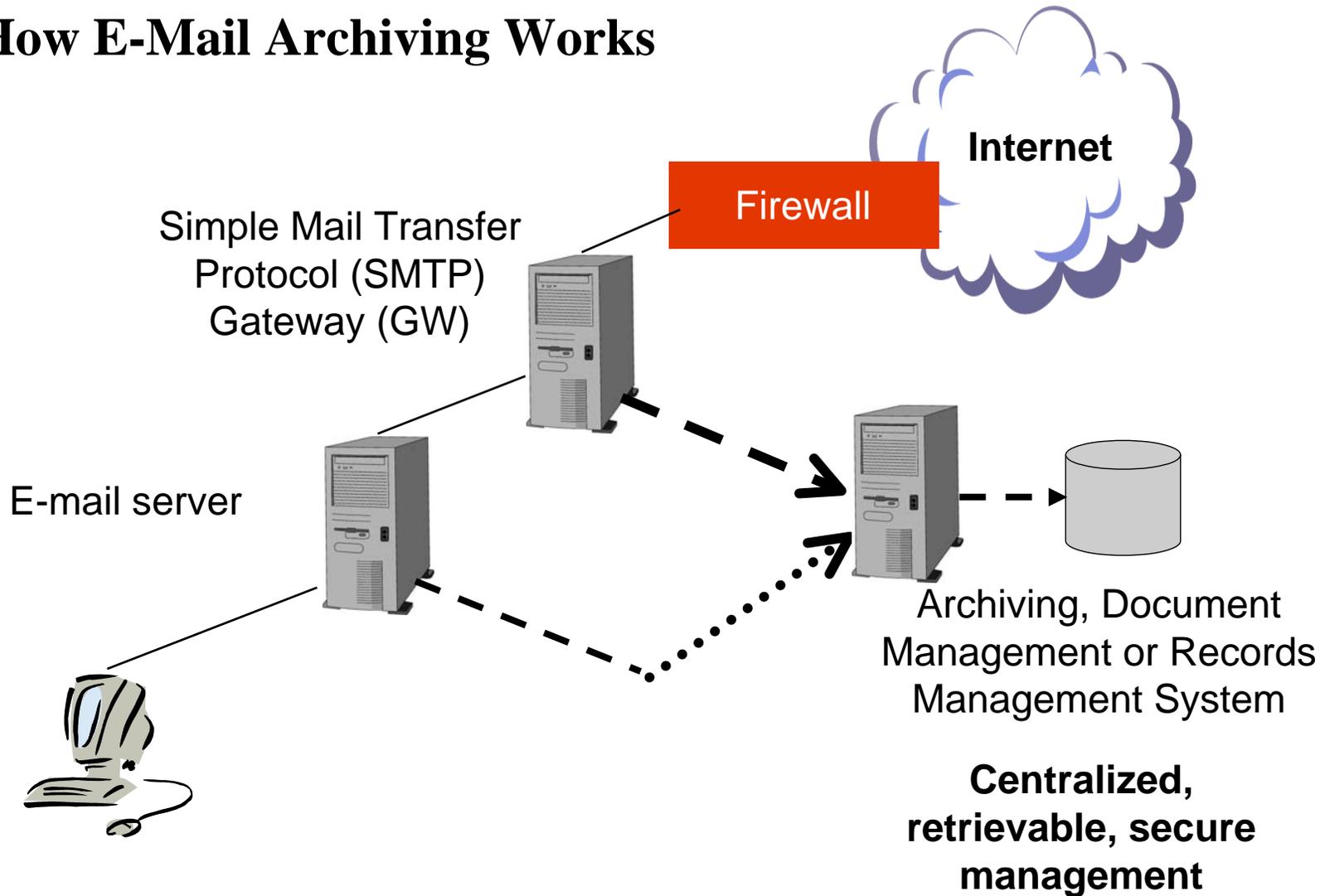


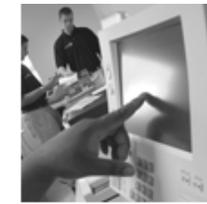
File
Management
Software
with
archiving





How E-Mail Archiving Works





Document Review Budget Estimate

Matter Name:
Date:

Total Cost Estimate		\$7,796,741	\$1,397,995	\$277,251
		Large	Medium	Small
E-File Collection		Scenario 1	Senario 2	Scenario 3
Key Custodians		10	5	2
GB/Key Custodian		10	5	2
Tier 2 Custodians		25	10	3
GB/Tier 2 Custodians		7.5	2	1
GB Shared Server Data		15	7.5	2
Estimated GB Collected		302.5	52.5	9
Estimated Pages/GB		75,000	75,000	75,000
Page equivalent		22,687,500	3,937,500	675,000
Yield after Pre-Processing as %		0.3	0.3	0.3
Yield after Pre-Processing GB		90.75	15.75	2.7
Estimated # pages		6,806,250	1,181,250	202,500
Box Equivalent (2,500pp/box)		2,723	473	81
Estimated % Responsive		0.25	0.25	0.25
Estimated # Responsive Pages		1,701,563	295,313	50,625
Collection Costs				
Collection Costs (1 hour/custodian @ \$300/hr)		\$10,500	\$4,500	\$1,500
DeDup and Cull Cost/GB		1250	1250	1250
Estimate GB Collected		302.5	52.5	9
Total Collection, DeDup and Cull Costs		\$388,625	\$70,125	\$12,750
EDD Processing Costs				
EDD Processing Cost/GB		\$1.750	\$1.750	\$1.750

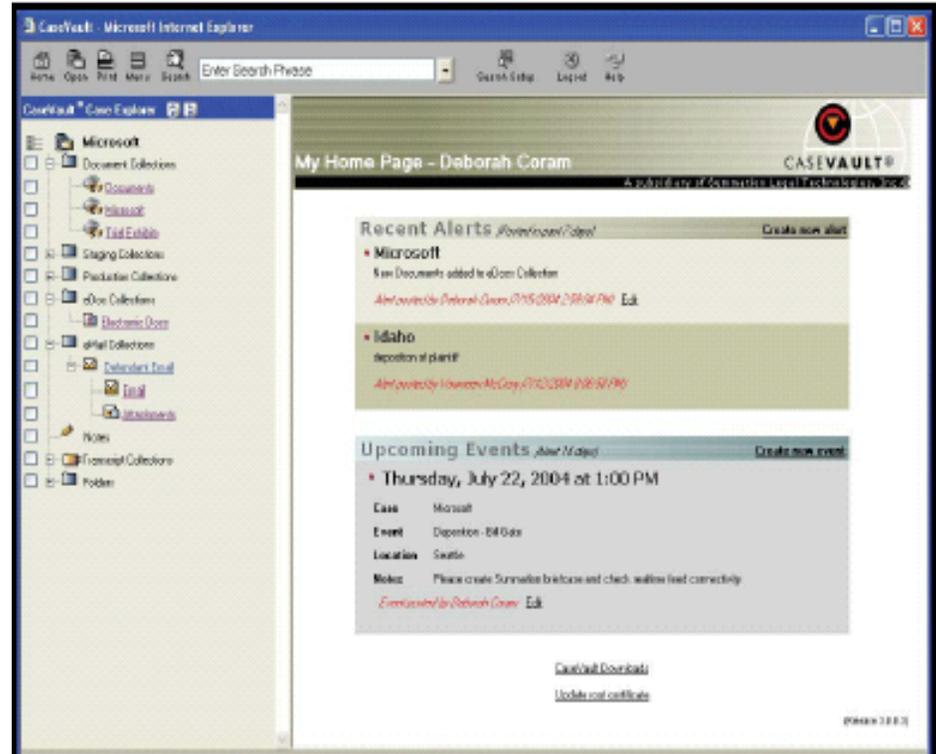


Client receiving
cost estimate
for E-Discovery



Web Hosted Reviews

- Simple but Powerful Interface
- Speed and Scalability
- Optimized for Native Review:
 - Speed
 - Search and Hit Highlighting
 - Reduced File Size
 - Bit-level streaming
 - TIFF or PDF on the “Fly”



- Data Load, Index, Search, Review, Production
- Flexible solutions – TIFF, PDF, Meta, Text, Native
- Flexible Security Infrastructure





Web Hosted Reviews

- **Secure High Availability Clustered Computer Configuration**
- **Billion Dollar Data Center Hosting Center**
 - **Five 9's (99.999%) availability Of Both Network And Hardware Components And Systems**
 - **Redundant Power and Failover of Network Components**
 - **Load Balancing And Failover Capability Of Servers For On-line Review**
 - **Secured Storage of Client Data**
 - **24 x 7 Response To System Failures With 4 Hour Hardware Replacement**





When to Use “CONCEPTUAL SEARCHING” Web Hosting

Technical nature of e-discovery are demanding sophisticated technical solutions

Different cases require different approaches – There is no 1 size fits all EDD Solution.

Conceptual Searching works well on:

- Large data collections: 25-30 GB *minimum*
- E-mail intensive
- Multiple languages
- Rapid processing required
- Potential for shifting issues/topics/strategies
- Data analysis required





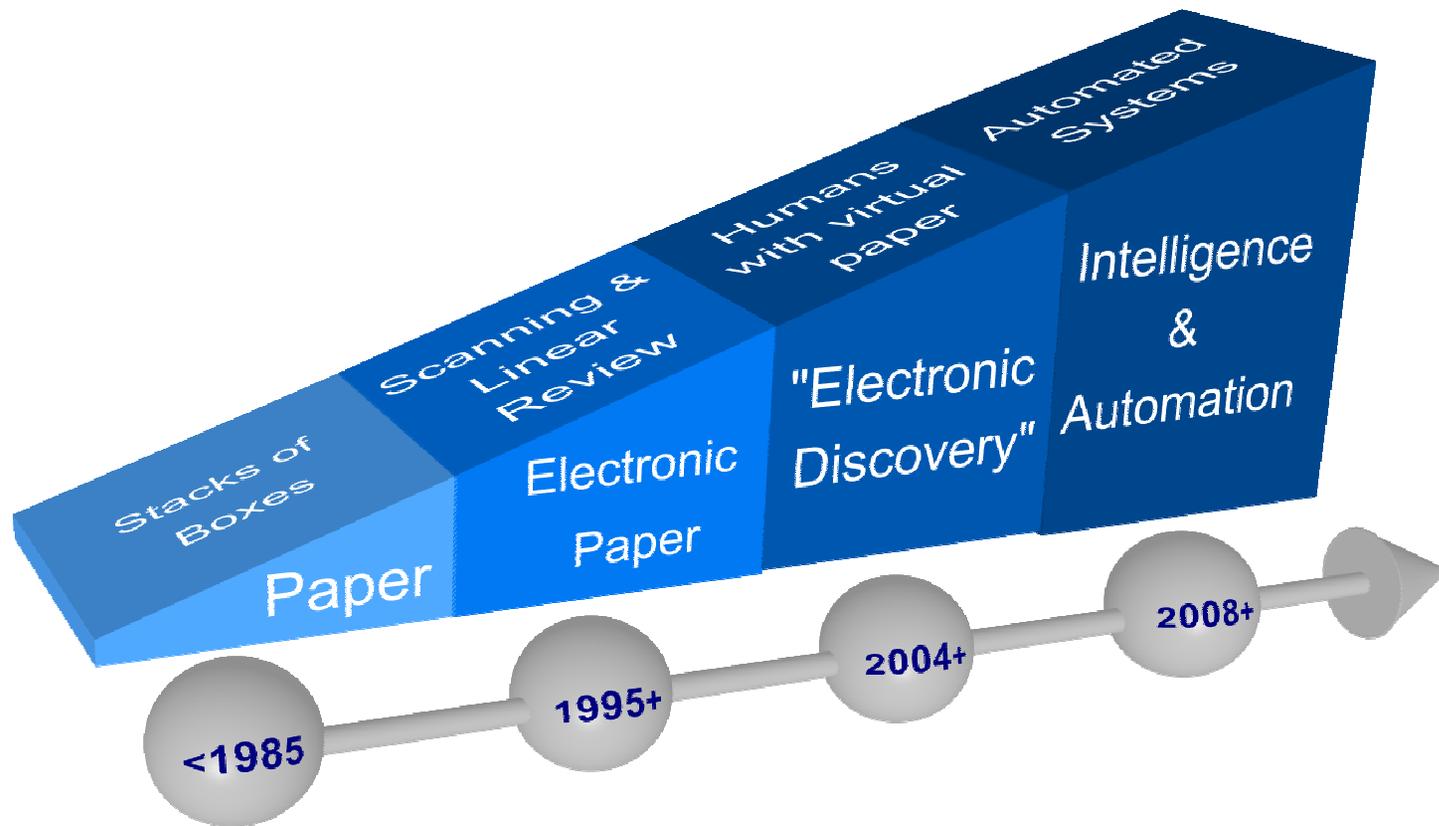
When to Use “CONCEPTUAL SEARCHING” Web Hosting

- **Early Assessment – Identification of key documents to determine litigation risks and settlement value**
- **Meet & Confer Preparation – concept folders and clustering enables pre-testing of keywords and resultant production sets**
- **Data Prioritization – advanced clustering and concept searching across entire population allows for prioritized data segmentation and lower review costs**
- **Accelerated Review – advanced review tools enable more efficient (cost savings) and more effective (document targeting) review**
- **Quality Assurance – reviewed documents can be clustered by concept to ensure consistent coding**



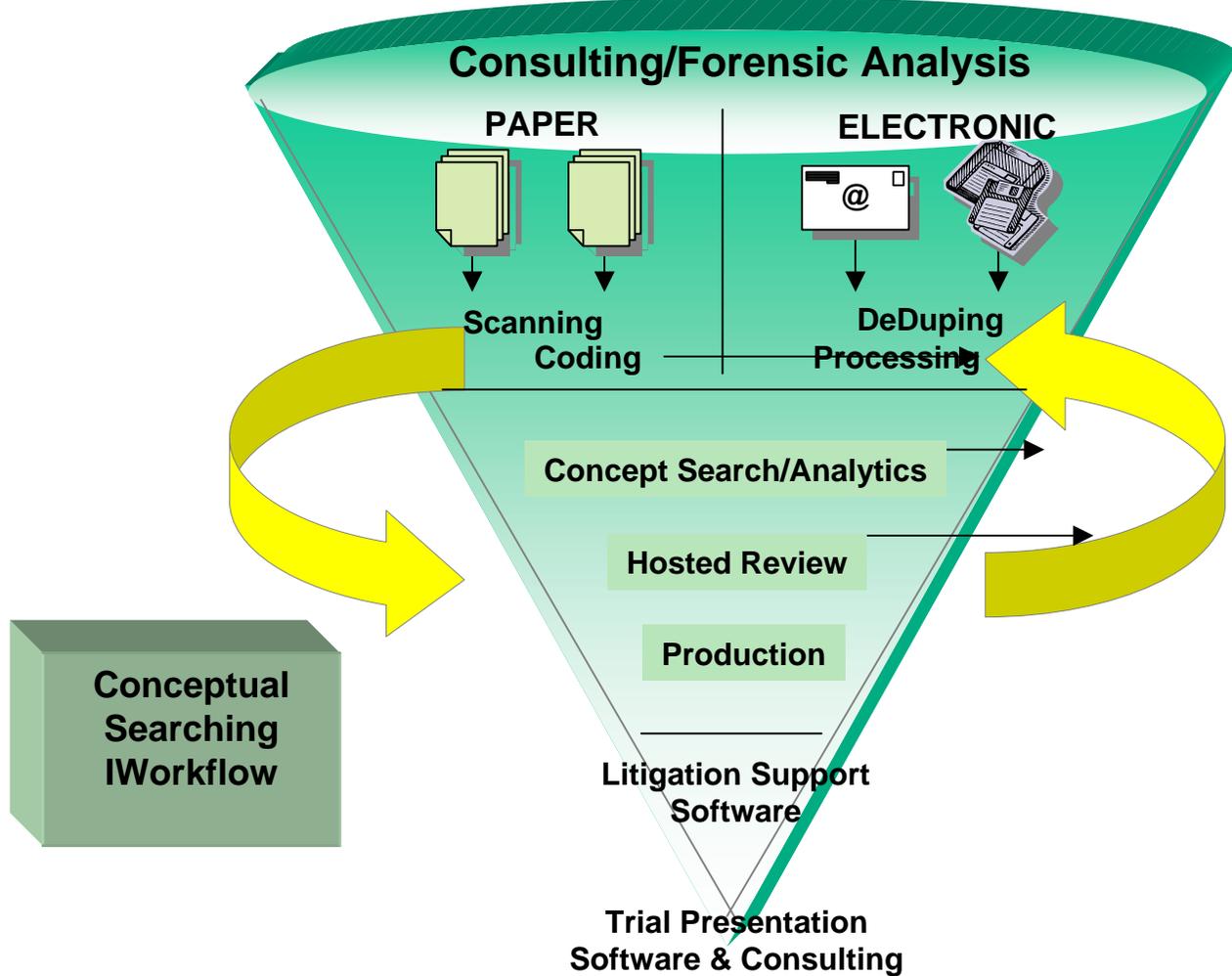


“CONCEPTUAL SEARCHING” – Reduces Review Time





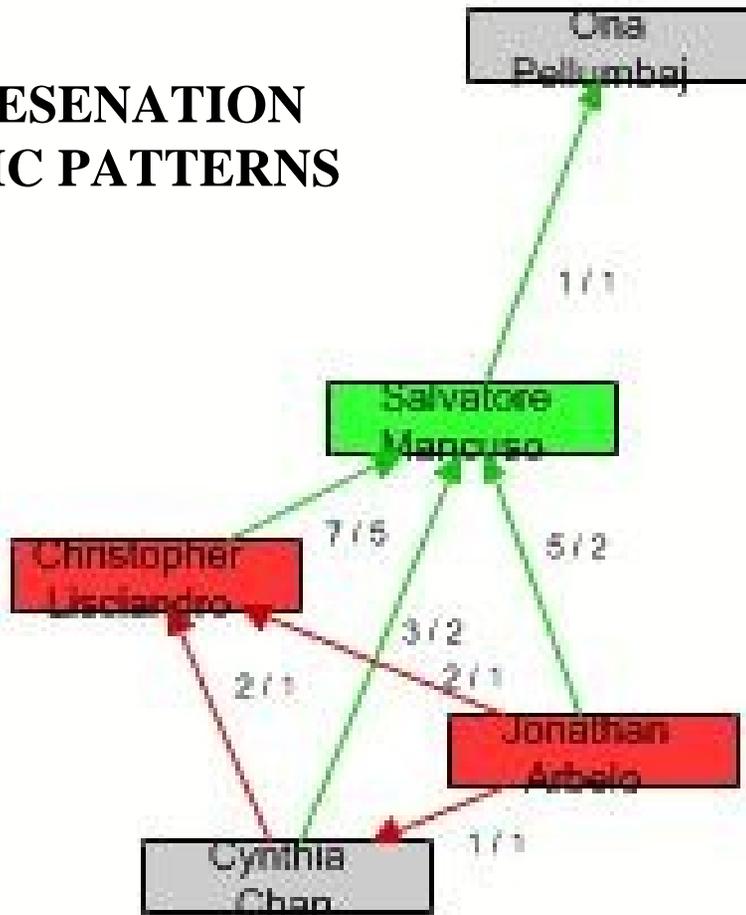
“CONCEPTUAL SEARCHING” – Reduces Review Time





CONCEPTUAL SEARCHING

GRAPHICAL REPRESENTATION OF E-MAIL TRAFFIC PATTERNS

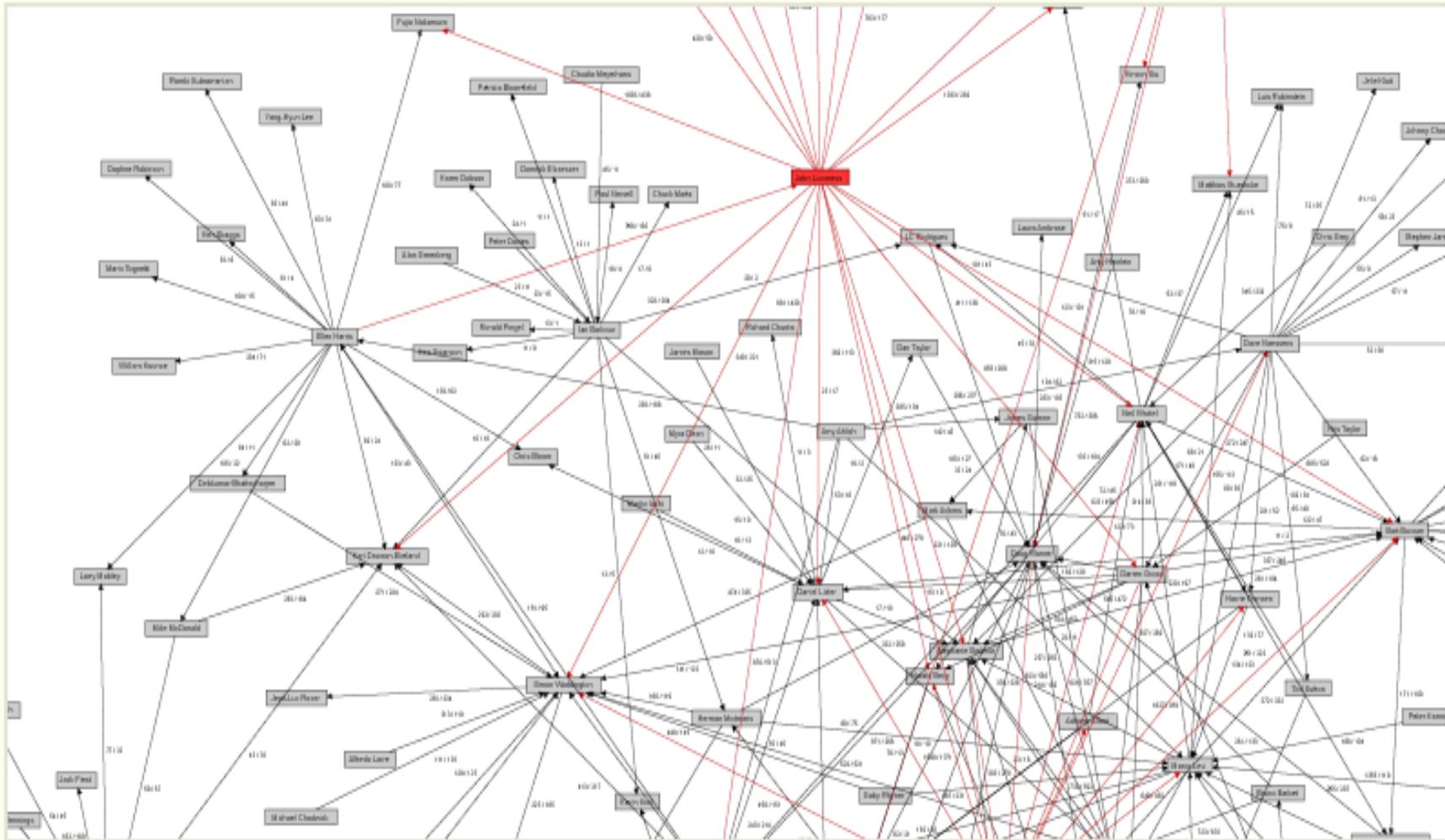


CONCEPTUAL SEARCHING GRAPHICAL REPRESENTATION OF E-MAIL TRAFFIC PATTERNS



Closest Actor

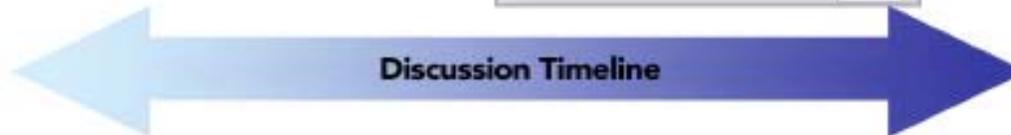
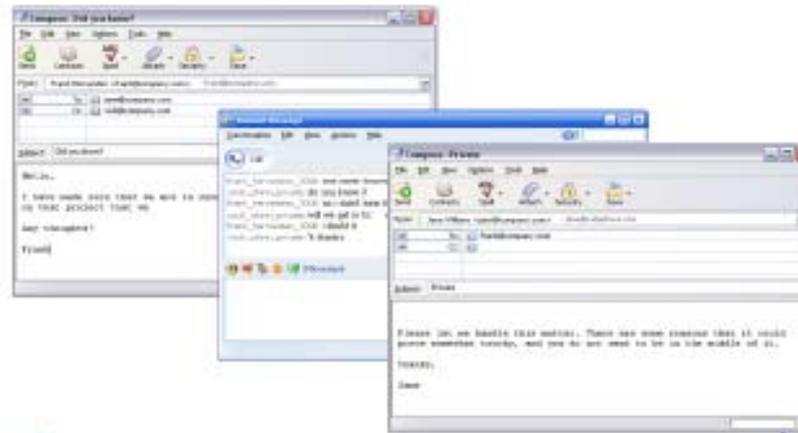
Closest Actor Graph





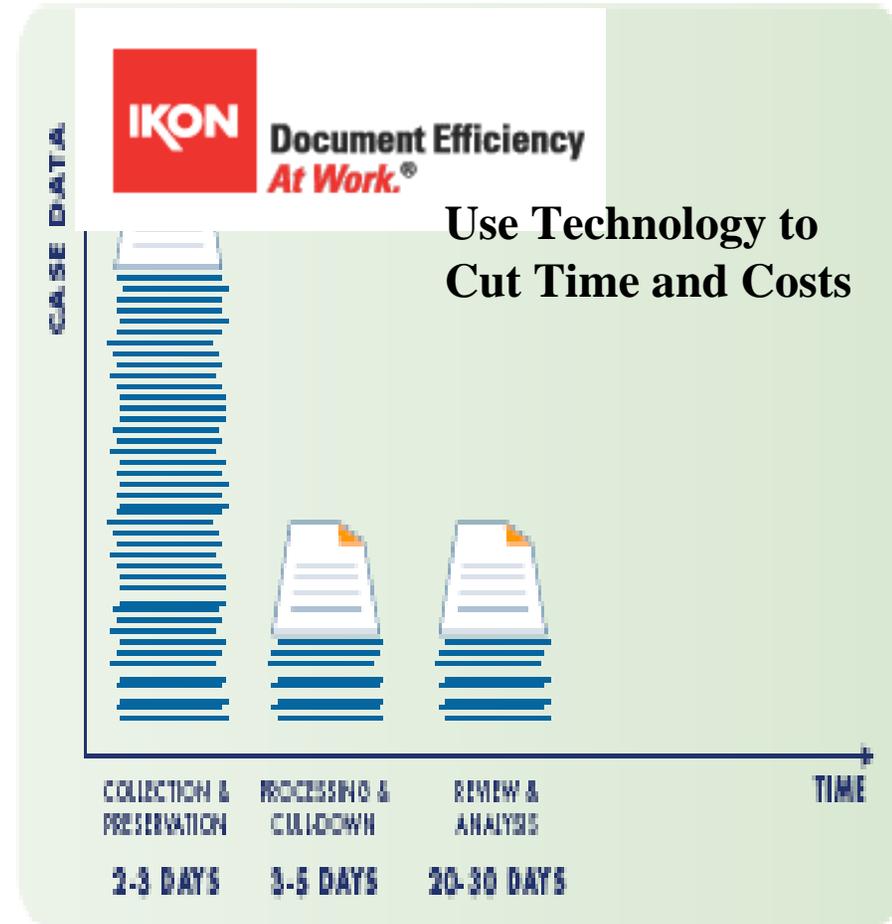
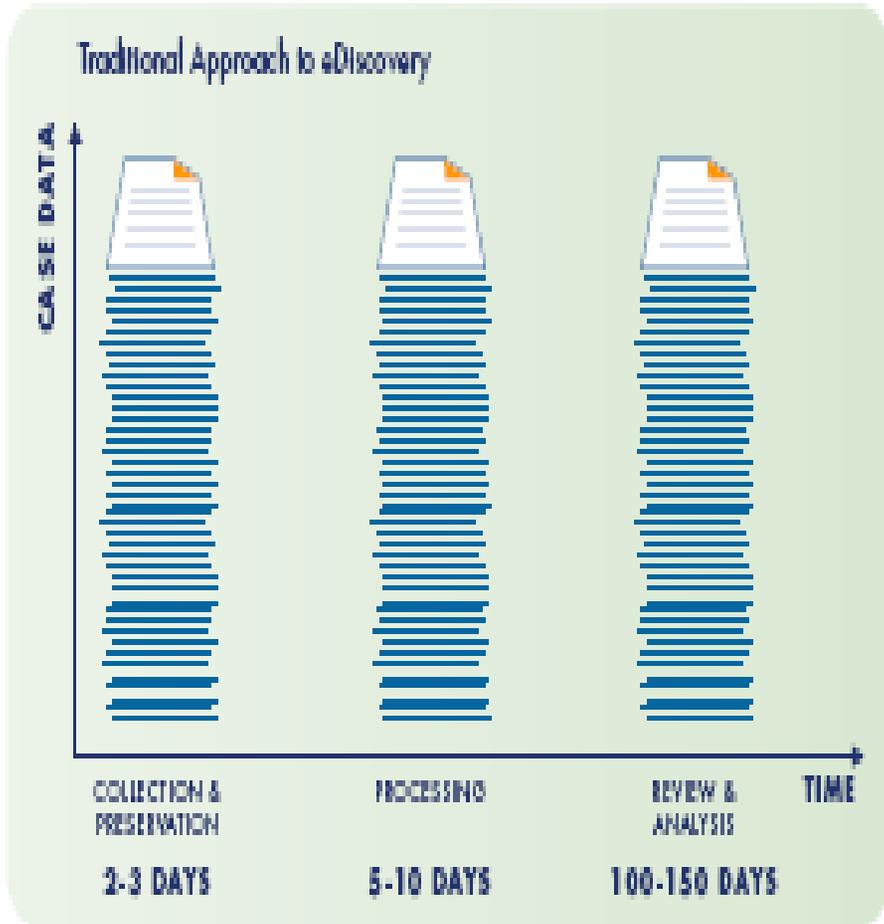
When to use “CONCEPTUAL SEARCHING”

Documents are presented in context, with related documents that come before them, with them, and after them. By seeing what writers and readers of a document knew at the time, and what they wrote and did afterwards, reviewers and investigators can understand the real significance of each piece of evidence - and can do so more quickly than ever before.





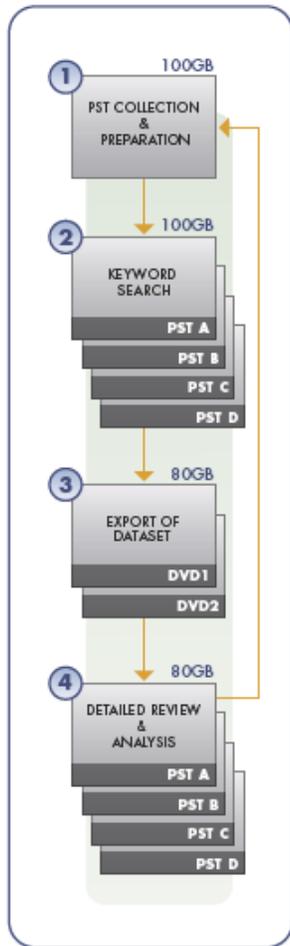
Plan Your Identification, Collection and Review





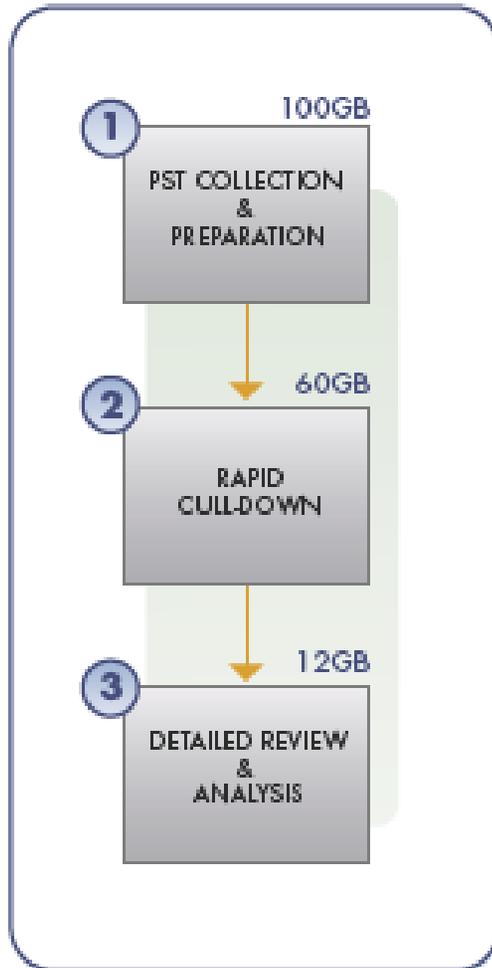
Plan Your Identification, Collection and Review

The
Old
Way



Use Technology to
Cut Time and Costs

The
New & Improved
Way



**Simply
WIN!**



Recent E-Discovery Case Law

Admissibility of ESI:

Lorraine, et al. V. Markel American Insurance Company, **(Dist. MD 2007)**

The Magistrate Judge denied Summary Judgment Motions from both sides stating that the ESI had not been properly authenticated. the Magistrate's opinion sets forth a series of hurdles that must be overcome by the parties in order to have ESI evidence admitted in support of a Summary Judgment motion. The following Federal Rules of Evidence must be considered in order to possibly admit ESI evidence: Rule 401 (Relevancy); Rule 901 (Authentication); Rules 801-807 (Hearsay); Rules 1001-1008 (Best Evidence/Originals); and Rule 403 (Unfair Prejudice) .





Inadvertent Waiver of Privilege:

Amersham Biosciences Corp. v. PerkinElmer, Inc., (D.N.J. 2007)

District court upheld magistrate's ruling that plaintiff had waived any privilege applicable to certain "unreadable" electronic documents that were nonetheless opened (with appropriate software) and produced by its e-discovery vendor; court remanded to magistrate question of whether plaintiff had preserved the privilege with respect other electronic documents that had been deleted from a DVD, but were nonetheless printed and produced by its outside e-discovery vendor, in light of magistrate's mistaken conclusion that error was not apparent on the face of the documents.

See Also... Gragg v. Int'l Mgmt. Group, (N.D.N.Y. 2007)





Form of Production:

In re Seroquel Prods. Liab. Litig., (M.D. Fla. 2007)

District court adopted magistrate's report and recommendations and entered modified case management order containing provisions relating to various electronic discovery issues, including format of production, metadata, databases, costs, inaccessible and/or legacy ESI, the preservation of documents and ESI and spoliation of evidence. The Court's order was very specific, including requirements regarding the metadata pertaining to redacted documents, stating that a basis must be provided for the redactions.

The defendant's were later subject to severe monetary sanctions for failing to comply.





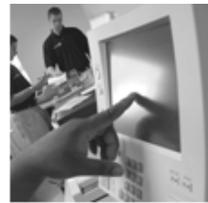
Form of Production:

Beardsley v. All Am. Heating, Inc., (W.D. Wash. 2007)

Court ordered defendant to answer certain interrogatories regarding customers and projects and to produce "a complete unedited electronic copy of Defendant's database" which contained the requested information. Defendant's only objection was that the request to produce the entire database was overbroad, and not reasonably calculated to lead to the discovery of admissible evidence, but the Court did not agree and compelled production of the entire database.

See Also...Perez-Farias v. Global Horizons, Inc., (E.D. Wash. 2007); and In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig., (E.D.N.Y. 2007); and





Inaccessible vs. Accessible – Cost Shifting:

Io Group, Inc. v. Veoh Networks, Inc., (N.D. Cal. 2007)

Court granted plaintiff's motion to compel and denied defendant's request to shift costs of production to plaintiff, since defendant provided no information about whether and how such information was "inaccessible" or any other information relevant to cost-shifting determination under Zubulake III; court encouraged parties to agree on most efficient means of production and noted that plaintiff had indicated willingness to provide high capacity storage devices.

See also...In re Veeco Instruments, Inc. Securities Litigation, (S.D.N.Y. 2007)





The Duty to Preserve Information

O'Bar v. Lowe's Home Centers, Inc., (W.D.N.C. 2007)

Court ordered parties to develop joint pre-certification discovery plan and articulated detailed guidelines for discovery of ESI adapted from the “Suggested Protocol for Discovery of Electronically Stored Information” set forth by the United States District Court for the District of Maryland. In addition, the Court discussed “staging” of discovery, aimed to produce ESI that was readily accessible first. If Metadata is redacted from a file, written notice of that redaction would be required.





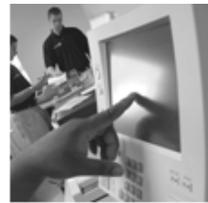
The Duty to Preserve Information

E-Discovery is impacting the relationship between in-house and Outside counsel...

Phoenix Four, Inc. v. Strategic Res. Corp. (S.D.N.Y. 2006)

Finding that monetary sanctions would most appropriately serve the prophylactic, punitive, and remedial purposes of discovery sanctions, court imposed monetary sanctions against certain defendants, and their outside counsel, for grossly negligent failure to timely locate and produce information from computer server (comprising 200-300 boxes of documents); court further found that defendants' abandonment of computers containing relevant evidence was grossly negligent but alone did not support sanction of adverse inference instruction.





Sanctions Regarding Discovery Abuses:

In re NTL, Inc. Sec. Litig., (S.D.N.Y. 2007)

Court granted plaintiffs' motion for adverse inference instruction and awarded costs and attorneys' fees incurred in connection with motion and additional discovery necessitated by defendant's conduct, where because of its grossly negligent failure to preserve relevant ESI, defendant was only able to produce emails for 13 out of 57 requested current and former employees who were "key players".

See also...Hill v. Eddie Bauer, (C.D. Cal. 2007); and Claredi Corp. v. Seebeyond Tech. Corp., (E.D. Mo. 2007)

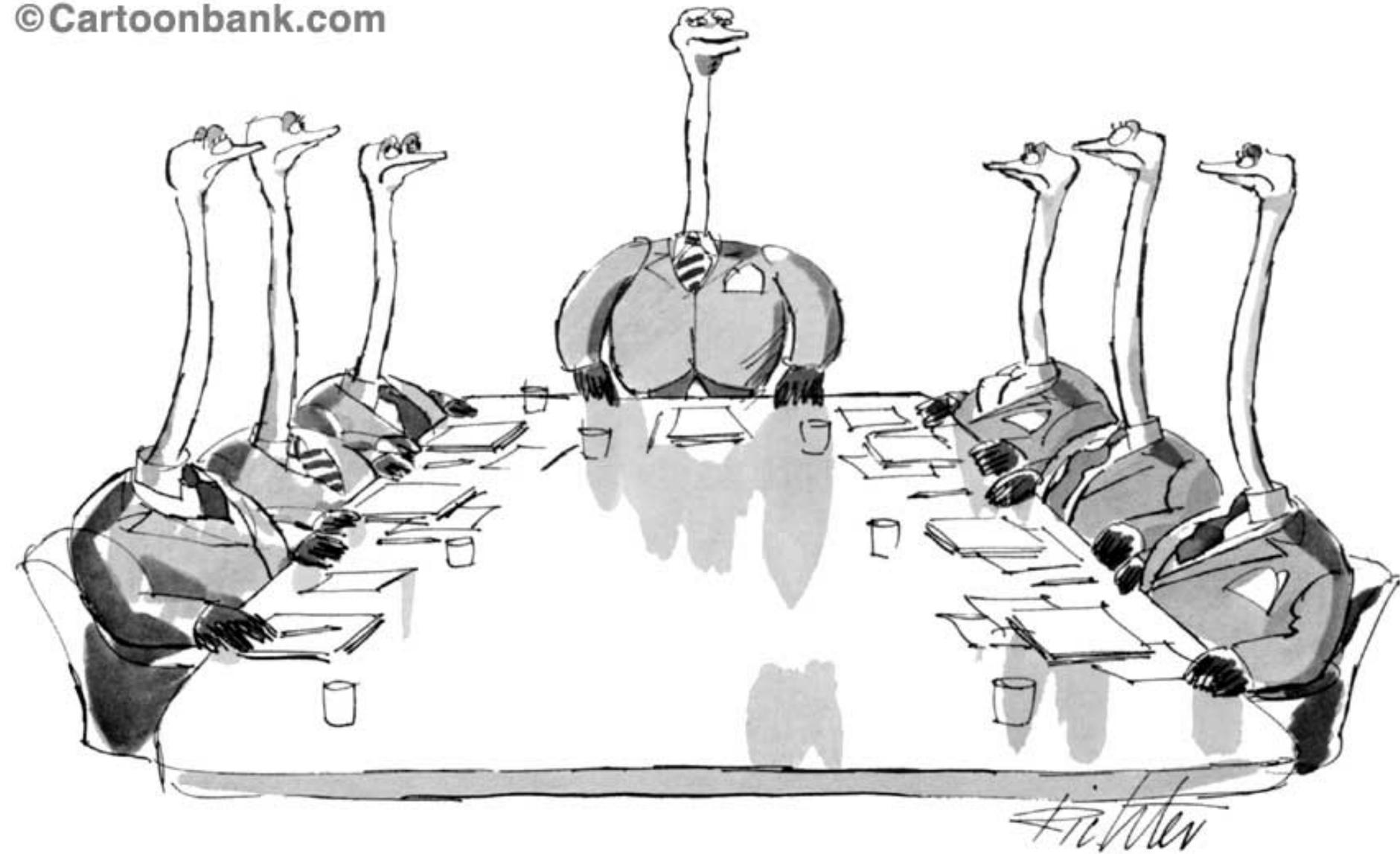




AGENDA



4.) Concluding Remarks



**“The Motion has been made and seconded
that we stick our heads in the sand.”**



Concluding Remarks: Growing Importance of ESI

- **Increase in information produced per person: 200% over 5 years (University of California at Berkeley Survey: How Much Information?)**
- **Increase in capacity per attorney: 0% over 5 years**
- **Legal costs relate to evidence, not information. How much evidence does a worker leave behind?**
 - **Before 1990: Most evidence was consciously created, and workers documented a small portion of their activities**
 - **Since 1997: Most evidence is created inadvertently, and workers document well**





Concluding Remarks: Growing Importance of ESI

- **10** custodians over a **5** year period ending in **1995** documented **10%** of their day, leaving behind **5** person years of reviewable material.
- **10** custodians over a **5** year period ending in **2007** documented **70%** of their day, leaving behind **35** person years of reviewable material.



Simply
WIN!



Concluding Remarks: Growing Importance of ESI

Issues of Concern - Summary

- **Over Production**
- **Mishandling of Electronic Discovery through I.T. Mistakes**
- **Inadvertent Waiver of Privilege**
- **Excessive Production Costs**
- **Penalties for Failure to Produce:**
 - **Monetary Sanctions (For Example
1.4 Billion, 253 Million and 29.2 Million
against Merck, Morgan Stanley & UBS in recent years)**
 - **Dismissal & Default Judgments**
 - **Erosion of Privilege**
 - **Sanctions**





Concluding Remarks: Growing Importance of ESI

Issues of Concern - Summary

- **Evolving Relationship between In-House and Outside Counsel**
- **Learn and implement effective document retention policies and information management environments**
- **Issue "litigation hold" to all potential custodians and for all potentially relevant information with periodic reminders.**
- **Identify and communicate directly with "key players" and IT personnel to ensure receipt and complete understanding, document, then double back to ensure compliance**
- **Instruct all relevant employees to produce electronic and hard copies of files in the manner they are ordinarily kept.**
- **In-House and Outside counsel must work together at earlier stages of the litigation**





Concluding Remarks: Growing Importance of ESI

Growing Importance of ESI

- Increasing Size of Document Populations;
- Increasing Amount of Electronic Evidence;
- Statutory Obligations:
 - Sarbanes-Oxley Act
 - Patriot Act
 - Gramm-Leach-Bliley Act
 - State Laws;





Concluding Remarks: Growing Importance of ESI

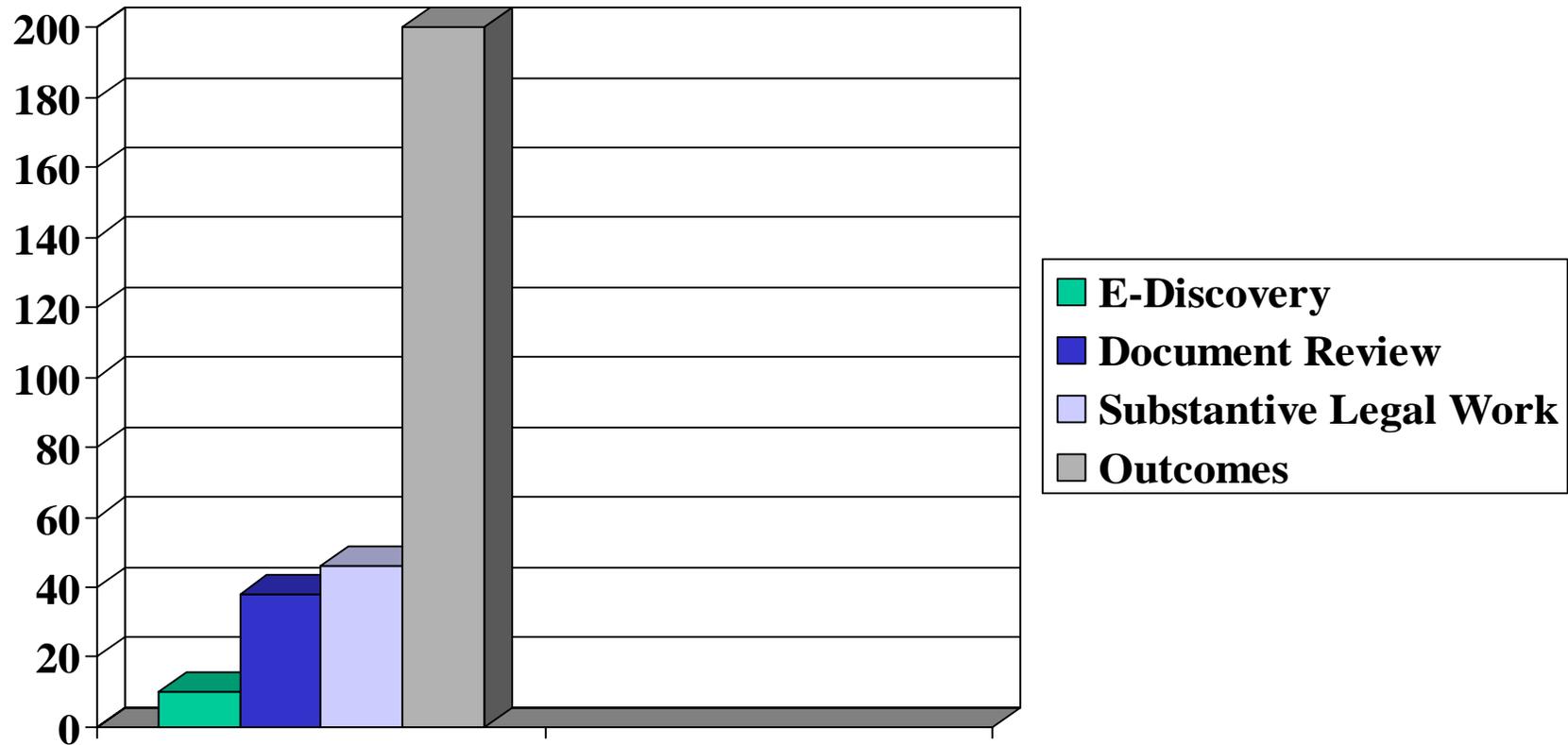
Growing Importance of ESI

- Technologically Savvy Judges and Attorneys;
- Changes in Federal Rules of Civil Procedure;
- Growing body of case law pertaining to EDD;
- Technological advances in the workplace;
- Movement toward digital case filings in Courts.





Where are the Litigation Costs?





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Questions & Comments

THANK YOU

