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presents

E-Discovery Cost Containment: Legal Strategies

Leveraging Economical Litigation Agreements, E-Mediation and Other Emerging Tools

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Todd L. Nunn, Partner, **K&L Gates**, Seattle

Scott A. Carlson, Partner, **Seyfarth Shaw**, Chicago

Rebecca G. Bradley, Shareholder, **Whyte Hirschboeck Dudek**, Milwaukee

Thursday, August 19, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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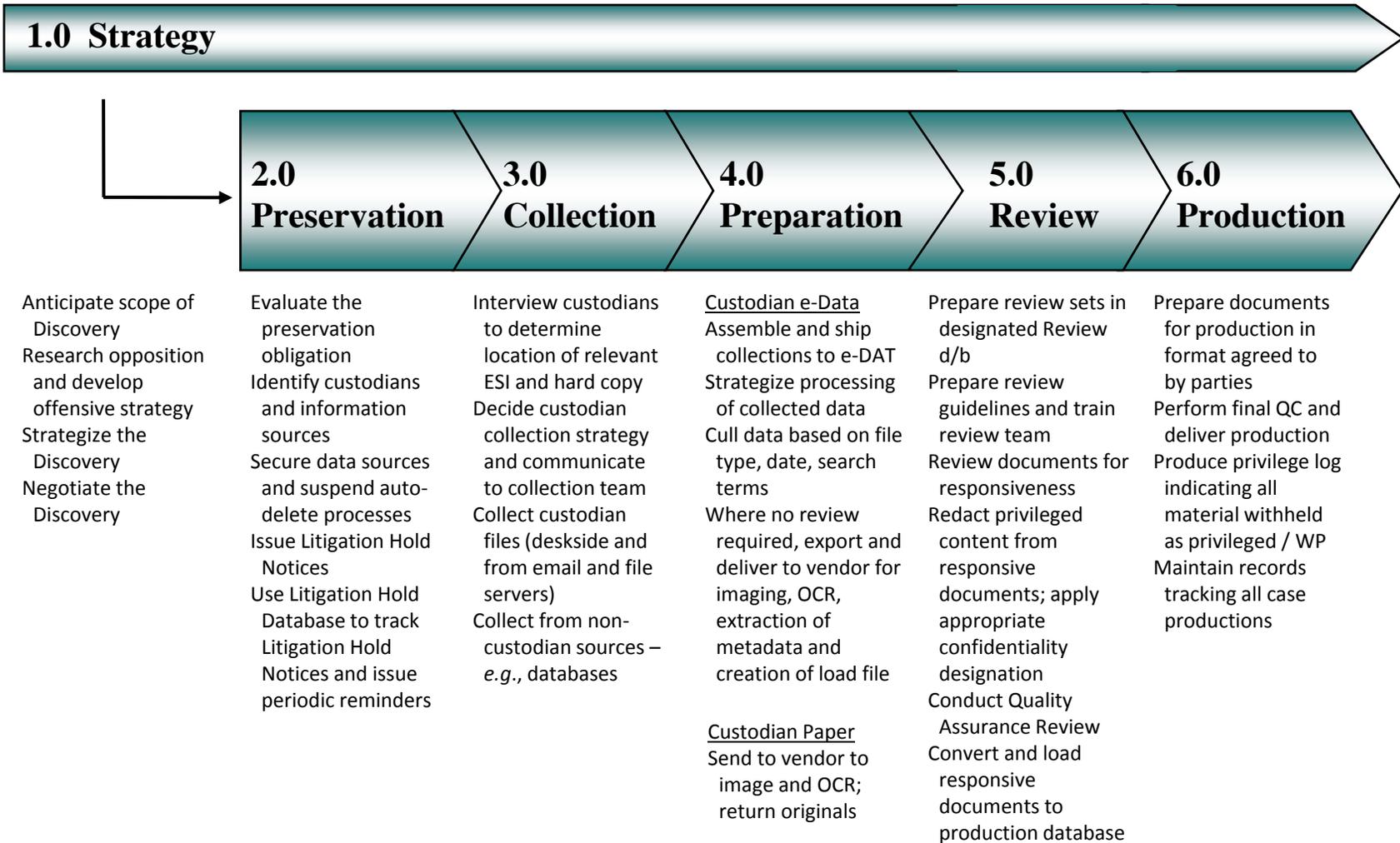
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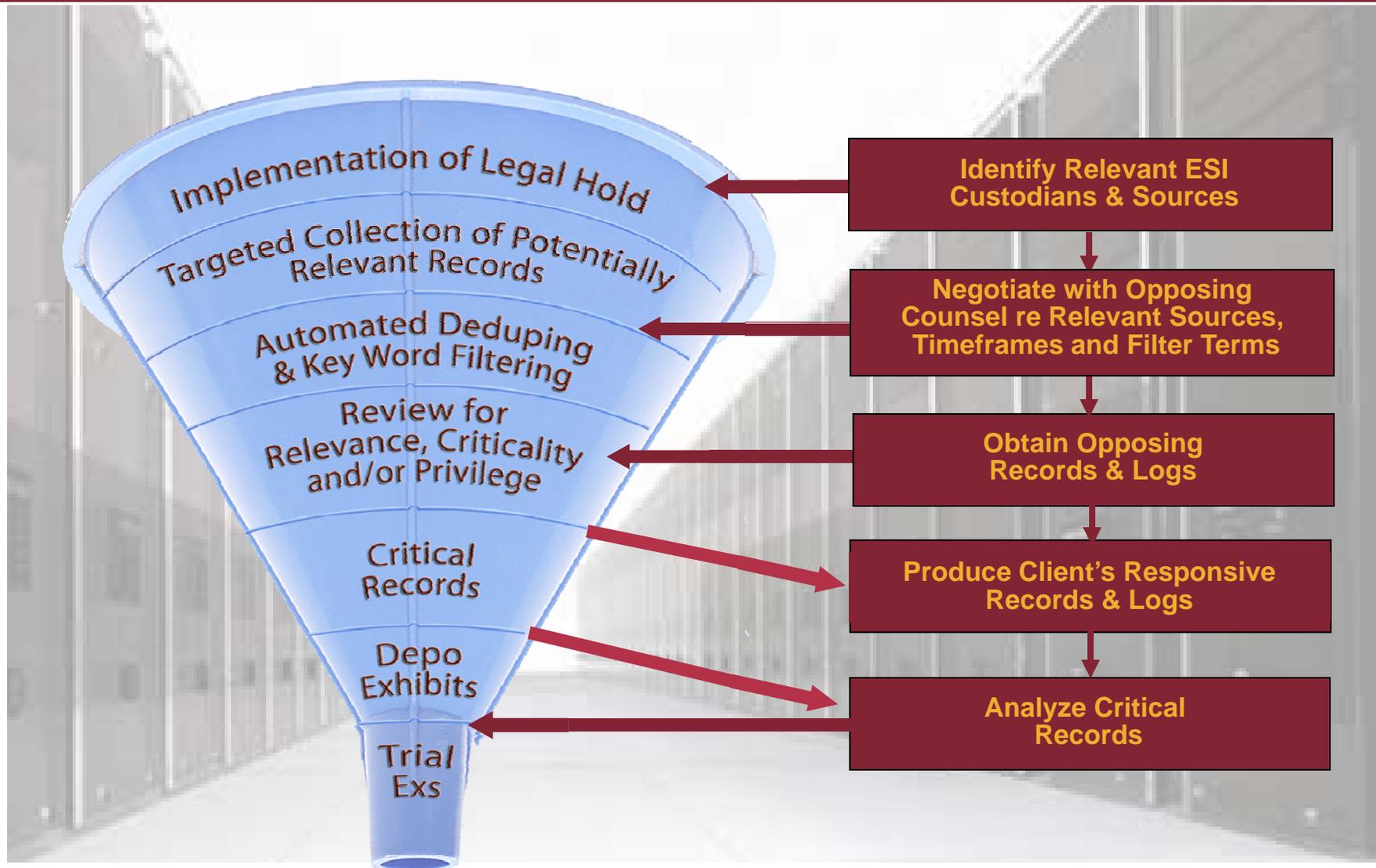
E-Discovery Cost Containment: Meet and Confer Process

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Discovery Process Flow Chart: Key Activities





Cost Drivers in e-Discovery

- Volume of ESI
 - Processing
 - Searching
 - Review
- Privilege review
- Privilege log/redaction
- Re-do anything
 - Review
 - Privilege log
 - Production

Preliminary Questions

- When you evaluate process of review/production
- What is needed for case?
 - What e-discovery needed?
 - Expense
 - Time
 - What privilege issues?
- Can I do all parts of process?
- Where do I need help/from whom?
 - E-discovery counsel
 - E-discovery vendor
 - Acquire in-house tools

Multiven, Inc. v. Cisco Systems, Inc., 2010 WL 2813618 (N.D.Cal.)

- Plaintiff rejected idea of using an outside vendor to help search and narrow ESI because of cost
- Instead, 5 attorneys reviewing everything
- Court found that review was taking too long and that completion of production would be too late
- “[S]omething must be done.”
- CISCO offered to pay for half of cost of a vendor to “assist with further collection, search, review, and production of documents.”
- Plaintiff agreed and court ordered.

Federal Rule 26(f)

Rule 26(f) requires parties to “confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties’ views and proposals concerning:

- (1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
- (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

Federal Rule 26(f)

- (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- (4) any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order;
- (5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
- (6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

Other Rules or Guidelines

- Check for local rules, protocols or guidelines
- Some district courts, or individual judges, have very specific guidelines
 - how to prepare
 - what to discuss
 - who should attend
 - definitions of terms
- Seventh Circuit Pilot Program

Strategic Issues

- Three basic subjects to discuss related to ESI
 - Preservation
 - Form of production
 - Privilege and work product
- Opportunity to handle issues early
- Even if can't agree
 - Raise issue
 - Get in front of judge
 - Tactical – bad news earlier or later
- Ability to enter into agreements or orders for handling discovery generally and e-discovery

Cooperation Given Teeth

- The Sedona Conference Cooperation Proclamation (2008)
- *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D.Md. 2008).
- *Covad Com. Co. v. Revonet, Inc.*, 254 F.R.D. 147 (D.D.C. 2008).
- *SEC v. Collins & Aikman Corp.*, 2009 WL 94311 (S.D.N.Y. 2009).
- *Oracle v. SAP*, 264 F.R.D. 541 (N.D Cal. 2009).

Mancia v. Mayflower Textile, 253 F.R.D. 354 (D.Md. 2008)

- FRCP 26(g) – certification duty
 - Affirmative duty to engage in discovery in a responsible manner
 - Designed to curb discovery abuse
- Duty to cooperate
- Required detailed consultation on discovery between parties
 - Determine amount at stake
 - Discuss discovery already provided
 - Attempt to agree on what additional discovery needed
 - Provide status report to judge

***Covad Comm. Co. v. Revonet, Inc.*, 254 F.R.D. 147
(D.D.C. 2008)**

- Covad sought to compel re-production of document in native format, following Revonet's initial production of hard copy and refusal to produce in native format unless Covad bore the cost
- Must defendant re-produce in native format absent specific request for native production and who should bear the costs?
- Holding: Re-production warranted where request was for documents as kept in the course of business and Revonet should have known that hard copy production was insufficient – either by its own research *or by speaking with Plaintiff*. As to the cost of re-production, court stated: “Since both parties went through the same stop sign, it appears to me that they both should pay for the crash. ”

***Oracle v. SAP*, 264 F.R.D. 541 (N.D Cal. 2009)**

- Relied in part on duty to cooperate to find that plaintiff's failure to disclose full damage claim earlier in case precluded those damage claims
- "The orderly case management of complex litigation requires defining the basic contours of the litigation from the outset, including the damages sought, and directing discovery accordingly in order to avoid runaway costs."
- "Th[e] lack of prompt disclosure to Defendants about the scope and nature of Plaintiffs' damages case and the failure to cooperate on defining the contours of appropriate discovery accordingly threatens the fair and cost-effective exchange of relevant discovery."

Strategic Issues

- Legitimate Question: “Is ESI discovery even implicated in this case?”
 - If so, how and what?
 - Is e-mail relevant?
- Be mindful of relative need for and burden of ESI discovery between all parties
 - Mutual assured destruction
 - Tit for tat

Preservation

Advisory Committee Notes

- Reasonableness should guide preservation efforts
- “The parties’ discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities.”
- recommends parties’ goal should be to agree to “reasonable preservation steps” taking all considerations into account

Preservation

- Discuss scope of discovery – what should be preserved
 - Preservation obligation can attach well before lawsuit
 - Now is a chance to attempt to narrow – or shore up gaps
- Identify problematic ESI
 - Dynamic data that will be difficult to preserve
 - Implicated data that is not being stored as a matter of policy and will not be preserved
 - Anything that has been deleted, or needs protection under Rule 37(e)
- Client needs to continue to operate

Preservation

Backup tapes/media

- If relevant information is being preserved in active data with litigation holds
- Try to reach agreement that backup tapes can continue usual recycle schedule
- At least seek agreement – or court approval if not – that current back up handling is appropriate

Privilege

- Timing and information in privilege log
- Any special issues of privilege
 - Problematic forms of ESI Implicated
 - Privilege in voicemail, database, IM
 - Metadata
- Any special way to handle privilege due to nature of case or amount in controversy
 - Quick peek/non-waiver
- Protective orders
 - Claw back agreements/post production assertion of privilege
 - Confidential documents
- Redactions

Review/Production

- Scope to size of matter – needs of case
- Timing and nature of requests
- Initial thoughts on volume of review
- Early discussion of search terms, custodians, deduplication (exact, near, cross-custodian)
- Timing of production
- Phasing of review/production
 - Particular sources, custodians, types of material
 - Opposing party review, discuss if more needed
- Form of production

Protective Orders

- Clawback/non-waiver clause in protective orders remain important despite FRE 502
- Waiver still possible under FRE 502
 - *Rhoads Ind. V. Building Materials Corp.*, 254 F.R.D. 216 (E.D.Pa. 2008).
- Non-waiver clause can provide greater protection
 - *Alcon Manufacturing, Ltd. v. Apotex Inc.*, 2008 WL 5070465 (S.D.Ind. 2008).
- FRE 502(d) requires incorporation of agreement into a court order

Other Agreements

- Economical Litigation Agreements
 - Daniel Winslow draft
 - Incorporated into business agreements
 - Limits all aspects of litigation/but includes specific e-discovery limits
- E-Mediation
 - Agree to mediate e-discovery issues
 - Agreement part of Rule 16 Discovery Plan
 - Mediated e-Discovery Plan/Individual issues
 - Expertise/Confidential Disclosure
- Special Masters
 - Court Order/Party Agreement
 - Expertise/Timely Action

Economical Litigation Agreement – e-Discovery

- **12.1.3. Document Retrieval.** Specific electronic documents requested by a party may be retrieved in any manner at the sole discretion of the custodial party that does not alter the contents of the document. The retrieval may alter metadata with the exception of “created by” and “doc date.”
- **12.1.4. Non-Searchable Files.** Parties are under no obligation to make non-searchable files searchable. Parties shall not produce a non-searchable version of a document when a searchable version exists and can be accessed by the same custodian.
- **12.1.5. Format.** Spreadsheets, or the exported contents of databases, shall be produced in native format, unless the native format would render the data not reasonably accessible because it would require software not licensed to the requesting party. In such case, the spreadsheet or database export shall be produced in an alternate searchable format that maintains the organization of the spreadsheet or database export to the extent possible. All other documents need not be produced in native format and, at the sole discretion of the custodial party, may instead be produced in alternate formats that are at least as searchable as the documents’ native format.

Economical Litigation Agreement – e-Discovery

12.5.2.2. Key Word Search Limits. The parties agree that each party's Requests for Key Word Searches shall be limited as specified below:

- **12.5.2.2.1.** Disputes up to \$400,000: No Requests for Key Word Searches allowed.
- **12.5.2.2.2.** Disputes up to \$1,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 4 custodians of information; for a period of time no more than six months, which may include multiple periods of time aggregating to no more than six months; and involving not more than six key words likely to lead to the discovery of information both relevant and material to the underlying dispute.
- **12.5.2.2.3.** Disputes up to \$10,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 8 custodians of information; for a period of time no more than 1 year, which may include multiple periods of time aggregating to no more than one year; and involving not more than 18 key words likely to lead to the discovery of information both relevant and material to the underlying dispute.

*E-Discovery Cost
Containment:*

Preservation and Production

Strafford Publications
July 28, 2009

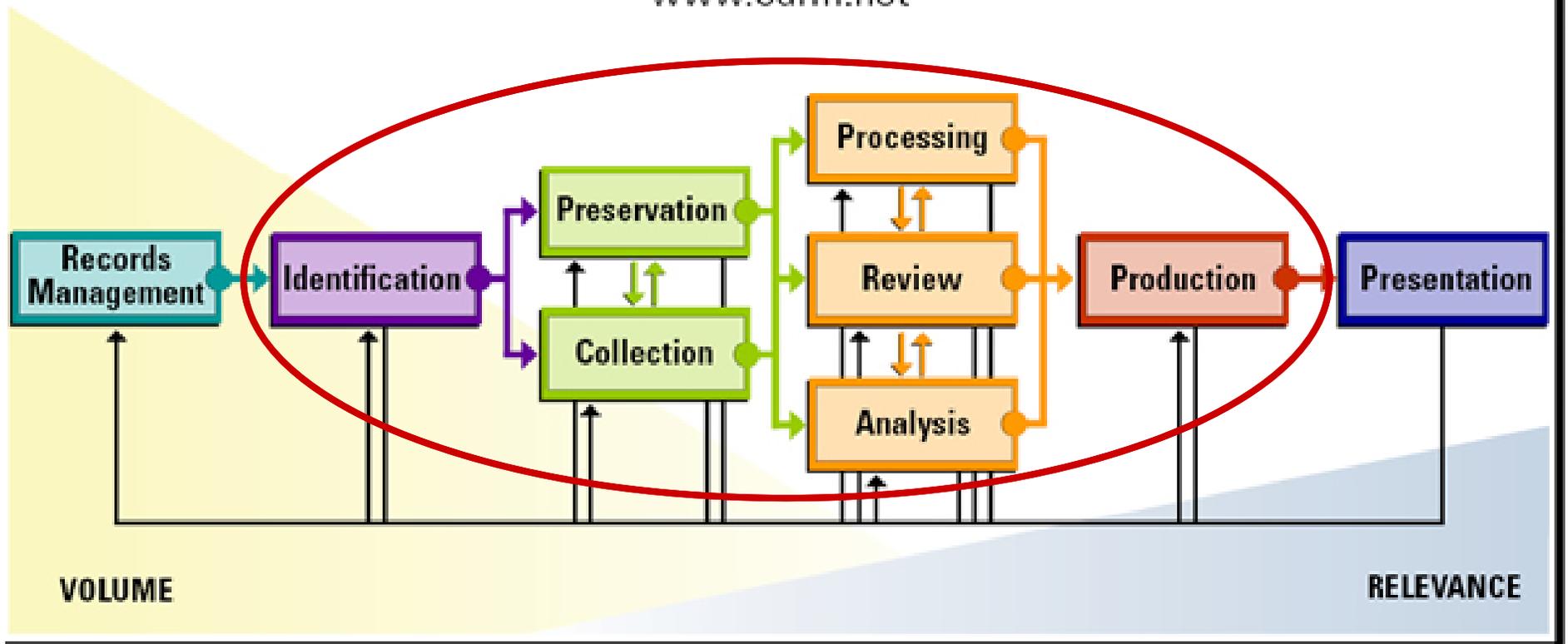
Breadth. Depth. **Results.**

Some Items to Discuss . . .

- Cost Savings in Preserving Electronic Evidence
 - Understanding the Duty to Preserve and Its Scope
 - Electronic Evidence Preservation Strategies
 - Define the Process
- Collection, Processing, Review and Production
 - Planning and Organization
 - Choosing the Right Vendors
 - Planning for and Managing the Review

Electronic Discovery Reference Model

www.edrm.net



Preservation Strategies:

Self Identification and “Delayed” Self Collection

- ✓ Issue Litigation Hold Notice
- ✓ Rely Upon Custodians

Consider:

- ✓ Low Cost -- Isn't this how we always did things?
- ✓ Risks of Self-Identification
 - ✓ Understanding “relevance”
 - ✓ Wolf guarding the hen house argument
- ✓ Dangers of “Losing Data” (former employees, lease returns, crashes, etc.)
- ✓ Metadata Concerns
- ✓ Chain of Custody Issues

Preservation Strategies:

Self Identification and “Early” Broad Collection

- ✓ Issue Litigation Hold Notice
- ✓ Collect Broadly from Custodians w/o consideration of relevance

Consider:

- ✓ Collection Based Upon Own Abilities
- ✓ “Shelf” the Copy Unless You Need It
- ✓ Still have Risks of Self-Identification
 - ✓ Understanding “relevance”
 - ✓ Wolf guarding the hen house argument
- ✓ Still have Self Collection issues

Preservation Strategies:

“Early” Broad Collection

- ✓ Issue Litigation Hold Notice
- ✓ Collect Broadly from All Custodians w/o consideration of relevance

Consider:

- ✓ Requires collection capabilities
- ✓ Costly
- ✓ Extreme Measure Often Best Suited for Very High Risk Matters
- ✓ Just Because you Collected Doesn't Mean you have to Process

Preservation Strategies:

“Early” Broad Collection of Key Custodians

- ✓ Issue Litigation Hold Notice
- ✓ Collect Broadly from “Key” Custodians w/o consideration of relevance

Consider:

- ✓ Requires collection capabilities
- ✓ Utilizes a “Tiered” Approach to Manage the Risk

Preservation Strategies:

“Early” Targeted Collection of Key Custodians

- ✓ Issue Litigation Hold Notice
- ✓ Sit Down with “Key” Custodians for Targeted Collection

Consider:

- ✓ Requires collection capabilities
- ✓ Utilizes a “Tiered” Approach to Manage the Risk
- ✓ Does Rely Upon Custodians to Assist Opening Up Some Self-Identification Arguments
- ✓ Can Significantly Reduce Volumes
- ✓ Can be Done In Conjunction with Tiered Approach

Whatever You Do “Define” the Process:

- **The Team Approach**
 - Involve the individuals who know what information to company maintains;
 - Involve the In-house lawyers who know the organization;
 - Involve the IT personnel who know the systems;
 - Employ a translator.
- **Develop a Protocol and Then Execute On It**

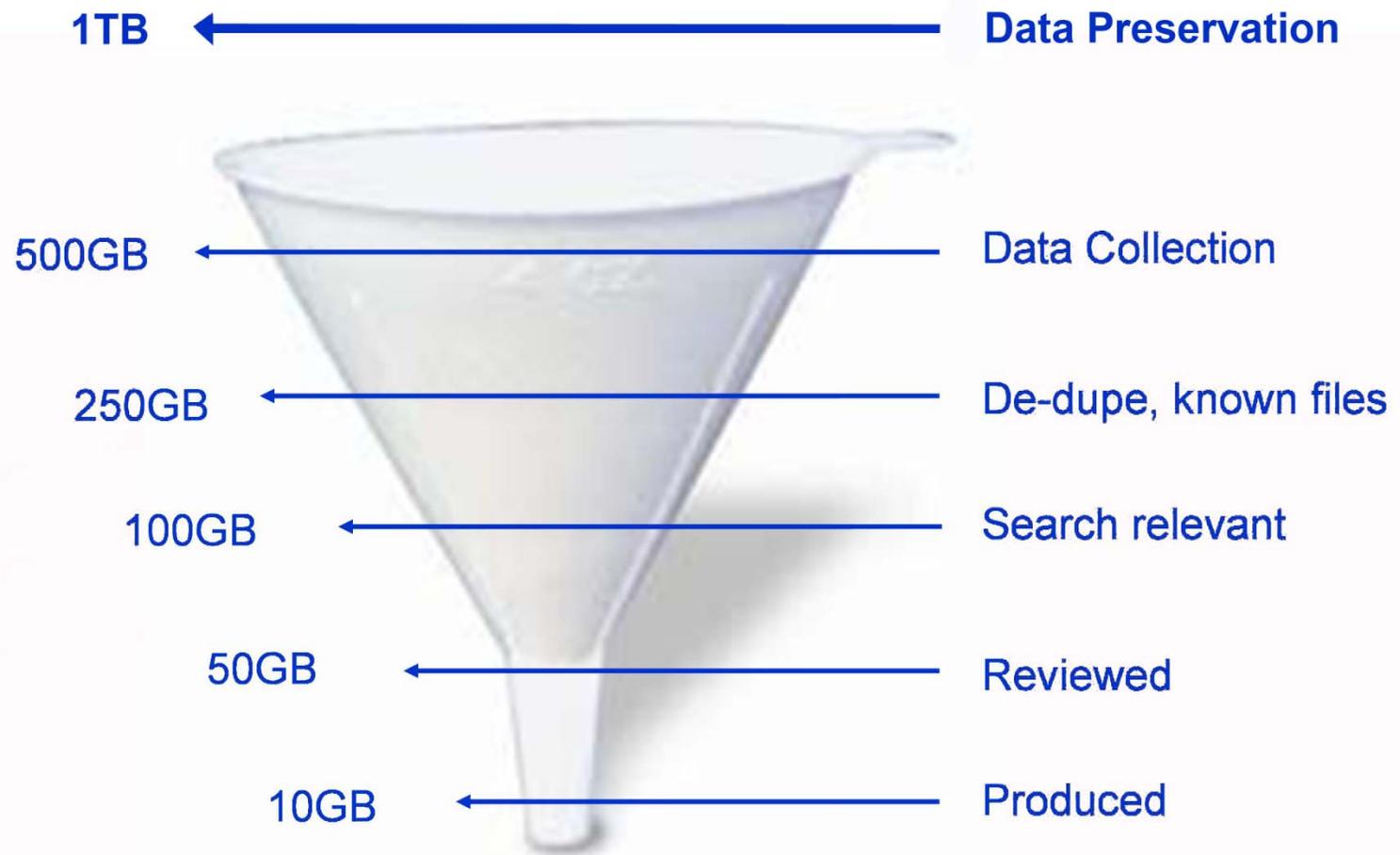
So you've collected some data...

Now what?

Planning for and Managing the Review

- ESI Processing
 - Data culling
 - Search terms
 - Date Filters
 - File Type Filters
- Choosing the Right Vendors
 - In-House document review tool?
 - Kinds of data collected
 - Volume of data
 - Proportionality

“Typical” Data Volume Flow



eDiscovery Vendor Pricing Models

Do your homework...

ESI Processing

- Per GB Pricing Models ... typical.
 - Data extraction and indexing
 - De-duplication
 - Search terms, date filters and file type filters applied
 - Is “TIFFing” necessary?
- Watch out!!
 - Some vendors charge separately for “data processing” and “data filtering”
 - Some vendors charge on the expanded volume rather than the “pre-expanded” volume of data.

Per GB Pricing Models

Estimated Totals for ALL Custodian Data	Units
Total Custodians	11
Total GB to Load	94.40
Average pre-cull Documents per GB	19,970
Pre-Cull Number of Documents (Estimated)	1,885,207
Search Terms & Filters Cull Rate (Estimated)	90%
Post-Cull Documents to Export (Estimated)	182,916
Average Size per Document (MB)	0.09
Post-Cull Volume to Export (GB) (Estimated)	16.83
Estimated "Expanded" Volume (20% Increase)	20.19

Some vendors charge separately for “data processing” and “data filtering”

			Processing	
Vendor A	Unit	Rate	Units	Cost
Filtering	Per GB	\$ 150.00	94.40	\$ 14,160.00
Processing w/ TIFF	Per GB	\$ 700.00	16.83	\$ 11,779.12
Tech Time	Per Hour	\$ 150.00	TBD	TBD
Production HD Media	Per HD	\$ 400.00	1.00	\$ 400.00
				\$ 26,339.12

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Some vendors charge on the expanded volume rather than the “pre-expanded” volume of data.

			Direct Processing Without Clearwell	
Vendor B	Unit	Rate	Units	Cost
Filtering	Na	Na	Na	\$ -
Processing w/ TIFF	Per GB	\$ 525.00	113.26	\$ 59,472.00
Tech Time	Per Hour	\$ 150.00	TBD	TBD
Production HD Media	Per HD	\$ 400.00	1.00	\$ 400.00
				\$ 59,872.00

eDiscovery Vendor Pricing Models

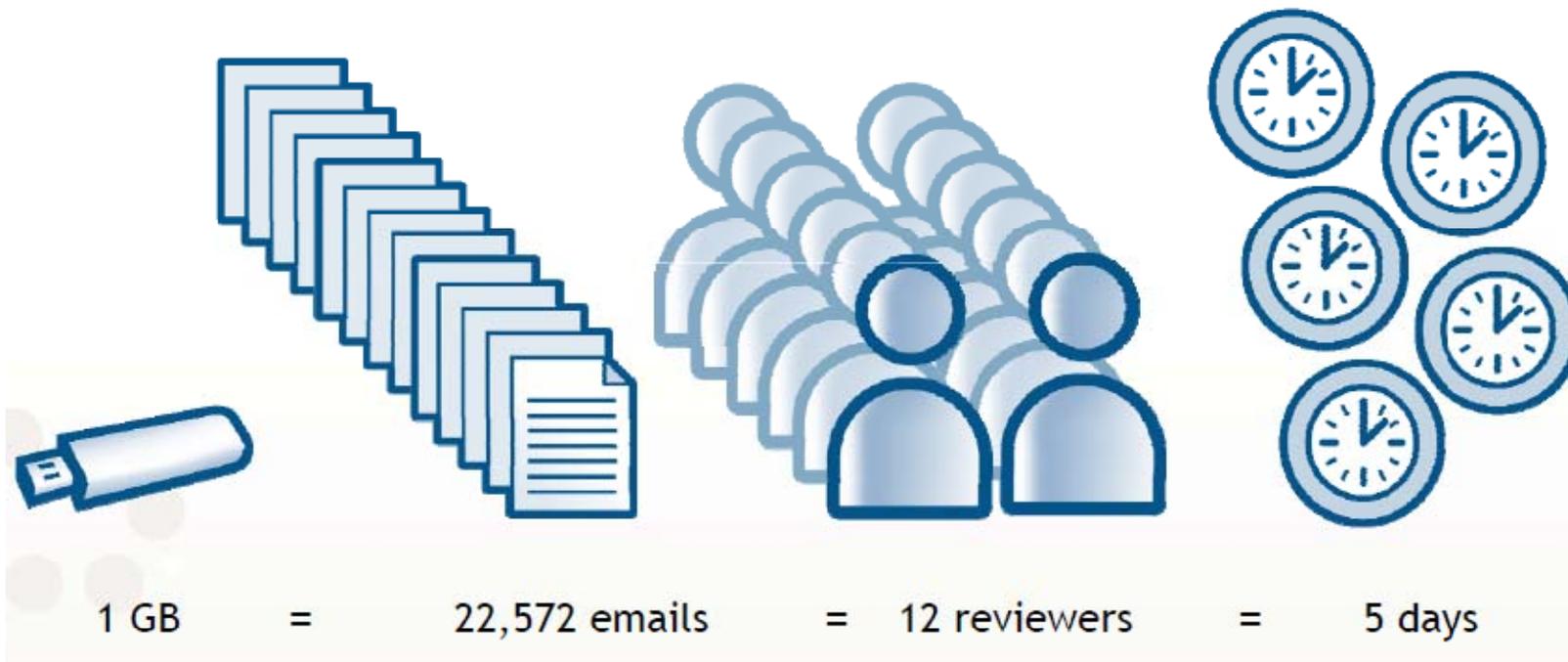
Do your homework...

“Other” typical vendor charges

- Separate TIFFing Costs (\$0.03 / page)
- Load to review tool after processing (\$ varies greatly)
- Monthly Hosting (Per GB / Per Month)
- User Access fees
- Project management (\$150 - \$250 /Hr)
- “Tech time” (\$150 - \$250 /Hr)
- Load file creation (per production...\$ varies greatly)
- Production Media

Document Review Strategies

- Linear, Custodian-based review: : **30-60 documents per hour**



Document Review Strategies

- Alternative Review Strategies
 - Near Duplication
 - Documents mapped into groups based on document similarity – *review in context*
 - Email Threading
 - Explore communication threads
 - Concept Analysis
 - Leverage document content to identify documents with similar themes

Planning is key...



Form of Production

- The requesting party typically identifies the form or forms in which it wishes the electronically stored information to be produced
 - Rule 34(b): Party may request the form in which production is made electronically;
 - Rule 34(b): Responding Party can “object” to requested form;
 - Rule 34(b): If no designation of “form” then produce in form in which it is maintained or “reasonably usable” (*i.e.* searchable); and
 - Rule 34(b): Only need to produce in one form

TIFF vs Native Files

- Form of Production Options:
 - Native production
 - Ordinary course
 - No ability to redact or Bates label
 - Difficult to “lock down” files
 - Image (TIFF/PDF) production with extraction of metadata and searchable extracted text
 - Reasonably usable (searchable)
 - What metadata do you need?
 - What is metadata?
 - How important is it?

Questions?



Whyte Hirschboeck Dudek S.C.



Challenging. Redefining. Advancing.

E-DISCOVERY COST CONTAINMENT: LEGAL STRATEGIES



EMERGING TRENDS
Rebecca Grassl Bradley
August 19, 2010



About Me

- Commercial litigator and transactional attorney, with a focus on technology industries and issues
- Former VP of Legal Operations for international software company
- AAA arbitrator



Topics

- Seventh Circuit Electronic Discovery Pilot Program
- E-Discovery Issues Affecting Cost
 - Proportionality
 - Inaccessibility
 - Cooperation
- How you can save your client \$\$
 - Utilizing Amendments to FRCP
 - Litigation Prenups



Setting the Stage...

- "If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."
 - *Krueger v. Pelican Prod. Corp.*, C/A No. 87-2385-A, slip. op. (W.D. Okla. Feb. 24, 1989), *quoted in Mancina v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 361 n.3 (D. Md. 2008).



Seventh Circuit Electronic Discovery Pilot Program

- Phase I: October 1, 2009 - May 1, 2010
- Phase II: July 1, 2010 – May 1, 2011
- Purpose: develop, implement, evaluate, and improve pretrial litigation procedures to provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with FRCP 1



What's The Problem?

- Generic preservation letters listing every type of storage device and requesting every piece of data, which are either ignored or invite pointless responses
- Procrastination regarding ESI discovery
- Lawyers' lack of technical expertise



Seventh Circuit Electronic Discovery Pilot Program: Phase I

- Principles tested in 93 pending cases before 13 judges in N.D. of Illinois
- 92% of judges believed the Principles had positive effect on lawyers' ability to resolve discovery disputes without court (compared to 38% of attorneys)
- 43% of attorneys believed Principles increased fairness of discovery process



But Will They Cut Costs?

- 57% of attorneys reported a neutral effect
- 22% of attorneys reported a decrease
- 21% of attorneys reported an increase
- Too early to draw conclusions



7th Circuit Electronic Discovery Pilot Program: General Principles

- 1.01 (Purpose): Secure just, speedy and inexpensive determination of suits and promote early resolution of discovery disputes related to ESI without court intervention



7th Circuit Electronic Discovery Pilot Program: General Principles

- 1.02 (Cooperation): Failure to cooperate in facilitating and limiting discovery requests and responses raises litigation costs
- 1.03 (Proportionality): The proportionality principle set forth in FRCP 26(b)(2)(C) should be applied in discovery plan; requests for ESI and responses should be targeted, clear and specific



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.01 (Meet & Confer):
 - (a) Counsel should meet to discuss the identification of relevant and discoverable ESI; the scope of ESI to be preserved; formats for preservation and production; conducting discovery in stages; handling inadvertent production
 - (b) Unresolved disputes presented to Court at initial status conference or scheduling conference



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.01 (Meet & Confer):
 - (c) Prior to meeting, counsel should first review and understand how client data is stored and retrieved
 - (d) Failure to cooperate and participate in good faith may require additional discussions before discovery commences and may result in sanctions



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.02 (E-Discovery Liaison(s)): In the event of a dispute concerning preservation or production of ESI, each party shall designate an individual to act as a liaison to meet, confer, and attend related court hearings. Each liaison (outside or in-house counsel, third party consultant, party employee) must be familiar with party's electronic systems and must be knowledgeable about the technical aspects of e-discovery, such as document storage, organization, formatting, retrieval, and search methodology (or have access to those who are)



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.03 (Preservation Requests and Orders):
 - (a) Vague and overly broad preservation orders should not be sought or entered. Information sought to be preserved should be reasonable in scope and mindful of Rule 26(b)(2)(C)
 - (b) Preservation letters should transmit specific and useful information such as party names, factual background of legal claim, identification of potential cause(s) of action, names of potential witnesses, and relevant time period



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.03 (Preservation Requests and Orders):
 - (c) Any response to preservation letter should provide useful information regarding preservation efforts undertaken, disagreements with request, and preservation issues not raised



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.04 (Scope of Preservation):
 - (a) Every party and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI under its control, as appropriate for the case



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.04 (Scope of Preservation):
 - (b) Discovery regarding preservation and collection efforts may be appropriate but may add expense and delay and implicate work product and privileged matter; therefore, prior to initiating, party shall confer with other party
 - (c) At meet and confer conference, parties should discuss reasonably foreseeable preservation issues



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.04 (Scope of Preservation):
 - (d) The following categories of ESI are generally not discoverable; intention to seek discovery should be discussed at meet and confer conference:
 - (1) deleted, slack, fragmented or unallocated data on hard drives (preservation generally requires specialized forensic tools at increased expense and can dramatically increase amount of data collected)
 - (2) RAM or ephemeral data (disappears when computer is powered off unless saved to hard drive)
 - (3) tifs, history, cache, cookies (can dramatically increase amount of data collected)



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.04(d) (Scope of Preservation):
 - (4) data in metadata fields that are frequently updated automatically (i.e., last-opened dates) (many litigants do not have ESI collection tools to collect data without affecting metadata fields and vendors are expensive)
 - (5) backup data duplicative of more accessible data (retaining backup tapes adds costs and leads to aging that makes tapes impossible to recycle)
 - (6) ESI requiring extraordinary measures to preserve (i.e. email journaling/IM logging to capture sent/received data; most litigants don't use and adoption is expensive)
- (e) If a dispute arises, parties should meet and confer and raise with court if not resolved



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.05 (Identification of ESI):
 - (a) At Rule 26(f) conference, counsel or parties shall discuss potential methodologies for identifying ESI for production



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

2.05 (Identification of ESI):

(b) Parties may discuss elimination of duplicative ESI; filter data (file type, date ranges, sender, receiver, custodian, search terms); and use of keyword searching, topic or concept clustering, and advanced culling technologies



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.06 (Production Format):
 - (a) At Rule 26(f) conference, counsel and parties should make good faith effort to agree on format(s) for production
 - (b) ESI in database or database management system often can be produced by querying, resulting in a report or exportable electronic file for review



7th Circuit Electronic Discovery Pilot Program: Early Case Assessment Principles

- 2.06 (Production Format):
 - (c) ESI and hard copy documents need not be made text-searchable if not already
 - (d) Generally, *requesting* party is responsible for incremental cost of creating its copy of information. Counsel or parties are encouraged to discuss cost sharing for OCR or other upgrades of paper documents



7th Circuit Electronic Discovery Pilot Program: Education Principles

- 3.01 (Judicial Expectations of Counsel): Judges adopting these Principles expect that all counsel will have familiarized themselves with the following:
 - (1) e-discovery provisions of FRCP, including Rules 26, 33, 34, 37 and 45 as well as any applicable State Rules of Procedure
 - (2) the Advisory Committee Report on the 2006 Amendments to the FRCP at:
http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf
 - (3) these Principles



7th Circuit Electronic Discovery Pilot Program: Education Principles

- 3.02 (Duty of Continuing Education): Judges, attorneys and parties should continue to educate themselves on e-discovery by consulting applicable case law, statutes, FRCP, FRE, the Sedona Conference® publications, materials on court websites, and other organizations providing educational information regarding ESI discovery



7th Circuit Electronic Discovery Pilot Program: Phase Two

- Geographic reach expanded
- Number of cases and judges increased
- Longer period than Phase One
- Committee Considering proposed protocol to guide ESI production, including:
 - production format
 - preservation and production procedures
 - identification of search criteria formats
 - de-duplicating procedures
 - production of redacted documents
 - TIFF processing specs
 - bates numbering procedures
 - clawback procedures



E-Discovery Issues Affecting Cost

- Each of the following three issues influence e-discovery costs:
 - Proportionality
 - Inaccessibility
 - Cooperation



Proportionality

- FRCP 26(b)(2)(C): On motion or on its own, the court *must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.



Proportionality

- Court denied as overbroad party's request for electronic copies of all word processing files created, modified and/or accessed by five employees during two and a half year period where requesting party failed to provide theory of relevance
 - *Wright v. AmSouth Bancorporation*, 320 F.3d 1198, 1205 (11th Cir. 2003)



Inaccessibility

- *FRCP 26(b)(2)(B) Specific Limitations on Electronically Stored Information.*

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.



Inaccessibility

- Backup Tapes: A litigation hold generally does not apply to “inaccessible” backup tapes—those typically maintained for disaster recovery—which may continue to be recycled pursuant to company policy. If backup tapes are actively used for information retrieval, then such tapes may likely be subject to litigation hold.
 - *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003)
- Erased/Fragmented Data: Generally inaccessible because access would require extraordinary measures (forensic services)
 - *Id.*
- Out-of-Commission Systems: If decommissioned in ordinary course, “inaccessible” because access would require system reconstruction
 - *Xpedior Creditor Trust v. Credit Suisse First Boston (USA)*, 309 F.Supp.2d 459, 465 (S.D.N.Y. 2003)



Cooperation

- “Lawyers are officers of the court and should not use discovery as a weapon in ways that undermine resolving cases timely, efficiently, and on their merits.”
-7th Circuit Electronic Discovery Pilot Program, Report on Phase One
- “Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.”
 - The Sedona Conference®
Cooperation Proclamation



Cooperation

- FRCP 26(f) Conference of Parties; Planning for Discovery
 - (1) ... the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held...
 - (2) In conferring, the parties must ... discuss any issues about preserving discoverable information ...
 - (3) A discovery plan must state the parties' views and proposals on:
 - (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced



Cooperation

- Methods to accomplish cooperation:
 - Utilizing ESI discovery liaisons
 - Exchanging information on data sources
 - Jointly developing search and retrieval methodologies
 - Promoting early identification of form(s) of production
 - Developing proportionate discovery budgets
 - Considering court-appointed experts, mediators or ADR programs to resolve discovery disputes
 - The Sedona Conference® Cooperation Proclamation



States are Adopting Federal E-Discovery Rules

- 25 states* have adopted or will be adopting e-discovery rules that match or parallel the federal rules
- Federal case law will be persuasive authority in state court discovery disputes

*Including AK, AZ, CA, CT, ID, ILL, IN, LA, ME, MN, MO, MS, NC, NE, NH, NJ, NY, OH, TX, UT, WI



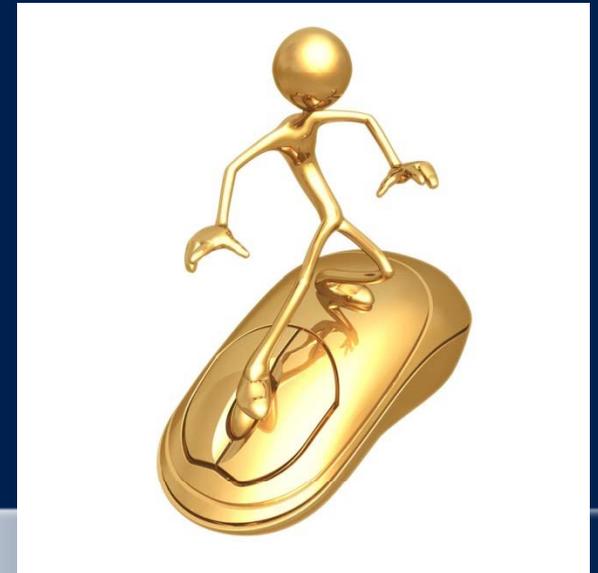
How Can I Save My Client \$\$?

- FRCP 33(d) allows a responding party to provide the requesting party access to the responding party's business records, specifying the records from which the answer(s) may be obtained, in lieu of answering, *if* the burden would be the same for either party.



... *But At What Cost?*

- The FRCP 33(d) option may require the responding party to:
 - Provide direct access to its electronic information systems (!)
 - Provide some combination of technical support, information on application software, or other assistance
 - *See Advisory Committee Notes to 2006 amendment to FRCP 33(d).*



...And Will That Really Save \$\$?

- The FRCP 33(d) option may require the responding party to design a computer program to extract data from computerized business records.
 - *Anti-Monopoly Inc. v. Hasbro*, 1995 U.S. Dist. LEXIS 16355 at *1 (S.D.N.Y. 1995) (court reserved discretion as to allocation of costs)
- The responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d)
 - Comment to FRCP 33(d)



How Can I Save My Client \$\$?

- FRCP 34(b)(1)(C): The requesting party *may* specify the form or forms for production of ESI
- FRCP 34(b)(2)(D): The responding party may object to the requested form for producing ESI. If the responding party objects to a requested form or if no form was specified in the request, the responding party must state the form or forms it *intends* to use (*before actually producing ESI*)
- FRCP 34(b)(2)(E)(ii): If a request does not specify a form for producing ESI, the responding party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.



How Can I Save My Client \$\$?

- Explore cost shifting opportunities:
 - If ESI is sought that is not reasonably accessible and will involve unreasonable burden and expense to retrieve
 - FRCP 26(b)(2)
 - *Zubalake v. UBS Warburg LLC*, 217 FRD 309, 322 (S.D.N.Y. 2003)
 - *Rowe Entertainment v. William Morris Agency*, 205 FRD 421 (S.D.N.Y. 2002)
 - *Byers v. Illinois State Police*, No. 2002 U.S. Dist. LEXIS 9861 at *37 (N.D.Ill. 2002) (plaintiff ordered to pay cost to license program needed to view archived e-mails)



How Can I Save My Client \$\$?

- Seven-Factor Test For Cost Shifting
 - Extent to which request is specifically tailored to discover relevant information
 - Availability of information from other sources
 - Total cost of production compared to amount in controversy
 - Total cost of production, compared to each party's resources
 - Relative ability and incentive of each party to control costs
 - Importance of issues at stake in litigation
 - Relative benefits to the parties of obtaining information
 - *Zubulake*, 217 FRD at 322.



How Can I Save My Client \$\$?

- Consider discovery in phases to “allow the Court to engage in a more meaningful benefit-burden analysis before determining whether to require cost-shifting or cost-sharing”
 - *AAB Joint Venture v. U.S.*, No. 04-1719 C, 2007 U.S. Claims LEXIS 56 at *35-36 (Fed. Cl. Feb. 28, 2007)



How Can I Save My Client \$\$?

- Object to duplicative requests, such as asking for paper plus electronic copies. A party is not required to produce information in more than one format.
 - FRCP 34(b)(2)(E)(iii)



Litigation Prenups

- Consider including dispute resolution clauses in commercial contracts:
 - **XX. Economical Litigation Agreement:** Any Dispute arising out of or relating to this contract, including the breach, termination or validity thereof, whether based on action in contract or tort, shall be finally resolved by civil litigation in accordance with the International Institute for Conflict Prevention & Resolution Economical Litigation Agreement (2010 edition), by a judge sitting without a jury. In jurisdictions where advance waiver of jury is prohibited as a matter of law, or where all parties to this agreement subsequently agree in writing, such Dispute shall be decided by a jury.
 - CPR Model Economical Litigation Agreement



Litigation Prenups

- Limit e-discovery requests based on the amount in controversy (either the contractual monetary consideration or the amount claimed in the complaint or counterclaim)
- Require party executives to “meet and confer”



Litigation Prenups

- But be wary of well-intentioned cost saving mechanisms proposed by your client (i.e., “no discovery” clauses may violate proportionality—in reverse—and cost more in the long run).



Sources and Resources

- Seventh Circuit Electronic Discovery Pilot Program Report on Phase One May 20, 2009-May 1, 2010
 - <http://www.7thcircuitbar.org/>
- “What You Need To Know: New Electronic Discovery Rules” *Wisconsin Lawyer* July 2010 at 8.
- CPR Model Economical Litigation Agreement
 - <http://www.cpradr.org/ClausesRules/EconomicalLitigationAgreements/tabid/452/Default.aspx>
- The Sedona Conference® Cooperation Proclamation
 - http://www.thesedonaconference.org/content/tsc_cooperation_proclamation



QUESTIONS?

