Delete! Litigation Risk Management and Data Retention Policies

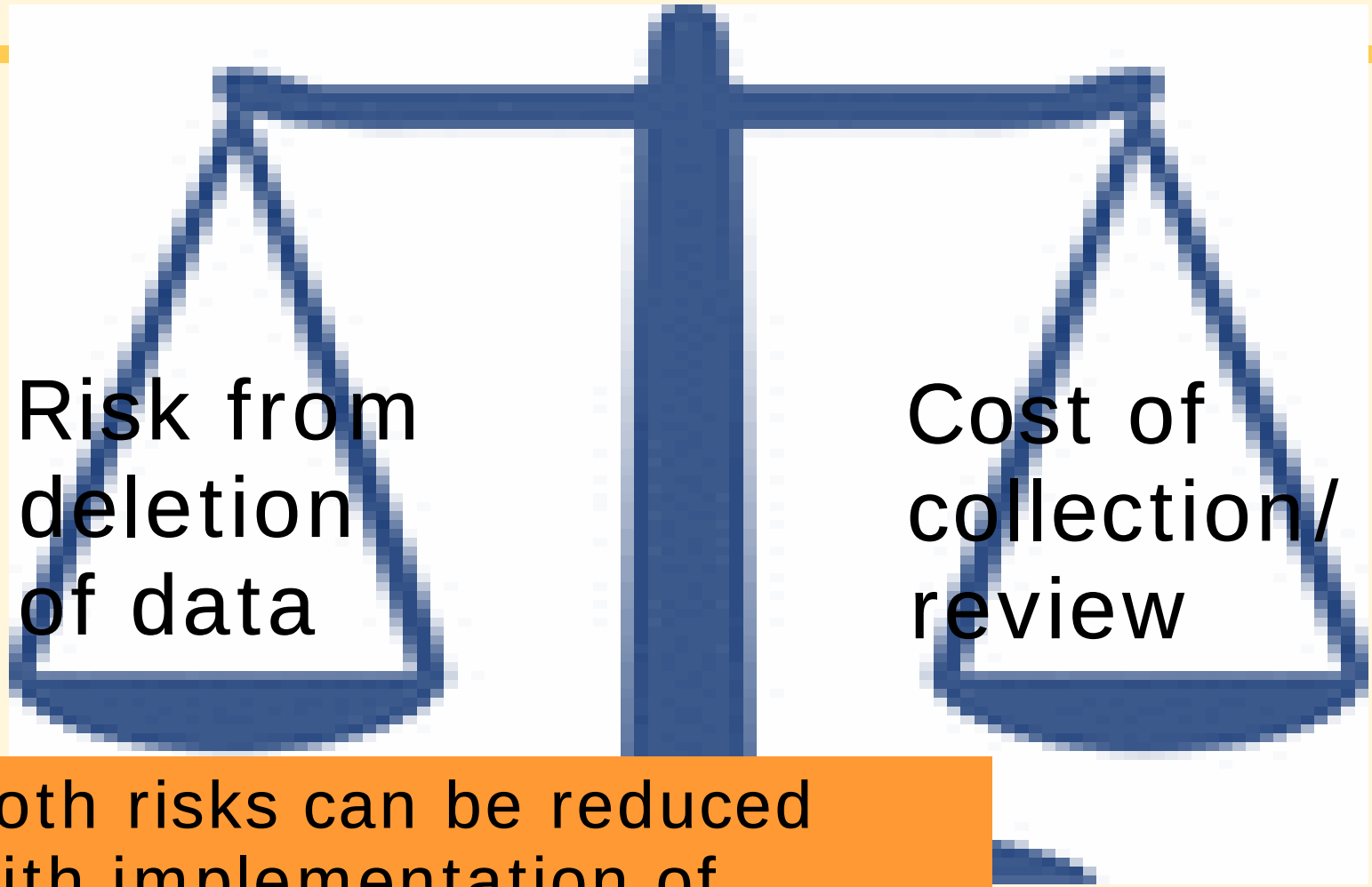
Holland+Knight

October 14 – 16, 2008

Goals of Document Retention Policy

- Business objectives – serve business needs for access to business records
- Comply with statutory and regulatory obligations, e.g. HR, Sarbanes-Oxley
- Respond effectively in litigation, which necessarily looks to the past

Introduction: Two Problems



Both risks can be reduced with implementation of document retention policy.

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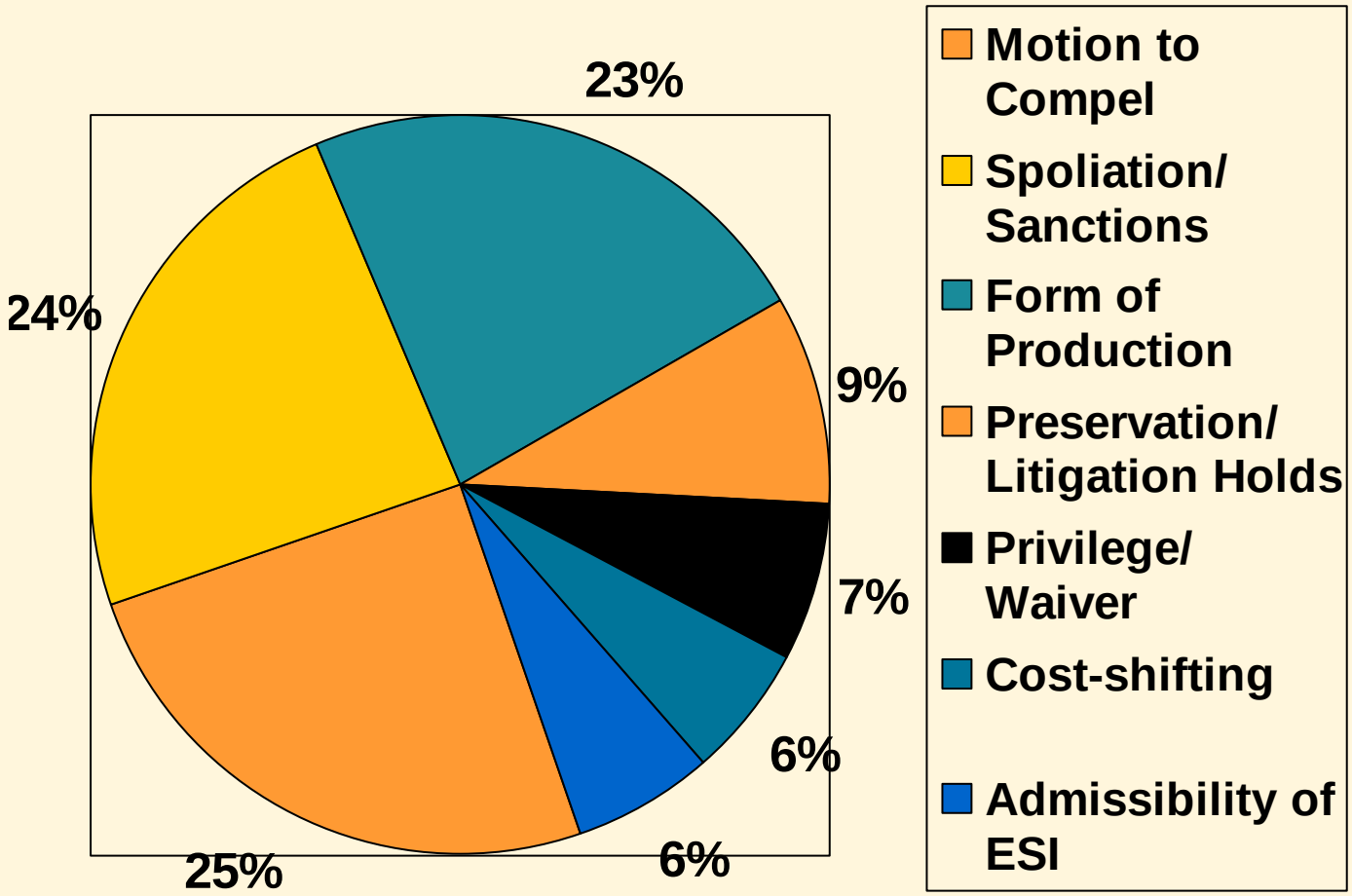
Risk From Deletion of Records

- Monetary sanctions for spoliation
- Lost claims
- Attorneys fees (yours and theirs)
- Lost time

2007 Case Law After New Rules



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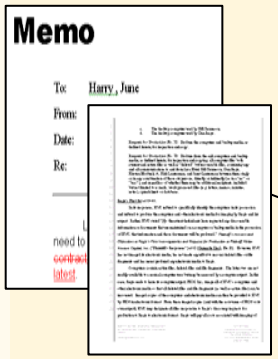
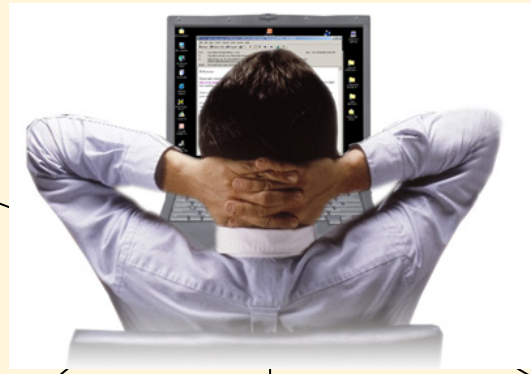
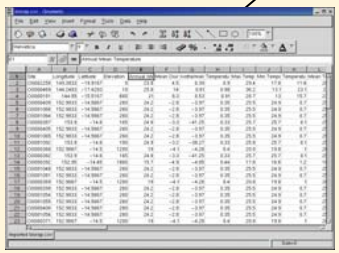
Examples of ESI



Word processing documents

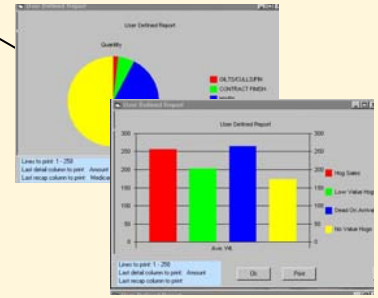


Web logs



Spreadsheets

Email messages and attachments



Graphic images

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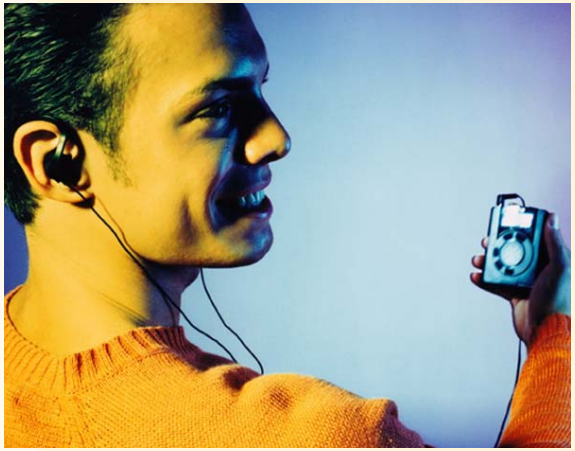
"Non Traditional" Sources of ESI



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Risks/Costs Of "Too Much" Data

- burden of preserving
- cost of retrieval
- cost of review
- risk of producing confidential/ proprietary business records

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Boxes of Bytes

Putting It All in Perspective

Assumptions:
Average **banker's box** holds 2,500 sheets of paper

1 page of information on average = (.02 megabytes)

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= **File Sizes**

1	2,500	50	Megabytes
10	25,000	500	
20	50,000	1	
100	250,000	5	
200	500,000	10	
300	750,000	15	
400	1,000,000	20	Gigabytes
500	1,250,000	25	
1,000	2,500,000	50	
2,000	5,000,000	100	
5,000	12,500,000	250	
10,000	25,000,000	500	
20,000	50,000,000	1	
40,000	100,00,000	2	Terabytes
60,000	150,000,000	3	

Typical Server Hard Disk

Typical PC Hard Disk

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Cost of Review

6.26 g = 110 boxes @ 5 hrs per box = 550 hours @$200/hour = $110,000

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Why Do We Need To Review Documents Carefully?

- FRCP 26(b)(5)(B) addressed procedure for return of privileged information, but not substantive questions of waiver of privilege or work product.
- Substantial risk from inadvertent production of privileged documents.
- New FRE 502 – limited protection:

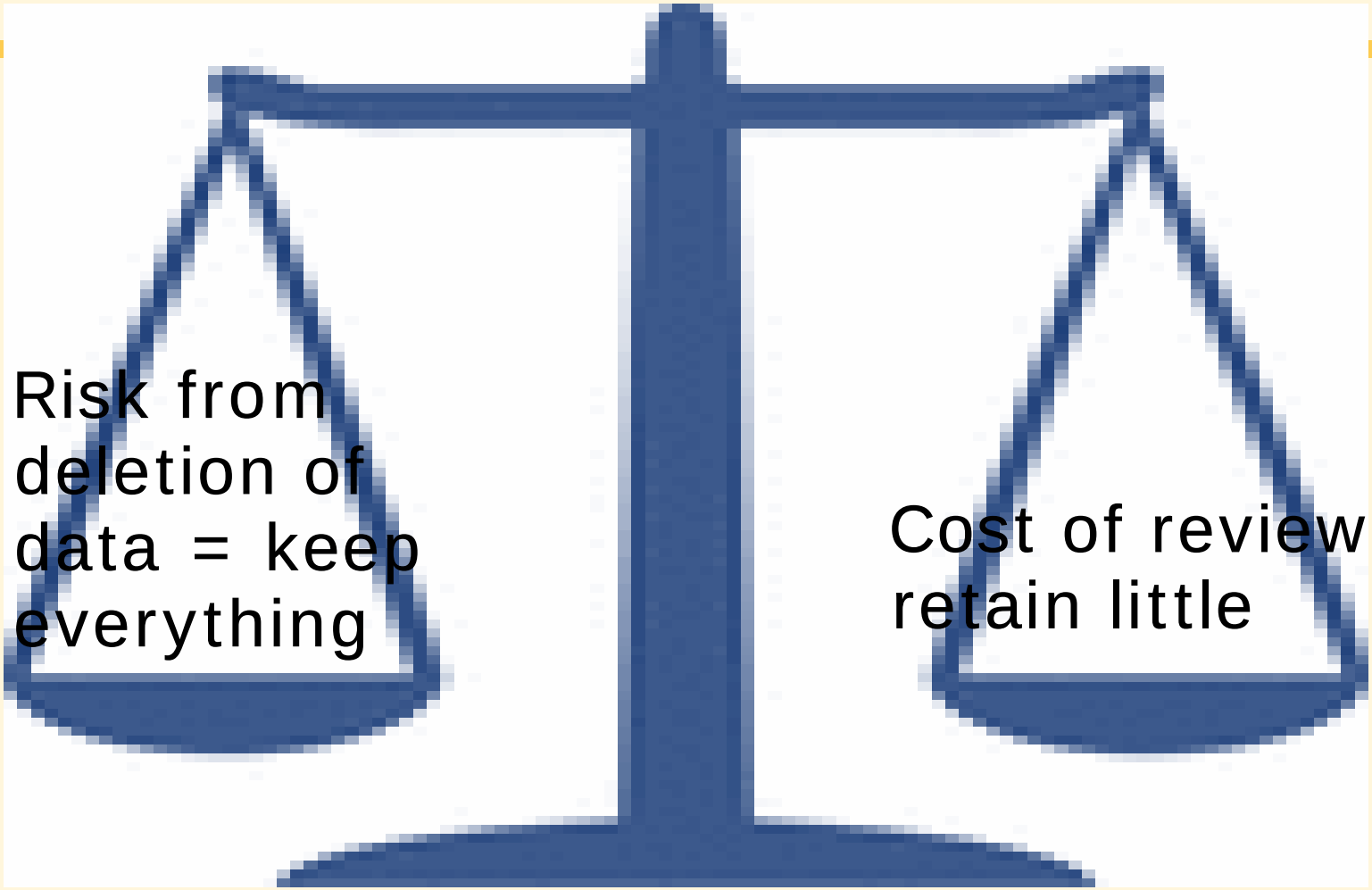
(b) Inadvertent disclosure. — When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;
(2) the holder of the privilege or protection took *reasonable steps* to prevent disclosure; and
(3) the holder promptly took **reasonable steps** to rectify the error, including (if applicable) following Fed.R.Civ.P.26(b)(5)(B).

New FRE 502(d)

(d) Controlling effect of a court order. — A federal court order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

How to Achieve Balance



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Defensible Document Retention Policy

- Reasonable retention periods
- Integrated into business processes/enforced
- “Safe harbor” under federal rules - minimize risk of sanctions if destruction done pursuant to policy
- Provision for litigation hold – suspension of destruction
- Consideration of international standards for data protection

Litigation holds: Stop the automatic deletion of data

Best Practices for Litigation Holds

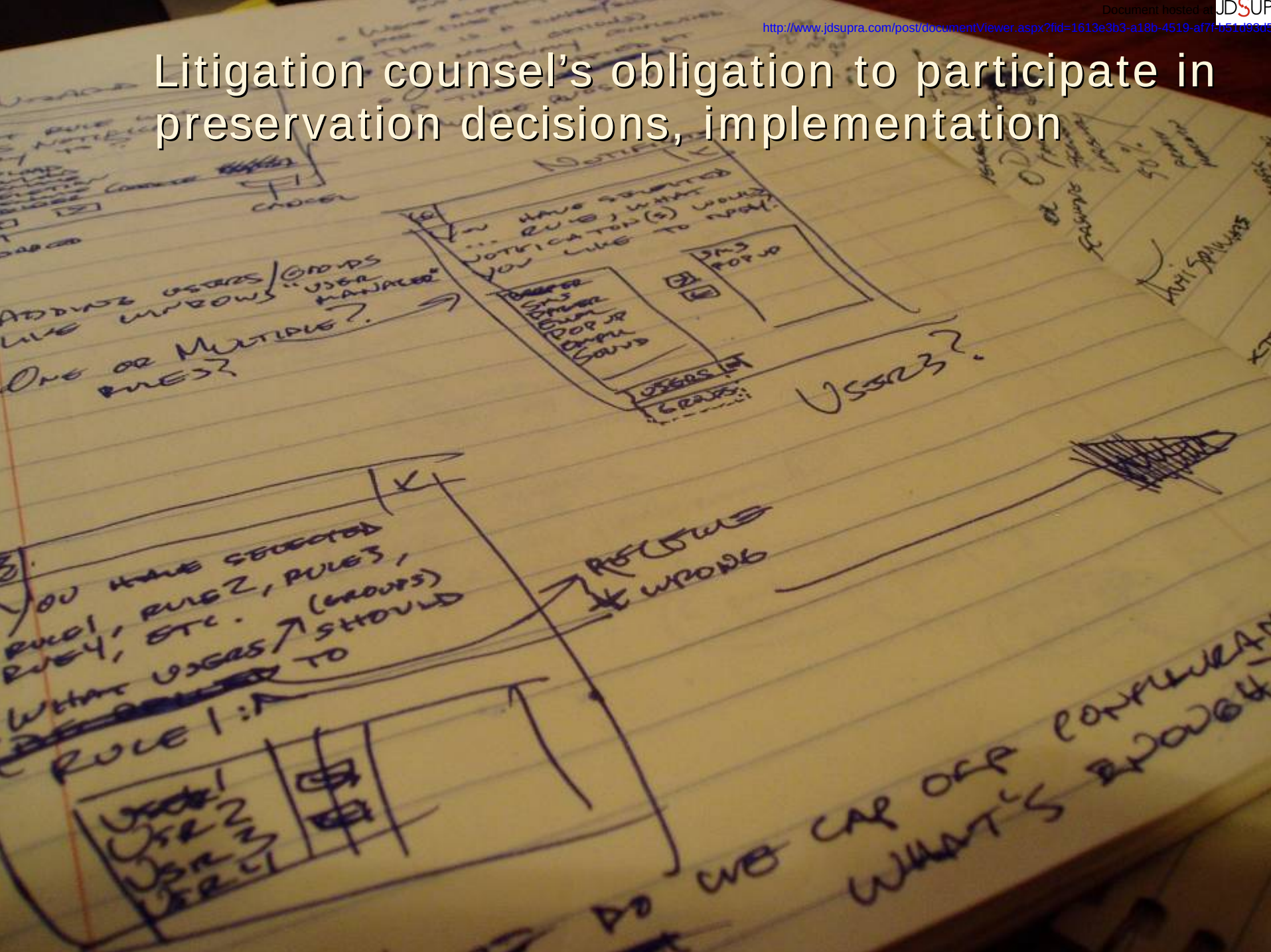
- Determine appropriate distribution list – document custodians, their managers, responsible IT
- Make it clear that "documents" includes all forms of ESI
- Err on the side of preservation
- Solicit feedback re: documents that may have been lost
- Follow up – then follow up again

Using the Policy to Make the Right Initial Preservation Decision

A Document Retention Policy Can Reduce Costs of Litigation In Other Ways…

- Counsel have duties under new electronic discovery rules to participate in preservation decisions; understand IT architecture; disclose and discuss electronic discovery with opposing counsel
- New duties leads to “front loading” of costs

Litigation counsel's obligation to participate in preservation decisions, implementation



Litigation counsel's obligation to understand IT architecture

Litigation counsel's obligations to meet with opponent, disclose

Rule 26(f) Meeting of Counsel

- Federal Rule of Civil Procedure 26(f):

  Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event **at least 21 days before a scheduling conference is held** or a scheduling order is due under Rule 16(b), 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…

Topics For Rule 26f Conference

- Issues where e-discovery may be needed
- Preservation
- Sources of ESI
- Form of production
- Sources that are “not reasonably accessible”
- Search terms
- Dealing with privileged material

Rule 26(a) Disclosure Requirements

- Federal Rule of Civil Procedure 26(a)(1):
  - the names of persons who have discoverable information
  - the topics that each such person may have information about
  - either a copy or a **description by category and location** of all documents, including electronically stored information, that the party has and may use to support or defend its claims or defenses.

Efficient Searching For ESI

- Document preservation policy "data mapping" process will assist in understanding where ESI should be located
- Collection from data sources - active data extraction v mirror imaging of entire source
- Search terms: key personnel, date ranges, terminology, concepts
- Sampling - *McPeek v. Ashcroft,* 202 F.R.D. 31 (D.D.C. 2001).

Theft of trade secrets: increasingly electronic

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The Min Case

- Gary Min, research chemist at DuPont
- Before leaving for a competitor in China, Min downloaded to storage devices technology with an FMV of over $400 million
- DuPont later discovers through network-use monitoring
- FBI searches home; new employer seizes laptop
- 10 year sentence + fine

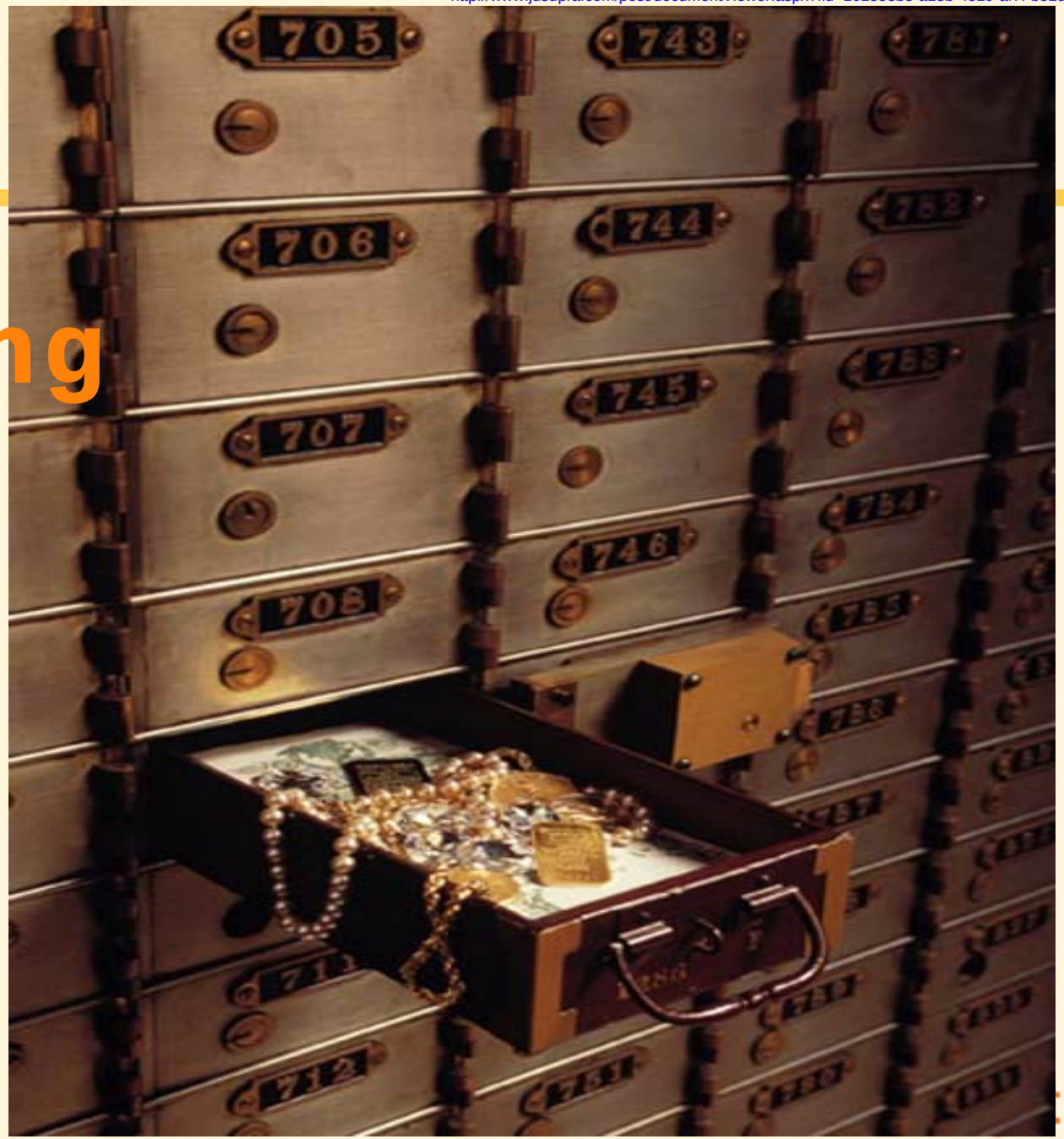
Effective Protection of Electronic Business Assets

- Policies: identify what is “trade secret” and what is confidential information – overbroad definitions risk dilution of protection
- Practices: take “reasonable efforts” to protect your assets
  - Physical security
  - Computing security
  - Information security
  - Employee security
  - Delivery chain security

Protecting Trade Secrets with Restrictive Covenants

- Restrictive covenant agreement (nondisclosure, nonsolicitation, noncompete):
  - Provides contractual protection for trade secret.
  - Provides additional remedy and an ability to sue new employer in tort if it interferes with agreement.
  - Educates employee on her or her obligations as to protect trade secrets.
  - Limited usability in California
- Severity of restrictive covenant depends on importance of employee and their exposure to and knowledge of trade secrets.

Balancing



Thank You!

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