



EVERYTHING MATTERS

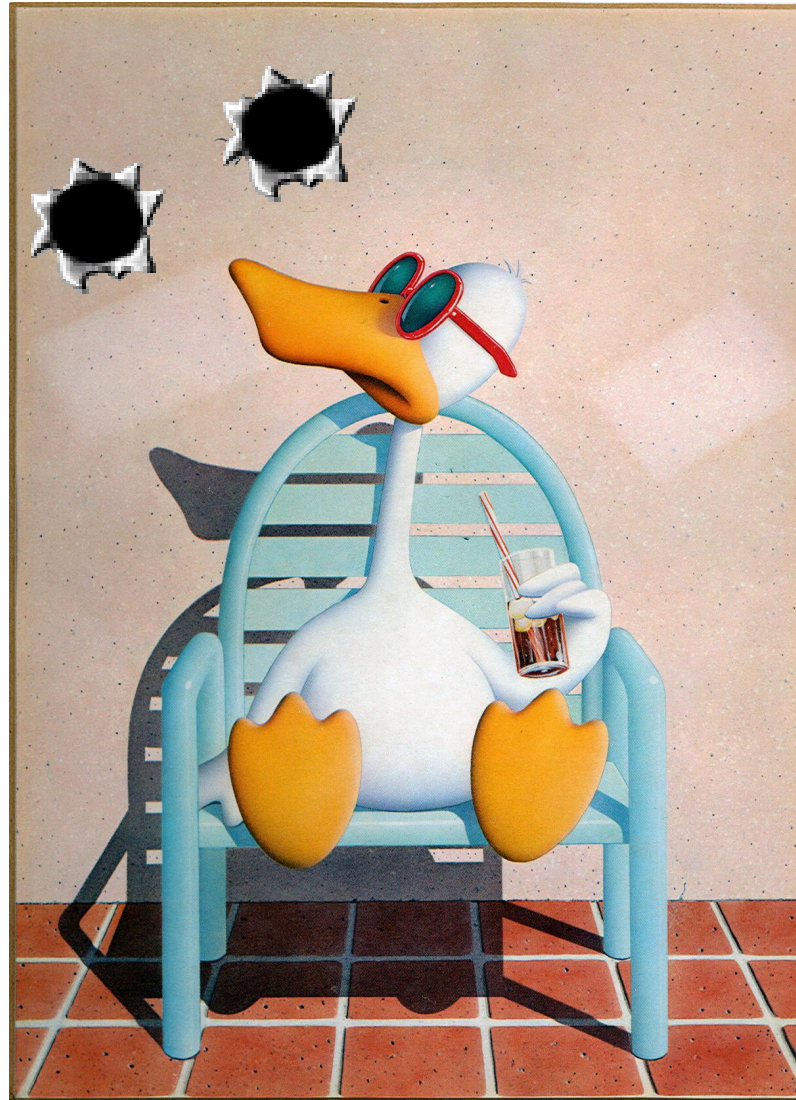
Intermountain eDiscovery Conference 2009

eDiscovery 101 Controlling the Cascading Costs

Hayward D. Fisk

May 28, 2009

New Challenges and Risks





Overview

- The unique challenges posed by eDiscovery
- How the enemy will attack
- New duties for counsel
- Best practices to implement
- Understand impact of changes to the U.S. Federal Rules of Civil Procedure
- Consequential Cost Controls



The Challenge

- Huge volumes of electronic data
- The data is all over the place
- Relevant data is mixed with irrelevant data
- Records retention policies are not followed
- People write stupid things
- New technologies create new challenges
 - IM
 - VOIP



The Challenge

- Some electronic data is invisible
 - Deleted data
 - “Metadata.”
- “Delete” does not mean “Delete”
- Attorney-Client Privilege and Work Product are interspersed with other data

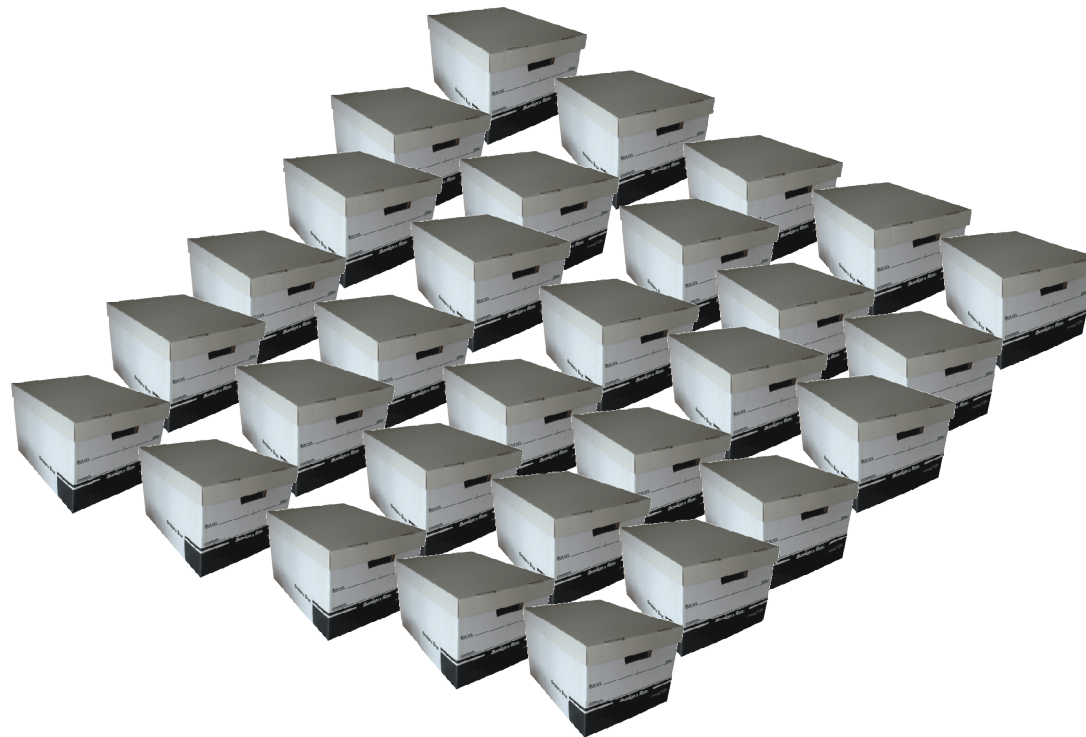


The Landscape

- 95% of all data is now created on computers initially; most never printed out
- eMails – casual conversation
 - 4 billion eMails per day in the US
- Growth of Instant Messaging – 31% of employees now use IM
 - Few companies retain & archive business record IM

Useful Metrics

1 Gig = Approximately 75,000 Pages
Or 30 Bankers Boxes!



The Landscape

“The computer age has turned David into Goliath. The computer age has also put Goliath at a distinct...disadvantage.”

- Jerold Solovy – Jenner & Block



Opponent's Strategy is Simple and Compelling

- Every case is now a case within a case
 - The Spoliation/Sanctions case
 - The Substantive case
- Strategy is most effective in asymmetrical litigation
- Create the perception that opponent is destroying or withholding evidence because it has something to hide.



Implementing the Strategy

- Notify opponent that electronic info will be sought and request that it be preserved.
- File motion for an order requiring preservation.
- Seek discovery of electronic info that is difficult to locate and produce.
 - Run up the costs associated with eDiscovery



Steps Opponents Follow

- Use discovery to obtain overview of opponent's computer system.
- File a motion to compel, when opponent inevitably objects or fails to produce.
- Repeatedly argue that opponent's duty is to make "full disclosure."
- Repeatedly accuse the opponent, in every forum available, of routinely and systematically obstructing discovery.



Steps Opponents Follow

- Get opponent to certify that “everything” has been produced
- Seek harsh sanctions, to remedy opponent’s “discovery abuse.”
- Leverage impact on business operations.
- Leverage undue burden of costs, but consider...
 - cost sharing
 - cost shiftingopportunities



Seminal Cases

- Zubulake v. UBS Warburg
- Morgan Stanley
- Qualcomm vs. Broadcom



Zubulake

- Counsel gave instructions to hold, and repeated them but failed to:
 - Request data from one key employee; give hold instructions to another; adequately communicate with another about how files retained
 - Safeguard backup tapes
- Adverse inference sanction
- Jury awarded \$29.2 million (\$20.1 punitive)



Morgan Stanley

- Jury awards \$1.45 billion in damages
 - \$850,000,000 in punitive
- Law firm fired
- Class actions for earlier suits due to discovery problems
- Later reversed, but not on eDiscovery failures



Duties of Counsel

- Counsel must actively oversee and direct the discovery and preservation process.
- Merely issuing an order or memo is not enough.
- Counsel's duty to oversee extends to:
 - the **preservation** of evidence
 - the **location** of responsive information
 - the **timely production** of responsive information
- *Zubulake V* is clearest exposition of duties



Duties of Counsel

- Learn client's document retention policies and data retention architecture
- Issue "litigation hold" for all potentially relevant information with periodic reminders when litigation "reasonably foreseeable"
- Identify and communicate directly with "key players" and IT personnel to ensure receipt and complete understanding, then double back to ensure compliance
- Instruct all relevant employees to produce electronic and hard copies of files

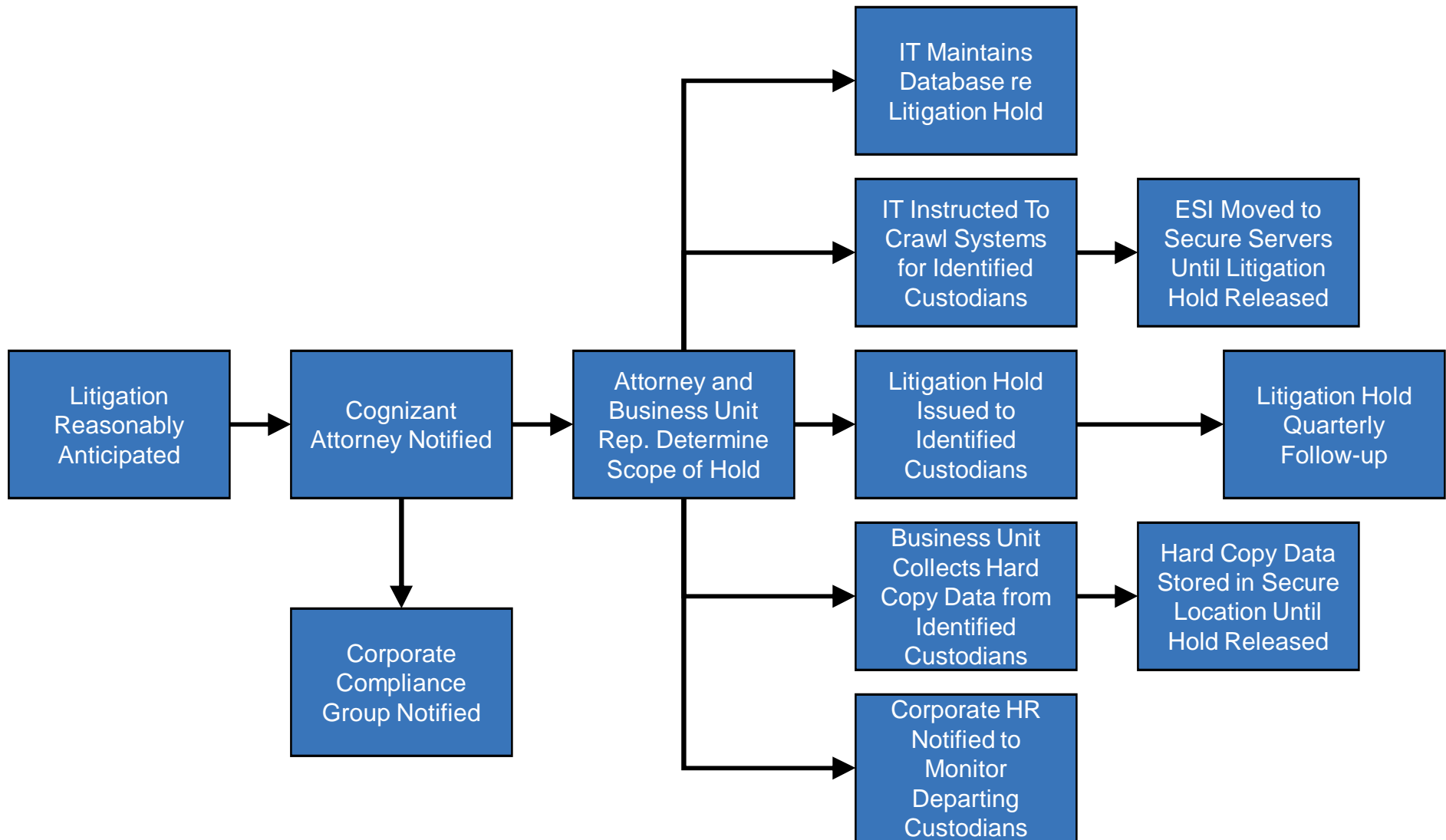


Litigation Hold

- Develop Legal Hold Policy and Procedures
- Characteristics of a good policy
 - Efficient
 - Reasonable
 - Repeatable
 - Documented
- Steps
 - Recognize trigger of duty to preserve
 - Identify scope
 - Identify custodians
 - Identify stores of information
 - Issue hold



Litigation Hold Policy Process Flow





Duties of Counsel

- Locate and safeguard relevant files, laptops, electronic records, backup media, etc.
- Halt routine records management and recycling policies and suspend automatic deletion and auto purges
- Institute controls against unauthorized access and tampering
- Compliance audits/re-issuance of "litigation hold"
 - *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004)



Litigation Hold

- Key skill: Design, implement and maintain an effective Litigation Hold
- Issue a “litigation hold” (and re-issue periodically), which
 - suspends the company’s routine document retention/destruction policy
 - ensures that relevant information is not accidentally erased or overwritten
- Duty arises at onset of litigation or **when litigation is reasonably anticipated**



Litigation Hold -- Key Players

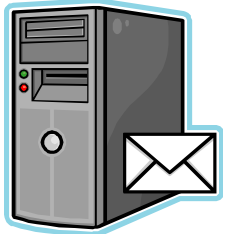
- Identify the “key players” (i.e., persons likely to have relevant information).
- Communicate the preservation duty directly to “key players” (and remind them periodically).
- Interview “key players” to determine how they store information.
- Interview each “key player” to determine whether all potential sources of information have been identified and inspected.



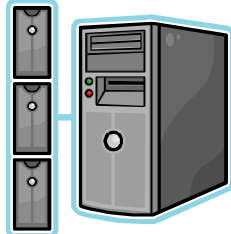
The Obligation

- Cannot destroy, materially alter evidence, or fail to preserve evidence in pending or reasonably foreseeable litigation.
 - *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)
- Obligation applies when party “knows **or should have known** that documents would become material at some point in the future.”
 - *Lewy v. Remington Arms Co.*, 836 F.2d 1404 (8th Cir. 1988)

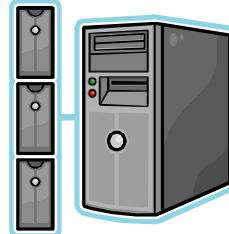
Potential Sources Of Data



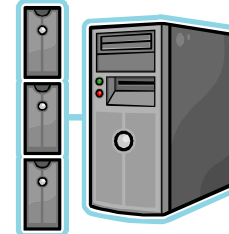
eMail Servers



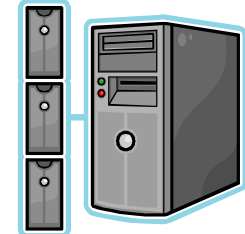
Network Shares



DMS Servers



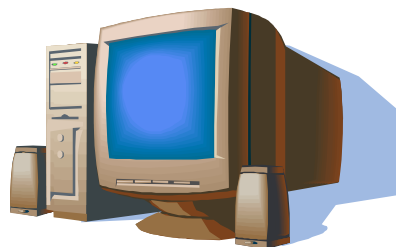
**Financial Systems
Time & Billing**



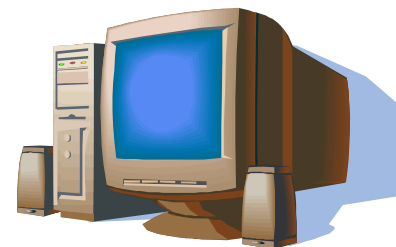
Back-up Servers



Web Servers



**Individual User
eMail Archives and
Local Files**



**Remote and Home
Users via VPN**



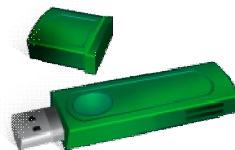
Back-Up Tapes



Blackberry



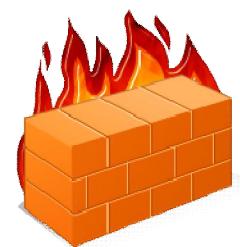
Paper Files



External Storage



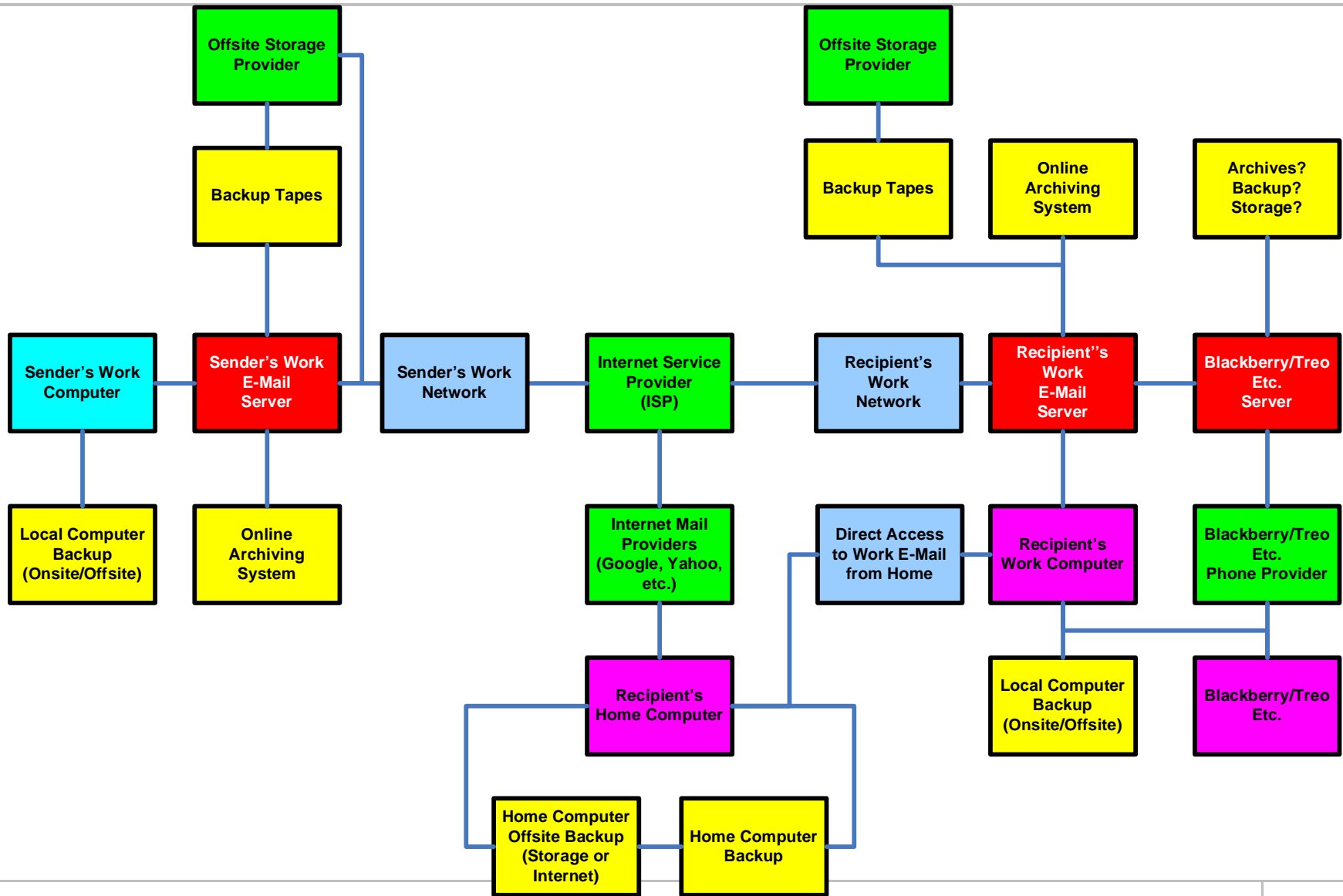
Voice Mail



**Company
Firewall**



Potential eMail Routes and Locations





Safeguard Data

- The preservation duty applies to backup media – at least initially
- No duty, absent court order, to preserve inaccessible backup media not related to key players



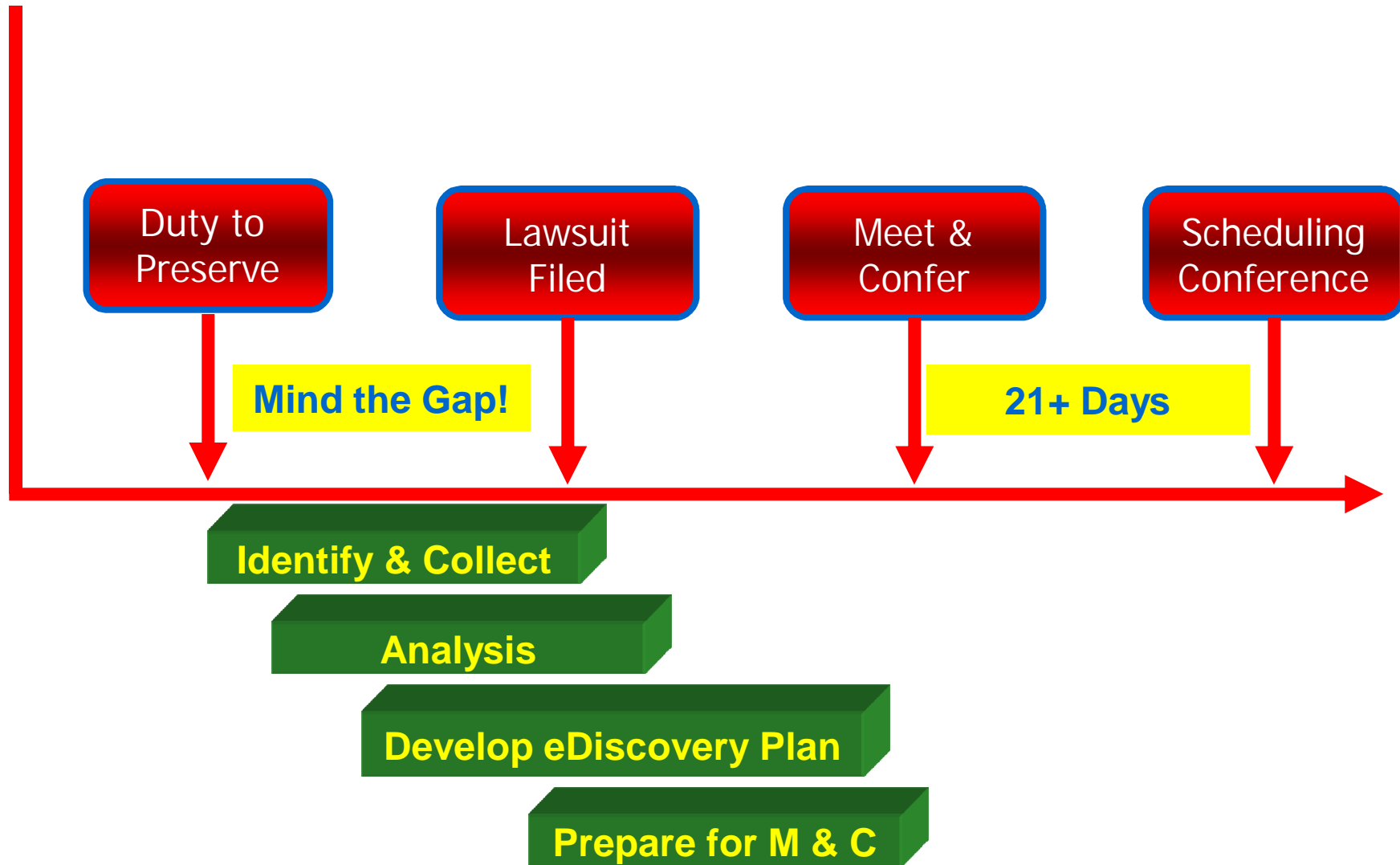
Most Mistakes Occur Early in the Process



MISTAKES

IT COULD BE THAT THE PURPOSE OF YOUR LIFE IS
ONLY TO SERVE AS A WARNING TO OTHERS.

Litigation Holds





Steps to Follow

- Issue immediate litigation hold
- Interview Key players
- Repeated warnings
- Obtain active computer files
- Preserve backup tapes



Zubulake: The Judge's Warning

“Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information.”



Records Retention

- Failure to comply with regulatory requirements risks spoliation sanction.
- Failure to comply with internal policies risks spoliation sanction.
- You must produce responsive information, even if you could have destroyed it.
 - DuPont 5-yr study: Half of materials reviewed for discovery, at cost of \$11 million, were past retention.

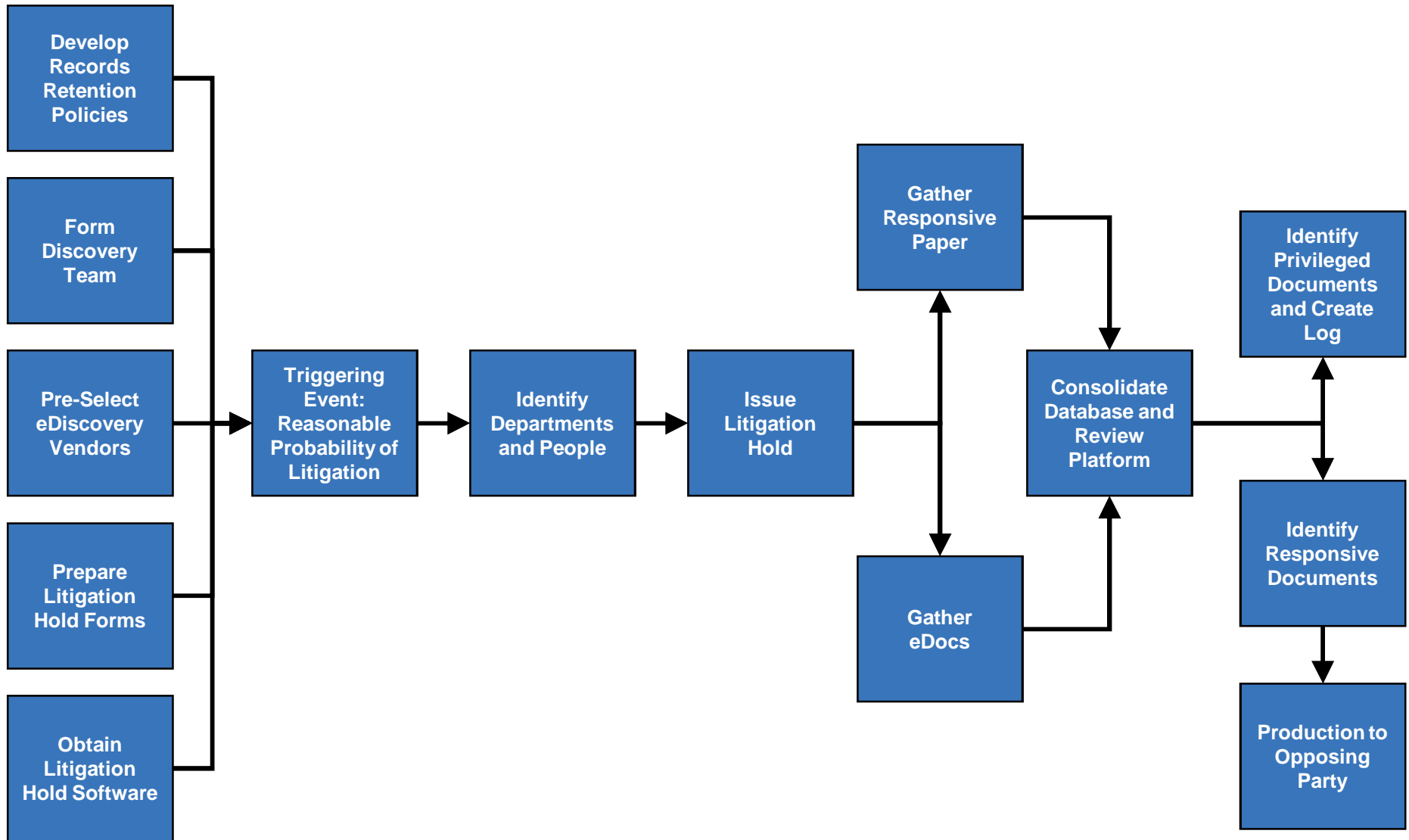


Pre-Litigation Planning

- Audit, revise and enforce records retention policies – do you abide by your internal policies?
- Develop a pre-litigation response plan
 - Become familiar with data retention architecture
 - Develop plan with your CIO or IT manager
 - Develop a protocol for preservation at each level: IT, individual, forensic
 - Document your findings

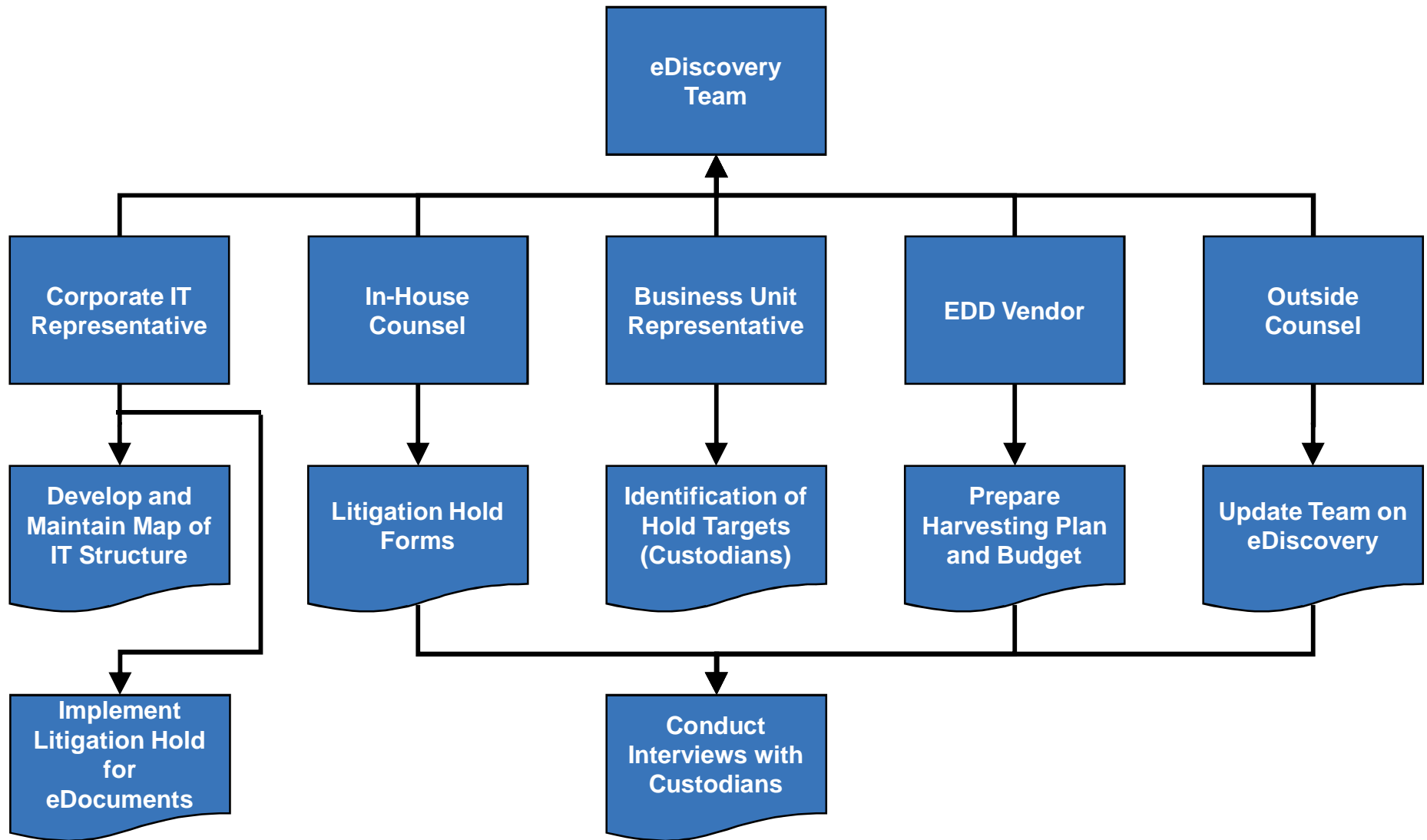


Discovery Response Procedures





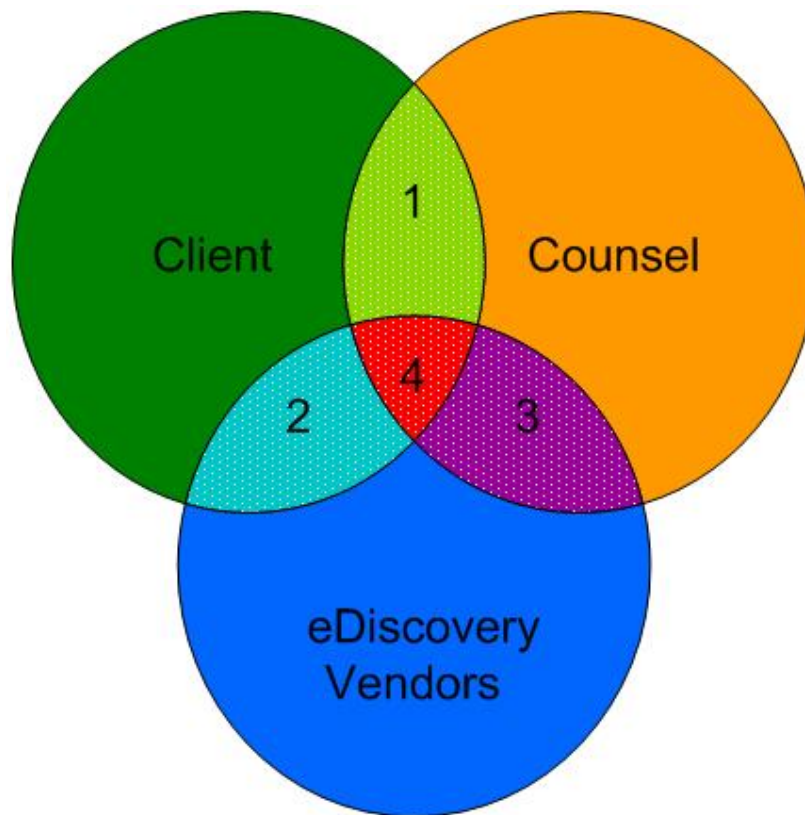
Electronic Discovery Response Team



Lion Taming is Really Lion Teaming



The eDiscovery Team



▪ **Client**

- Owns Risk, Pays Costs, so can make risk decisions quickly
- Knows ESI best, has IT resources
- Ability to move early and quickly

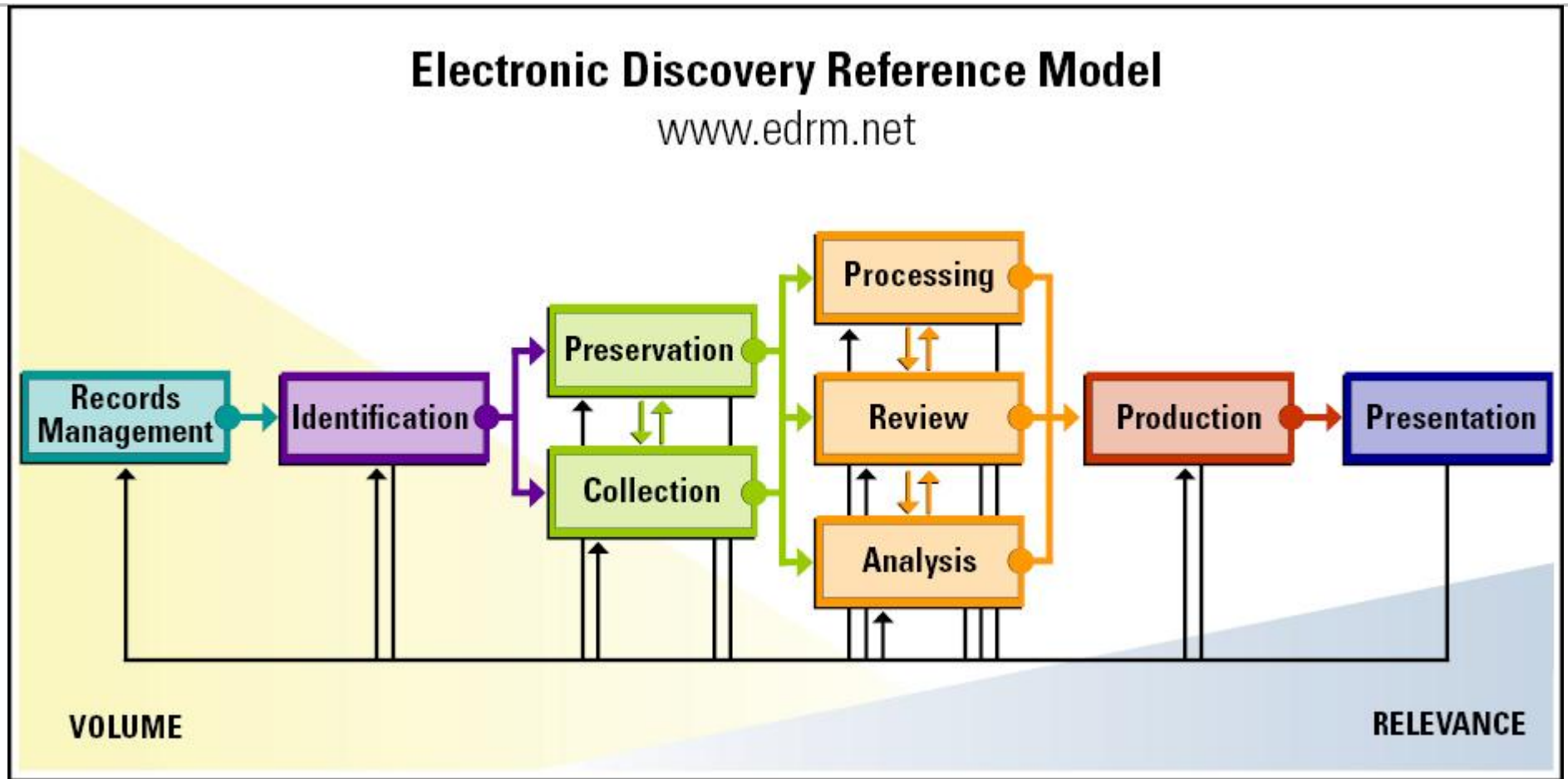
▪ **Counsel**

- Strategic Legal Knowledge
- Familiarity with Court
- Knowledge of legal issues in eDiscovery

▪ **eDiscovery Tech Vendor[s]**

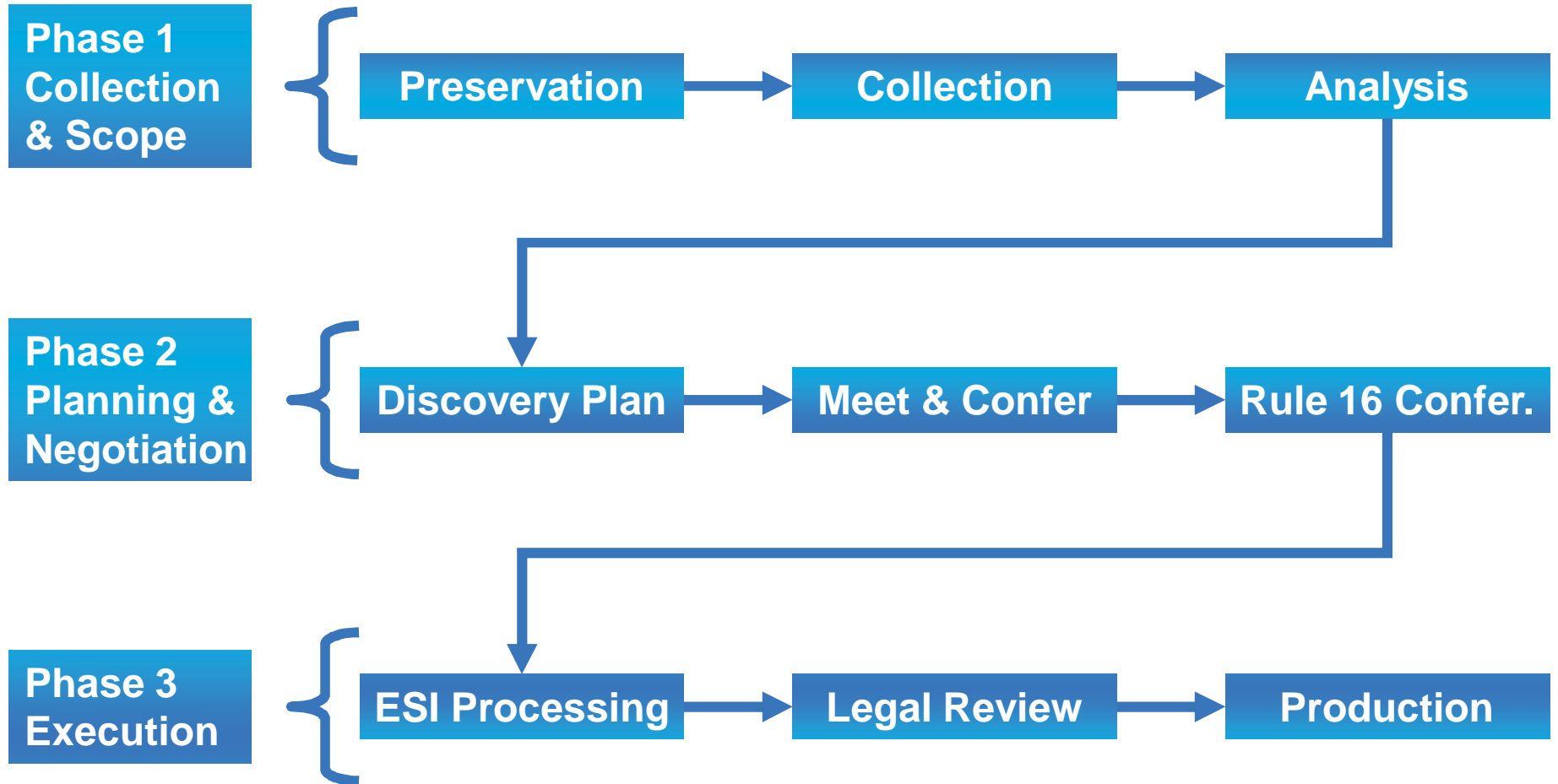
- Powerful technology options
- Ability to apply resources as needed
- Experience in processing ESI
- Ability to provide expert testimony to eDiscovery matters

Electronic Discovery Reference Model

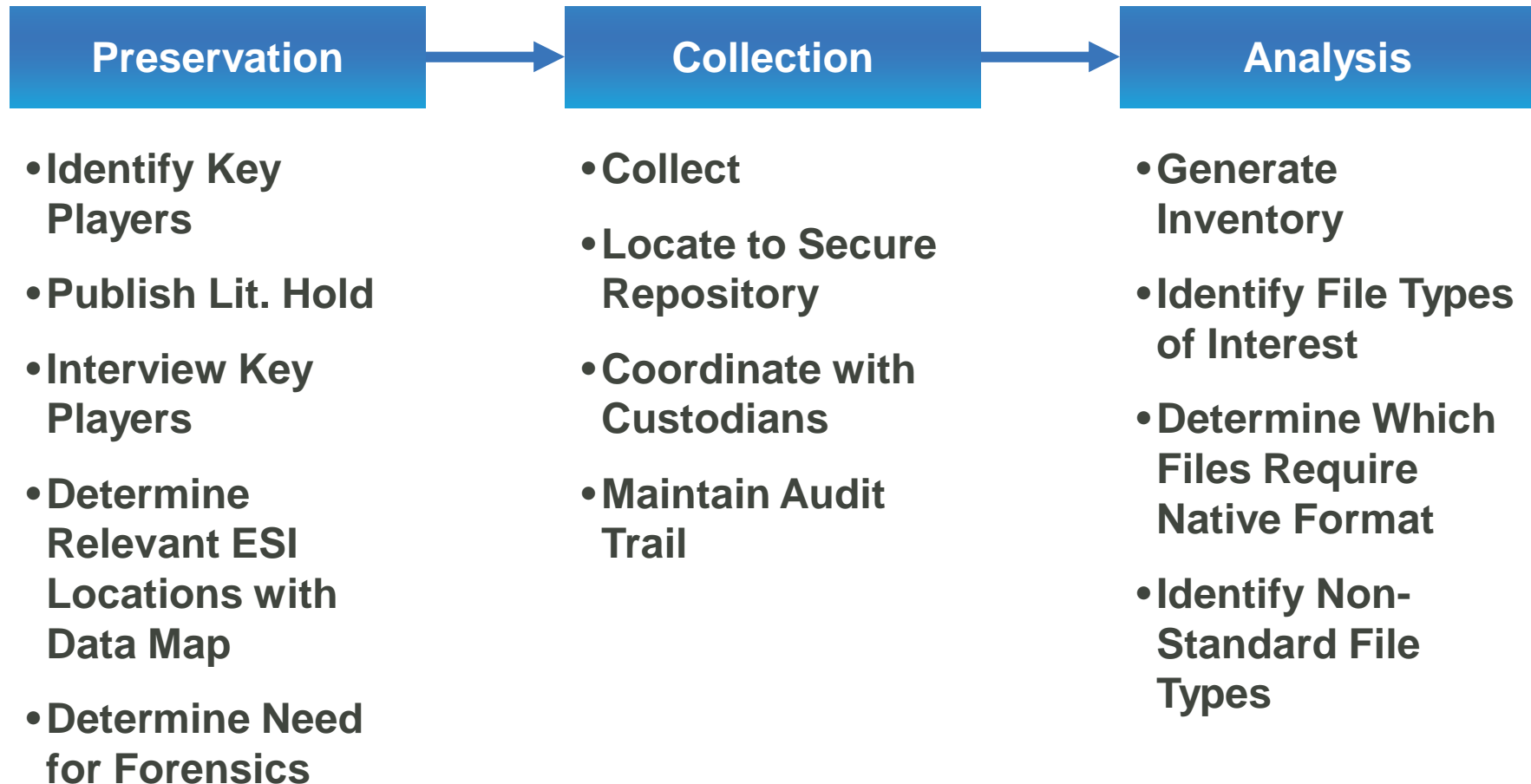




The eDiscovery Process Overview



Phase 1 Actions & Decisions



Phase 2 Actions & Decisions

Discovery Plan

- Identify File Types and Search Criteria
- Develop Plan for Back-up and Other Media
- Establish Burden Arguments for NRA File types
- Identify 30(B)(6) Deponent(s)

Meet & Confer

- Who Attends?
- Present Proposed Discovery Plan
- Negotiate Search Terms
- Negotiate Privilege issues
- Negotiate Form(s) of Production
- Negotiate Authentication Issues

Rule 16 Conference

- Who Attends?
- Negotiate Differences in Discovery Plan
- Present/Defend Burden Arguments for NRA ESI
- Argue Cost Shifting'
- Negotiate Schedule



Phase 3 Actions & Decisions

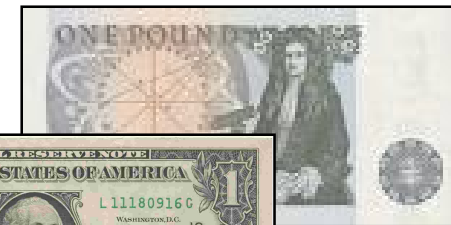


Consequential Cascading Costs



Avoiding Pitfalls

- Cost management
 - Harvesting - Where does the time go?
 - Setup/Breakdown
 - Size of hard drive
 - Data transfer speed
 - Verification
 - Problems
 - Using the time wisely
 - Written documentation
 - Preparing next device
 - Reduce EDD Costs
 - Target the processing



Avoiding Pitfalls

- Do-it-yourself Client
 - Conflict of Interest
 - Employees involved in case
 - Inadequate training
 - Spoliation
 - Increased cost to handoff, redo work





Vendor Selection Criteria

Experience / References

Experience and expertise managing a data set of comparable volume to that of the current case is critical in assessing a vendor's ability to work with the complexities of the matter. Below are summaries of each vendor's experience with a data set of similar or larger size, as well as a summary of the references/comments provided by attorneys, law firm litigation support directors and an electronic discovery consultant.

1. Experience with Data Set of [insert data amount]
2. References



Vendor Selection Criteria

Ease of Document Review & User Functionality

This element of the review focuses on the ability of end-users to access, analyze, mark and organize documents. With a large data collection the ease of use of the system has a significant role in the overall costs of the project. For example, the cost of document review is directly impacted by the ease with which a reviewer can access similar documents, analyze them quickly and mark them correctly.

1. Automated Concept Grouping

The ability of a system to “read” and group similar documents together is key in maximizing reviewer speed and accuracy.

2. Review Functionality

- Ability to rearrange review screen for most efficient use
- Ability to manipulate document to facilitate review (e.g., rotate document, zoom in on areas, etc.)



Vendor Selection Criteria

Ease of Document Review & User Functionality

(continued)

2. Review Functionality (*continued*)
 - Ability to view all file types in native format.
 - Ability to view relevant metadata
 - Ability to view emails in email/attachment relationship
 - Ability to find key words within a document or series of documents
 - Review of documents in native format vs. tagged image file format (“TIFF”)
 - Ability to view comma separated value (“CSV”) files when dealing with data drawn from relational databases
3. Search Capabilities



Vendor Selection Criteria

Ease of Document Review & User Functionality

(continued)

4. Marking Documents

Ease of tagging/coding by attorney reviewers.

5. Document Review Speed

Ease of use is directly correlated to document review speed. Given the large volume of data in this case, document review costs will be extensive and should be factored into the overall cost of a document review system.



Vendor Selection Criteria

Administrative Functionality

This element of the review focuses on the ability of technical administrators and attorney supervisors to manage the document review process. A strong showing in this category will result in litigation management cost savings. Moreover, a document management system that excels in this category minimizes the risks of inadvertent production of a document and inadvertent waiver of privilege. Litigation Management cost savings include the time spent by law firm litigation support staff in managing the technical aspects of the production as well as the time spent by law firm legal staff in supervising the document review and production and conducting quality screed. Litigation management savings are less easily quantified than review speed savings.

1. Transfer of Date into the Vendor's System
2. Ability to Filter / Cull Initial Data Transfers

The ability to suppress certain types of documents and/or files is critical in minimizing the volume of documents requiring attorney review.



Vendor Selection Criteria

Administrative Functionality

(continued)

3. Quality Review
 - System's ability to minimize possible coding errors by reviewers
 - Ability to easily identify potential inadvertent document production or privilege waiver
4. Reporting Capabilities
 - Ability to monitor reviewer productivity
 - Ability to monitor reviewer coding of documents
 - Ease of use of the reporting tools
 - Need for customized reports vs. standard reporting functionality
5. Management of Documents by Administrator to Enhance Efficacy of Document Review
 - Ability to batch reviewer assignments in such a way to maximize speed
 - Ability to create and manipulate coding tags
6. Access to System
 - Ease with which system can be accessed remotely
 - Speed with which system loads onto machine



Vendor Selection Criteria

Project Management / Customer Service

This element of the review focuses on the accessibility, expertise and usefulness of the personnel that will be supporting the matter. The ability to quickly and easily resolve problems will allow the document review and litigation teams to proceed with their tasks in the most timely and efficient manner.

1. Project Manager / Project Management
 - Expertise of Project Manager
 - Ability to resolve problems quickly and fully
 - Accessibility of Project Manager
 - Response time
2. Help Desk Inquiries
 - Response time
 - Expertise of Help Desk
 - Ability to resolve problems quickly and fully



Vendor Selection Criteria

Redaction / Production

This element of the review focuses on the ability of the vendor to manage redactions and document productions. A vendor's ability to simplify document redaction will reduce review attorney costs. Further, the ability to track redactions and productions (e.g., which documents were produced, when were they produced, how were they produced) will reduce litigation management time during a protracted and document intensive discovery process.

1. Redaction Capabilities
2. Production Capabilities



Develop an eDiscovery Plan

- What data to be preserved
- What data to be produced
- How data to be produced
 - Native
 - Tiff
- Dealing with privilege issues
- Responding to Litigation Hold



Immediate Steps

- Determine Relevant Time Frames
- Identify Key Witnesses and Custodians Within Organization
- Identify Other Witnesses and Custodians
- Develop Custodian Interview Checklist
- Develop Comprehensive Map of Organization's Information Systems
- Develop Detailed Understanding of Organization's eMail Systems
- Develop Map of Other Sources of Data
- Obtain and Review Document Retention Policies



Immediate Steps

- Develop Estimate of Amount of Data per Custodian
- Identify Potentially Relevant Document Types
- Identify Data Types Requiring Special Handling
- Identify Additional Data Sources in Organization's Possession, Custody and Control
- Identify and Collect Backup and Archiving Policies and Practices
- Consider fighting fire with fire via use of experienced IT forensics consultant
- Failing to preserve exculpatory evidence may be as damaging as failing to preserve incriminating evidence



Discovery Project Management Template

Discovery Project Management Template

Case Name _____

Client Matter Number: _____

Item	Task	Responsible	Date Due	Notes
1	Initial discussions with client re status to date			
2	Conduct litigation hold strategy meeting			
3	Determine scope of hold			
4	Determine recipients of hold			
5	Coordinate with HR re incoming/departing employees subject to hold			
6	Determine if third parties have relevant data			
7	Determine if computer forensics implicated			
8	Issue litigation hold communication			
9	Schedule periodic follow-up reminders re litigation hold			
10	Send opposition appropriate preservation demand			
11	Receive confirmation of hold instructions from recipients			
12	Develop outline of legal and factual issues			
13	Prepare and interview IT staff re systems, back-ups, etc.			
14	Identify sources of data and possible 30(B)(6) witness(es)			
15	Determine relative accessibility of data sources			
16	Determine if back-up tapes are implicated			
17	Determine if ongoing conduct implicated			
18	Consider taking snapshot of system			
19	Develop plan for gathering electronic data			
20	Develop plan for dealing with databases			
21	Develop plan for gathering paper documents			
22	Contact US-LitSupport for vendor recommendations/bids			
23	Select outside vendors if required			
24	Select platform for hosting data			
25	Develop initial budget for discovery			



Document Review Budget Estimate

Total Cost Estimate	\$5,026,597	\$917,227	\$194,834
	Large	Medium	Small
	Scenario 1	Senario 2	Scenario 3
eFile Collection			
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
Total GB to be Processed	90.75	15.75	2.7
Total EDD Processing Costs	\$158,813	\$27,563	\$4,725
Paper Collection and Processing			
Pages/Key Custodians (Assume 5000 pages/custodian)	50,000	25,000	10,000
Pages Tier 2 Custodians (Assume 2500 pages/custodian)	62,500	25,000	7,500
Total Pages	112,500	50,000	17,500
Scan/OCR/page	0.2	0.2	0.2
Processing costs	\$22,500	\$10,000	\$3,500
Vendor Load Fee/page	0	0	0
Load Fees	\$5,625	\$2,500	\$875
Total Paper Processing Costs	\$28,125	\$12,500	\$4,375
Total Pre-Review Costs	\$575,563	\$110,188	\$21,850



Document Review Budget Estimate

	Large Scenario 1	Medium Senario 2	Small Scenario 3
eFile Collection			
Phase 1 Review			
GB to be reviewed	90.75	15.75	2.7
Pages to be reviewed	6,806,250	1,181,250	202,500
Attorney review rate (pp/hour)	175	175	175
Attorney hours needed to complete review	38893	6750	1157
Cost per hour of attorney review	\$65	\$65	\$65
Review attorney cost of Phase 1 review	\$2,528,036	\$438,750	\$75,214
Supervisory billable time for training, project management, etc. (~10% Rev Atty Cost)	\$252,804	\$43,875	\$7,521
Total Cost of Phase 1 Review	\$2,780,839	\$482,625	\$82,736
Phase 2 Review			
Yield from Phase 1 Review	0.4	0.4	0.4
Pages to be Reviewed in Phase 2	2,722,500	472,500	81,000
Attorney review rate (pp/hr)	200	200	200
Attorney hours needed to complete review	13,613	2,363	405
Cost per hour of attorney review	\$65	\$65	\$65
Review attorney cost of Phase 2 review	\$884,813	\$153,563	\$26,325
Supervisory billable time for training, project management, etc. (~10% Rev Atty Cost)	\$88,481	\$15,356	\$2,633
Total Cost of Phase 2 Review	\$973,294	\$168,919	\$28,958
Review of Materials Received from Opposition			
Assume Equal Amount of Data Received as Produced	0	0	0
Attorney review rate (pp/hr)	200	200	200
Attorney hours needed to complete review	0	0	0
Cost per hour of attorney review	\$250	\$250	\$250
Review attorney cost of Phase 2 review	\$0	\$0	\$0
Supervisory billable time for training, project management, etc. (~10% Rev Atty Cost)	\$0	\$0	\$0
Total Cost of Reviewing Opposition Production	\$0	\$0	\$0
Production			
Responsive Pages	1,701,563	295,313	50,625
Production Costs/Page @ \$0.10	\$170,156	\$29,531	\$5,063
Total Costs of Production	\$170,156	\$29,531	\$5,063



Document Review Budget Estimate

	Large	Medium	Small
eFile Collection	Scenario 1	Scenario 2	Scenario 3
Privileged Pages (Assume 10% of Responsive Documents are Privileged)	170,156	29,531	5,063
Privileged Documents (Assume 5pp/doc)	34,031	5,906	1,013
Percent Reduced during Phase 2 Review	0.6	0.6	0.6
Privileged Documents to be Logged	13,613	2,363	405
Logging Pace docs/hr	8	8	8
Logging Hours Needed	1,702	295	51
Hours/day	8	8	8
Logging days needed	213	37	6
Loggers (Staff attorneys)	5	5	5
Project Days needed	43	7	1
Avg Hourly Billing Rate	\$275	\$275	\$275
Personnel Costs	\$467,930	\$81,211	\$13,922
Export cost/page @ \$0.10	\$17,016	\$2,953	\$506
Total Privilege Log Costs	\$484,945	\$84,164	\$14,428
ASP Costs			
Database Set-Up Fees (Includes Initial Upload)	\$1,000	\$1,000	\$1,000
User Set Up Fees (Assume \$100/User; 20 Users)	\$2,000	\$2,000	\$2,000
Monthly Maintenance (Assume \$200/Mo; 24 Month Life of Case)	\$4,800	\$4,800	\$4,800
Image Storage (TBD)			
Log In/Month (Assume 20 Users @ \$100/user/month/24 months)	\$24,000	\$24,000	\$24,000
Additional Uploads (TBD)			
Project Management (Assume 50 hours @ \$200/hour)	\$10,000	\$10,000	\$10,000
Total ASP Costs	\$41,800	\$41,800	\$41,800
Total Cost Estimate	\$5,026,597	\$917,227	\$194,834
Total Cost Estimate	\$5,026,597	\$917,227	\$194,834



Closing Quotes

- **"Truth is tough. It will not break, like a bubble, at a touch; nay, you may kick it about all day like a football, and it will be round and full at evening."-- Oliver Wendell Holmes**
- **"The reason most people never reach their goals is that they don't define them, or ever seriously consider them as believable or achievable. Winners can tell you where they are going, what they plan to do along the way, and who will be sharing the adventure with them." -- *Denis Watley***
- **"We succeed only as we identify in life, or in war, or in anything else, a single overriding objective, and make all other considerations bend to that one objective." -- *Dwight D. Eisenhower***
- **"It is no use saying, 'We are doing our best.' You have got to succeed in doing what is necessary. " -- *Winston Churchill***
- **"Be like a duck. Remain calm on the surface and paddle like hell underneath." -- *Michael Cain***



Closing Quotes

Thank you for listening . . .

- "With the gift of listening comes the gift of healing." --
Catherine de Hueck

And remember . . .

- "Honest criticism is hard to take, particularly from a relative, a friend, an acquaintance, or a stranger." --
Franklin P. Jones

And remember, especially . . .

- "Gratitude is the sign of noble souls." -- *Aesop*



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