



YOUR FIRST E-DISCOVERY PROJECT

CLE

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AGENDA

1. Introductions & Agenda
2. Overview of E-Discovery
3. The Lawyer's Role
4. How To Conceptualize E-Discovery:
The Electronic Discovery Reference Model (EDRM)
 - a. **Identification**
 - b. **Preservation**
 - c. **Collection**
5. Selecting E-Discovery Consultants
6. Q&A Period

OVERVIEW OF E-DISCOVERY

E-Discovery is discovery involving the exchange of electronically stored information (ESI) in connection with litigation and investigations. It includes the method in which parties preserve, collect, review, and produce information in electronic form.

Challenges include:

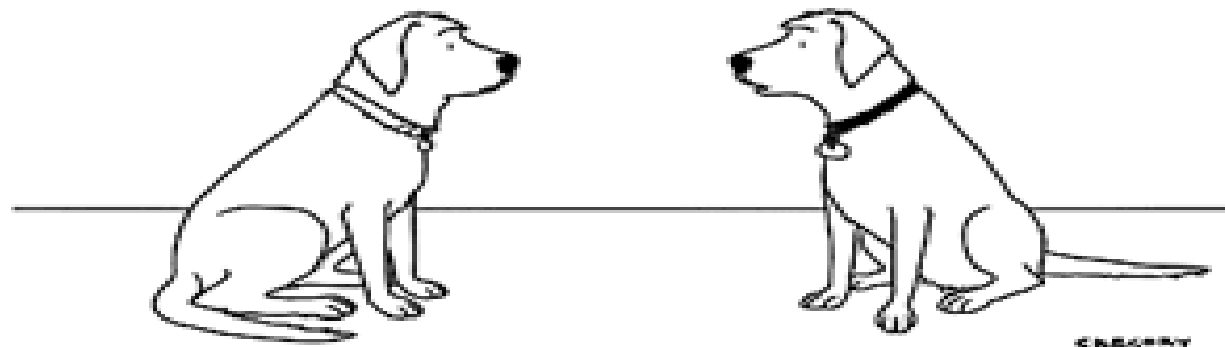
- Ascertaining how your client's ESI is created, maintained and destroyed
- Managing collection of ESI
- Keeping pace with evolving tech and law
- Vendor selection and management

MY CASE DOESN'T HAVE ESI....

- 🇺🇸 Email
- 🇺🇸 Text messages
- 🇺🇸 Native files
- 🇺🇸 Databases
- 🇺🇸 Computer records
- 🇺🇸 Over 93% of all documents are generated electronically and more than 70% of electronic information is never printed.
- 🇺🇸 Average is over 100 emails per employee per day!

ESI

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"I had my own blog for a while, but I decided to go back to just pointless, incessant barking."

BACKGROUND AND CAUTIONARY TALE

Wai Feng Trading Co. Ltd. V. Quick Fitting, Inc., 2019 WL 118412
(D.R.I. Jan. 7, 2019) (M.J. Sullivan)

- ⌘ Rule 37(e) – post 2015 amendment
 - ESI has been lost and is not available in any other location.
 - Court must consider whether and when a duty to preserve arose.
- ⌘ Party must take reasonable steps/proportionality.
- ⌘ If established party failed to take reasonable steps, court's next inquiry is whether loss of ESI caused prejudice and whether party acted with "intent to deprive another party of the information's use in the litigation."

THINK ABOUT E-DISCOVERY NOW

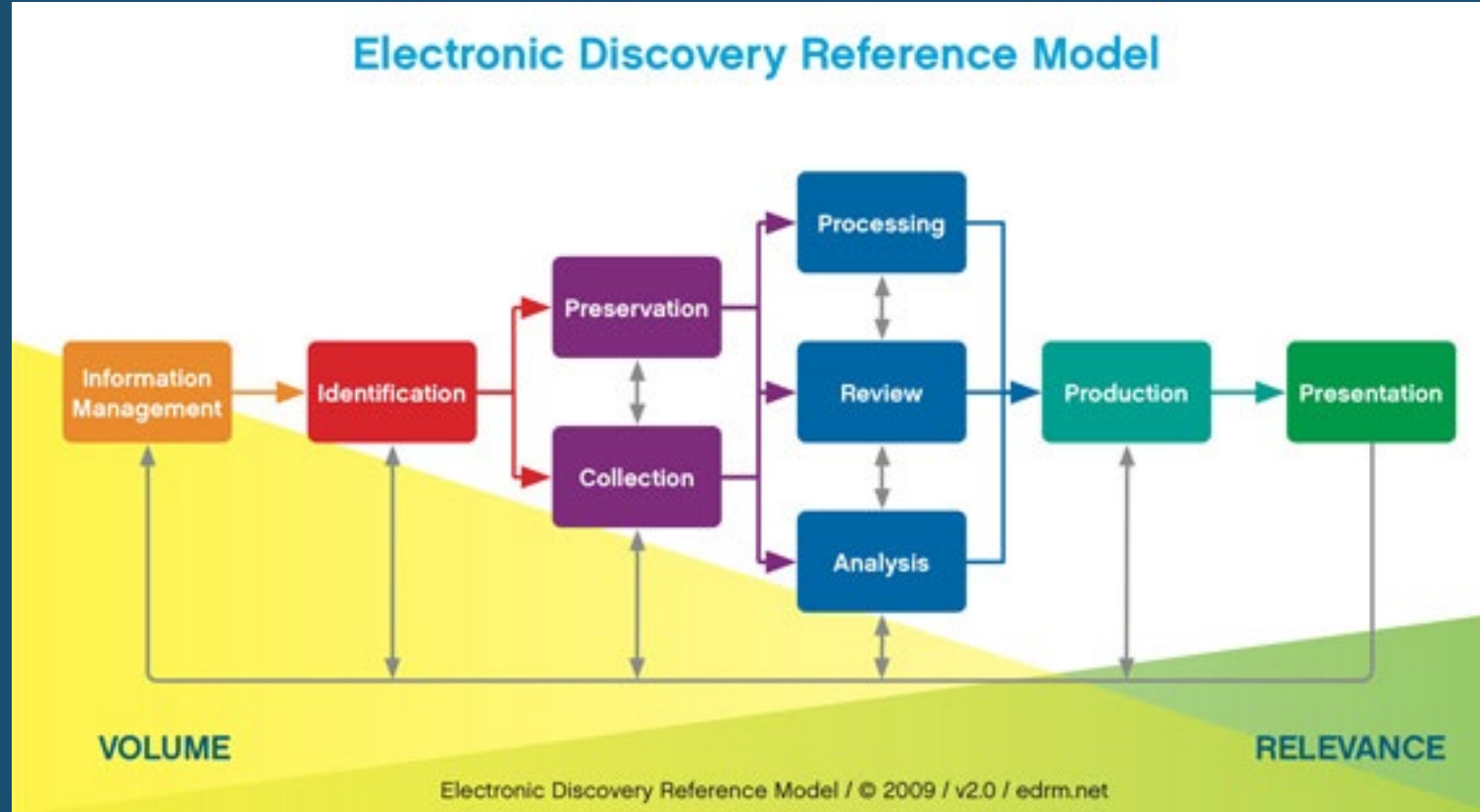
When do you have to
consider e-discovery?

- ☞ Once your client is on notice of potential litigation

- ☞ **Now!**

- ☞ Consider the e-discovery issues in every piece of litigation

THE ELECTRONIC DISCOVERY REFERENCE MODEL (EDRM)



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THE LAWYER'S ROLE

- ⌚ A lawyer cannot -- and should not -- do everything. Neither can a litigation paralegal accomplish everything.
- ⌚ Chances are, the resources you need are not available in house. Don't hesitate to bring in consultants.
- ⌚ **The lawyer's role is to develop a defensible process and manage it.**
- ⌚ If you have a chance to cooperate with opposing counsel, consider doing so.
- ⌚ Importance of understanding ESI and metadata.



MISTAKES

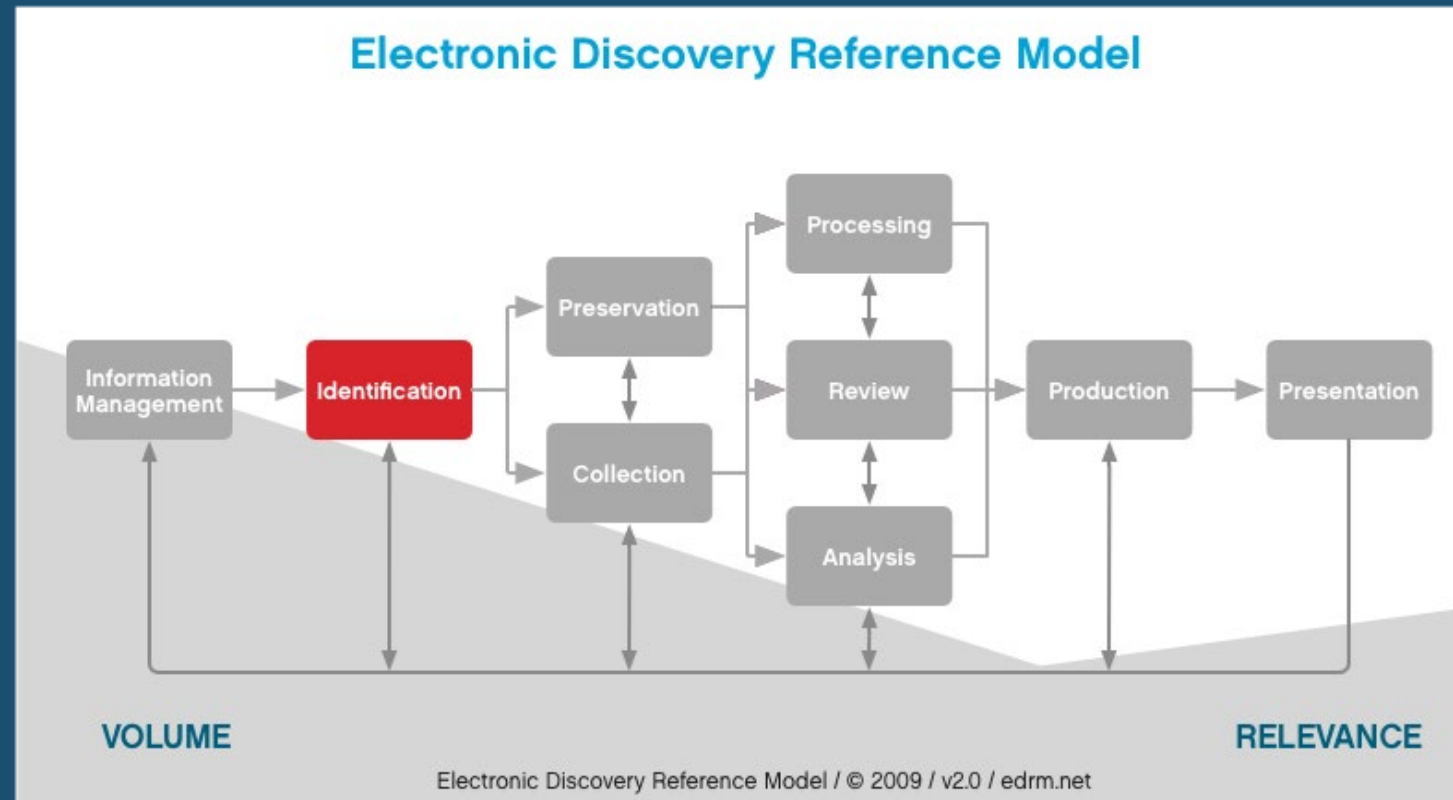
IT COULD BE THAT THE PURPOSE OF YOUR LIFE IS
ONLY TO SERVE AS A WARNING TO OTHERS.

Source: <http://www.despair.com/mistakes.html>

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THE ELECTRONIC DISCOVERY REFERENCE MODEL (EDRM)



Source: <http://www.edrm.net>

IDENTIFICATION

- 🇪🇺 Identify and interview ESI Custodians.
 - Consider Drafting Memos of ESI Custodian Interviews.
- 🇪🇺 Identify potentially relevant ESI Sources
 - Write down the information you obtained.
- 🇪🇺 Understand policies and protocols of organization.

CUSTODIAN INTERVIEWS

Interviews help you identify the location and nature of relevant documents and ESI.

- 🇺🇸 Make a checklist -- See the Sedona Conference "Jumpstart Outline" for a sample list of questions (available at <http://thesedonaconference.org/publications>).
- 🇺🇸 Tailor your interview checklist.
- 🇺🇸 Ask specific questions.
- 🇺🇸 Communicate the litigation hold verbally and confirm that the custodians understand it.

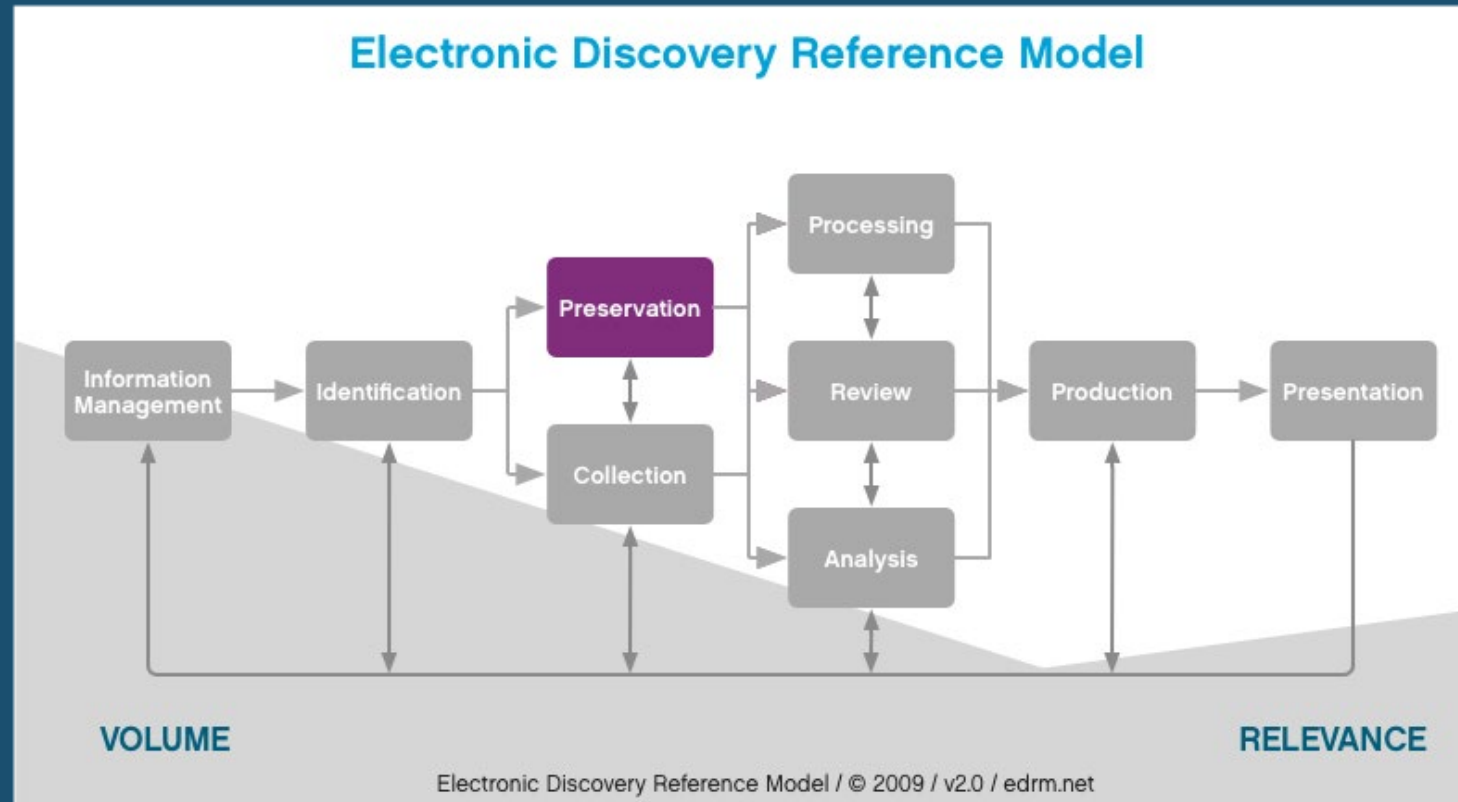
CUSTODIAN INTERVIEWS

- Identify other custodians
- Determine relevant time frames
- List keywords, jargon & acronyms
- Exhaust potentially relevant data types
- Learn how the client stored ESI
(1) presently and (2) during the relevant time period (hard drive, network, cloud computing, removable media)
- List email systems used by the client

IDENTIFICATION: BEYOND EMAIL

- Backup Media, Retired Hardware and Disaster Recovery Systems
- Cloud Computing or Third-Party Systems (e.g., Dropbox, Google Drive)
- Internet Browsing History
- Social Media (e.g., Facebook, Twitter)
- Smartphones and other mobile devices
- Event data recorders (EDRs), which are devices installed in some automobiles to record information related to vehicle crashes or accidents.

THE ELECTRONIC DISCOVERY REFERENCE MODEL (EDRM)



Source: <http://www.edrm.net>

PRESERVATION

Once a party is on notice of potential litigation, it is under an affirmative duty to preserve documents and ESI that may be relevant to the dispute.

That said, Federal Rules acknowledge that “reasonable steps” need to be taken to preserve relevant ESI once on notice subject to proportionality. *See Wai Feng Trading*, 2019 WL 118412, at *5.

Proportionality guides all aspects of discovery. *See* Fed. R. Civ. P. 26 (b)(1) definition of what is discoverable.

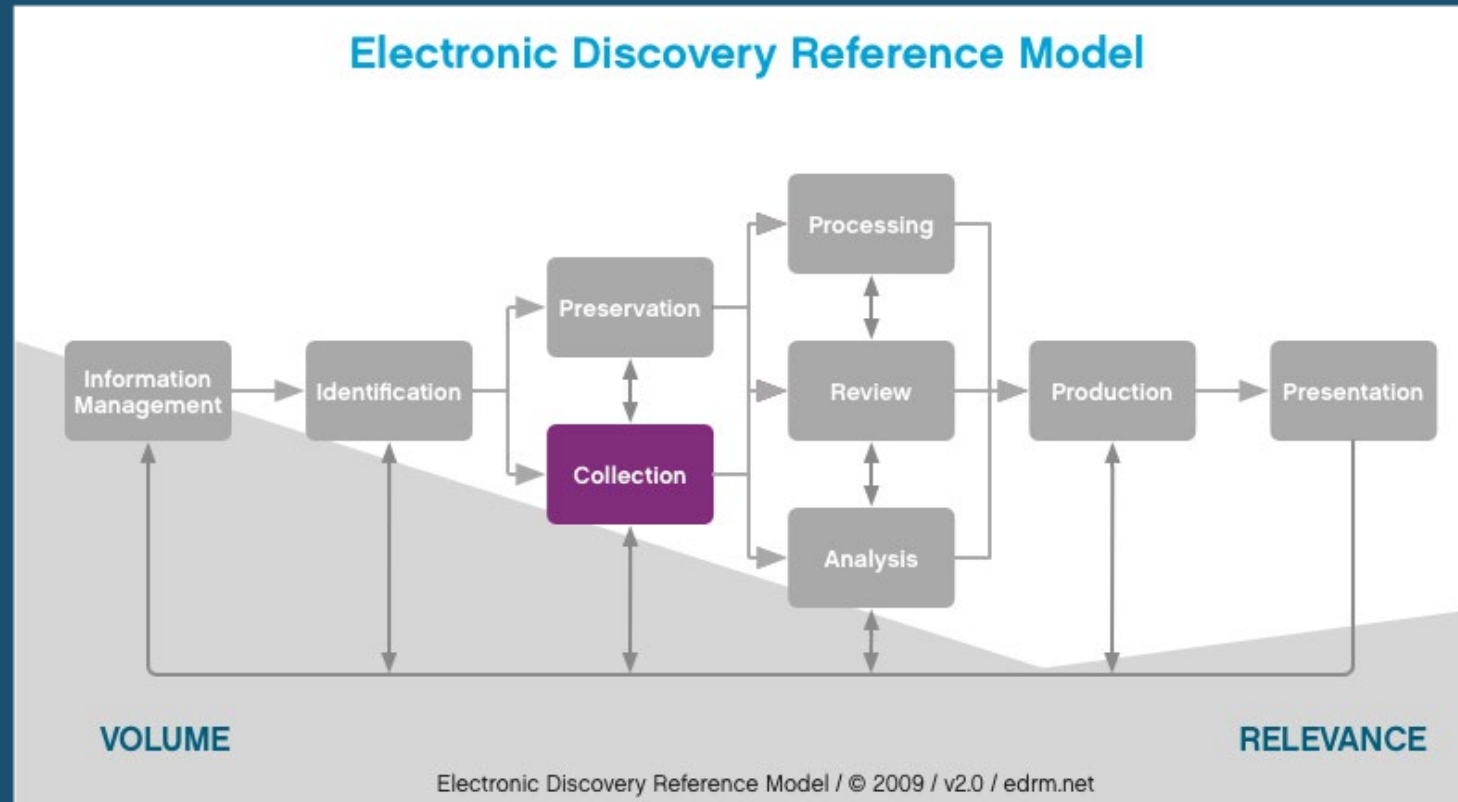
PRESERVATION

- 🇺🇸 Understand Client's Record Retention Policies
- 🇺🇸 Draft and circulate a "Litigation Hold" as soon as practicable after the duty to preserve arises.
 - Must prevent loss of ESI due to routine operations.
 - Users may delete information that they regard as personal, confidential or embarrassing.
In so doing, they may also (in)advertently destroy potentially relevant ESI.
- 🇺🇸 Document the Preservation Process

PRESERVATION -- KEEP IT SIMPLE

- ⚖️ When first engaged, verbally instructed to preserve all documents and ESI (and inquire and suspend any automatic deletion of data)
- ⚖️ The Litigation Hold should be drafted in layman's terms to ensure that all recipients are able to understand what is required.
- ⚖️ Consider following up in person or over the phone to confirm that the client or employees understand the obligations.
- ⚖️ Should be broadly disseminated, shared with Key Personnel, IT, Information Management or Risk Management where appropriate, key department heads (if applicable).
- ⚖️ Duty can extend to ESI in the possession of third parties under your control.

THE ELECTRONIC DISCOVERY REFERENCE MODEL (EDRM)



Source: <http://www.edrm.net>

COLLECTION

Once you've identified potentially relevant ESI and taken steps to preserve it, the next step is collection.

ESI, as well as associated metadata, must be collected in a manner that is:

- Legally defensible
- Cost-effective
- Targeted
- Proportionate
- Auditable

COLLECTION

ESI is susceptible to alteration:

- 🇪🇺 The key piece of evidence may be in the form of metadata, which could be lost or destroyed if collection is not properly performed.
- 🇪🇺 Forensic – *Forensically Sound* – Nonforensic

You, as the lawyer, will need to determine a defensible collection method.

Use a consultant, if you can, to help.

COLLECTION: FORENSIC COPY

A "forensic copy" is defined as:

An exact copy of an entire physical storage media (hard drive, CD-ROM, DVD-ROM, tape, etc.), including all active and residual data and unallocated or slack space on the media. Forensic copies are often called 'images' or 'imaged copies.'

The Sedona Conference Glossary: E-Discovery &
Digital Information Management (5th. ed. 2020)
(available at <http://thesedonaconference.org/publications>).

COLLECTION: FORENSIC COPY

Consider obtaining a "forensic copy" if the date stamps, deleted data, edit history, web browser history, registry values, or other metadata have any bearing on the issues of your case.

- 🇪🇺 E.g., a trade secret misappropriation case where you want to know whether a departing employee copied trade secret information from his company-owned laptop onto a jump drive.

COLLECTION: FORENSICALLY SOUND AND NOT FORENSICALLY SOUND

- Logical Copy – simply a copy of the contents of the directories is usually fine for civil litigation unless there's suspicion of data tampering.
- Creating a copy of one or more files using the operating system including file copying provisions in the user interface.
- Be careful with just copying data (Control C, Control V) from one drive to another – usually alters metadata.

COLLECTION: EMAIL (AND BEYOND)

There are three ways to harvest email in a forensically defensible manner, each of which has pros and cons:

- 🇪🇸 Back-End Collection: Harvesting from an email server or developing an enterprise solution
- 🇪🇸 Front-End Collection: Harvesting from a local email client, such as an individual workstation
- 🇪🇸 Web-based Collection: Harvesting from an internet email client (e.g., Gmail)

LAWYERS' ROLE

- ⌘ The lawyers' role is to “perform a reasonable inquiry to determine whether [the client has] complied with its discovery obligations.” *Qualcomm Inc. v. Broadcom Corp.*, 2010 WL 1336937 (S.D. Cal. April 2, 2010).

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SELECTING E-DISCOVERY CONSULTANTS

- ☞ Cost/Proportionality
- ☞ Experience level
- ☞ As e-discovery becomes more specialized, not all consultants will perform all functions.
 - For example, a vendor that specializes in hosting work may farm out harvesting work to sub-contractors.
 - Understand who is doing what.
- ☞ The earlier they are brought in the better – can help with identifying, preserving, collecting AND PRODUCING.

SELECTING E-DISCOVERY CONSULTANTS

- ⌘ Every consultant has its strengths and weaknesses.
- ⌘ Consider having more than one e-discovery consultant available.
- ⌘ Doing it in-house. Allows for your to electronically harvest documents in forensically sound manner that preserves meta-data. Used DISCO -- <https://www.csdisco.com/>

VENDORS I'VE USED

☞ Consilio

<https://www.consilio.com>

☞ Opentext

<https://www.opentext.com>

☞ IST Management

<https://istmanagement.com>

SELECTING E-DISCOVERY CONSULTANTS

If the process is challenged by the other side, the attorney will have to justify the process.

Don't be afraid to ask questions:

- 🇺🇸 What is your experience in ESI collection?
- 🇺🇸 Have you done this specific task before?
- 🇺🇸 Has the process you're proposing been previously approved by a court?
This court?
- 🇺🇸 Have you previously testified in court about a similar project? Did you submit an affidavit? Can you please provide a copy?

SELECTING E-DISCOVERY CONSULTANTS

Get to know your Project Manager.

- The best PMs listen to you, but also provide suggestions that you may not have considered.
- Listen for: “You asked for X. We can certainly do X. But you may also consider Y and Z, which may be other ways to accomplish the goal.”
- Once you agree on a process, read the Statement of Work, and confirm that it meets your expectations. (And if you’re not getting a Statement of Work, ask for one!)

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