"eDiscovery 101 – Myth Busting"

October 29, 2009

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Background

- Olivia Gerroll, eDiscovery Solutions Group Director
- Over sixteen years of experience in litigation technology support and practice support management
- Experience includes
  - Law firm Paralegal and Case Manager
  - In-House Litigation Support Director
  - Eight years as a national litigation services consultant for domestic and international law firm and corporate clients
- Experience with most litigation support products
- Focus on improving efficiency and productivity through solution development, automation, technology implementation, and data management

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Agenda

- Litigation Support
- eDiscovery
  - What is ESI
  - What is the language
- Understanding the data volume
- What is the timeline
- What questions do we have to ask
- What do we do when we get electronic documents
  - How do I practically work to get the job done

Definition

Litigation Support

- All activities designed to prepare a lawyer to try a case

- Combining People, Skills, Processes, and Technology to:
  - Improve Litigator Efficiency
  - Improve Litigator Effectiveness
  - Attract and Retain Clients

- Litigation Support involves the organization of evidentiary materials through the use of technology such as litigation support software and systems. Documents are organized into searchable databases for review and production

Definition Of E-Discovery

- Part of normal litigation discovery activities
- Merely the electronic counterpart to paper collection
- Focuses on data maintained "in the ordinary course of business" i.e.
  - documents
  - e-mails
  - databases
- Like paper, the requirement is to preserve just those materials related to claims and defenses when anticipating litigation

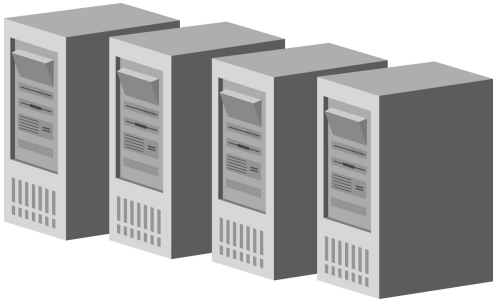
Definition Of E-Discovery (Cont)

- Data is typically captured during the day while equipment is in ordinary use
- Less emphasis on specialized collection tools (although need to preserve file attributes may require specialized approaches)
- Emphasis typically on post-processing
  - filtering
  - de-duplication
  - review for relevance and privilege
  - etc.

Definition Of Forensics

- Required when media itself has evidentiary value or bad behavior is suspected
- Requires specialized tools and training to capture entire media
  - Hard drive
  - PDA, Cell Phone
  - CD, DVD, USB drives
  - Etc.
- Requires specialized tools to analyze and search image and create audit trails
- Typically involves search of deleted, temporary, and/or "slack" file space for evidence
- Disruptive - requires machine to be taken over, powered off, often disassembled

"ESI" Electronically Stored Information

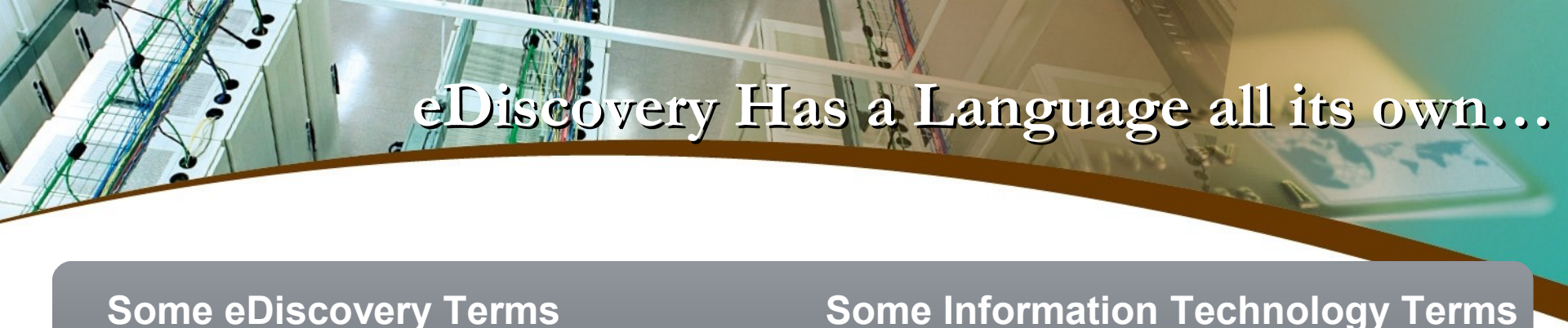


- ESI is now the dominant method of storing human information
- Over 99% of new information stored in the United States is stored electronically

- ESI is different than paper
  - Persistent ("delete" is a misnomer)
  - Dynamic (susceptible to changes, both predictable and mysterious)
  - Ubiquitous (copies can exist in many places at once: servers, e-mail, PDAs, backup media, hard drives, portable USB drives, iPods, phones, cameras, almost anywhere on the Internet, etc!)

eDiscovery Language

- eDiscovery has its own language
  - All parties need to become conversant
    - Helpful sites
      - www.sedonaconference.com
      - (http://www.sedonaconference.com/content/miscFiles/TSCGlossary_12_07.pdf)
      - www.edrm.com



eDiscovery Has a Language all its own…

Some eDiscovery Terms

- Spoliation
- Metadata
- Native File
- Image
- TIFF
- PD
- File Format
- Load File
- Annotation
- Redaction
- Keywords
- Culling
- Filtering
- ASP
- Forensic Collection
- Targeted Collection

Some Information Technology Terms

- Information Stores
- Active Files
- Archives
- Backup Tape
- Near-line
- Hot/Warm/Cold
- Legacy System
- Database
- Server
- Disc
- Megabyte
- Gigabyte
- Terabyte
- Terabyte
- Drive Array
- Production System
- Hard Drive
- PDA
- Thumb-drive
- Review Platform
- Operating System (OS)
- Disaster Recovery (DR)

Understanding the Data Volume

Email is projected to more than double:

- 76.7 Trillion emails estimate to be sent in 2008
  - (as reported by Radicati Group)

REAL emails are sent by around 1.3 billion email users

- More than 1 in 5 people on earth use email
- Approx. 516 million business email inboxes worldwide in 2007

95% of all documents are created electronically

30% – 70% of documents never get printed to paper

Volume of Data Increasing

- Assume your opponent is a company with 1,000 employees
- Assume each employee receives 10 emails per day
- That's 3.65 million emails per year
- If you seek 2% of all emails sent over the last 5 years --
- That's 365,000 emails.

How storing this data relates to paper

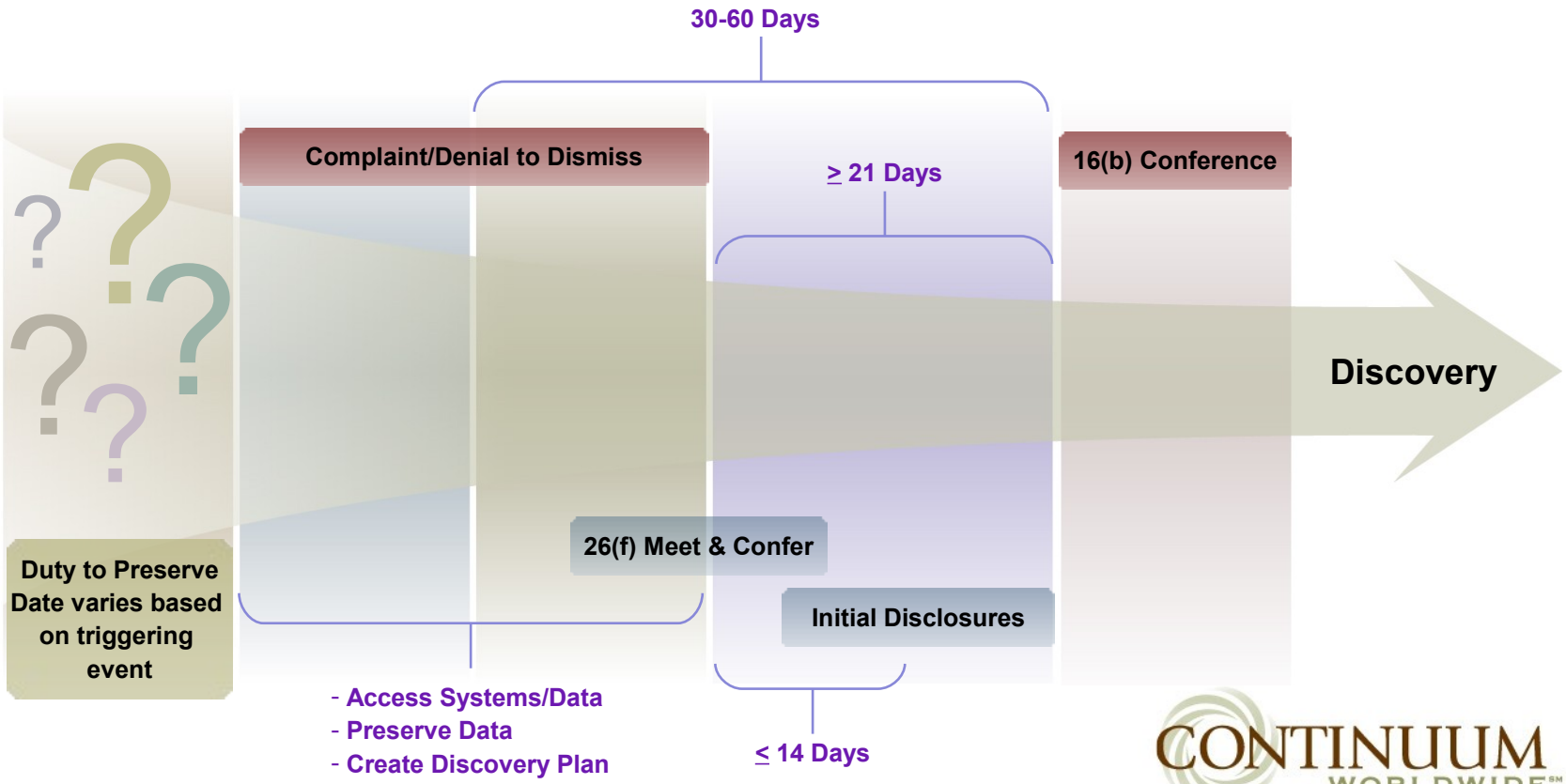
MEDIA	PAGES
Floppy (1.4 megabyte)	750
CD-ROM (650 megabyte)	325,000
Gigabyte	500,000
Terabyte	500 billion

Understanding the Enormous Amounts of Data

1 MB of data	=	75 page stack
1 GB of data	=	32 foot stack
500 GB of data	=	3 mile stack

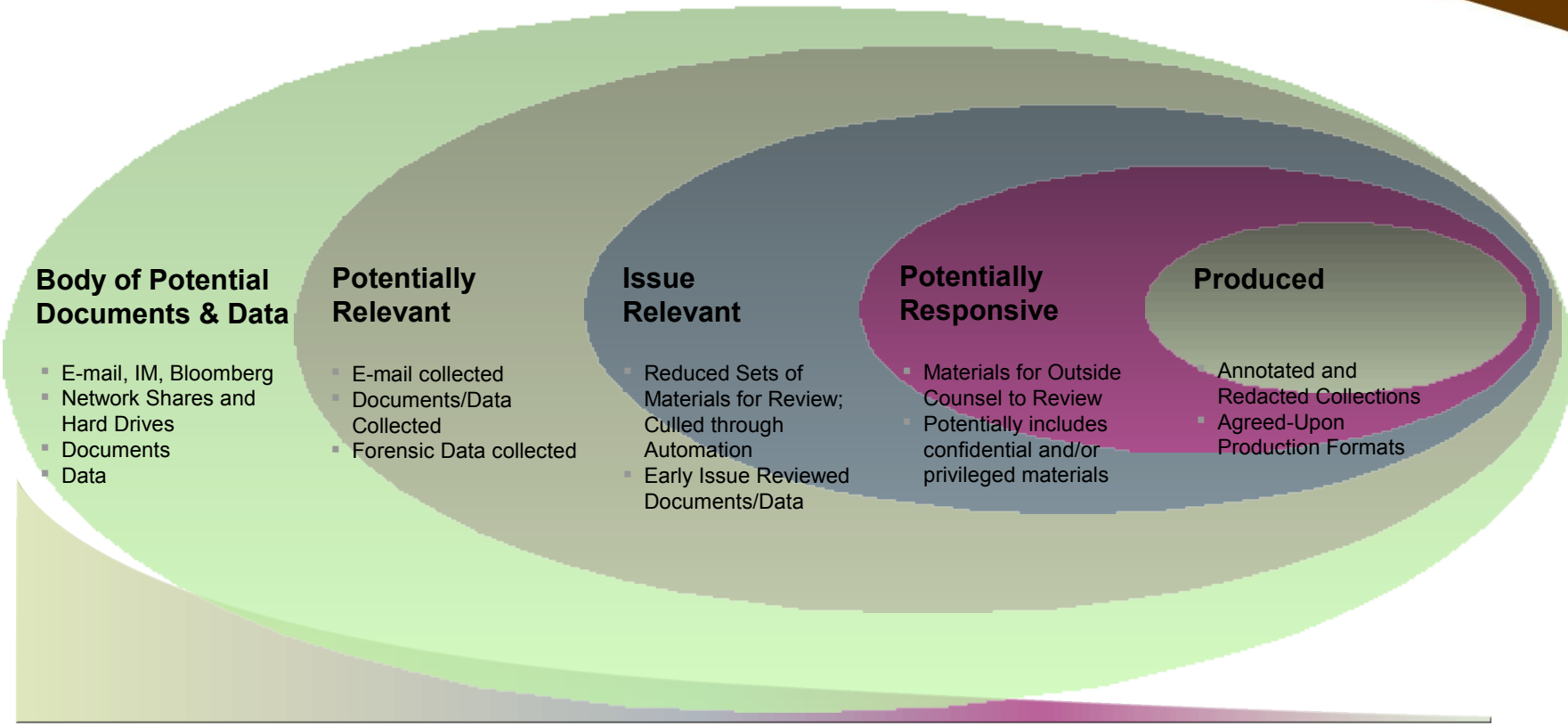
Discovery Timeline

Amendments to Federal Rules of Civil Procedures impose even more time pressure on e-data discovery issues.



This diagram is for illustrative purposes only.
CHECK LOCAL RULES

Winnowing the Collection



- Legal Hold
- Email archiving
- Declaration of business records

- Custodian filtering (e.g. key player's mailbox)
- De-duplication & file type culling

- Keyword culling e.g. "option grant")
- Early issue review
- Regulatory production
- Document processing

- Issue coding (hot documents)
- Privilege identification
- Document annotation

- Redaction
- Bulk printing/disk creation
- Trial preparation

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Questions

Questions need to be posed when working with eDiscovery, some of which include:

- Will single or multipage TIFFs, PDFs or other image formats be produced?
- Will there be a need for native file production? Quasi-native production?
- Will load files accompany document images, and how will they be populated?
- How will the parties approach file naming, unique identification and bates numbering?
- On what media will ESI be delivered? Optical disks? External drives? FTP?
- How will we handle inadvertent production of privileged ESI?
- What potential duplication issues will there be?

Now What?

- Most important – have the questions in previous slide answered
- Must understand production requirements and potential "spoliation" issues
- Any work on the electronic data received should be done against a copy of the original data received
- Understand what type of collection methodology was used to gather the data
- What does the attorney want to do with the contents and what is the deadline
- Do not move forward until you understand the end result requirements and what you are dealing with
- What approaches are open to you?
- Understand all the potential risks

Practical Approach

- Best practices generally require the use of an expert service provider and the implementation of a litigation support review application to ensure defensibility of the process:
  - Summation
  - Concordance
  - ASP

- Practicality and client/in-house expense pressures often dictate work-arounds:
  - Before you do ANYTHING understand your ESI contents
    - Spreadsheets can be problematic
    - Databases are problematic
    - Email stores can be problematic (embedded attachments, etc.)

Practical Approach

Work-Around Options

- Index media contents and use Excel to hyperlink evidentiary materials
- Create an internal database such as MS Access with links to the native files or a converted image format
- Convert contents from native to an image format with accessible text and access through a viewer such as IPRO
- Printing (not the best option but sometimes that is the only option)
- Simple PDF conversion for review and production
    - Allows redaction and annotation options

Practical Approach

Work-Around Options

- Hybrid approach – use service provider to extract the metadata, index and provide a searchable index to link to the evidentiary materials (a much cheaper but simpler and quicker approach for a limited budget)
- Reviewing native files and emails directly on the firm's network is not advisable. While a quick and easy way to review eDiscovery materials is can corrupt the metadata and potentially destroy the defensibility of the collection

The most important point is to understand the options available and the potential ramifications, if any, to using that approach. Sometimes the initial cost savings can create a larger expense in the long run.

Final Words

We are here to help!

If in doubt pick up the phone.

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Attachments:

Sample ESI Checklist

Sample eDiscovery Interrogatory