eDiscovery Issues For Corporate Counsel

Identification, Preservation, Processing & Review

Presented to the ACC Mountain West Chapter
by Jon T. Simmons and Shane Sawyer

EVANS KEANE LLP
Attorneys at Law

Established more than 34 years ago, Evans Keane represents clients in size from publicly-held corporations to sole proprietorships, nonprofit entities and individuals. The firm offers legal expertise in issues related to business law, corporate finance, general litigation, bankruptcy, wills/trusts/estates/probate, water rights, real property, and land use. Evans Keane is the only Idaho law firm that can offer the unique global reach of the *Meritas* network, a worldwide alliance of nearly 200 independent law firms.

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Presenters:

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Partner in Evans Keane LLP's litigation practice. Jon's personal practice focuses on commercial & complex litigation, including business disputes, contract disputes, premises liability, product liability, construction, employment, & insurance litigation.

Shane Sawyer, Streamline Imaging

Extensive document management & eDiscovery expertise, Shane oversees Streamline's Boise office, advising on all phases of the EDRM. Graduating *summa cum laude* from Oregon State University's Honors College, Shane enjoys fly fishing & playing soccer in his free time.

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eDiscovery on an Industry Scale

- Total Market Size (as of Q3 2018): $9.2B to $10.8B annually.
  - Over 80% of 2018 North American Theater Box Office Revenue ($11.07B)
  - 3 Times The Annual NFL Ticket Sales of $2.7B
- Predicted Growth: to between $17.3B to $21.1B in the next four years.

CASE IN POINT
by Tom Fishburne
DADDY, WHAT DOES THE "E" IN E-MAIL STAND FOR?
EVIDENCE
EnCase eDiscovery
E-DISCOVERY DONE RIGHT
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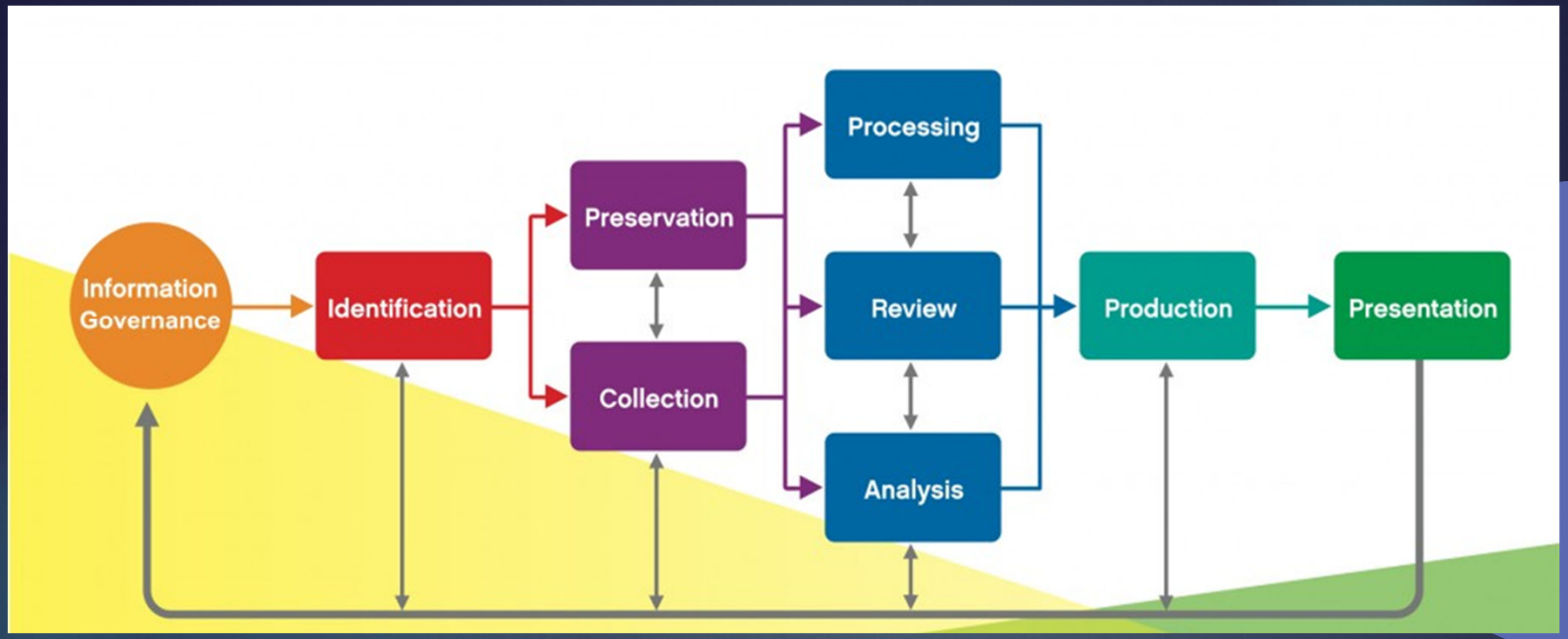
GUIDANCE SOFTWARE.COM

eDiscovery From a Company Level

- 2012 RAND Study: Costs of eDiscovery production for individual companies ran from $17,000 to $27 mil, with a median of $1.8 annually
- 2018 CLOC Survey: According to this smaller but more recent survey, the average spend of the responding companies on eDiscovery annually was $2.8 mil.

Electronic Discovery Reference Model

- Conceptual Model, Standards & Best Practices Developed in Conjunction with Duke Law School
- EDRM Advisory Counsel draws from Academia, Practitioners, the Judiciary and Industry
- Tools To Develop and Check Alignment With Best Practices



VOLUME RELEVANCE

Electronic Discovery Reference Model

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eDiscovery on a Micro Level

The Litigation Hold

- A written notice/directive from counsel to custodians of information to preserve potentially relevant information in anticipation of future litigation
  - When: When litigation is reasonably foreseeable
    - ✓ Beware of non-obvious triggers
  - Why: The risk of spoliation of evidence

Litigation Holds, Cont.

- Typically deemed to be the trigger date for the work product doctrine
- Hold letters/notices are usually deemed privileged unless spoliation is found to have occurred
- An understanding of the organization's ESI architecture is required for an effective litigation hold

  - Does potentially relevant ESI exist on social media platforms?
  - Instant messaging?
  - Voicemails and cell phones?
  - Home computers connected to the network?

Practical Guidance in Federal Court

Federal Rule of Civil Procedure 26(f) requires that the parties meet & confer regarding ESI and prepare a detailed discovery plan to be submitted to the Court in advance of the Case Management Conference

Proportionality is King

- Regarding the scope of discovery, Federal Rule of Civil Procedure 26(b)(1) provides:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

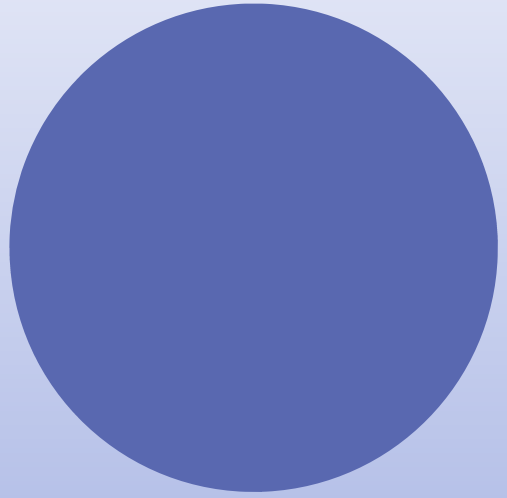
Proportionality, Cont.

Requiring parties to discuss proportionality at the inception of the case forces them to be much better prepared for the rigors and costs of eDiscovery:

- To have a true discussion about proportionality, you must have:
  - Attempted to identify likely data, data sources and custodians
  - An understanding of the organizations data retention policies/protocols
  - Thought about costs of retention and retrieval
  - Thought about existing file formats and desired production formats

Model Discovery Plan

- Preservation of ESI:
  - Date Range
  - Scope of Preservation
  - Preserved But Not Searched
  - Not Preserved
  - Retention Protocols
  - Cost Sharing



ESI Checklist

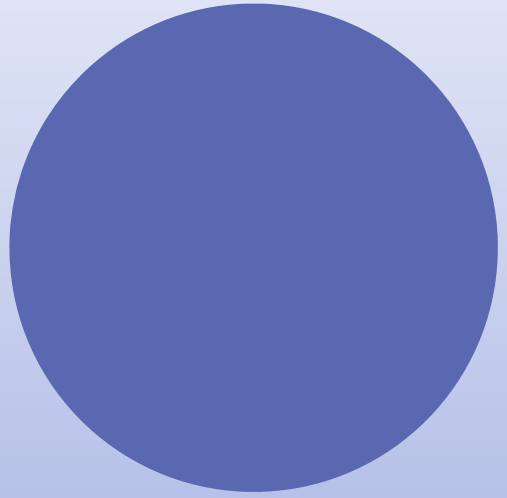
- Proportionality Rules of Thumb
- File & Production Formats
- ESI Search Methodology
- Transparency
- E-mail Custodian List Exchanges
- Threshold Discovery Re Custodians, Search Terms & Time Frames
- ESI Liaisons

A Few Thoughts About Guidelines For Completing The Model Discovery Plan

- Proportionality Revisited
  - The proportionality standard does **not** place the burden of addressing all proportionality considerations
  - Monetary stakes are but one factor considered

- Transparency in search methodology is crucial.

QUESTIONS?



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