

Challenges of E-Discovery



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Challenges of E-Discovery

- The Law
- Policy
- Technology



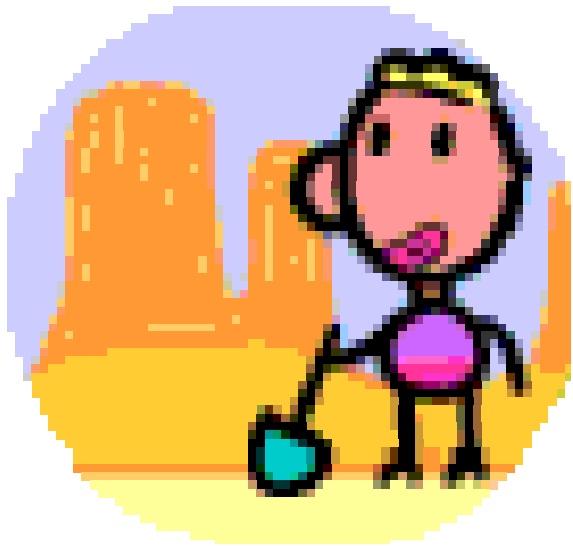
Challenges of E-Discovery

- 100% of documents created electronically
 - Most never hit paper
- Billions of daily emails
- Court rules for electronically stored information
- “ESI”



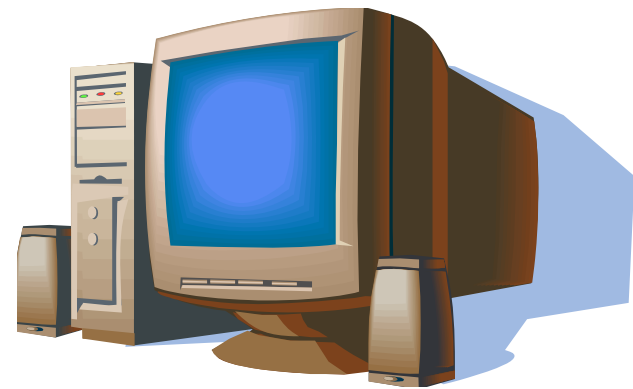
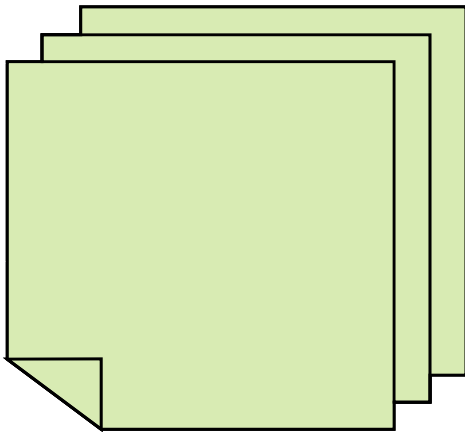
Challenges of E-Discovery

- E-Discovery - Any legal process where ESI is sought, located, secured, searched and produced.



Challenges of E-Discovery

- Paper = ESI
 - Duty to identify, segregate, preserve and produce
 - Legal principals are the same



Challenges of E-Discovery

- Paper ≠ ESI
 - Volume
 - Unstructured content
 - Automated and ease
 - Dynamic and change
 - Metadata
 - Recoverability



Challenges of E-Discovery-The Law

- Production of Reasonably Accessible ESI
 - Presumption – producing party bears cost
 - But only if ESI is reasonably accessible
 - Cost the primary factor

Challenges of E-Discovery-The Law

- Production of Reasonably Accessible ESI
 - Fee Shifting Considerations
 - Need for discovery
 - Relative resources of the parties
 - Amount in controversy
 - Ability of one party to control costs
 - Misconduct



Challenges of E-Discovery-The Law

- Duty to Preserve
 - Complaint
 - Subpoena
 - Litigation reasonably anticipated



Challenges of E-Discovery-The Law

- Duty to Preserve

- Issue “Litigation Hold”
- Suspend routine destruction protocols
- Mirror image or secure personal computers?



Challenges of E-Discovery-The Law

- Litigation hold
 - Division of responsibility
 - Client and attorneys
 - Identify litigation control group
 - Written communication to all with potentially relevant information
 - Paper and ESI
 - Instructions on legal responsibility
 - Instructions on technical means.



Challenges of E-Discovery-The Law

- **Spoliation**
 - Destruction or significant alteration of evidence
 - Possible Sanctions
 - Adverse inference instructions to jury
 - Striking of pleadings
 - Fees
 - Cost shifting

Challenges of E-Discovery - Policy

- Sources of Document Retention Policy
 - NJ Destruction of Public Records Law
 - Schedules
 - Other statutory and regulatory schemes
 - Other internal policies
- Sanctions
 - May be similar to spoliation



Challenges of E-Discovery - Policy

- Document Retention Compliance
 - Training is critical
 - Policy
 - Technology
 - Provide technical tools
 - Monitor compliance



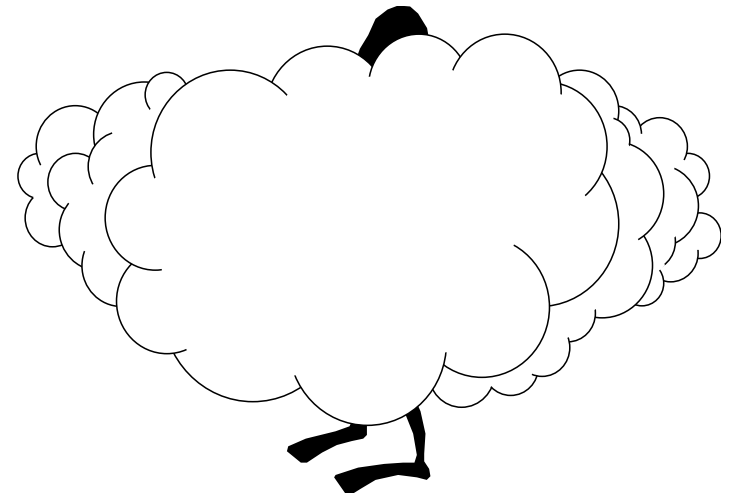
Challenges of E-Discovery - Technology

- Language barriers
 - English
 - Legalese
 - Techese



Challenges of E-Discovery - Technology

- Many shapes and sizes
 - Active – Dynamic
 - Active – Work in progress
 - Static
 - Backup or archival
 - Hidden – metadata
 - Legacy
 - Residual – appears to be gone



Challenges of E-Discovery - Technology

- **E-mails**
- Letters & memos
- Permits
- Draft & final reports
- Test results
- QA results
- Maps
- Enforcement & oversight documents
- Meeting Minutes
- Sign in Sheets
- Field Notes
- Site Journals & log books
- telephone messages
- Calendars & planners
- Handwritten Notes
- Spreadsheets
- Presentations
- Agency specific database
- Text & instant messages
- Digital Art
- Digital photos or images
- Blackberry messages
- Instant messages
- Digital records on cell phones
- Sound recordings & videos
- Web pages & blogs
- Any other format or media used for the creation or storage of information

Challenges of E-Discovery - Technology

- Where is information stored
 - Personal computers
 - Servers
 - Active
 - Archival
 - Back-up tapes
 - Home computers
 - Everywhere on last slide
 - The cloud



Challenges of E-Discovery - Technology

- How long is information stored
 - Automated protocols
 - Pursuant to directions
 - Individual discretion



Challenges of E-Discovery - Technology

- How to search and retrieve ESI
 - Depends on hardware and software
 - Beware of backup tapes
 - Manually
 - Application tools
 - Specialized e discovery tools
 - (Vendors)



Challenges of E-Discovery - Technology

- **Forensics**
 - Recovery of ESI which has been deleted or been subject to attempts at destruction



Challenges of E-Discovery



Challenges of E-Discovery

