

eDiscovery in a Healthcare Setting

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**Agenda:**  
The Legal Landscape: eDiscovery & Legal Holds  
1. Healthcare: EHR's and ESI  
2. eDiscovery and Legal Holds in Healthcare Settings:  
    ➤ Discovery Team  
    ➤ Discovery Response Plan  
    ➤ The Legal Hold Process  
    ➤ Technology Solutions  
        ➤ Legal Holds  
        ➤ Technology on the horizon  
3. Question and Answer

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## THE LEGAL LANDSCAPE



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### **Discovery Defined:**

- Discovery is a normal part of our legal system (it is not new!).
- Pertains to pretrial access to witnesses or documents:
  - Oral depositions
  - Interrogatories
  - Paper documents and records
  - Electronically stored information (ESI)



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### Rules of Civil Procedure:

- Following a string of case law related to electronic discovery, amendments were made to the Federal Rules of Civil Procedure (FRCP) which took effect on December 1<sup>st</sup>, 2006 and the Arizona Rules of Civil Procedure, which took effect January 1, 2008.
- Almost half of the states have adopted the amendments
- The impetus behind the new rules is to ensure that all sources of relevant electronic information is preserved in anticipation of litigation.

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### Federal Rules of Civil Procedure:

Rule 16 – Parties must meet early and discuss any issues pertaining to electronically stored information (“ESI”), including the location and accessibility of such information.

Rule 26 – Parties must be able to describe *by category and location*- all documents and ESI that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.

- Places limitations on the scope of discovery.
  - Privilege
  - Unreasonably accessible because of undue burden or cost; cumulative, duplicative

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## **Federal Rules of Civil Procedure: 30 (b) (6) Witness:**

Person designated by an organization to testify about information known or reasonably available to the organization.

- HIMS
- IT
- Records Manager
- Directors/Managers
- Custodians of information



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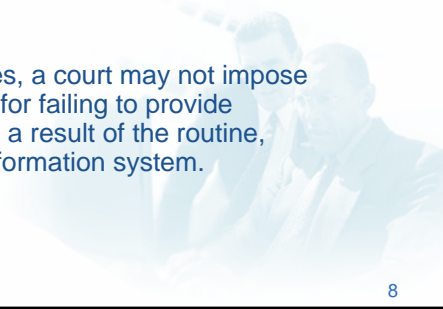


## **Federal Rules of Civil Procedure:**

Rule 34 – Allows parties to request the form of production for ESI

- If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
- A party need not produce the same electronically stored information in more than one form.

Rule 37- Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.



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### **John B. v. Goetz, 2007 WL 3012808 (M.D. Tenn. Oct. 10, 2007) and Oct. 9, 2007 Memorandum**

- Class action against various Tennessee state agencies on behalf of roughly 550,000 children entitled under federal law to medical services
  - Court faulted defendants' preservation and production methods, court ordered defendant state agencies:
    - to produce ESI using agreed search terms
    - designated key custodians, and
    - specified time period, and
    - ordered that production of responsive ESI must include *all metadata and all deleted information on any computer of designated key custodians*

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### **Kevin Keithley et al. v. The Home Store.com, Inc., et al. Order: August 12, 2008**

(2008 U.S. Dist. LEXIS 61741)

*Patten infringement case. Threshold question is when did the duty to preserve evidence arise.*

Violations:

-Court critical of defendants for **failure to have a written legal hold policy in place.**

-*"Defendants had a duty to notify and periodically remind technical personnel of Defendant's preservation obligation and ensure that they took adequate steps to safeguard the data."*

Sanction: (1) Adverse Inference instruction; (2) financial sanctions – discovery fees & costs.

Result: \$148,269.50 for fees and costs and certain additional monetary sanctions.

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**Aguilar v. Immigration and Customs Enforcement Division, of the  
U.S. Dept of Homeland Security, 2008 WL 5062700 (S.D.N.Y.  
November 21, 2008)**

- Case involves class action by thirty Latino plaintiffs alleging that immigration and customs agents subjected them to unlawful searches of their homes in violation of the Fourth Amendment.
  - Counsel failed to discuss the form of production at the FRCP 26(f) conference.
  - Plaintiff's requested documents "as kept in the ordinary course of business."
  - Plaintiffs were granted their request for production of certain metadata, notwithstanding the fact that defendants had already completed production, and plaintiff's had not requested metadata.
- The court also cited the Sedona Principles and its focus on the proper role of metadata in litigation.

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- The Sedona Conference® Working Group Series is a series of think-tanks consisting of leading jurists, lawyers, experts and consultants brought together by a desire to address various "tipping point" issues in each area under consideration.
- **NEW HEALTHCARE WORKING GROUP**  
The focus will be on establishing high-level best practices for the management and production of electronically stored information in the health care industry for litigation and legal compliance.

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## HEALTHCARE: EHR'S & ESI



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### **Electronically Stored Information (ESI):**

- Any data stored in electronic form.
  - Electronic Health Record
  - Scanned Images
  - eMail
  - Billing Data
  - Meeting Minutes
  - Staffing Sheets
  - Employment Data
  - Medical Equipment Reports/Data



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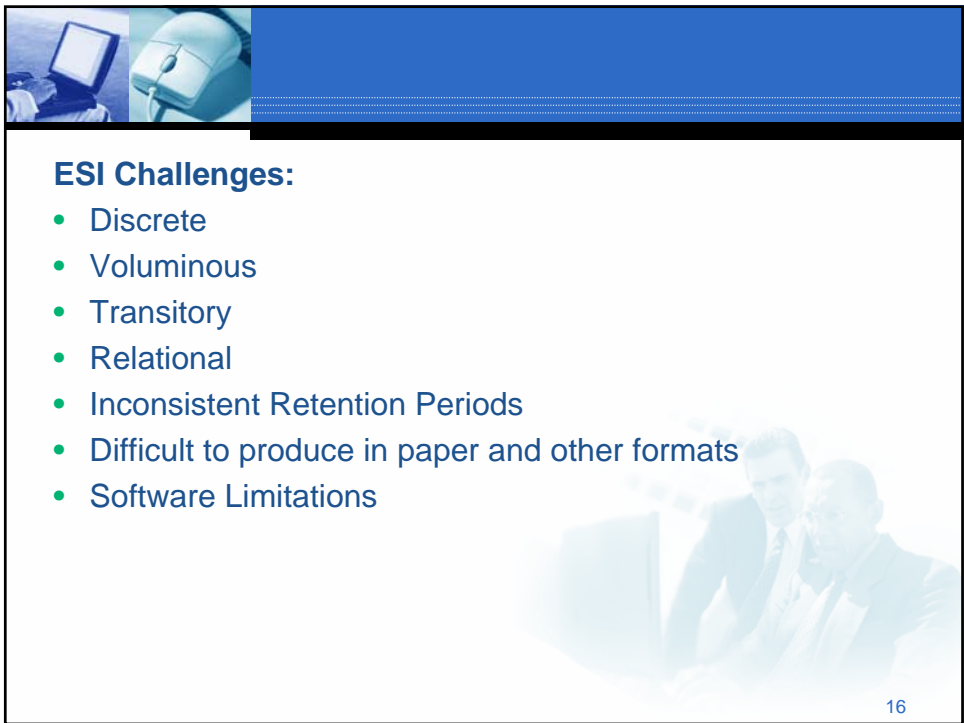


Hospital ESI

## Healthcare: Complex ESI Environment!

A 3D cube diagram illustrating the complex ESI environment in healthcare. The cube is composed of multiple blocks, each representing a different data source or system. The blocks are arranged in a 3x3x3 grid. The top layer includes 'Interfaces'. The middle layer includes 'eMails', 'Digital Dictation', 'Clinical Decision Support', 'Physician Documentation', 'Nursing Documentation', and 'Ancillary Documentation'. The bottom layer includes 'Photographs', 'Billing Information', 'Pre-Hospital Data', 'Lab', 'Radiology', and 'RX'. Other blocks include 'Office Documents', 'Claims Submission', 'Telemedicine', 'CPOE', and 'Scanned Images'. A faint background image shows two men in business attire looking at a laptop.

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ESI Challenges:

- Discrete
- Voluminous
- Transitory
- Relational
- Inconsistent Retention Periods
- Difficult to produce in paper and other formats
- Software Limitations

A faint background image shows two men in business attire looking at a laptop.

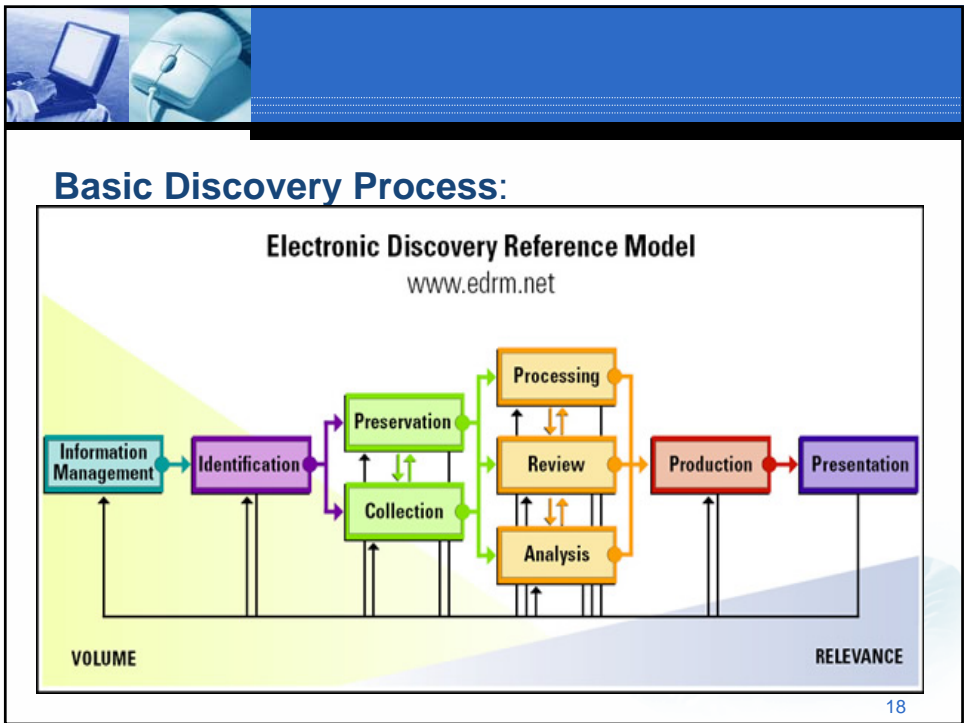
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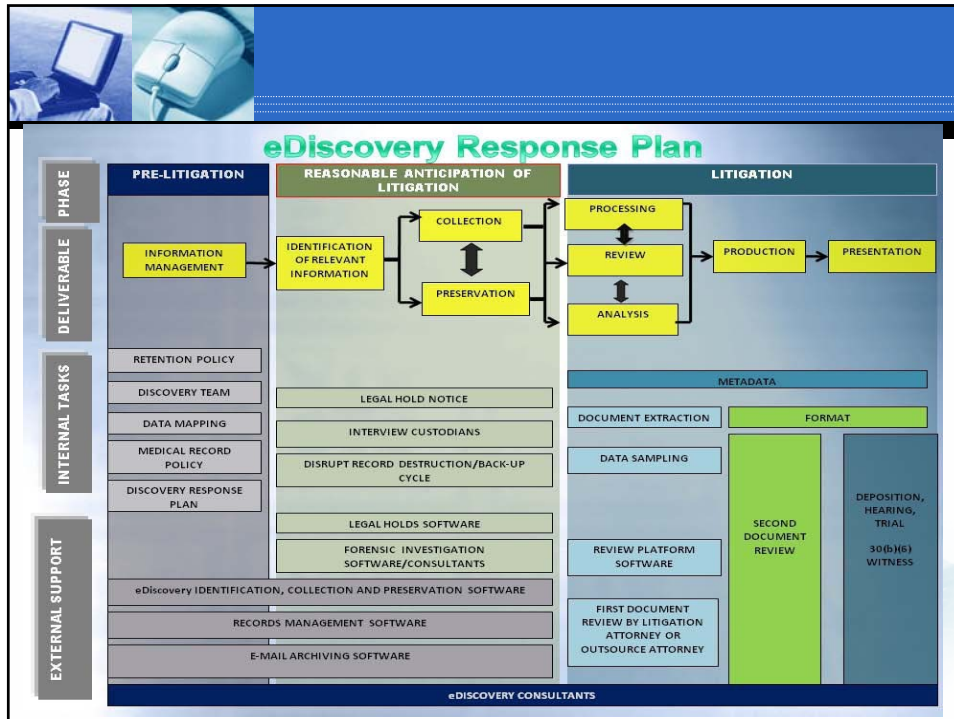


# DISCOVERY ROADMAP

## A HEALTHCARE SETTING APPROACH

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## How can healthcare organizations effectively approach each step of the discovery process?

- Establish an Discovery Team
- Draft an ESI Data Map (always changing!)
- Develop a Discovery Response Plan



### Discovery Team Roles:

- Identify and secure people and resources to adequately respond to discovery matters.
  - Legal Consultants
  - eDiscovery Consultants
  - Forensic Vendors
- Develop policies and procedures for discovery matters
- Educate
- Monitor compliance with discovery response plan.

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### Policies and Procedures involving eDiscovery

- Records Management
  - Paper
  - ESI
  - Voice Recordings
  - Pre-Hospital Documentation
  - Hybrid Records
  - Metadata
- Release of Information
- Privacy Policies
  - Computer Use
  - HIPAA
  - Confidential Corporate Information
- E-Mail
- Legal Holds

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### **Discovery Team Members:**

- Administration
- Legal
- Risk Management
- IT
- HIMS
- Records Management
- Human Resources
- Consultants
  - eDiscovery, Legal, Forensics



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### **Discovery Response Plan (DRP):**

- The need for those in healthcare organization to become “eDiscovery ready” is driving the need to assess, analyze and plan discovery response practices.
- An effective plan requires healthcare organizations to proactively anticipate the type of discovery that could be initiated and develop an offensive response strategy for their organization.



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### **Questions Healthcare facilities should ask in developing their DRP:**

- Who will respond to Legal Hold requests and monitor compliance?
- How are you going to preserve in a complex healthcare environment?
- How are you going to suspend auto-delete retention programs?
- Where are you going sequester collected ESI

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## **CASE STUDY**

### **A HEALTHCARE SETTING APPROACH**

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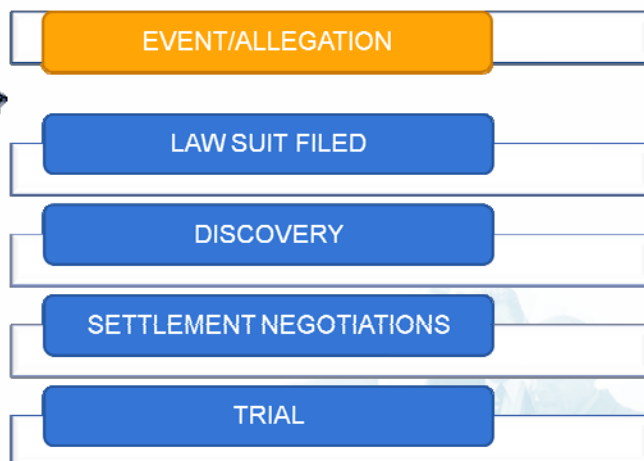


### Preservation:

- Obligation to maintain information, regardless of retention obligations, when the information may be relevant to pending or reasonably anticipated litigation.



### Preservation





### **Legal Hold:**

- A process for preserving documents, information or other evidence that may be relevant in litigation.



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### **Manual Legal Hold Process:**

- Manual identification of ESI
- Manual identification of custodians
- Cumbersome distribution and tracking of legal hold notices
- Manual follow-up
- Manual reports or audit trails to demonstrate compliance

Discovery Team: "There has to be a better way"!



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### Legal Holds--A Good Place to Start

- Risk Management identified the benefits of automating the manual process for establishing and maintaining a legal hold.
- Discovery Team engaged the Executive members to obtain buy-in.
- Legal Hold vendor was selected based on defined technology criteria.



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### Legal Hold Process: The Future State

- Goal: A fully automated Legal Hold software solution that ensures compliance with the new FRCP and streamlines the legal hold process.



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## Legal Hold Software System Functionalities:

### NOTIFICATION

- May interface to an HR system to identify potential custodians of information.
- May send legal hold notices to all potential custodians, including external resources (outside counsel, vendors and contractors)

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## Legal Hold Software System Functionalities:

### INTERVIEW

- Allows litigation team members to schedule interviews with potential custodians—integrates with employee calendars.

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## Legal Hold Software System Functionalities:

### COLLECT

- Custodians of information may attach responsive documents to the legal hold notice and sends those documents to the litigation team.
- Provides a dashboard of status and statistics related to a litigation hold or requested documents.

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## Legal Hold Software System Functionalities:

### MONITOR COMPLIANCE

Records the following:

- Date notice was sent
- Date recipient acknowledged legal hold
- Records all recipient questions regarding the legal hold
- Sends automated reminders to litigation hold recipients.

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## Legal Hold Software System Functionalities:

### **MONITOR COMPLIANCE:**

- Sends automated alerts/notifications to supervisors of non-respondents at a specified time duration
- Software provides a single source for creating, distributing, managing and tracking all litigation hold notices
- Provides a dashboard statistics related to legal hold notification, collection, and compliance.

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### **The project as it stands today:**

- Key players in the healthcare organization agree that legal hold compliance is important to the organization; allocated resources to meet obligations.
- A legal hold software vendor has been selected; implementation in progress.
- Two FTE's have been allocated:
  - Discovery Program Manager
  - Discovery IT Analyst

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### Ongoing Efforts:

- Discovery Team meeting regularly; focused on clearly defined deliverables
- Developing a Discovery Response Plan
- Organization-wide education for leadership; online education for all employees (in development)
- Data Mapping
- Developing partnerships with key consultants/vendors.

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### Challenges:

- Healthcare offers a diverse mix of characters with different interests, culture and priorities.
- eDiscovery costs compete with EHR implementation and other critical funds.
- Others may underestimate the potential cost of eDiscovery.
- Legal Holds software is not the silver bullet. Still need to address collection, preservation, and production of medical ESI.

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### Success Factors:

- Engaged executive sponsors early in the process:
  - Legal (General Counsel)
  - Chief Information Officer (CIO)
  - Risk Management
  - Corporate Compliance



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### Success Factors:

- Diversified!
  - Found collateral benefits to eDiscovery initiatives to spread the cost between various departments.
  - Recruited the right players on the team.
    - Don't be cheap-EDUCATE!
    - A well informed team helps drive your initiatives.



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## Success Factors

- Leveraged the law to drive change.
- Developed a strong business plan
  - Who, what, where, how much, ROI



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## Technology Solutions on the Horizon for Healthcare Organizations:

- Preservation and Production software solutions
- Electronic Record and Content Management



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### Lessons Learned

- More efficient to involve eDiscovery consultants at the onset of any eDiscovery initiative.
- Should develop a 3 year eDiscovery plan to clearly outline the scope and timeline of eDiscovery initiatives.

**BUDGET FOR E-DISCOVERY...IT IS INEVITABLE!!!**



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## THANK YOU!

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