

**Don't Get Burned:
Proper Implementation of the
"Litigation Hold" Process is Your Best
SPF (Spoliation Protection Factor)**

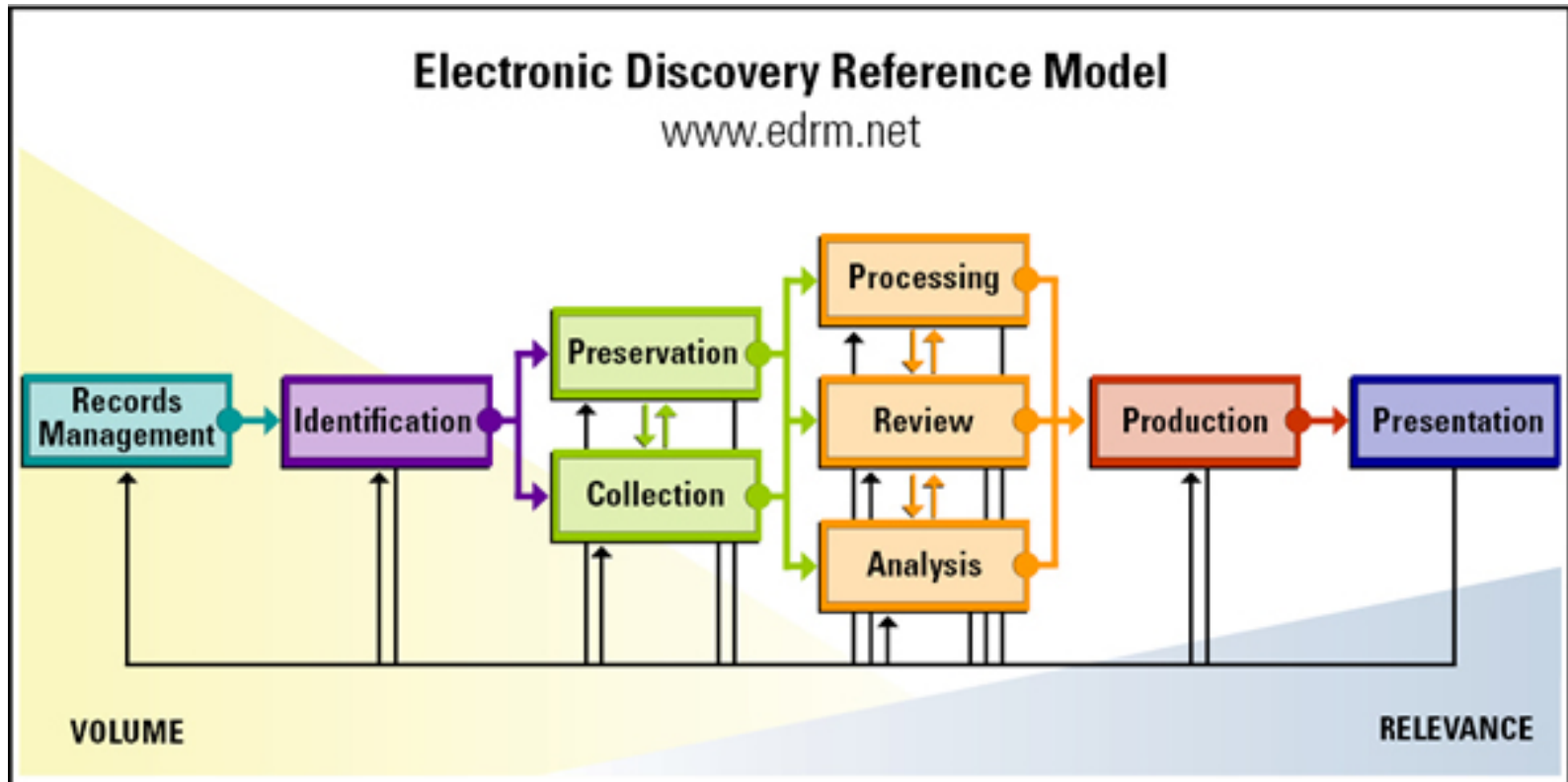
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Overview

- Understanding the duties upon parties or potential parties to litigation
- Building a blueprint for a defensible electronic evidence collection plan
- Implementing the litigation hold as customized to each particular situation
- Avoiding sanctions for failure to comply with court's expectations
- Q & A throughout!



The Litigation Hold Doctrine

- Duty to preserve evidence requires good faith and reasonableness, considering the nature and risk of the (potential) litigation
- Litigation Hold = Formal directive advising employees of obligation to preserve both hard copies and electronic evidence
- Preserve = save in identical condition, without alteration of “metadata”
- Suspension of document destruction policy

Trigger Dates for Duty to Preserve

- When a demand to preserve evidence is received
- When litigation is filed or served
- When a court issues a preservation order
- When litigation is “reasonably foreseeable”

When is litigation reasonably foreseeable? Not a bright line!

- A government claim, tort claim, construction claims review board claim, special investigation, or regulatory audit
- Contractual performance issues
- Major accident or injury
- Incident that results in police report (think both civil and criminal liability issues)
- Third party requests indemnification

When is litigation reasonably foreseeable? Not a bright line! [continued]

- When an employee is terminated
- DFEH, EEOC, or OCR charge is filed
- Whistleblower or retaliation claim is filed
- A party says that he/she is going to sue
- Multiple complaints about the same person/practice
- Experience with similar situations

When is litigation reasonably foreseeable? Not a bright line! [continued]

- Investigations that corroborate complaints
- Insurance carrier notified of risk
- Where the party holding information is contemplating its own lawsuit

Other Considerations

- There must be actual notice of a specific and definite claim with specific witnesses and supporting facts
- The value of the claim is irrelevant
- The scope or nature of the claim is irrelevant

What to do when circumstances call for a “litigation hold”

- First, must establish a team with representatives from:
 - Administration
 - Office of General Counsel
 - Technology department
 - Records management
 - HR and/or Risk Management
 - Involved campus departments

What to do when circumstances call for a “litigation hold”

- Second, after creation of the “team,” identify the key players who may hold relevant evidence
- Third, determine which files are relevant (file locations, file types, date ranges, etc.)
- Fourth, identify where these files exist
- Fifth, determine whether implementation of litigation hold is sufficient, or whether you need to begin collecting the data now to prevent risk of spoliation
- Sixth, create a collection plan taking into account the need to avoid incurring undue cost, time, or risk

Creating the collection plan

Under guidance of University Counsel:

- ✓ Understand where documents reside throughout the campus, particularly when multiple departments are involved
- ✓ Focus on key custodians and relevant files to narrow the scope
- ✓ Issue and repeat the “litigation hold” along with guidelines using several formats (email, mail, phone, in-person meetings)
- ✓ Make sure the process preserves all potentially relevant evidence
- ✓ Keep a written record of all steps taken (“chain of custody” log)
- ✓ Keep attorney-client privilege intact

Where to look?

Documents, data, and things may include: writings; records; files; correspondence; reports; memoranda; calendars; diaries; minutes; electronic messages; voicemail; e-mail; telephone message records or logs; computer and network activity logs; hard drives; backup data; removable computer storage media such as tapes, disks, and cards; printouts; document image files; Web pages, cache and temporary Internet files; databases; spreadsheets; software; books; ledgers; journals; orders; invoices; bills; vouchers; checks; statements; worksheets; summaries; compilations; computations; charts; diagrams; graphic presentations; drawings; films; charts; digital or chemical process photographs; video; phonographic tape; or digital recordings or transcripts thereof; drafts; jottings; and notes. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition.

Crucial Points in Implementation of “Litigation Hold”

- Interrupt regular document retention/destruction schedules
- Includes all forms of electronic communication in all locations and forms
- Must protect against overwriting
- Must retain backup tapes
- Must preserve evidence in original format, retaining metadata, until litigation is resolved

Understanding Metadata

- Metadata = “data about other data”
- Includes descriptive information about the context, quality, condition, or characteristics of the data, such as where the data is located, how it is associated, when it was created, identity of the authors and/or reviewers
- Is automatically generated by software applications; and can also be deliberately inserted by authors

Concerns about Metadata

- The law expects us to preserve this information during the period of a litigation hold
- Metadata can change, depending on how you save the electronic files
 - Sometimes when printed
 - When moved from hard drive to CD
 - When converted to PDF or text file
 - Sometimes when converted to newer version of native application
- Metadata is preserved in multiple locations (work stations, servers, backup systems)

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(f) ~~(d)~~ "Authorized Applications" means the Applications Software listed on Schedule 1.1(~~(d)~~) which the Parties intend to reside and run on the Host Equipment.

(g) ~~(e)~~ "Benchmark" has the meaning given in Section 8.8(b).~~"Benchmark" has the meaning given in Section 8.8(b).~~

(h) "Best Efforts"¹ means, with respect to any Party's performance of an obligation, a level of effort that is commensurate to reasonable for such Party to take after taking into consideration the reasonably foreseeable economic and other consequences the other Party would suffer if that obligation were not performed. For purposes of clarity the Parties acknowledge that Best Efforts may require a performing Party to incur costs or to make expenditures which costs or expenditures exceed the financial penalties such Party would incur, or the damages such Party would be liable for hereunder (including without limitation, any Service Credits), were it to fail to perform the obligation in question.

(i) ~~(f)~~ "Business Day" means any day other than a Saturday, Sunday or legal holiday in the State of California.

(j) ~~(g)~~ "Change Control Procedures" has the meaning given in Section 8.7(a).8.7.

(k) ~~(h)~~ "Commencement Date" means the date upon which Unisys completes the Transition Services.

(l) ~~(i)~~ "Commercially Reasonable Efforts" "Confidential Information"

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Particular CSU Nuances

- Computer use policy addressing personal use
- No promises of expectations of privacy
- Personal, private, or privileged information will be captured
- Potential collective bargaining issues
- Laptops and home computers
- Use of non-CSU controlled email accounts

Sanctions for Non-Compliance

- By the court:
 - Monetary sanctions
 - Evidentiary sanctions
 - Issue sanctions
 - Adverse inference jury instruction
 - Terminating sanctions, including possible entry of adverse judgment

- By CSU:
 - Potential discipline (you can't outsmart the system)

Lessons Learned

- Time to get your evidence collection plan in place is now!
- Importance of having regular document retention/destruction policies
- Importance of putting together the right team to establish a plan for each unique case
- Importance of good communication throughout the process with the right people
- Consideration of commercial vendors

Questions?



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