



Electronic Record Retention and eDiscovery

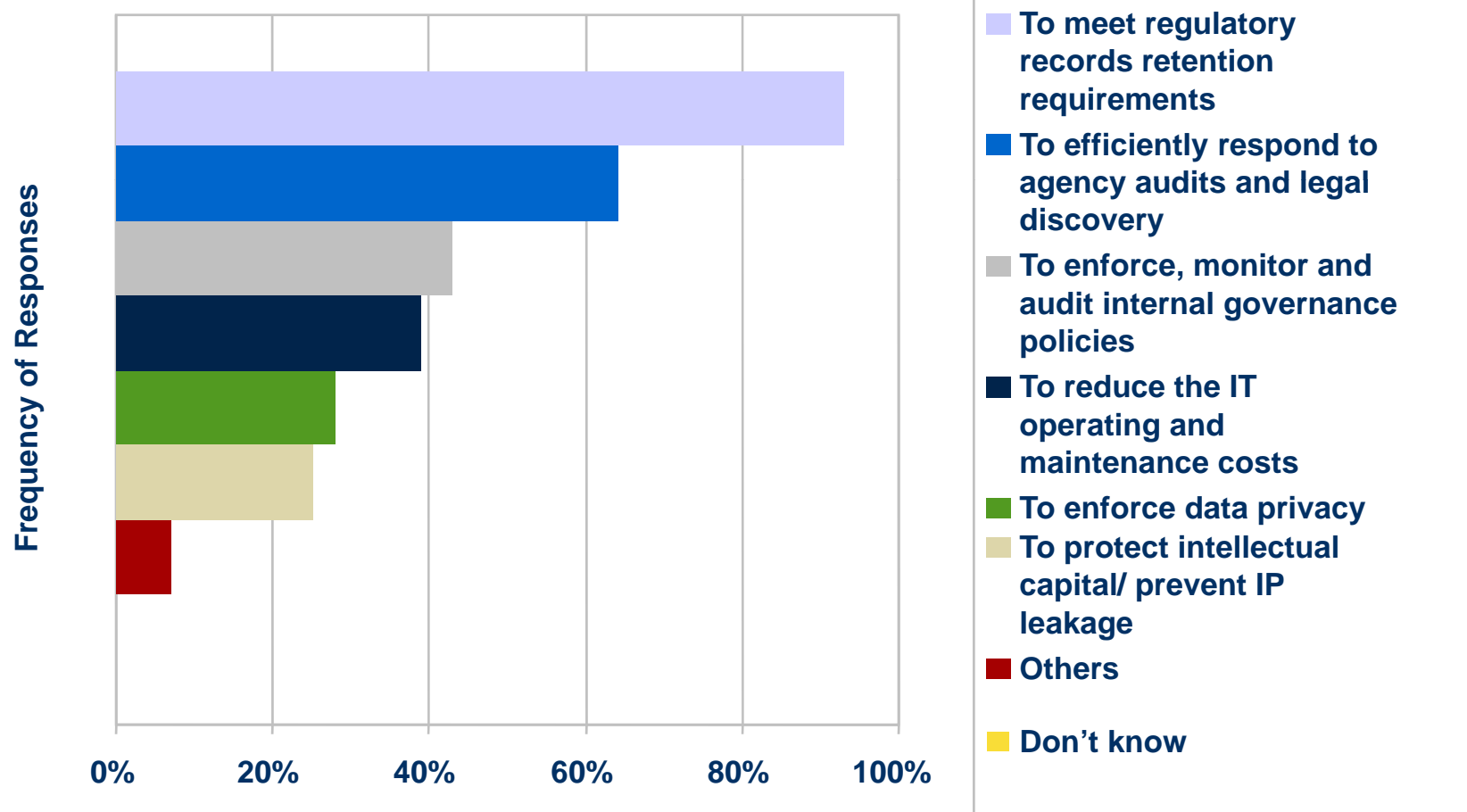
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Agenda

- What is all this eDiscovery buzz?
 - Email is major focus of ESI
- Impact of New FRCP rules
 - What are your retention and preservation obligations?
- The Discovery workflow
- Pre-litigation obligations
 - What is the trigger?
 - Responding to the trigger; conducting eDiscovery
 - Preservation
 - Collection
 - Etc.
- How to prepare your organization for a eDiscovery request?
- Federation or centralization
- IT / Legal disconnected?

Data Retention, Governance, and eDiscovery

What are the MAIN reasons your organization has implemented or is planning to implement its records & information management program?



n = 200

Source: IDC/ARMA Survey on Information Management for Compliance, 2007

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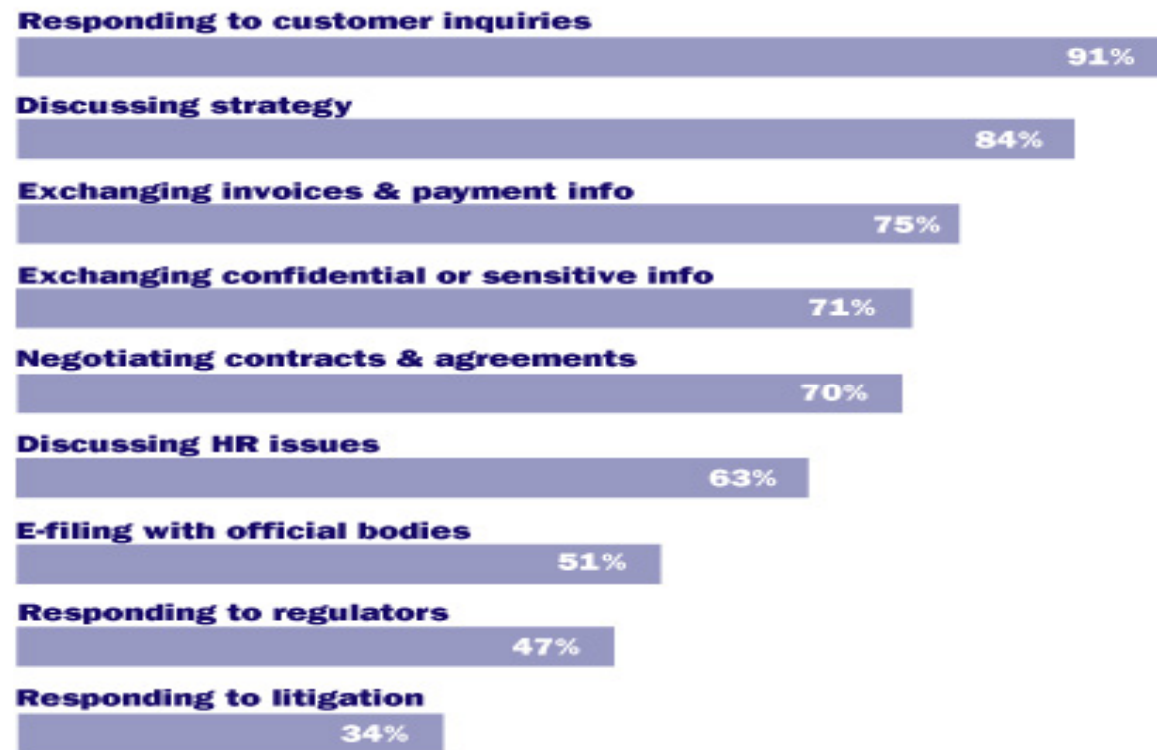
Understanding eDiscovery

- Electronically stored information (ESI) is increasingly becoming the focus of discovery
- Email is largest factor
- Can severely impact IT and potential to incur high costs
- Few organizations have appropriate “hold” mechanisms that freeze records in anticipation of litigation or audits.

How Email is Used

- The volume and value is increasing
- Many are potential records
- Email records must be captured and managed against an organization's retention plan

How Organizations Use Email Today (as a percentage of respondents)



Source: *Electronic Communications Policies and Procedures: A 2005 Industry Study*
AIMM International and Kahn Consulting, Inc., 2005

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www.kahnconsultinginc.com



Email Records Management & Discovery

“Every email should NOT be retained”

- *Forrester Research*

“Email should NOT be retained forever”

- *Gartner*

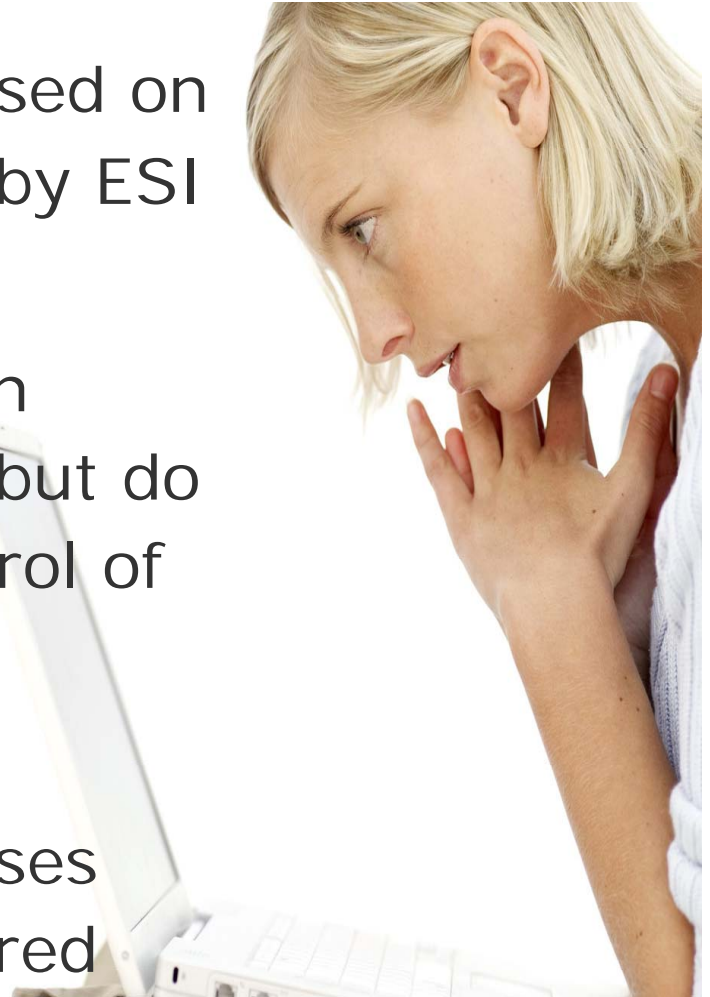
“Firms need a way to **archive only those emails that are business records, for just as long as necessary**, and to be able to produce just the relevant records as part of a legal discovery or internal investigation.”

- *Forrester Research*

Taking Control of Information

Impact of the New Federal Rules

- The new Amendments are focused on the important issues presented by ESI
- The new rules don't mandate an organizations retention policies but do provide impetus for tighter control of information.
- All cases are now eDiscovery cases because of early attention required



Understanding eDiscovery

Early Attention Conferences

- Initial conference for parties to meet and discuss “issues relating to disclosure or discovery of ESI.” (Rule 16c & 26f)
 - Identify early all sources of data that you might want to use to support your claims or defenses by “category and location.
 - Develop a proposed discovery plan
 - Requesting party may specify “native format” including metadata
- Discussion should include:
 - Computer systems
 - Persons with Special Knowledge
 - Scope of eDiscovery
 - Sources of Information
 - **Reasonable Accessibility**

Understanding eDiscovery

Production of ESI

- Rule 34(a): Specifically calls out “electronically stored information” as within the scope of documents that may be inspected, copied, tested or sampled.
- Rule 34(b): Production Format
 - Allows the requesting party to specify production format for electronic documents (i.e., native format, tiff or in an online repository).
 - The default production format may be either a format in which the information is “ordinarily maintained” or in a “reasonably usable” format.

Understanding eDiscovery

Two Tier Production of Rule 26(b)(2)(B)

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.

On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. (Producing party has burden.)

If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. (Proportionality.)

Understanding eDiscovery

Safe Harbor

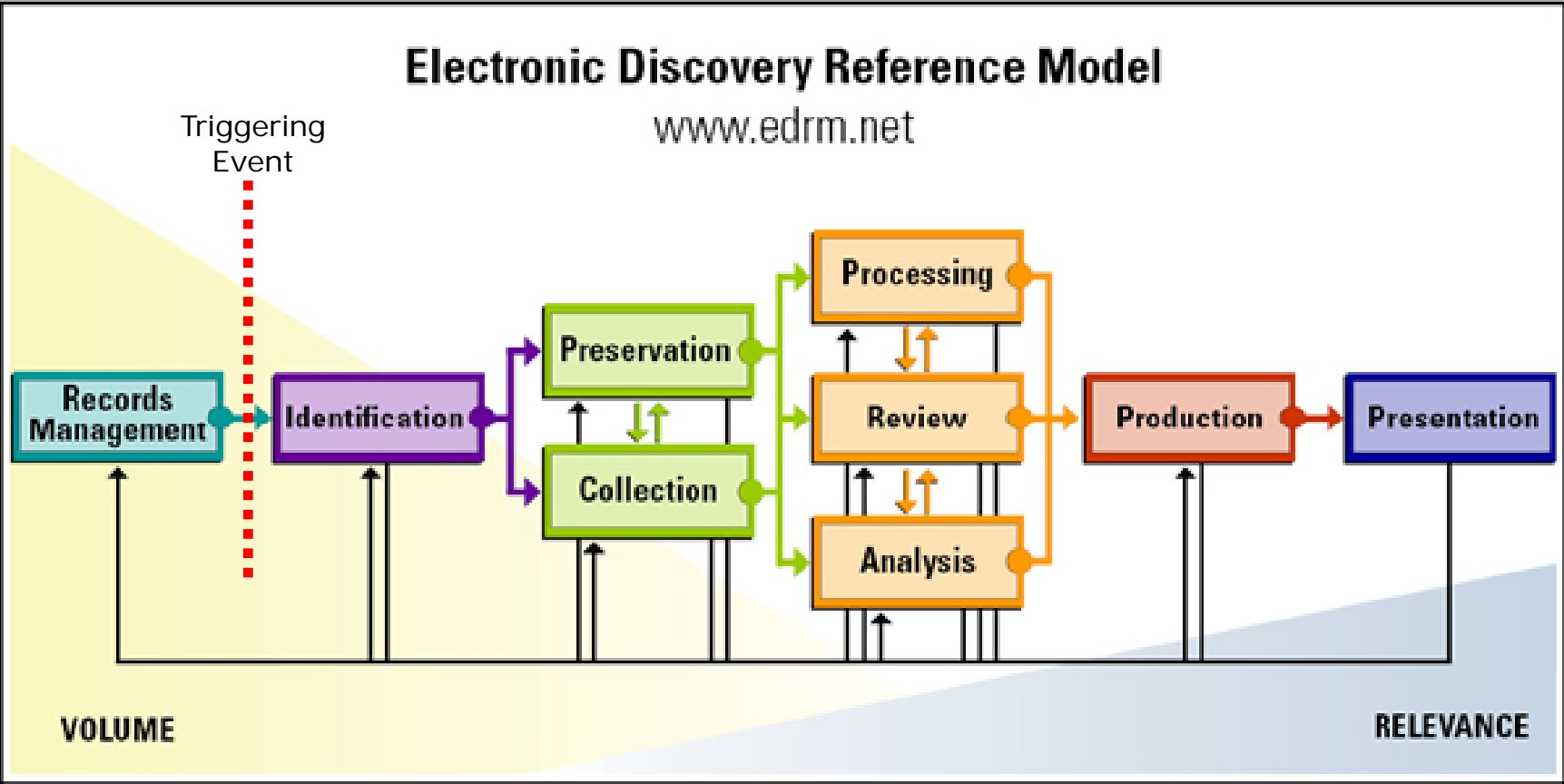
- Rule 37(f) offers a limited safe harbor from rules-based sanctions for ESI lost as a result of the "routine, good-faith operation" of a computer system.
- "Routine" and "good-faith" are used to indicate control over the information that a company has good Records Retention practices.

Implications for CIOs

- Early conferences with lawyers on what you have and how it is stored.
- CIO probable manager of Litigation Hold.
- Probable participation in early conferences with opposing counsel.
- Possible testimony to describe and explain systems at case management conference and at Person Most Knowledgeable (PMK) deposition.

Taking Control of Information

The eDiscovery Flow

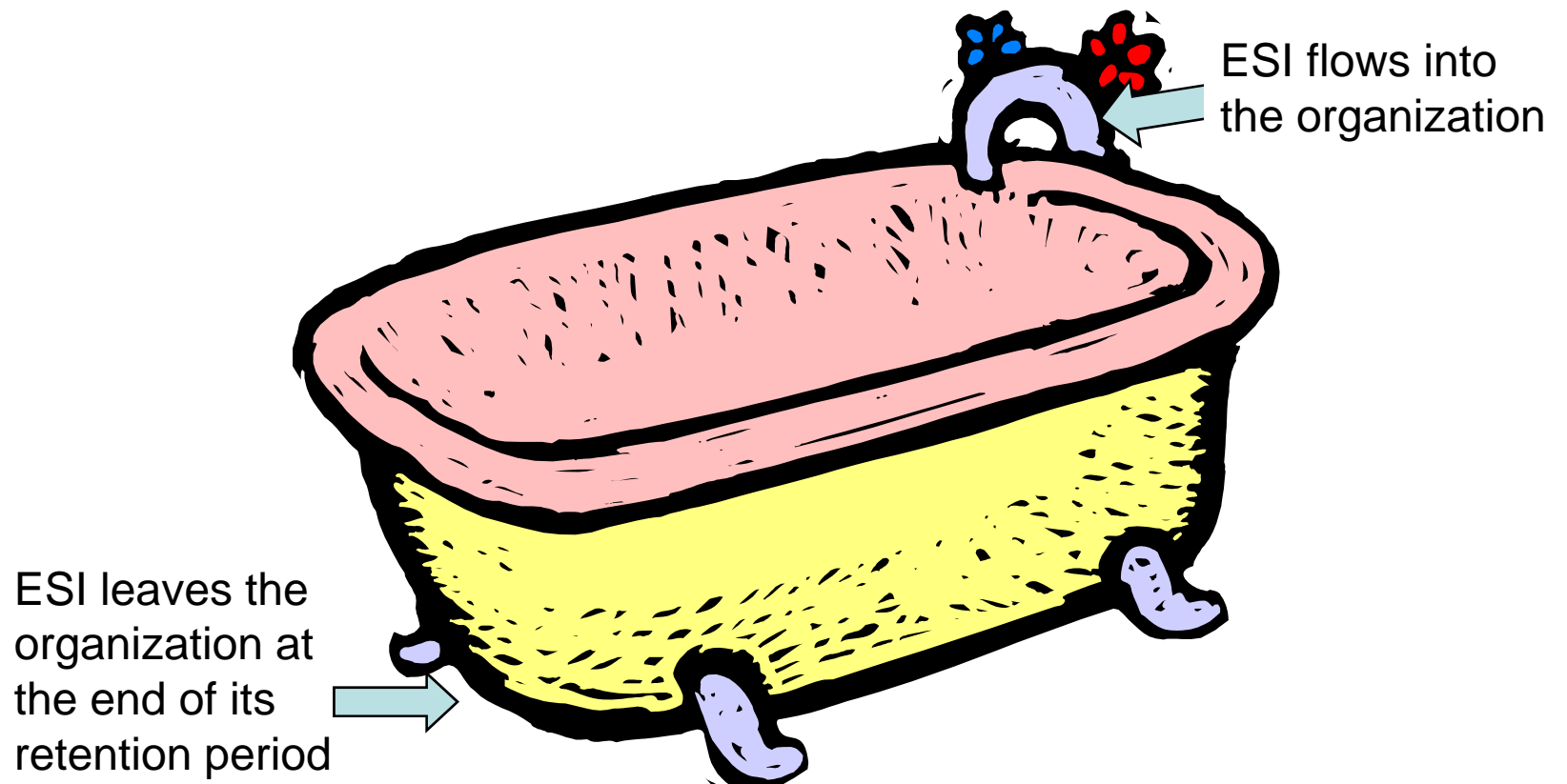


Best Practices in Ordinary Times

Pre Litigation or ESI request

- Determine retention policy
 - Lots of policies are OK
 - 60 day delete
 - Keep Everything
 - Rigorous Records Management
- Prepare process for legal holds
 - Determine process
 - Use technology
- Map out data sources
 - Where is it and in what format

Data flow in 'ordinary times'



The Triggering Event

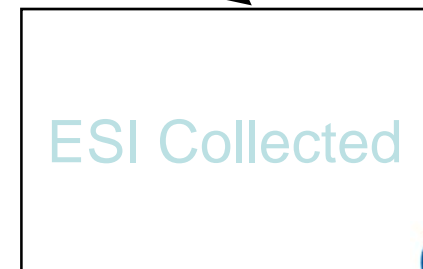
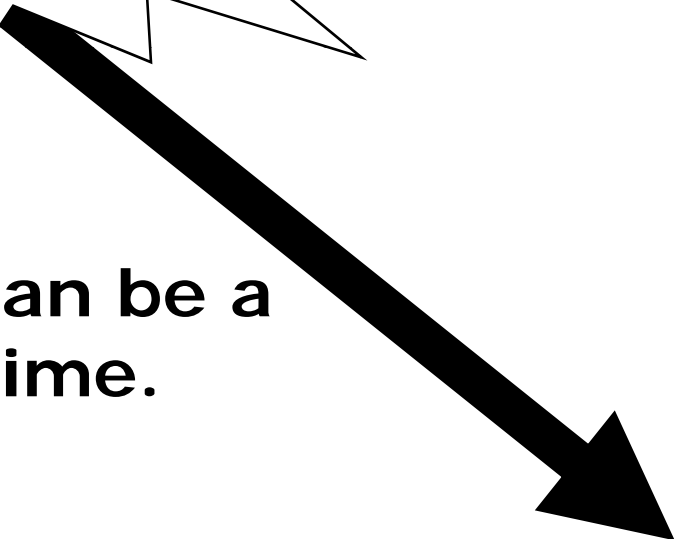
- Lawsuit
- Subpoena
- Preservation letter
- Regulatory Investigation letter
- “Reasonable Anticipation” of litigation
 - Threat of litigation
 - Employee storms out in a huff
 - Etc.

This is an **END** to Ordinary Times

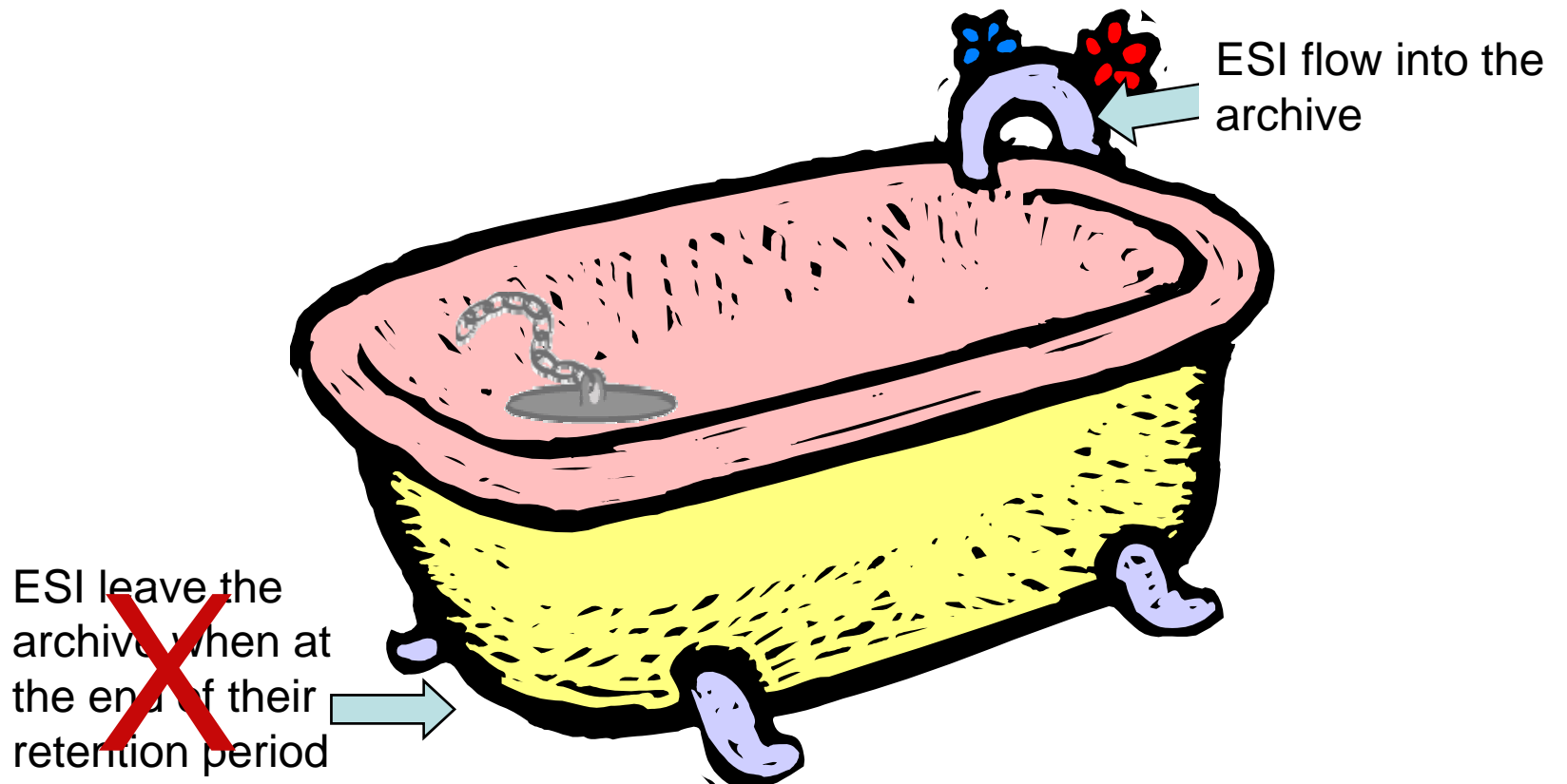
First Order of Business: Preservation



This can be a long time.



Preservation Obligation



Preservation Best Practices

- Identify 'Key Players'
- Select relevant date range
- Take preservation steps
 - Communicate preservation obligations
 - - OR -
 - Use technology to take users 'out of the loop'
- Obligation kicks in immediately
- Use your data map

Preservation Efforts

Why Can't Legal Just Ask For What They Want?

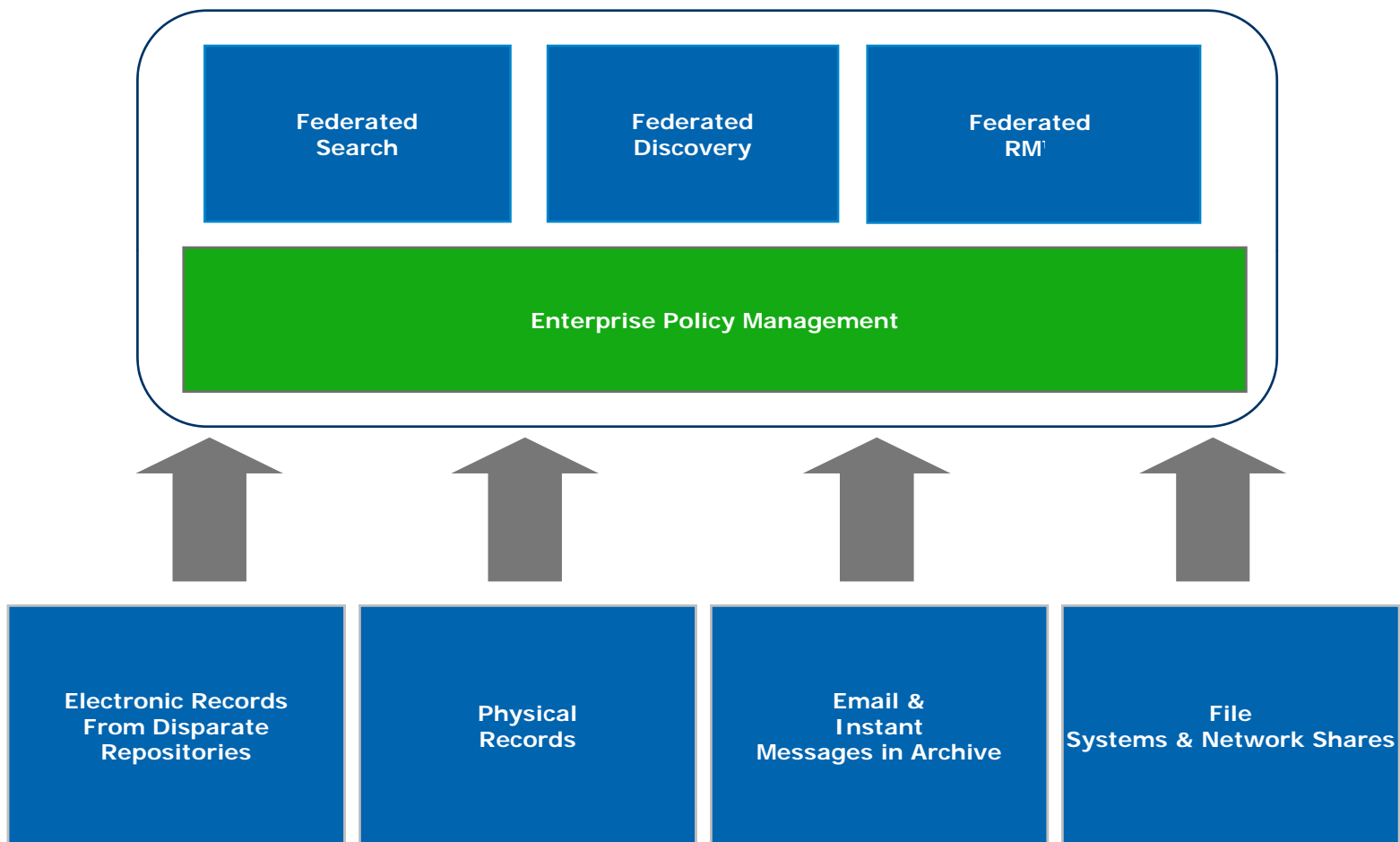
- Typical scenario:
 - Day 1 – Preserve for 35 people
 - Day 30 – Preserve for 350 additional people
 - Day 90 – Wait; we only need 40 people. But 3 on the initial list don't need to be preserved.

Very Dynamic Process

eDiscovery Best Practices - Summary

- Identify what you have and where
- Determine/apply retention policy
 - According to data value or regulations
- Clean out what you can
- Develop (and audit) legal hold capabilities
- Learn from experiences
- Technology can help

Federated Information Governance

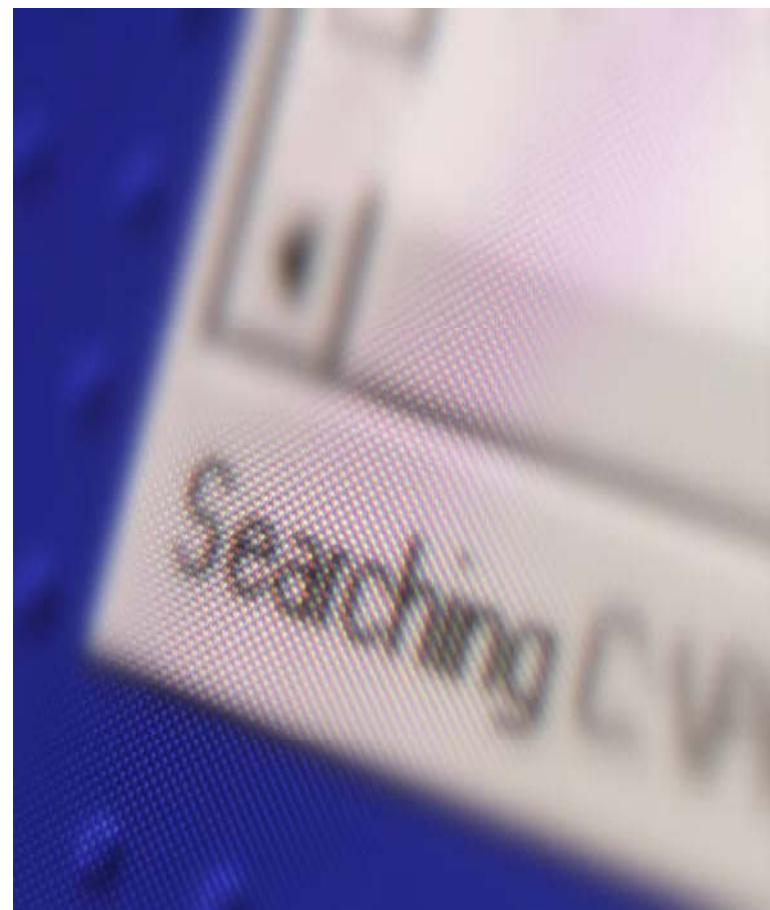


eDiscovery challenges

How it is handled by many organization

Current Landscape

- Reactive, ad hoc action
- High eDiscovery cost
- Services based, law-firm centric
- Clients billed by volume
- Collection efforts disruptive to business
- No investment; throw-away money



Taking Control of Information

IT and Legal Disconnect

- IT owns data, Legal owns discovery process
- IT must do Legal's bidding, abandoning its own work and using scarce IT resources
- IT must frequently stop recycling backup tapes to meet court-ordered data preservation
- Legal must rely on IT for critical restoration tasks



Taking Control of Information

Technology Wish Lists

What IT Wants

- Manageable Data Stores
- Server Performance
- Backup capability / Ability to recycle backup tapes
- Hand over discovery to legal

What Legal Wants

- Defensible collection and preservation methodologies
- Searchable ESI universe
- Bring ESI under management when necessary
- Predictable Discovery costs
- Minimize disruption to the business
- Turn Discovery into a business process, investment

Taking Control of Information

What is needed in an eDiscovery solution

- Legal Holds applied / managed by Legal
- Ability to manage multiple Legal Holds
- Collect Messages and ESI at the time of creation / receipt or based on a policy?
- All Messages (and attachment) and other ESI content indexed, so searchable
- Collection is transparent to end-users
- Provide ESI collection and document Triage from Day 1

Thank you