HOW TO SURVIVE THE DISCOVERY E-POCALYPSE

HALEY CARPENTER- DIRECTOR OF MANAGED REVIEW SERVICES & HANNAH OGARD- VP OF MANAGED SERVICES

cicayda

MAIN TAKE-AWAYS FROM THIS CLE

- WHAT ESI IS AND WHERE IT COMES FROM
- WHAT MAKES ESI DIFFERENT FROM PAPER DISCOVERY
- WHAT IS THE EDRM AND STAGES THEREOF
- THE VALUE OF PROPER EDISCOVERY WORKFLOW
- EDISCOVERY TECHNOLOGY AND BEST PRACTICES

cicayda

EDISCOVERY – WHAT CHANGED?

- THE WAY WE WORK CHANGED
- THE WAY WE COMMUNICATED CHANGED
- THE WAY WE STORE RECORDS CHANGED
- THE AMOUNT WE WORK, COMMUNICATE AND STORE RECORDS BOOMED

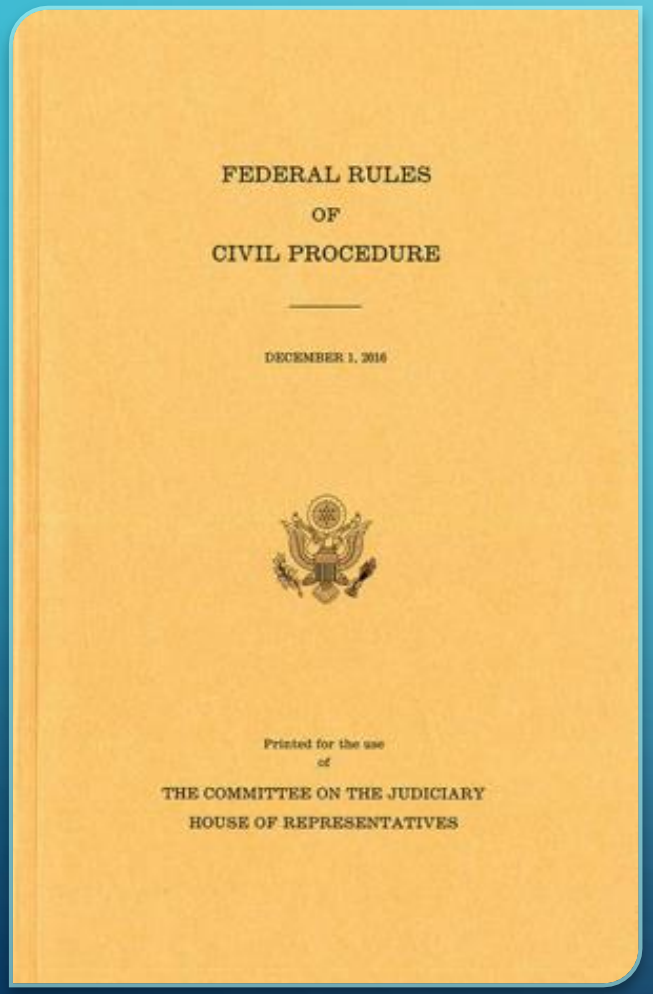
cicayda

EDISCOVERY – WHERE DOES IT COME FROM

- Electronic discovery is not really a major shift in the legal world. It is better thought of as a shift from the paper-based processes of the past to the computer-based current environment

cicayda

ESI (ELECTRONICALLY STORED INFORMATION)


FEDERAL RULES
OF
CIVIL PROCEDURE

DECEMBER 1, 2016

Printed for the use
of
THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

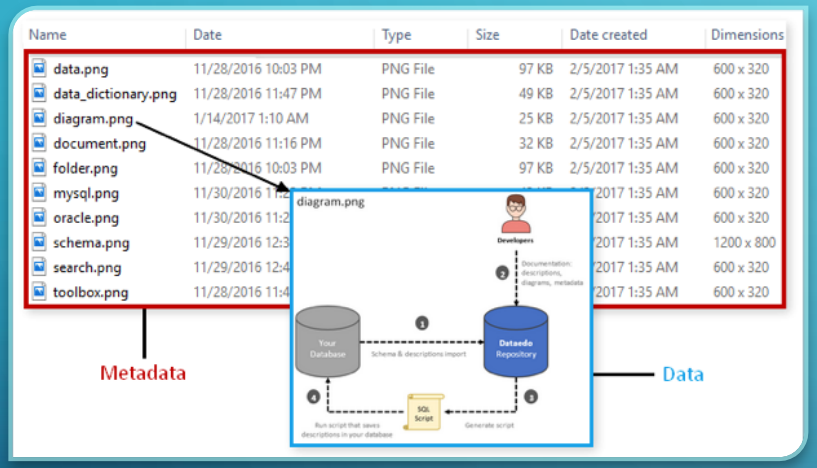
- **Electronically stored information** (**ESI**), for the purpose of the Federal Rules of Civil Procedure (FRCP) is information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software

WHAT IS ESI ? - FRCP RULE 34(A)

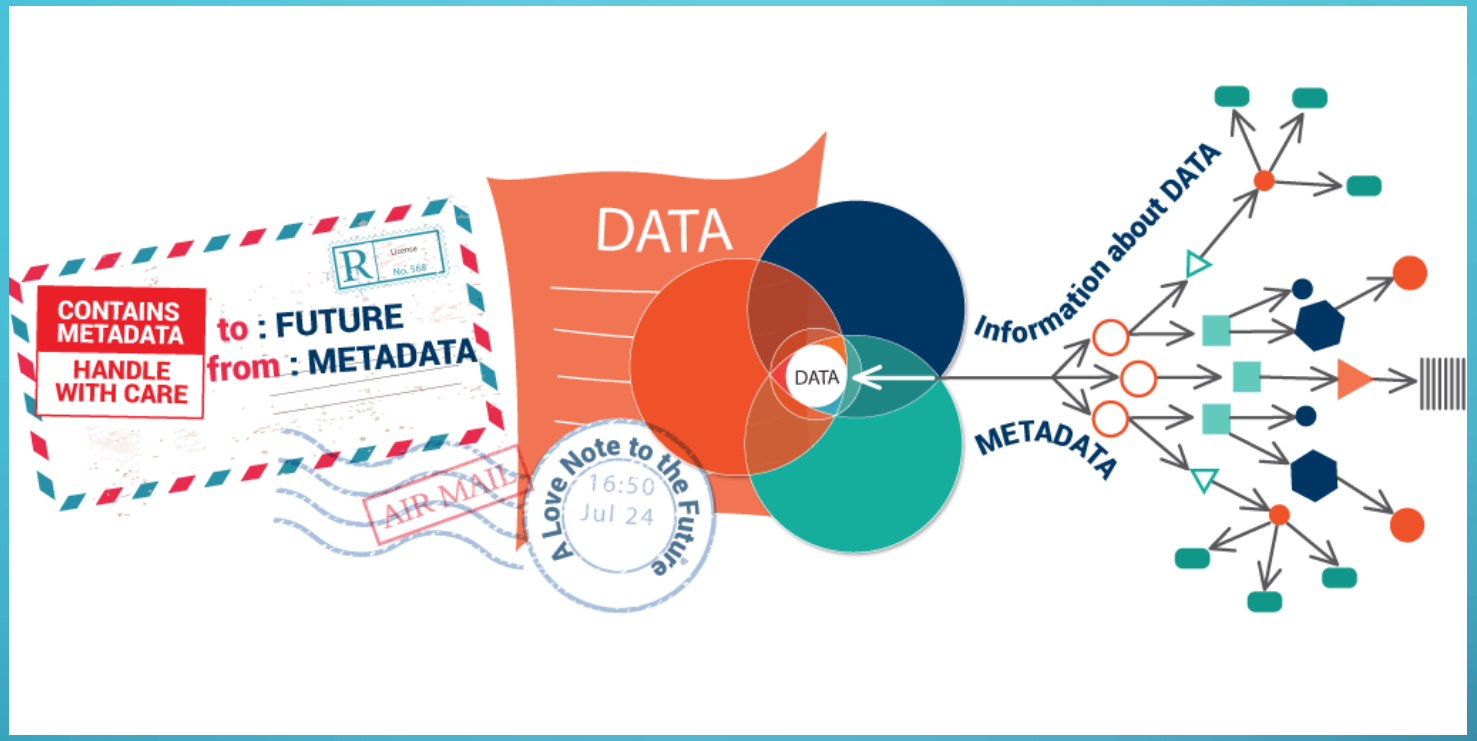
- Any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;

cicayda

ESI - WHAT MAKES IT DIFFERENT



- METADATA – DATA ABOUT DATA
- ESI is usually accompanied by metadata that is not found in paper documents and that can play an important part as evidence
- The preservation of metadata from electronic documents creates special challenges to prevent spoliation



- ONCE EXTRACTED FROM THE FILES, METADATA HELPS TO:
  - SEARCH, ISOLATE, FILTER, QUERY
  - CULL, SORT, IDENTIFY, ORGANIZE

ESI - WHAT MAKES IT DIFFERENT?

- Unlike paper evidence, electronic evidence is multi-dimensional, potentially “virtual” — since it is not necessarily tied to, or under the control of, a single user — and rarely can be destroyed without leaving evidence of the destruction

EDISCOVERY – FRCP RULE 26

- RULE 26(F) MEET AND CONFER
- The stated goal of the rules is for parties to have an open dialogue, exchange information, and strive to reach agreement on many of the discovery-related topics.
- Ideally, the end result of the FRCP 26(f) conference will be the joint creation of a comprehensive discovery plan, details of which are addressed more fully herein.

cicayda

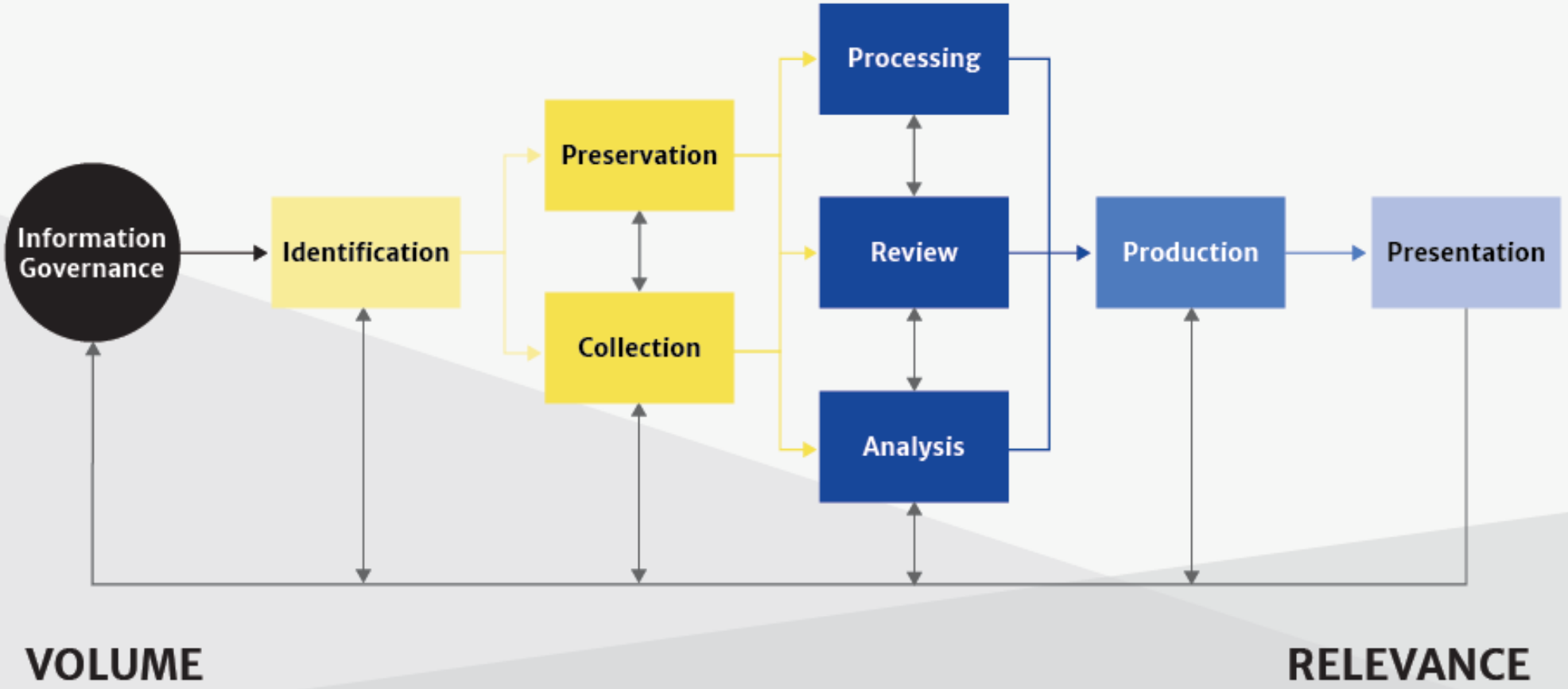
EDISCOVERY – FRCP RULE 26

- **RULE 26 DISCOVERY PLAN**
- Initial disclosures, including proposed changes to the timing, form, or requirements.
- The parties may choose to change the timing or detail to be included in the initial disclosures or reach agreements about the specific information that will be included.
- For example, they may agree to exchange lists of proposed custodians and non-custodial sources of ESI, or they may agree to delay such a detailed exchange until a specific later date.

cicayda

CORPORATE EDISCOVERY

Electronic Discovery Reference Model



Adapted from Electronic Discovery Reference Model, EDRM (edrm.net)

cicayda

EDRM - INFORMATION GOVERNANCE

- Information management is the starting point for the entire e-discovery process.
- Sound and comprehensive information management strategies aid organizations in the identification, collection, and preservation steps of the process and can lower the number of documents that need to be reviewed and produced for any litigation, thereby reducing costs.

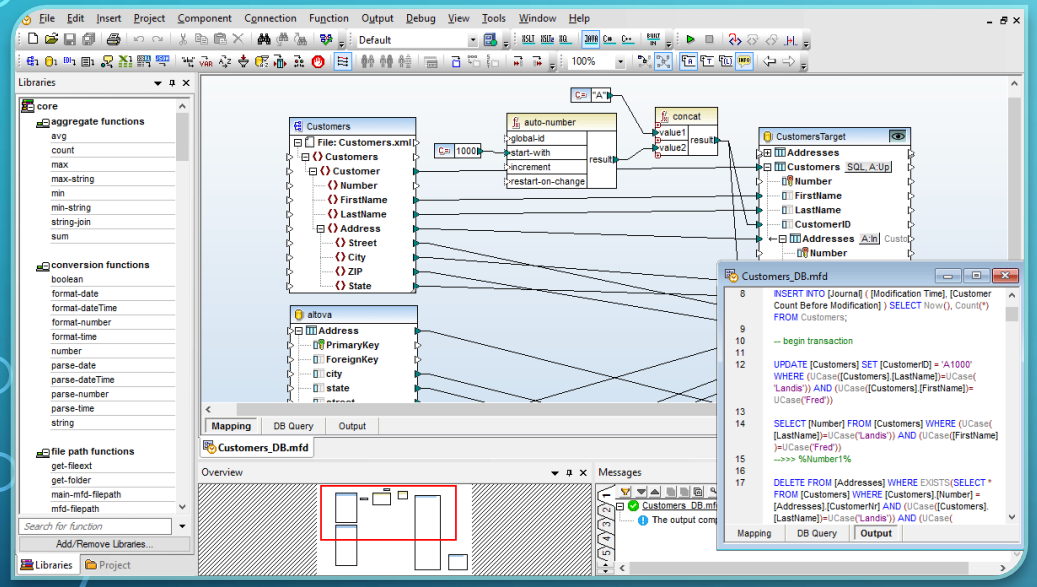
cicayda

INFORMATION GOVERNANCE

- Having a sound information management strategy can be particularly important with regard to preservation.
- While case law is constantly evolving, it remains the organization's duty to take steps to preserve potentially relevant documents as soon as there is a reasonable expectation of a legal event.
- Failure to do so, even with the best of intentions, can have disastrous consequences. To avoid a claim of spoliation, every organization should employ an information management strategy that facilitates document preservation.

cicayda

IDENTIFICATION - DATA MAPS



- Identifying which electronic documents may be germane to a particular matter can be expensive and time- consuming.
- One helpful way to sift through the company's data is to use its data map or data survey of IT systems.

IDENTIFICATION - **DATA MAPS**

- The first step in creating a data map is to list all of the IT systems used by company employees. This is helpful in responding to discovery requests and in participating in the required Rule 26 "meet and confer" process at the beginning of a lawsuit.
- The list will include all physical servers, virtual servers, networks, externally hosted systems, back-ups (tapes and digital backups), archival systems, desktops, smart phones, etc.

cicayda

IDENTIFICATION - **DATA MAPS**

- The next step in surveying the data is to gather as much information as possible about the ESI stored on each system.
- To do this, it is generally necessary to include a wide spectrum of employees of the company since each may use different systems.

cicayda

QUIZ TIME – DATA SIZES

- Can you rank these in order from smallest to largest?
  - A) Terabyte
  - B) Megabyte
  - C) Petabyte
  - D) Gigabyte

IDENTIFICATION - **LITIGATION HOLD**

- Part of any litigation readiness plan is to create and implement a litigation hold protocol.
- A litigation hold is a directive to preserve ESI and documents that are potentially relevant to a matter.

cicayda

IDENTIFICATION - **LITIGATION HOLD**

- The timely issuance of a litigation hold is critical to minimizing the risk an organization faces arising from the loss of relevant ESI that may be requested for production or used by the organization in its own defense.
- The issuance of a litigation hold is generally required at the outset of litigation or <u>whenever litigation is reasonably anticipated</u>.

cicayda

PRESERVATION - **LITIGATION HOLD**

- As soon as a party reasonably anticipates litigation (or a similar event, such as a governmental investigation) over a subject, that party has an immediate obligation to preserve both hard copy materials and electronically stored information ("ESI") relevant to claims and defenses around that subject.

cicayda

PRESERVATION

- Failure to implement an adequate legal hold may cause the loss of potentially relevant ESI (as well as paper, of course) and give rise to legal claims of spoliation.
- Even if no data loss occurs, a shoddy legal hold process may provide an opponent with fodder for an expensive and distracting exploration of the party's discovery processes.

cicayda

PRESERVATION

- **There are four major types of sanctions:**
- **monetary awards,**
- **adverse inference instructions,**
- **limiting of claims, or**
- **defenses and default judgment or dismissal.**
- These are not mutually exclusive and a court may award a combination of sanctions.

cicayda

COLLECTION

- A reasonable collection strategy must address what ESI should be collected, when, and *how*.
- Thoughtful planning of data collection and careful implementation of that plan will reduce the time and money spent on collection, review, and production.
- It will also guard against later disputes related to the data that is collected.

cicayda

PROCESSING

- **<u>FIRST STEP IN MAKING ESI READY FOR A REVIEW DB</u>**
- PRESERVING NATIVE – IMAGING
- EXTRACTING TEXT AND METADATA
- CREATING LOAD FILES

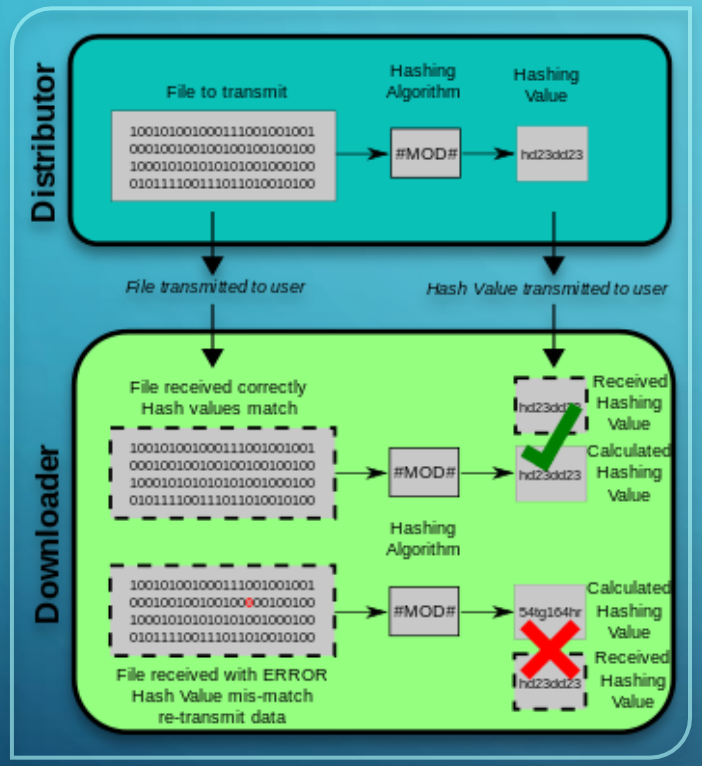
cicayda

PROCESSING

- **ELIMINATING IRRELEVANT ESI THROUGH CULLING**
- **DE-NISTING** – Remove all files on a specific list of file types deemed to be of no evidentiary value, sometimes referred to as "de-NISTing" because the list was created by the National Institute of Standards and Technology (NIST).
- **DE-DUPLICATION** - De-duplication is the process of removing exact copies of the same message or file from a data set, thus reducing the number of files that need to be reviewed.

cicayda

QUIZ TIME – PROCESSING



- What is a MD5 Hash Value?

REVIEW

- Once the collection and processing of ESI is complete, the next phase in the discovery project is the review of that material to determine exactly what needs to be produced to the requesting party.
- There are myriad decisions to be made about structuring and staffing the review, all with costs and benefits and strategy implications.

cicayda

REVIEW - REVIEW TOOLS AND METHODS

- **Linear review tool** Presents the documents in a fashion similar to how paper review was done in years past: a virtual box of documents (an electronic file) is reviewed from front to back, in the order in which the documents happen to be stored.
- No association is made between one document and another for purposes of review and each document is presented essentially at face value, with no additional information about that document displayed.

cicayda

REVIEW - REVIEW TOOLS AND METHODS

- **ANALYTICAL TOOL**
- Performs some analysis of the ESI contents and metadata and presents the documents in some non-linear way.
- The specific functions of different analytical tools vary significantly, but they all generally aggregate documents by some method in order to present them in groupings that make some logical sense and convey information about the groups.
- For example, emails might be gathered together based on similarities in subject lines, proximity of dates, commonality of sender and recipients, or concepts contained in the words of the document, as analyzed and identified by the software.

cicayda

REVIEW – MANAGED REVIEW

- COST EFFICIENT
- REVIEW PROTOCOL
- COMMUNICATING WITH REVIEW TEAM
- QUALITY CONTROL
- SEAMLESS 1ST, 2ND AND PRIV REVIEW ALL AT ONCE
- CONSISTANT RESULTS FROM FULL TIME REVIEW STAFF

cicayda

REVIEW – TECHNOLOGY ASSITED REVIEW

- A form of automated document review by which senior attorneys intimately familiar with a case or investigation "train" the software program to make coding decisions, technology assisted review may drastically reduce the time associated with traditional document review methods while besting the accuracy of keyword-based and manual reviews.
- These tools may also be less expensive than human review, though that needs to be determined on a case-by-case basis.

cicayda

REVIEW – TECHNOLOGY ASSITED REVIEW

- Adoption of these review technologies was initially slowed by defensibility concerns and uncertainty over whether courts would deem use of the technology a reasonable precaution against the wrongful disclosure of privileged materials.
- These fears were perhaps compounded by the lack of transparency afforded by some of the software programs.
- Service providers, wary of revealing the secrets behind their proprietary coding formulas, kept the specifics of their algorithms and workflows under wraps.

cicayda

PRODUCTION

- Once the production set of ESI is reviewed; it must be produced to the requesting party.
- This ESI must also be maintained by the producing party as a record of the production.
- The produced data will generally be held in a database that will allow the producing party to work with the documents as the case proceeds.
- Often a party will use the same repository to store both its produced and received documents.

cicayda

PRODUCTION - FORMATS

- **NATIVE PRODUCTIONS** -
- There are both advantages and dangers to dealing with documents in their native format, which should be weighed carefully before making a decision to produce in this format.
- Native documents can easily be altered, either intentionally or accidentally, leading to concerns about the integrity of the documents once they are produced

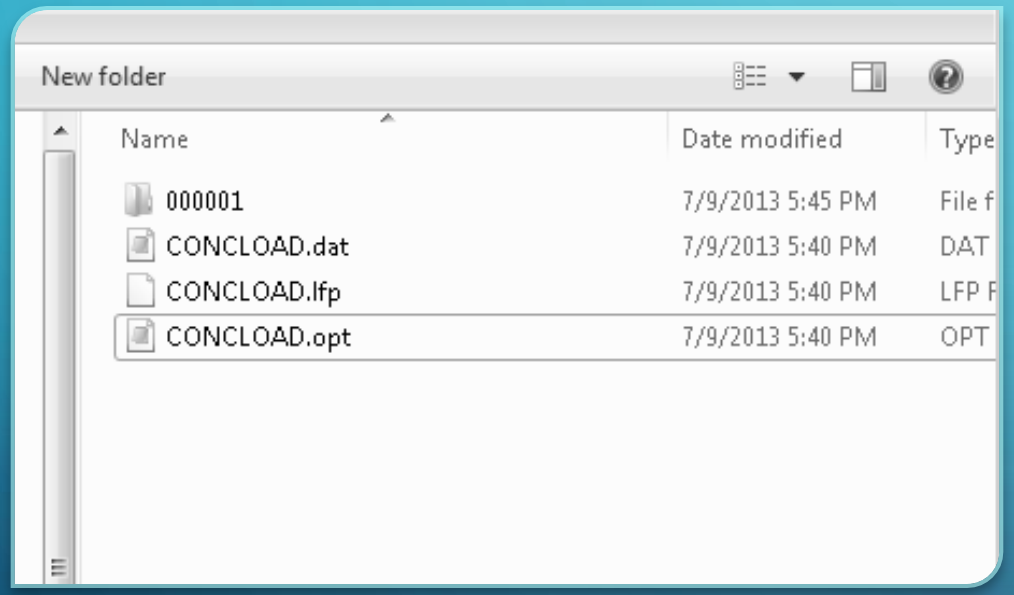
cicayda

PRODUCTION - FORMATS

- **IMAGE PRODUCTIONS**
- This is the electronic equivalent of printing it out and creating a static image with distinct pagination, which can be labeled with numbering and protective order designation.
- This format is more difficult to alter and is more amenable to use as an exhibit for deposition or trial. It can be printed and used in paper format with ease.
- There are three main drawbacks to producing in an imaged format: expense, time, and loss of useful information to which the requesting party may be entitled.

cicayda

QUIZ TIME – PRODUCTIONS



- What is a load file?

ESTABLISH A ESI PROTOCOL EARLY

- IN FEDERAL COURT, THIS IS THE RULE 26 MEET AND CONFER
- IN STATE COURT, FOLLOW THE SAME PROCESS INFORMALLY
- DRAFT A ESI PROTOCOL AGREEMENT TO BE SIGNED BY BOTH SIDES AND ENTERED INTO A ORDER BY THE COURT IF NEEDED
- WILL SAVE TIME AND MONEY FOR BOTH SIDES

cicayda

EDISCOVERY PROJECT MANAGEMENT

- DEFINE WHO IS ON YOUR TEAM AND WHAT ROLE EACH PLAYS
- CLIENT CONTACT, VENDOR CONTACT (COLLECTION, PROCESSING, HOSTING) PARALEGAL, ATTORNEYS, IT
- IMPLEMENT A COLLECTION AND PRODUCTION TRACKER
- PM NEEDS TO UNDERSTAND THE WHOLLISTIC PROCESS AND THE INFORMATION NEEDED TO COMMINICATE WITH EACH TEAM MEMBER

cicayda

EDISCOVERY - COSTS AND BUDGETING

- The practitioner who seeks to budget accurately and control expenses must understand which factors contribute to overall costs and how the variables associated with individual expenses can affect the project's ultimate cost.
- Consider the OPPORTUNITY COST

cicayda

EDISCOVERY - COSTS AND BUDGETING

- **<u>THIRD PARTY VENDORS</u>**
- Vendors are available to assist with virtually every step of the process, but are used most often for collecting ESI, processing ESI (culling by document type, deduplication, search terms, date range), hosting the ESI on a review platform, providing personnel to conduct the actual review, and converting the post-review documents to an imaged format if required and creating the associated load files.

cicayda

EDISCOVERY - COSTS AND BUDGETING

- **THIRD PARTY VENDORS**
- Solicit bids from a number of different vendors to obtain the most competitive price.
- When engaging in a bid process, ensure that each vendor is applying the same assumptions to the project and providing similar pricing information.
- Vendor proposals must be scrutinized to ensure that all costs identified in the bidding process are included in the vendor's proposal and that the vendor's cost variables are understood.

cicayda

EDISCOVERY - COSTS AND BUDGETING

- **THIRD PARTY VENDORS**
- Solicit bids from a number of different vendors to obtain the most competitive price.
- When engaging in a bid process, ensure that each vendor is applying the same assumptions to the project and providing similar pricing information.
- Vendor proposals must be scrutinized to ensure that all costs identified in the bidding process are included in the vendor's proposal and that the vendor's cost variables are understood.

cicayda

EDISCOVERY CLE – WRAPPING UP

- CURRENT TRENDS
- AI AND TAR
- SCALABLE ON DEMAND SOFTWARE
- COST EFFICIENT AND PASS THROUGH BILLING
- Q AND A