eDiscovery: Tips and Traps

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Fun Facts to Know and Tell

- **GHOST/MIRROR**: **Complete bit by bit copy of a drive. (Not just copying data; actually reproducing the hard drive.)**

- **LEGACY**: **Information from older systems no longer actively supported and not easily accessible.**

- **METADATA**: **Automatically created identifying information describing the history, tracking or management of an electronic file; linked to the file, but not visible when viewing the file.**

- **NATIVE**: **File format for a particular software (i.e. ".doc" for MS Word; ".xls" for MS Excel, etc.).**

Know Your Client (and their client)

- **Understand the hierarchy**
- **Who is responsible?**
- **Do they need expert help?**
- **Tour the facility**
- **What is their architecture?**
- **Legacy systems**
- **Proprietary software**
- **Hardware – laptops, smartphones, etc.**

Preservation Process - Plan

Anticipation of Litigation

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Notice to Client

Identify Witnesses/Key Players

IT

Auto Delete Policies

- Network Architecture
- Departed Employees
- Backup Procedures
- Initial, cost effective steps to preserve
- Competency
- Documentation

Legal

Employee hold notice

Consider Forensic Collection

Compliance

- Bad Actors
- Criminal?
- Risk

Reissue notice

HR

Departing Employees

- Policy for Departing Employees

Witnesses

- Work Data
- Home Data
- Personal email Accounts
- PDAs

Third Parties

Litigation HOLD, Seriously

- **If the attorney work product privilege attaches, so does the duty to preserve.**

- **Tell every department: IT, Legal, HR, etc.**

- **Be SPECIFIC as to the information to be preserved.**

- **Monitor and document compliance.**

- **Disable automatic deletion***

*BUT remember the safe-harbor (37(e)) for pre-suit deletions

Pre-discovery Collection

- **Make sure you are working with competent employees.**
- **Self-collection is subject to attack.**
- **Find independent collection/storage.**
- **Never offer to secure the data yourself and do not have e-mails forwarded to you.** *(You should work from a copy.)*
- **Don't assume that everyone knows the "obvious" (*e.g. m*ake sure everyone understands the meaning of "document").**

Internal Process Workflow

Data Collection Received

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Internal Processing

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Intake

- Materials logged
- Evidence ticket created
- Evidence mounted

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Analysis

- Create working copy
- Analyze file types
- Submit to attorney

Processing

- ESI Preparation
- Dedupe and Filter
- Exception handling
- Quality control

Review

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Production

Avoid Overproduction

- **Preserve *ALL***
  - **E-mail boxes**
  - **Key hard drives**
  - **Tape back up**

- **Collect *SOME***

- **Review *SOME***

- **Produce *LESS***
  - **Only what they ask for**
  - **Only what is reasonably accessible**

Preserve   Collect   Review   Produce
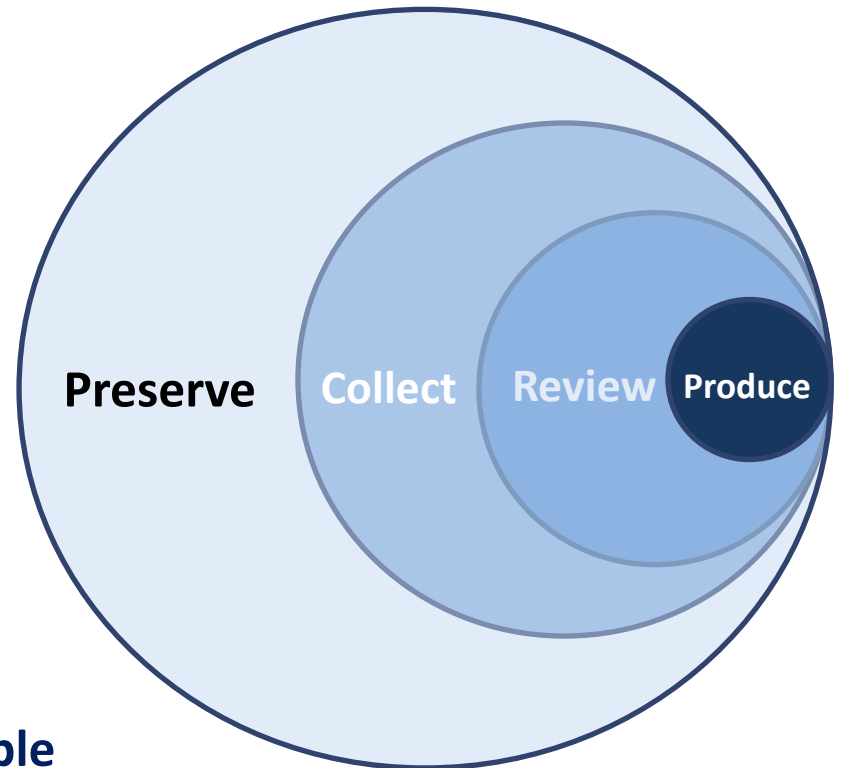
"Reasonably Accessible"

Most

Accessible

Least

Accessible

- **Active data** *(e.g. hard drives in use, on-line)*
- **Offline archives** *(e.g. indexed tapes)*
- **Near line data** *(e.g. CD's, flash drives)*

- **Offline storage** *(e.g. disaster recovery tapes)*
- **Erased or fragmented files** *(e.g. "deleted" files)*
- **Legacy data** *(e.g. for systems no longer in use)*

Speaking with the Enemy

- **Protective order**
- **Privilege waiver:**
  - **Claw Back**
  - **Quick Peek**
- **Format and preservation of ESI.**
- **Personnel, subject matters and search terms.**

Pesky Third Parties

- **Who else has your client's documents?**

- **Are you gathering data from another client of yours?**

- **Bank, Medical (and other) privacy laws**

- **Requests to third parties need to be narrow.**

Something WILL Go Wrong

- **Rogue or forgetful employees**
- **LOTUS Notes**
- **You'll forget if you do not write it down**
- **The data you forget could be your own**
- **Don't forget about PAPER!**

They're not all Federal Cases

- **Texas Rule 196.4:**
  - **Specifically ask for electronic or magnetic data.**
  - **Must produce what is "reasonably available."**
  - **Requesting party bears the cost.**
- **_Weekley Homes (295 S.W.3d 309)_**
  - **Courts must balance the benefit with the burden.**
  - **Sensitive information must be protected.**
  - **Look to FRCP for guidance.**

You can eDiscover some evidence on your own...

Aggregators
- **Addictomatic.com**
- **Blogpulse.com**
- **Boardreader.com**
- **Omgili.com**
- **Tweetbeep.com**
- **Twitrratr.com**
- **Tweetdeck.com**
- **Archive.org (Wayback)**

People Finders
- **ZabaSearch.com**
- **Pipl.com**
- **Wink.com**
- **Zoominfo.com**
- **Google.com**
- **Peoplefinder.com**
- **Spokeo.com**
- **411.com**
- **Whowhere.com**

- **Incriminating photos**
- **Incriminating posts, tweets, etc.**
- **Mood indicators**
- **Lists of friends**