

**CIO**  
Legal CIO Roundtable

# 2011 CIO ROUNDTABLE RETREAT

## Architecting Our Future

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*The Arizona Biltmore*  
*Phoenix, Arizona*

**eSentio**  
Technologies



# LITIGATION HOLD AND eDISCOVERY INDUSTRY BRIEFS

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# Agenda

What are law firm IT departments facing in continued support of their litigation groups?

- Legal Hold Updates
  - New Case Law
  - Legal Hold Process
  - Technology Solutions
  - ROI
- Industry Briefs
  - Social Media
  - Outsourcing
  - Evolving Technologies



# Legal Hold

One of the principal rules is that whenever litigation is *reasonably anticipated*, threatened, or pending against an organization, that organization has a *duty* to undertake *reasonable and good faith* actions to preserve relevant and discoverable information and tangible evidence.

*THE SEDONA CONFERENCE® COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS, September 2010*



# 2010 Rulings

- *Rimkus Consulting Group Inc. v. Nickie G. Cammarata, et al.*, 07-cv-00405 (SDTX Feb. 19, 2010)
- *Crown Castle USA, Inc. v. Fred A. Nudd Corp.*, 2010 U.S. Dist. LEXIS 32982, (W.D.N.Y. Mar. 31, 2010)
- *Merck Eprova AG v. Gnosis S.p.A. et al.*, 07 Civ. 5898 (S.D.N.Y. Apr. 20, 2010)
- *Jones v. Bremen High School Dist.* 228, 2010 WL 2106640 (N.D. Ill. May 25, 2010)
- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010) (“Victor Stanley II”)



# 2010 Rulings

- 2010 decisions tip the scales toward
  - Higher standards
    - Practices once thought acceptable or perhaps merely negligent are now understood to be sufficient to touch off sanctions.
  - Higher stakes
    - Equating an ineffective legal hold to gross negligence puts litigants at risk of the most severe sanctions, even dispositive sanction.
  - New vulnerabilities
    - Adversaries in litigation have greater incentive to challenge an opponent's preservation efforts when a flawed legal hold becomes a shortcut to victory.



# Question?

Who is currently contemplating automating the  
Legal Hold Process?

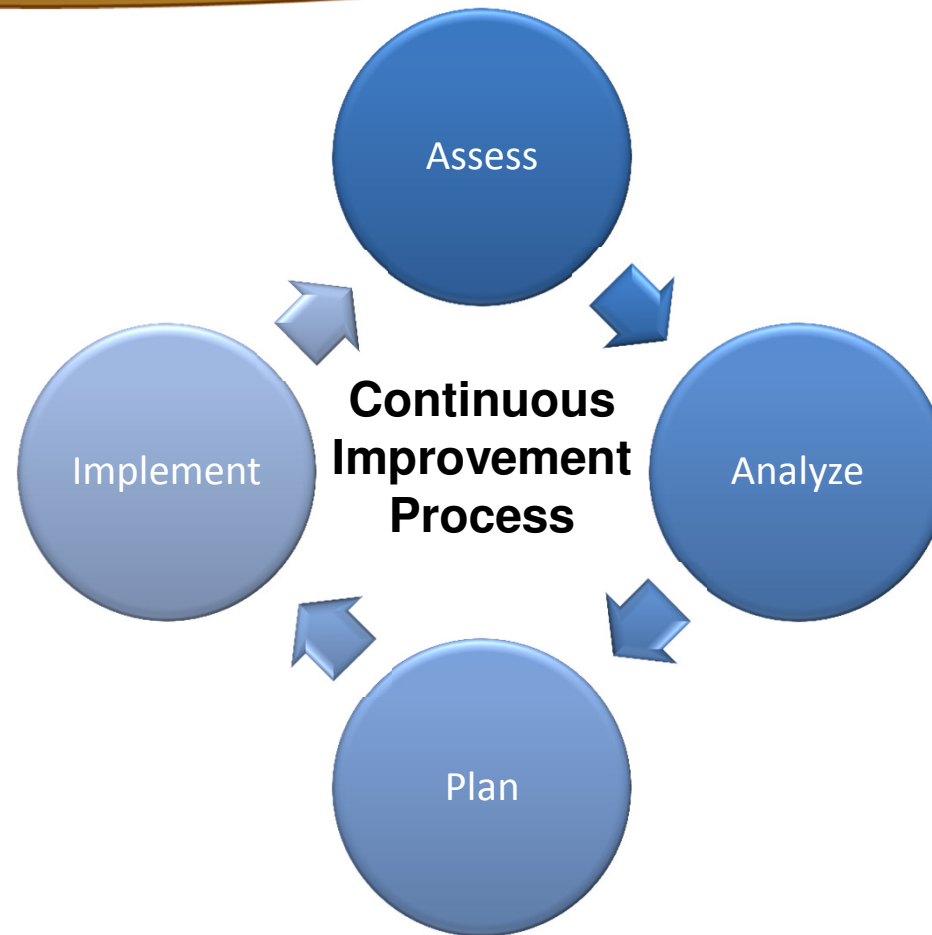


# Elements of a Sound Process

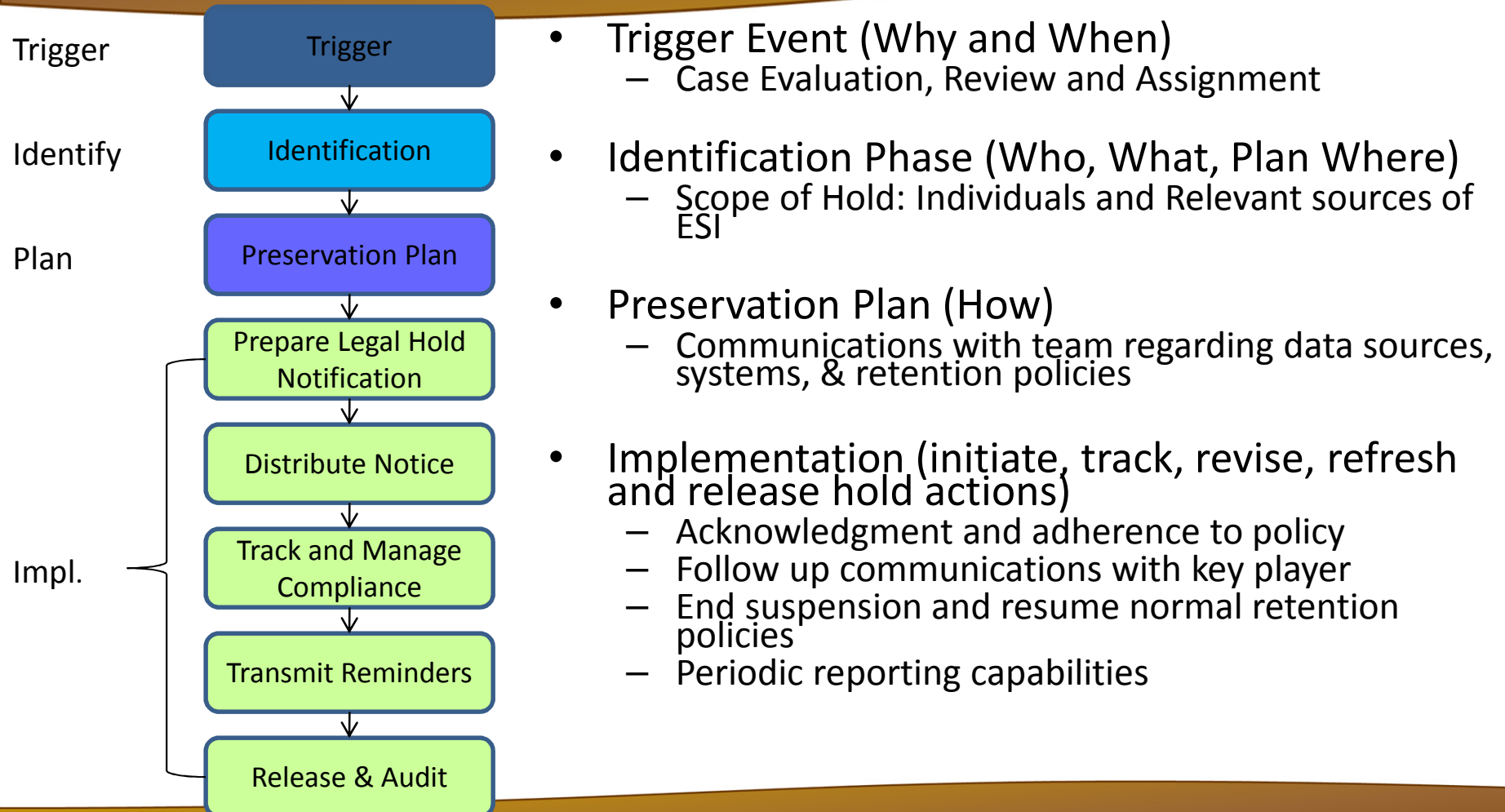
- Formation of a legal hold working group – legal, IT, records.
- Issue timely, *written* legal hold directives.
- Ensure custodians understand what's required and how to comply.
- Follow up (e.g., confirmation and clarity).
- Provide for periodic updates and reminders.
- Account for employee mobility and turnover.
- Consider third-party custodians.
- Thoroughly document actions and the bases for decisions.
- Develop procedures, recordkeeping and training materials that leverage past preservation efforts.
- Remember that legal hold is a process, not simply a document.



# Good Faith Through Reasonable Design



# Legal Hold & Preservation Process



# Application Feature Set

- Identification
- Notification Management
- Interviewing
- Templates
- Preservation in place
- Copy and move
- Forensically sound collections
- Activity logs and reports



# Legal Hold Applications

	Product	Identification	Notification management	Interviewing	Templates	Preservation in Place	Copy & Move	Forensically Sound Collection	Activity Logs & Reports
Autonomy	Aungate	X	X	X	X	X	X	X	X
PSS	Atlas	X	X	X	X	X		X	X
Exterro	Fusion	X	X	X	X				X
AccessData	AD E-Discovery	X	X	X	X		X		X
Kazeon	KazHold	X	X	X	X	X			X
Recommind	Accelerate ECA & Collections						X	X	X
kCura	Method	X	X	X	X				X
Zapproved	Legal Hold Pro	X	X	X	X				X
Bridgeway	Bridgeway Legal Hold	X	X	X	X	X	X	X	X



# Technology Deployment ROI Example – Case Study

Mid-size corporate legal department – 5-6 legal holds  
per month; 15 custodians per hold

	Total Hours/Yr	Total Labor (\$60k/yr)	Additional Expenses	Total Cost
Manual Hold	1,912.0	\$87,019		\$87,019
Automated Hold (SaaS)	487.9	\$22,181	\$18,000	\$40,181
Benefits	Labor Costs Reduced:	76%	Total Savings:	\$46,838
			Estimated ROI	260.2%



# Continuing Challenges Associated with Legal Holds

- Structured and unstructured repositories
- SharePoint
- Email – corporate email and webmail access
- Backup Tapes
- Voicemail, IM and Unified Messaging Systems
- Smartphones, iPADS, mobile devices
- Social media and networking sites
- Desktops and Local Files
- Segregation of Litigation and Client Data
- Existing litigation hold data collections
- Removable media
- Data from individuals who have left the firm



# Recommendations

- Develop formalized preservation hold policy for *all* ESI
  - Improve Litigation Intake & Classification.
  - Standardize Preservation Procedures.
  - Educate and train employees on preservation obligations.
- Implement automated legal hold and management system as stand-alone or integrated with archival solution
  - Develop company wide custodial lists and groups.
  - Centralize sending and tracking of notices and preservation activities.
  - Track collection efforts and production histories.
- Create comprehensive data map and inventory for *all* ESI to assist with litigation preparedness efforts
  - All employee data (network or user shares)
  - Operations systems (accounting, departmental applications)
  - Other relevant systems (customer data)



# Recommendations (cont)

- Best Practices review of collection procedures and processes
  - Approach to standardize internal collections practices.
  - Evaluation of use of and need for enterprise tools, chain of custody, and authentication especially for high exposure matters.
  - Evaluate other related risk activities (e.g., risks of data loss inherent in sequestering or employee departure).
- Formalize the role of outside counsel's obligations throughout all phases of litigation process
  - Heightened obligation on outside counsel in litigation hold and preservation process.
  - Control and cost containment issues associated with outside counsel's role in collection, processing, review and production efforts.
- Define governance structure and centralized management
  - Establish roles and responsibilities in litigation hold processes.
- Integrate Litigation Hold to Records Policy



# Industry Briefs

## Social Media Challenges



# Social Media Challenges

- Estimated 2010 volume of social networking communications
  - 400 billion FaceBook communications
  - 200 billion Twitter messages
- Organizations will have to face forward in addressing new sources of data and how to handle them as there will continue to be more social media communications (many viewed via mobile devices) with customers, employees, etc.
- FRCP regulations often apply to all business correspondence, which now includes social network communication such as tweets, Facebook status updates, LinkedIn postings.



# Social Media Case Law

- ***McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD (C.P. Jefferson, Sept. 9, 2010)***
- ***Romano v. Steelcase Inc., 2010 WL 3703242 (N.Y. Sup. Ct. Sept. 21, 2010)***
- ***EEOC v. Simply Storage Mgmt. , LLC, No. 1:09-cv-1223-WTL-DML (S. D. Ind. May 11, 2010)***



# Social Media Challenges

- Even armed with a subpoena, social media outlets often do not easily cooperate.
- Organizations need to take it upon themselves to manage social media with the same or a greater degree of diligence as they do other forms of electronic communications and content.
- Young professionals will be accessing social media actively which needs to be recognized as part of any legal hold, preservation and collection effort.



# Social Media Challenges

- Challenges with collecting data from social networking sites results.
  - A lack of understanding of how to get the data and then how to work with it.
  - Much of the social networking data is stored in various locations even though it appears as a single page or site and is difficult to recreate for eDiscovery purposes.
    - Facebook is the exception.



# Social Media Management

- Social Media interaction cannot be managed by technology.
- Must be managed through an educational process
  - Policy development.
  - Onboarding.
  - Ongoing education.
- There are professional and ethical responsibilities with risk and exposure to the firm of inappropriate activities by employees.



# Industry Briefs

Outsourcing



# Outsourcing Challenges

- George Socha estimates there are currently over 1,100 active vendors.
  - A lot of movement continues in the market.
  - eDiscovery is still an emerging market.
- There are multiple outsourcing options and there must be a clear understanding what the vendor is providing
  - ASP
  - SaaS
  - Cloud



# What Are They Providing?

- Application Service Provider “ASP”
  - Original outsource model that delivered hosted applications that were managed and support by a vendor.
  - Vendor has control of the data.
  - Traditional pricing for use per license and volume based.
- Software As A Service delivers an application as a utility
  - A software application that is deployed as a hosted service, accessed over the internet and viewed via a browser or other options such as Silverlight etc.
  - Vendor has control of the data.
  - Flexibility in pricing but still more traditional with user licensing and volume based.
- Cloud delivers computing as a utility
  - Next generation of the SaaS model – many vendors will use SaaS and Cloud interchangeably.
  - Data is in client’s control.
  - Subscription license from the vendor, provides for the “pay for what you use” model.



# In-House vs. Outsourcing

- Ever-increasing pressures on the legal budgets of corporations and the resulting pricing flexibility demands continue to raise the question of in-house vs. outsourcing of the discovery services.
- The increased volumes of ESI being delivered and stored in-house are generating a more aggressive outsourcing approach regarding utilizing vendors to process and provide review platforms.
- The technology challenges driving from new products and solutions can provide for options to use outsource options rather than continue to invest in bringing the technology into the firm.
- Pricing challenges by firm's absorbing costs which would otherwise be passed through to their client if outsourced.



# Outsourcing Pricing

- Pricing compression continues in the market due to the various offerings and large competitor landscape.
- Pricing transparency behind pricing models is required as consumers are becoming more aware and educated.
- Vendors must be able to demonstrate the value and be able to support their pricing model.
- Forward thinking application vendors are offering options to quantify what the cost of eDiscovery will be such providing dashboards and other options to input information for cost generation before you engage.



# Industry Briefs

Evolving Technology



# Evolving Technology

- What are we seeing for 2011 and beyond?
- Jim Britt



# Technology Drivers

- Workflow has to change to respond to the increasing amounts of ESI being collected for review.
  - The traditional linear review cannot continue.
- Technology is providing for new workflows and the courts are responding by allowing for technology to facilitate responsive identification as long as it is defensible.
- Desire for seamless movement of data between eDiscovery tasks.
  - Manual movement of data between tools is becoming less desirable due to risk of spoliation, quality control and lack of efficiencies.



# Technology Drivers

- Corporations are driving for “faster, better, cheaper”.
- Corporate clients are embracing the new technology solutions and forcing law firms to move in that direction.
- New tools providing “smarter” handling of ESI are becoming critical to respond to the very large volumes of data being collected.



# Technology – New Horizons

Technology	What It Is	Example Products/Vendors
Predictive Coding	Automated document classification and statistical ranking technology	Equivio, Recommind, Kroll Fios, Catalyst, FTI
Latent Symantec Indexing (LSI), concept searching, clustering, email threading	LSI uses advanced algorithms to rapidly scan large volumes of data for related concepts, ideas and context based on an analysis of the actual information being scanned. AI used to identify relevant concepts and relationships.	Integrated options provided by Content Analyst and Equivio for use within available review tools such as Relativity, iConect, Concordance, Recommind, Autonomy
Foreign Language identification and cross-lingual support	Ability to identify and report on foreign languages within documents and multiple languages within a single documents. Provide ability to conduct English-language queries against foreign language documents	Relativity, Autonomy , IPRO, Recommind
“First Pass Review” or “Early Case Assessment”	Very rapid indexing of ESI for early access to test culling criteria, validate search terms and prepare for review. Cuts traditional processing time down by 50-75%. Can be leveraged within the corporate firewall or post collection	Nuix, Venio, Clearwell, IPRO, Recommind
Multi-platform ESI access and indexing	Generally is leveraged behind an entity’s firewall. Connects to, accesses and indexes data from multiple platforms for identification, preservation and possible collection in anticipation of litigation	StoredIQ, DigitalReef, Kazeon, Autonomy, Recommind



# Questions & Discussion

