



# Ethics of ESI: Do Lawyers Need to be “Techies” in the Age of eDiscovery?

Steven C. Bennett, Jones Day

Adam I. Cohen, FTI Technology

November 08



# AGENDA

## Meet our Speakers

## Today's Premise

- *Duty of Competent Representation*
- *Duty to Supervise*
- *Duty of Candor*

## What do Lawyers Need to Know about Technology?

- *Sources & Retention*
- *eDiscovery Process*
- *Accurate Facts*

## Q&A

# TODAY'S PRESENTERS

## **Steven Bennett, Jones Day**

Steve Bennett's practice at Jones Day focuses on domestic and international commercial litigation and arbitration, including cases involving bankruptcy, construction, corporate, energy, insurance, intellectual property, securities, and other disputes. Steve is chair of the Firm's e-Discovery Committee and a founding member of the Sedona Conference Working Group on International E-Discovery. Steve received his B.A. from Macalester College and a J.D. from New York University.



## **Adam Cohen, FTI Consulting.**

Adam I. Cohen is a senior managing director in the New York office of FTI's Technology Consulting practice. Mr. Cohen is a nationally recognized expert in electronic discovery and electronic information management policy issues, who advises on planning and implementation issues associated with every phase of electronic discovery in litigations and investigations as well as electronic information management policies and practices. He holds a B.A. from Wesleyan University and a J.D. from Duke University School of Law.



# PREMISE

In the age of electronic discovery, lawyers need to know ***something*** about computer technology in order to meet minimum standards of professional responsibility.

The open question is not whether lawyers need to know something about computer technology, but rather ***how much they need to know*** and the ***nature of the knowledge*** they need to have.

# DUTY OF COMPETENT REPRESENTATION

**“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”**

## **Examples to consider:**

- Phoenix Four → Partitioned Drives
- Zubulake → “Archive”

# DUTY TO SUPERVISE

**“A law firm shall ensure that the work of non-lawyers who work for the firm is adequately supervised, as appropriate.”**

## **Examples to consider:**

- Document reviewers
- Technology vendors

# DUTY OF CANDOR

“A lawyer shall not knowingly make a false statement of fact or law or fail to correct a false statement of fact or previously made to the tribunal by the lawyer.”

- ***Qualcomm*** → impact on merits of content of ESI not produced
- ***Philip Morris*** → waiting too long to disclose preservation failure
- ***Morgan Stanley*** → misrepresentations of facts about ESI known to be untrue

# WHAT DO LAWYERS NEED TO KNOW ABOUT TECHNOLOGY?

- Sources and Retention
- How the choices they make in handling ESI will impact the completeness and accuracy of their responses to discovery requests
- Whether they are accurately representing facts to their adversaries and the court



# SOURCES AND RETENTION

## Proposition:

The lawyer needs to be able to identify and ***describe sources of ESI***, as well as ***understand the retention policies and practices*** that impact on the availability of ESI for production.

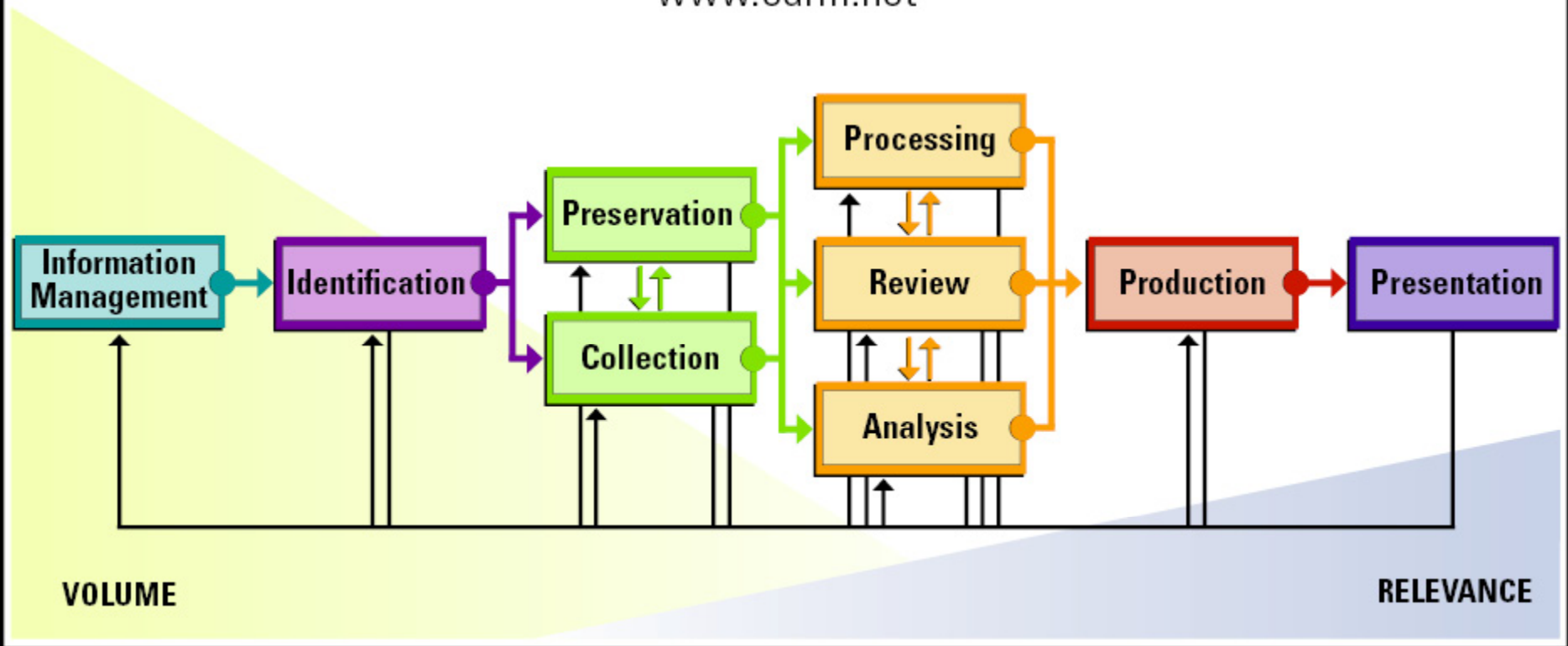
## Why?

Preservation, 26(f), 26(a)(1), etc.

# eDiscovery Process

## Electronic Discovery Reference Model

[www.edrm.net](http://www.edrm.net)



# eDiscovery Process (cont.)

## Proposition:

The lawyer needs to know how the choices he or she makes in handling ESI will impact the completeness and accuracy of his or her responses to discovery requests.

## What choices?

- means of collection – forensic, logical, etc.
- processing – deduplication, exception handling, etc.
- quality control process and documentation
- search technology – limitations (also see Victor Stanley)

# ACCURATE FACTS

## Proposition:

A lawyer needs to conduct a reasonable inquiry into facts impacting the availability of ESI, and should not simply rely upon the client to provide the necessary information without the lawyer's assistance (*which assistance may come in the form of poking and prodding*).

This means that the lawyer must know enough about ESI to ask the right questions and evaluate the client's responses.

## Why?

*See, Zubulake, Morgan Stanley*

# CONCLUSION

Lawyers are not required to become computer experts.

However, even the most technology averse lawyer must learn certain facts about technology that impact the lawyer's ability to fulfill ethical obligations.

# Q & A

# Thank you for joining us today!

## Contact info:

Steve Bennett: [scbennett@JonesDay.com](mailto:scbennett@JonesDay.com)

Adam Cohen: [Adam.Cohen@FTIConsulting.com](mailto:Adam.Cohen@FTIConsulting.com)

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