



Avoiding eDiscovery Turbulence in the Cloud:

eDiscovery & Cloud Computing



Speakers

- **Dean Gonsowski** – Sr. eDiscovery Counsel, Symantec
- **Amy Dugdale** – Product Marketing Director for Cloud Computing, LiveOffice (*now a part of Symantec*)
- **Matthew Nelson** – eDiscovery Counsel, Symantec

Discussion Topics

- Top Four Reasons Organizations Move to the Cloud
- Why Doesn't Everyone Jump on the Bandwagon?
- Attorney Lightning Round
- Case Study
- Key Takeaways & Resources

Top Four Reasons Organizations Move to the Cloud?

13% 1. Hardware/Infrastructure Costs Reduced

37% 2. Software Fixes and Updates Outsourced

10% 3. Fewer Help Desk Calls

20% 4. Saves Time and Money

20% 5. All of the Above

What Are the Analysts Saying?

“

The number of mailboxes for SaaS based email archive solutions will increase by 344% between 2010 and 2015.



IT managers today are increasingly compelled to adopt a cloud-based infrastructure, and many already have a cloud adoption strategy in place.



E-mail archiving delivered as a service now accounts for more than one-third of the market.



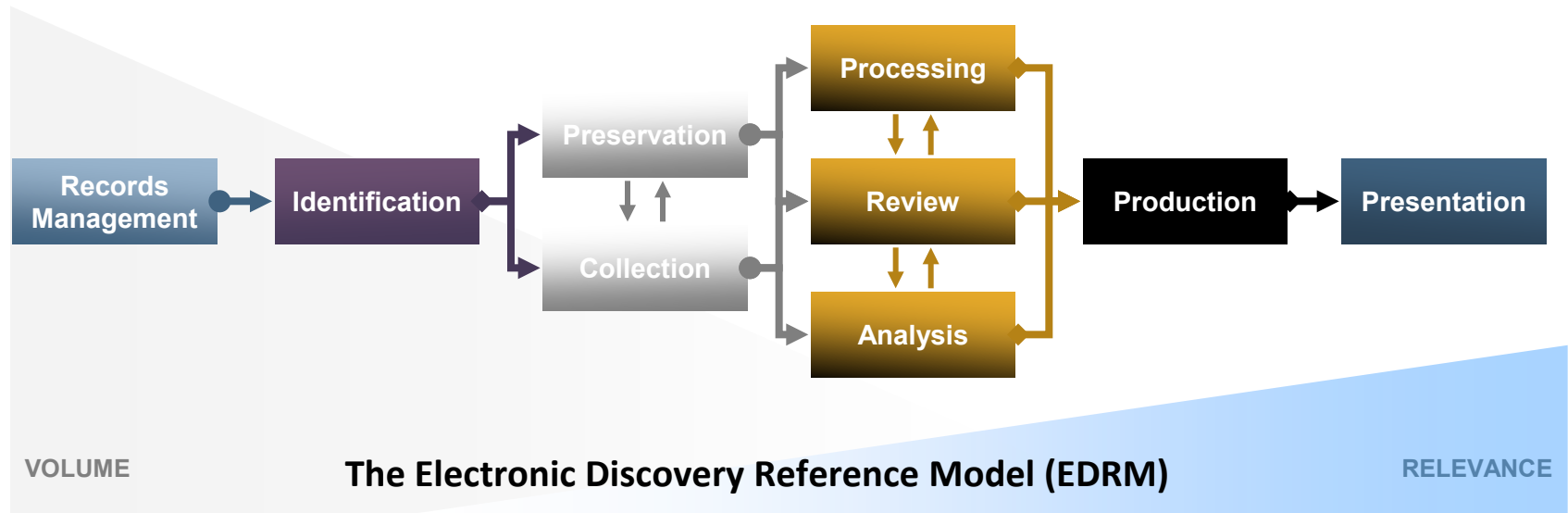
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Why Isn't Every Organization Jumping on the Cloud Bandwagon?

- Data Security/Privacy
- Internal Resistance
- Bandwidth
- eDiscovery Challenges



Attorney Lightning Round



Information Mgmt:
Define and enforce retention policy

Identification:
Determine the scope, breadth and depth of ESI

Preservation:
Ensure ESI is protected against destruction

Collection:
Gather ESI from various sources

Processing:
Convert ESI to format suitable for review and analysis

Analysis:
Evaluate ESI for key topics, people, discussions, etc.

Review:
Conduct review for privilege and relevance

Production:
Deliver ESI in appropriate format (e.g., redacted, in TIFF, etc.)

Presentation:
Display ESI at depositions, hearings, trial, etc.

www.edrm.net

Attorney Lightning Round

1. Is there a Preservation/Legal Hold Duty?
2. Who is Responsible for Preservation?
3. “Not Reasonably Accessible” Argument?
4. “Possession, Custody & Control” Argument?



Case Study: Migrating 20TB to the Cloud

- Multinational music company
- 6,000 employees



Business Challenges:

- On-premise HP archive going end of life
- Limited IT resources available to manage on-premise apps
- Needed integration with Clearwell for eDiscovery searches
- Needed to move 20 TB from HP to Enterprise Vault.cloud



Case Study: Solution

- * Client liked Clearwell integration story and long term value of Symantec's combined archiving and eDiscovery strategy



Results:

- ✓ Accelerated migration
- ✓ Decreased IT burden
- ✓ Reduced overall archiving costs
- ✓ eDiscovery on premise or in the cloud



Tips For Avoiding Cloud Headaches

Negotiate SLA Terms

- Ownership/Access Rights
- Physical Location of Data
- 3rd Party Subpoena Process
- Notification Requirements
- Security Measures
- Backup Technology
- Termination of Relationship
- Bankruptcy

Define Process

- How Will ESI be Placed on Legal Hold?
- Can Record Retention Policies Be Suspended?
- Do We Have eDiscovery Software That Can Collect ESI in the Cloud?
- Access Restrictions
- Is There a Fee to Collect/Extract Data?
- Response Times

Key Takeaways

- ✔ Build Internal Consensus Before Migrating to the Cloud
- ✔ Negotiate Agreements (SLAs) Up Front
- ✔ Most Cloud Providers are Not eDiscovery Providers
- ✔ eDiscovery Software Should be Able to Collect ESI Both On Premise & in the Cloud
- ✔ eDiscovery & Archiving Technology Should Be Integrated
- ✔ Understand How Data is Backed Up & Secured

Thank You!

Resources and Reference Material:

- *NIST Definition of Cloud Computing:*
<http://www.nist.gov/itl/cloud/upload/cloud-def-v15.pdf>
- *Clearwell Blog 2.0: Key Considerations for Selecting Cloud Providers*
<http://www.clearwellsystems.com/e-discovery-blog/>
- *Enterprise Strategy Group Website:*
<http://www.enterprisestrategygroup.com/>
- *The Electronic Discovery Reference Model:*
<http://edrm.net/>
- *Twitter: @InfoGovLawyer; @Dean_Gonsowki*
- *Webopedia technology definitions:* <http://www.webopedia.com/>

Q&A

Additional Slides

Legal Issues: Preservation/Litigation Holds Required?

- “The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).
- Failure to retain information that’s subject to a litigation hold means that the organization may incur sanctions ranging from fines to dismissal.

Legal Issues: Who “Controls” ESI in the Cloud?

- Under Rule 34 of the Federal Rules of Civil Procedure, a party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control.
- If you have the contractual or other legal right to obtain the information, the fact that the ESI is not in your physical possession, or even within the United States, does not normally constrain your duty to produce the information.

Legal Issues: “Not Reasonably Accessible” in the Cloud?

- FRCP 26(b)(2)(B): *Specific Limitations on Electronically Stored Information*. 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. 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
- See also: *Isom, The Burden of Discovering Inaccessible Electronically Stored Information: Rules 26(b)(2)(B) & 45(d)(2)(D), 2009 Fed. Cts. L. Rev. 1 (January 2009)*.

Legal Issues: Are Privacy Rights Relinquished?

- The Stored Communications Act is a law that was enacted by the United States Congress in 1986. It is not a stand-alone law but forms part of the Electronic Communications Privacy Act - codified as 18 U.S.C. § § 2701 to 2712.
- The SCA addresses voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" held by third-party internet service providers (ISPs).
- See, [*Flagg v. City of Detroit, Slip Copy, 2008 WL 787061 \(E.D.Mich.\)*](#) . A great analysis of this case by Timothy Ackermann is available in The Federal Lawyer, November/December 2009 article, titled [Consent and Discovery under the Stored Communications Act](#) .

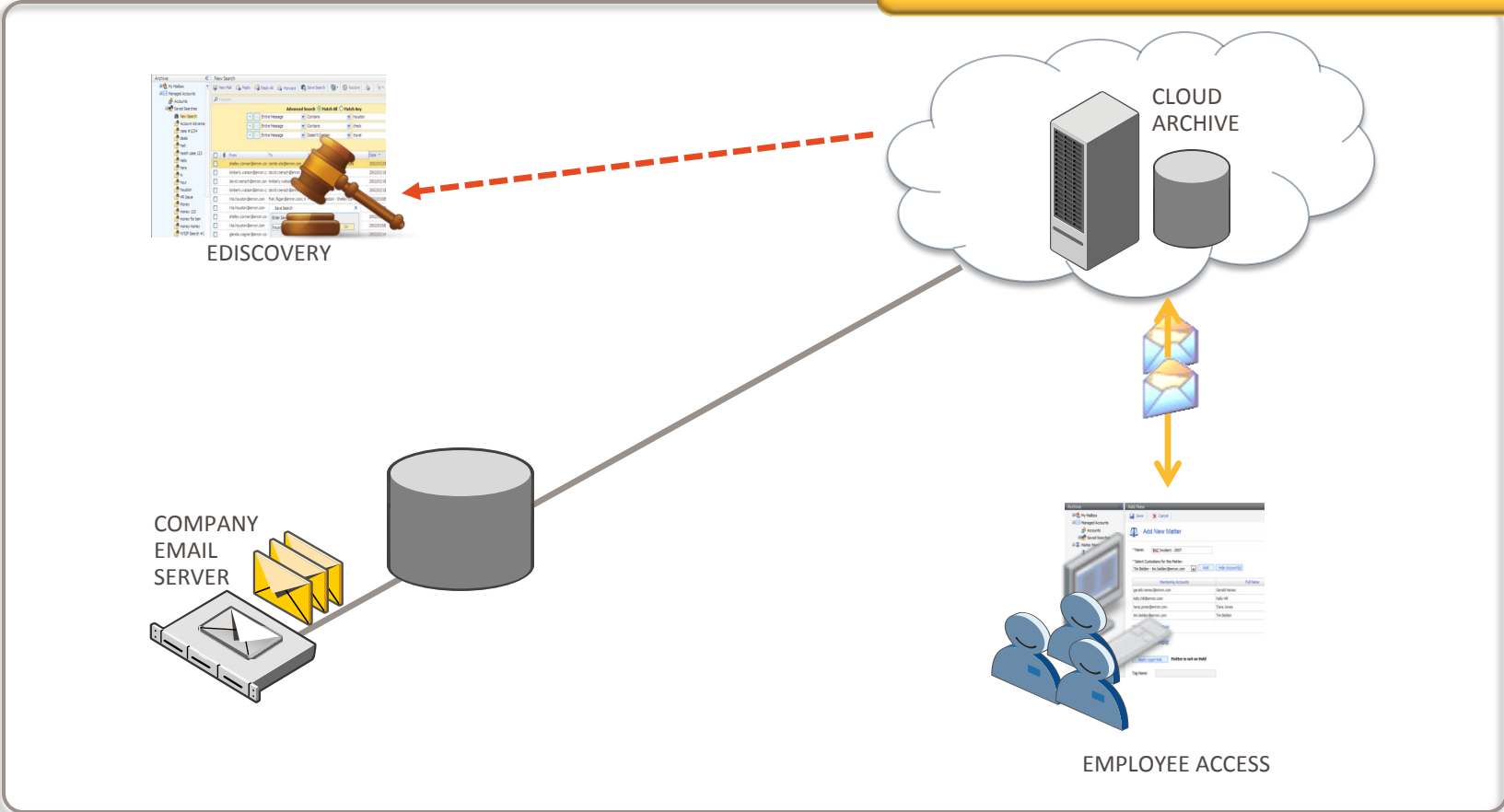
What is Cloud Computing?



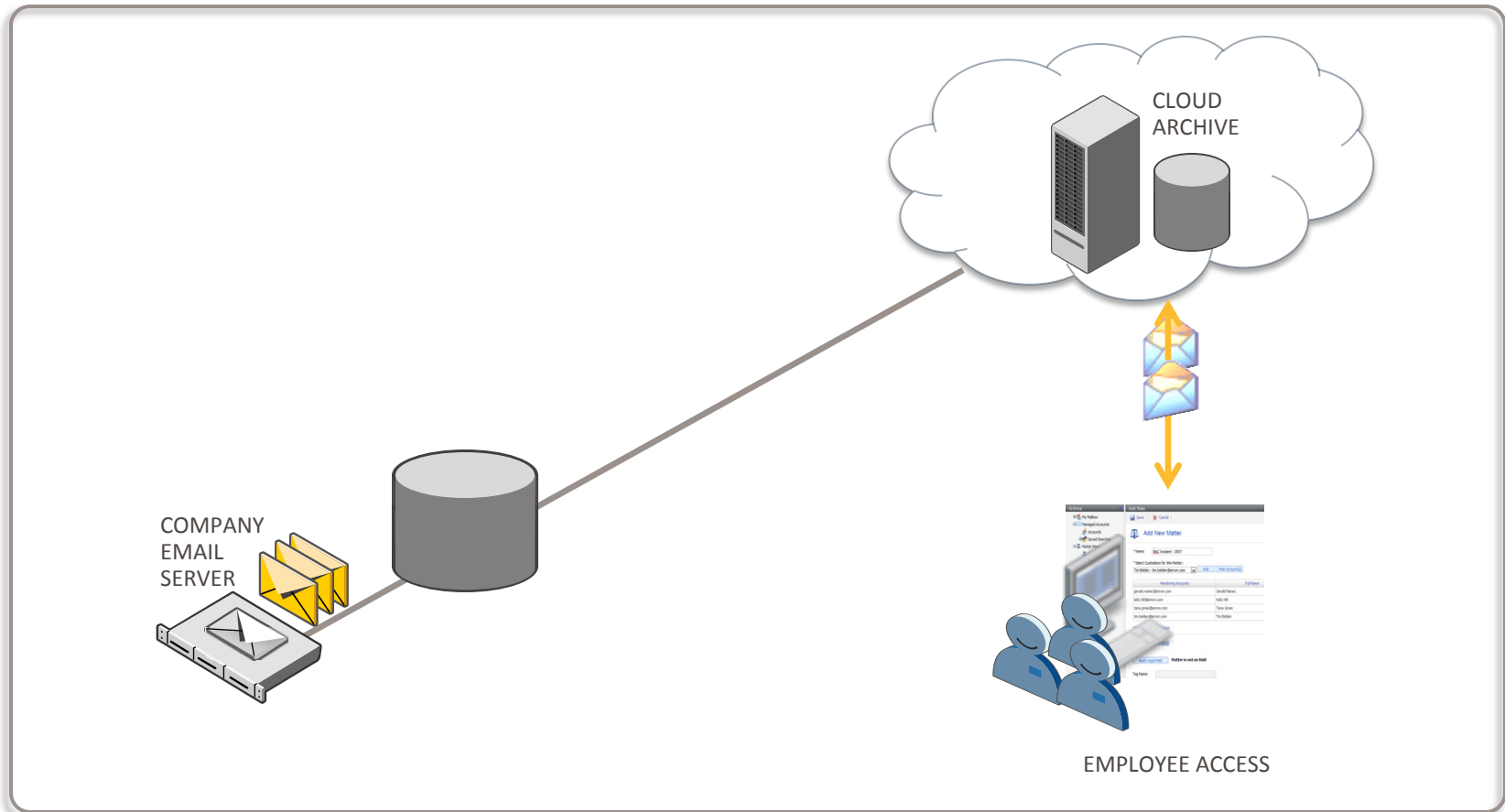
First Cloud Computing RAP Ever!!! - YouTube42223.flv

What is Cloud Computing?

- 1 Email and other Files Archived in the Cloud
- 2 Retention Policies Can be Applied
- 3 Users Can Still Access Files in the Cloud Archive
- 4 What About eDiscovery?



What's The Problem?



eDiscovery Problems?

Checking ESI Into the Cloud May Be Easy, But Checking it Out Could Be Difficult!



Attorney Lightning Round

20% 1. Is there a Preservation/Legal Hold Duty?

17% 2. Who is Responsible for Preservation?

27% 3. “Not Reasonably Accessible” Argument?

7% 4. Data Privacy Concerns?

20% 5. Will My Cloud Provider Cooperate?

10% 6. All of the Above?

Case Study 1: Oops! No eDiscovery Plan

- International Pharmaceutical Company
- 120k employees

Company: One of the largest healthcare companies in the world with over \$50 Billion in sales revenue and operations in 120 countries.

Problem: IT decided to move email into the cloud without consulting the legal department. IT didn't consider how to retrieve email from the cloud during discovery and the Cloud provider was not equipped to respond retrieve messages from approximately 120k employees.

Solution: A single eDiscovery solution to collect email and other ESI whether the ESI lives on-premise within the company or in the Cloud.

