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?

1. Hardware/Infrastructure Costs Reduced (13%)
2. Software Fixes and Updates Outsourced (37%)
3. Fewer Help Desk Calls (10%)
4. Saves Time and Money (20%)
5. All of the Above (20%)
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.
Why Isn’t Every Organization Jumping on the Cloud Bandwagon?

- Data Security/Privacy
- Internal Resistance
- Bandwidth
- eDiscovery Challenges
Attorney Lightning Round

The Electronic Discovery Reference Model (EDRM)

- **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

Avoiding eDiscovery Turbulence in the Cloud
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
Avoiding eDiscovery Turbulence 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:

- 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/
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

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).

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.