



3 "C" Words You Need to Know: Custody - Control - Cloud

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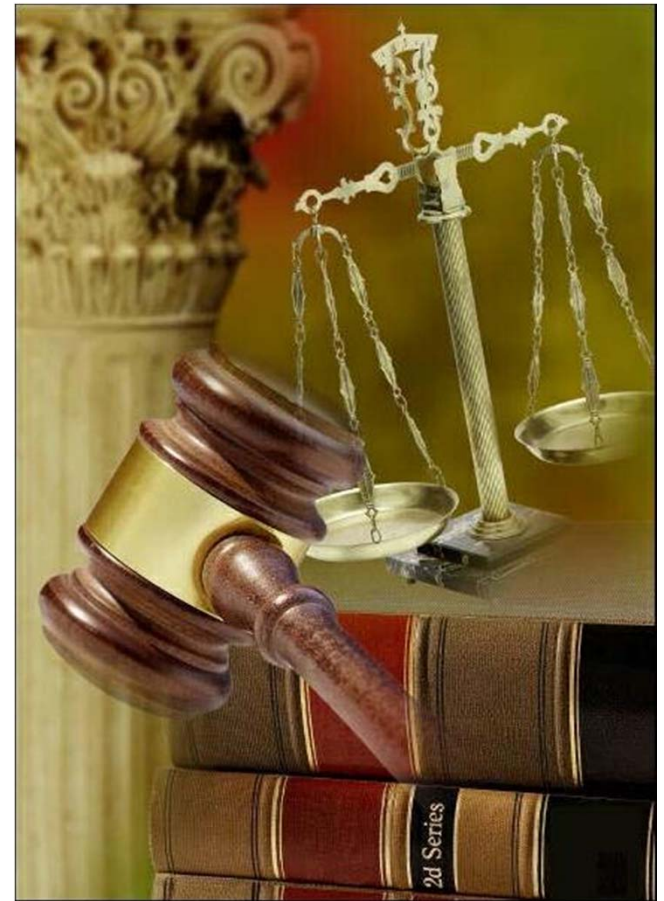
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Bradley's Standard Legal Disclaimer

- I am not your attorney and I do not represent you
- Nothing in this presentation should be construed as legal advice
- You should seek the advice of qualified counsel about your specific circumstances



Hypothetical Scenario

- Multi-million dollar class action lawsuit
- Extensive set of discovery requests
- Requests include meta-data
- Discoverable info is in the cloud service provider's databases
- Contract doesn't say anything about preservation or production
- Your service provider isn't cooperating
- What will you do???



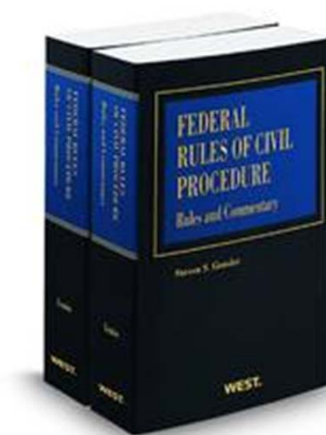
Objectives

- Recognize risks associated with cloud computing service models
- Enhance awareness of e-discovery challenges in a cloud computing environment
- Better manage risk throughout the relationship with your cloud service provider
- Assess your program against the FRCP requirements



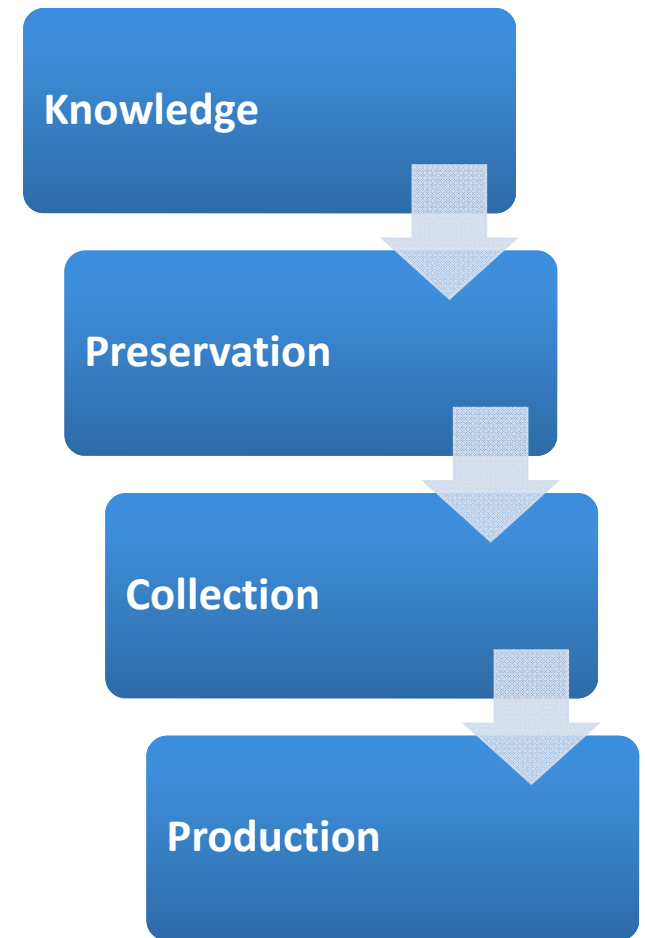
Federal Rules of Civil Procedure Basics

- Procedural rules governing federal litigants
- Amended in late 2006 to address ESI
- Failure to comply may result in sanctions
- Sanctions range from fines to judgment



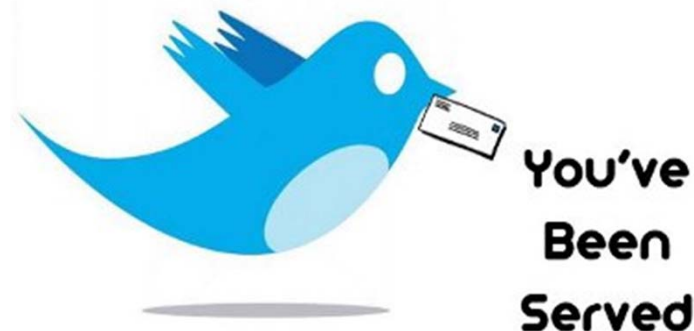
E-Discovery Obligations Created by FRCP

- Knowledge – Of location and accessibility of ESI
- Preservation – “Reasonably foreseeable” standard
- Collection – Diligence in searching for and retrieving discoverable ESI
- Production – Delivery in a format the opponent can use



Legal Requests for Information

- “Requests for production” v. subpoenas
- “Possession, custody, or control” is the standard
- Data in the cloud is likely under your “control”
- Subpoenas of service providers may be quashed under the SCA



How “the Cloud” Complicates E-Discovery

- Litigant does not have physical custody of its information
- Retrieving deleted files or unallocated hard disk space difficult on multi-tenant systems
- In a shared technology environment, other customers are affected



Legal Issues that Arise in the Cloud

- Potential loss of trade secret status or the attorney-client privilege
- Different legal requirements and protections if data ends up in another jurisdiction
- No requirement for service providers to cooperate under the current contract

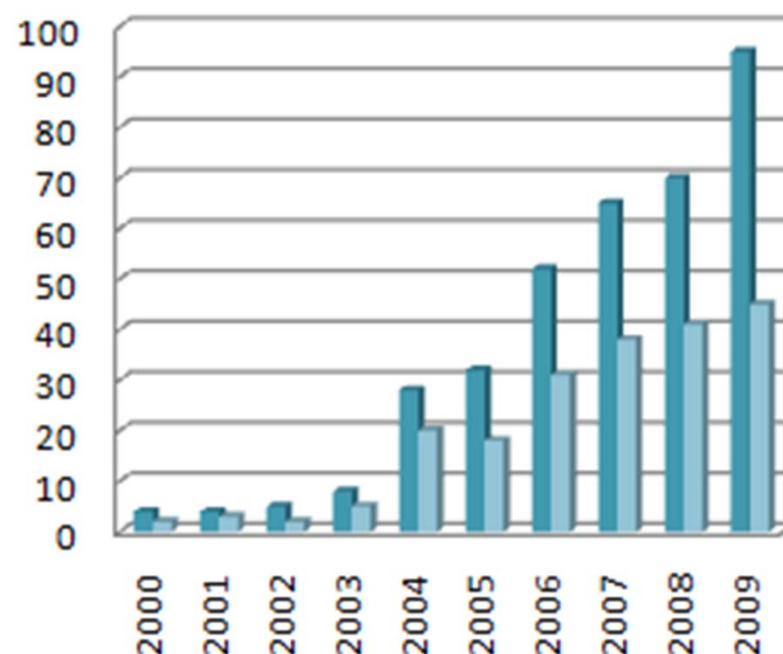
Confidential Document
Attorney-Client Privilege

**TRADE
SECRET**



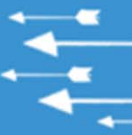
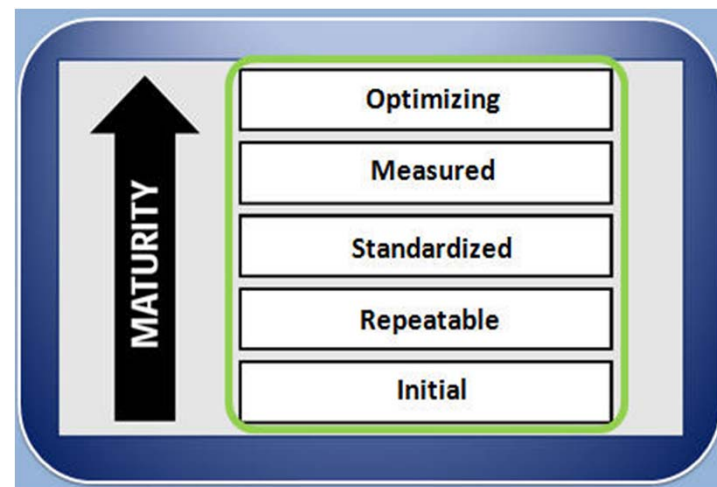
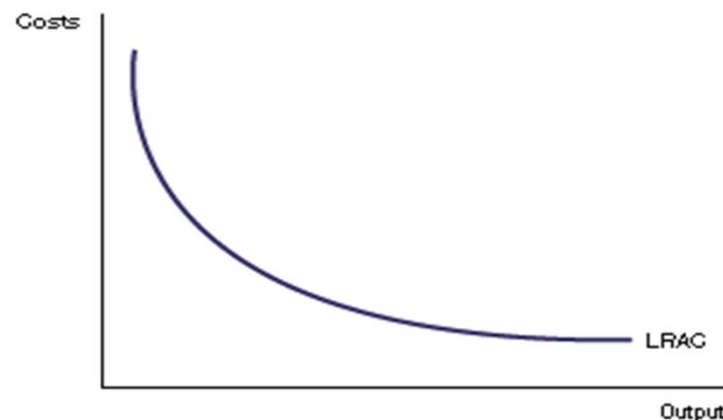
Consequences of Not Getting it Right

- Spoliation
 - Destruction of evidence
- Loss of Rights:
 - Attorney-client privilege
 - Trade secret status
 - Local legal protections
- Sanctions
 - Fines to judgment
 - Disputes and awards rising



E-Discovery Advantages of the Cloud

- Economies of Scale – Cost of e-discovery tools can be spread across customers
- Experience – Cloud service provider's e-discovery processes may be more mature and efficient



Cloud Service Provider Lifecycle

- Due diligence – Pre-contracting / RFP / vendor selection
- Negotiations – Contracting
- Oversight – Ongoing management of relationship
- Termination / Non-renewal - Exit



Tips for Choosing Cloud Service Providers

- Don't use “consumer grade” cloud service providers for business purposes
- Make e-discovery considerations part of your cloud services RFP
- Add e-discovery factors to your due diligence process
- Get it in writing!



Due Diligence Questions

- Where will my data physically reside?
- Will my data be segregated from others' data?
- Can I set record retention policies for my data?
- Can I implement litigation holds?
- What is the cloud service provider's involvement in e-discovery and what is the cost of that help?
- How will access to my data will be controlled?
- Does the cloud service provider possess in-house e-discovery expertise?



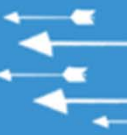
E-Discovery Service Level Agreements

- The FRCP set forth strict discovery deadlines
- Missing these deadlines can result in sanction
- Look for well-defined SLAs for e-discovery tasks
- Quality is as important as quantity!



Service Provider Monitoring and Review

- Cloud service providers should be monitored and periodically re-evaluated
- E-discovery readiness should be part of vendor reviews
- Test cloud service provider's e-discovery capabilities
- Keep an eye out for changes in discovery rules



Termination of Relationship

- Will your data be retained or deleted per your record retention policy?
- Will your cloud service provider assist you with post-termination discovery requests?
- Make sure these topics are covered in your contract



How to Apply What You Have Learned

- Within three months, you should:
 - Take inventory of cloud service providers that possess potentially discoverable information
 - Perform a gap analysis between existing services and e-discovery needs (e.g., record retention, holds, etc.)
- Beyond three months, you should:
 - Ensure that cloud service providers are integrated into your organization's e-discovery protocol
 - When contracts with cloud service providers come up for renewal, or when signing new contracts, clarify e-discovery roles and responsibilities in writing



Summary

- We have covered:
 - The risks associated with the cloud computing model
 - E-discovery challenges in a cloud computing environment
 - Managing risk throughout the relationship with your cloud service provider
 - Assessing your program against the FRCP requirements



Conclusion

- Cloud computing complicates your ability to meet FRCP requirements
- E-discovery risks must be managed throughout the life of the cloud services relationship
- These risks can be successfully managed



Resources Available to Assist You

- E-Discovery & the FRCP – A Pocket Guide: <http://www.amazon.com/Discovery-Federal-Rules-Civil-Procedure/dp/1905356331>
- E-Discovery – Implications of FRCP Changes on IT Risk Management: <http://documents.jdsupra.com/9c9d5f0c-1ffd-4978-b66c-08d944c33e0b.pdf>
- E-Discovery in the Cloud Resource Page: <http://cloud.cyberlawblog.com>



Q&A

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