



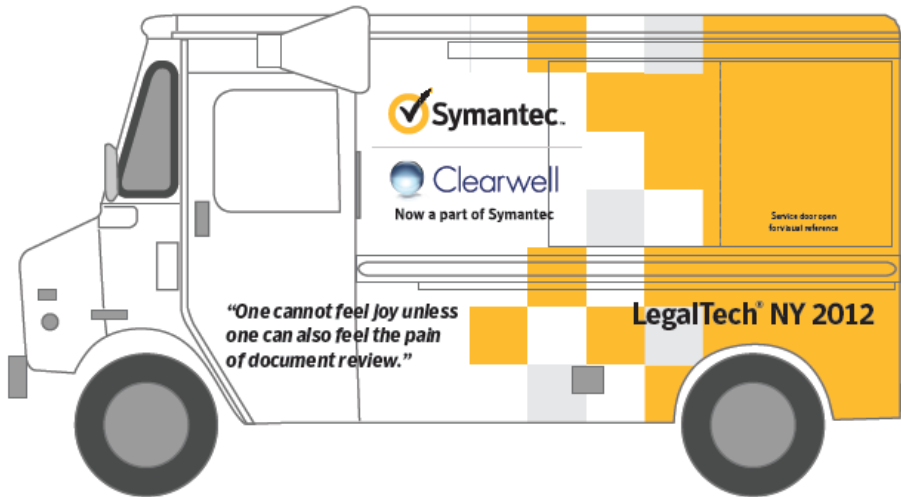
When IT Departments Go Rogue: *eDiscovery & Cloud Computing*





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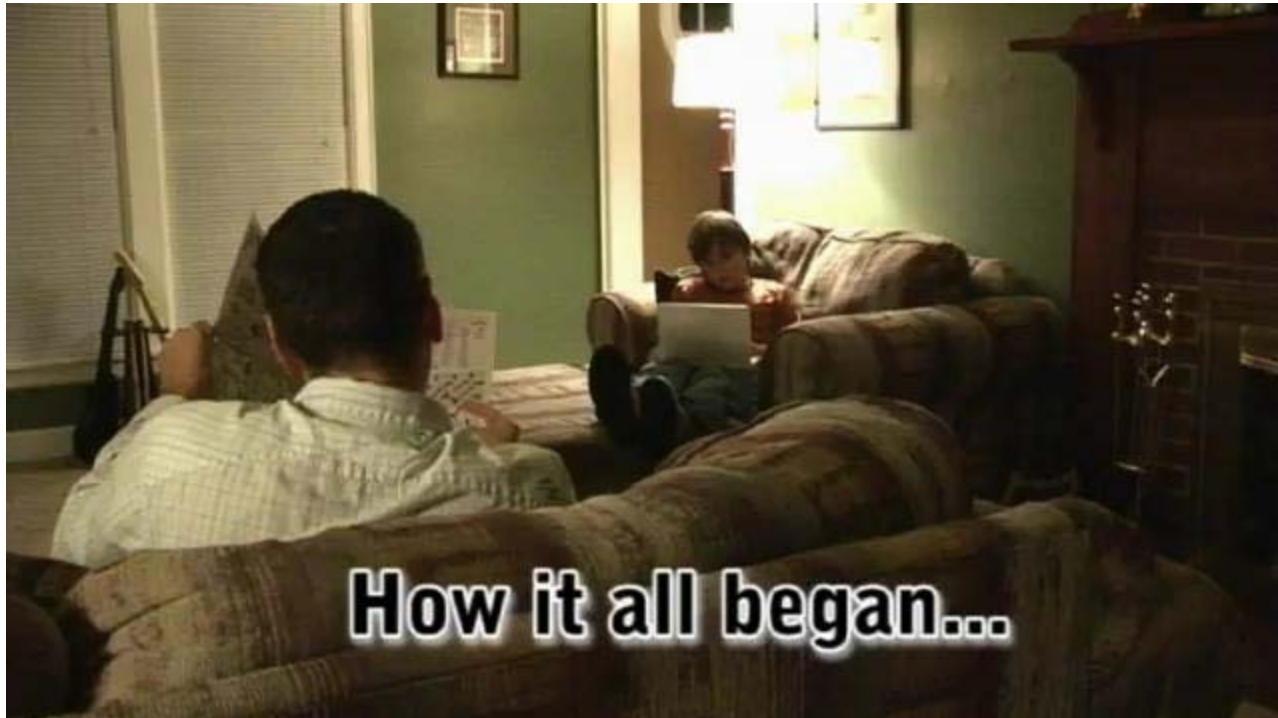
Speakers

- **Browning Marean** – Sr. Counsel, DLA Piper
- **Katey Wood** - Analyst, Enterprise Strategy Group, Inc.
- **Matthew Nelson** – eDiscovery Counsel, Symantec

Discussion Topics

- What is Cloud Computing?
- Why Do IT Departments Like Cloud Computing?
- Why Does the Cloud Give Attorneys Headaches?
- Tips for Avoiding Cloud Headaches
- Key Takeaways & Resources

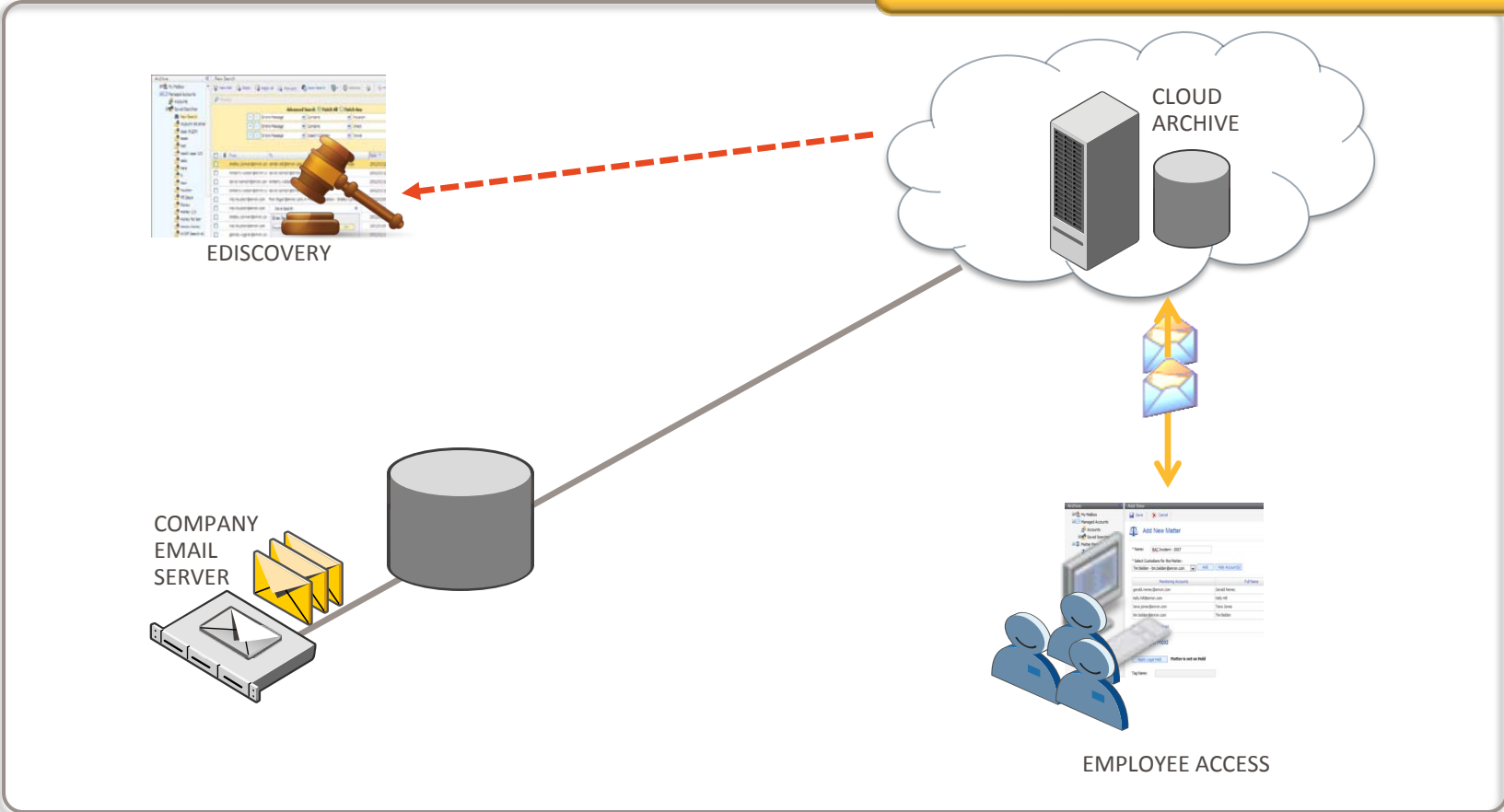
What is Cloud Computing?



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?



Why Do IT Departments Like the Cloud?

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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.

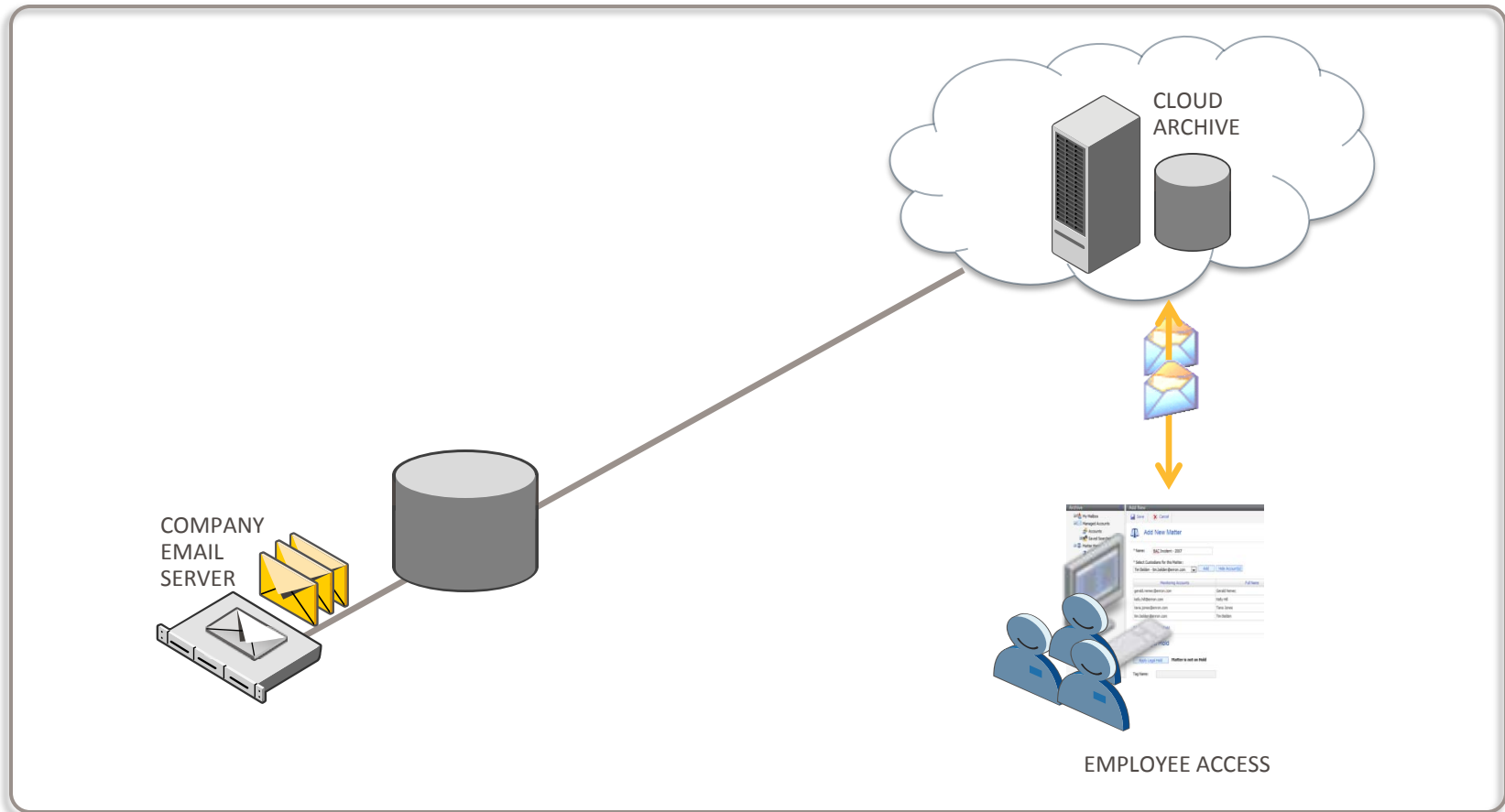
IDC

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

Gartner

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What's The Problem?



What's the Problem?

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



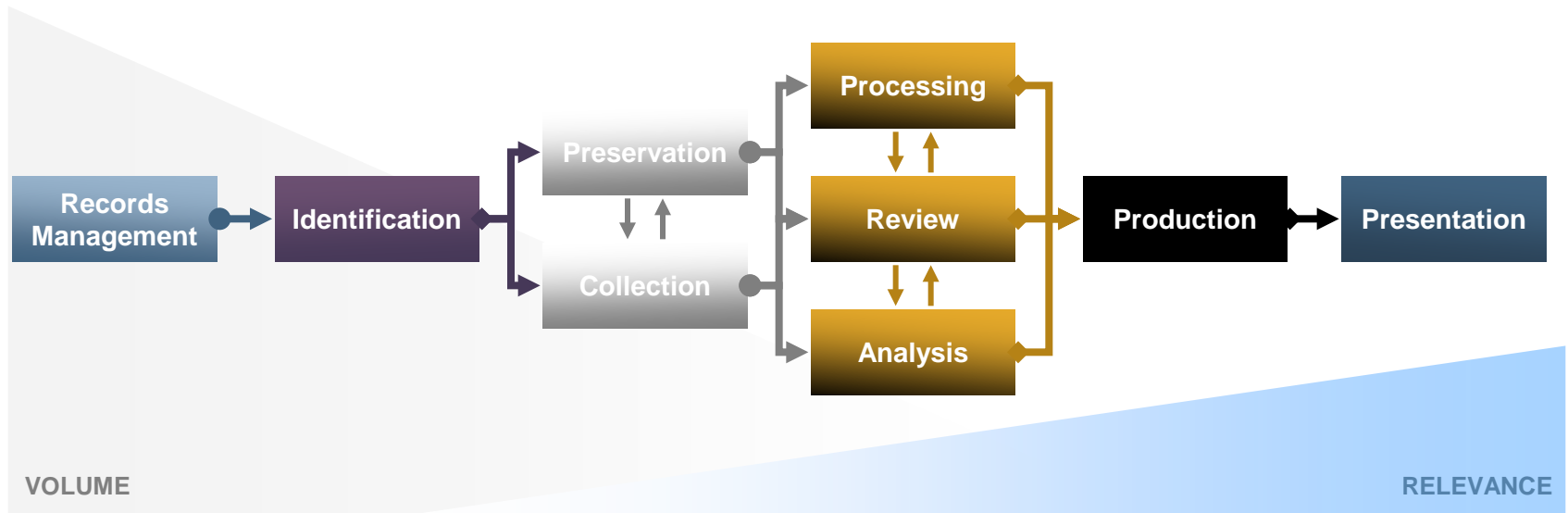
Why Does the Cloud Give Attorneys Headaches?

Real Life Going Rogue Scenario

- 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.



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 form 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

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

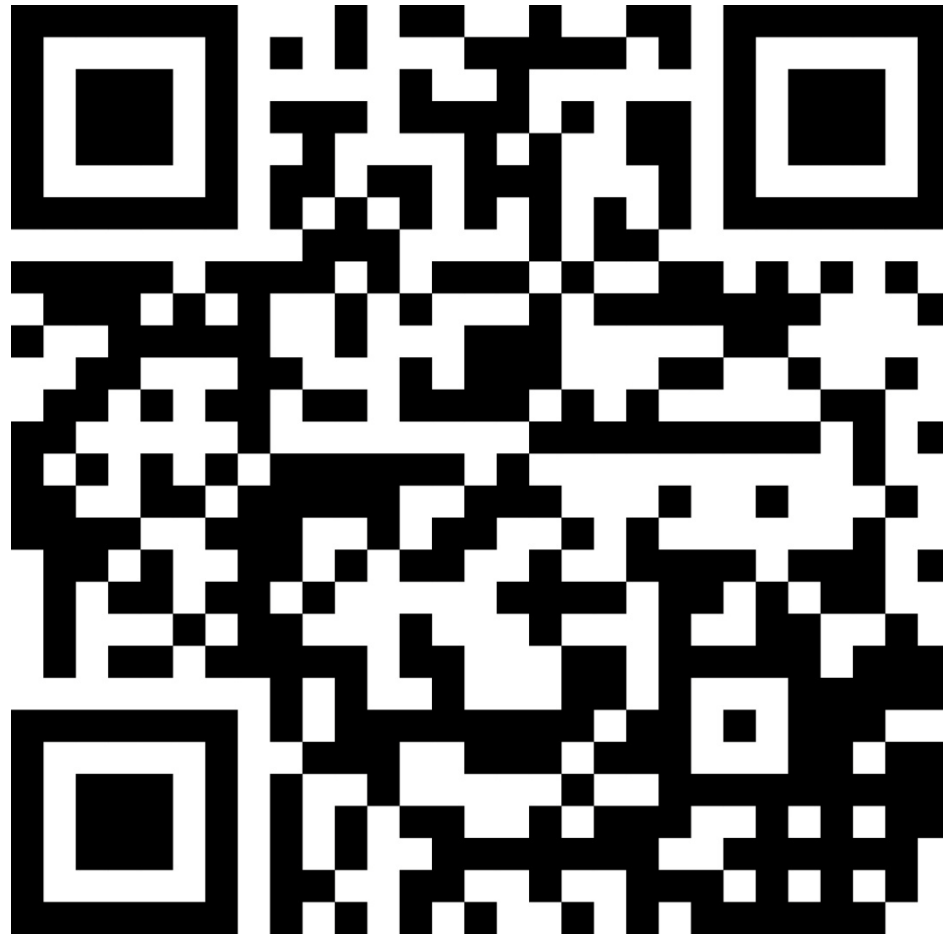
- ✔ Build Internal Consensus Before Migrating to the Cloud
- ✔ Negotiate Agreements (SLAs) Up Front
- ✔ Most Cloud Providers are Not eDiscovery Providers
- ✔ eDiscovery Software Should be Able to Collect ESI Both On Premise & in the Cloud
- ✔ eDiscovery & Archiving Technology Should Be Integrated
- ✔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

Thank You!

Resources and Reference Material:

- Today's Presentation: <http://www.clearwellsystems.com/legaltech/>
 - 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](https://twitter.com/InfoGovLawyer)
 - DLA Piper Website: <http://www.dlapiper.com/>
 - Webopedia technology definitions: <http://www.webopedia.com/>
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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](#) .