



# E-Discovery Work Product Repository

## CLE Presentation to HIPLA

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January 28, 2010



# Definition

## Work Product Repository

### What is a Work Product Repository (WPR)?

- A method for retaining work that is or was required by law
  
- Working definition of a Work Product Repository:
  - **Content:** Master set of relevant information, documents, attorneys decisions and matter metrics spanning many litigation matters – stored in a central location
  
  - **Location:** Can be a stand alone or hosted solution
  
  - **Security:** Availability of access controls to ensure work product can be available to OR protected from other law firms.



# CIO Perspective

## What is a Work Product Repository (WPR)?

- CIO trending towards comprehensive corporate information governance (The Holy Grail)
  - **Easy to manage** document retention /destruction policies
    - **Mirror copy** of documents subject to Legal Holds and other documents “backed up” to WPR.
    - **Existing data retention policies** applied to original docs. Most corporate documents not required by law have little use after 12 months.
    - **Leverage processed searchable documents** and associated attorney work product have significant monetary value
  - **Isolate and segregate** documents required by law
    - SEC Compliance
    - SOX
    - Industry specific compliance documentation
    - Litigation holds
  - **Barriers** to real time, enterprise-wide information governance
    - Silos of information – 20 years of CIO network security and access control
    - Selective deletion harder than selective copying to WPR
    - Implementation Impossible – System integration 5x cost of software



# General Counsel Perspective

## What is a Work Product Repository (WPR)?

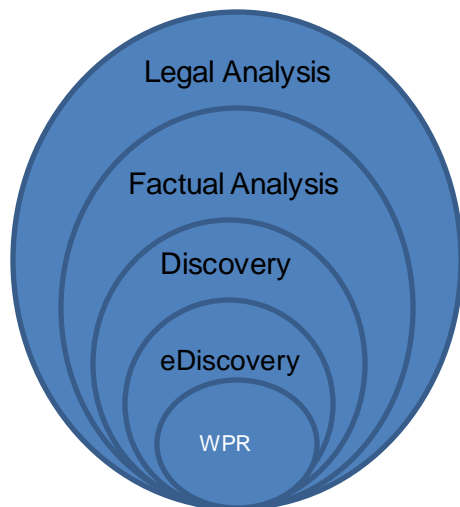
- GC wants to minimize both risks and costs associated with discovery obligations. A business optimization problem.
- Costs: WPRs help to manage litigation expenses.
  - **Processing fees:** Reuse processed/searchable documents ~ save \$500/GB.
  - **Priv Review:** Reduce costs associated with future Priv review and Priv logs
  - **Prior art repository:** Retain and build on the back of matter expenses
  - **Manage vendor fees** and law firm performance. WPRs Store matter metrics and fees to track Law firm and Vendor quality and efficiency .
- Risks: WPRs provide compliance audit ability and help to avoid future claims of Negligence or Spoliation
  - WPRs make it easier to **comply** with and document Litigation holds
  - WPRs **preserve** processed documents and provide stronger preservation preparedness for likelihood of derivative litigation
  - WPRs help **enforce** data retention and destruction policies
  - Useful as an Early **case assessment** tool



# Context

## Work Product Repository

A Work Product Repository plays a supporting role in a broader legal Process



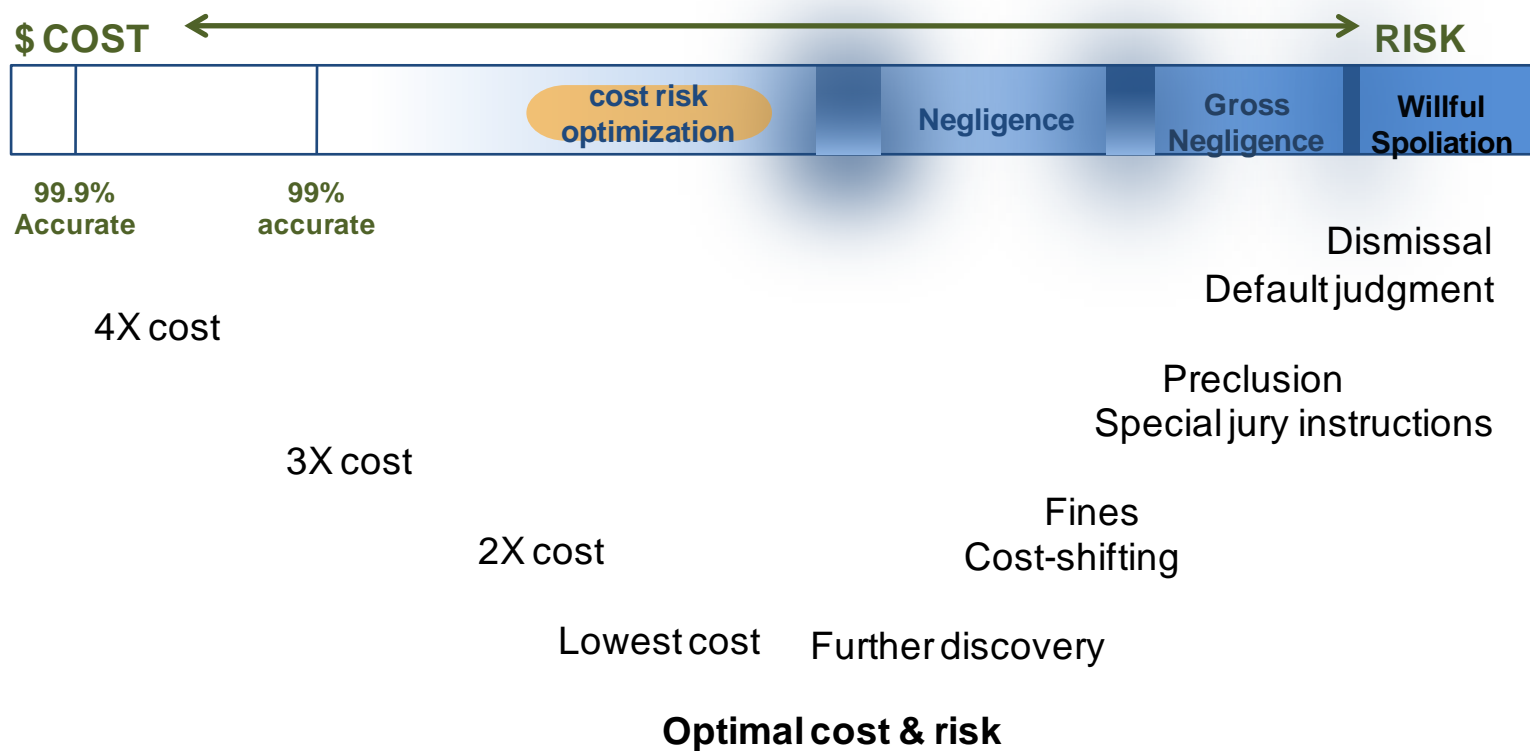
“Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law.”

John Dickinson  
*Administrative Justice and the  
Supremacy of Law (1927)*



# The Business Problem

## Optimizing Cost and Risk





# E-Discovery Risk

## Defining Defensible Compliance

The PENSION COMMITTEE OF the UNIVERSITY OF MONTREAL PENSION PLAN, et al., Plaintiffs, v. BANC OF AMERICA SECURITIES, LLC, et al.,

SHIRA A. SCHEINDLIN, District Judge.

Jan 15, 2010

83 pages

**Defines Discovery Compliance requirements as well as Negligence, Gross Negligence, Willful Spoliation and appropriate sanctions**



# E-Discovery Risk Work Product Repository

## Examples of Negligence

1. **Failure to preserve** evidence resulting in the loss or destruction of relevant information
2. **Failure of document collection supervisor** to be sufficiently knowledgeable about electronic storage systems and processes/
3. **Delegation of collection** to others without meaningful supervision
4. **Failure to search backup tapes** known to exist when it has been shown that relevant material existed (or should have existed) but not produced
5. **Failure to search relevant sources**
6. Failure to preserve records from *all* employees
7. Failure to take all appropriate measures to preserve ESI
8. Failure to institute a **written** litigation hold





# E-Discovery Risk Work Product Repository

## Examples of Gross Negligence

1. Failure to issue a written litigation hold: great tools available
2. Failure to cease the deletion of email (without mirror copies)
3. Failure to identify *key players* and ensure preservation of their documents
4. Failure to execute a comprehensive search for documents
5. Failure to preserve records of former employees in a party's possession, custody or control
6. Deleting electronic documents after the duty to preserve arose
7. Failure to sufficiently supervise or monitor employees' document collection



# E-Discovery Risk

## GOAL: Defensible Compliance

### Good Enough and Willful

#### Judge Scheindlin's latest opinion

**Good enough:** Courts do not and cannot expect that any party can meet a standard of perfection...

**Negligence:** Failed to produce 33 highly responsive docs

**Gross Neg:** Failed to produce 311 highly responsive docs

**Willful:** Intentional destruction of relevant electronic or paper, after the duty to preserve has attached

**Acceptable:** Sedona/EDRM Guidelines ~ 98% accuracy



# E-Discovery Cost Work Product Repository

Costs are controlled by these levers:

1. Initial volume
2. Culling rate
3. Processing costs
4. Quality-adjusted productivity
5. Labor rates

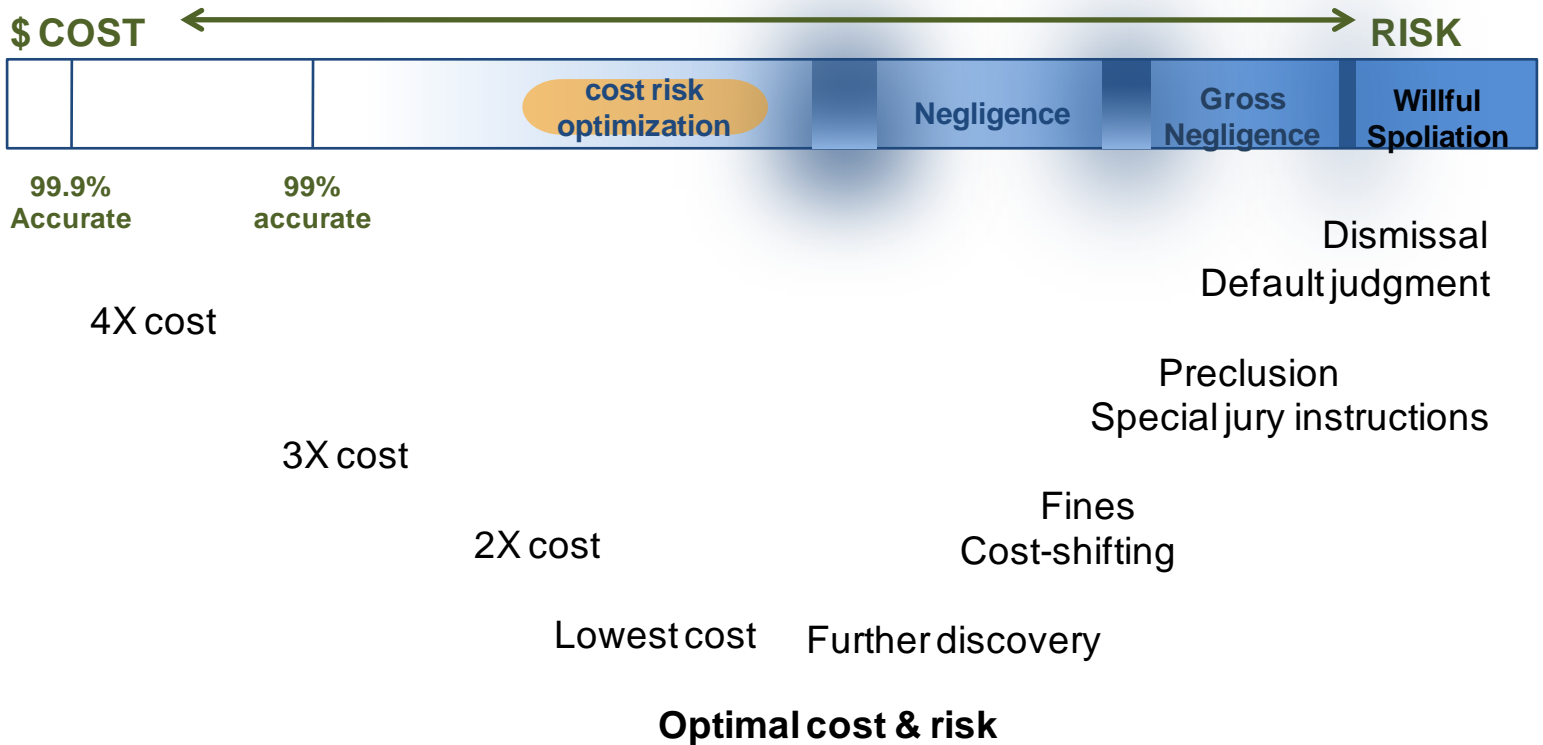


# The Business Problem

## Optimizing Cost and Risk

80% of Cost is Post Collection

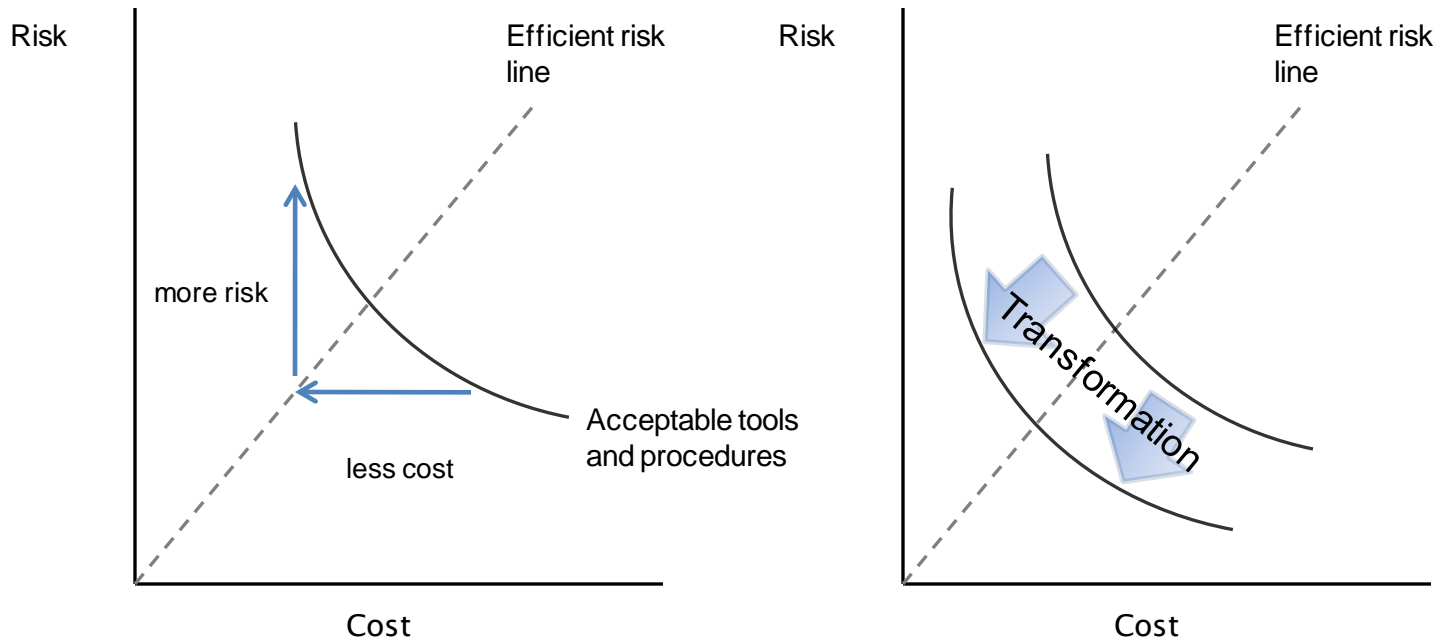
70% of Risk is Prior to Processing





# Cost Risk Work Product Repository

Technology can shift the cost/risk curve





# Measuring Risk Adjusted Costs

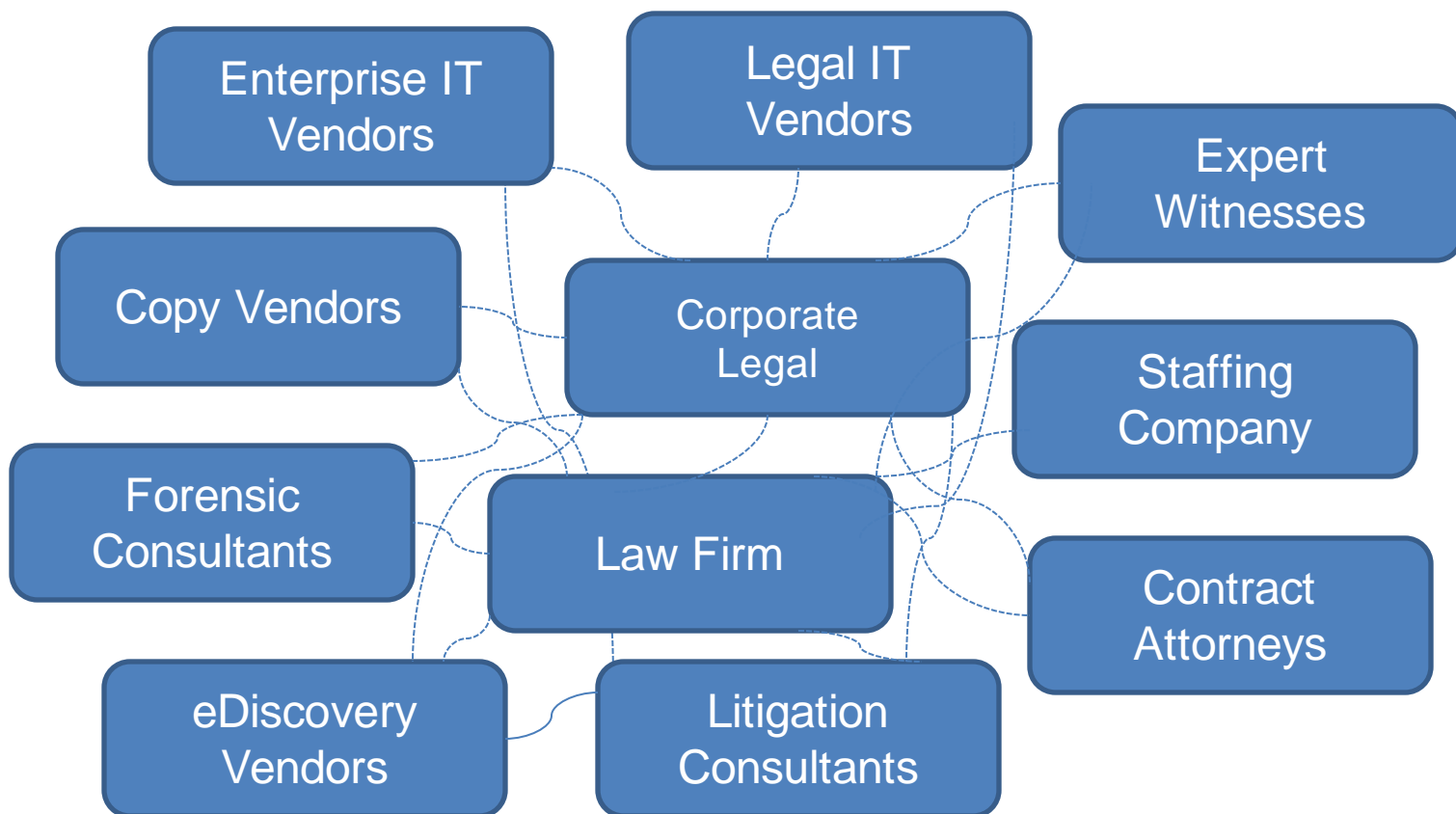
PAST: Litigation outsourcing used to be relatively straightforward





# Managing Law firms and Vendors

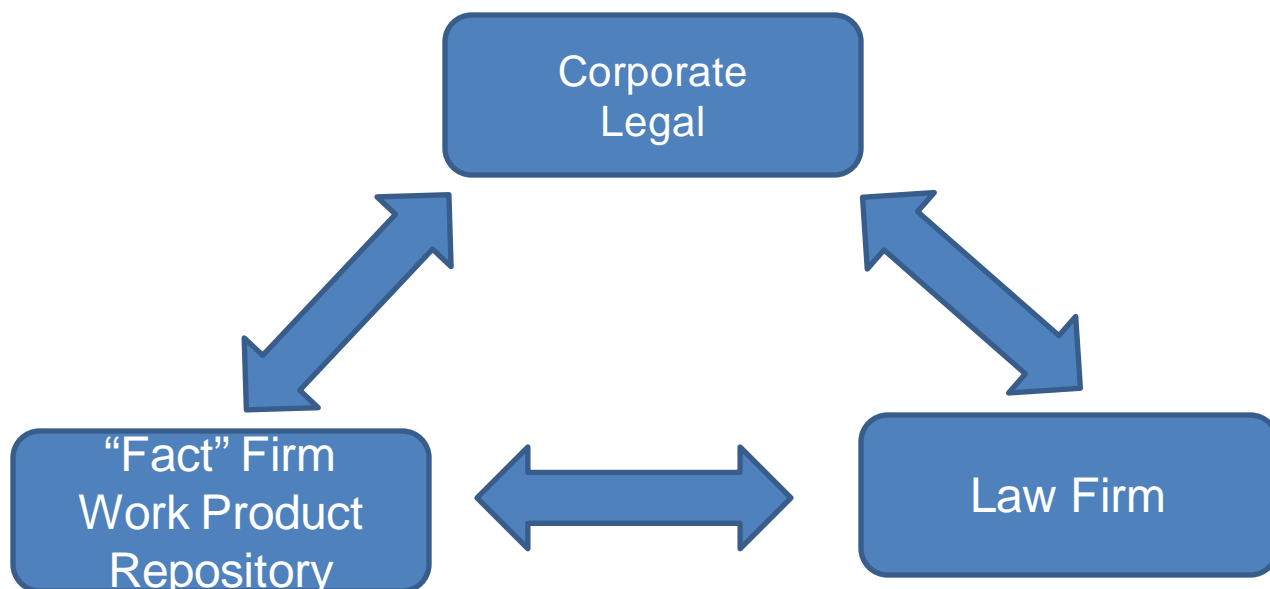
PRESENT: Fragmented information flow and process management





# Measuring Risk Adjusted Costs

FUTURE: Rethink the structure of legal services delivery.







# E-Discovery Costs Work Product Repository

Costs are controlled by these levers:

1. Initial volume:
2. **Culling rate:** Improves with WPR load files
3. **Processing costs:** WPRs reuse e-discovery vendor work product
4. **Quality-adjusted productivity:** Less Priv reviews
5. Labor rates



# E-Discovery Work Product Repository

## Why Maintain a Work Product Repository?

- Manage legal budgets
  - Re-use of same documents over and over for a variety of different matters
  - Reduce repetitive processing fees
  - Enhance recall of privileged documents
  - Enhance culling of junk: personal and public documents that are never responsive
  - Companies are finding themselves repeatedly collecting and processing the same information to be reviewed for each matter
  
- Early case assessment
  - Quickly access documents to sample for relevancy
  - Information for “high-value” custodians is immediately available in a central location – ready to be accessed and reviewed
  - Enhance Risk Management decisions related to claim construction or defense strategy
  
- Manage and measure law firm, vendor performance over time
  
- WPR helps reduce 3 of 5 activities that drive e-discovery fees



# E-Discovery Work Product Repository

## Advantages of a Work Product Repository

- No re-collection of previously processed documents
- Process records only once and re-use across different matters
- Leverage prior work product – share tags relating to privilege, relevancy, etc.
- Confirm that records are being treated consistently – are privilege calls being made consistently across different types of documents for different types of litigation?
  - This is another way to save time by focusing review activity and effort on second line of review vs. initial relevancy review
- Ensure privileged information is not inadvertently disclosed
- Addresses the number one cost of discovery: Attorney review time and cost
  - More than just the time to review – it is also the time and cost to collect and process/re-process documents
  - Immediately leverage prior work product



# E-Discovery Work Product Repository

## Disadvantages of a Work Product Repository

- Cost of maintaining hardware/software
- Unclear if privilege can be asserted on previously processed documents
- Another source that could be subpoenaed – retention policy meets litigation budget concerns
- Access control and security concerns – another place that sensitive documents could be accessed



# E-Discovery Work Product Repository

## Different Approaches- Deluxe

- Enterprise Profile
  - Large Fortune 100 technology companies
  - Serial litigation defendant
  - Annual litigation budget over \$20M

### *Case Study One - Internal Hosting Service*

- WPR Implementation
  - In-Source Hosting
  - Save and reuse all databases
  - Save and reuse all previously processed documents
  - Save and reuse all previously produced documents (both Bates stamped and unstamped)
  - Maintain a database of databases



# E-Discovery Work Product Repository

## Different Approaches – Lite

- Enterprise Profile
  - Large Fortune 1000 Internet retail company
  - 2-3 large matters per year, many small matters
  - Annual litigation budget over \$10M
  - All operational servers and network documents mirrored

### *Case Study Two – The Digital Bonfire*

- WPR “Lite”
  - Keep all matter databases
    - Save file fingerprints with associated attorney work product
    - Use as privilege and junk screening for future processing
  - Keep little to no processed documents (Prior Art)
  - Purge documents after matter closes\*
  - Leave prior productions with law firm



# E-Discovery Work Product Repository

## How to Use a Work Product Repository to Your Advantage

- Strategy depends on several factors
  - CIO relationship and policies
  - Amount and types of litigation, investigations
  - Size and predictability of legal budgets
- Be prepared for the meet and confer
  - Know what you have when you walk into that initial meeting
  - Everything is in one place
- Transparency for the Enterprise
  - Know who is looking at your documents and what is being done with them
  - Know how the documents can be used to respond to requests and subpoenas
  - Limit your early preservation exposure



# E-Discovery Work Product Repository

Q&A with Bill Gallivan, Managing Executive of GGO

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