

Have you heard of Electronic Discovery/Disclosure?

Warm Welcome

BCS IRMA 8th November 2011

Cher Devey
BSc MBA DiplIntArb
www.click2ediscovery.com

Agenda

Overview

Open Dialogue

Closing Remarks

Your Takeaways

Lookout Points

What is it?

Disclosure vs Discovery

Proceedings

Disc

Paper to Electronics

Exponential Growth

eDisc

eDisc vs Digital Forensics

Why need to know?

Processes

eAmplified

eSkills

eChallenges

eFramework

My Journey so far...

- ✓ Dec 2007 Digital Forensics and Incident Response, City University London
- ✓ Sept 2007 The First Electronic Evidence and E-discovery Forum, London
- ✓ Jan 2008 Electronic Evidence in International Arbitration, Juris Conferences, **New York**
- ✓ Jun 2008 DESI II International Workshop on Supporting Search and Sensemaking for Electronically Stored Information in Discovery Proceedings, London
- ✓ Jun 2008 The First Conference to Treat Digital Evidence on Global Platform, London
- ✓ May 2009 Weighing the Facts: Information Exchange and Presentation of Evidence in International Commercial and Investment Arbitration, Permanent Court of Arbitration, **The Hague, Netherlands**
- ✓ Jun 2009 International Programme on Cross Border EDiscovery and Data Privacy, The Sedona Conference, Barcelona, **Spain**
- ✓ Jul 2009 1st E-Discovery and Digital Forensic Conference in Asia, LexisNexis, **Hong Kong**
- ✓ Oct 2010 e-Discovery Exchange Platform, Innoxcell, **Singapore**

Claimers/Disclaimers

This presentation in terms of views, opinions, comments, suggestions expressed here represent my own personal interests, feelings and expressions and not those of the people, institutions or organizations that I may or may not be related with unless stated explicitly.

Any errors/omissions are mine alone.

Any questions/answers raised will be noted without storage and disclosure of your identity.

Your privacy is respected and
I trust others will do too.

Thank You.

What is it?

It is

a process/procedure

a piece of rules/law

electronic documents/information

It lacks 'something'

Disclosure vs Discovery

England and Wales

Disclosure

stage of the litigation procedure

each party is required to disclose to the other party the existence of the **documents** on which he relies or which adversely affect his own case, another party's or support another party's case

Source: Lovells – Disclosure of documents in civil proceedings in England & Wales

US

Discovery

pre-trial **phase** in a lawsuit

each party through the law of **civil procedure** can request **documents** and other evidence from other parties or can compel the production of evidence by using a subpoena or through other discovery devices, such as requests for production and depositions

Source: <http://en.wikipedia.org/wiki/Discovery>

Procedure – subtle differences

Document – trusted form of evidence

Costs

Proceedings

Investigations – regulatory bodies or market led

Arbitration – in private; flexible procedures; adversarial; complex relationships

Arbitration – Disclosure – preferred term

Discovery – ambiguous term;

to a civil lawyer it **means nothing**

to a US lawyer it encompasses **production of documents** and depositions of potential witnesses and experts as well as inspection of the subject-matter of the dispute

to an English lawyer it refers only to **production of documents**

discovery/disclosure => *Disc*

production of document => *Disc procedure*

Disc

England & Wales Civil Procedure Rules (CPR), Practice Direction(PD) 31;

31.2 Meaning of **disclosure**

A party discloses a document by stating that the document exists or has existed.

31.4 Meaning of **document**

‘document’ means anything in which information of any description is recorded; ...

Discovery

process of **identifying, locating**, securing and producing information

purpose of **obtaining evidence**

process of **reviewing** all materials that may be potentially relevant

materials that may need to be **disclosed** to other parties

evaluating evidence to prove or disprove facts, theories or

allegations : **The Sedona Conference®**

prepare factual ground

enables preservation of evidence

What is it?

Disc is

a process/procedure

a piece of rules/law

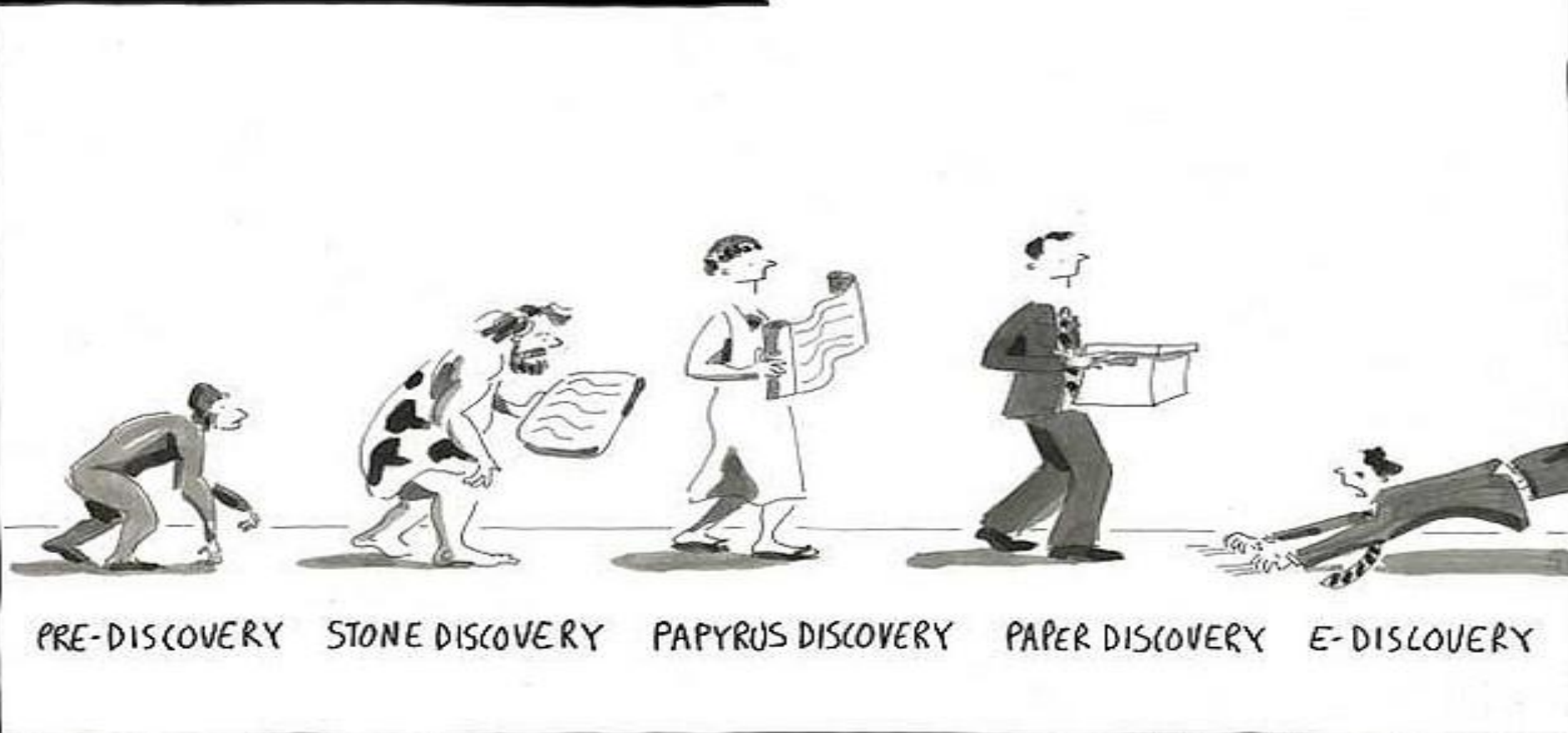
Paper to Electronics

CASE IN POINT

by Tom Fishburne

EVOLUTION OF E-DISCOVERY

CaseCentral!



PRE-DISCOVERY STONE DISCOVERY PAPYRUS DISCOVERY PAPER DISCOVERY E-DISCOVERY

©2010

CASECENTRAL.COM/CASEINPOINT

Pre-discovery to e-discovery
=> eDisc

With special thanks to Tom Fishburne

US Landmark

Zubulake v. UBS Warburg LCC case :

involving gender discrimination and retaliation case

Zubulake v UBS Warburg 02 Civ. 1243 (SAS),
[2003]; the US court cited:

‘The world was a far different place in 1849, when Henry David Thoreau opined : “[t]he **process of discovery is very simple.**” That hopeful maxim has given way to rapid technological advances, *requiring new solutions to old problems*’.

Old problems with Disc is now eDisc

Exponential growth

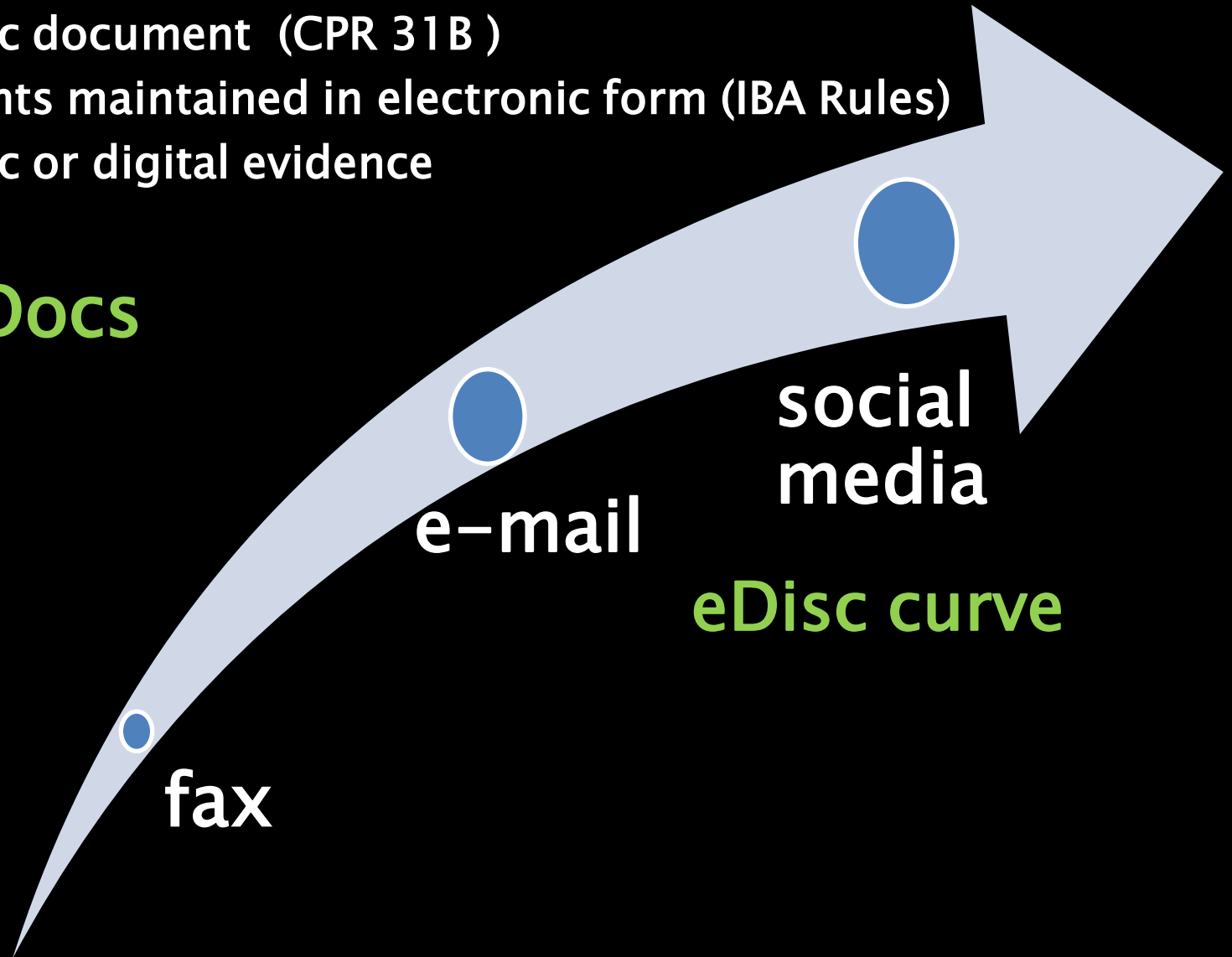
Electronically stored information (ESI)

Electronic document (CPR 31B)

Documents maintained in electronic form (IBA Rules)

Electronic or digital evidence

=>eDocs



eDisc

eDisc curve

amount of data being generated by all communications channels –
voluminous

prevalence of data held or stored in electronic form – **disperse** from
handsets → servers ('cloud')

eDocs

Burden

'How to do...'

Obligations

Costs

accessibility vs admissibility

proportionality

Risks

amplified routine activities

reasonably anticipated or foreseeable trial/dispute

Burden and Costs => power of court

eDisc Rules

Civil Litigation

CPR Part 31 PD31 Oct 2005 ; CPR PD31B Oct 2010

FRCP Rules 16, 26, 34, 37, 45 Dec 2006

Fed. Court Australia CM 6 2009

Canada : the Sedona Canada Principles

Singapore Practice Direction No 3 of 2009

Hong Kong Civil Procedures Reform Apr 2009

Arbitration

IBA Rules of Evidence May 2010

Chartered Institution of Arbitrators Protocol Oct 2008

International Centre for Dispute Resolution (AAA) May 2008

Arbitration Rules e.g. SIAC, HKIAC, KLRCA, ICC

UNCITRAL Arbitration Rules Aug 2010

Overarching aim

control the **costs**

shortening the **time**

fees schedule (arbitration)

Burden and Costs of eDisc vs

Control of Costs, Time and Process

eDisc vs Digital Forensics

eDisc

EDiscovery

for most of us is very much about a controlled collection/review of data for a client

E.g. in a case, it involved a managed collection of active logical data from each custodian, no recovery at all – Source: David C. Rule MBA, CPP, CFE, CFC, CMI^{II}, EnCE, CISM (2011)

eDiscovery : **petabytes**

Source: The Reliability of Forensic Evidence – BCS talk by John Douglas (2010)

Digital Forensics

Cyber forensics

work is really much deeper than eDiscovery and an in-depth investigation into what went on, recover deleted folders, Info2 Records, search unallocated clusters, swap files and greater search levels – Source: David C. Rule MBA, CPP, CFE, CFC, CMI^{II}, EnCE, CISM (2011)

Forensics : tens of **terabytes**

Source: The Reliability of Forensic Evidence – BCS talk by John Douglas (2010)

Bits and Bytes

1,024 megabytes are equal to 1 gigabyte (GB)
(truck full of paper).

1,024 gigabytes are equal to 1 terabyte (TB)
(50,000 trees of paper).

1,024 terabytes are equal to 1 petabyte (PB)
(250 Billion Pages of Text).

1,024 petabytes are equal to 1 exabytes (EB)
(1 000 000 000 000 000 000 bytes).

Source: Ralph Losey <http://ediscoveryteam.com/>

Don't you agree – unfathomable volumes?

Confluence of Cultures?

CASE IN POINT

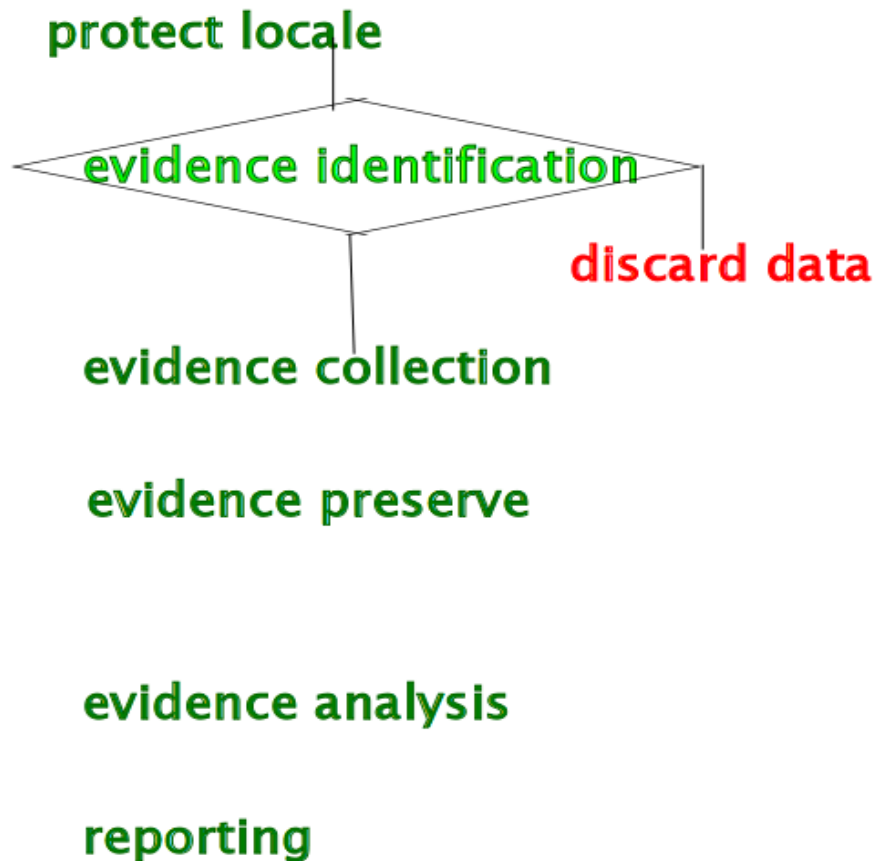
by Tom Fishburne



Or confluence of technology with law?
Perhaps a bit of both and more...

With special thanks to Tom Fishburne

Digital Forensics Process



e-Forensics Process in China

planning

identification

collection

At Scene

preserve

examination

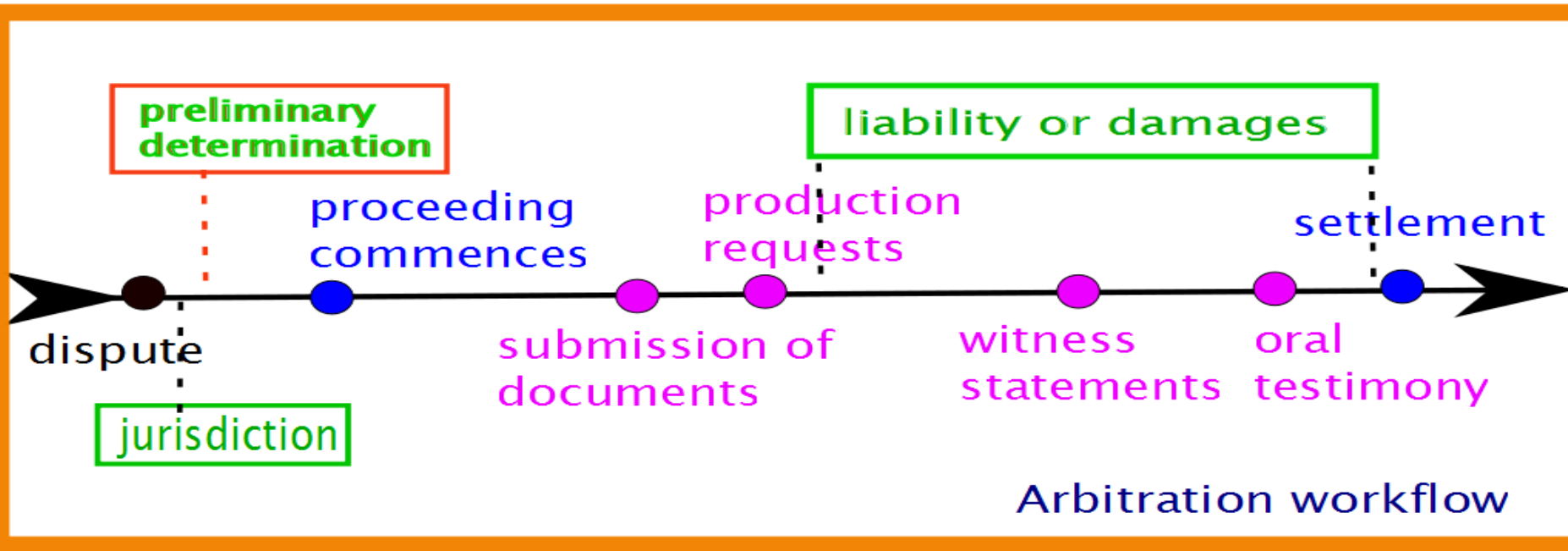
analysis

Lab

report

Digital Forensics

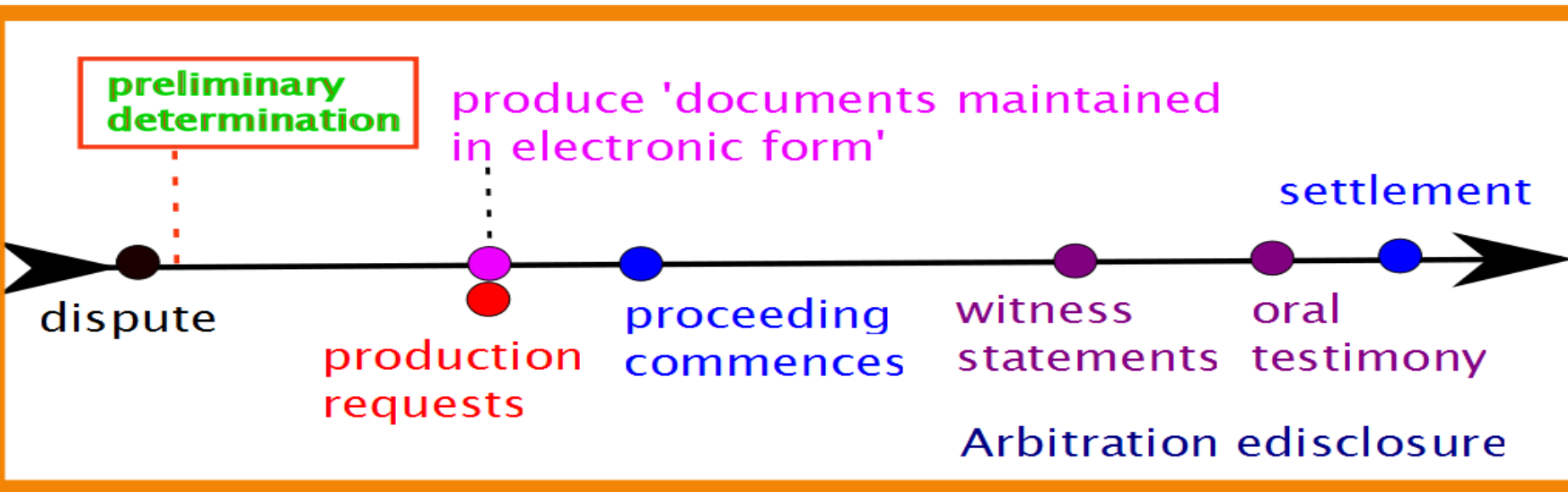
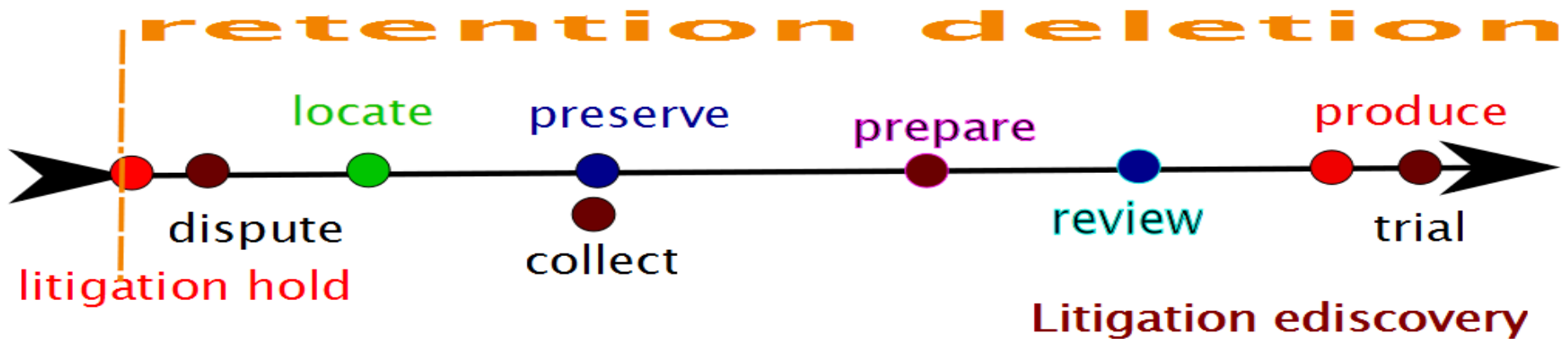
Processes



Case Management Conference (CMC)
Preliminary determination

Cher Devey 2011

eDisc Workflows



Procedure is amplified
eDocs not trusted form of evidence

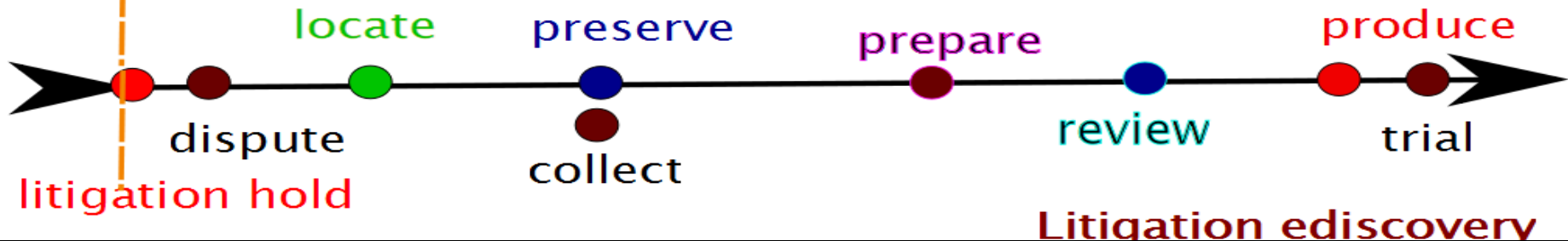


Where does litigation hold start?

[1st CMC as mentioned in the CPR must occur before proceeding commences]

*When does the litigation hold –
unhold or ‘released’?*

retention deletion



Litigation hold well before 1st CMC

Before 1st CMC , parties to meet and discuss issues related to technology and disclosure [CPR 31B 8]

*Who has the duty and obligations to ensure the rules/PDs/court order are in compliance?
Lawyers & Parties duties to plan and manage the edisc processes?
Court's duty to manage cases.*

*Most expansive process?
Also most challenging – materially easy to change?*

eAmplified

Routine tasks amplified

search & retrieval & indexing

review/inspect & forensics analytics

categorisation tools & meanings

document management

case management

social network analysis

eDisc risks

Little technology failure, tends to be people or process failure

Quote: eDisc Manager, Barclays Capital, 2011

eSkills

The role of expert witnesses in the forensic analysis of electronic media is by now quite familiar to most litigators,

but the **e-discovery consultant** offers a very different expertise. Instead of testimony regarding the recovery of files from unallocated space or evidence of unauthorized copying or downloading of data,

the **e-discovery consultant** instead **attests** to the sufficiency of the company's methods for preservation, collection, review, and production of electronic data.

Source : <http://www.insidecounsel.com> 2011

Digital Forensics Skills

Evaluating

can the expert justify a stand or decision?

(appraise, argue, defend, judge, select, support, value, evaluate)

Creating

can the expert create new methods or develop a new point of view?

(assemble, construct, create, design, develop, formulate, write)

Higher Level Thinking

Source: Glenn S. Dardick, LongWood University , ADFSL, 2011

eDisc Skills

Planning

hold, pre-trial to
produce

reasonable anticipation/
foreseeability (trial) and
manage

Awareness

eDisc rules, privacy,
work package/privilege
data rules, data
custodians

Reporting & Justifying

eDisc process

=> eDisc expert - manager - lawyer?

Collaborative

pre-trial
case management
conference
diverse team
cultures

IT Infrastructure & Technology

expert in eDisc
technology

Collaborate or Counseling?

CASE IN POINT

by Tom Fishburne

LAWYERS ARE FROM MARS, TECHIES ARE FROM VENUS

HE'S JUST NOT LISTENING: THE AMENDED FRCP REQUIRES A LEGAL HOLD AND AN EARLY CASE ASSESSMENT SO WE CAN AVOID RULE 502

SHE'S JUST NOT LISTENING: OUR TIERED STORAGE SUBSYSTEM AND FEDERATED SEARCH ONLY ALLOW ENTITY EXTRACTION WITH THE RIGHT ACL PERMISSIONS

GOOD, GOOD, NOW HOW DOES THAT MAKE YOU FEEL?



CaseCentral

©2008

CASECENTRAL.COM/CASEINPOINT

Sharing the couch and the document?

With special thanks to Tom Fishburne

eChallenges

Expanding data universe

accessibility
'reasonableness'
time limits

Costs

re-allocations
retrospective
specialised technology
experts

eDisc evidence

eDisc process
collaboration

International settings

trust, culture, ethics
local laws and
regulations

eDisc curves

accessibility in different
time zones
language
legacy

Model of Cyber Forensics Assurance (CFA)

CFA

Components

I
a) **Confidentiality** – ensuring that information is accessible only to those authorized to have access

b) **Possession / Control** – i.e. chain of custody

II
a) **Integrity/Consistency** – perceived consistency of actions, values, methods, measures and principle – unchanged “is it true all of the time?” (Verification)

b) **Authenticity / Original** – quality of being authentic or of established authority for truth and correctness – “best evidence” (Validity)

III
a) **Availability/Timeliness** – the degree to which the facts and analysis are available and relevant (valid and verifiable at a specific time)

b) **Utility/Relevance** – “Is it useful / is it the right information?”

IV
a) **Completeness** – “Is it the whole truth?”

b) **Non-Repudiation / Accuracy** – transaction cannot be denied (Validity)

How does this model apply to eDisc?

With special thanks to Glenn S Dardick,
Longwood University, ADFSL, 2011

eFramework

An eHolistic Framework

user centric process centric data centric

control

cost

time



operation



security



compliance

governance

risk

communication

life cycle

cher devey 2011

How to incorporate eDisc processes as design principles?

Cher Devey 2011

Takeaways

eDisc

contextual aspects in jurisdictions

eDisc is

a process/procedure,

a piece of rules/law,

and it has to do with electronic

documents/information

eDisc lacks something

Your Takeaways?

Thank You

Have a safe journey home

cher@click2ediscovery.com

Questions

What is it?

Who has heard of ediscovery or edisclosure?

Who has not?

Who is in the ediscovery business/space or dealing with ediscovery as a profession?

Exponential growth

Who don't create data daily?

How much do you think you create daily?

Do you know where your data is, when you need it?

Questions

Confluence of Cultures

Anyone here has encountered similar story shown here?

Why need to know eh?

What is the phrase (similar to litigation hold) here?

Suggestions anyone?

Questions

eAmplified

Challenges and Opportunities for IT folks?

In the record management world, not all documents are records.

How does this translate into eDisc space?

eDisc Skills

Any comments/suggestions/additions?

eChallenges

What do you think eDisc lacks?

eFramework

Cyber Forensics Model & eFramework

We don't need more eDisc rules. We need to look elsewhere