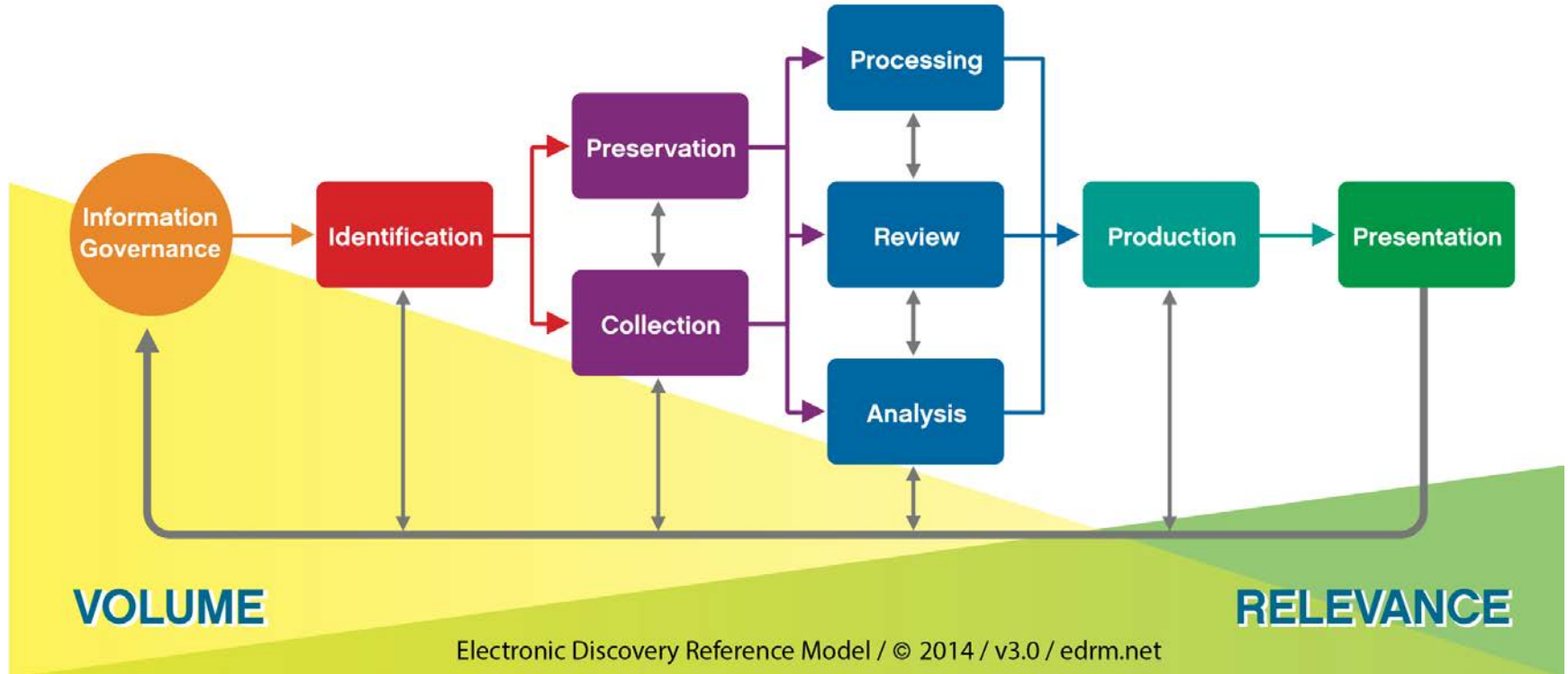




# **E-Discovery and Data Preservation**

By: Jake Poorman, Partner, *IP Litigation*, Procopio, Cory, Hargreaves and Savitch LLP

# Electronic Discovery Reference Model



# Know Your Data



# Discovery Requests can have a Short Fuse

- California Code of Civil Procedure Section 2020.220(a): Subject to subdivision (c) of Section 2020.410, *service of a deposition subpoena shall be effected a sufficient time in advance of the deposition to provide the deponent a reasonable opportunity to locate and produce any designated business records, documents, electronically stored information, and tangible things, as described in Article 4 (commencing with Section 2020.410), and, where personal attendance is commanded, a reasonable time to travel to the place of deposition.*
- Fed. R. Civ. P. 45(d)((3) Quashing or Modifying a Subpoena.(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that: (i) *fails to allow a reasonable time to comply ...*

# Learning Your Data



# The Duty to Preserve Electronically Stored Information (“ESI”)



# Triggering the Duty to Preserve ESI

## Federal Law

- The duty to preserve applies “from the moment that litigation is reasonably anticipated.” *Apple Inc. v. Samsung Electronics Co., Ltd.*, 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012);
- Fed. R. Civ. P. 37(e) (sanctions for failure to take reasonable steps to preserve ESI in anticipation of litigation);
- *Byrnie v. Town of Cromwell Board of Education*, 243 F.3d 93, 109-09 (2d Cir. 2001) (“destruction of evidence in violation of a regulation that requires its retention can give rise to an inference of spoliation”)

## California

- *Victor Valley Union High Sch. Dist. v. Superior Ct.*, 91 Cal. App. 5th 1121, 1149, (2023), review denied (Aug. 16, 2023) (applying Federal law)
- Judicial Council of California Civil Jury Instruction NO. 204. Willful Suppression of Evidence (“You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.”)
- *Cedar-Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 12-13 (1998) (ethical duty to preserve evidence);
- 2015 California State Bar Ethics Opinion 2015-193
  - Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information (“ESI”).

# When is litigation reasonably anticipated?





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## Potential Defendants

- *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y.2006) (business dispute is not in itself sufficient to trigger duty to preserve);
- *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 616 (D. Colo. 2007) (request to negotiate claims did not trigger duty to preserve; more than “equivocal statement of discontent” required);
- *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 510 (D. Md. 2009) (letter noting potential for substantial damages triggered duty to preserve);
- *103 Invs. I, L.P. v. Square D Co.*, 470 F.3d 985, 987 (10th Cir. 2006) (plaintiff sanctioned for disposing of electrical equipment after it determined defect in the equipment started a fire);
- *Willard v. Caterpillar, Inc.*, 40 Cal. App. 4th 892 (1995) (duty to preserve product defect records);
- *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191 (D. Utah 2009) (patent application for technology addressing prominent defect in floppy disks triggered duty to preserve)

# When is litigation reasonably anticipated?

## Potential Plaintiffs

- *Milenkamp v. Davisco Foods Int'l*, 562 F.3d 971, 981 (9th Cir. 2009) (no duty to preserve until plaintiff determines [or should have determined] that legal action is appropriate);
- *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 475 (S.D.N.Y. 2010), *abrogated on other grounds by Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012) (investor plaintiffs under duty to preserve);
- *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 641 (S.D. Tex. 2010) (email to counsel discussing plan to sue employer triggered duty to preserve evidence)

# When is litigation reasonably anticipated?

## Factors to Consider



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# When is an employee's reasonable anticipation of litigation imputable to their employer?

- *In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 2002) (“An agent’s knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority.”)

# What is the scope of the duty to preserve?



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- *T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984) (a party must take reasonable steps to preserve “what it knows, or reasonable should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request”); see also *In Napster, Inc. Copyright Litig.*, 462 F.Supp.2d 1060, 1067 (N.D. Cal. 2006);
- *Zubulake v. UBS Warburg*, 2020 FRD 212, 218 (S.D.N.Y. 2003) (Once litigation is anticipated, a party “must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”)
- *Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991) (duty to preserve applies to lawyers and “corporate managers”)

# Identifying Records to Preserve

- Fed. R. Civ. P. 34(a): “A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce “documents “in the responding party’s possession, custody or control ...”
- Fed. R. Civ. P. 33 (requiring party responding to an interrogatory to “furnish the information available to the party”)
- *In re NTI, Inc. Sec. Litig.*, 244 F.R.D. 179 (S.D.N.Y. 2007) (third-party records within control of defendant)

# The scope of the duty to preserve is informed by the attendant burden.

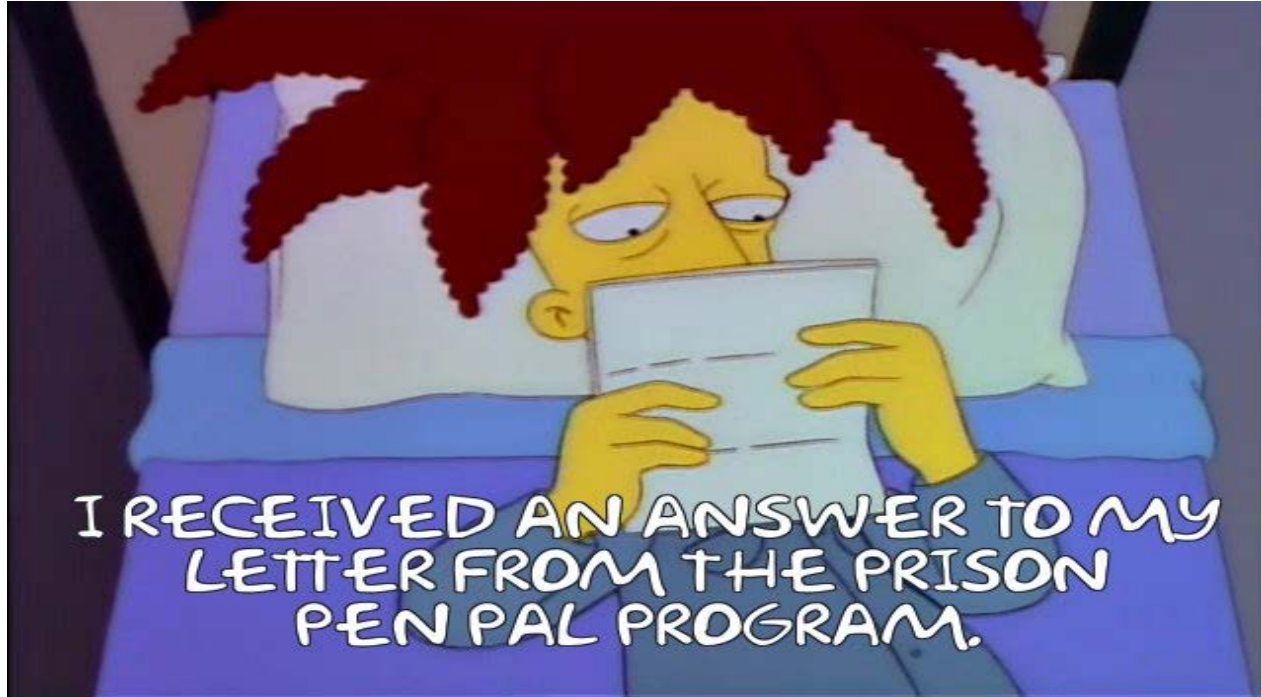
- *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 641 (S.D. Tex. 2010) (“Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards.”);
- Seventh Circuit Pilot Program on E-Discovery (2009) (“every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control.”)
- Northern District of California Guidelines for the Discovery of ESI (preservation is both reasonable and proportionate)
- Fed R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case”)



# Restrictions on the Preservation of Foreign Documents

- See, e.g., The European Directive 95/46/EC regarding personal data for citizens of the EU.

# Is the duty to preserve limited by the scope of evidence preservation demands?



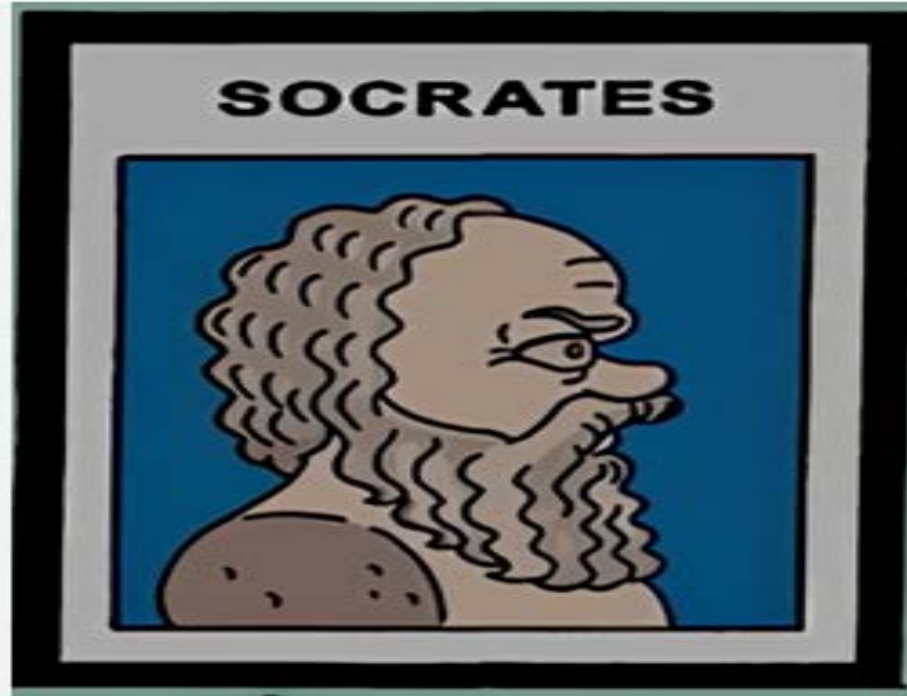
# Data Preservation Formats

- *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 646–47 (D.Kan. 2005) (metadata discoverable);
- *Lubrizol Corp. v. IBM Corp.*, 2023 WL 3453643 (N.D. Ohio 2023) (relevant MS Teams and slack messages should be produced, as well as messages sent shortly before/after those messages to provide context)
- *In re Uber Techs., Inc. Passenger Sexual Assault Litig.*, MDL No. 3084 (N.D. Cal. 2024), (parties directed to take all reasonable steps to “maintain and preserve the relationship between any message or email and any cloud-hosted document hyperlink(ed).”)

# Complying with eDiscovery Obligations



# eDiscovery Philosophy



# eDiscovery Philosophy





## eDiscovery Philosophy



- Cal. Code of Civ. Proc. Section 2031.310(h): the court shall impose a monetary sanction ... against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to a demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.
- Fed. R. Civ. P. 37(a)(5) (reasonable attorneys' fees and costs for prevailing party on motion to compel)

# eDiscovery Philosophy





# eDiscovery Philosophy



# Both Federal and California State Court Require Parties to Meet and Confer about ESI

- California Rule of Court 3.724
  - Requires parties to meet and confer regarding discovery issues including, but not limited to, electronically stored information prior to the initial case management conference
- Fed. R. Civ. 26(F)
  - Conference of the Parties; Planning for Discovery to occur at least 21 days for scheduling conference under Rule 16
  - "Any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced"
- Fed. R. Civ. 26(b)(2)(B): *Specific Limitations on Electronically Stored Data*
- Fed. R. Evid. 502: Clawback agreements

# Rule 26 requires the early disclosure of information in Federal Court.



# California State Procedure Permits Early Discovery

- California Rules of Civil Procedure Sections 2030.020, 2031.020
  - Plaintiff may serve discovery requests 10 days after service of the complaint;
  - Defendants may serve discovery requests “at any time”
- Fed. R. Civ. P. 26(d)(2)(A) – early discovery requests

# The Scope of eDiscovery

- California Code of Civil Procedure § 2017.010:
  - “any party may obtain discovery regarding any matter ... that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either ... appears reasonably calculated to lead to the discovery of admissible evidence”
  - “Discovery may be obtained ... of the existence, description, nature, custody, condition, and location of any” ESI
- Fed. R. Civ. P. 26(b)(1) DISCOVERY SCOPE AND LIMITS. Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.

# The Scope of eDiscovery – California vs. Federal



# The Scope of eDiscovery – California vs. Federal

- *Emerson Electric Co. v. Superior Court*, 16 Cal.4th 1101, 110 (1997) (California courts allow “expansive scope” of discovery);
- *Norton v. Superior Court*, 24 Cal.App.4th 1750, 1761 (1994) (“some level” of “fishing” in discovery is permitted)

# The Scope of eDiscovery – California vs. Federal

- California Code, Code of Civil Procedure - CCP § 2030.030 (35 interrogatories);
- Fed. R. Civ. P. 33 (25 interrogatories);
- Fed R. Civ. P. 30(a)(2)(A)(i) (10 depositions)



# The Scope of eDiscovery – California vs. Federal

- Fed. R. Civ. P. 26(b)(2)(B) *Specific Limitations on Electronically Stored Information.*
- ***Compare*** California Code of Civil Procedure § 2023.030(f)(1) (no sanctions for good faith failure to preserve absent exceptional circumstances) *with* Fed. R. Civ. P. 37(e)(1) (sanctions for failure to take “reasonable steps” to preserve ESI).

# Identifying Responsive eDiscovery

- *Legault v. Zambrano*, 105 F.3d 24, 28 (1st Cir. 1997) (responding party required to make “a reasonable effort” to “provid[e] all the information and documents available to [it] that are responsive to the discovery demand”);
- *Price v. Synapse Grp., Inc.*, 2018 WL 9517276, at \*8 (S.D. Cal. Sept. 12, 2018) (responding party has a “duty under Rule 34 to conduct a diligent search and reasonable inquiry in effort to obtain responsive documents”)
- California Code, Code of Civil Procedure - CCP § 2031.230 (responding to request for inspection requires diligent search and reasonable inquiry)

# Identifying Responsive eDiscovery – Third-Party Obligations?



# Pushing Back on eDiscovery Requests



# The Meet and Confer Process



# Reviewing ESI



# Reviewing ESI



# Technological Methods for Reducing the Volume of ESI

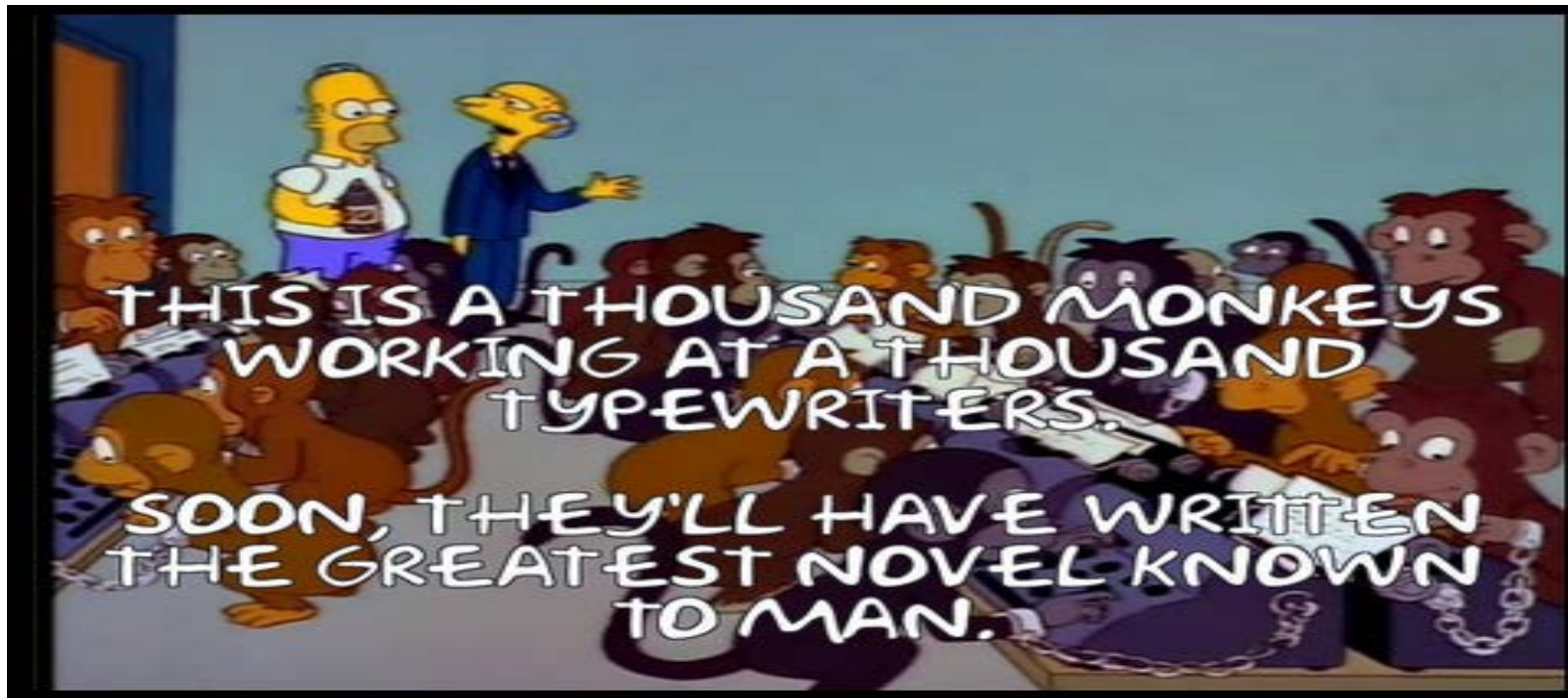




# Technological Methods for Reviewing ESI



# Generative AI and LLMs



# Producing ESI

- Fed R. Civ. P. 34(b)(2)(E) *Producing the Documents or Electronically Stored Information.*

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# Thank you!



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