

10 Commandments of eDiscovery

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Agenda

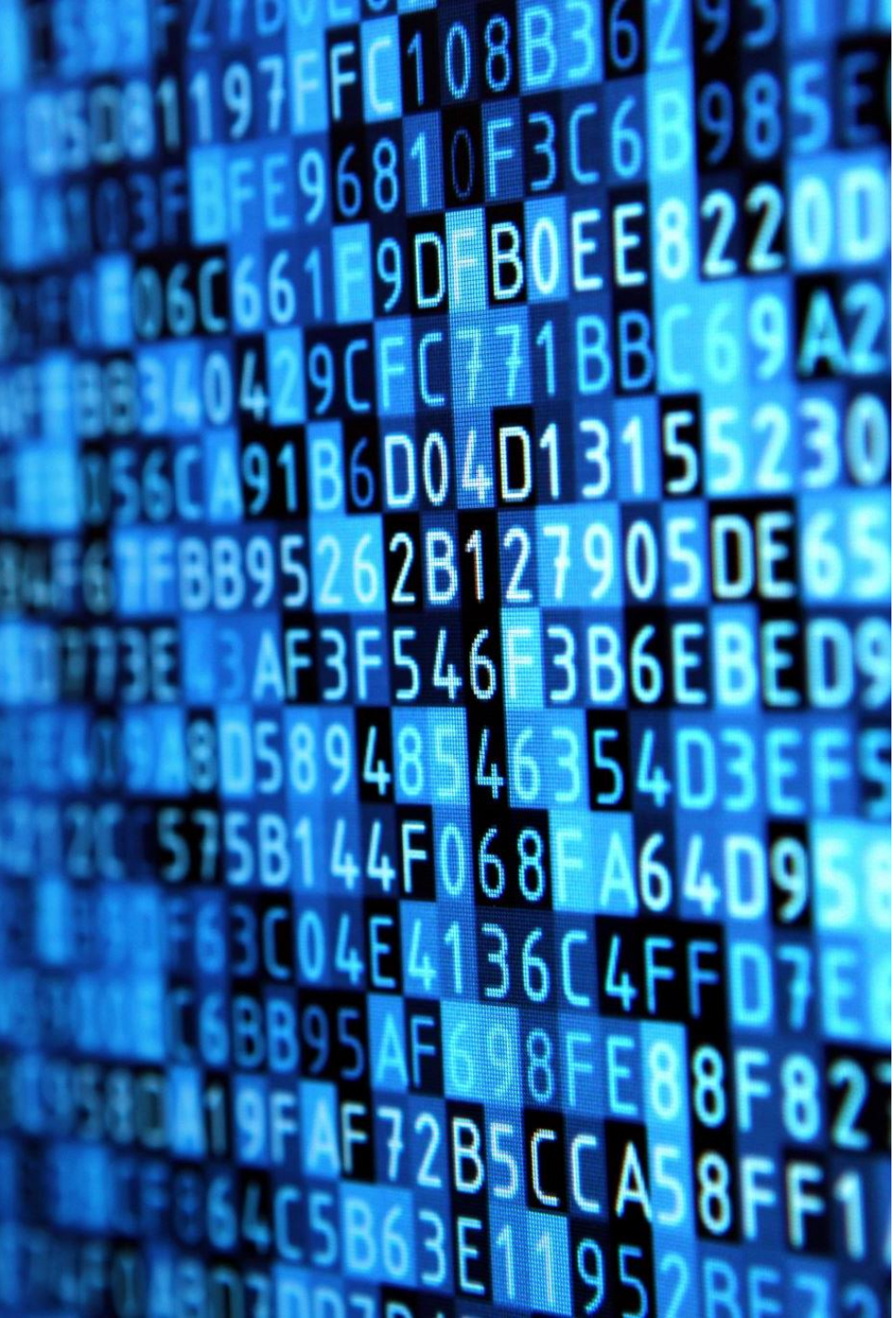
- eDiscovery Overview
- COVID-19 Implications on eDiscovery
- The 10 Commandments of eDiscovery
- eDiscovery Case Law

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eDiscovery Overview

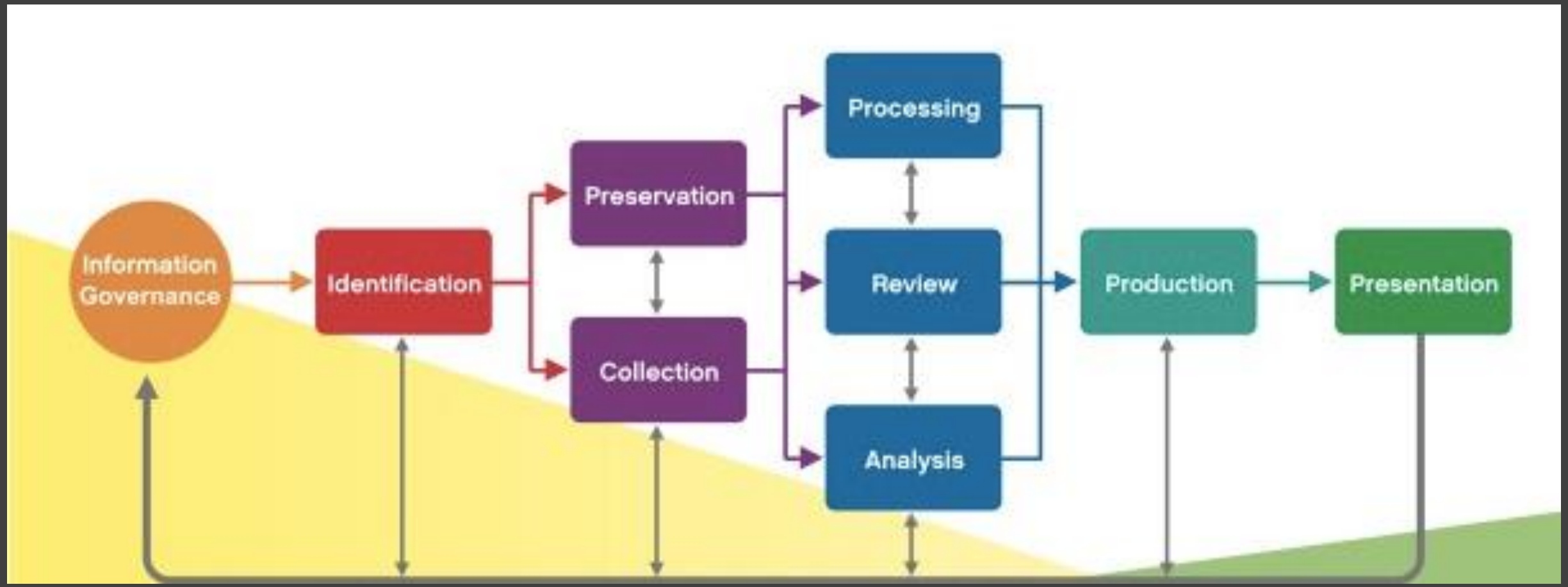
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What is eDiscovery?

- Electronic Discovery (eDiscovery) is a process by which parties involved in a legal case preserve, collect, review, and exchange information that is stored electronically.
- Electronically Stored Information (ESI) comes in many formats ranging from emails, instant messages and text messages to social media, smartphone applications, and more.

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EDRM

The EDRM (Electronic Discovery Reference Model) is a workflow model depicting the continuous, interdependent stages of eDiscovery.

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Importance of eDiscovery

- eDiscovery is a critical part of the legal process, the ruling in a case may sometimes hinge on something found in an email or on social media
- As big data continues to grow, it increases the amount of potential eDiscovery documents to be analyzed and reviewed→ increased volume leads to increased risk!
  - In 2014, data professionals were responsible for 230 GB of data.
  - In 2020, per FTI Consulting, it is expected that data professionals will be responsible for 1,231 GB of data

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International eDiscovery Awareness

- General Data Protection Regulation (GDPR)
  - Went into effect on May 25, 2018
  - Key features:
    - citizens' ability to control their own data;
    - individuals' right to be forgotten;
    - responsibility for 3rd parties accessing data;
    - fines up to 4% of global revenue for non-compliance
  - Fines levied against 91 companies in the first year alone, totaling €56 million

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State-level eDiscovery Awareness

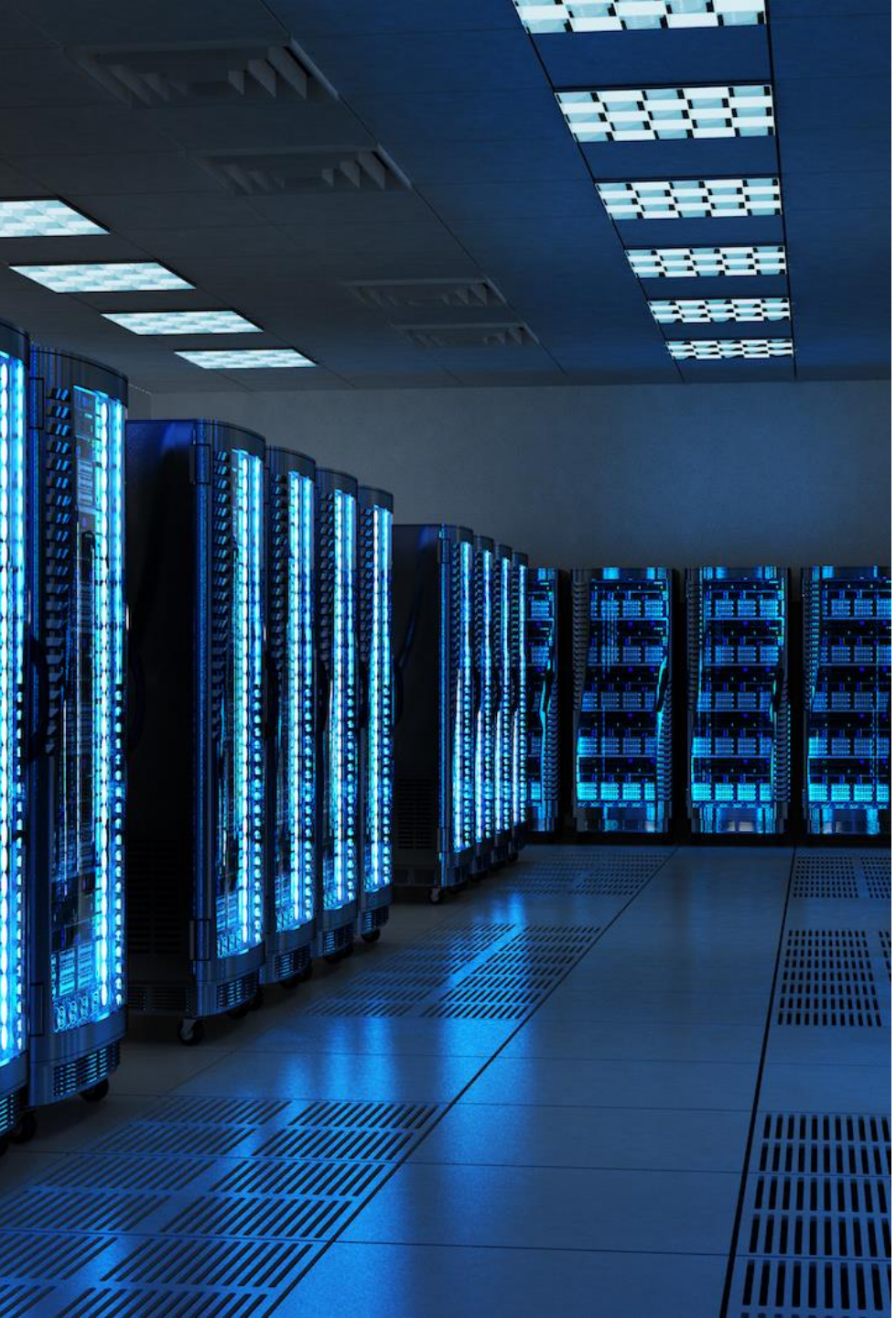
- California Consumer Privacy Act (CCPA)
  - Went into effect on January 1, 2020
  - Key features:
    - individuals' right to know what data is being collected;
    - individuals' right to know whether data is being sold or shared;
    - individuals' right to say no to the sale of their data;
    - individuals' right to access their data;
    - individuals' right to equal service and price even if they exercise these privacy rights

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COVID-19 Implications on eDiscovery

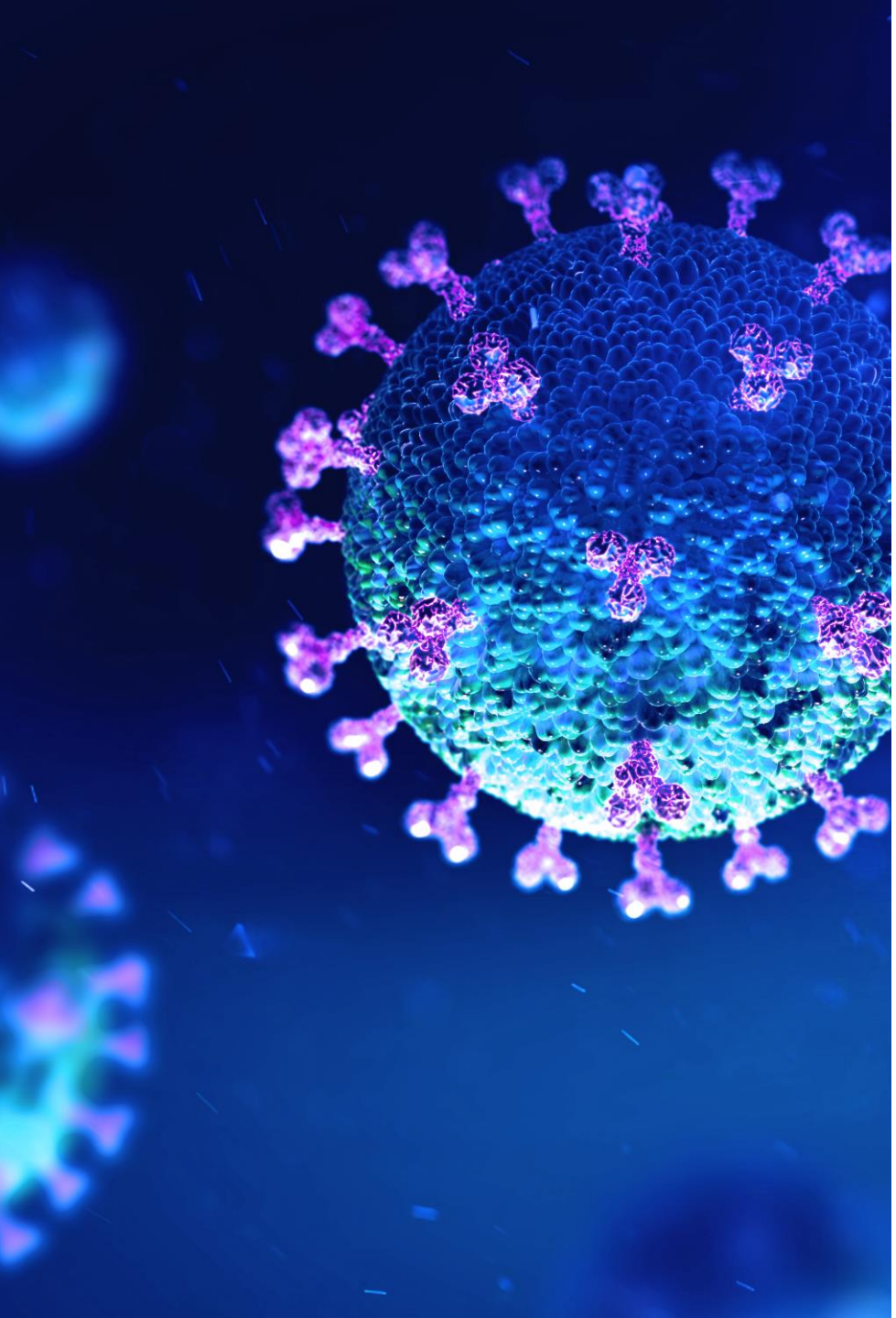
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COVID-19: Preparation for New Data Storage and Collection Challenges

- Organizations must prepare for the potential eDiscovery issues that may continue to arise from the surge in remote work due to the COVID-19 pandemic.
- Reasonable efforts by organizations to facilitate remote work in a secure manner and prioritization of data preservation will likely be considered heavily by courts during eDiscovery or legal hold disputes arising from the circumstances caused by the COVID-19 pandemic.

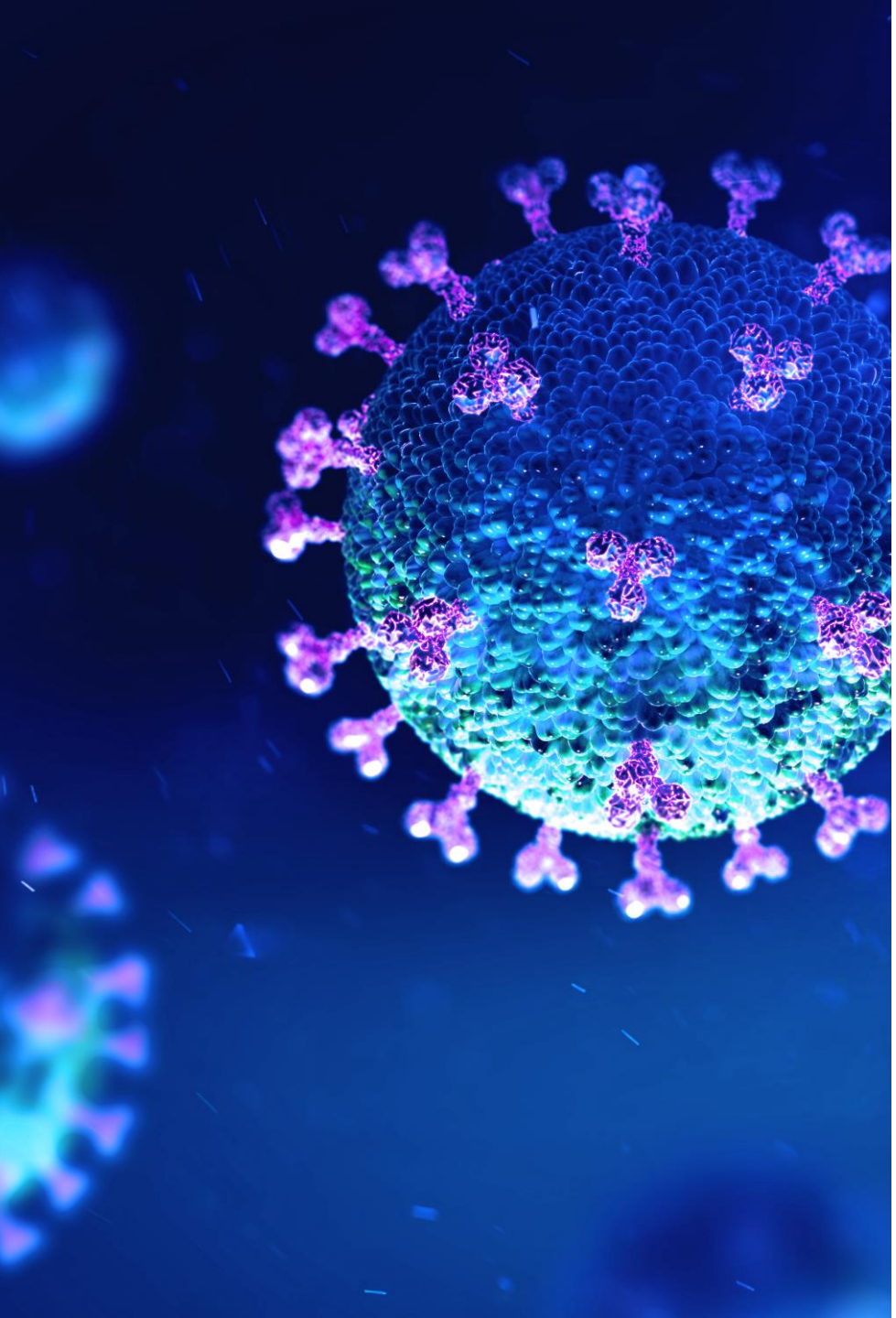
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COVID-19: Update, Anticipate, Perform!

- **Update** all key policies and procedures pertaining to remote work and device usage
  - All remote work & BYOD policies should be current, and ensure employees are aware that business data is always discoverable, regardless of whether it is generated at the office or at home.
  - Particular attention should be given to: 1) what devices and applications the organization authorizes for business use; 2) data storage practices; 3) retention policies; and 4) how to implement personal device usage.

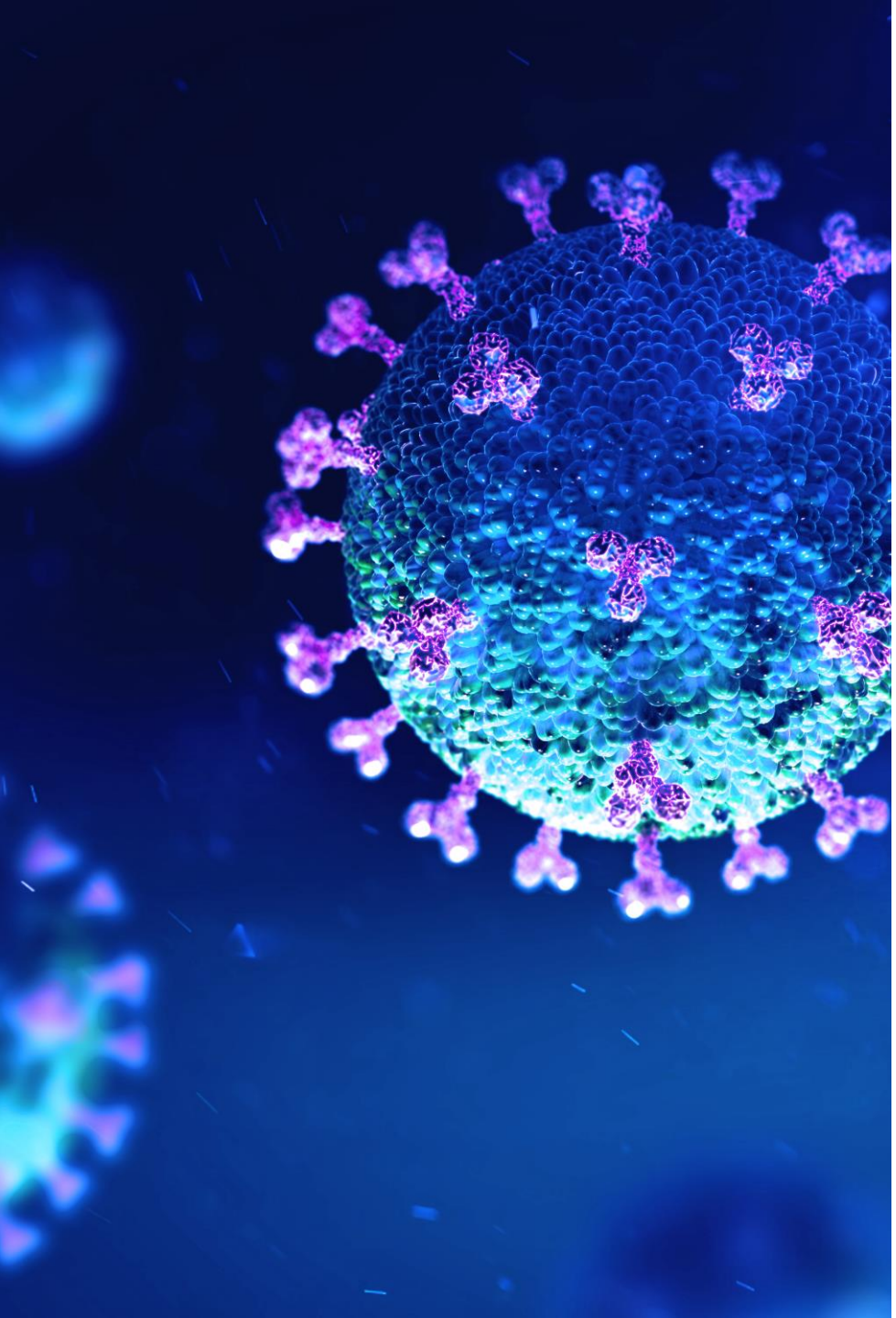
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COVID-19: Update, Anticipate, Perform! (cont.)

- **Anticipate** data collection challenges and learn how to collect from non-traditional data sources.
  - E.g. where employees are primarily using Microsoft Teams, Slack, or similar platforms to collaborate, chat, and store data, it is likely that email and text communications will be less frequent. As such, organizations should educate themselves on how such collaboration tools operate and store data to prepare for potential future collection efforts.

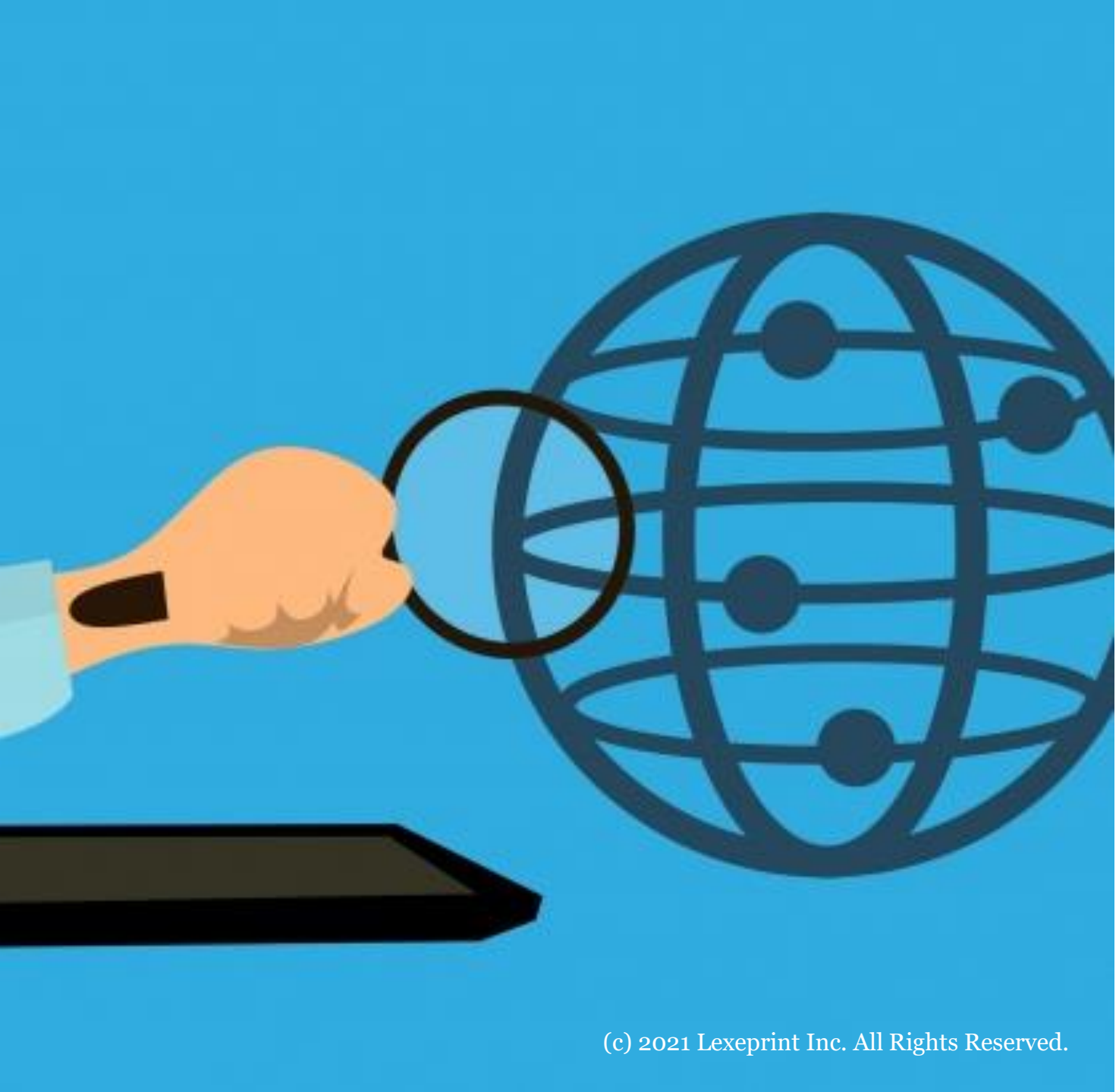
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COVID-19: Update, Anticipate, Perform! (cont.)

- **Perform** routine compliance checks
  - Especially when employees are working remotely, it is essential for supervisors to hold conference calls and virtual meetings, not only to ensure everyone is aware of their data storage obligations, but also to confirm employees are meeting company expectations.

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The 10 Commandments of eDiscovery

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First Commandment
Trust but Verify

- Carefully review all documents and representations made by your company or client regarding eDiscovery capabilities, but don't stop there! It is essential to verify the representations and test the capabilities and document your findings accordingly.
  - Why? This protects your client from being accused of spoilation

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Second Commandment
Be Careful What You Wish For

- While expediting the discovery process may be important, it is even more important to ensure the efficiency of the eDiscovery process.
- Make sure you are aware of all applicable deadlines and ensure that your company or client is able to meet them.
    - Requesting too much (i.e. all social media or Slack communications) could result in getting more data than you need, and possible more than you can handle reviewing thoroughly!

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Third Commandment
Ensure Reality Matches Your Company or Client's Representations

- While robust policies and procedures may be in place, those procedures may not be 100% followed on the ground.
- Both in-house and outside counsel must take the extra steps necessary to ensure that what is written and outlined in their company or client's policies and procedures is being properly executed on the ground.

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Fourth Commandment
Engage the IT Department Early

- Attorneys must speak with those stakeholders who are familiar with the systems.
- In speaking with the IT experts, lawyers must be prepared to learn and ask as many questions as necessary to get a thorough understanding of the systems.
- There are many resources available to assist lawyers in determining what questions they should ask (i.e. the Sedona Conference JumpStart Guide)

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Fifth Commandment
Identify and Engage Business Stakeholders

- Interview the business stakeholders to understand how the systems are being used.
- Learn what kind of data is captured within each system.
  - This will enable you to work more effectively with IT and ensure that nothing is missed.
- There are many resources available to assist lawyers in determining what questions they should ask (i.e. the Sedona Conference JumpStart Guide)

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Sixth Commandment
There is No Such Thing as “1 Click” Collection

- Despite how “easy” the idea of collecting ESI may seem, it is important to be prepared for unexpected issues to arise.
  - Most places are complex organizations so it is unlikely that data collection will be easy or seamless
  - Issues, such as system crashes and lost data, could occur
- Follow rigorous chain of custody procedures and document each step to ensure you are able to defend your collection process.

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Seventh Commandment

Verify and Validate Costs Against Internal Resources

- Though it may seem easier or faster to push things to outside vendors, analyzing internal resources and expertise often yields cheaper and better results, and gives a better perspective of the benefit/burden argument.
  - The key is to not focus solely on what is the most cost-effective solution, especially where complex systems are involved.

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Eighth Commandment

Make Sure Everything is Happening As Written

- If your company or client has established litigation hold and collection policies and procedures, ensure that those are being followed!
- Nothing is worse than opposing counsel identifying wrongfully deleted ESI which should have been preserved per your own litigation hold policy.
- Verifying that what is represented is actually happening protects you from possibly incurring costs, sanctions or legal actions which could have otherwise been avoided.

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Ninth Commandment
Prepare for the Meet & Confer

- Meet and confer conferences are NOT the venue for initial eDiscovery thoughts and conversations.
- The potential scope and possible pitfalls associated with what might be sought by opposing counsel should be discussed with your company or client and its IT department well in advance of the meet and confer.
    - If you prepare, you'll be in a much better position to be successful.

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Tenth Commandment

Remember: Perfection is NOT the Standard, Reasonableness IS.

- Sanctions exist to punish willful and grossly negligent reckless parties. If you follow a **reasonable** path and document everything along the way, you will significantly mitigate the risk of sanctions.
- Lawyers can sometimes be overly cautious and cause their clients to spend significant amounts of money on eDiscovery of things that are simply unnecessary.
    - Remember: you define your standard, but the standard is **not** perfection- it is objective reasonableness.

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eDiscovery Case Law

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Discovery of Tagged Photos on Social Media

Vasquez-Santos v. Mathew (2019)

- NY Appellate Division found that the defendant's motion to compel access by a third- party data mining company to plaintiff's devices, email accounts and social media accounts to obtain photographs and other evidence relevant to the case was improperly denied.
  - Appellate division unanimously reversed the lower court's decision, noting that although the plaintiff did not take or post the photos, he was tagged in them, and other photos were "sent to his phone", so he had "access to them".
  - The defendant is entitled to discovery to rebut the plaintiff's claims that the photos are from basketball games he played prior to his accident and to defend against the plaintiff's claims of injury.
  - "The access to plaintiff's accounts and devices is appropriately limited in time…and in subject matter".

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COVID-19: The Duty to Preserve Still Exists

Bolding v. Banner Bank (2020)

- In this class-action employment case, the plaintiffs motioned to the United States District Court for the Western District of Washington for spoliation sanctions and default judgement based on the defendant's alleged intentional destruction of relevant information after the defendant had sent a legal hold notice to preserve emails and other documents relating to the case after filing the complaint in April 2017.
- The court found that:
  - "discoverable ESI existed at the time the duties to preserve the evidence arose,
  - that defendant's efforts to preserve the ESI were deficient,
  - that defendant took affirmative and intentional steps to destroy relevant evidence that it knew or should have known had not been preserved, and
  - that the evidence is now irretrievably lost.
  - Thus, plaintiffs have shown that spoliation occurred."

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Preservation of ESI

Alsadi v. Intel Corporation (2020)

- Plaintiffs sought a negative inference sanction against defendant Intel Corporation for its alleged failure to preserve relevant information generated and recorded by an electronic measurement device.
  - They argued that such information was not ESI within the ambit of FRCP 37(e) and that the court should therefore rely on its inherent authority (not FRCP 37(e)) to issue the negative inference.
- Analyzing the issues through FRCP 37(e), the court denied the requested negative inference. In his explanation, Judge Campbell noted that:
  - The data in question was ESI within the scope of both **FRCP 34** and FRCP 37(e), both of which had been developed to broadly include any type of stored electronic data.
  - FRCP 37(e) provides the **exclusive** framework for addressing whether ESI preservation failures justified sanctions.
    - Reliance on inherent authority would both violate this premise and run contrary to the Advisory Committee's stated goal of providing "uniformity to an area of the law that had been badly splintered by various courts' reliance on inherent authority."

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Questions?

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Daniel Garrie is the Co-Founder of Law & Forensics LLC, Head of Computer Forensics and Cyber Security Practice Groups and has been a dominant voice in the computer forensic and cybersecurity space for over 20 years. Prior to Daniel's legal career, he successfully built and sold several technology start-up companies. Since co-founding Law & Forensics LLC in 2008, Daniel has built it into one of the leading boutique cybersecurity forensic engineering firms in the industry. Daniel has both a Bachelor's and a Master's Degree in computer science from Brandeis University, as well as a J.D. degree from Rutgers Law School. Daniel has led forensic teams in some of the most visible and sensitive cyber incidents in the United States. In particular, Daniel recently located and recovered deleted files in both private and public cloud computing environments using his patented software, Forensic Scan. This investigation took less than forty-eight hours to clean and recover the data from the servers of a cloud-hosting provider that was compromised by a malicious cyber-attack. Thanks to the Forensic Scan technology, that Daniel co-invented and patented (US9990498B2 and US9990497B2), and his own expertise, Daniel and his team was able to identify the source of the breach and remediate the problem in record time.

Daniel regularly testifies as an e-discovery, cybersecurity and computer forensic expert witness, authoring forensic expert reports on multi-million-dollar disputes. His ability to perform complex investigations and effectively communicate the results to a jury has made him one of the most sought-after experts in the country. His testimony has been pivotal in a number of cases, including one involving the embezzlement of millions of dollars from a large non-profit. Daniel was able to perform a thorough analysis of the alleged embezzlers' phone and computer, despite the embezzlers' attempts to wipe them, and identify concrete evidence of the embezzlement to a jury. Since 2008, Daniel has served as a Neutral and Special Master and in 2016, he joined JAMS as one of the organization's youngest Neutrals. At JAMS, Daniel serves as an Arbitrator, Forensic Neutral, and technical Special Master with a focus on cybersecurity, cryptocurrency, and complex software and technology related disputes. Some of the major cases for which he has served as an e-discovery special master, or forensic neutral include: *Hougan vs. City of Newport Beach, No. 30-2012-00582855* (Super. Ct. Cal. 2014)*; Small v. University Medical Center of Southern Nevada, 2014 WL 4079507*(D. Nev. 2014)*; C.D.S. Inc. v. Zelter and Amazon Web Services, Inc.*, (S.D.N.Y. 2016); *Jawbone, Inc. v. Fitbit Inc.* et al (Super. Cal., S.F. County 2018). In addition to his vast litigious experience, Daniel is well-published in the cybersecurity space, Editor-in-Chief of the Journal of Law & Cyberwarfare, author of more than 200 articles and books including, "Understanding Software, the Internet, Mobile Computing, and the Cloud. A guide for Judges", published by the Federal Judicial Center. He has been recognized by several United States Supreme Court Justices for his legal scholarship and is a trusted source and a thought leader for cybersecurity articles and opinions, being cited over 500 times to date.

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Jeff, again nominated in 2021 as a Southern California Super Lawyer, has been a civil litigator on behalf of plaintiffs for his entire career handling complex matters in federal and state courts, and arbitration. With experience in all aspects of civil trial and appellate practice, he has concentrated on consumer class actions in courts throughout the country representing consumers against large corporations and now does the same in financial services litigation and mass torts.

In the area of class actions, Jeff recently represented several notable musicians, among them, The Temptations and The Motels, in class actions seeking compensation relating to the payment of digital download royalties from their record labels including Universal Music Group, Capitol EMI and Warner Brothers. Jeff has also represented various Hollywood notables, including the estates of Charles Bronson, Peter Sellers and Richard Pryor, seeking payment of home video royalties from major movies studios including Universal Studios, Paramount Pictures, Twentieth Century Fox, and Sony Pictures. The settlements with the studios resulted in payments to class members exceeding $51 million. He has also been active against major automobile manufacturers such as BMW relating to the timing chain in MINI Cooper vehicles, Toyota for HVAC systems, GM for braking issues and Mazda for water pump failures. Jeff also litigates on behalf of individual investors as a result of wrongdoing by their financial services advisors including currently litigating a $10+ million loss suffered by an Indian Tribe.

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Jeremy E. Deutsch is a shareholder in Anderson Kill's New York office and is Chair of the firm's Corporate and Securities group. Mr. Deutsch has over 20 years' experience in business law, including transactional and day to day legal counseling as well as complex corporate and commercial litigation and arbitration.

In 2018, Mr. Deutsch was selected as a member of Law360's Banking editorial advisory board. Mr. Deutsch's corporate practice embraces all areas of corporate transactional and advisory roles. In transactional work, he has represented clients in mergers/ acquisitions, sales/ leases, employment agreements/ terminations, and all manner of commercial transactions, including private investment deals, technology transactions, and private equity. In advisory work, he acts as general counsel to a number of different businesses and provides counsel and advice to established businesses and startups on corporate relationship creation and architecture; corporate governance, including disputes between partners and advising Boards of Directors; and day to day business issues.

In litigation, Mr. Deutsch has represented clients and tried cases to verdict and arbitrated matters to final award in matters involving large frauds, breaches of fiduciary duty, breaches of contract and joint venture agreements, complex financial instrument and securities litigation, real estate lending, shareholder derivative suits, stock option litigation, construction disputes, employment disputes, and violations of restrictive covenant agreements by employees. He has experience in cross-border litigation in the United States, Canada and in England, including matters involving securities fraud, trade secret theft, copyright and trademark infringement, commodities fraud, investment fraud, various types of financial fraud, employee theft of high-tech products, officer liability/mandatory indemnification issues, RICO claims, employment contracts and management buyout litigation. He has been lead trial counsel in United States Federal Courts, New York State courts, the state courts of other states, and private dispute resolution in the American Arbitration Association, FINRA, JAMS, and the International Chamber of Commerce International Court of Arbitration. Mr. Deutsch also has extensive federal and state court injunction experience.

Mr. Deutsch's training as a trial lawyer gives him an unusual perspective on corporate matters, as he has seen and litigated the results of failed deals and ventures. He views corporate work as a form of centralized risk management, insofar as well-designed contracts on other corporate documents foster productive partnerships and can help prevent disputes and litigation.

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