



EVERYTHING MATTERS

Designing, Implementing, Maintaining and Releasing Litigation Holds

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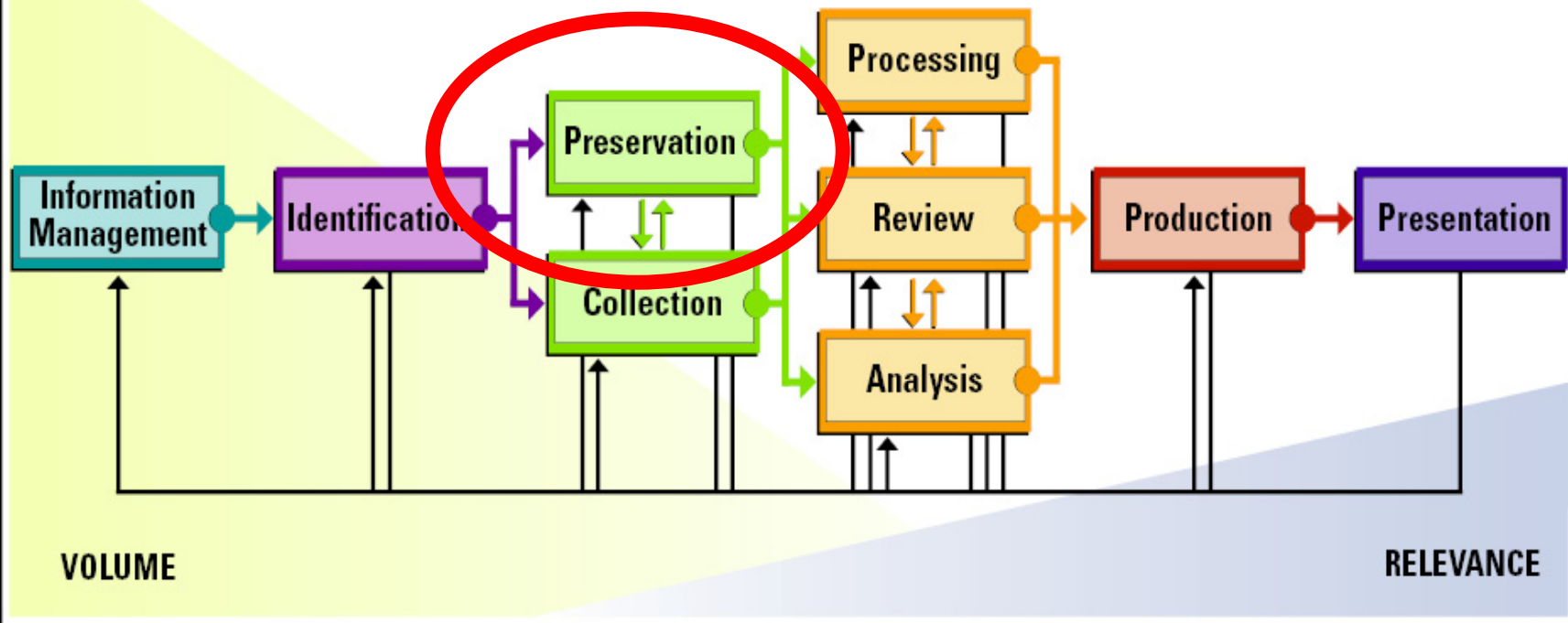
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Preservation – Litigation Holds

Electronic Discovery Reference Model

www.edrm.net

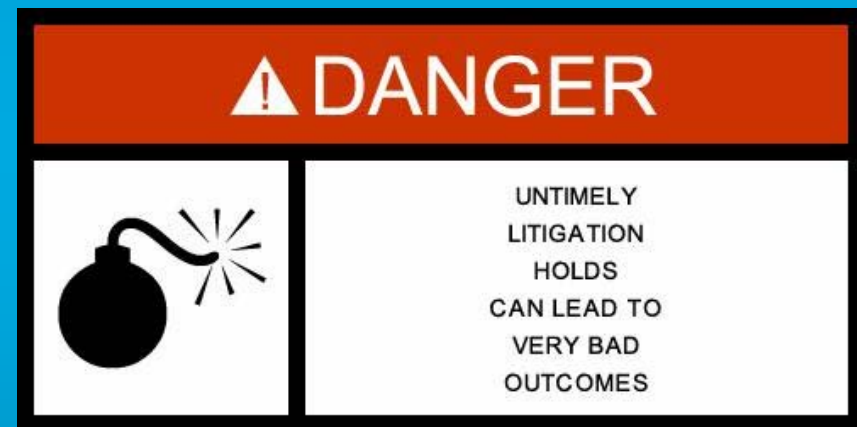
13% (According to Kroll Analysis of eDiscovery cases in 2008)



Litigation Holds



- Key skill: Design, implement, and maintain an effective Litigation Hold. You also have to know when to release the hold
- Issue a “litigation hold” (and re-issue periodically), which
 - Suspends the company’s routine document retention/destruction policy
 - Ensures that relevant information is not accidentally erased or overwritten
- Duty arises at onset of litigation or when litigation is reasonably anticipated



Preservation – Litigation Hold



- Who
- What
- Where
- When
- How

Company-wide or targeted hold???

- Pros ~ Everyone receives hold so you do not have to worry about missing someone
- Cons ~ Effect of hold is diluted, can require significant storage space, more potential data for review

Litigation Hold ~ Who



- Determine individuals who should receive notice ~ Identify the “key players” (i.e. persons likely to have relevant information)
- Set up means to identify new employees who should receive the hold
- Set up means to identify departing employees who are subject to the hold
- Determine departments who should receive notice
- Notify HR and IT

What items are subject to the hold?

- “Documents”
- E-mail
- Databases
- Instant Messaging
- Voicemail
- Drafts
- File Shares/Shared Drive Data
- E-Rooms
- Back-up tapes

Litigation Hold – What is the Obligation



- Negotiating Breadth of Obligation
 - Scope of preservation is broader than scope of production: *In Re Veeco Instruments, Inc. Sec. Lit.*, 2007 WL 983987 (S.D.N.Y. April 2, 2007)
 - In-House Counsel and Outside Counsel need to work together on how to limit scope
- Conforming Standardized Notice(s)
 - What does a legal hold notice need to encompass?
- Routine Method of Submitting Notice(s) to Custodians
 - Automated solutions are frequently used to attain routine and repeat methods

- Hold notices should address the following areas:
 - Statement of purpose for the hold
 - Description of the lawsuit or investigation and the pertinent issues
 - Guidelines for determining which documents and data should be maintained
 - How data should be handled going forward
 - What types of information/data should be maintained – ESI and hard-copy documents
 - Locations to search for information /data – ESI and hard-copy documents
 - Time period relevant to the litigation

Litigation Hold – What to include in the notice



- Hold notices should address the following areas:
 - Location where an employee can confirm that he/she received, understand and are in compliance with the notice
 - Instructions for employees that leave prior to the hold being lifted/released
 - Reminder that legal hold obligation overrides record retention policies
 - Reminder not to discuss the matter (include Attorney-Client Privilege header)
 - List of potential consequences of non-compliance
 - Contact information for questions regarding compliance

Litigation Hold – Where is Data

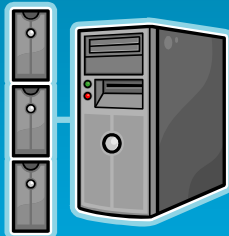


- Individual computers
- Network data
- Back-up tapes
- Location(s) of archived documents and data
- Departmental files
- Homes
- Car trunks

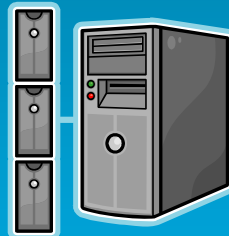
Litigation Hold – Where is Data



E-Mail Servers



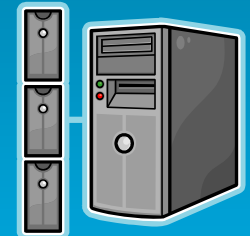
Network Shares



DMS Servers



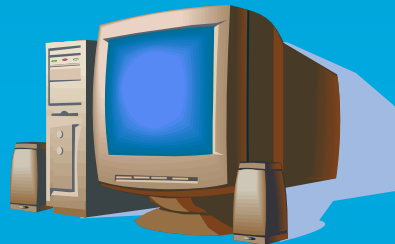
Financial Systems
Time & Billing



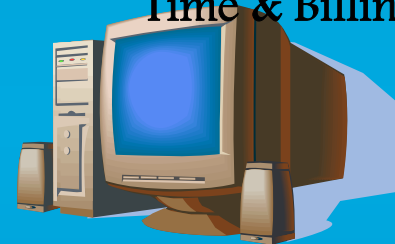
Back-up Servers



Web Servers



Individual User
E-mail Archives and
Local Files



Remote and Home
Users via VPN



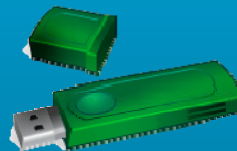
Back-Up Tapes



Blackberry



Paper Files



External Storage



Voice Mail



Company
Firewall

When

- Notice of litigation
- Notice of government inquiry
- Document hold establishes first date for work product privilege to apply

Litigation Hold ~ When

Litigation Reasonably Anticipated

Lawsuit Filed

Issue Litigation Hold



This can be a long time



Time

When to Instigate a Hold ~ Plaintiff



- As soon as a potential claim is identified, even if the litigation is not imminent.
 - *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D. Cal. 1987)
 - *Micron Technology, Inc. v. Rambus Inc.*, 2009 U.S. Dist. LEXIS 1260 (D. Del. Jan. 9, 2009)

When to Instigate a Hold ~ Defendant



- Duty arises at onset of litigation or when litigation is reasonably anticipated.
- What is “reasonably anticipated” ~ what is the trigger???

- What is a Triggering Event?
 - Actual notice
 - Reasonably anticipated
 - Fact intensive

Litigation Hold ~ When/Triggering Events



- Possible Triggering Events
 - Receive a demand letter threatening litigation
 - Receipt of subpoena from party in a litigation
 - Learn of a possible government investigation
 - Company deems communications should be governed by attorney work product doctrine
 - Complaint is filed
- Caselaw
 - *Phillip M. Adams & Assoc., LLC v. Dell, Inc.*, 2009 WL 910801 (D. Utah Mar. 30, 2009) ~ duty arose not when company received the notification of a potential infringement, but when the company became “sensitized” to the issue 5-6 years earlier.

Litigation Hold ~ When/Sedona Factors



- Nature and specificity of complaint
- Party making the claim
- Business relationship between parties
- Nature of threat
 - Direct, implied or inferred
- Strength, scope, value of potential claim
- Likelihood that relevant data will go missing
- Etc.

Litigation Hold – When/The “Kitchen-Sink” Preservation Request



Dear Company,

Please preserve everything:

All email, documents, logs, databases, calendars,
instant messages, voicemail, etc.

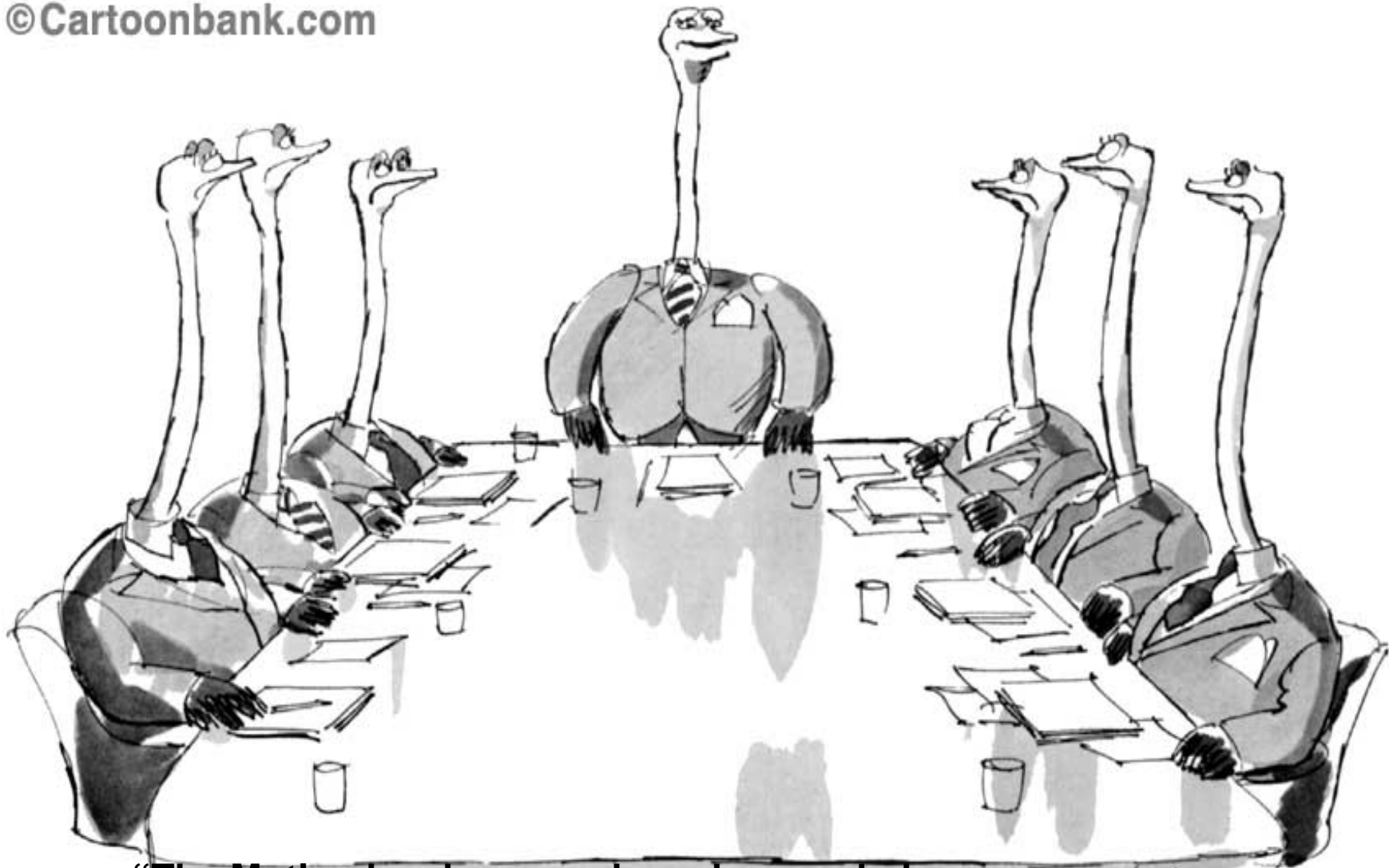
Stop back-up tape rotation and do not erase anything.

Sincerely,

The person who will sue you

Litigation Hold – When/After the “Kitchen-Sink” Request

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“The Motion has been made and seconded that we stick our heads in the sand.”

Litigation Hold – When/After the “Kitchen-Sink” Request



- Respond
- State what you are willing to do
- Offer to meet-and-confer

Litigation Hold ~ How



- Document your decisions
- Written notice
- Use clear terms
- Conference call to explain hold
- Reminders
- Reevaluate

Litigation Hold – How/Implementation



- Ensure that department heads, IT personnel and all pertinent employees are made aware of the hold
- Counsel should also notify legal opponents and relevant third-parties of their duty to preserve potentially responsive documents and data

Litigation Hold ~ How/Duty to Undertake a Reasonable Investigation



- The PhoenixFour court held that counsel failed to undertake the methodical survey of their client's sources of information as called for by Judge Scheindlin in the Zubulake V decision. The court, in finding that counsel failed to satisfy the clear requirements of FRCP Rule 26(a), held that counsel's deficiencies constituted gross negligence. *PhoenixFour, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413 (S.D.N.Y. May 23, 2006).



Litigation Hold – How/Follow-up

- Inside and outside counsel should actively monitor suspension measures and personally ensure compliance
 - Counsel cannot rely on client's assertions regarding sources and locations of discoverable information without conducting an independent inquiry
 - Phoenix Four, Inc. v. Strategic Res. Corp., 2006 WL 1409413 (S.D.N.Y. May 23, 2006)
- Follow-up with key players and new employees who may be affected by the hold
- Send multiple notices, especially during protracted litigation
- Put into place measures to capture data for the departing employee

Litigation Hold – How/Communications



- Varied Methods of Communication
 - In-Person
 - E-mail
 - Voicemail
 - Written memorandum
- Employee acknowledgement

Litigation Hold – How Long

- If there is litigation, the hold should remain in effect until:
 - All appeals deadlines have tolled and the entered judgment and award is final; or
 - A final settlement agreement has been reached and a formal release has been signed by all parties; or
 - The case is dismissed with prejudice and no outstanding related claims remain.

- If litigation was not filed, the hold should remain in effect until the factors that initially gave rise to the anticipation of litigation are no longer in play.

Litigation Hold ~ Release/Cessation of Hold



- Records Retention Policies

- Ensure everyone understands the differences between legal hold obligation verses records retention obligations
- Ensure that everyone understands that a release from a legal hold obligation does not override any business based record retention schedule

- Remediation of Data

- Provide effective guidance on when and how to remediate ESI that has accumulated throughout the legal hold process

Consequence for Failure to Implement Legal Hold Procedures and Follow-Through



- Risks Associated with Failure to Timely Implement Hold
 - *Keithley v. Homestore.com, Inc.*, 2008 WL 383384 (N.D.Cal. Aug. 12, 2008)
 - Discovery abuses “among the most egregious this Court has seen.”
 - \$320,000 monetary sanctions and an adverse inference instructions
 - *Acorn v. Co. of Nassau*, 2009 WL 605859, (EDNY March 9, 2009)
 - “the failure to implement a litigation hold at the outset of litigation amounts to gross negligence.”
 - awarded sanction of motion costs and attorneys fees for failing to implement a legal hold.
- Spoliation Claims
- Monetary Sanctions

Consequence for Failure to Implement Legal Hold Procedures and Follow-Through

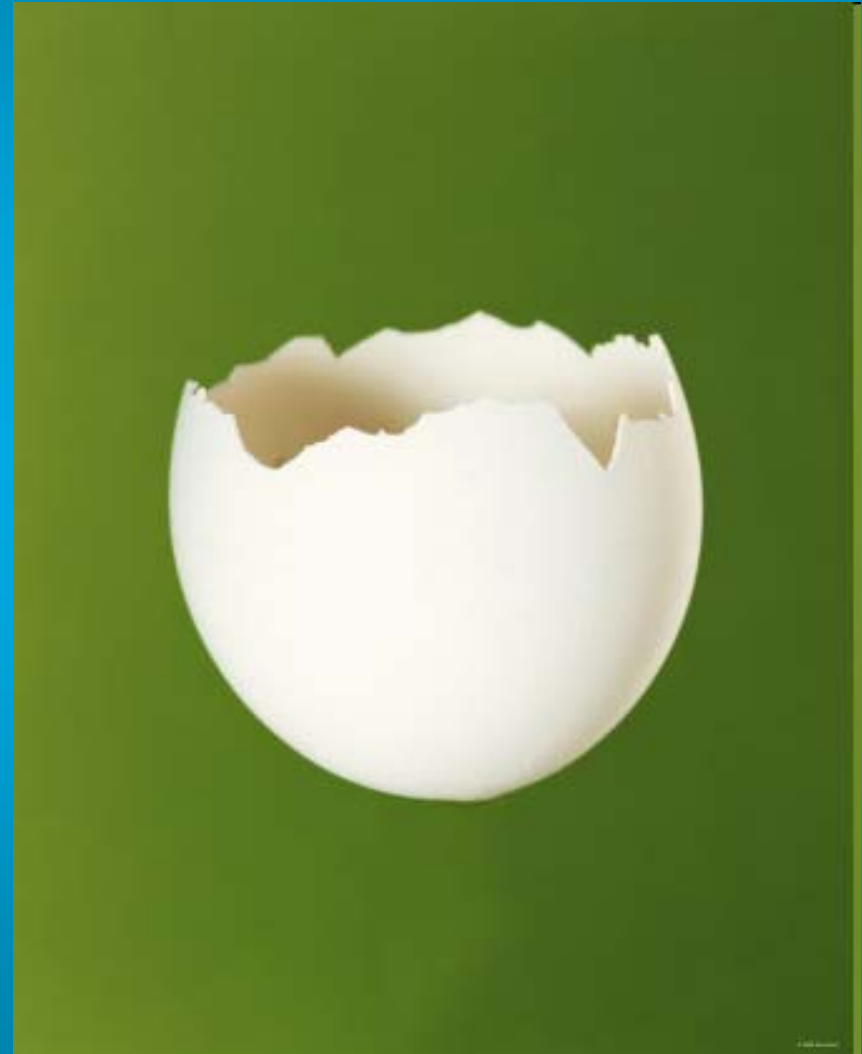


- Risks Associated with Failure to Issue Reminders and Notice Updates
 - *United Medical Supply Co., Inc. vs. U.S.*, 2007 WL 1952680 (Fed. Cl. June 27, 2007)
 - sanctioned government for failure to follow up on litigation hold e-mails sent
 - *In re NTL, Inc. Sec. Lit.*, 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007)
 - failed to meet litigation hold requirements extending to documents to which it had access through agreement with successor company
 - sanctions included adverse inference instruction concerning destroyed e-mail
 - *School-Link Tech., Inc. v. Applied Res. Inc.*, 2007 WL 677647 (D. Kan. Feb. 28, 2007)
 - refused to order sanctions for failure to implement hold and gather information because there was no showing that failure caused relevant information to be destroyed

Litigation Hold ~ Summary



- Focus on the Fragile first
- Anticipate human frailty and head it off
- Decide if IT can be trusted
 - Thanks to Craig Ball





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