

KARTA LEGAL LLC

# THE RISE OF THE TECHNICALLY COMPETENT LAWYER

2019

# TOPICS:

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1. **ETHICAL CONSIDERATIONS**

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2. **DOCUMENT MANAGEMENT IN THE OFFICE**

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3. **PRESENTATION OF DATA AT TRIAL**

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# ETHICAL CONSIDERATIONS

# Virginia Bar Rules of Professional Conduct

## Preamble: A Lawyer's Responsibilities

- In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. **A lawyer should keep in confidence information** relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.



## Rule 1.1: Competence

A lawyer shall provide competent representation to a client. **Competent representation** requires the legal knowledge, **skill**, thoroughness and preparation reasonably necessary for the representation.

- *Technical competence and skill is a must. Let's see how the rules expand on that:*

## 1.1: Comment 1

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or **associate or consult with**, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. **Expertise in a particular field of law may be required in some circumstances.**

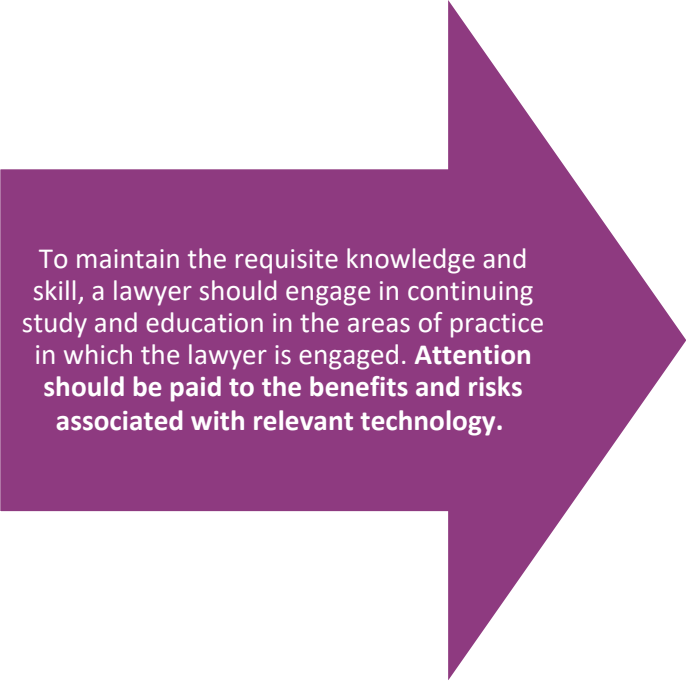
## 1.1: Comment [2a]

*Virginia Note: The Committee adopted the ABA Model Rule verbatim, but added the third paragraph of the Comment to make it clear that legal representation, in which a lawyer is expected to be competent, involves not only litigation but also negotiation techniques and strategies:*

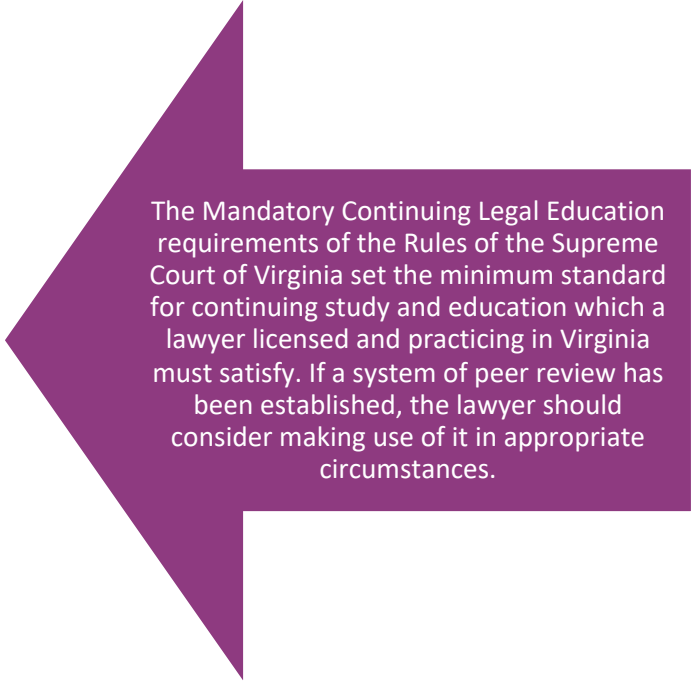


**[2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.**

## 1.1: Comment 6



To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. **Attention should be paid to the benefits and risks associated with relevant technology.**



The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

## Rule 1.3: Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

- Data management and available technology allow for the lawyer to act diligently and promptly.
- Inefficient discovery efforts can foil those duties.

## Rule 1.6: Confidentiality of Information

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(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation....

## Rule 1.6: Confidentiality of Information

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(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

## 1.6: Comment 2



The **common law** recognizes that the client's **confidences must be protected from disclosure.**



The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.



## 1.6: Comment 19

### ***Acting Reasonably to Preserve Confidentiality***

[19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure.

## 1.6: Comment 19

Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the employment or engagement of persons competent with technology,
- the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

## 1.6: Comment 19(a)

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Whether a lawyer may be required to take **additional steps** to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern **data privacy** or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is **beyond the scope of this Rule.**

## 1.6: Comment 20



Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made **reasonable efforts** to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. ....



Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is “reasonable” will be determined in part by the size of the firm.

## 1.6: Comment 20

To comply with this Rule, a lawyer does not need to have all the required technology competencies. **The lawyer can and more likely must turn to the expertise of staff or an outside technology professional.** Because threats and technology both change, lawyers should **periodically review both and enhance** their security as needed; steps that are reasonable measures when adopted may become outdated as well.

## 1.6: Comment 21

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Because of **evolving technology**, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

## 1.6: Comment 21

- (a) Periodic staff security **training and evaluation** programs, including precautions and procedures regarding data security;
- (b) Policies to address **departing employee's** future access to confidential firm data and return of electronically stored confidential data;
- (c) Procedures addressing security measures for **access of third parties** to stored information;
- (d) Procedures for both the **backup and storage** of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;
- (e) The use of **strong passwords or other authentication** measures to log on to their network, and the security of password and authentication measures; and
- (f) The use of hardware and/or software **measures to prevent, detect and respond** to malicious software and activity.

## RULE 3.4: Fairness To Opposing Party And Counsel

A lawyer shall not:

- (a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

.....

- (e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.



## 3.4: Comments

In practice, this means that, to avoid spoliation claims, an attorney needs to fully understand the client's data, including:

- The email and network infrastructure,
- The document retention and destruction practices, and
- The sources of all potentially relevant data.

Lawyers must be able to represent with candor and proficiency the entire process of identification, preservation, collection, processing, review and production in any given case. This includes compliance with any court orders, such as **Protective Orders**.

## Courts are aware of the problem

In a recent Federal Judges Survey only 23% of federal judges agreed with the statement:

“The typical attorney possesses the legal and technical subject matter expertise required to effectively counsel clients on e-discovery matters.”

# Restatement 3<sup>rd</sup> of the Law Governing Lawyers

## **RESTATEMENT §§16(2), 52: DUTY OF CARE**

- Lawyers need to act carefully in performing work for clients. Care is judged by the prevailing standards of professional competence in the relevant field of law.

## **RESTATEMENT §§59-60:**

- Lawyers also owe clients a duty not to use or disclose confidential information.

# Obligations to Secure Data

In 2017, the American Bar Association issued ABA Formal Opinion 477, wherein the ABA Standing Committee on Ethics and Professional Responsibility concluded that, under the “reasonable efforts” requirements:

“[A] lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.”

With the growing awareness of data vulnerabilities within law firms, the ever-advancing capabilities (& monetary incentives) of bad actors, and the more accessible data security options available to protect data, it is only a question of when the next “reasonable efforts” analysis draws a more advanced line for the minimum level of safeguards.

# Obligations to Protect PII

Your documents may contain PII or sensitive information that needs to be secured and cannot be disclosed unless specifically authorized. For example:

- **Social security numbers (local laws)**
- **Bank account numbers (state data protection laws)**
- **Healthcare information (HIPAA)**
- **Medical insurance information (HIPAA)**
- **Driver's license and state ID information (state data protection laws)**
- **Credit and debit card numbers (state data protection laws)**

This data may be your client's or may be your client's clients... It doesn't matter!

# **LEGAL TECH FOR DOCUMENT MANAGEMENT AT WORK**

# Data Management with Technology



An **Electronic Document Management System (EDMS)** is an enterprise level software that controls and organizes documents throughout an organization in a central repository. It incorporates document and content capture, provides metadata indexing, access control, workflow, output, and allows for organization wide retrieval, archiving, and destruction.

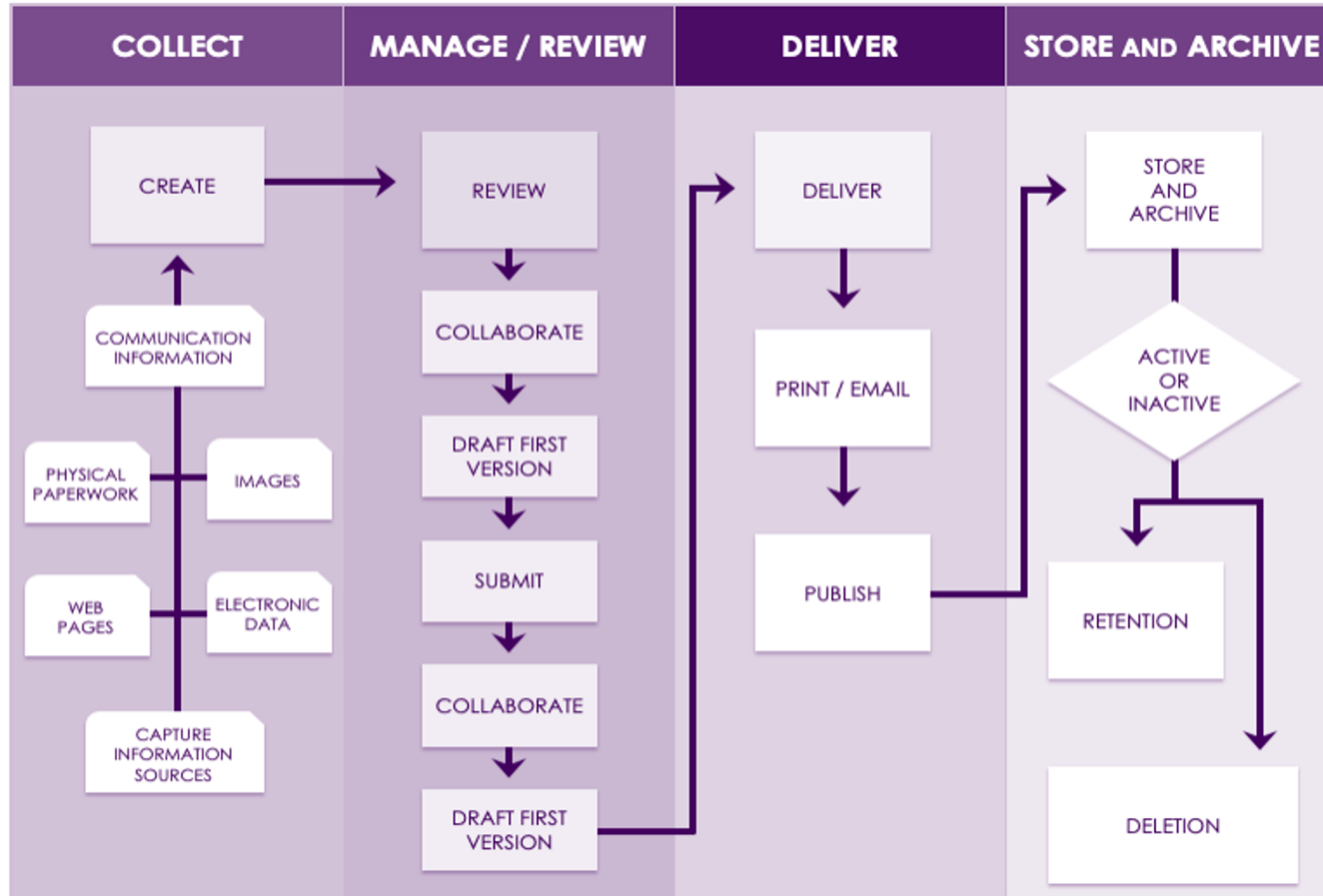
# The Stats

- ❑ Document challenges account for 21.3% productivity loss
- ❑ 92% of Knowledge Workers collaborate over documents using email
- ❑ 83% of Knowledge Workers lose time to versioning issues, every day
- ❑ Organizations spend \$20 in labor to file a document, \$120 in labor to find a misfiled document, and \$220 in labor to reproduce a lost document
- ❑ 7.5% of all documents get lost
- ❑ Professionals spend 5 to 15% of their time reading information, and up to 50% of their time looking for it

Source: <https://www.business.com/articles/7-statistics-that-will-make-you-rethink-your-document-management-strategy/>



# Document Management Workflow Template



# Technology Without Process Is Without Profit



Printed paper and filing cabinets are a type of technology.

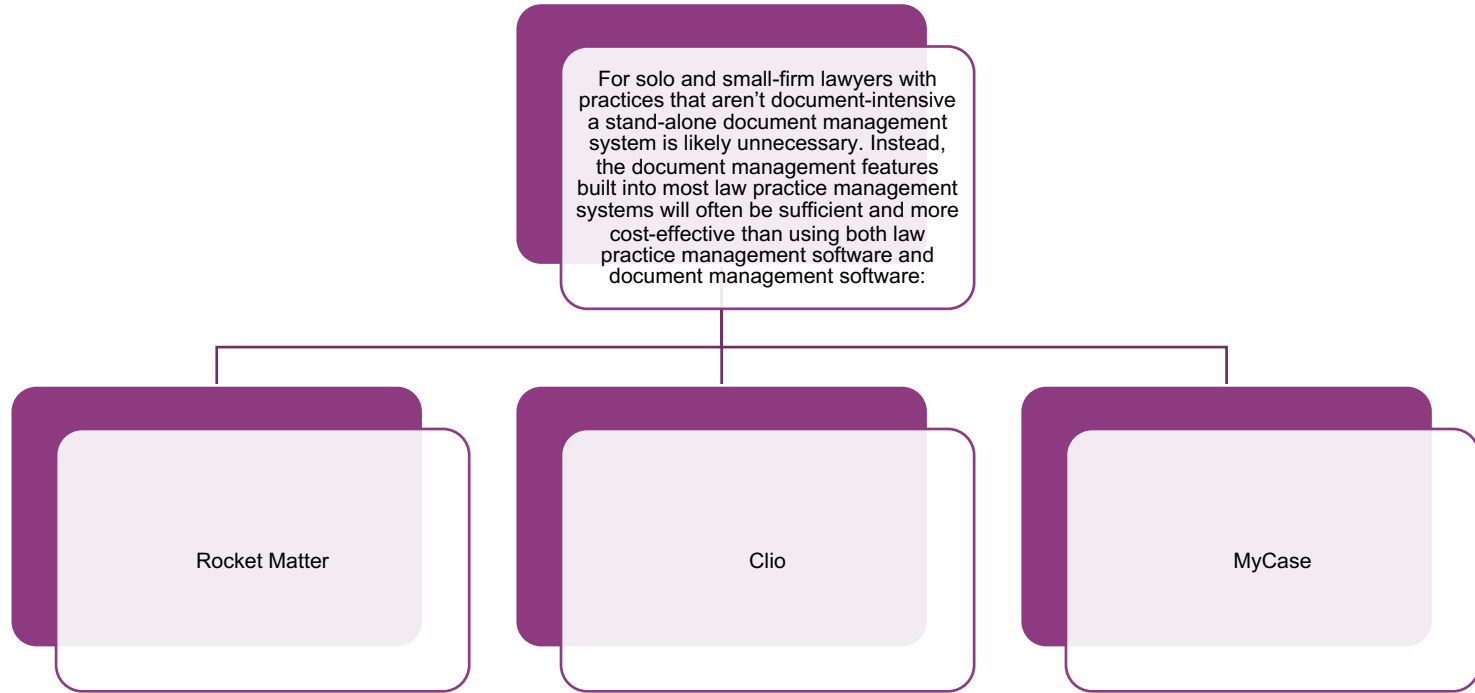


There are now better technologies available.



However! Without proper policies, procedures, and policing, the most expensive and advanced electronic document management system can quickly become as unwieldy as its carbon-based predecessors.

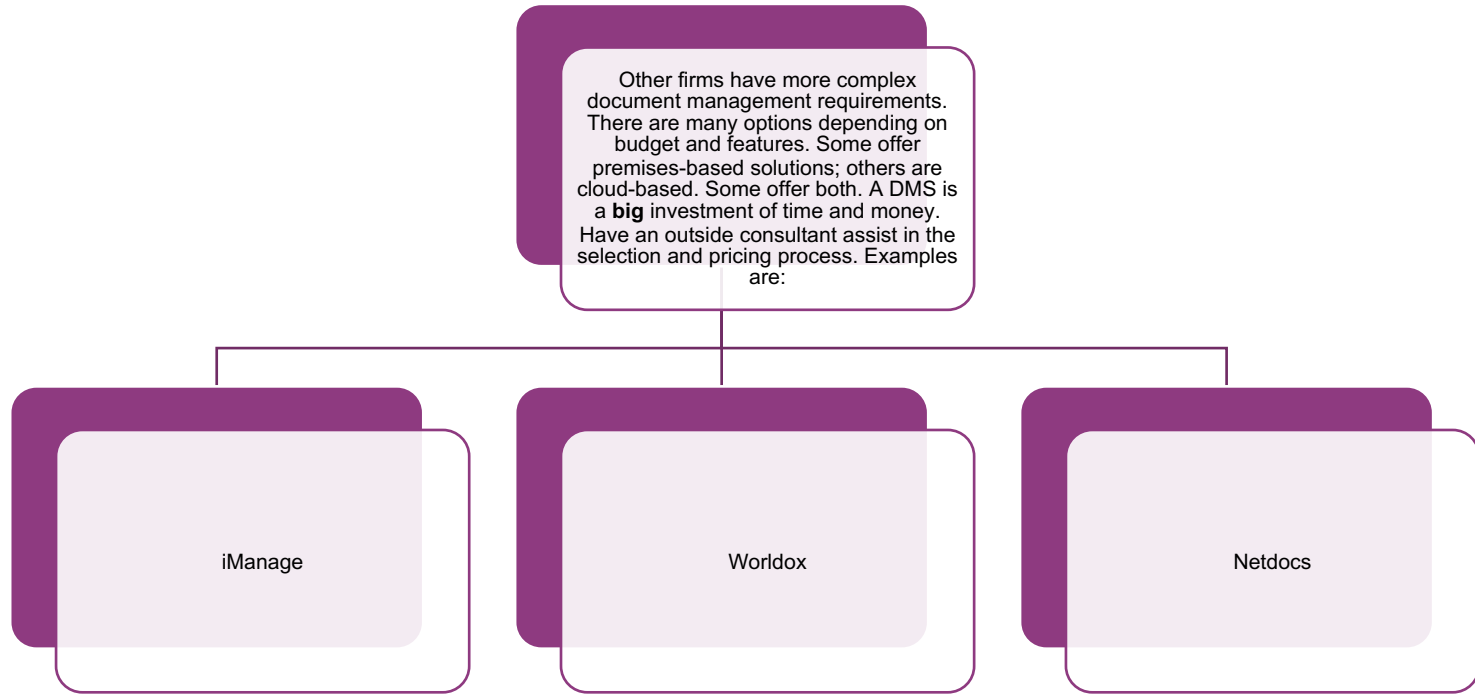
# Small Law Practice Management Software



The document management features built into law practice management software typically include the ability to:

- Categorize documents to particular clients/matters
- Create and track multiple versions of a document over time
- Secure document permissions to specific users or groups
- Collaborate and share documents using secure online portals

# Law Practice Management Software



# Benefits

**A. One central hub**

**B.  
Organize unstructured  
data**

**C. Document access,  
control and security**

**D. Precursor for  
efficient Content  
and Knowledge  
Management**

**E. Saves time and  
money**

**F. Compliance with  
rules and regulations.**

**G. Audit trails,  
reporting and indexing**

**H. Email management  
tools**

**I. Key integrations with  
Office 365 or e-  
discovery platforms**

**J. Mobile document  
access**

**K. Increase in  
employee satisfaction**

**L. Legal process  
improvement**

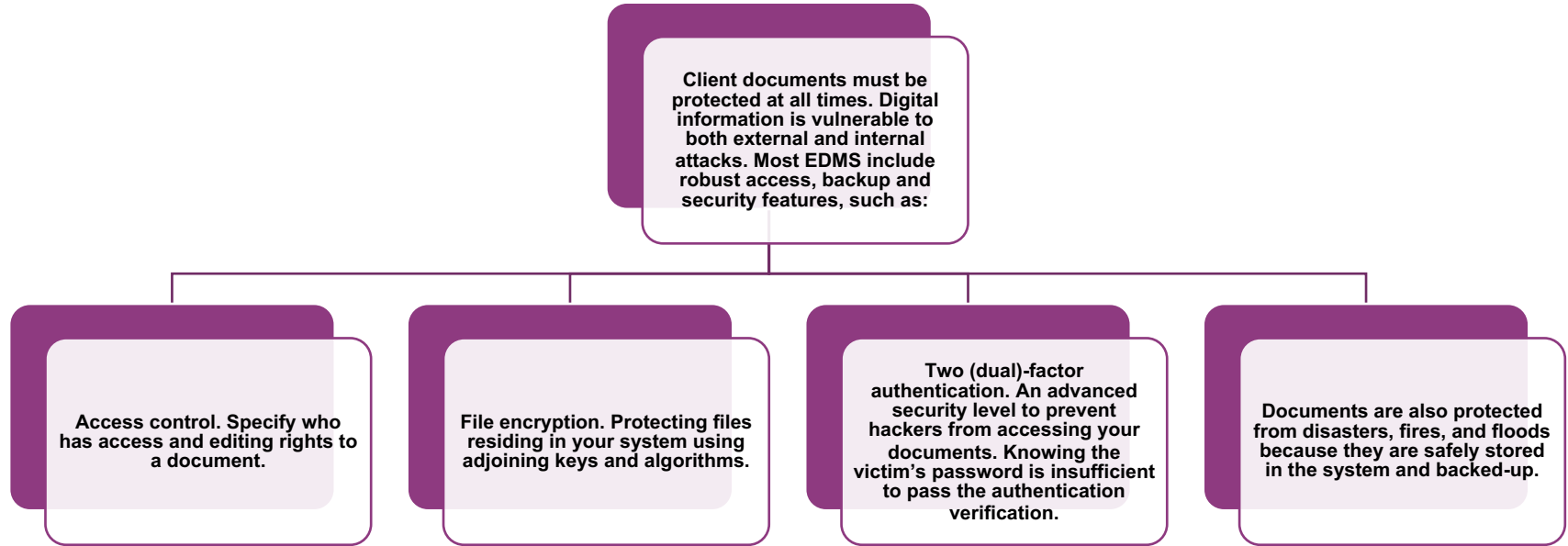
# Unstructured Data

Any piece of data outside of a formal database is unstructured data. This includes data stored on computers, hard drives, shared drives, phones, laptops or any other storage device.

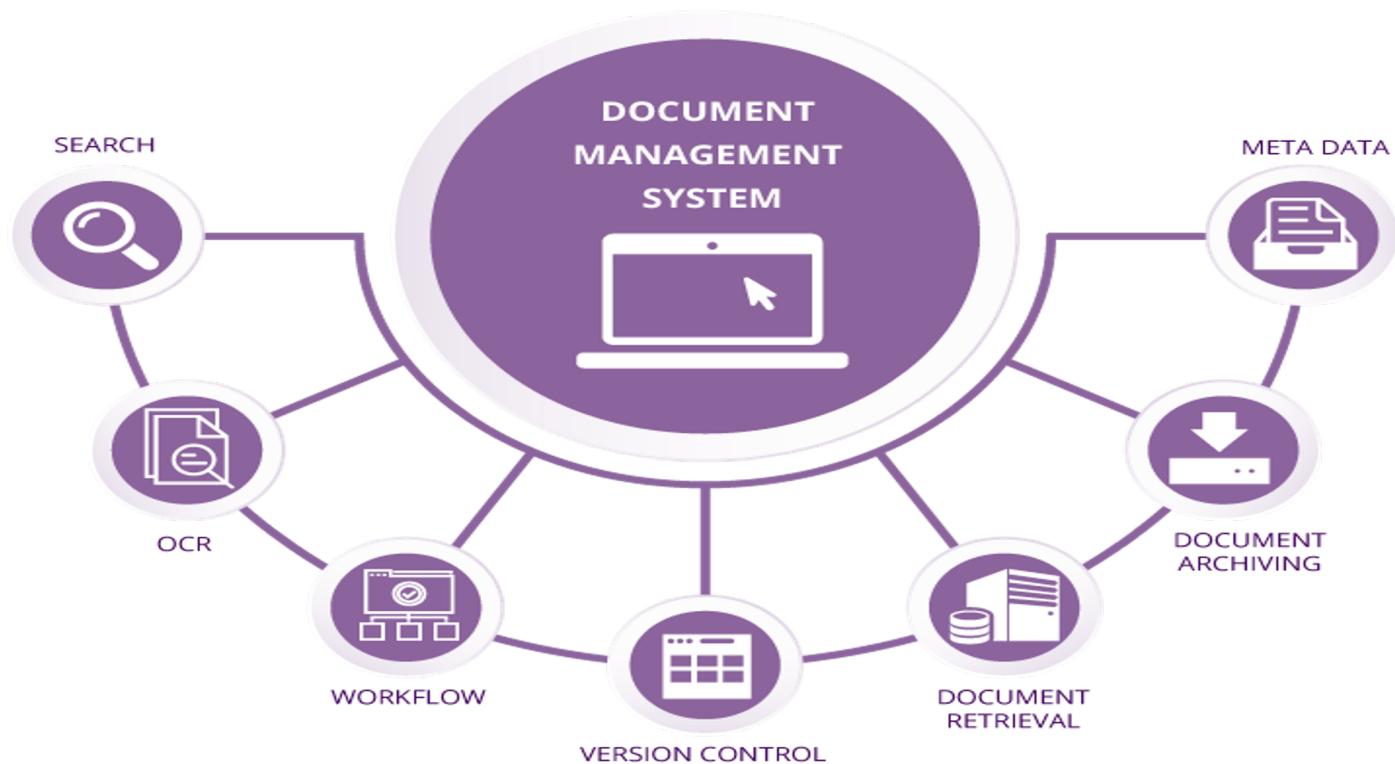
Some report that unstructured data accounts for 90% of the digital universe, and that these files are growing at a rate of 60-70% per year.

A robust EDMS can certainly organize and categorize the documents and allow for defensible data disposition.

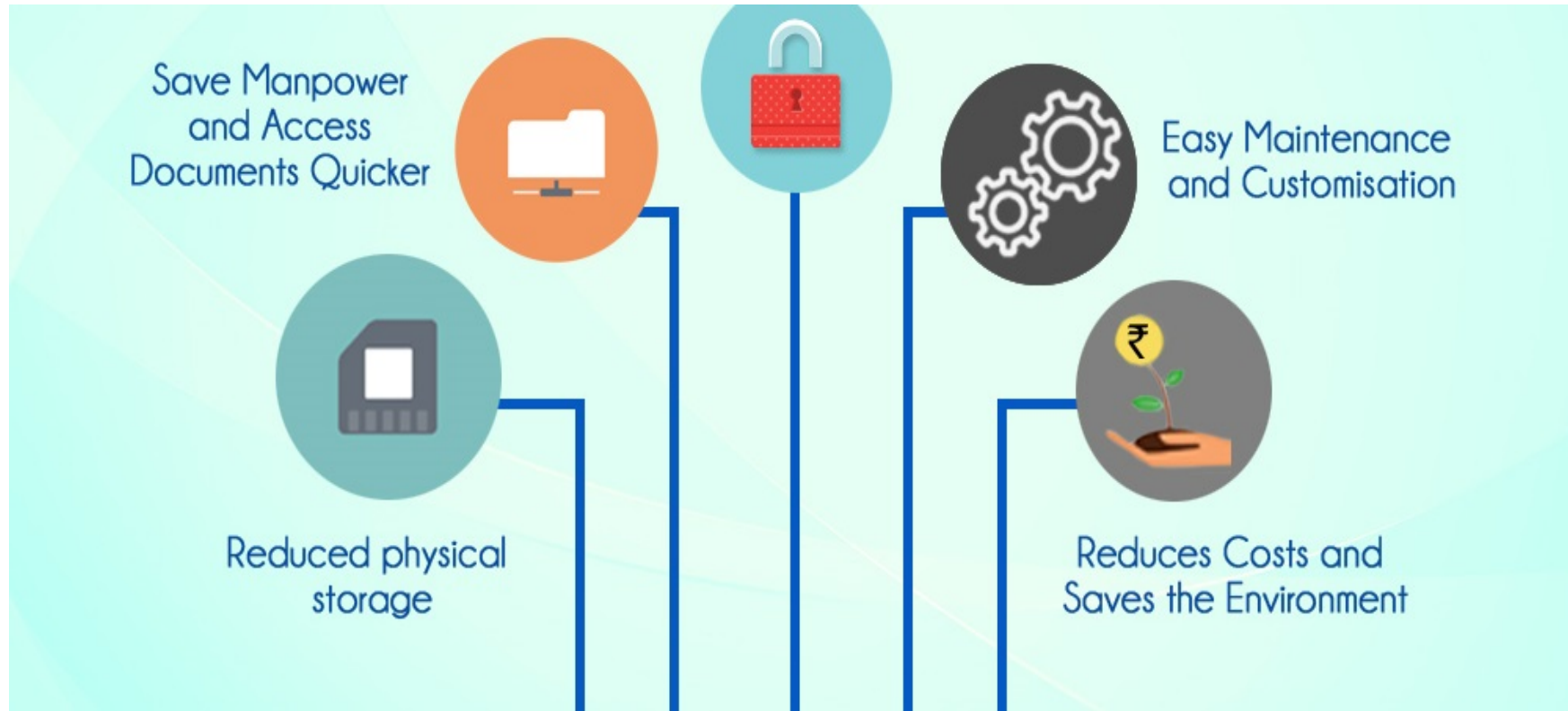
# Data Security and Access Control







# EDMS Takeaways

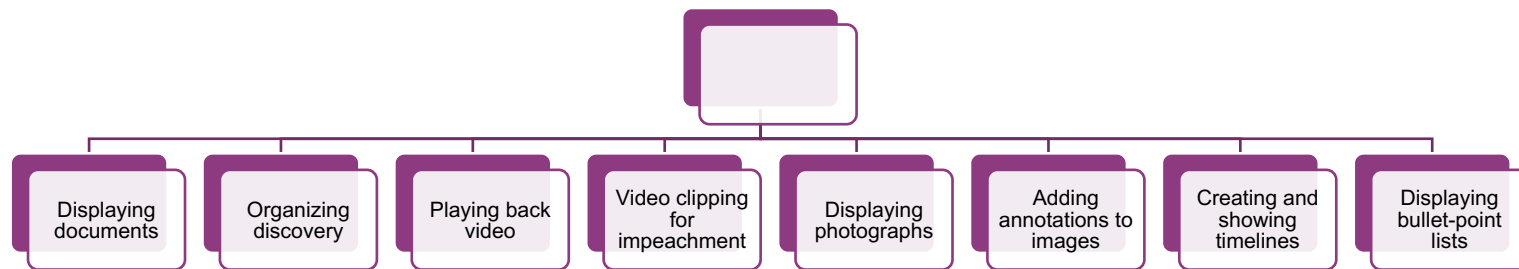


# **LEGAL TECH FOR PRESENTATION OF DATA AT TRIAL**

Trial prep has evolved over the years. There are now countless presentation tools. What you choose can make the difference between a smooth trial and one riddled with missteps. Ask these questions:

- How many exhibits?
- How many depositions?
- Plan on using deposition impeachments?
- Who is running the software?
- What technology is available at the trial site?

## Use trial presentation software for:



## Under 50 exhibits and no impeachment videos:

If under 50 exhibits and no need to display video, I recommend the free [TrialDirector for iPad app](#).

TrialDirector for iPad is a straightforward app that any tech-savvy attorney or paralegal can run with minimal training. The app offers basic annotation tools; split screen for showing up to two documents at a time; and a simple pinch zoom to easily navigate documents.

## Less than 200 exhibits and no impeachment video

For smaller cases, less than 200 exhibits and no impeachment videos, consider:

Trial Pad for iPad\_([www.trialpad.com](http://www.trialpad.com))

Check out: [https://www.youtube.com/watch?v=HvjMG5\\_fZpU](https://www.youtube.com/watch?v=HvjMG5_fZpU))

Cost: The TrialPad app is a one-time purchase of around \$130.

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# 200+ Exhibits and/or Impeachment Videos

If you need to store, manage, retrieve and display lots of images, documents and video, you need to invest in a trial presentation database program. There are many trial presentation software options.

These two are great for handling video clips and impeachment:

Trial Director  
([www.indatacorp.com](http://www.indatacorp.com)):  
cost \$550/year

Oncue ([www.oncue.com](http://www.oncue.com)):  
cost \$780/year



## Computer Accessories for Trial:

Power Cord

External Storage  
Media (copies of  
evidence)

Wireless mouse

Projector

External  
Speakers

Additional  
Monitors

Portable  
Document  
Presenter

# Portable Document Camera (for those who don't know what they are...)



# Planning and Processes Underlay Tech Implementation



MANY COURTHOUSES ACROSS THE COUNTRY HAVE UNDERGONE TECHNOLOGICAL UPGRADES DESIGNED TO CREATE MORE MODERN AND EFFICIENT HEARINGS AND TRIALS. KNOW WHAT RESOURCES ARE AVAILABLE AT THE COURTHOUSE, WHAT ADAPTORS OR HOOK-UPS YOU MAY NEED, ETC.



MAKE SURE ANY KEY EVIDENCE IS AVAILABLE OFFLINE, PREFERABLY WITH A BACK-UP DIGITAL AND/OR ELECTRONIC COPY.



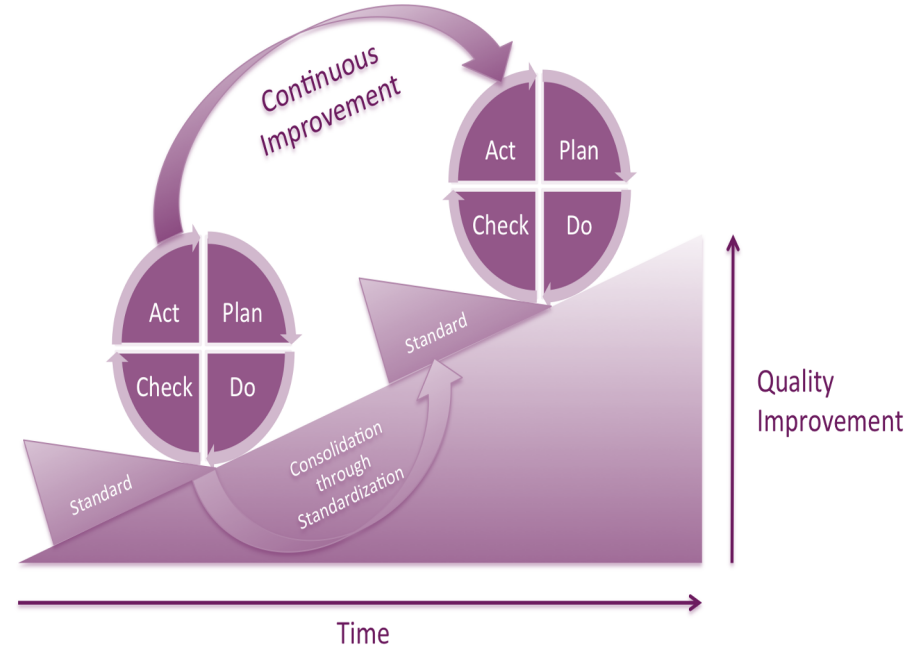
HAVE CONTINGENCY PLANS AND BE PREPARED FOR TECHNOLOGY TO NOT BE AVAILABLE. THERE HAVE BEEN SEVERAL RECENT INCIDENTS IN THE NEWS OF COURTS AND MUNICIPAL SYSTEMS BEING UNAVAILABLE DUE TO IT SECURITY ISSUES.

**The goal is continuous process improvement because a bad process has the power to beat a good lawyer anytime.**

**“A BAD SYSTEM  
WILL BEAT A  
GOOD PERSON  
EVERY TIME.”**

**-W. EDWARDS DEMING**

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# Thank You

Lourdes Fuentes Slater, CEO Karta Legal LLC