



# eDiscovery: Managing Costs & Avoiding Pitfalls

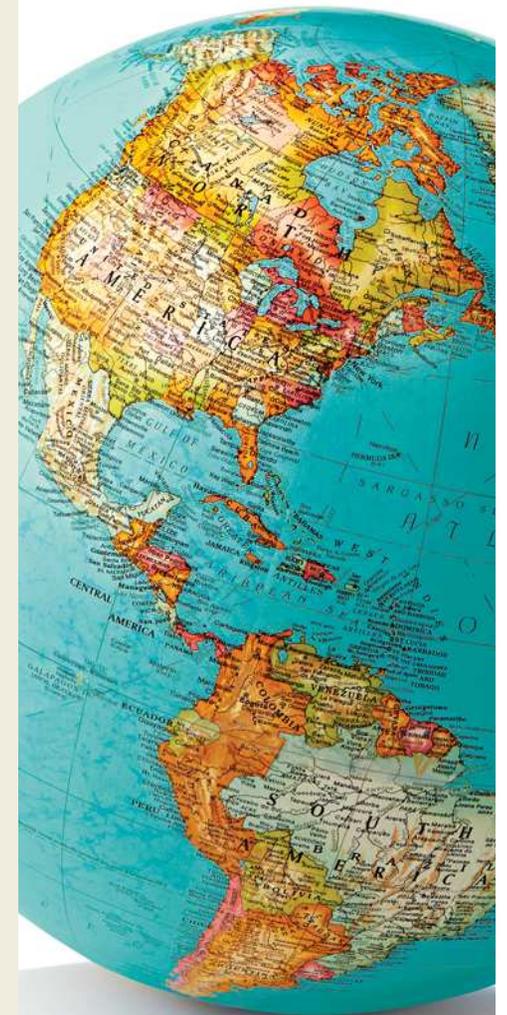
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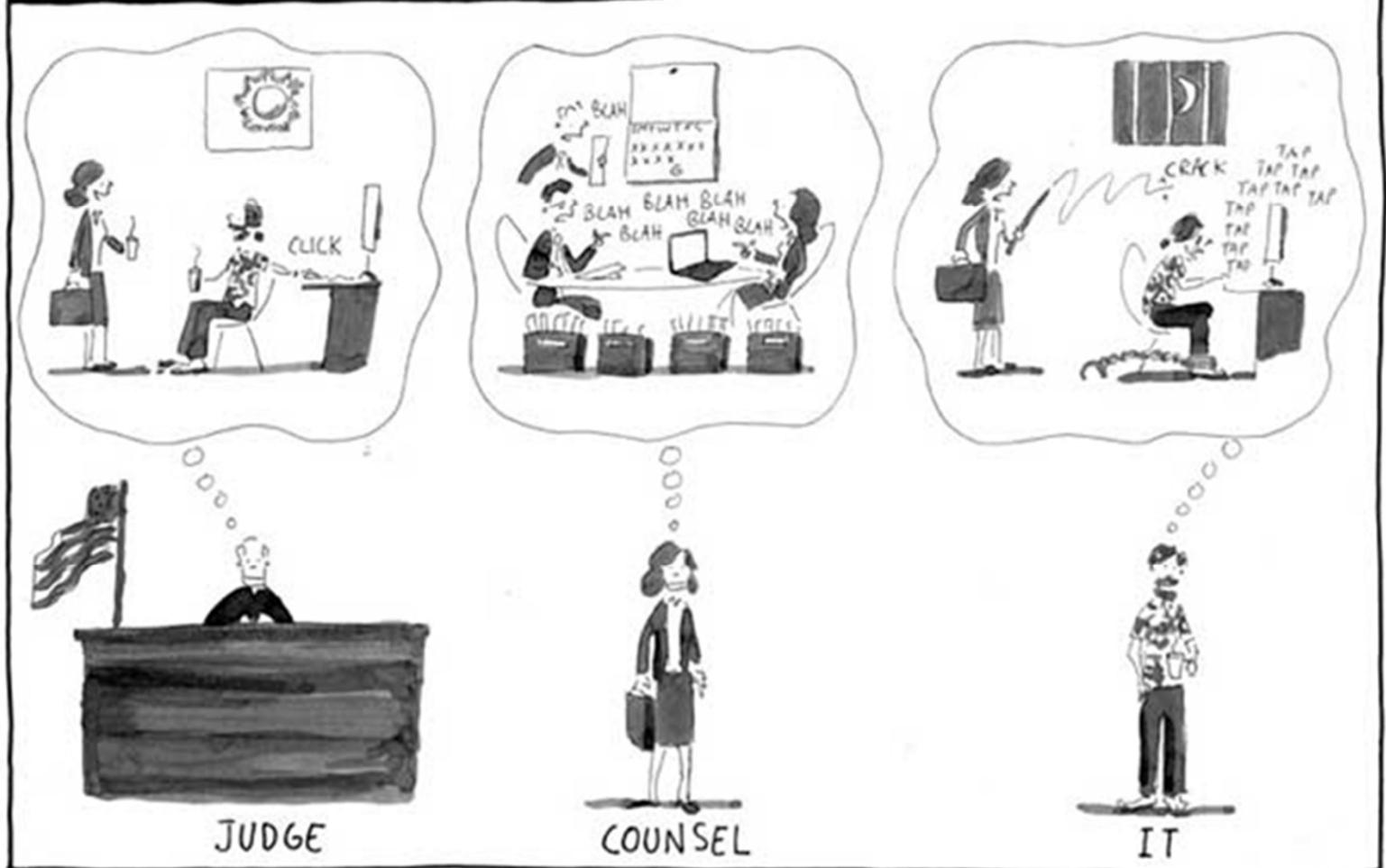


CASE IN POINT

by Tom Fishburne

HOW E-DISCOVERY WORKS

CaseCentral



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# Overview

- Managing Costs
  - How to Address the Dual Problems of Cost and Irrelevant Data
  - Technology Advances and Predictive Coding
- Avoiding Pitfalls
  - The Important Role of In-house Counsel in the eDiscovery Process
    - *Apple v. Samsung*
    - *State National Insurance Co. v. County of Camden*
  - Best Practices

# Managing Costs

- The Problem
  - Expense
  - Most data is irrelevant
- Solutions
  - Limit the Scope of ESI discovery
  - Use technology to help reduce the burden
    - Pre-review culling
    - Predictive Coding



## Limit the Scope of E-Discovery

- Negotiation – Discovery Conference
  - Number of Key Custodians
  - Date ranges
  - Search Terms
- Court Intervention
  - Standing Orders
  - Motion Practice – Cost Shifting and Protective Order

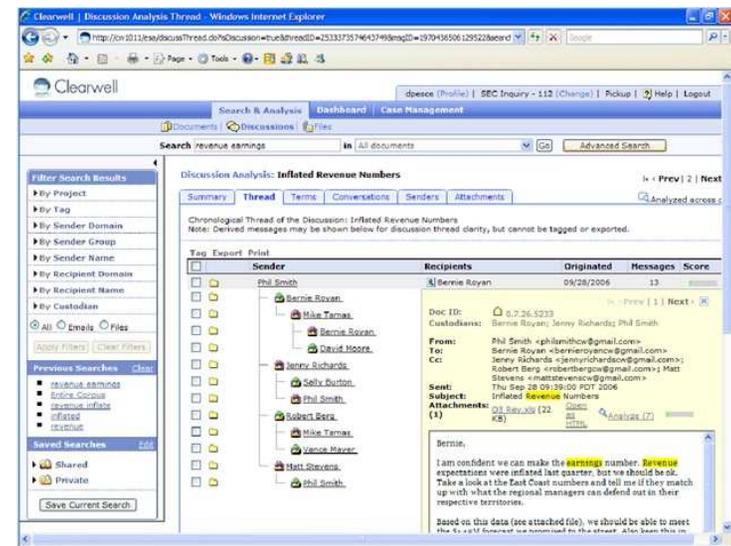


# Culling Tools

- What are culling tools?
  - Effectuate negotiated protocols
  - More sophisticated search terms
  - Date/custodian limitations
  - Before any actual review



- Product Comparisons
  - Clearwell
    - Tried and True
    - But stand alone
  - Allegro
    - New
    - But integrated with iPro products



# Predictive Coding

- Technology Assisted Review (TAR)
  - Automated methods should be viewed as reasonable, valuable, and even necessary
  - BUT some level of manual review continues to be important
  - Cycle:
    - Input of ESI →
    - Review Sample →
    - Random Baseline →
    - Auto Run →
    - Prediction Error Corrections →
    - Random QC →
    - Proportional Final Review →
    - Production

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# Avoiding Pitfalls

- The Role of In-House Counsel
  - BE COLLABORATIVE
    - Identify departments that may be called upon to assist with a litigation hold – Legal, HR, IT, Records – and know what role each department will need to play
  - BE PREPARED
    - Do not wait for a crisis to develop eDiscovery policies and protocols
  - BE INFORMED
    - Know how data is stored and how the company currently manages data retention
    - Learn from others' mistakes



## Apple v. Samsung

- Less than a week before trial U.S. Magistrate Judge Paul S. Grewal ordered **adverse inference instructions due to spoliation** resulting from **Samsung's poor efforts to manage its litigation hold.**
  - August 4, 2010 - Apple notified Samsung of its infringement
  - August 23, 2010 - Samsung issued a legal hold to a small group of key employees - nowhere near the number of employees with potentially responsive information
  - Samsung did nothing to suspend automatic deletion of emails every two weeks on email management system
  - Samsung did nothing to verify whether employees were complying with litigation hold instructions for 7 months
  - “bad faith is not required mental state ... Samsung acted with ‘conscious disregard’ because with the auto-deletion protocol it had an obligation to verify compliance... This is more than sufficient to show willfulness.”  
(\*19)

## State National Insurance Co. v. County of Camden

- District Judge Noel L. Hillman upheld the opinion of U.S. Magistrate Judge Ann Marie Donio “regarding the County’s **failure to preserve its electronically stored information when it did not issue a ‘litigation hold’ on the email system after being notified about State National’s lawsuit against it.**”
  - First determination - Whether the party failed in its duty to preserve
  - Found the County’s efforts to be severely lacking, including:
    - failure to institute a legal hold after the trigger event
    - failure to suspend auto-deletion of email
    - failure to retain copies of any back-up tapes
  - Litigants can be punished for preservation failures whether or not spoliation occurred

## Best Practices

- Establish Information Governance Protocols
  - **RESPONSE TEAMS:** Legal, IT, HR, Records Management
  - **DOCUMENT POLICIES:** Understand where data is stored by the organization and know how information is disposed of and retained
  - **TRAIN EMPLOYEES:** Teach employees how to recognize potential trigger events and the responsibilities of a custodian
  - **BUILD A CULTURE OF COMPLIANCE**

## Best Practices

- **Do Not Hesitate To Issue Legal Hold**
  - **WRITTEN:** Issue hold notification in a written form
  - **TIMELY:** Issue the hold in a timely manner
  - **IDENTIFY:** Identify and focus on key players
  - **MONITOR:** Obtain affirmative custodial responses and continue to monitor compliance
  - **INSTRUCT:** Include clear, direct instructions to custodians
  - **RE-ISSUE:** Periodically re-issue holds
  - **SUPERVISE:** Counsel must supervise employees' preservation efforts and compliance

# Questions?

# Worldwide Locations



## North America

- Cincinnati
- Cleveland
- Columbus
- Houston
- Los Angeles
- Miami
- New York
- Northern Virginia
- Palo Alto
- Phoenix
- San Francisco
- Tampa
- Washington DC
- West Palm Beach

## Latin America

- Bogotá+
- Buenos Aires+
- Caracas+
- La Paz+
- Lima+
- Panamá+
- Santiago+
- Santo Domingo

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- Birmingham
- Bratislava
- Brussels
- Bucharest+
- Budapest
- Frankfurt
- Kyiv
- Leeds
- London
- Madrid
- Manchester
- Moscow
- Paris
- Prague
- Riyadh
- Warsaw

## Asia Pacific

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- Hong Kong
- Perth
- Seoul
- Shanghai
- Singapore
- Sydney
- Tokyo