



AMERICAN  
BANKRUPTCY  
INSTITUTE

# 2019 Annual Spring Meeting

Hosted by the Business Reorganization  
and Emerging Industries & Technologies  
Committees

## **Utilizing New Technology in Chapter 11 Cases**

### **Kelly DiBlasi**

*Weil, Gotshal & Manges LLP; New York*

### **Patrick Mohan**

*Reorg Research; Columbia, S.C.*

### **Christine A. Okike**

*Skadden, Arps, Slate, Meagher & Flom LLP; New York*

### **Jackson D. Toof**

*Arent Fox LLP; Washington, D.C.*

# UTILIZING NEW TECHNOLOGY IN CHAPTER 11 CASES

## *Presented by*

Christine A. Okike:	Moderator (Skadden, Arps, Slate, Meager & Flom LLP, New York, NY)
Kelly DiBlasi:	Panelist (Weil, Gotshal & Manges LLP, New York, NY)
Jackson D. Toof:	Panelist (Arent Fox LLP, Washington, DC)
Patrick Mohan:	Panelist (Reorg, Columbia, SC)

March 15, 2019

## Presenters



Christine A. Okike is a counsel in the corporate restructuring department of Skadden, Arps, Slate, Meagher & Flom LLP. She represents debtors, creditors, sponsors, sellers, purchasers and other parties-in-interest in all stages of complex restructuring transactions, including prepackaged, prearranged and traditional Chapter 11 cases, out-of-court workouts, distressed acquisitions and cross-border proceedings.



Kelly DiBlasi is a partner in Weil, Gotshal & Manges LLP's Business Finance & Restructuring Department. Ms. DiBlasi's practice focuses on debtors, creditors, and equity interest holders in all areas of domestic and international restructurings and crisis management, both in and out of court.

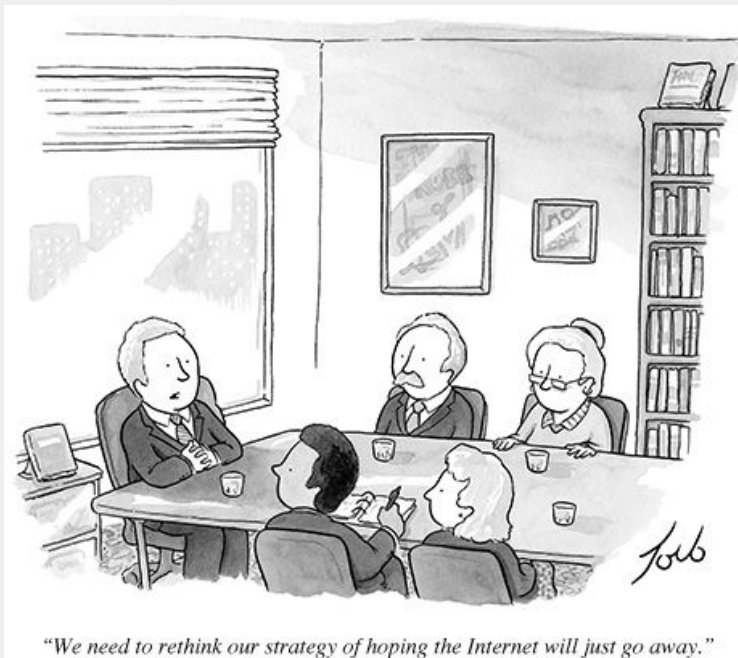


Jackson D. Toof is a trial lawyer whose practice regularly focuses on complex business litigation and bankruptcy litigation. Jackson is a Partner at Arent Fox LLP in the Washington, DC office. He is also a member of the Firm's Professional Conduct Committee and co-chairs the Firm's Litigation Support Committee.



Patrick Mohan is a senior legal analyst with Reorg. He covers in-court and out-of-court restructurings and distressed situations, with a specific focus on Puerto Rico, for Reorg Americas. Prior to joining Reorg, Patrick worked in private practice and served as a law clerk in the Southern District of New York and South Carolina.

2



Footer Text

3

# Agenda

- Introduction
- Key Resources
- Prepetition *Debtor & Creditor Side*
- Postpetition *Debtor & Creditor Side*
- Litigation
- Conclusion

4

# Introduction

Footer Text

5

## Why Does Technology Matter?

- Better service to clients
- Better informed professionals and clients
- Improves efficiency
- Reduces costs
- Promotes transparency
- Facilitates work-life balance

Footer Text

6

# Key Resources

Footer Text

7

## Key Resources in Chapter 11

- Public Financial Information (SEC Filings, ISDA, EMMA)
- Press Releases
- Court filings (PACER, State and Local Courts)
- Legal Search (WestLaw, LexisNexis, Casetext, ROSS)
- Traditional News Providers (WSJ, Bloomberg, New York Times)
- Intelligence Providers (Reorg, Acuris)
- Social Media (Twitter, Facebook)
- Blogs and Podcasts
- Something that hasn't even been invented yet

Footer Text

8

# Prepetition

Footer Text

9

## Prepetition

- Assistance with identifying opportunities
- Enhanced research capabilities
- Ease of information gathering and sharing
  - Identifying key constituents
  - Collecting information for legal analysis and chapter 11 papers
  - Communicating with your client and key constituents
- Efficiencies in preparing a chapter 11 filing
  - Increased prominence of prepackaged and prearranged chapter 11 cases
  - Selling point for advisors and vendors
  - Use of mail merge and other software developments
  - Electronic filing

Footer Text

10

# Prepetition (cont.)

- Greater transparency of the process
  - Pacer and case websites
  - Ease of noticing
  - Advanced communication plans
- Data rooms

Footer Text

11

# Postpetition

Footer Text

12

# Postpetition

- › Staying informed once a case files
- › Creditor outreach and organization
- › E- [insert action here] (noticing, balloting and claims filing)
- › Remote participation (e.g., CourtCall, Court Solutions, Join.me)
- › Tracking developments inside and outside of the courtroom
- › Combining traditional and nontraditional resources

Footer Text

13

# Litigation

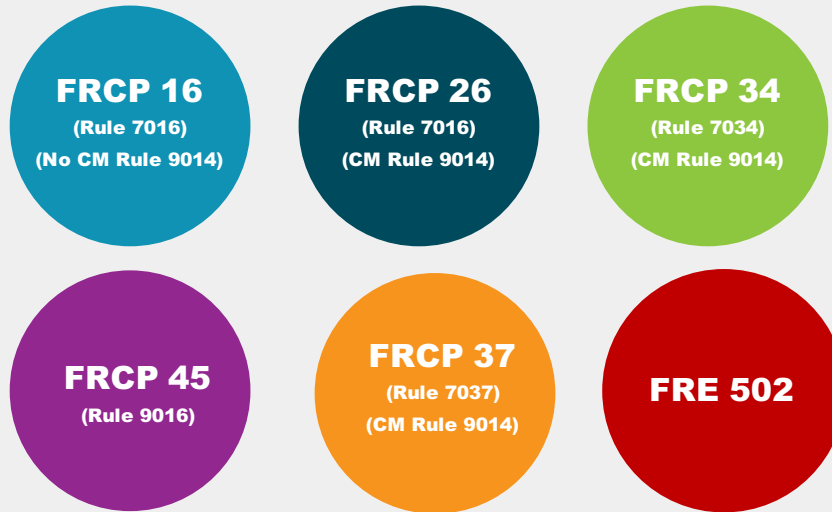
Footer Text

14



# Federal eDiscovery Rules

(made applicable by the Bankruptcy Code...)



## Federal eDiscovery Rules: FRCP 16 Conference

- Court creates a scheduling order governing the parties' discovery, including a discovery schedule, the extent of discovery, and stipulations on privilege issues.
- Scheduling orders must be issued within 90 days after the complaint is filed.
- Always check the local rules and the judge's standing orders for specific protocols.

## Federal eDiscovery Rules: FRCP 26(f) Conference

- Requires the parties to confer to discuss issues on document preservation and develop a proposed discovery plan.
- Discovery plan must include:
  - Timing for discovery responses
  - Subjects on which discovery may be needed
  - Issues about disclosure, discovery, or preservation of ESI, including the form in which it should be produced
  - Issues about claims of privilege or attorney work product

17

## Federal eDiscovery Rules: FRCP 26(f) Conference

- Rule 26(b)(1) limits the scope of permissible discovery to what is “proportional to the needs of the case,” including the amount in controversy, the parties’ resources, and the expense of the proposed discovery relative to its value.

*Practice tip:* Consider engaging in some data analysis to use in negotiating with counsel on proportionality concerns.

18

## Federal eDiscovery Rules: FRCP 26(g) Certification

- Rule 26(g) provides that the attorney's signature on a discovery response is a certification that, to the best of the attorney's knowledge "formed after a reasonably inquiry" that the statements are consistent with the rules.
  - Attorneys are therefore obligated to make a reasonable investigation to ensure that their clients have conducted a thorough search and produced all responsive information before making that certification.

19

## Federal eDiscovery Rules: FRCP 34 Obligations

- Requesting party entitled to any ESI *stored in any medium* from which information can be obtained.
- ESI must be produced as it is kept in the usual course of business and in a form in which it is ordinarily maintained or in a reasonably usable form.
- Production must be completed within the timeframe set forth in the request unless otherwise stated.
  - Best practice is to negotiate a rolling production with opposing counsel.

20

## Federal eDiscovery Rules: FRCP 37(a)-(b) Sanctions

- ▶ Under Rule 37(a)(4), an incomplete disclosure or response is treated as a failure to disclose or respond, which permits the receiving party to file a motion to compel.
  - If the motion is granted, the court *must* grant the movant reasonable expenses, including attorney’s fees. R. 37(a)(5)(A).
- ▶ Failure to comply with a discovery order may result in additional sanctions under Rule 37(b), including the dismissal of claims, a default judgment, or contempt of court.

21

## Federal eDiscovery Rules: Rule 37(e) Preserving ESI

- ▶ ESI must be preserved “in the anticipation or conduct of litigation,” and failure to take reasonable steps to do so can result in sanctions or other orders to cure the prejudice to the opposing party.
  - If the court finds that the failure to preserve ESI was intentional, the court may impose a presumption that the lost information was unfavorable or resolve the case in favor of the opposing party.

22

## Federal eDiscovery Rules: FRCP 45 Subpoena

- ▶ Rule 45 allows for discovery from a nonparty witness via subpoena, but the party or attorney serving the subpoena must take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena.
  - Nonparty witness may be entitled to lost earnings and attorney's fees as a result of misuse of a subpoena.

23

## Federal eDiscovery Rules: FRE 502(b)

- ▶ Inadvertent disclosure of privileged material will not operate as a waiver of attorney client privilege or work product protection if: (i) the disclosure is inadvertent; (ii) the holder of the privilege took reasonable steps to prevent disclosure; and (iii) the holder promptly took reasonable steps to rectify the error.

24

# Federal eDiscovery Rules: FRE 502(b) in Action

- Protective Orders are also increasingly requiring receiving parties to ensure that they have sufficient safeguards in place to secure the confidentiality of information and protect against hacking:
  - Limiting access to certain individuals
  - Requiring information to be password-protected
  - Requiring immediate notice of a data breach
- Whether and to what extent these measures should be imposed depends on the size of the case and sophistication of the parties involved.

25

## Contested Matter or Adversary Proceeding – Now What?

- **Document Collection**
  - Sources
  - Timing
- **Document Review**
  - Legal Hold Letter to Client
  - Coordinate Technical Litigation Hold with Client's IT department
- **Scoping**
  - Deadlines
  - Start thinking about custodians and date ranges
  - “Data Mapping” (no surprises!)
  - Prepare for Meet and Confer

*Practice Tip:* The best way to lose data that is needed is by not looping in the client's IT department early. A litigation hold letter doesn't mean everything is preserved!

# Matter Initiation

## ➤ **Proportionality is the name of the game**

- **Sedona Conference Principle 2:**
  - “Discovery should focus on the needs of the case and generally be obtained from the most convenient, least burdensome, and least expensive sources.”
- **Helps you decide:**
  - Number of custodians
  - Date Range
  - Data Scope (just e-mail versus searches across servers, databases, etc.)
  - Search Terms
  - Preservation Steps
- **Considerations:**
  - Value of Case
  - Number of people who might have relevant data
  - Date Range
  - Complexity of Issues
  - Difficulty/Cost of obtaining data
  - Purported value of data



# ESI Step 1: Collection and Processing

## ➤ **Preservation**

- Beyond the litigation hold, the question is: what might we actively need to preserve to make sure we have everything we need?
- Often devices, servers, and accounts are copied “just in case”
- Walk through the areas of potential risk with the case team and IT.

## ➤ **Collection**

- **Big questions to decide:**
  - Self-collected or vendors?
  - Global or targeted (search terms before or after collections)?
  - On-site or remotely
  - Consider potentially applicable privacy issues (e.g., European privacy laws)

## ESI Step 2: Processing and Culling

### ► Processing Decisions

- Deduplication options (global, custodian level, collection level)
- OCRing (creating text from scanned images)
- When to run search terms

### ► Early Case Assessment

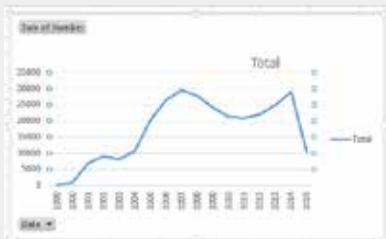
- Search terms are helpful, but limited – you only know what you think you know
- Some front-end work can leave you with a better, more focused set for searches and review
- Helpful to get a bird's eye view of the documents
  - Reporting on domains, communications and dates
  - Analytics tools
  - Random sampling
  - “Junk” filters
  - E-Mail threading

*Practice Tip:* Search terms will not get you everything. Studies show that search terms alone will find only 25% of the relevant documents, and you will review 75% NR documents to get there.

## ESI Step 2<sub>(cont.)</sub>: Processing and Culling

### ► Reporting examples for Early Case Assessment:

Dates (Viewpoint)



Clustering (Relativity)



Domains (Viewpoint)

Domain	Total	% Total	Documents	Unreviewed Documents
Corporate	1000	100%	1000	0
Personal	250	25%	250	0
Government	150	15%	150	0
Academic	100	10%	100	0
Non-Profit	50	5%	50	0
Healthcare	200	20%	200	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0
Finance	100	10%	100	0
Technology	100	10%	100	0
Media	100	10%	100	0
Legal	100	10%	100	0
Government	100	10%	100	0
Academic	100	10%	100	0
Non-Profit	100	10%	100	0
Healthcare	100	10%	100	0
Education	100	10%	100	0

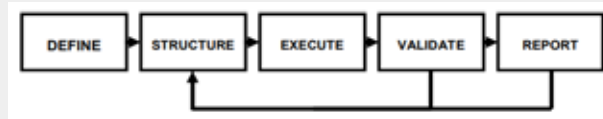


## ESI Step 3: Search Terms

### ➤ Search terms versus Technology Assisted Review and Analytics

### ➤ Search terms – Should be an iterative and exploratory process

– *Your first search terms are almost never your best search terms*



### ➤ Recall vs. Precision – An unescapable decision

– *A fishing net vs. a harpoon*

## ESI Step 3<sub>(cont.)</sub>: Search Terms

### ➤ Proportionality is key

### ➤ To look for:

- Not raw numbers, but % of data pulled and their involvement in the scope of the matter.
- “Including Family” – these are the documents that are attached to the documents with hits.
  - Big increases can mean very large families.
  - Take a look! (e.g., In one case, determined tagging of 11,000 documents by looking at just 128).
- Unique Hits = Number of documents that are hitting that term only
  - Often a sign that the term needs refinement
- Sample the results. Sample what is left out.

*Practice Tip:* Your first search terms are rarely your best search terms. Sampling is a good tool to find out what you don't know.

## ESI Step 4: Hosting

### ► Decisions:

- Platform
- Cost structures
- Host everything or just search term results?
- Analytics or not?

## ESI Step 5: Review

### ► Decisions:

- Internal or contract reviewers
- Use of analytics to prioritize and group
- Use of e-mail threading and near-duplication
- Segregation of potentially privileged documents and large excels
- Options for leveled review

## ESI Step 5<sub>(cont.)</sub>: Review

### ► Steps to a successful review (internal or contractors)

- Review memo
- Training with common coding, where the team looks at documents together
- Team lead who can coordinate the reviewers
- Quality Control review early and often by core case team member
- Log of all decisions and questions for the entire review team. Share knowledge!
- **Feedback** to reviewers and retraining where needed
- Targeted QC of risk areas

## ESI Step 6: Production

### ► Production Format

- Usually in requests/subpoena or by agreement with opposing counsel.
- Decisions
  - Organized by custodians or requests
  - Native vs PDF vs TIFF
  - Searchable text, metadata, etc.
  - Bates and Confidentiality stamping

### ► Production Timeline

1. QC and inconsistency checks
2. TIFFing images
3. Setting up production specifications
4. Running production
5. QCing production
6. Copying production to drive or folder

# Technology Pitfalls

- Downside of technology / digital footprint
- Inconsistency and QC Checks to be taken before a production:
  - Tagging inconsistencies
  - Family inconsistencies
  - Missing tags
  - Technical Issues
  - Documents tagged “Further Review”
  - Hot Doc Review
  - Privilege Screen

*Practice Tip:* Avoid issues in productions after the fact by taking the time to QC and check. One pass is not enough for these risk areas.

Footer Text

37

# Trial / Evidentiary Hearing

- Evidence Presentation
  - Logistics
    - Know Court and Judge
    - Understand computer/tech system (\*or bring in someone who does)
    - Have contingency plan
    - Have WiFi available (unless not permitted)
  - Practice, Practice, Practice
- Courtroom Technology
  - Document Cameras
  - Annotation Monitors
  - PowerPoint
  - Trial Presentation Software (e.g., Trial Director, Sanction, OnCue)
    - The best presentation software helps you organize, prepare, and present. It files your documents and transcripts. It creates exhibit lists and reports. It helps you create a presentation plan of attack.
  - Hot Seat Operator
  - iPad / Trial Pad

Footer Text

38

# Final Thoughts...

Footer Text

39

# Questions?