

Integrating IT into Your E-Discovery Process

Intermountain eDiscovery 2010
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www.gulfltc.org

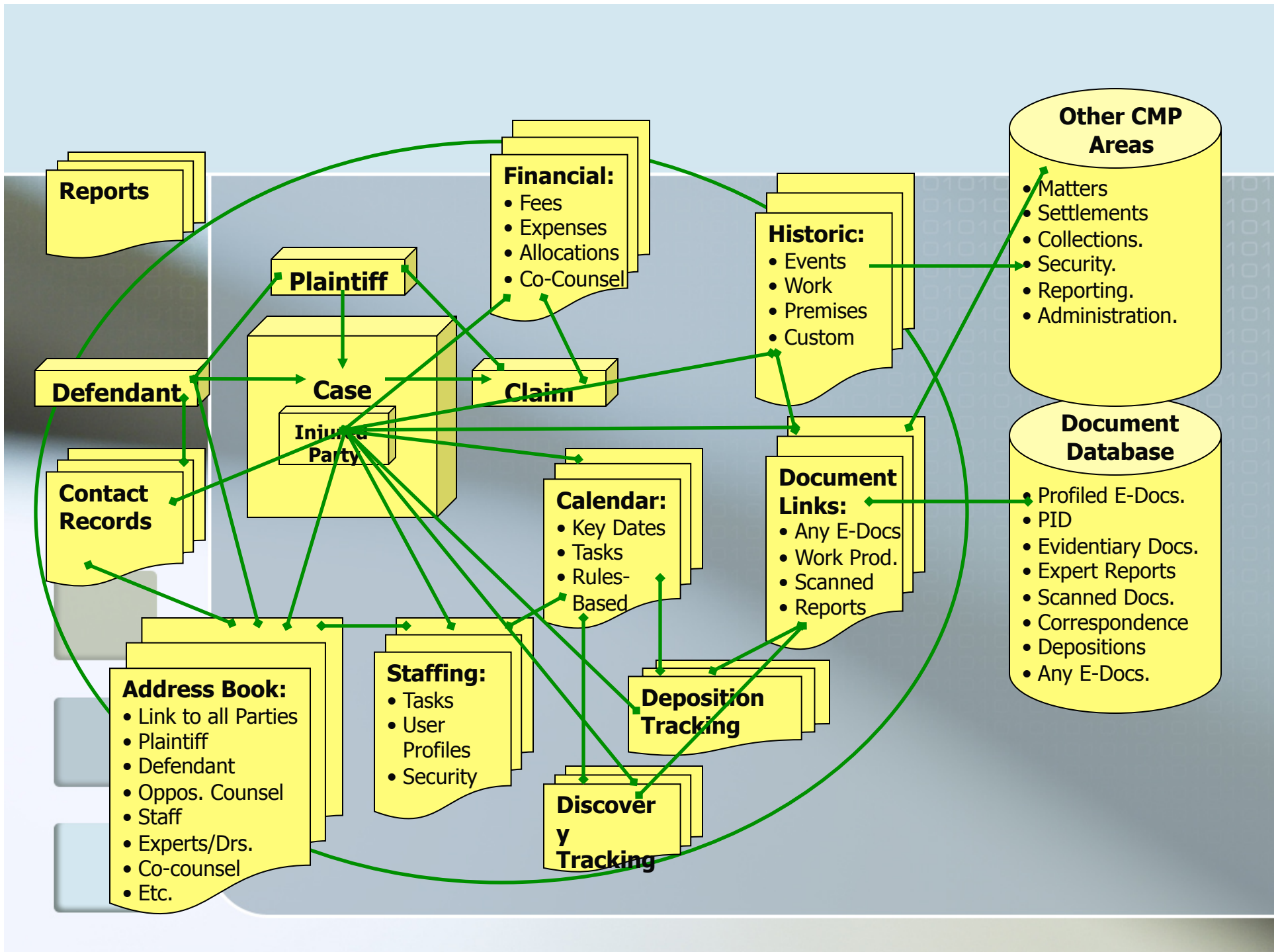
AGENDA

- How We Got Here
- The **problem**-huge amounts of data
- The **challenge** -new obligations
- The **solution** - have a strategy



A Brief Look Back (circa 1990 to 2002)

- Litigation was mostly paper based
- The legal profession was slow to embrace computerization
- Corporate IS applications operated as separate information “Silos”
- Records Retention and compliance requirements were not taken seriously



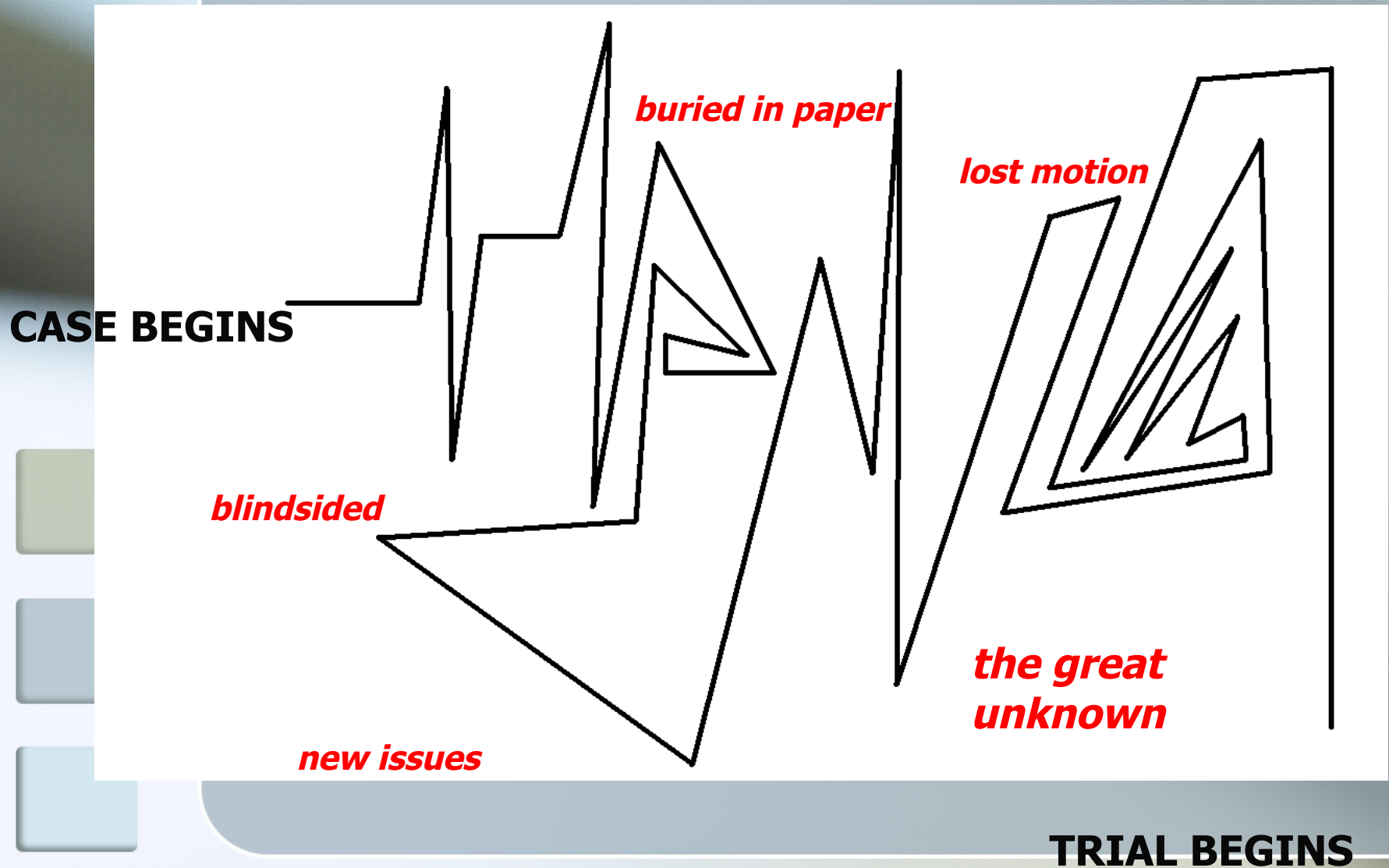
THE PROCESS

Lifecycle OF A CASE



1. Meet with Clients
2. Collect Client Documents
3. 1st Analysis of Issues
4. Action Filed
5. Discovery
6. 2nd Analysis of Issues
7. Pre-Trial
8. Trial
9. Post Trial

TIMELINE REALLY



THE PROBLEM

- ANY type of electronic information
 - WP documents
 - Spreadsheets
 - Audio files
 - Video files
 - Pictures
- Metadata
- Corrupt data
- Deleted data
- AND PAPER



THE PROBLEM

Information gets **doubled** approximately every four years

Global Disk Space Per Person (GDSP) *

1983	20k
1996	28MB
2000	472MB
2004	1 GB
2008	2 GB
2010	4 GB

Average corporate hard drive holds **100 GB** of data

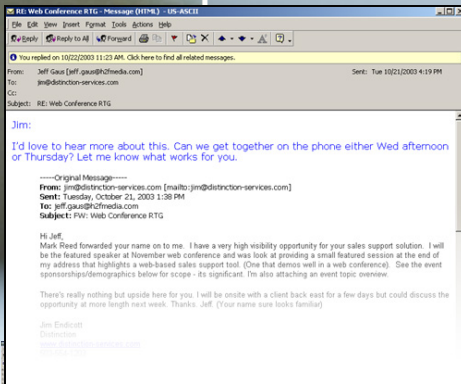
Information Explosion. *Confidentiality, Disclosure, and Data Access: Theory and Practical Applications for Statistical Agencies*

THE PROBLEM

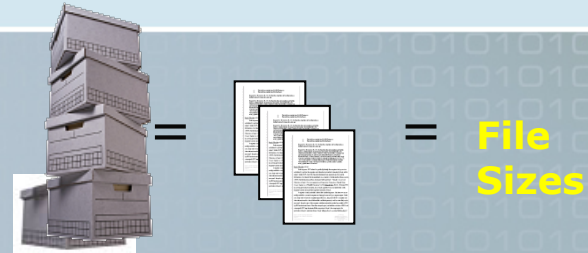
1.5 trillion U.S. email messages were transmitted in 2003

2.7 trillion by the end of 2007

Roughly 14 billion messages per day



Boxes of Bytes



	1	2,500	50	
	10	25,000	500	Megabytes
	20	50,000	1	
	100	250,000	5	
	200	500,000	10	
	300	750,000	15	
	400	1,000,000	20	Gigabytes
	500	1,250,000	25	
	1,000	2,500,000	50	
	2,000	5,000,000	100	
	5,000	12,500,000	250	
	10,000	25,000,000	500	
	20,000	50,000,000	1	Terabytes
	40,000	100,000,000	2	
	60,000	150,000,000	3	



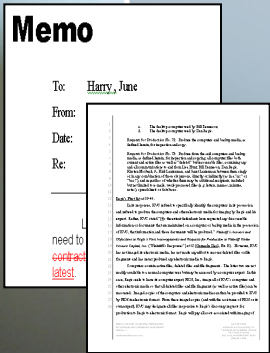
Typical Server Hard Disk



Typical PC Hard Disk



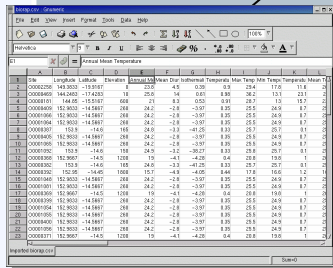
E - Documents Include



Word processing documents



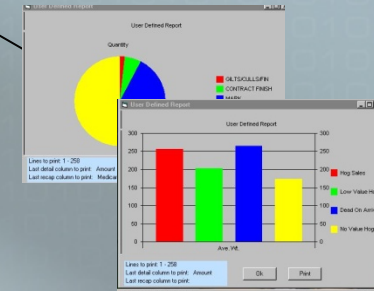
Web logs



Spreadsheets



Email messages and attachments



Graphic images

“Old” Sources Include:



Laptop hard drives



Pagers



Desktop hard drives



Floppy discs



Backup tapes



Cell phones



CDs/DVDs



PDAs



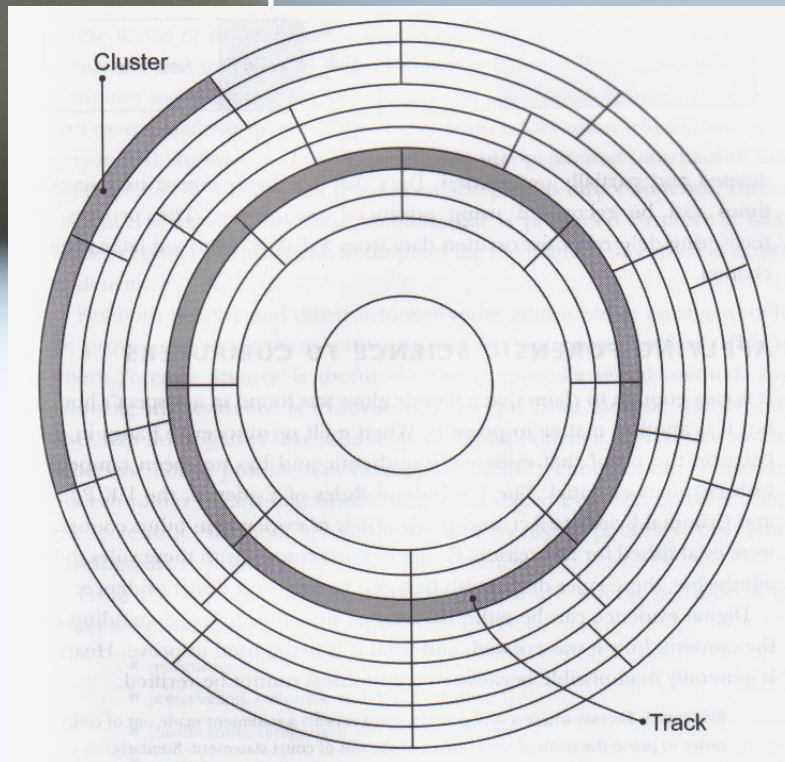
Network servers

New Sources Include:

- IM (Instant Messaging)
- VOIP
- MP3 Storage Devices (iPods)
- Memory sticks and flash drives
- GPS (Global Positioning Systems)
- Retail purchase card databases
- Blogs

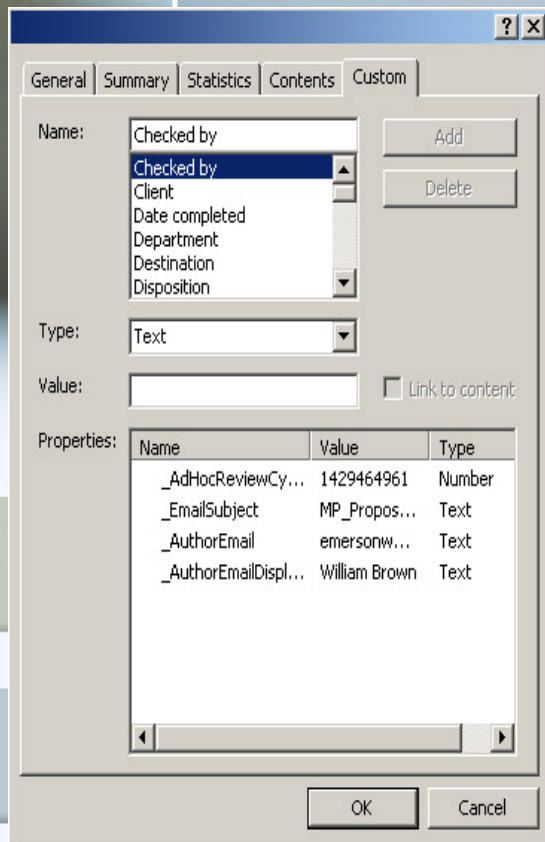


Forms of Digital Data



- **Active**
 - "Actively" reside on user's hard drive and/or the network server
- **Archival**
 - Compiled in back-up tapes
- **Replicant**
 - Created by programs, also called "ghost" files
- **Residual**
 - Deleted files and e-mails, are not actually deleted until the medium has been destroyed or overwritten
 - "A deleted file is not a deleted file, it is merely organized differently." State v. Townsend, 2002 WL 31477600 (Wash. Nov. 7, 2002)
- **Meta Data**

Metadata



WHAT IS META DATA?

- ❖ Data about data
- ❖ Not Version Control
- ❖ Revealing metadata can find important **"hidden info"** such as
 - ❖ Author
 - ❖ Modification Times
 - ❖ Who Modified
 - ❖ Date/Time Received
 - ❖ Date/Time Opened

Spreadsheet Metadata

Revealed
formula refers
to hidden
sheet

Note 25
hidden rows

Microsoft Excel - ABC Widget Financials.xls

File Edit View Insert Format Tools Data Window Help

Paste Special... 110%

Arial 10

B8 =Detail!\$F\$11

	A	B	C	D	E	F
1	PROFORMA FINANCIAL STATEMENT					
2	ABC Widget Corporation					
3						
4		Operating Quarter				Operating Year
5					One Totals	
6		Qtr 1	Qtr 2	Qtr 3	Qtr 4	
7	Revenue					
7	Manufacturing services	\$ 435,000	\$ 870,000	\$ 1,500,000	\$ 2,175,000	\$ 4,980,000
8	Processing	\$ 112,500	\$ 258,750	\$ 438,750	\$ 573,750	\$ 1,383,750
9	Total Revenue	\$ 547,500	\$ 1,128,750	\$ 1,938,750	\$ 2,748,750	\$ 6,363,750
10						
11	Operating Expenses					
12	Personnel (fully burdened)					
13	Manufacturing and production	\$ 215,625	\$ 271,875	\$ 478,125	\$ 824,625	\$ 1,790,250
14	Headcount	11	23	40	56	
15	Administrative	\$ 314,219	\$ 314,219	\$ 314,219	\$ 314,219	\$ 1,256,875
16	Headcount	11.75	12.5	12.5	12.5	
17	Total Personnel	\$ 529,844	\$ 588,094	\$ 792,344	\$ 1,138,844	\$ 3,047,125
18	G&A/Sales & Marketing (excluding personnel)	\$ 129,877	\$ 143,318	\$ 162,729	\$ 186,891	\$ 622,614
19	Research and Development Costs	\$ 125,000	\$ 125,000	\$ 125,000	\$ 125,000	\$ 500,000
20	Total Operating Expenses	\$ 784,521	\$ 854,411	\$ 1,080,072	\$ 1,450,735	\$ 4,189,739
21	Percent of Revenue	143%	76%	56%	53%	66%
22						
23	Income (loss) Before Int., Taxes, Deprec., Amort.	\$ (237,021)	\$ 274,339	\$ 858,678	\$ 1,298,015	\$ 2,194,011
24	Percent of Revenue	-43%	24%	44%	47%	34%
25						
50						
51						
52						
53						
54						

Summary Financials / Operating Summary /

Ready

EMAIL METADATA

File Edit View Tools Message Help

Reply Reply All Forward Print Delete Previous Next Addresses

From: Lewis & Clark College
Date: Friday, September 05, 2003 9:10 PM
To: Alexander Lubarsky '90
Subject: Tonkon Torp Report Available

Message to the Lewis & Clark College community from Interim President Paul E. Bragdon:

Today (September 5) the Board of Trustees of the College at its regularly scheduled meeting accepted the Report of the law firm of Tonkon Torp to the Board with respect to the EVOP loan transaction and related matters, waived its attorney-client privilege, and authorized delivery of the Report to the Attorney General of the State of Oregon and its release to the College community and the public.

The Report itself is now on the web site at <http://www.lclark.edu/dept/public/report.html>

To: mcadam@linelink.com, rodell@linelink.com
 From: Peter Andrews <pandrew@linelink.com>
 Subject: Fwd: Results from the study
 Cc:
 Bcc:

Bob and Milt,

I have seen it and I think we need to stop the deal/project ASAP. I am in Toronto and I will be back in the Chicago later tonight.

P

>> To: pandrew@linelink.com
 >> From: Robert O'Dell <rodell@linelink.com>
 >> Subject: Results from the study
 >> Cc: Inez Sims <ims@linelink.com>
 >> Bcc:
 >> X-Attachments: C:\Program Files\Qualcomm\Badora\Audit.xls;

>> Peter,

>> I think this warrants attention. Please review and suggest a solution. I am in London
 >> next Monday (12/17) so we need to meet on this matter.

Bcc:	hkincaid@linelink.com
Read flag:	Read
Attachment:	C:\Program Files \Audit.xls
Sending Server	198.165.98.1
Receiving Server	209.45.65.01
Sender Name	Frank Smith
Receiver Name	Sally Franklin
Print Out	Yes
Reply	No

bcc: recipient

Proof the email was opened

Real Sender and

Receiver mailboxes

Document MetaData

File Name	SoftWard Solutions
Size (Bytes)	20,480
Create Date	April 10, 1999
Create Time	4:04:00 PM
File Type	Microsoft Word 97
Title	Software Problems all solved at GMACD
Subject	
Author	Geoff Toms
Manager	
Company	Dellum Computer
Print Date	November 12, 2000
Print Time	2:06:00 PM
Last Saved By	Andy Jacobs
Editing Time (min.)	236
Revs	28
Pgs	2
Paragraphs	27
Lines	67
Words	375
Characters	2151

Dates

Authors

Changes

January 18, 1999

Below you will find some very disturbing shortcomings with the SoftWard Product. These issues have all been talked about here at Seminal Calls and will probably need to be address in the near future if the Dial is too be successful here or anywhere else. Understanding that the SoftWarder product is not a predictive dialer unit, only a predictive dialer algorithm, it is perceived as one by the customer. If some of the below facilities are already available please direct me too them....

SoftWard Issues:

1. The SoftWarder / RIM products do not have an efficient method of stopping a campaign that has been started. The only way to stop an active campaign is to have all agents attached to the campaign logoff and exit GEO, or issue a UNIX "tpclient" command that supervisors do not have access too. Service Bureaus constantly start and stop campaigns based on their effectiveness. This is Bad.
2. In the event GEO exits an agent improperly while working a campaign or the PC locks up or is shut off, the agent remains in the dialer and can never re-enter without shutting down the NT SoftWarder and restarting. There needs to be a facility to allow re-entry if the agent is already registered with the dialer. This is Bad.
3. If the client wishes to modify the SoftWarder settings i.e. Busy retries, abandon retries etc. The modifications do not take place unless every agent attached to the campaign logs off GEO and re-enters or the RIM servers are restarted manually. This is not a very efficient way to fine-tune your campaigns. This is Bad.
4. Currently there is no standard reporting facilities available to the customer other than the real-time display provided by the SoftWard product. Customers want to be able to combine telephony events with data capture such as cost per sale etc. Reporting is a very big issue in determining the effectiveness of a particular campaign. This is a Killer.
5. There is no way to filter an active campaign. For example: A tornado ripped through Shelton Ca. And wiped out half the city. Obviously you don't want to call folks in this area as a cuntsy because you probably would not be very effective. Currently the only way to extract these leads would be to stop the campaign and rebuild it. This is Bad.

As you can tell from our conference call today with another client, they too have the same concerns. Just my thoughts..... ie: GMACD

Thanks

SOLUTIONS

- **Changes to FRCP**
- **Changes to State Rules**
- **Court Decisions**
- **EDRM**



OBLIGATIONS

- Federal Rules effective Dec. 1, 2006
- Permits the requesting party to specifically request documents in native format.
- The responding party may oppose producing documents in native format, but must make a formal objection to the form requested on a basis conforming to the Federal Rules
- There is no valid objection to production simply because the document contains metadata

OBLIGATIONS

- **Duty to Preserve**

- When faced with anticipated or pending litigation or government investigation matters, corporations have an **obligation to preserve** potentially relevant evidence
- Preservation requires preventing willful or inadvertent destruction or alteration (spoliation)
- Records and information management is a key component, especially where it can be used to suspend document destruction

- The duty to preserve goes beyond documents under “records management” to wherever and in whatever format the potentially relevant evidence resides!

DUTIES OF COUNSEL

- Duty of Confidentiality
- Duty to Comply with Discovery Obligations
 - Duty to Direct Discovery
 - Duty to be Proactive Regarding the Client's E-discovery
 - Duty to Preserve Data That is Reasonably Accessible
 - Duty to Confer Early re E-discovery Issues
- Duty of Competence
 - Communication
 - Meritorious Claims
 - Reporting
 - Misconduct
- Duty of Loyalty: Conflicts with Clients

NEW CHALLENGES and RISKS



INCREASED LITIGATION RISK

Price Waterhouse Cooper (2003) ...

\$345 million for “overly slow” production

Phillip Morris (2004) –

\$27.5 million sanction against 11 senior executives who failed to preserve e-mails

Coleman Holdings v. Morgan Stanley (2005). . .

\$604 million in compensatory damages and \$805 million in punitive damages after adverse instruction

Qualcom v Broadcom (2007) :

attorneys reported to state bar

Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, LLC.,

Case no. 05 Civ. 9016 (SAS), 2010 U.S. Dist. Lexis 4546

WHAT JUDGES SAY

- **Victor Stanley, Inc. v. Creative Pipe, Inc.,**
2008 WL 2221841 (D. Md. May 29, 2008)
 - Selection and implementation of a proper search requires technical and even scientific knowledge.

- **United States v. O'Keefe,**
537 F. Supp. 2d 14 (D.D.C. 2008)

- **Equity Analytics, LLC v. Lundin,**
248 F.R.D. 331 (D.D.C. 2008)
 - "when parties decide to use a particular ESI search and retrieval methodology, they need to be aware of literature describing the strengths and weaknesses...and select the one that they believe is most appropriate for its intended task."

- **White v. Graceland Coll. for Lifelong Learning, Inc**
2008 WL 3271924 (D. Kan. Aug. 7, 2008),
 - Paper print out of PDF is not "reasonably usable format" under FRCP

- **Goodbys Creek, LLC v. Arch Ins. Co.,**
2008 WL 4279693 (M.D. Fla. Sept. 15, 2008)
 - TIFF printouts of documents not valid production

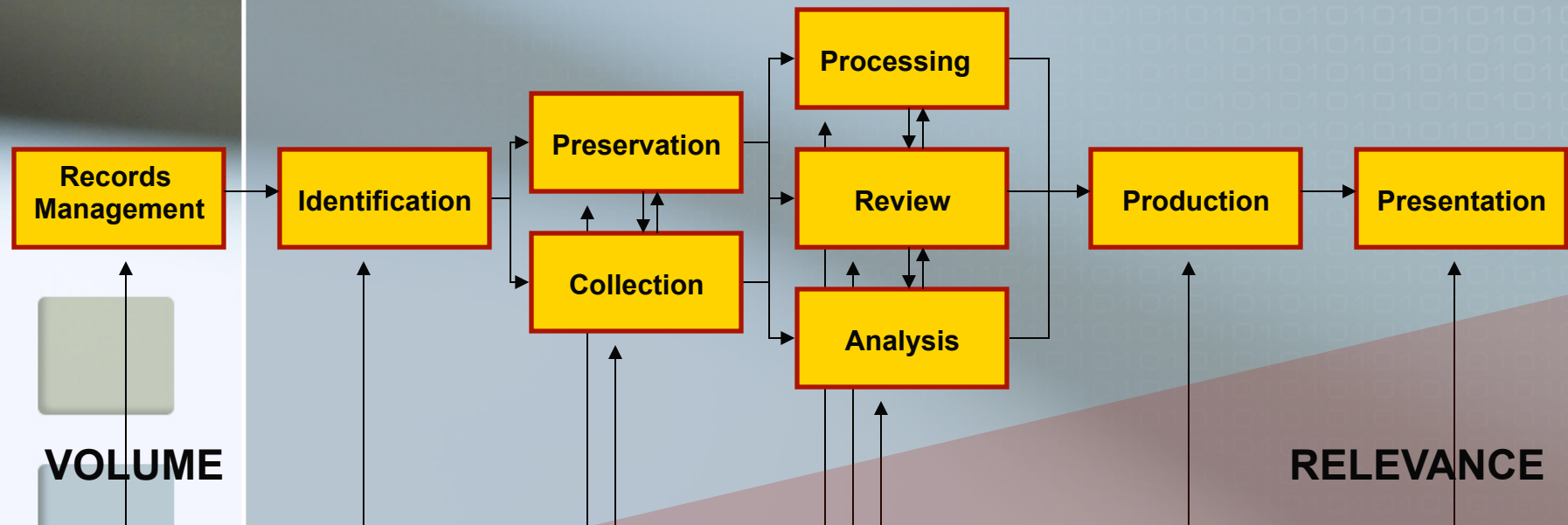
- **Mancia v. Mayflower Textile Servs. Co., 2008 WL 4595175**
(D. Md. Oct. 15, 2008)
 - Sedona Cooperation Proclamation

A SOLUTION



*"Good news, chief, a computer virus
destroyed all our documents."*

A SOLUTION



Electronic Discovery Reference Model

www.edrm.net

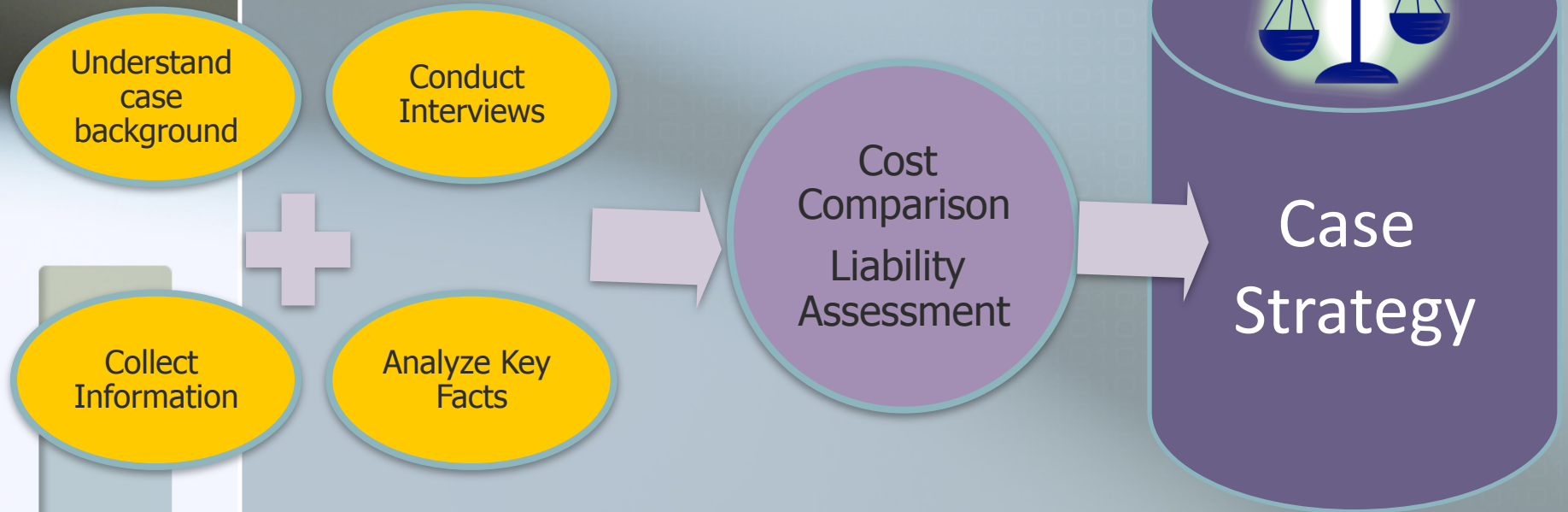
STRATEGY



RTFM



ECA ... SAME AS IT EVER WAS



EARLY INSIGHT NOT ECA

BUDGET PLAN

**FIND and REVIEW
RELEVANT DATA**

**Collect Key Metrics
Reduce Downstream eDiscovery Costs
Identify Potential Exposure**

LITIGATE OR SETTLE?

**PREPARE FOR
MEET AND CONFER**

STRATEGY

Manage Costs and Risks :

Determine key facts

- **Collect relevant contents**
- **Eliminate irrelevant content**

Ensure compliance

- **FRCP**
- **Relevant Case Laws**

STRATEGY

Early actions to take:

1. Meet with the client

Include IT

Understand the client's systems and policies

3. Develop outline of legal and factual issues

4. Issue "Litigation Hold."

4. Agree (to the extent possible) on ESI and e-discovery issues before the initial conference with the court

STRATEGY

Issue litigation hold :

- **Schedule periodic follow-up reminders re: litigation hold**
- **Send opposition appropriate preservation demand**
- **Receive confirmation of hold instructions from recipients**

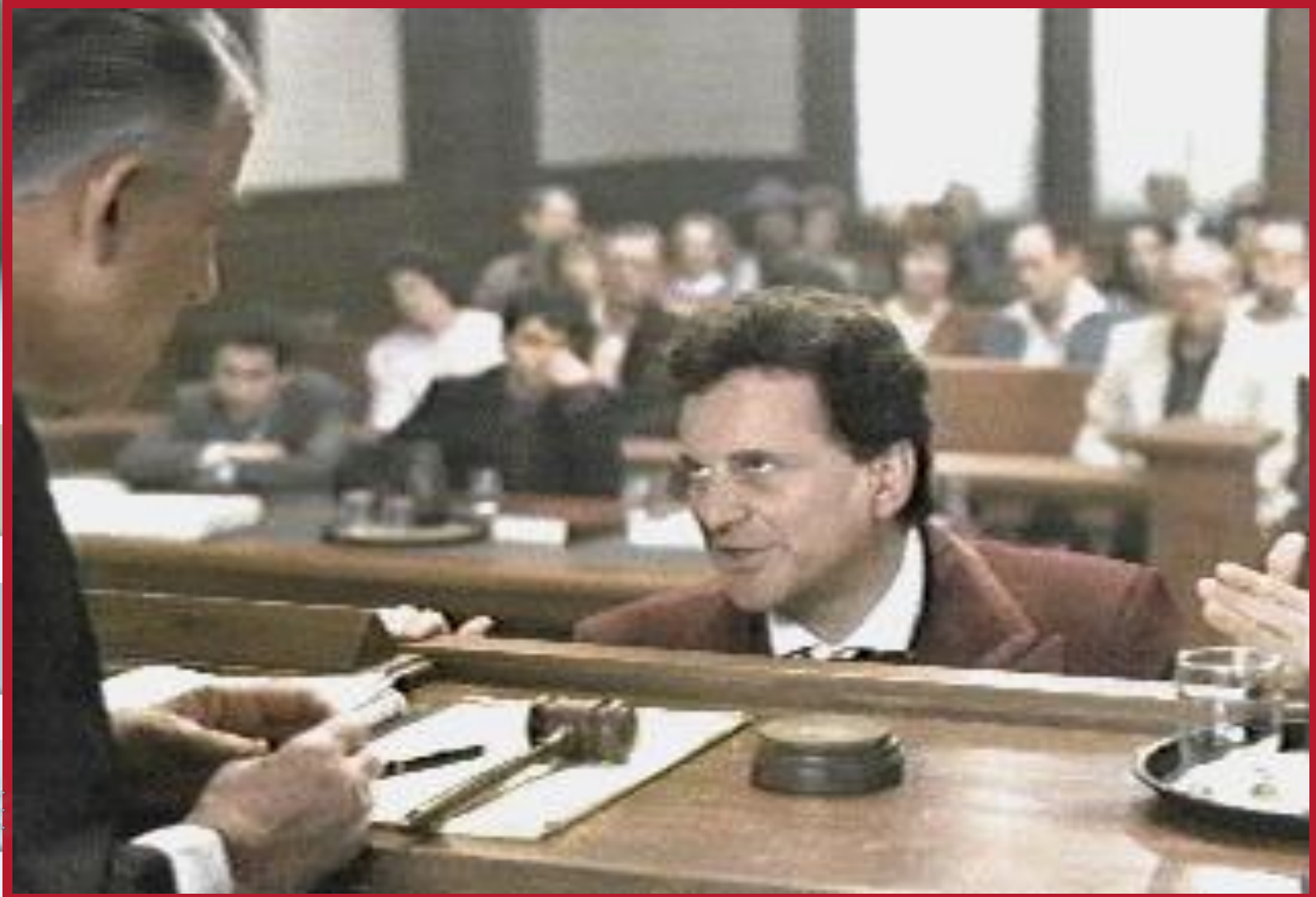
STRATEGY

- **Hosted Review**

- **Production Management**

- **Develop plan for gathering electronic data**
- **Develop plan for dealing with databases**
- **Develop plan for gathering paper documents**
- **Determine desired production format(s)**
- **Negotiate production format(s) with opposition**

STRATEGY: MEET and CONFER



CLIENT EXPECTATIONS

- **Expertise**
- **Coordination with IT**
- **Service & Pricing**
 - **Disclosure**
 - **Approvals**
- **Decisions**
 - **Planned**
 - **Reactive**

THANK YOU



Thank You Very Much

