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Data Management for Health Care Organizations: Is Your Head in the Sand? The Data Is Not There

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Meet Today's Speakers



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Welcome

- Upcoming Ober|Kaler Health Care General Counsel webinars
- Webinar housekeeping
- Overview of the topic
- Discussion
- Questions

Upcoming Webinars

Coming in January 2013: A career focused webinar with guest speaker Lynne Waymon on internal networking

Visit www.healthcaregcinstitute.com for slides and recordings.

Webinar Housekeeping

- *Slides* are located in the left hand corner to download.
- Type your *questions* into the question window at any time. We will answer them at the end of the program.
- Webinar slides and audio replay are available at **www.healthcaregcinstitute.com** and posted on LinkedIn for members.
- A brief *evaluation* (6 questions) will be emailed to you after this program.

The Source Of The Burgeoning Market For Electronic Discovery And Data Management Services



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

Today's Technology Challenge

What Happens in an Internet Minute?



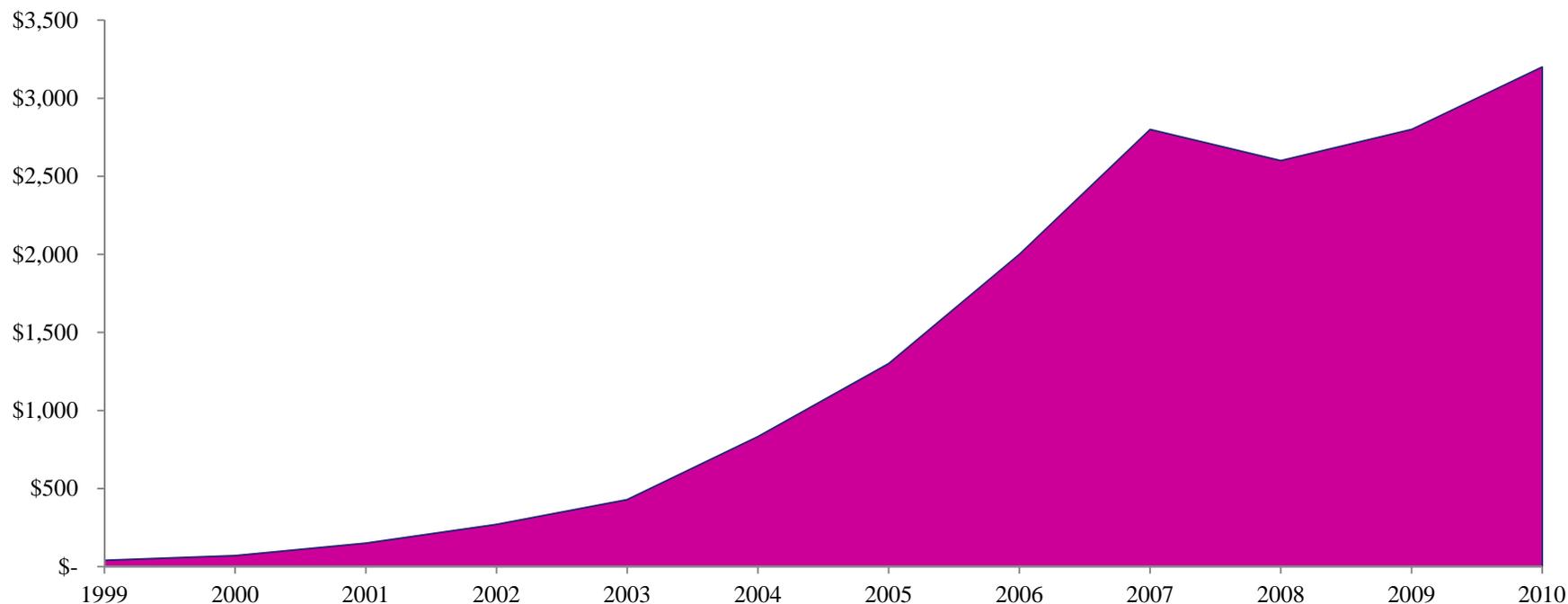
And Future Growth is Staggering



The Data Explosion

- 93% of corporate documents created electronically
- 70% of those never migrate to paper
 - UC Berkeley Study, How Much Information (2003)
- 144 billion emails were sent each day in 2012, 89 billion of which are “business related”
- By 2016, 193 billion emails will be sent each day, 143 billion of which will be business related
 - - Radicati Group

Electronic Discovery Market



1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
\$40M	\$70M	\$150M	\$270M	\$429M	\$832.5M	\$1,300M	\$2,000M	\$2,800M	\$2,600M	\$2,800M	\$3,200M

2010 Socha-Gelbmann Electronic Discovery Survey

E-Data is Different Than Paper

- Volume and duplicability
- Persistence
- Dynamic changeable content
- Metadata
- Environment dependence and obsolescence
- Dispersion and searchability

Volume and Duplicability

- There are 2 billion email users.
- Generating 144 billion email messages per day.
- That's more than 100 times more messages in one day than the U.S. Postal Service handles in one year!
- Electronic documents are more easily duplicated than paper documents.

Persistence

- E-data is more difficult to dispose of than paper.
- “Deleting” a file does not erase the e-data from the computer’s storage devices.
- E-data not erased until it is overwritten or physically destroyed (could take years).
- Creates an entire subset of e-data that exists unknown to the individuals with custody over them, called “latent data.”

Dynamic Content

- E-data is designed to change over time even without human intervention.
 - Automatic file updates
 - Backup applications that move data
 - Email systems that reorganize and remove data automatically
- E-data is more easily modified and changes are harder to detect without computer forensic techniques.

Metadata

- Hidden embedded data reflecting the generation, handling, transfer and storage of the e-data within the computer system
 - Create and edit dates
 - Email sent, received, forwarded and replied to
 - Bcc information
 - Hidden calculations in spreadsheets
 - Cookies track usage and transmit information

Environmental Dependence

- Unlike paper, e-data may be incomprehensible when separated from its native environment.
- Need special and/or proprietary software to actually make sense of some e-data.
- Frequent obsolescence of computer systems and migration of e-data to new platforms can make retrieval of legacy e-data more difficult and costly.

Dispersion

- Paper may be confined to a box or filing cabinet.
- E-data is easily dispersed to numerous storage locations: network servers, laptop, desktop, PDA (smart phone or tablet), removable storage devices (thumb drives, CDs, DVDs), back-up tapes, etc...
- E-data may be searched much more efficiently than paper documents.

Multiple Reasons Why E-Data Must Be Preserved, Retrieved And Produced

- Company involvement in litigation
- Discovery requests served on Company
- Government investigations
- Compliance Investigations
- Normal business activity (e.g., due diligence in merger and acquisition)

E-Discovery in Litigation: Evolving Legal Standards

- Duty to Preserve
- Spoliation
- Failure to Produce
- Cost Containment/Cost Shifting

Statistics

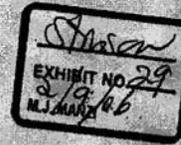
If a litigation involves discovery,
55-80% of the money spent will be on eDiscovery

AND

75-85% of the eDiscovery budget will be spent on
review

Why E-Data Is Different In Court: A Case Study

From: [REDACTED]
Sent: Wednesday, November 12, 2003 3:45 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: Progress Update: Sept2-Nov10, 2003



John,

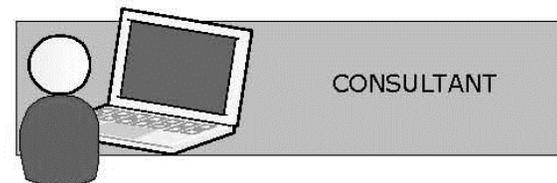
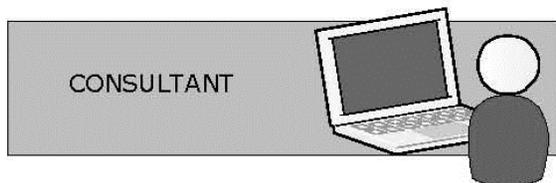
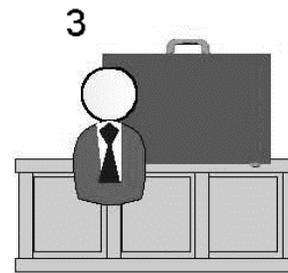
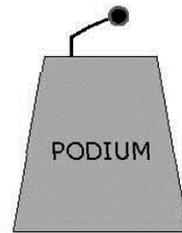
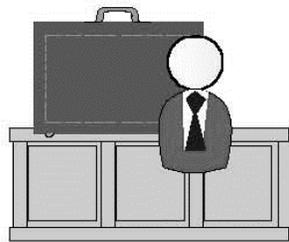
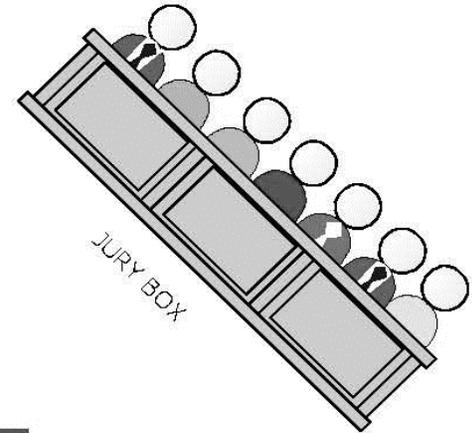
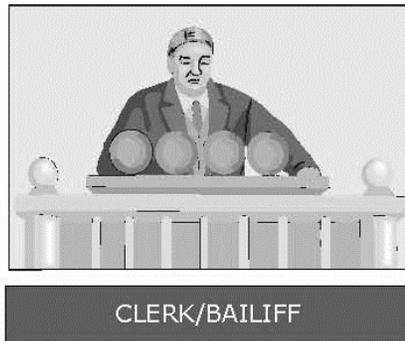
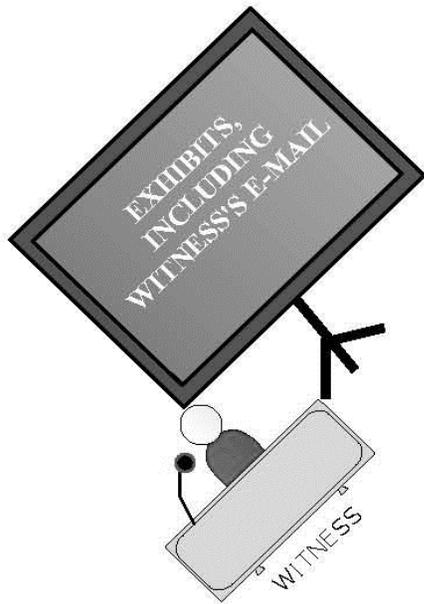
EXHIBIT
NUMBER 54

To this point, I have been exclusively assisting [REDACTED] at [REDACTED]

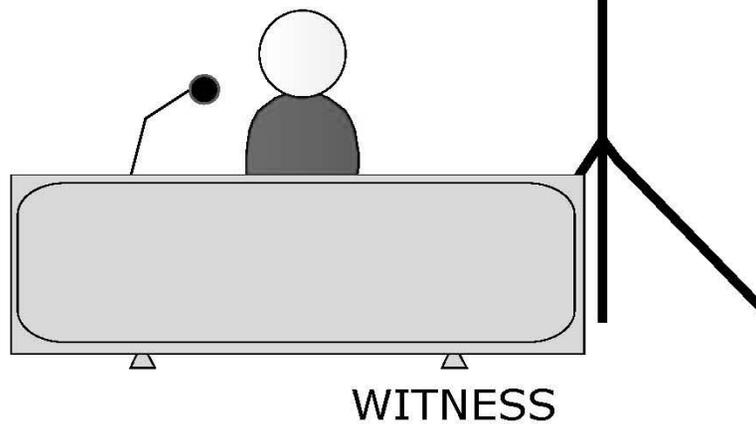
I have worked on the following:

- 1) Opacity. The plant was experiencing elevated baseline levels of opacity with occasional excursions, several times a day, resulting in many exceedences. The problem is now under control, thanks to a big effort of everyone on the team. We learned that maximizing the frequency of rapping, at much higher frequencies than expected, are necessary to control opacity. We tried about everything else during the effort. I am following up with the rapping controls, as the present system at the plant needs some low cost upgrades to be able to reliably maximize rapping where it needs to be.
- 2) Unit 1 Turbine failure from May, 2003. AI asked me to evaluate [REDACTED] report and what [REDACTED] consultant determined. Also to evaluate the risk of failure in Unit 2. [REDACTED] attributed the failure to a pit formed by the unusually high level of corrosion experienced in this machine. [REDACTED] concluded that the corrosion resulted from steam contamination and thus was not their fault. I conclude that the contamination was caused by [REDACTED] practice of immediate vacuum breaking upon turbine trip combined with the fact that LP hood sprays were also on and the unit operated for months with a minor condenser tube leak.
 - a. Vacuum breaking under these circumstances causes the LP hood cooling spray water to be "blasted" throughout the LP and IP turbine. This is the source of the salty contamination that caused the pit corrosion.
 - b. Vacuum breaking (to decelerate rapidly through the critical speeds on shutdown and trip) was eliminated on Unit 1 after the re-build because AI insisted that the unit be properly balanced. It will be eliminated on Unit 2 after the current outage by re-balancing this machine.
 - c. Although I agree that the pit on the L-1 stage blade provided a convenient site for a high cycle fatigue crack to initiate, I am skeptical that the pit corrosion is the root cause of the problem. I think it more likely that immediate vacuum breaking at 3600 rpm, allowing the condenser pressure to rise to close to atmospheric, is more likely to produce high stresses in these blades. The inspection of Unit 2 blades and the elimination of vacuum breaking on this unit is likely to eliminate further risk.
 - d. A small residual risk remains that the blade in Unit 1 failed due to a design problem with the blades. I do not have the means to evaluate this risk, and [REDACTED] is not being presently very cooperative in helping us evaluate this risk. I am not highly concerned, though.
- 3) FBHE tube failure. We determined that the recent failure in Unit 1 was caused by high cyclic stress, cracking a tube. This high stress was caused by migrating tube clamps. A temporary solution was implemented with the advice and assistance of [REDACTED] consultant, Bill Kownurko. A permanent solution is being implemented on Unit 2 this outage. It was fun to be able to use my Thames experience again, but AI and I agree that this was an example where we failed to take note of what we already knew during construction of the plant.
- 4) Commodity consumption. I have been working to develop a program to reduce consumption of lime, limestone, urea, water, and other consumables to or below design levels. I expect that this is achievable, and AI is determined to do it. I have begun by getting a number of control loops re-designed and tuned so that they can run in automatic. We corrected a recently a problem with the unit master that was causing the unit to upset on increasing load. We are making good progress here. Later this fall, AI will have a new performance engineer, Csaba Kiss, from Hungary, start at the plant. I will turn over my work in area to him when he is ready.
- 5) Overall, I think [REDACTED] has the potential to be quite a strong model for the rest of [REDACTED]. I would like to continue to support AI in achieving this status. I am providing some advice and assistance with developing his engineering staff.

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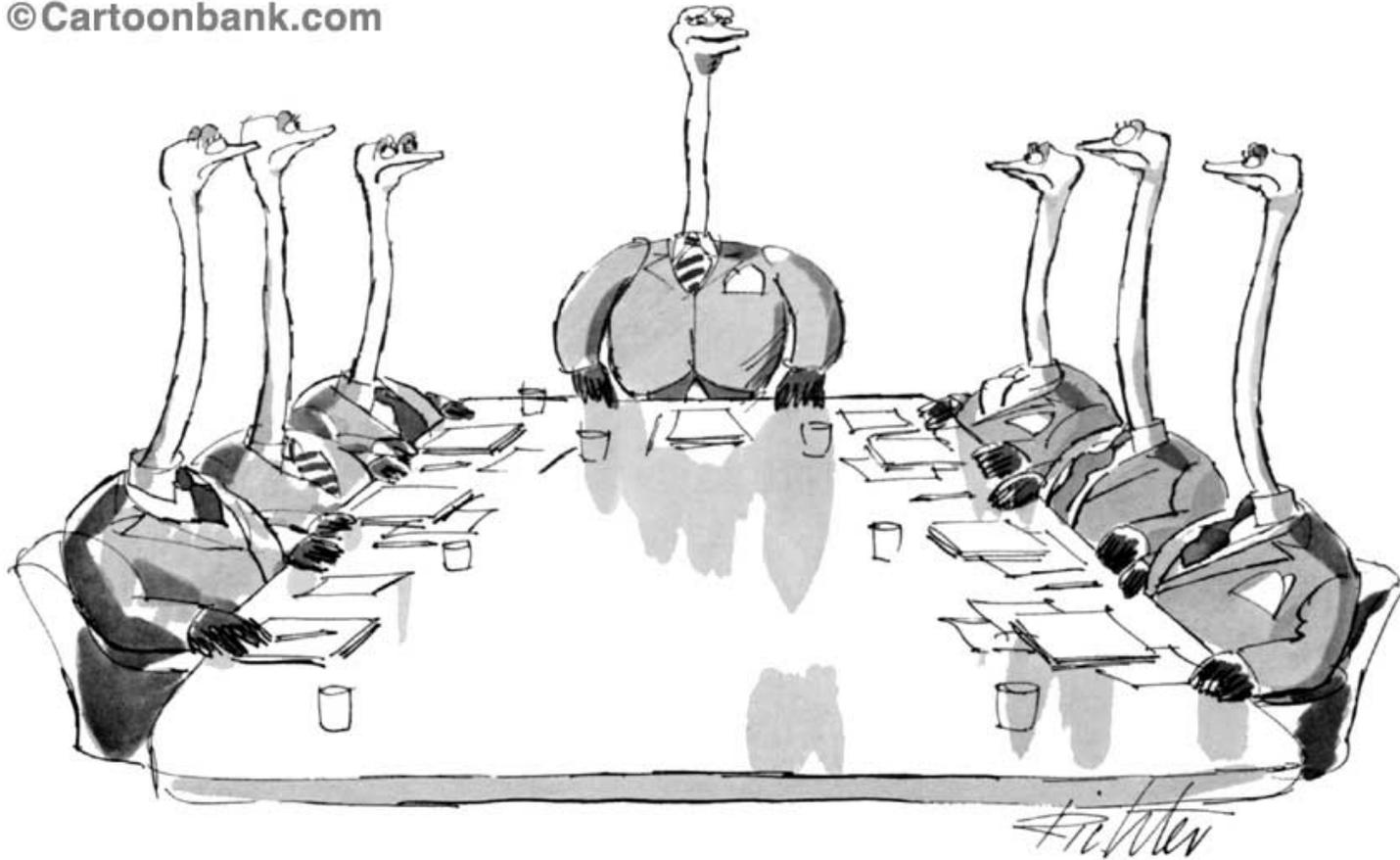
EXHIBITS, INCLUDING WITNESS'S E-MAIL



E-Data Management Solutions

All Discovery Includes eDiscovery

©Cartoonbank.com



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

Why Be Concerned?

Landmark Cases:

- *Zubulake* \$29 million verdict
- *Morgan Stanley* \$1.45 billion verdict
- *Philip Morris* \$2.75 million sanction
- *Merrill Lynch* \$2.5 million fine
- *Morgan Stanley* \$15 million fine

More Recent Developments

- DuPont v. Kolon Ind.
 - \$919 M verdict for DuPont (harsh spoliation instruction)
- 2010 Review of Sanctions Awards in 230 cases: most common misconduct – failure to preserve
- Monetary sanctions range from \$250 to \$8.8M
- More sanctions awarded in 2009 than all pre-2005 cases combined

60 Duke L.J. 789

Educate Workforce

- E-Mail not always best: pick up the phone.
- Don't send e-mail to everyone just because you can.
- Be careful with sensitive communications that should be privileged.
 - include in-house or outside counsel
 - do not send or forward to third parties

Document Retention Policies

DuPont Case Study

- DuPont reviewed 75 million pages of text in response to discovery requests during the three-year period.
- More than 50% of the documents that DuPont was obliged to review were kept beyond their required retention period.
- The cost of reviewing documents past their retention periods amounted to \$12 million.
- Lesson learned: if you have a policy, follow it.

What to Retain

- Operational Value
- Fiscal Value
- Historical Value
- Regulatory Value
- Litigation Value

What to Destroy

- Everything Else!
- Caveat: Information that might otherwise be subject to destruction must be preserved if it is relevant to actual or anticipated litigation.

Preparing for the Inevitable

- Develop a document retention policy that includes electronic data.
- Within the policy, develop a litigation hold procedure based on:
 - Technical requirements
 - Legal requirements
 - Practical considerations
- Assemble a team responsible for carrying out the hold procedure.



Legal Requirements

- Determine date that preservation duty attaches
 - Reasonably anticipate litigation
 - Lawsuit is imminent
 - Lawsuit is filed
- Determine scope of preservation
 - Identify key players or custodians
 - Identify relevant timeframe
 - Challenge scope if received broad preservation letter
 - Narrow scope with court at the first opportunity
- Notice to key players or custodians
- Notice to Litigation Hold Team

Technical Requirements

Find where key player or custodian data resides and place reasonable limits on where data can be stored:

- **File servers**
- **Email servers**
- **Hard drives**
- **Removable storage devices**
- **Peripherals**
- **Backup tapes**
- **PDA's**
- **Legacy systems**
- **Personal and home computers/tablets**
- **Smart phones**
- **Fax machines**
- **Photo copiers**
- **HIPAA**
- **Develop a policy to put reasonable limits on where company data can be stored**

Technical Requirements

- Preserving data from destruction: have a plan in place
 - Imaging hard drives
 - Suspend email overwriting
 - Pull backup tapes from rotation
 - Collection of data
 - Collection method (risk v. cost)
 - Who collects? (in-house or third party)
 - Maintain chain-of-custody
- Developing technical solution for preserving forward

Choose A Data Collection Method

- “Do-It-Yourself” Data Collection
 - High probability of damaging, deleting, or missing data
 - Likely will not pass judicial muster
- IT Onsite Collection
 - Lack requisite training and skills
 - Lack tools and equipment to handle the job
 - Unable to handle the additional workload
 - Also likely will not pass judicial muster
- Forensic
 - Third Party Verification
 - Authentication

Practical Requirements

- Interview key players, custodians, and IT to find where they store data
- Coordination between GC, IT, and outside counsel
- Verify compliance with preservation request
- Corporate representative prepared to testify in a 30(b)(6) deposition to describe information systems and litigation hold procedure
- Collecting data from legacy systems
 - Hardware
 - Software
 - Personnel

Cutting Costs

- Institute and Follow Record Retention Policy
- Litigation Hold Procedure
- Use Sampling Techniques
- Cull by Type of Data and Word Search
- Deduplicate
- Use Appropriate Collection Procedure

Questions



More questions? Contact us.



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