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ACC Association of Corporate Counsel

TENNESSEE

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Q4 2018



President's Message

Steve Cavezza, Legal Counsel, Mars, Inc.

I have never been more excited for the future of this Chapter than I am now. We recently elected three new Officers, voted in six new Directors to our Board, and appointed three new Committee Chairpersons – all in addition to the amazing leadership team that we already had in place. We held our first ever Board Transition Meeting in Nashville in September to pass the proverbial baton from the previous Board of Directors to the new Board, and it was a great success. This is by far the strongest, most engaged collection of leaders our Chapter has ever had, and they are all committed to serving you, our members.

Our three Grand Divisions are well positioned to build on recent successes and improve even more in the coming year. Memphis is getting rejuvenated by an energized core of leaders, Nashville is looking to keep its fantastic momentum going, and Knoxville continues to grow. In addition, we are seeing developing areas of the state beginning to evolve, such as in Chattanooga and the Tri-Cities. Our Chapter's reach continues to expand and benefit more members across our state than ever before.

Importantly, our Chapter's financials are right on target, thanks in large part to our fantastic sponsorship partners. 2018 has been by far our best year for both the Chapter and its sponsors. We brought in a record amount of sponsorship revenue, and in return our sponsors saw new highs in attendance at our Chapter events. By focusing on the quality of our program offerings, rather than quantity, we have improved the events for our members and increased on sponsors' return on investment. As a thank you to our 2018 sponsors, we will be hosting our first annual sponsor appreciation event in Nashville this November. All members are invited. We hope to expand this event to the other regions in the future. Sponsorship outreach and program planning is already well underway for next year, and we look forward to continuing our success and setting new records for our Chapter in 2019.

Many of our Chapter leaders and members attended the ACC Annual Meeting in Austin in October. It was my first time attending the Annual Meeting. If you've never been, I highly recommend it. Three days of meeting with thousands of fellow in-house lawyers from across the country, applicable CLE from knowledgeable presenters, an exhibit hall full of helpful legal service providers, and plenty of opportunities for informal networking (with free food, drinks and giveaways, of course). We even held a Tennessee member-only happy hour for our 40+ members in attendance so that we could connect with others from across the State in person. I encourage you to mark your calendar now for next year's event in Phoenix from October 27th to the 30th.

Lastly, I'll close with a call to action to all of our members: Get involved! There is no better way to connect with fellow local in-house lawyers than ACC Tennessee. Come to the local ACC events, connect, engage, and get the most out of your membership. If you're interested in getting more involved with our Chapter, just call, email, or send me a message on LinkedIn. We will get you in a role that fits your skill set and interests. It's a great way to grow both personally and professionally.

We have a lot of exciting things in store for our Chapter in 2019. I'm looking forward to an incredible year, and I hope you are too!

Sponsor

Appreciation

Reception

Thursday, November 29, 2018

5:00–7:00 PM

Woolworth on 5th
Upstairs

221 5th Avenue North
Nashville, TN 37221

Thank our 2018 ACC Sponsors
for the fabulous statewide
programming during the year and for
supporting ACC TN!

[Register Here](#)

Valet in front of the restaurant for a small fee.

OR



Receive 10% off your ride two and from the event!

Use the code "ACC1129".

Chapter Leadership

Stephen Cavezza, President
North American Petcare at Mars
Counsel

Scott Ellis, President Elect
CoreCivic, Inc.
Senior Director, Contract Compliance

Angelia Nystrom, Vice President, East TN
University of Tennessee Institute of Agriculture
Executive Director of Specialty Programs

Gulam Zade, Vice President, Middle TN
LOGICFORCE
General Counsel

Meredith Wooten, Vice President, West TN
Vero Business Capital
General Counsel

Allison Cotton, Secretary
Employment Counsel
Community Health Trust

Scott Lynn, Treasurer
Ryman Hospitality Properties, Inc.
Associate General Counsel

Justin Martin, Immediate Past President
Electric Power Research Institute
Senior Corporate Counsel

Board of Directors

East Tennessee

Brad Hendrix
CBL & Associates Properties, Inc.
Associate Counsel—Management

Robbie Pope
Regal Entertainment Group
Real Estate Counsel

Tammye Taylor
Eastman Chemical
Senior Counsel, Intellectual Property

Middle Tennessee

April Berman
Asurion
Senior Vice President and
Deputy General Counsel

Peter Malanchuk
Bridgestone Americas, Inc.
Sr. Counsel Labor & Employment

Leslie Zmugg
Caterpillar Financial
General Counsel

West Tennessee

David Billions
Fed Express
Managing Director—Litigation

David Chambers
Smith & Nephew
Senior Intellectual Property Counsel

Angelia Nystrom
University of Tennessee Institute of Agriculture
Executive Director of Specialty Programs

Executive Director

Melanie Gober Grand

ACC TN CALENDAR OF EVENTS

West Region

November 27, 2018

Dual CLE/Lunch

Sponsored by Adams & Reese

“The Legal Ethics Year in Review: News You Can Use for Corporate Counsel”

[Register Here](#) to attend this wide-ranging one-hour review of the most important developments in legal ethics, the law of lawyering, and attorney-client privilege, especially aimed at the daily work of corporate counsel. We'll distill practical guidance from ethics opinions and case law from all over, including Tennessee, that corporate counsel should know about to protect their clients and themselves and to practice more effectively. Lucian Pera, partner in the Memphis office will present the program.

December 13, 2018

CLE/Lunch

Sponsored by Ogletree Deakins

“2018’s Greatest Hits: The Most Significant Developments in Employment Law This Year”

Kimberly Hodges will present an informative and educational briefing to address the latest labor and employment law topics impacting all employers. [Register Here](#) to attend.

Middle Region*

December 13, 2018

Dual CLE/Lunch

Sponsored by Adams & Reese

“The Legal Ethics Year in Review: News You Can Use for Corporate Counsel”

[Register Here](#) to attend this wide-ranging one-hour review of the most important developments in legal ethics, the law of lawyering, and attorney-client privilege, especially aimed at the daily work of corporate counsel. We'll distill practical guidance from ethics opinions and case law from all over, including Tennessee, that corporate counsel should know about to protect their clients and themselves and to practice more effectively. Lucian Pera, partner in the Memphis office will present the program.

East Region (Chattanooga)

December 3, 2018

CLE/Networking Reception

Sponsored by Miller & Martin

”Pitfalls of Standard Contract Provisions”

This presentation will provide a practical discussion of standard contract provisions that companies often encounter. Standard provisions – sometimes referred to as “boilerplate” – can have an outsized effect on a company’s rights and liabilities. They arise in all types of agreements, including vendor contracts, business partnership agreements, software & licensing agreements, employment agreements, and construction/real estate contracts. Attendees will also hear about common pitfalls with standard contract provisions language that can expose companies to risks if a dispute arises. [Register Here](#) to attend this event presented by Matt Jannerbo and Billy Eiselstein.

**For more information on ACC TN events
go to <https://www.acc.com/chapters.tenn/>**

***Unless specifically noted, all meetings in the Middle Region are held the 2nd Thursday of the month.**

Meet the 2018-19 Board Members



April Berman (Director at Large – Middle) is Senior Vice President and Deputy General Counsel for Asurion in Nashville. Previously, April was an attorney at Baker Donelson and Dinsmore & Shohl. April received her law degree from the University of Tennessee (2000) and her undergraduate degree in English and Political Science from the University of Tennessee at Chattanooga (1997). April is newly elected to the Board.



David Billions (Director at Large – West) is Managing Director – Litigation at Federal Express in Memphis. Previously, David held various in-house positions with Federal Express, and was an attorney at Rossie, Luckett, Parker & Ridder. He received his law degree from the University of Memphis (1999) and his undergraduate degree in English from the University of Georgia (1994). David is newly elected to the Board.



Steve Cavezza (President) is Counsel, North American Petcare at Mars in Nashville. Steve's prior in-house experience includes service with American Blue Ribbon Holdings and Fidelity National Financial. He received his law degree from Florida Coastal School of Law and his undergraduate degree in Marketing from the University of Kentucky. Steve has been serving on the Board since 2013.



David Chambers (Director at Large – West) is Senior Intellectual Property Counsel at Smith & Nephew in Memphis. Previously, David held various in-house positions at Smith & Nephew, and was an attorney at Husch & Eppenberger. He received his law degree from the University of Illinois (2002) and his undergraduate degree in Manufacturing from the Bradley University (1995). David is newly elected to the Board.



Allison Cotton (Secretary) is Employment Counsel for Community Health Systems in Franklin. Previously, Allison was an attorney at FordHarrison and Manier & Herod in Nashville. Allison received her law degree from the University of Tennessee (2010) and her undergraduate degree in Public Policy Studies from Vanderbilt University (2007). Allison is newly elected to the Board.



Scott Ellis (President Elect) is Senior Director, Contract Compliance for CoreCivic in Nashville. Scott's prior in-house experience includes serving as Vice President and General Counsel at FutureNet Security Solutions and as Division Counsel at Smith & Wesson. He received his law degree from the University of Tennessee (1999) and his undergraduate degree in Management from Middle Tennessee State University (1995). Scott has been serving on the Board since 2016.



Brad Hendrix (Director at Large – East) is Associate Counsel – Management at CBL & Associates in Chattanooga. Previously, Brad was in private practice, and served as a prosecutor in Alabama. He received his law degree from Samford University Cumberland School of Law (2001) and his undergraduate degree in Political Science from Athens State University (1998). Brad has been serving on the Board since 2018.



Scott Lynn (Treasurer) is Executive Vice President and General Counsel of Ryman Hospitality Properties in Nashville. Previously, Scott was Senior Counsel at Progeny Marketing Innovations, and an attorney at Stokes and Bartholomew. He received his law degree from Vanderbilt University (1998) and his undergraduate degree in accounting from Tennessee Technological University (1994). Scott has been serving on the Board since 2017.



Peter Malunchuk (Director at Large – Middle) is Senior Counsel, Labor and Employment at Bridgestone Americas in Nashville. Previously, Peter served as Employment Counsel at Community Health Systems and as an attorney at Constangy, Brooks, Smith and Prophete in Nashville. Peter was also a federal law clerk for the United States District Court, Middle District of Tennessee. He received his law degree from the University of Alabama (2008) and his undergraduate degree in History/Political Science from Kenyon College (2002). Peter has been serving on the Board since 2017.



Justin Martin (Immediate Past President) is Associate General Counsel at Electric Power Research Institute in Knoxville. Previously, Justin was an attorney at Kizer & Black and Winchester, Sellers, Foster & Steele. He received both his law degree (2000) and his undergraduate degree (1995) in Philosophy and American Studies from the University of Tennessee. Justin has been serving on the Board since 2013.



Mickki Murray (Director at Large – West) is IP Counsel at Medtronic in Memphis. Previously, Mickki was an attorney at Parks IP Law and Alston & Bird in Atlanta. He received his law degree from the George Washington University Law School (2003) and his undergraduate degree in Mechanical Engineering from the Georgia Institute of Technology (1996) and in General Science from Morehouse College (1995). Mickki is newly elected to the Board.



Angelia Nystrom (Vice President – East) is the Executive Director of Specialty Programs at the University of Tennessee Institute of Agriculture in Knoxville. Her prior legal experience includes service as Director of Planned Giving for the University of Tennessee Foundation, and as an attorney at selected Knoxville law firms. Angelia received her law degree from Mercer University and her undergraduate degree from Carson Newman College. She also holds an LLM in estate planning and elder law from Western New England University. Angelia is newly elected to the Board.



Robbie Pope (Director at Large – East) is Director and Real Estate Counsel at Regal Entertainment Group in Knoxville. Previously, Robbie was an attorney at Kramer Rayson LLP in Knoxville. He received his law degree from the University of Tennessee (2001) and his undergraduate degree in History from Emory University (1996). Robbie has been serving on the Board since 2016.



Tammye Taylor (Director at Large – East) is Senior Counsel, Intellectual Property for Eastman Chemical Company in Johnson City. Previously, Tammye was a research chemist at Azko Nobel. Tammye received her law degree from the University of Georgia (2002), her master's degree in Chemistry from Georgia Institute of Technology (1994) and her undergraduate degree in Chemistry from the University of Tennessee at Martin (1991). Tammye is newly elected to the Board.



Meredith Wooten (Vice President – West) is the General Counsel of Vero Business Capital in Memphis. Her prior legal experience includes service with Enoble Business Capitol and the Law Offices of William Jeter. Meredith received her law degree from the University of Memphis (2011) and her undergraduate degree in Psychology from Berry College (2007). Meredith has been serving on the Board since October 2017.



Gulam Zade (Vice President – Middle) is Partner and General Counsel of LOGICFORCE in Nashville. Previously, Gulam was an attorney at Garfinkle, McLemore & Young. He received his law degree from the University of Louisville and his undergraduate degree from Western Kentucky University. Gulam has been serving on the Board since 2014.



Leslie Zmugg (Director at Large – Middle) is General Counsel for Caterpillar Financial in Nashville. Previously, Leslie held various positions with Caterpillar, and was an attorney at Schulte Roth & Zabel. Leslie received her law degree from Fordham University and her undergraduate degree in Philosophy from the State University of New York at Binghamton. Leslie is newly elected to the Board.



Melanie Gober Grand (Chapter Administrator) is the Chapter Administrator for the Association of Corporate Counsel – Tennessee and the Executive Director of the Lawyer's Association for Women in Nashville. Melanie attended Tennessee Technological University and UT Nashville and received her Paralegal Certificate from Southeastern Paralegal Institute (1987). Melanie has been serving as Chapter Administrator since 2017.

Corporate Legal Departments Strive for Efficiency, According to New Thomson Reuters Survey

By the Legal Executive Institute, Thomson Reuters

Corporate legal departments, already stretched by limited resources, are confronting new, as well as traditional, challenges, according to the *2018 Thomson Reuters Corporate Legal Department Efficiency Report: Doing More with Less and Increasing Productivity in Corporate Legal Settings*.

The 2018 report — the third in a series of Thomson Reuters efficiency reports — surveyed 462 attorneys and decision-makers working in corporate legal departments nationwide to identify trends in managing resources and adapting to business needs. The report findings stressed how survey respondents noted that data security and ethics and compliance remain key priorities, but cybersecurity ranked higher in importance to legal departments in 2018. Among the factors heightening this concern was the May 2018 deadline to comply with the European Union’s General Data Protection Regulation (GDPR), which imposed new rules for how companies manage the personal data of those in the EU and significant fines for noncompliance.

The report also underscores that legal department trends continue to show general counsel and their teams facing pressure to do more with less as departments’ roles are expanding yet staffing headcount and available resources often remain unchanged. Growing demands of and expectations on departments — such as the role of general counsel expanding to business advisor and ever-changing government regulations — are making it increasingly difficult for in-house leaders to avoid the pitfalls of inefficiencies, such as a budget stress, staffing woes, and dependence on outside counsel.

“One trend continuing to shape legal departments through each survey is how general counsel are increasingly expected to serve as business advisers in addition to providing legal advice,” explained Chris Maguire, managing director of the U.S. Corporate segment for Thomson Reuters Legal. “General counsel are becoming more involved across their organizations, particularly in terms of advising the board of directors and business leadership.”

The report also examines how corporate legal departments are making the most of the resources available to them, especially in terms of keeping work in-house around matters related to contracts, M&A, intellectual property, and litigation. It also explores the measures in-house leaders are implementing to increase productivity —such as professionalizing the role of legal department operations managers and shifting work from lawyers to paralegals — as well as confronting the ups and downs of partnering with outside counsel.

The report highlighted the measures legal departments are implementing in order to operate more efficiently. “GCs are increasingly relying on legal department operations managers to find creative ways to use resources, as well as track spending and time,” said Maguire. “This gets to the heart of the rationale for a more efficient in-house team: the ability to focus on strategic work.”

Indeed, according to 41% of survey respondents, the top benefit of being more efficient is the ability to focus on strategic work.

Thomson Reuters is a 2018 ACC TN Platinum Sponsor.

KUDOS

Three Tennessee Members took home BIG awards from the Annual Convention in Austin October 21-24th!

Steve Roth from the East TN Region received the ACC Member of the Year award.

**Sherie Edwards from Middle TN received the Association of Corporate Counsel
Jonathan S. Silber Network Member of the Year.**

Gulam Zade from Middle TN received the ACC Small Law Department Member of the Year.

Trade Update: A Difficult Road Awaits the U.S.- Mexico-Canada Trade Agreement in Congress

By Tony Swafford and Cole Callihan
Adams and Reese LLP

The U.S.-Mexico-Canada Agreement (USMCA) still has obstacles to clear before the agreement can take effect. Congress hopes to approve the agreement under Trade Promotion Authority (TPA), which set deadlines and reporting requirements for the administration in exchange for expedited consideration in Congress. Without TPA fast-track consideration, the deal would require 60 votes in the Senate and would open to amendments.

Due to notification and reporting requirements under TPA, the USMCA will not receive final approval from Congress until 2019. Congressional control following the 2018 midterm elections will determine whether the agreement receives expedited approval. Republican control will likely result in approval of the deal, but if Democrats take back either chamber, the agreement's fate becomes unclear.

Major steps still ahead of the deal under TPA procedures include:

- **Signature:** President Trump signed the deal August 31 and USTR released the draft text of the agreement September 30.
- **Law Changes:** The president must provide Congress with a description of changes to existing laws necessary to implement the agreement within 60 days of signing.
- **ITC Report:** The International Trade Commission has 105 days from signing the agreement to release a report on economic impact. ITC started the study October 12 and is accepting comments through December. However, Congress can vote on the agreement before the report is released. If they retain power, Republicans may look to move on the agreement quickly and not wait for the ITC report. Expect calls by Democratic members in the media not to vote until the ITC releases the report.
- **Administrative Action & Final Agreement:** TPA requires the president to send Congress a draft statement of administrative action, as well as the text of the final agreement, at least 30 days before submitting implementing legislation. The statement describes the administration's interpretation of the agreement and significant actions to implement. The already-released draft must undergo a "legal scrub" before it's finalized.
- ****Mock Markups:** House and Senate committees, with the proper jurisdiction, may hold markups before they receive the implementing bill, an alternative way for Congress to provide modifications. However, markups are not required under TPA and have no bearing on the implementing legislation, and are a way for members to add input outside the vote in Congress. If Democrats take back either chamber, they will likely use mock markups to voice criticism of the agreement or delay implementation.
- **Implementing Legislation:** Next, the president sends draft implementing bill to Congress with a final statement of administrative action and the deal's justification.
- **House Consideration:** Once sent to Congress, the House will probably take the lead in considering the bill, since it affects tariffs, and revenue-related bills must originate in the House. The Ways and Means Committee will have 45 legislative days to report the bill or it will be discharged. A floor vote must take place within 15 legislative days of when the bill is discharged or reported. Floor debate is limited to 20 hours, often shortened by the Rules Committee, and only a simple majority is required for passage. The bill can't be amended by the committee or on the House floor.
- **Senate Consideration:** The Senate Finance Committee will have 15 session days to report the House-passed bill (or 45 session days to report its own bill). The Senate has 15 session days from then to hold a vote, debate is limited to 20 hours, the bill can't be amended, and only a simple majority is required for passage, rather than 60 votes or the two-thirds majority required for a treaty.
- **Other Countries' Compliance:** At least 30 days before the agreement takes effect, the president must attest that Canada and Mexico have made necessary changes to their laws.
- **Final Steps:** The president signs the bill into law and implements the agreement by proclamation. Canada and Mexico's legislatures will also have to approve the agreement.

Congress could attempt to deny the implementing bill's eligibility for expedited TPA consideration.

A procedural disapproval resolution would withdraw TPA eligibility if members can show that the administration failed to meet TPA's notification and consultation requirements. Both chambers must adopt the resolution within 60 days of each other.

A consultation and compliance resolution could be adopted by either chamber to withdraw TPA procedures only in that chamber. This would complicate consideration in the other chamber and further delay approval.

Lastly, either chamber could change their rules and override TPA procedures.

The new trade agreement's fate still faces a long road to implementation and will depend on which party controls Congress after November 6. If Congress modifies the legislation, it may force the administration back to the negotiating table.



Tony Swafford is a Partner and Special Business Services Group Leader in the Nashville office where his practice is largely class action and complex litigation matters.



Cole Callihan is an Associate in the New Orleans office where his practice encompasses maritime/transportation and customs matters.

Adams & Reese is a 2018 ACC TN Platinum Sponsor.

... From ACC Headquarters

Nominate A Star! The nomination period for ACC's [2019 "Top 10 30-Something"](#) is now open. This [awards program](#) recognizes in-house counsel rising stars for their innovation, global perspectives, proactive practice, advocacy efforts, and pro-bono and community service work. To be eligible, attorneys must be between age 30 and 39 on Dec. 31, 2018, and show outstanding achievement in their profession. Self-nominations are accepted. [Nominations](#) must be complete and received by **Dec. 7, 2018**. Contact [Joshua Shields](#) for more information.

Law Firm Alumni Program: ACC's [Law Firm Alumni Program](#) provides an opportunity for law firms to give attorneys transitioning, or who have transitioned, to an in-house role the gift of a complimentary six-month individual membership to ACC. [Reach out](#) to your firm network. [Check the latest list of participants.](#) If you have questions, please contact [David Chu](#).

ACC In the News - ACC President & CEO Veta T. Richardson authors an article in [China Business Law Journal](#) on career advancement and mobility for in-house counsel, including ACC research on the topic. The article also notes relevant ACC programming for this highly-mobile, international in-house workforce. ([Full Article](#))

Developments in Litigation Technology: Early Sleuthing and Scoping

By Seth Eichenholtz, Tim Donovan, and Anne Kershaw



This article was featured in the October 2018 issue of ACC Docket. Here, the authors delve into the newest litigation technology advancements and how they can help legal departments save time and money. To learn about the 10 steps for early awareness and relevance/non-relevance selection, read the [second part of the series](#).

In litigation, the side that gets the earliest and best understanding of the underlying facts and how the evidence supports or undercuts key witnesses has a distinct strategic advantage. Fortunately, several trends are converging that make early case sleuthing and scoping more affordable and feasible than ever for cases of all sizes.

Cloud storage is increasingly inexpensive and highly elastic. Large volumes can be processed on demand for literally pennies per gigabyte without infrastructure investment. Geospecific cloud storage can keep data in country, avoiding many General Data Protection Regulation (GDPR) problems.

Secure bandwidth has increased. Large sets of data can be moved quickly, securely, and economically without physically shipping computer media.

Analytics software is becoming more ubiquitous. Corporations don't have to load email and documents onto expensive final review platforms to have comparable functionality (e.g., predictive coding, concept wheels, email threading, deduping, text search, etc.).

Project-based virtual teams can come together just for the life of a project and include the expertise needed for any part of the project (e.g., database discovery or dealing with legacy applications). There is no need for large, ongoing headcounts.

Screen sharing applications permit quick, spontaneous meetings and information exchanges. Litigation teams can be assembled globally and can be much nimbler than only face-to-face meetings.

Pricing models have shifted from the old per-gigabyte or per-document models

Experts now provide technology at either no additional cost or may bill for direct out-of-pocket cost for things like Amazon Web Services hosting or processing fees — minor expenses compared to final review platforms.

These trends offer opportunities and solutions with distinct advantages over traditional methods of document review and predictive analytics.

Early sleuthing and scoping

Being able to collect, process, and analyze email and electronic documents for little or no cost allows lawyers to understand what information they have when deciding whether to settle or to negotiate on a preliminary scope for e-discovery. It also provides metrics to use in such negotiations.

The truth is that if corporations use people who understand robust software, they can find whatever they need in just about any collection of documents, without a lot of cost and heartache.

With the early investigation and scoping approach to e-discovery, outside counsel will be reading only relevant documents for intelligence and understanding, not just to make "in" or "out" relevancy decisions or apply "confidential" or "privileged" tags to documents.

Because early scoping is affordable, attorneys can do this as soon as the demand letter arrives. They can know before the case is filed what happened, who said what to whom, and whether to fight or settle.

For every pleading and subpoena, in-house counsel can quickly and inexpensively scope the task at hand by collecting the email for two or three highly relevant custodians and quickly see with whom they discussed the topics at issue.

Basic e-discovery cost control

Here are some basic things that can be done to greatly lower costs without compromising quality. More information on the first three items is available in the *ACC Docket* article, "Ethics and E-Discovery Review," Jan./Feb. 2010, pp. 46-57:

DeNIST

As soon as possible, identify and exclude files that are created by and obtained from software providers as part of their software installations and updates. There is no evidentiary value in these files. The National Institute of Standards and Technology maintains a Software Reference Library that lists these files and their hash values that can be used to identify them.

DeDUPE

Don't have multiple instances of the same files repeatedly reviewed by different people. It's wasteful, and you risk inconsistent production decisions.

Thread emails

Emails and attachments that are part of the same email conversation or thread must be tethered together, so that they are read together by one person. This provides the overall context of the whole conversation and avoids inconsistent coding or designations.

Be transparent early

If sweeping discovery doesn't make sense, get on the phone with opposing counsel, and tell them what you're planning to do. Use screen share software to show examples of what you're talking about.

Get a divorce from per gigabyte pricing

Just as there is growing recognition that companies are better served by flat billing as opposed to per gigabyte pricing, e-discovery should be purchased on a largely flat-fee basis. As Jeffrey Carr has said, buy the right thing.

Use benchmarks

Participate in ACC and other forums for exchanging information about what recurring tasks

This information can be used to not only negotiate the scope of discovery with the government or adversary, but also to inform you about who else really should be included as a custodian, based on the electronic evidence, not just supposition.

After the work is done and the relevant documents are produced, any questions by opposing counsel as to completeness can be quickly resolved with a screen share meeting with the lawyer who did the work, explaining the strategy and process for locating the documents.

As any trial lawyer will say, the story of how the process worked is much more defensible than any measure of recall or precision through sampling, which will always be less than 100 percent.

Examples

Here are some scenarios of how this new approach to technology-assisted awareness and processing can work.

Products liability — eye and skin irritation

You have a potential product liability situation where employees of a customer have complained about itchy eyes and skin from using the product at workbenches. Investigators from the National Institute for Occupational "key players" list, a chronology, and meaningful intelligence regarding what your client knew, or should have known, about irritated eyes and skin from using its products in a matter of days. Total professional fees at US\$200 per hour are less than US\$5,000.

DOJ price fixing investigation

You are dealing with a collection of 2.5 million documents queued for review in response to a Department of Justice (DOJ) subpoena regarding alleged price-fixing, and you are well aware that there will be subsequent civil litigation. You have service providers proposing techniques, including various forms of Technology Assisted Review (TAR), for prioritizing the documents so that those of lesser value are reviewed by less expensive lawyers in India. There are also proposals to test the results with sampling and measures taken of recall and precision.

It sounds great but it also sounds expensive, to the tune of several hundred thousand dollars per month, for many, many months. However, there are lower-cost alternatives now possible using cloud computing and lawyers skilled in using sophisticated investigative software. Assuming 10,000 documents per gigabyte, the collection you are dealing with is likely at least 250 gigs. At US\$20 per gig, per month, the cost to process, host, and maintain the documents would be US\$5,000 per month.

In addition, using the techniques mentioned in the "E-discovery proficiency quiz" below, such as domain name, file type analysis, and email name grouping, together with quickly finding and removing completely irrelevant and useless files (system files), the volume could be quickly reduced by as much as half — 1,250,000 documents and 125 gigs.

In an elastic cloud environment, this means that your server needs are reduced by half and your monthly costs go down to US\$2,500 per month. With today's document analytics tools, it wouldn't take much to find out from the documents who was involved in making pricing decisions, their emails about pricing and who they were sent to and received from, and who they may have met with from competing companies.

Two lawyers skilled in using the software's analytics capabilities, with an understanding of the allegations and key players both within and outside the organization, could likely identify the relevant documents in 200-300 hours. At US\$200 an hour, that is US\$40,000 to US\$60,000. After the production is made and the DOJ voices skepticism, those same skilled will screen-share with the Assistant US Attorneys and show them how and why they know they found and produced the responsive documents.

E-discovery proficiency quiz

Lawyers who can't make full hands-on use of the panoply of tools available to analyze electronic discovery are like dentists who can't personally use drills. They lose the ability to interact with the data and quickly gain insights from it. Here are some basic tasks that lead investigators or attorneys should be adept at handling.

Lead attorney/investigator

Each of the following tasks other than the keyword testing should take less than 10 minutes.

Domain-specific user names. List all user names associated with a specified domain name and the number of emails to/from each user.	This task is critical to obtaining a basic understanding of who the key players are and what the relationships are among them.
"Private" email addresses. Identify all usernames associated with "private" (i.e., non-corporate) email accounts.	Private emails are sometimes used to circumvent monitoring of corporate accounts. E-discovery practitioners should be able to identify the leading "private" email providers without being told (e.g., <i>Gmail.com</i> , <i>Hotmail.com</i> , <i>Yahoo.com</i> , <i>Comcast.com</i> , and <i>Verizon.net</i>).

<p>List name labels. Identify all the name labels associated with a given email address (e.g., the name labels associated with jsmith@enron.com might be “John Smith,” “J. Smith,” “Jack,” or “JS.”)</p>	<p>Name labels are added by people who create contacts in contact lists. There can be as many name labels as there are people who have a given email address as a contact. Listing name labels helps identify nicknames or alternate forms of names, which sometimes appear without the email address or domain for subsequent analysis.</p>
<p>Recipient domains. Identify all domain names that a specified person has sent emails to or all emails between certain individuals and/or organizations.</p>	<p>Without the ability to see organizations or people with whom certain individuals of interest have been communicating, it’s hard to see overall communication patterns.</p>
<p>Communication frequency over time. Present a frequency analysis of the number of emails a specified person has sent or received within a given time period.</p>	<p>In litigation involving key dates, a spike or gap in communications patterns can be indicative of underlying behavior.</p>
<p>Private cloud storage. Find all documents mentioning online data storage domains used for storing or exchanging data.</p>	<p>Cloud storage providers like DropBox, Google Drive, Cloud Drive, OneDrive, OneBox, etc. can be used to store data off corporate networks. Identifying where those terms appear in a data collection can be a way of identifying potentially additional data sources. The person doing the searching should be able to identify these domains/product names without being prompted or informed.</p>
<p>False positive keyword testing. Conduct keyword analysis to identify search terms that retrieve false positives.</p>	<p>Every data set is different and “dirty” search terms that unintentionally retrieve false positives can inflate costs enormously.</p>

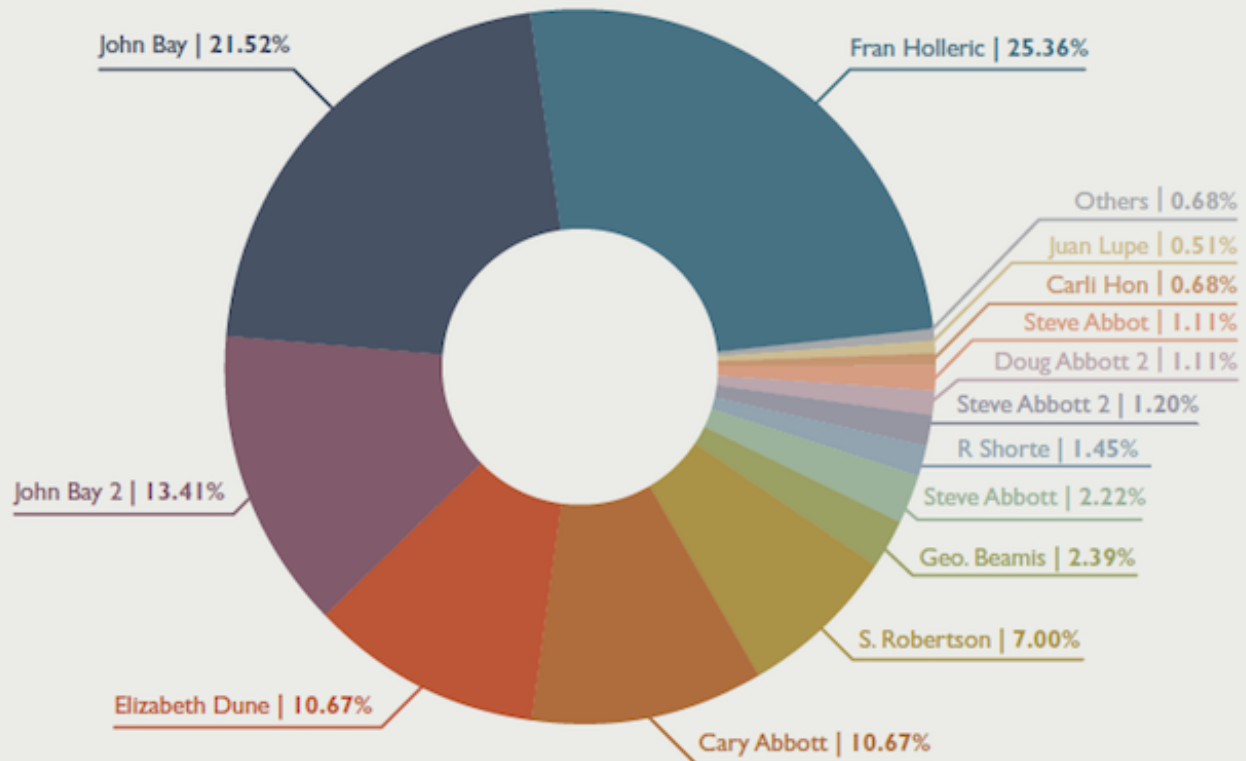
Additional scenarios

- Here are additional scenarios and how they might pan out using a strategic approach that leverages lawyers skilled in using state-of-art document analytics software in an elastic cloud computing environment.
- **Claim evaluation.** You receive notice of a claim. By identifying principal players in the matter and doing a preliminary collection and processing of their email, you can quickly get a preview of how the case will play out. The costs to collect and ingest the email for a few of the individuals involved and to find out what happened for many cases, is less than US\$1,500. As noted above, some consultants using Amazon Web Services do not charge for collecting or processing data, instead charging hourly for technical skills in using the software and finding the meaningful emails quickly (in some cases within a few hours).
- **Key employee departures.** A key employee suddenly leaves. Collecting and processing their email can be done for no cost and, once it is in a cloud-based repository and used by someone skilled in its search features, the departed employee's email can be quickly organized and managed as needed, for less than US\$2,000 in most cases.
- **Subpoena responses.** Responses to information and document subpoenas that might have run up costs and fees over US\$20,000 can now be responded to for less than US\$5,000, including processing, hosting, review, tagging, and production.

Interactive sleuthing and scoping tools

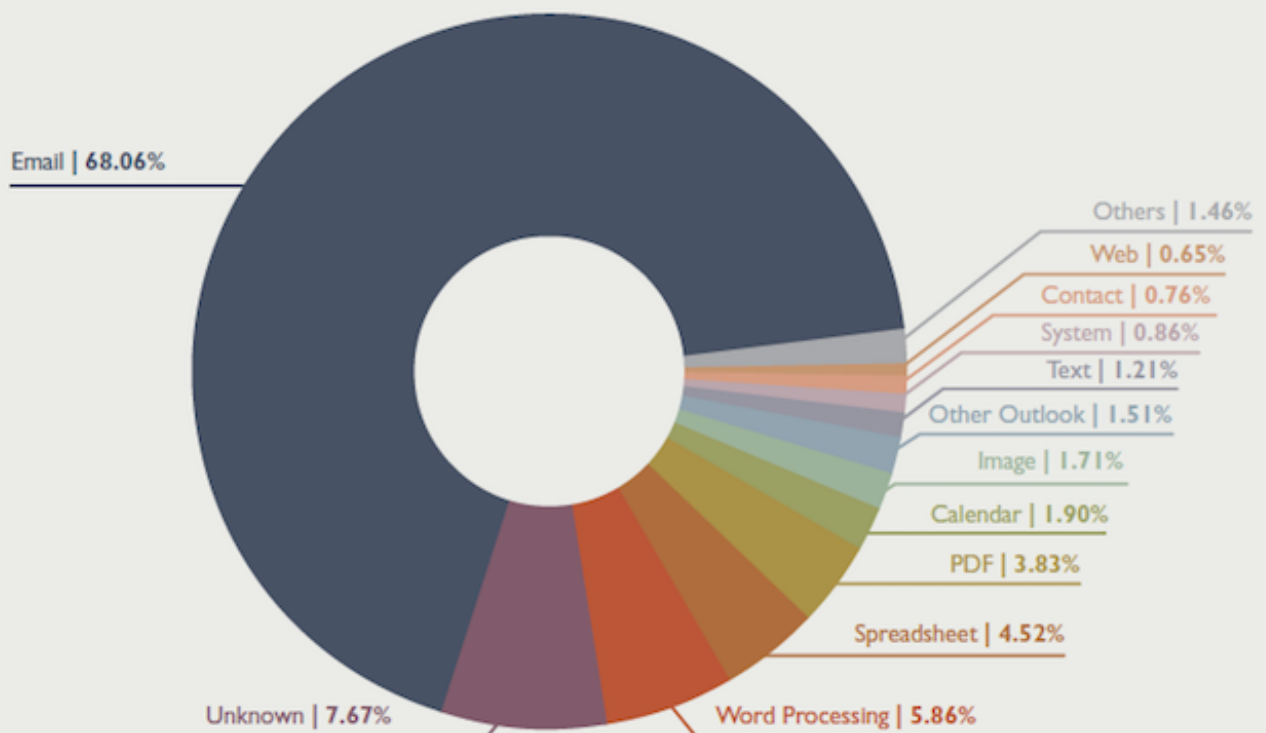
These are five of the types of interactive displays that can be used for early sleuthing and scoping prior to putting content in a final review platform:

Custodian Frequency
CUSTODIAN FREQUENCY graphs show the relative number of files obtained from each custodian.



File Type Analysis

FILE TYPE ANALYSIS can be performed on any subset of data, such as the whole collection, a specific custodian, or on search results.



Potential TAR tunnel vision

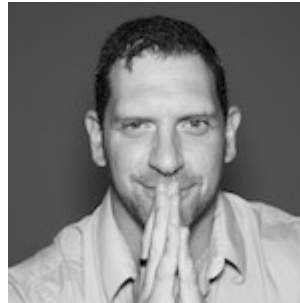
An over-emphasis on TAR (a.k.a. predictive coding) as a way to solve discovery related issues can lead to two types of tunnel vision.

Tool focus. Focusing on the predictive coding type of TAR (classifying sets of documents based on classifying a subset of them) can lead to ignoring other proven tools like concept clustering, domain name analysis, social network analysis, or advanced search techniques.

Over-emphasis on review. Focusing on the review phase can cause lawyers to overlook opportunities for analysis and understanding much earlier in the litigation process. Document review may not take place for many months, if not years, after the suit was initiated, and that is simply too late to go hands-on with the documents. To the extent that corporations find TAR to be a useful way to gain understanding, they should consider using it before documents are placed in a final review platform. They can also use it to evaluate not just outgoing productions but productions from other parties as well.

Conclusion

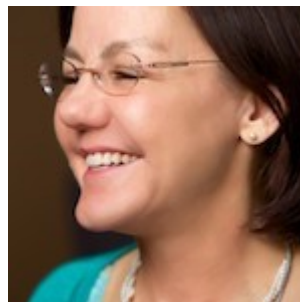
Scoping the extent and validity of litigation claims provides huge strategic advantages in knowledge and reduced cost to the great benefit of the corporation. Best of all, it is affordable and practical.



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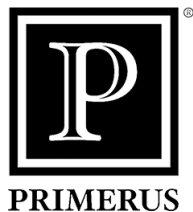
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