

INSIDE:

ILTA PREVIEW	PAGE 12
JAGGER RULES	PAGE 13
ALM APPLE APPS	PAGE 13
7 CEIC HOT TOOLS	PAGE 14
YOUTUBE OFFICE	PAGE 16

ACTION ITEMS

WATCH THE VIDEO:

Magistrate Judge Andrew Peck on e-discovery: <http://at.law.com/LTN138AP>

BE NOT AFRAID

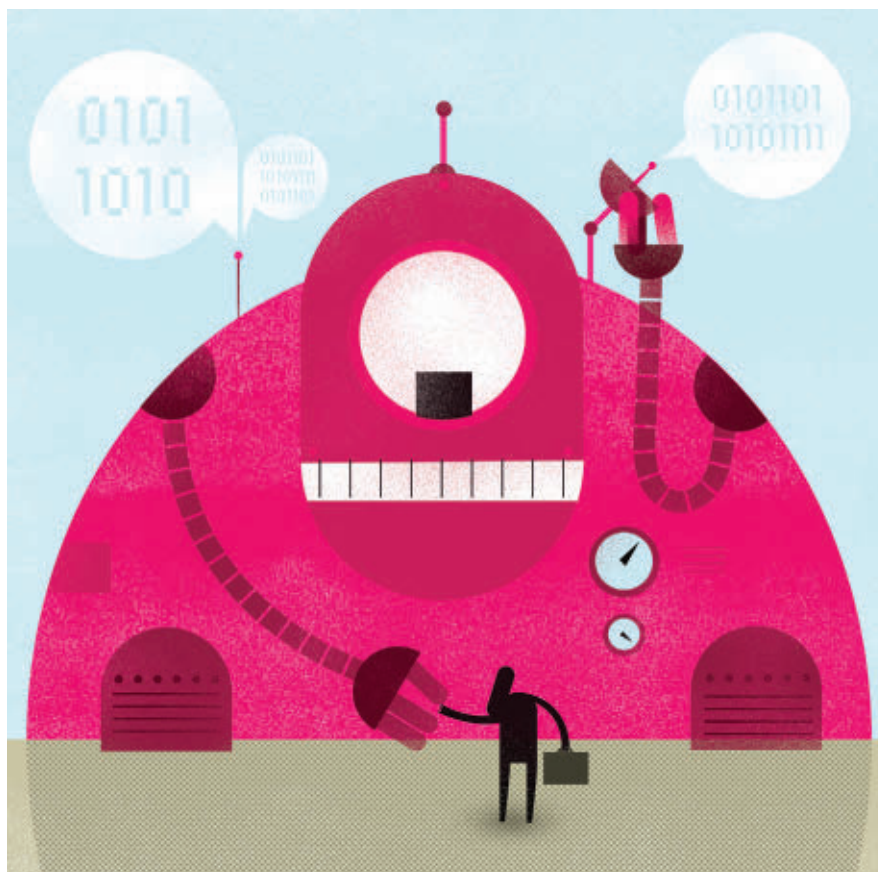
The fear sales pitch isn't supported by data.

BY KELLY TWIGGER

I speak on electronic data discovery four to five times per year. It never fails that most of the presenters at these events preach fear as the motivation for learning about e-discovery. What are the fears? Let's see — fear of sanctions, fear of spoliation, fear of not preserving the entire planet of information, fear of not knowing where every byte of potentially relevant information exists, etc. Sound familiar?

I've never bought into the fear mantra, and I'm not planning to start. Here's why. It's kind of funny if you think about it — the fear sales pitch isn't supported by the data. Yup, an e-discovery geek is telling you that your fears regarding EDD aren't supported by the statistics.

According to a recent article from Mark Diamond, president and CEO of Contoural Inc., (aptly named "Fibs Your E-Discovery Vendor and Law Firm Might Tell"), only 0.0065 percent of EDD cases filed have resulted in sanctions for failure to preserve. That includes



U.S. District Court Judge Shira Scheindlin's decision in *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.* (Note: I respect Scheindlin immensely, but heartily disagreed with that decision and have been happy to see judges curtail it.)

Truthfully, of your colleagues you know who have managed or engaged in e-discovery, how many of them have faced sanctions for spoliation? So, if not fear, then what? "E-discovery is a nightmare. I don't have time for it. I don't understand technology." To that I say

pshaw. E-discovery is an opportunity — a powerful opportunity.

Here are just a few reasons you should be diving into e-discovery and grabbing this opportunity with gusto:

1. *Electronically stored information is a treasure trove of information.* People say things in electronic communications that they would never even say out loud. Ten years ago, you were confined to memos and files where no one put the bad stuff in writing. Now, we get CEOs claiming they'll do anything to bring down the competition and Facebook pages showing the disability claimant

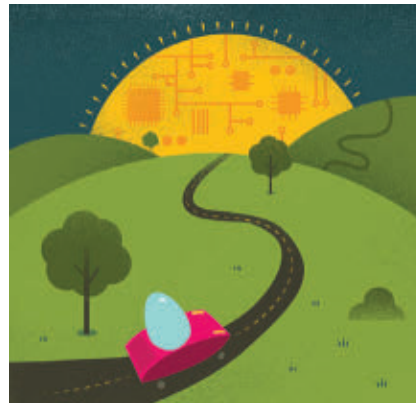
ILTA CHARGES INTO THE FUTURE

With 3,000 expected for its annual August meeting, the focus is on anticipating and exploiting change.

The International Legal Technology Association's 36th annual conference — like those before — will have a carefully crafted theme to unite the more than 3,000 attendees, and set the tone for the 200+ educational sessions. This year's moniker is The Catalyst (no doubt delighting John Treddenick, CEO of Catalyst Repository Systems).

The 2013 agenda is to identify, anticipate, embrace, and exploit the inevitable and probably profound changes confronting the legal profession.

With Big Law facing increasing pressure to use technology to provide better, faster, cheaper, and transparent services, ILTA has joined forces with Rohit Talwar and Fast Future Research Ltd.



to create the ILTA Legal Technology Future Horizons — Transformational Forces Project. Its core component will be a global research study, said ILTA Executive Director Randi Mayes.

ILTA's conference will be held August 18-22, at Caesar's Palace in Las Vegas. At the August 20 keynote, at 8:30 a.m., I will interview Talwar about the Future Horizon project and its goals. We'll discuss new and emerging technologies and their ramifications for law firms, and what shifts in priorities the legal profession can expect over the next 15 years. We won't just identify problems, we'll also detail new options — such as how firms can leverage emerging technologies and adopt and adapt to new business models.

ILTA plans to present results of the project at a keynote address at its Insight 2013 conference in London on November 14, 2013. — **Monica Bay**

who can't walk just climbed a mountain in Africa. It's a gold mine, and your case needs those gold nuggets.

2. *Information is power.* How you use your power is up to you. I like to use it to find out the facts faster and resolve matters more efficiently. Think about how we used to do paper discovery — the case was filed, the complaint sat on your desk, discovery didn't start until

learn the facts faster. That allows you to plan your strategy based on the merits of the case while conducting EDD more efficiently and cost-effectively. Finding out what you are dealing with in terms of quantities and types of data allows for better decision-making and a less costly collection and review. I dare you to find a vendor who will disagree with me.

3. *You can budget litigation more*

support the business, not spend all the profits on outside counsel.

4. *Metrics help you understand your costs.* The more control you gain over EDD and the less you rely on multiple law firms to handle each case differently, the more data you can collect about what you are spending and why.

5. *Early planning and strategy saves greenbacks.* One of my clients spent \$1,500 collecting one hard drive — instead of \$200 — because they forgot to mention that the custodian would be traveling. Her hard drive was mysteriously encrypted, requiring a special forensic collection at her hotel in Las Vegas in order to meet the production deadline. That may not sound like much, but it adds up over custodians and cases. Planning saves money in e-discovery.

6. *The technology is fun.* Reviewing documents one at a time (what we call

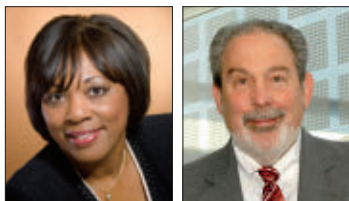
You can budget litigation more effectively. Remember — legal's job is to support the business, not spend all the profits.

six months in, and the initial meet and confer was useless because we always modified the schedule. We never talked about discovery.

Now, you have to start engaging in discovery when you find out about the case to CYA, and lo and behold, you

effectively. The days of open checkbooks in legal departments are over. In-house counsel needs better predictability in budgeting for litigation, especially when a huge matter comes out of the blue and the industry they work in is tanking. Remember — legal's job is to

WATCH THE VIDEO:

ALM's Bill Carter on challenges ahead: <http://at.law.com/LTN138BC>

Vanessa Gilmore

David Waxse

JAGGER RULES

A panel at the recent Computer and Enterprise Investigations Conference featured advice from federal judges Vanessa Gilmore, Karla Spaulding, and David Waxse. Highlights included:

» Judge Waxse cited a past case where the United States wanted search warrants to require Yahoo and Unity-Fax to disclose all copies of e-communications for a target email account, in a case involving allegations of spam. Waxse denied the applications without prejudice (2012 WL 4383917 (D.Kan.)),

saying the Fourth Amendment limits the scope of search warrants to, among other things, require particularity and probable cause for search and seizures.

» Criminal sentences are calculated based on the loss resulting from a computer breach and the cost to restore a computer system to a state before a breach occurred, said Gilmore. This includes costs of an investigation and data breach notifications to customers.

» Gilmore said she sometimes applies the “Jagger Doctrine” to EDD requests, paraphrasing the Rolling Stones: “You can’t always get what you want, but if you try real hard, you may get what you need.” Be careful when you investigate possible civil or criminal law violations, because your opponent will review your premises and conclusions and test the means to the end, she warned. —**Sean Doherty**. Unabridged: <http://at.law.com/LTN138z>.

14 ALM iApps

ALM has launched 14 apps for Apple Inc.’s iPhones, iPods, and iPads. They provide content from our national and regional web and print publications, and support iOS 6.1 and above. The *LTN* and *Corporate Counsel* apps are free; for a limited time the others will provide free access to all editorial content. Three publications retain digital magazine apps, powered by Texterity.



Reader preferences fueled ALM’s decision to create the apps. In the past, readers turned to our legal newspapers, said Bill Carter, president /CEO. “Today, the first thing they reach for is their smartphone and tablet. This marks a big step in ALM’s transition to a digital-first media company that delivers relevant, timely, news and insights to lawyers throughout the day.” —**M.B.**

linear review) is tedious and expensive. The right tools help you:

» **Cull data** down from a much larger set to what really needs to be reviewed.

» **Negotiate** key search terms based on terms that the witnesses really use and reduce your set further through agreement of counsel.

» **Filter data** and do what used to be three different levels of review (relevance, privilege, hot documents) all at one time.

» **Let the computer** do the EDD work for you by using sophisticated computer-assisted review tools.

» **Review documents** on your iPad, all with the swipe of a finger. Oh yeah. Document review has never been this much fun. We all know that cases are won and lost on the documents. Now, they are literally at your fingertips and you can search, store, and tag them.

» **Collaborate** with outside coun-

sel so you can see the review process, understand the costs and see searches tagged with the information you want to review, all with your own username and password.

7. *The potential costs and fear can push your organization or firm towards information management.* The cost of dealing with e-discovery and the volumes of data is a great motivator for information management within your organization or law firm. Antiquated backup and data storage methods can be swiftly, and for the better, ushered out the door.

If you won’t seize the opportunity of EDD, the Department of Justice will (and has). A recent NBC newscast included a story related to prosecutors at the DOJ secretly seizing the emails of AP and Fox News reporters on suspicion of conspiracy to violate the Espionage Act. A federal judge signed a warrant allowing the government to seize

email directly from Google for a reporter’s Gmail account based on probable cause that the reporter had solicited information related to North Korea. In the report, Matthew Miller, former DOJ spokesperson said, “It’s easier to track these leaks now — if you email someone, if you call them on your cell phone — it’s much easier to establish it than if you leave a flower pot on your stoop and go meet in a basement.” (Report by Michael Isikoff, national investigative correspondent, NBC News.)

Give up the fear. The opportunities of EDD abound. I’m still waiting for a compelling argument (from anyone) that explains the willingness to be left behind while your competition and clients demand and pursue better service.

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