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FEBRUARY 24 – 28 | MOSCONE CENTER | SAN FRANCISCO

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Collective Intelligence

How Good is Your Predictive Coding Poker Face?

SESSION ID: **LAW-W03**

Moderator: Matthew Nelson
eDiscovery Counsel
Symantec Corporation

Panelists: Hon. Andrew J. Peck
US Magistrate Judge
Southern District of New York

Steven Teppler
Attorney
Abbott Law Group, PA

2013 World Series of Poker Champion Ryan Riess

Ryan RiessPhoto by WSOP.com

$8.36m in Cold Hard Cash

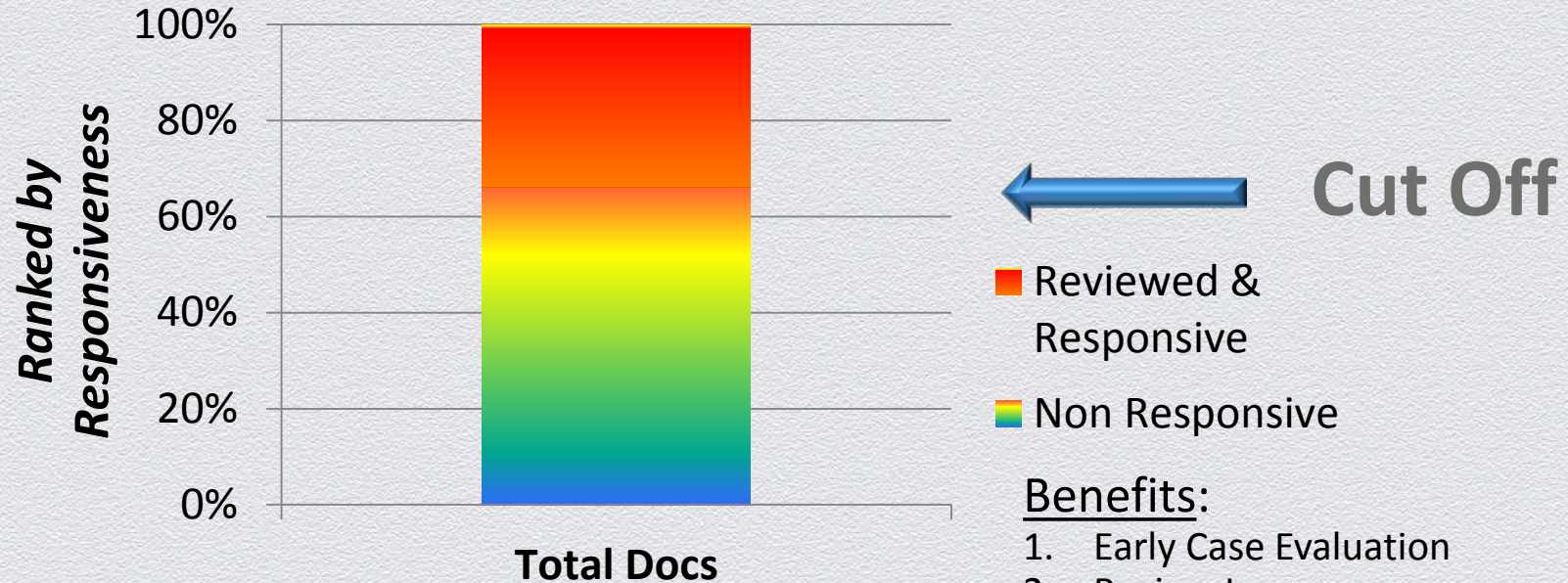#RSAC

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Limits on Predictive Coding?

What is keeping you from going "All-In" with Predictive Coding?

1. Nothing. We Use Predictive Coding
2. Seems Risky
3. Expensive
4. Too Confusing
5. Answers 2 through 4

How it Works

Cut Off

■ Reviewed & Responsive

■ Non Responsive

Benefits:
1. Early Case Evaluation
2. Review Less
3. Increased Accuracy
4. Save Money

Predictive Coding – Case Law

CASE LAW	KEY FACTS
Da Silva Moore v. Publicis Group	• Agree to use PC, but disagree on protocol • PC "Acceptable in appropriate cases." • Parties continue to scuffle
In re Actos: (Pioglitazone) Product Liability Litigation	• Parties stipulate to use PC • Case Man. Order outlines protocol • Protocol is confusing
***Anheuser-Busch InBev NV & Grupo Modelo Merger**	• DoJ investigation led to document request • Lawyers claimed review of > 1m docs required • Agreed to use PC and decreased cost by 50%
EORHB, Inc. v. HOA Holdings, Inc.	• Judge suggests PC to parties • Parties asked to "show cause" if they object • Recommends selecting one vendor
Hinterberger v. Catholic Health Systems **Gordon v. Kaleida Health**	• Judge suggests PC after lengthy keyword battles • Parties disagree over "seed set" & protocol • P's MTC dismissed w/out prejudice for now

Predictive Coding – Case Law

CASE LAW	KEY FACTS
*NDLON v. ICE, et. al	• MSJ re adequacy of gov't FOIA search • Evaluation of gov't keyword approach • Dicta endorses use of PC
Global Aerospace et. al. v. Landow Aviation	• D files motion for protective order to use PC • P "radical departure" from manual review • Judge grants D's order
Cambridge Place Investments v. Morgan Stanley	• D files motion to use PC over P's objection • Court approves the use of PC • Parties required to agree on protocol
Kleen Products v. Packaging Corporation of America	• P tries to force to Ds to use PC • Some Ds already reviewed and produced • PC issue on hold until October 2013
In re: Biomet M2a Magnum Hip Implant Products Liability Litigation	• D objects to P's use of keywords before PC • Requiring D to use PC on 19.5m not proportional • Large % of docs may have been left behind
Fosamax/Alendronate Sodium Drug Cases	• D produced more than 11m docs in related cases • P wants D to redo productions using PC • Denied since no "material deficiency" shown by P

Strategic Decisions During Meet & Confer Discussions

Matt Damon in *Rounders*, Miramax Films (1998)

Reading Your Opponents?
Should parties declare their use of predictive coding technology when going heads-up in meet-and-confer conferences?

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Strategic Decisions During Meet & Confer Discussions

Avoiding a Rigged Game?

Is the predictive coding game rigged if the producing party insists on keyword culling before predictive coding?

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Strategic Considerations During Meet & Confer Discussions

Calling the Bluff

Your opponent agrees to use predictive coding, but only if you agree to show your discard pile?

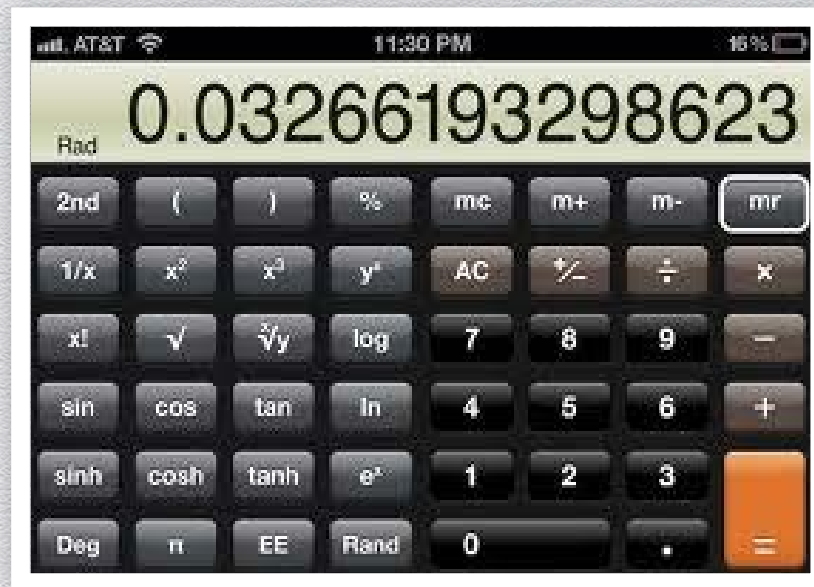# Strategic Considerations During the Meet & Confer

Statistics
How do you know when your opponent is bluffing about statistics?

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Statistics

The role of statistics in predictive coding is best described as follows:

1. Irrelevant

2. Necessary, but Over-rated

3. Marginally Important

4. Important

5. Moot Since All PC Tools Have Statistics Built-In

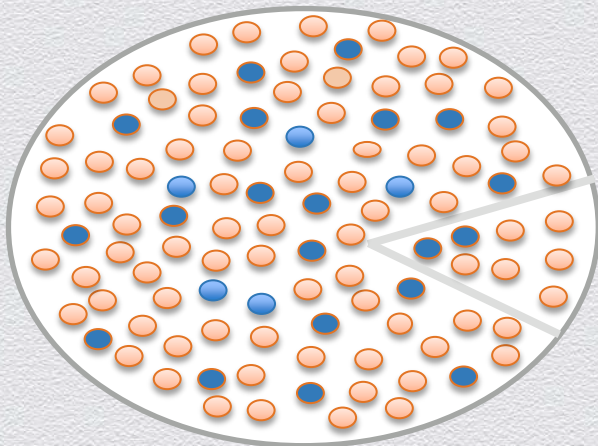# Strategic Decisions During Meet & Confer Discussions

4/52 = 7.69%

Predictive Coding & Statistics 101: <u>Standard Sampling</u>

Document Population

Sample (<u>High</u> Yield)

Sample Size = 8

Actual Responsive = 25% (25/100)
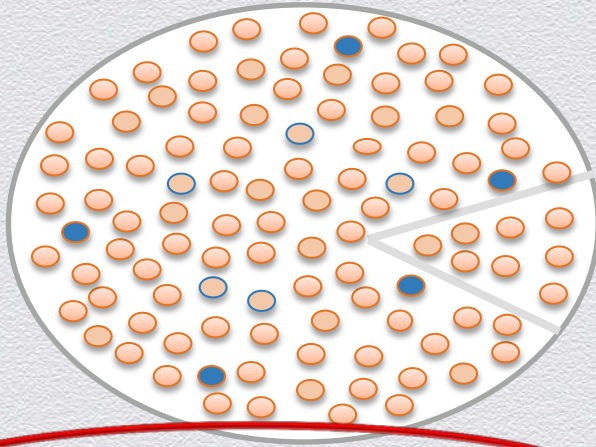
Actual Non Responsive = 75% 75/100

Estimated Responsive = 25% (2/8)

Estimated Non Responsive = 75% (6/8)

Predictive Coding & Statistics 101: Standard Sampling

Document Population

Sample (Low Yield)

Sample Size = 8

Actual Responsive = 5% (5/100)

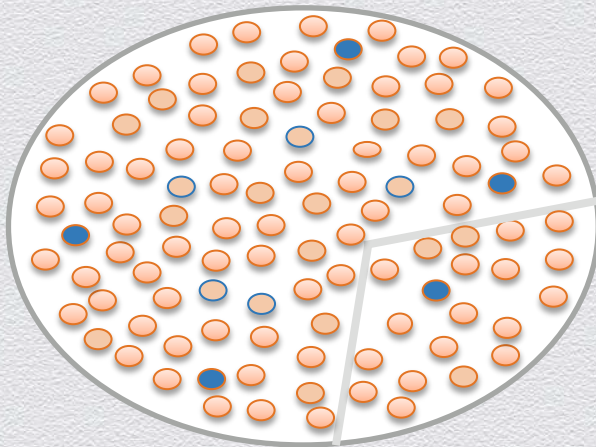**Actual Non Responsive = 95% (95/100)**

Estimated Responsive = 0% (0/8)

Estimated Non Responsive = 100% (8/8)

Predictive Coding & Statistics 101: Advanced Sampling

Document Population

Increase Sample Size = 20 →

Advanced Sample (Low Yield)

● **Actual Responsive = 5 (5%)**
○ **Actual Non Responsive = 95 (95%)**

● **Estimated Responsive = 5% (1/20)**
○ **Estimated Non Responsive = 95% (19/20)**

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Who Cares?

Assume your opponent agrees to produce approximately 90% of all responsive documents in a population of 1m documents, but they incorrectly **underestimate** the number of responsive documents due to flawed sampling.

They do *This*

Instead of *This*

- They **incorrectly** estimate 5% of population is responsive or 50,000 docs

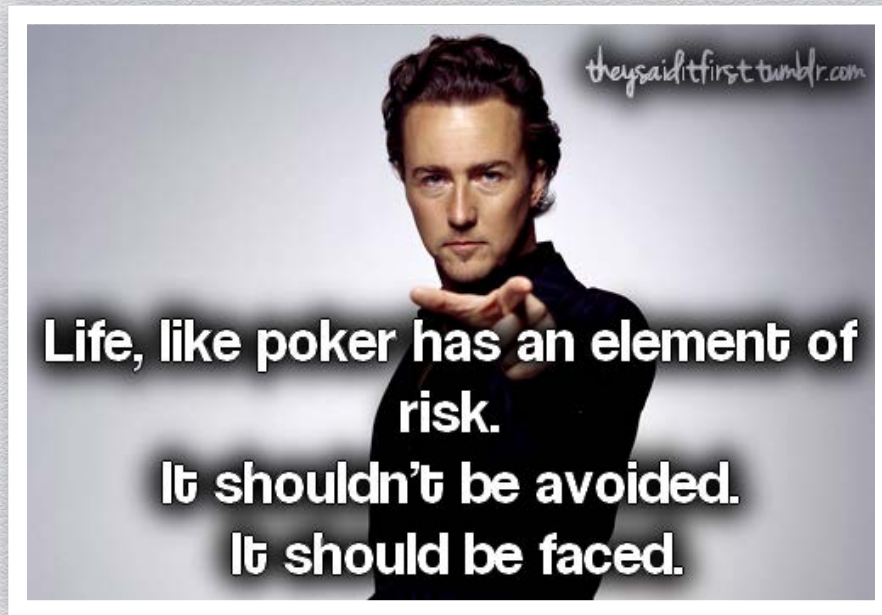- They **incorrectly** assume their burden is met when they find 45,000 responsive documents (90% x 50,000)

- Estimate 10% of population is responsive or 100,000 docs

- Burden actually met when they reach 90,000 documents (90% x 100,000)

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PC in 2014

How can technology tools better address the perceived risks of predictive coding in 2013?

1. Become More Transparent

2. Have Statistics Built-In

3. Easier to Use

4. Less Expensive

5. Become Better Integrated

6. All of the Above?

Actor Edward Norton

Speed Round

◆ Biggest Barrier to PC Adoption?

◆ Statistics matter. True or False?

◆ PC is a replacement for all other technology tools?

◆ PC is a complete replacement for keyword search?

◆ Requesting parties should be entitled to see non-privileged discard pile?

◆ All PC technologies are created equal and are statistically sound?

◆ Daubert tests should be required to vet the statistical approach applied?

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Resources

e-discovery 2.0
thoughts about the evolution of e-discovery

Breaking News: Over $12 million in Attorney Fees Awarded in Patent Case Involving Predictive Coding

BY MATTHEW NELSON ON FEBRUARY 14TH, 2013

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A federal judge for the Southern District of California rang in the month of February by ordering plaintiffs in a patent related case to pay a whopping $12 million in attorney fees. The award included more than $2.8 million in "computer assisted" review fees and to add insult to injury, the judge tacked on an additional $64,316.50 in Rule 11 sanctions

FREE BLOG
clearwellsystems.com/e-discovery-blog

Moving Data to the Cloud? Top 5 Tips for Corporate Legal Departments

BY MATTHEW NELSON ON SEPTEMBER 30TH, 2013

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One of the hottest information technology (IT) trends is to move data once stored within the corporate firewall into a hosted cloud environment managed by third-party providers. In 2013 alone, the public cloud services market is forecast to grow an astonishing 18.5 percent to $131 billion worldwide, up from $111 billion in 2012. The trend is driven largely by the fact that labor, infrastructure, and software costs can be reduced by sending email and other data to third-party providers for off-site hosting. Although the benefits of cloud computing are real, many organizations make the decision to move to the cloud without thoroughly weighing all the risks and benefits first.

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Resources

Free *Predictive Coding for Dummies* Book: **go.symantec.com/predictive-coding**

"Computer-Assisted Review Appropriate in some Cases Says Judge Peck in New *Da Silva Moore* eDiscovery Ruling": **http://bit.ly/yENOsX**

"Shining a Light Into the Black Box of Predictive Coding Technology": **http://bit.ly/K5DBKQ**

"Search, Forward: Will manual document review and keyword searches be replaced by computer assisted-coding?": by Judge Andrew Peck **http://bit.ly/qGwIRh**

Twitter: **@InfoGovLawyer**

"Technology-Assisted Review in Electronic Discovery Can Be More Efficient And More Cost Effective Than Exhaustive Manual Review" by Maura R. Grossman & Gordon V. Cormack**:** **http://jolt.richmond.edu/v17i3/article11.pdf**

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Thank you!

2009 WSOP Winner Joe Cada, Photo by WSOP.com

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