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# Mitigating Discovery Costs and Scope: Controlling the Process to Your Advantage

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TUESDAY, JULY 23, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Jay C. Carle, Partner, **Seyfarth Shaw**, Chicago

Tushar P. Vaidya, Attorney, **Seyfarth Shaw**, Chicago

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# Mitigating Discovery Costs & Scope: Controlling the Process to Your Advantage

July 23, 2019

Jay C. Carle  
Tushar Vaidya

# Speakers

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## What is this Talk About?

**Reorientation of common perceptions and approaches to discovery and how the discovery landscape has changed.**

**Strategic approaches to discovery that will make you more successful in litigation while saving money, and extracting value from the discovery process.**

**Legal and technology tools that get us there.**

## Rethinking Your Perceptions And Approach To Discovery

*“How did it get so late so soon?  
Its night before its afternoon.  
December is here before its June.  
My goodness how the time has flown.  
How did it get so late so soon?”*



Dr. Seuss



# Rethinking Your Perceptions And Approach To Discovery

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## Sound Familiar?

### We're going to hold off on discovery because...

- Discovery is too expensive / too burdensome.
- We are at odds with the opponent on what is at issue, so we should wait to do anything on discovery.
- Let's let the opposing counsel make the first move (they have not given us search terms or custodians).
- We think you we wait until we have total agreement with the opposition on scope of discovery before we do anything.
- The case may settle.
- **The discovery they are asking for is not proportional.**

# Rethinking Your Perceptions And Approach To Discovery

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## Too much delay may weaken your overall position.

- Unnecessary motion practice, distracting away from the substantive strategy and narrative for the case.
- Lost credibility with the Court and opposing counsel.
- Negatively impacts discovery arguments involving proportionality, reasonableness, and cost-shifting.
- **Unnecessarily expose weaknesses.**
- The scramble to produce last minute (usually at around 3 or 4 PM on Fridays)
  - Leads to mistakes (production of privileged information)
  - Missed bad documents / missed good documents
- **= Significantly increased costs**

# Rethinking Your Perceptions And Approach To Discovery

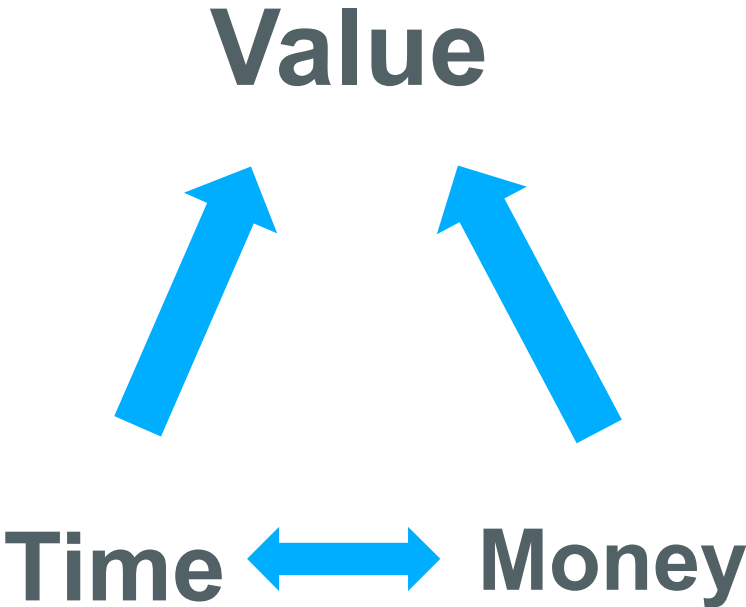
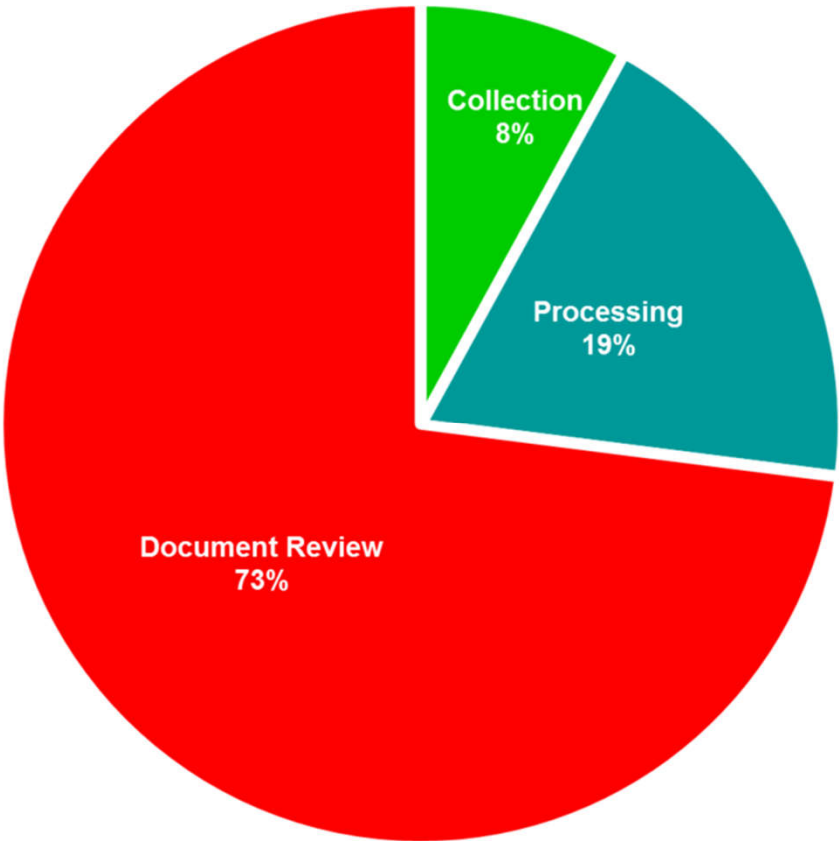
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## Discovery for Discovery's Sake?

- Not always, but too often discovery is treated as a mechanical process devoid of strategic and tactical planning.
- We go through the motions to collect and produce information and check the box.
- Litigants often see discovery as a time-consuming burden. However, it can be strategically advantageous to formulate your discovery strategy with an eye to your claims or defenses.
- Are we really getting the value out of the money spent on discovery?

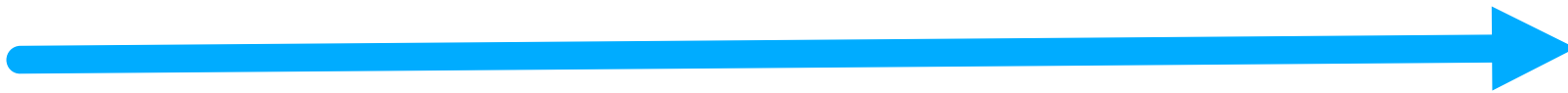
# Rethinking Your Perceptions And Approach To Discovery

Discovery for the client's sake.



# Rethinking Your Perceptions And Approach To Discovery

## How the discovery landscape has changed



### 2007 and earlier

- \$1,100 per GB of ESI only process (not inclusive of anything else)
- Businesses not prepared
- Judges and lawyers clueless
- Spoliation and sanctions disasters (the sky is falling)
- No machine learning or analytics – Linear review of millions of documents.
- **Proportionally not really discussed**

### Today and the future

- \$175 per GB of ESI to process (or less - inclusive of almost everything and prices are falling)
- Businesses are much smarter about eDiscovery and ESI
- Judges and lawyers are much more in the know about eDiscovery
- Sky no longer falling (as fast)
- Machine learning – Review a fraction of the documents
- **Proportionality DEFINES the scope of discovery**



## Rethinking Your perceptions and approach to Discovery

**Discovery is an opportunity to help control narrative of the case.**

# Rethinking Your Perceptions And Approach To Discovery

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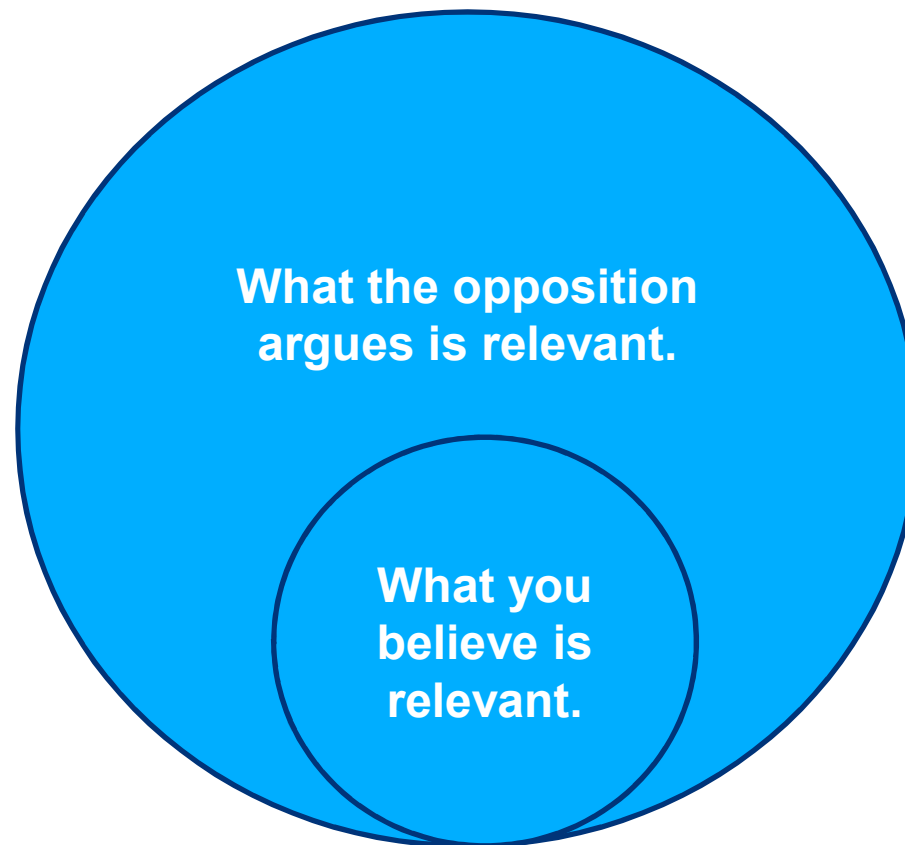
## Treat Discovery as an Opportunity

- Prepare a reasonable and defensible discovery strategy as early as possible.
- Execute it. Don't wait. Modify as necessary as the case progresses.
  - Avoid drawn out discovery disputes
  - Disarm opposing counsel
  - Take control of the discovery narrative
  - Reduce Risk
  - Produce discovery that supports your position
  - **Results in significantly decreased discovery costs, much lower risk, and better substantive results**

# Rethinking Your Perceptions And Approach To Discovery

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## Treat Discovery as an Opportunity





# Rethinking Your Perceptions And Approach To Discovery

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## Proportionality?

**“The quality of corresponding in size or amount to something else.”**

- Proportionality arguments are much more effective when you have already made productions.
- Proportionality is very difficult to argue in the abstract.

# Rethinking Your Perceptions And Approach To Discovery

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Won't we save money if we wait to reach total agreement on discovery before we do anything?

- **Almost certainly not**

Shouldn't we wait for the other side to make a proposal or ask for specific custodians or search terms?

- **No, not necessarily, and the parties can still be cooperative**

Shouldn't we cooperate with other side and disclose our custodians and search terms?

- **Usually that is advisable, but it does not mean a party should not move forward promptly with their theories and approach to discovery**

**How do you execute on this strategy?**

## What Initial Steps Should You Take to Focus Discovery?

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- Weave discovery strategy into an overall case strategy from the very beginning.
- Think about discovery scope and limits during fact investigation.
  - Add another ½ page to your witness interview outlines relating to discovery.
    - What would they have that is relevant?
    - How did they communicate and with whom?
    - Where do the key witnesses store relevant information?
- Think about implementing a tiered discovery process.
- If a judge asks, can you defend why and how you defined the scope of discovery the way you did?

## What Initial Steps Should You Take to Focus Discovery?

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- Research local rules, court rules and judge/opposing counsel to gauge their level of experience and expertise with discovery.
- Cooperate with opposing counsel and do so early in the case.
- Do not proffer or tolerate facially overbroad and burdensome discovery requests (i.e. “Please provide all emails sent or received by anyone in the Accounting Department for 2006 to the present.”) Work to be specific in your discovery requests and responses.
- If a judge asks, can you defend why and how you defined the scope of discovery the way you did?

# Collection and Review in Terms of Case Strategy

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- The initial collection, review, and production of ESI is a critical and required step to develop and focus the theories of the case, rather than as an additional expensive hurdle to overcome.
- For this reason, it is advisable to integrate discussions about the initial collection, review, and production of ESI into their initial case strategy discussions.
  - **Don't:** Separate discovery strategy from overall case strategy.
  - **Do:** Promptly collect and review key documents, providing significant benefits to the case while improving your strategic positioning and reducing overall discovery-related costs.

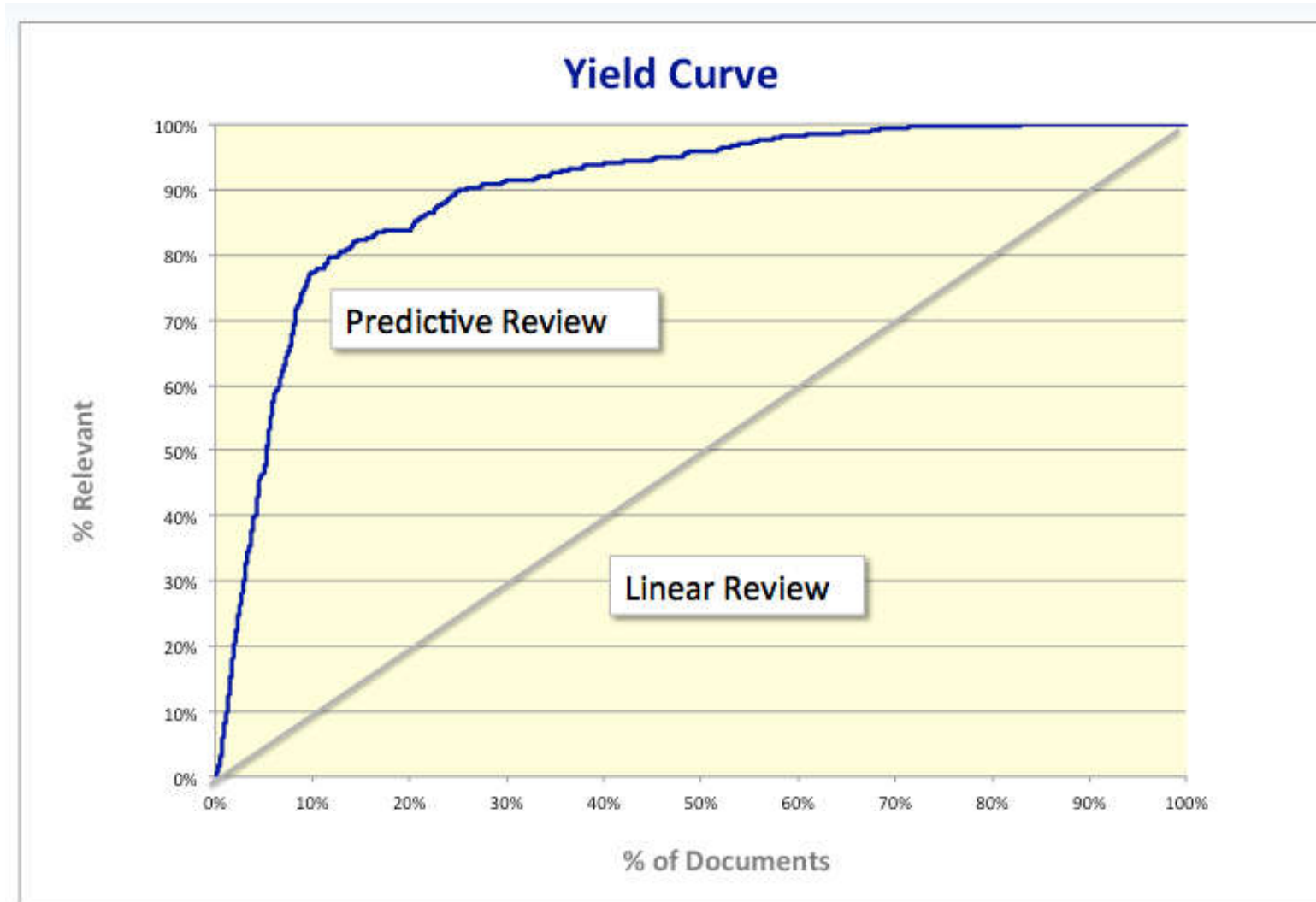
# You Can't Review It All and You Shouldn't

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- Standard Tools
  - Date and Custodian Filters
  - Search Terms
  - Email Threading
  - Categorization and Clustering
  - Find Similar
  - Concept Searching
- Analytics
  - Predictive Coding
  - Technology-Assisted Review
  - Continuous Active Learning

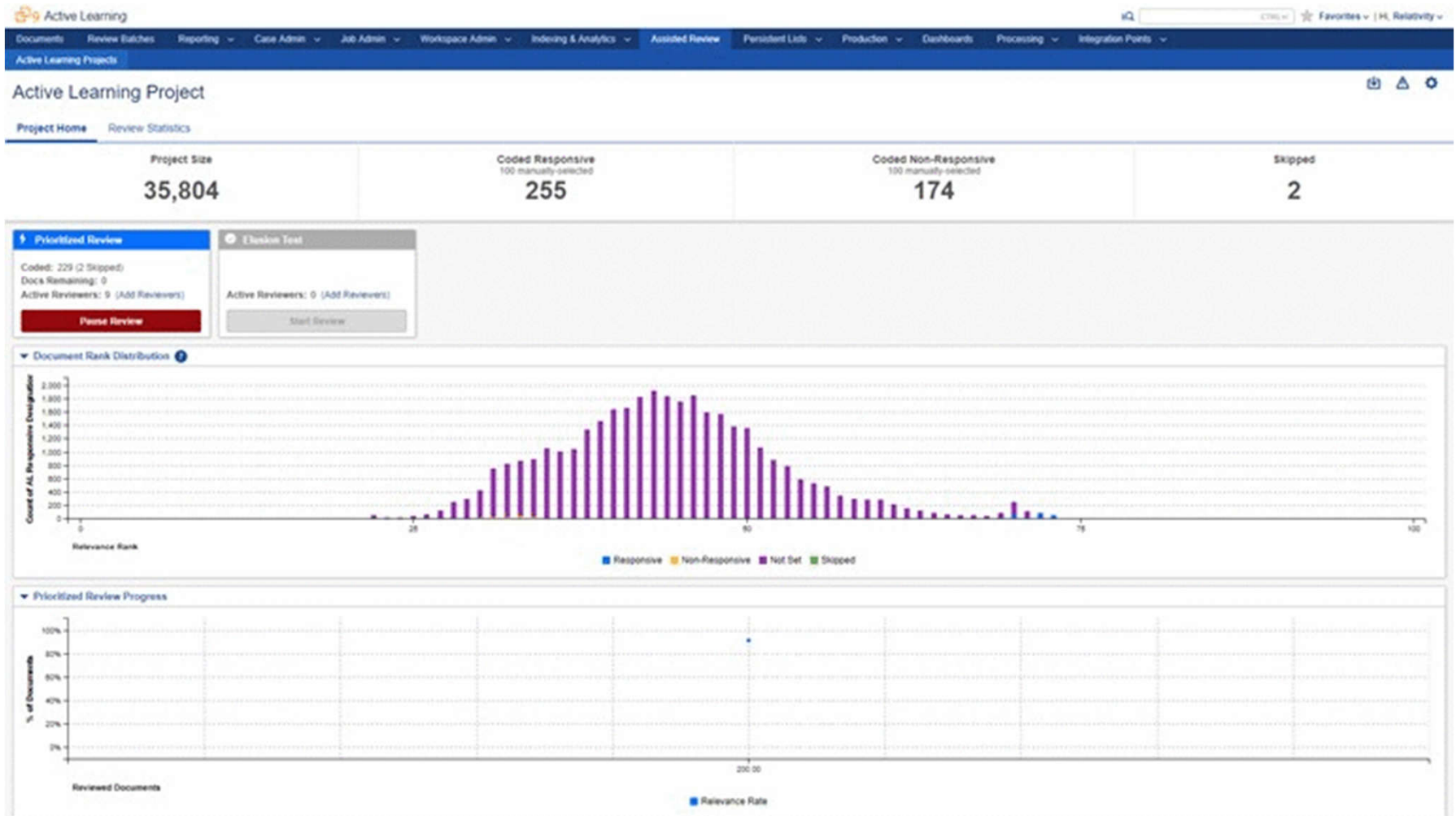


# How I Learned to Stop Worrying and Love CAL





# The Savings are in the Statistics



## Ending the Review: When to Stop?

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Measures the proportion of documents that could be relevant within the remaining documents that have not been reviewed.

- Generate a random sample with a 99% confidence interval and a margin of error of +/- 2.5%.
- Based on the results, you will be able to say that you are 99% confident that between 0 and \_\_\_\_\_ responsive documents are left in the unreviewed population.

Experiment with additional search terms, and examine the most-likely relevant documents containing those terms.

- Make sure there is not a category of responsiveness or unique issue that did not get trained into the system.
  - If the first 100 shows you watched on Netflix were documentaries, it may not think you have any interest in romantic comedies. This is still addressed through the CAL process and the sampling at the “end” of the review.

## CAL Use Cases

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- Virtually all “standard” reviews.
  - Internal investigations.
  - Reviewing opposing productions.
  - Supplemental Collections of Custodial ESI
  - Privilege Review
- 
- Use highly responsive documents you are already aware of!

## Real World CAL Examples

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- ~29,000 document population → ~5,200 reviewed (18%)
  - ~288,000 document population → ~62,000 reviewed (22%)
  - ~43,000 document population → ~10,000 reviewed (23%)
  - ~25,000 document population → ~6,900 reviewed (~28%)
- 
- Provides opportunities to reduce document review costs while, in some cases, precluding the need to staff contract attorneys to complete the review.
    - ~\$60,000 estimated contract review cost avoided by only needing to review 10% of the document population.
    - ~\$100,000 estimated contract review cost avoided by only needing to review 20% of the document population.

# Maximize Value from the Document Review

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- Develop an Effective and Comprehensive Review Memorandum
  - What is your theory of the case?
  - Describe the key players.
  - Call out certain types of information and/or documents that you *hope* to find (for better or worse).
  - If you have key documents, provide them!
  - Include key documents as exhibits to the review memorandum, including complaints, answers, discovery requests, responses, and attorney lists.
- Managed Review
  - Contract Attorneys are a direct extension of your team.
  - You get what you pay for.

# Maximize Value from the Document Review

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- Contract attorneys have traditionally been engaged to determine which documents were relevant, privileged, and confidential. **They can and should do much more!**
  - The document review team is your partner and should be thought of as an extension of your team.
  - Document review team members are not drones! They are licensed attorneys who should be considered integral team members.
  - Integrating the document review team into the overall case team will allow the “boots on the ground” to provide you with substantive analysis and real-time intelligence about what they are seeing in the document universe.
  - If you have key documents, provide them!
  - Include key documents as exhibits to the review memorandum, including complaints, answers, discovery requests, responses, and attorney lists.

# Maximize Value from the Document Review

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- How do you maximize value from document review?
  - Traditionally, document review vendors have provided quantitative summaries of their progress, the number of responsive documents, the number of privileged documents, etc...
  - This information is meaningful, but is it enough? Are you maximizing value with only numbers?
- **Businesses and outside counsel should demand that their document review partners provide substantive and qualitative analyses about what they are seeing in documents.**

# Maximize Value from the Document Review

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- How do you maximize value from document review?
  - Before a document review begins, enable clear lines of communication amongst the review team, review project managers, outside counsel, and in-house counsel.
  - Once a review begins, schedule check-in meetings with the review team, review project managers, outside counsel, and in-house counsel (if necessary) to discuss document questions, key documents, and other document review issues.
  - Encourage collaboration amongst the review team by providing time for the team to meet to discuss what they are seeing in documents.
  - Maintain a written question and answer log that is shared in real-time amongst the review team, review project managers, outside counsel, and in-house counsel.
  - Require the review team to prepare and share weekly narrative summaries identifying and describing key documents.



## Takeaways

**Approach discovery as an opportunity to control the narrative and pace of the matter.**

**Conduct discovery early and design a reasoned approach that you believe the court would accept (for the current phase of the case).**

**Approach the review of documents strategically with the objective of supporting your theory of the case, not just as a task-oriented mechanical process.**

# Speakers

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**Thank You!**