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AboveTheLaw.com presents:

An eDiscovery Roundtable Discussion w/moderator David Lat

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David Lat: Over a year has passed since the federal e-discovery rules took effect, yet there appears to be some confusion over how to comply. How significant a problem is this?

Steve Stein: We aren't seeing the amended rules themselves and the case law that interprets those rules as causing confusion. Rather, we have observed that electronic discovery is necessarily complicated by the complexity of corporate IT and the increasing amounts of electronic information, much of it email, that corporations are retaining. When corporations develop a consistent eDiscovery process and strategy and strictly comply when faced with electronic discovery demands, most are protected by the rules and case law. The caliber and experience of outside counsel and the outside consultant/vendor can greatly reduce the pain of eDiscovery.

Courtney Barton: The problem stems from the fact we have very little



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case law interpreting these new rules. For example, there are very few cases interpreting Rule 34 (form of production) or Rule 37(e) (“safe harbor” provision). Other rules, such as Rule 26(b)(2)(B)(information that is “not reasonably accessible”) require a very fact specific analysis of costs and burdens, so there are no bright lines that can be followed. If you couple this with the fact that technology is constantly changing, it can be hard to know what to do.

That being said, there are some best practices that parties can follow that will help them with the e-discovery process, and these are things we have been talking about for a long time. The main thing is for corporations to make sure they have a comprehensive records retention policy and data map. In-house counsel and outside counsel also need to make sure they are coordinating their efforts and communicating immediately upon notice of litigation to make sure that preservation requirements are properly met. Finally, there must be cooperation between parties. Even if a party is confused about how to comply with specific rules, the spirit of the rules requires cooperation and an open dialog about electronically stored information at the Rule 26(f) conference. If parties adhere to that principle and can show good faith, compliance should not be an issue.

Ron Hedges: I don't think that there is "confusion" arising from the rules themselves, but the case law continues to develop and each may inform parties on "how" to comply. The rules and the accompanying committee notes are rather detailed as to procedures to follow and what the rule amendments were intended to accomplish. It takes time within any given organization to get its policies and procedures in place and there is no uniformity there. I expect where confusion is coming from--and from a failure to meet discovery obligations..

Deb Logan: Most companies are by now aware of the changes to the rules of civil procedure. I find that in many companies, it is IT who first brings up the issue to legal. This simply shouldn't be the case, it should be House Counsel who is leading the charge. Legal throws requests over the wall and then blames IT when things go wrong. Ultimately, however, it is the lawyers who have to answer for this and whose professional reputations are most at risk. Most e-discovery processes are ad hoc and inefficient, leading to increased costs and risks of sanctions.

One need look no further than today's news to see how serious this issue is. As the first sub-prime cases come to light, we can see serious deficiencies in dealing with electronic evidence. The Chapter 11 report for New Century (a subprime lender) is a virtual catalog of errors, with the examiner citing delays in the production of electronic



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evidence, gaps in the evidence that was produced and oversights and errors as to the extent of the sources of information that was available electronically. At the same time, the examiner managed to find specific emails that indicated that the corporate officers at New Century knew things that they were not disclosing in their statements to the financial analysts. The plaintiff's bar is going to have a field day.

I take calls from Gartner clients every day, legal and IT alike, that demonstrate to me that many, many companies are not anywhere near having a repeatable business process for the identification, preservation and collection of electronic evidence.

George Marinis: There is significant confusion among organizations and companies about compliance with federal e-discovery rules which has resulted for some in considerable expense. Today, organizations are responding to the challenges of what has become a technology-driven environment, and are dealing with the specifics around legal holds and collections, as well as balancing the work being performed by their outside counsel, consultants and vendors.

Some organizations have taken conservative approaches, often applying wide-ranging preservation efforts in an attempt to avoid any perception of spoliation, while others aren't doing enough in managing legal holds and the collection process. Wide-ranging preservation methods can lead to extraordinary levels of data being retained and ultimately processed, reviewed, and produced, at a significant expense to the organization. Part of the challenge is that organizations have traditionally seen the activities associated with e-discovery as one-off efforts in support of specific litigation, when in reality this process has become more akin to a traditional enterprise business process. By embracing this change and taking the initiative to develop an e-discovery program, companies can prepare themselves to respond appropriately. If an organization has not gone through the process of balancing its legal responsibilities with the needs of its business as it pertains to the management of electronic data, it will either be sub-optimizing e-discovery cost savings or putting itself at undue risk.

Steve Whetstone: In many respects the current state of confusion is no different than the confusion that existed prior to the new rules adoption. That is, lawyers and technology have never mixed very well. So, even prior to the recent rules adoption, there were many cases in which litigants failed to preserve relevant data (and lost or destroyed it), inadvertently produced privileged data, incurred huge costs in trying to review electronically stored information (ESI), and battled incessantly with one another over the forms of production. What's changed is that the new rules act as a floodlight -- and thereby expose



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and exacerbate -- these ongoing challenges.

Recall, the only meaningful reference to ESI in the old rules was embedded in the definition of a “document;” “data compilations” were a catch-all form of discoverable documents. That phrase was added to the rules only in 1970 and remained in place as the lone reference to ESI until the amendments were adopted in 2006. So, prior to 1970, litigants had no guidance regarding what do with computer and other electronic records. And, during the 36 years between 1970 and the FRCP amendments, litigants were supposed to treat ESI like paper (it’s not); there were no specific provisions whatsoever regarding whether the parties were supposed to talk about ESI at the Rule 16 conference, whether ESI was “accessible” or “inaccessible,” what to do if privileged ESI was inadvertently produced or destroyed, the acceptable forms of ESI production, etc. So, until the Rules amendments, it was the Wild West. Today, the eDiscovery battles are waged under a set of more detailed rules, so that’s progress. .

David Lat: **Going forward, what steps should be taken by corporations to prepare themselves for the e-discovery revolution?**

Steve Stein: Corporations are moving to implement process and technology tools to consistently respond to the demands of discovery. In order to reduce eDiscovery risk, improve efficiencies and reduce litigation discovery costs, it is important to have a comprehensive electronic discovery process in place. Most of our clients are falling into one of three predominant segments: (1) in-source segment (those companies looking to in-source people, process and technology to enable them to handle all aspects of discovery from preservation to production), (2) hybrid segment (those companies looking to in-source some people, process and technology to manage process from preservation to culling but to out-source hosted review) and (3) out-source segment (those companies that face infrequent investigations and litigations who outsource all functions of discovery to outside counsel and outside service providers)

Courtney Barton: Corporations need to get organized and take a coordinated approach to e-discovery. E-discovery is only one piece of a much larger information management puzzle that involves many different business units, as such, it should be treated on an enterprise level, such that document retention, legal holds, and discovery documents are all a part of the same system. Companies need to communicate internally with their CIOs and CTOs to see what, if any, effort has been made to organize the companies’ data resources. Many corporations have formed e-discovery committees that include the IT, Records Management and General Counsel’s offices. This type of coordination is especially crucial for managing the duty to preserve, which is where many companies get into trouble, often when the



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general counsel's office knows that a legal hold has to be implemented, but doesn't have adequate communication mechanisms in place to ensure compliance by the rest of the organization.

Corporations should also partner with outside counsel with e-discovery expertise and with trusted service providers and staffing firms. Using one or a handful of specific advisors that are familiar with a corporation's business data, key players and technical issues, can help streamline the e-discovery process and make it much more efficient and cost effective. For example, many corporations have successfully implemented a two-tiered approach: working directly with outsourced discovery providers for data collection and processing, using attorney staffing agencies for first level review, then working with their outside counsel to manage only the documents that need substantive review.

Ron Hedges: Corporations need to be proactive and anticipate future litigation or the like by establishing or revising document retention and legal hold policies and educating personnel on what those policies.

Deb Logan: First, IT and legal need to start working together. Form a joint team. Take it seriously. Second, outline a repeatable business process, following the Electronic Discovery Reference Model, to make sure that when you are collecting electronic evidence, you do it the same way every time. Third, create information management policies, information retention policies and e-mail management policies and implement them. Triage the systems you have. Email and file servers come first. This is where most uncontrolled information is and this is where the examiners, regulators and opposing counsel go first to find the information that they want to prove any case against you.

George Marinos: The business environment of the next decade will dictate that organizations must actively manage e-discovery just as they would other core business processes. Organizations must recognize that this process, like other enterprise business processes, needs to be managed, executed, and funded accordingly. Preparation requires the right combination and balance of technology, process, people, and business acumen to develop and maintain a solution that meets the needs of the business. Specific initial efforts an organization should consider so as to get started include:

- Development of a demonstrative and documented legal hold and preservation process;

- Generation of a "data map" of the organization, which is particularly helpful in preparing counsel for the meet and confer meetings;



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Consensus building with enterprise stakeholders in records, risk management, IT, and legal; and

The appropriate coordination and management of the organization's outside counsel, consultants, vendors and internal stakeholders.

It is the dynamic relationship between these initiatives and stakeholders that will prove effective in representing the interests of the organization.

Steve Whetstone: Companies can and should take several prophylactic measures to address the new digital challenge – all of which, I recognize, are easier said than done. Among other things, as a first step, companies should conduct a risk assessment analysis to determine the scope of their particular challenge and the proportionate responses. This assessment should cover a variety of factors, including (but not limited to): the volume and types of prior legal controversies (litigations, government investigations, and internal inquiries), the amounts of past legal liability, the regulatory environment in which a company operates (e.g., is it required by the SEC to preserve electronic records under Rule 17a.4? or NASD Rule 3010), the company's size, the complexity of the company's IT systems, the number of facilities and geographic locations, etc. It's a matrix analysis, with "litigation risk" on one axis and "IT complexity" on the other. The quadrant in which a company finds itself will help inform the degree to which it will need to craft extensive policies and procedures for dealing with the data retention and discovery. Again, this is tough stuff and there's more to it, but this a good, first step.

Second, even companies that map out as "low risk/low IT complexity" should put in place a document management policy which establishes, at a minimum, some basic rules concerning how long electronic records will be maintained and what is to happen in the event of a "litigation hold" – the triggering of a legal duty to preserve data, which will override the standard policy.

Third, the company should appoint and publish the name of the person(s) responsible for its document management and litigation hold policies. Doing so prior to the start of litigation eliminates confusion and reduces the risk of missteps during those first critical days after the duty to preserve triggers. The midst of litigation is a bad time to sort this out.

Fourth, most companies that successfully develop document



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management programs tend to do so because there is buy in from the top and a budget (and clarity regarding who owns the budget) to make the necessary investments.

Fifth, all of Legal, Compliance, and Records Management must work together to make this work, again, with clear assignments of responsibility and budgetary authority.

Sixth, in-house counsel should sit with outside counsel and third party discovery providers before, during and after the onslaught of litigation to make sure that each camp understands its respective role and expectations. It's usually the case that where there are significant eDiscovery challenges or abuses, these three camps are not aligned.

David Lat: And what about law firms? How can they deal with, and take advantage of, the rise of e-discovery?

Steve Stein: Law firms would do well to identify key partners knowledgeable in the law, eDiscovery and technology and make them the primary contacts for discovery in all major cases being handled at the firm. Many firms that we see are looking to get away from the recent litigation patterns to in-source collections, processing and online attorney review. Law firms are also seeking ways to reduce client costs by increased reliance on analytics to reduce the amount of data ultimately reviewed by attorneys while maintaining their quality of service and profitability.

Courtney Barton: Law firms are already seeing the need to hire or cultivate attorneys who specialize in e-discovery. As many corporations are looking to national e-discovery counsel to manage all of their discovery projects, law firms understand that they need to be able to provide their clients with expertise in both the substantive area of law and in the discovery process. Many firms have had tremendous success by creating e-discovery practice groups, or cross-disciplinary teams that address these issues. Other firms have created an e-discovery counsel position that interacts with a client counterpart. Law firms that do not have this particular expertise should be careful in proceeding with large-scale e-discovery cases without engaging help. As we have seen in some very high profile cases, law firms that do not have or do not understand the technical and legal aspects of e-discovery can find themselves in over their heads. Like corporations, law firms can also team with trusted service providers to add the technical expertise to their legal offering. That being said, law firms also need to understand the tremendous pressure that their clients are under to contain the costs of e-discovery, and they should be creative about ways to help their clients find a balance between their legal responsibilities and rising bills. Law firms should encourage their clients to have an enterprise approach to e-discovery and to utilize



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outsourcing when appropriate. While this may seem counter-intuitive to the law firm business model, clients appreciate when outside counsel look out for their long-term best interests. Moreover, to the extent some of the data collection and review is outsourced, law firm lawyers can focus on the substantive area of the law, which is also good for attorney retention. Outsourcing must not be done in a vacuum, however, so law firms have to make sure they have the proper expertise, oversight and reporting in place to ensure that their service providers are properly serving their clients.

Ron Hedges: Dealing with and taking advantage of the rise of e-discovery requires firms to become knowledgeable about the amendments and to plan for e-discovery on an institutional basis.

Deb Logan: Many law firms are still in denial about this problem. What do I mean by that? I spoke to lawyers over the summer who believe that 'this will all settle down and we'll go back to doing things the way we've always done them' whatever that means. Law firms must come to grips with the technology needed to solve this problem THEMSELVES and not rely on third parties. More and more, your clients and potential clients will expect you to come in with a detailed plan for how you will manage e-discovery. They do not want their outside counsel to simply pass on costs from a third party firm for collection and processing. They want choices and options and are educating themselves to deal with those options. What they want from you is sound legal advice and they want you to concentrate on the substance of the case. In order to do that, you need to advise THEM on how they can best manage the process internally. They know technology can reduce the amount of information that must be reviewed by lawyers. \$125 an hour contract attorneys reading hundreds of thousands of emails is no longer an option. Prove to the client that you are using technology to best advantage to reduce the amount of potentially responsive evidence and save the human resource for working on the case, not culling the document set.

George Marinis: E-discovery presents a great opportunity for law firms to differentiate themselves from competition. Lawyers willing to take the time to understand their client's data systems and processes are making a long-term investment in the relationship. Some areas to focus on are:

a. Learn the client's systems. Increasingly, the facts surrounding a piece of litigation are found in ESI such as email, network files and database records. Law firms that are familiar with their clients' email



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retention policies, email archiving policies and data management systems have a distinct advantage in locating the potentially relevant documents.

b. Learn to communicate with IT. Law firms that are familiar with key systems and perhaps even the name of the IT professional that supports that system, become uniquely able to support the client. Most IT personnel are not responding to e-discovery requests on a full time basis. It is important to remember that these requests for data are in addition to their current “regular” job responsibilities and their job descriptions must evolve as well.

c. Understand the factors that drive e-discovery costs. E-discovery is expensive. Lawyers have to become better armed in understanding how to manage these costs. For example, e-discovery vendors have varying methods for data filtering and keyword searching. Lawyers need to understand the fundamentals of the technology so that the overall document population is reduced while potentially relevant documents are not missed. Also, since document review can be the major cost in a case involving e-discovery, lawyers must be well versed in ways to mitigate these costs while offering the appropriate level of review.

d. Build e-discovery knowledge or expertise . Most law firms can now handle the basics of receiving load files from processing vendors and hosting the data on a document review platform. But are firms prepared to move beyond that stage? Corporations have largely eliminated hardcopy as the original document format and in some cases have reduced paper storage dramatically when compared to the volume of ESI versus paper storage in the past. The electronic copy of the document may be the only version available for review. A law firm can differentiate itself by increasing its knowledge of the various e-discovery solutions available in the marketplace and teaming with the most appropriate consultants and vendors to provide its clients with the most cost effective solution that meets the needs of the engagement. In many cases this may mean not having internal capabilities or “owning” the resources since it may not be the best use and control of resources (i.e., outsourcing may provide more experienced resources and better control over processing, hosting, review, etc.).

Steve Whetstone: In addition to working more closely with General Counsel and treating service providers as technology partners and not merely “vendors,” law firms should consider viewing eDiscovery as an opportunity to distinguish themselves, and not as an obstacle to litigating their cases. I recently wrote an article on this very subject



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with Richard Levick one of the nation's leading legal public relations and crisis management experts. Our key message was that while many law firms and corporations are wilting under the weight of the new digital challenge – or, at best, merely reacting to it – a few companies and firms are seizing it as an opportunity to extend their brands. A good example of this is Fulbright & Jaworski, which just issued its Fourth Annual Litigation Trends Survey, much of which focuses on eDiscovery issues. The survey is a must-read for anyone seriously interested in understanding the stresses that corporate clients now face.

Also, many law firms have now formed eDiscovery or technology committees comprised of attorneys and practice support staff to help select internal software systems, engage with outside providers, and develop best practices. Still, a few other firms – like Seyfarth Shaw – have dedicated attorney practice groups that specialize in eDiscovery and are brought in by their litigator peers to assist on the eDiscovery facets of litigation. But, firms must be careful; companies are sick and tired of paying hefty hourly rates for full-time attorneys to pore over reams of documents (or their ESI equivalent, many gigabytes of data). At \$200/hour, and much higher, law firm bills can become bloated fast, when there are now much cheaper and smarter ways to go about it.

David Lat: What tools and technologies are available to help companies and their lawyers manage and streamline their data?

Steve Stein: Many tools are being marketed to corporations that handle certain aspects of discovery, such as custodian notification of hold orders, automated preservation and collection technology, enterprise search and retrieval and on-site culling of data.

Courtney Barton: One of the most exciting technologies that has emerged over the past year is the use of document repositories for corporations. Using a repository, a company that finds itself in serial litigation can leverage prior treatment of a document. This means that a document is collected once, processed once, and reviewed once. This type of document management system leverages the efficiencies of technology and can provide tremendous savings in the overall cost of e-discovery. Moreover, it lessens business disruption and can become an integral part of a records management program. The other technologies that have emerged over the past few years include easier data collection methodologies and legal hold software. Again, these can all be integrated into a process that alleviates some of the burdens of e-discovery, especially for corporations that are constantly



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in litigation.

Ron Hedges: I would not even begin to list everything that is "on there." And I assume you mean by "their data" that which comes from clients and adversaries in e-discovery. Firms can manage-or attempt to manage-ESI entirely or partially in-house or can partner with vendors to do so. At this point in time, there are a bewildering set of tools and technologies.

Deb Logan: Every vendor and their brother and their brother's dog has entered the e-discovery market, so companies need to be careful in making purchasing decisions. I find that lawyers in particular can be dazzled by lovely demos that cannot possibly happen in the live IT environment. I'm not dissing the legal profession: vendors are really good at this and our business at Gartner is based on separating their claims from the reality. Of course you CAN do many things with software, but the problem is that many times doing those things inside your company will require a customized versions of what you see in a demonstration environment. Buyer, beware!, has never been more apt. Having said that, there are a number of good tools out there, though nothing that can 'solve the e-discovery problem' in and of itself, which will always depend on smart people in both IT and legal, sound and repeatable processes and good technology.

The vendors fall into a few categories. I like to break them up along the lines of the e-discovery reference model. So, there are tools that allow identification, preservation and collection of relevant data. These range from simple freeware to very sophisticated search and information access platforms to tools that computer forensic analysts have used. I see these as tools for IT or third party collection firms to use for the initial part of the discovery process. Legal directs the collection process, naming custodians, data sources and date ranges, and IT does the collection.

The processing step, again referring to the model, is where files are deduplicated and (to my mind) other machine based tasks can be performed and can either be part of the 'collection' sub-process or of the 'review' sub-process.

The review and analysis steps then require another type of software. These are tools for lawyers or paralegals to do initial review of individual documents, reviewing for privilege, marking, sorting, redacting: some call this first pass review. Review and analysis tools are widely available as hosted offerings and some are available as enterprise software. Once the initial pass has been made – some



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separate this, some don't – then you get into more sophisticated review and analytics capabilities that allow concept searching, entity extraction, visualization, social network analysis that sort of thing. These are becoming more and more mainstream, but are by no stretch of the imagination universal. Of course, the litigation support database vendors remain important, and many lawyers have used them, but they were not designed for the kind of scale we see in some of today's cases, where data comes in terabytes, and documents number in the millions. The keys to the kingdom of course, lie in ever more sophisticated 'search' engines and I use that quote deliberately. The sort of semantic analysis that is required to find 'a smoking gun' is very difficult indeed and it still takes a trained and analytical mind to tune any tools that are available to match the strategy of a particular case.

There is a final category of vendors, the large IT platform vendors, who want to help companies ultimately manage all information from a single storage, content management, search and retrieval and policy management basis. I call this proactive information management and it is the ultimate answer to e-discovery. There is no company that can do it right now – either end user or vendor – and I think we are 5 to 7 years away from this goal of what I would consider to be proper information management.

George Marinos: Companies need to rethink their records retention policy for the digital age. Policies that were developed while paper was the standard form of business records are not effective in today's business environment. Streamlining data assumes employees are knowledgeable about document retention policies and procedures and appropriate metrics and measuring techniques are in place to ensure employees are in compliance. Employees must be able to answer the following questions:

What types of documents are considered business critical?

How long do those documents need to be retained?

Which documents are under a legal hold?

There are tools and technologies available to help more efficiently streamline the e-discovery process. For instance, Huron Consulting Group recently launched V3locity which offers streamlined processing, hosting, review and production at a fixed per page cost that is up to 60 percent lower than similar services.

However, it is important to recognize that no tool or technology will be effective unless the organization implements the appropriate



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processes and procedures. It is the appropriate application of the disparate disciplines of technology, business, and legal, brought together through well defined business processes that will have the largest impact on efficiencies while best mitigating any risk or exposure.

There are turnkey applications that meet specific needs for litigation hold, preservation, data mapping, workflow, early case assessment, review, production, etc., and some organizations are even building their own solutions. The important items to consider are: which tools are best suited for the particular enterprise or industry; which current tools and technologies can be leveraged; and most importantly, how the processes and personnel's roles and responsibilities are defined and managed in regard to these technologies.

Steve Whetstone: With the emergence of new digital challenges come new digital solutions. One of the more significant developments in the past several years is technology – such as Stratify's – that automatically organizes a client data collection, without human intervention. Most simply stated, these technologies compare every gathered file against every other gathered file, and then match and group them based on identity, near identity (think drafts of documents) and the relatedness of the text content. Once auto-organized based on the unique properties of a given data collection, documents can be doled out by law firm team leaders by subject matter and therefore reviewed many times faster than if reviewed only in the order which the data was originally stored and retrieved.

For example, the email that I have received and that resides in my "inbox" thus far today concerns a wide variety of subjects like, our office expansion, client projects, my upcoming travel, marketing programs, some legal discussion, our product development, and, yes, even some spam. So, if an outside attorney were tasked with reviewing my email by traditional means he or she would have to shift gears repeatedly, try to interpret (without any other context) my acronyms and internal company jargon, and manually search for other emails that I sent or received earlier this month and year (for completeness and context), all at a significant cost. But so-called "concept organization" technology eliminates much of that scut work by auto-grouping like topic files together. So, review team leaders can direct the presumptively most important subjects to the most seasoned (and expensive) lawyers and the less important and presumptively irrelevant files to junior or contract attorneys or even paralegals or support staff. Many companies and law firms now leverage this technology to drive down costs and meet key deadlines.



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Most important, however, increased speed does not come at the cost of accuracy; although, perhaps counter-intuitively, improves it. An age old myth is that lawyer review is the “gold standard” and that technology, whether in the form of keyword search or more advanced concept technology, undermines that standard. But, various studies have shown just the opposite to be true. Manual lawyer review is only about 50% accurate – imagine, every other document decision may be called wrong! There are lots of reasons for this, including human fatigue, communications challenges, false confidence syndrome, etc., and anyone who has spent significant time on a large paper-based review doesn’t need to read the studies to be convinced. Technology, however, doesn’t suffer from these same limitations; computers don’t tire. In addition, by eliminating the busy work of data organizing, lawyers have more time and energy to focus on the job at hand. The implications in terms of job satisfaction are huge, at a time when other studies show that law firm morale is at an all-time low.

Of course, lawyers will always want and need to continue to leverage search and manual review – they are both essential elements to review. But, if used in conjunction with newer technologies, they make for a formidable trio.

Another technology development of note relates to the globalization of our economy – not just companies but law firms, too. So, with that expansion comes a rapidly increased need to support eDiscovery in not just English, but in foreign languages, too, including more complex languages, such as Chinese and Japanese, which use so-called “double-byte” characters. (English and other Latin-based languages have single byte characters, i.e., each character takes just one byte of memory space on a computer.) Law firms not only want review platforms that can display these languages, but they also need providers who understand how to collect and extract foreign language sets (without losing data), how to machine or auto-translate that data, and how to leverage the same advanced technologies available in English on foreign data to increase speed and accuracy and reduce costs and risks, as well.

David Lat: Companies and their lawyers often complain about the burdens of electronic discovery. What, if any, are the benefits gained from e-discovery?

Steve Stein: The benefits of the increased use of electronic data by corporations almost go without saying, and are often taken for granted. The ability to transmit content around the world in seconds has opened up a true global marketplace where one previously did not exist. That said, the use of technology comes with costs and opportunities for those corporations embroiled in litigation and corporate investigations.



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Searching through electronic data for key documents certainly beats the old days of searching through dusty storage facilities for paper documents. Searching also allows attorneys to quickly identify information that may be exculpatory to the non-requesting party. In addition, because the data is in electronic format to begin with, it enables value-driven search, collaboration and review by professionals located across the world.

Courtney Barton: One of the obvious benefits that we have seen with our clients is that e-discovery issues have forced corporations to look at their information management policies. Many have found that once they look at e-discovery as one aspect of their overall records and information management program, they have found tremendous efficiencies in their overall business processes. But these are some of the more sophisticated corporations; those that have looked at e-discovery from the top down. I wish more corporations would take stock of their own policies. E-discovery may be the end game but an efficient e-discovery program can allow a corporation to find new and more effective ways of handling their information assets. This may ultimately lead to a stronger corporate infrastructure and easier discovery, which will allow cases to proceed on their merits instead of having to be settled or crippled by the process.

Ron Hedges: E-discovery furnishes a means to secure substantial amounts of (hopefully) discoverable information. The problem is that the costs of production and review by all parties can be overwhelming and can overshadow the merits of the litigation.

Deb Logan: In my opinion, this is the best thing that has happened in a long time. Why? Because it is finally getting companies to see how badly they are managing information and how much money they are wasting. I talk to clients every day who say things like 'we have tapes of data from systems we no longer have the software or hardware to read'. Why are they retaining this information? Find out what it is, determine whether or not it does need to be retained long term, and then destroy it in a systematic and documented way if you do not need it for legal or regulatory purposes. Its certainly not a part of your day to day business. I think that the e-discovery issue will finally get companies to 'clean house', which will in turn reduce their costs, lower their risks AND help them to spend more time and energy on VALUABLE information that helps them grow their businesses.

George Marinos: At Huron, we understand that e-discovery can uncover serious inefficiencies and waste related to an organization's data management practices and ultimately inflate business costs. Through the collection and review of data for e-discovery purposes we have been able to:



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Identify redundant data sources

Identify data anomalies and outliers

Raise sensitivity to the disclosure of personally identifiable information

Identify risks related to the retention of data for longer than necessary

Surface non-compliance with existing required retention policies or other regulatory requirements

The solution requires an organization to improve its data management practices. This can be achieved through the implementation of mature and comprehensive records management policies, and by leveraging hardware and software technology advancements in the storage industry. Ultimately, these same investments will also allow for more timely responses and potential cost-savings on future e-discovery requests.

Steve Whetstone: As mentioned, new digital solutions can greatly enhance speed and accuracy, and significantly reduce the total cost of review (i.e., the combination of provider costs and lawyer review costs... what the client actually pays). Without it, there simply would be no other way to get through massive volumes. Bear in mind, a single gigabyte of email is the print equivalent of approximately 100,000 pages, or 30-40 bankers' boxes, of paper. An iPod Nano holds up to 8 GBs or about 300 boxes of paper.

eDiscovery also allows lawyers and companies to get at the truth, which may sound trite, but really should remain an essential element of every litigator's mission. For too long litigators hid behind piles of paper and pretended that the stacks rose out of thin air, and from not computers. Of course, paper is just the tip of the iceberg, and so, with access to more data comes a greater chance to understand the truth.

Also, as mentioned, several recent studies reveal that traditional document review is a key factor in declining associate morale – GenX'ers grew up on technology, are extraordinarily comfortable with it, and use it in many facets of their daily lives. Thus, to sentence them to windowless rooms for endless paper review is a career path regression. So, if deployed right, new technology and eDiscovery can help curb waning associate morale.



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Finally, “eDiscovery” is now an industry. Just a few years ago, it was perceived as a peculiar interest among technologists and a small number of lawyers. Now, major industry analysts, like the Enterprise Storage Group, the 451 Group, IDT and Gartner – all cover it. So, the eDiscovery industry presents career opportunities for litigators, like me, both inside and outside of law firms. In fact, we just hired another AmLaw 50 litigator, who is eager to work on eDiscovery issues full-time with us.

David Lat: How are the courts tackling e-discovery? What trends do you see emerging in the case law?

Steve Stein: Courts are responding by increasing their education. My company is frequently asked by judicial groups to speak at conferences so they have a better understanding of the demands and requirements to perform electronic discovery. The case law emphasizes the need for corporations to have comprehensive strategies and plans in place prior to receipt of a subpoena or discovery document requests. From *Zubulake* through the *Serroquel Product Litigation* decisions and the recent *Qualcomm* case, courts are looking for companies and their counsel to assume responsibility for active management and supervision of the electronic discovery process. For those companies that have eDiscovery plans in place and follow those plans, we see courts endorsing those reasonable approaches and denying claims of spoliation.

Courtney Barton: The main thing we are seeing is that the courts are relying heavily on the meet and confer. Judges do not want to get involved in discovery disputes. To the extent parties can not agree, the courts are, many times, making them go back to work it out. It is really in a party’s best interest to cooperate with their adversary on these issues. These can be very complicated issues and the costs, enormous. The parties are in the best position to come to an agreement – a court may not know all of the intricacies involved in a case and could very well lose patience and order something that is not in a client’s best interest.

Ron Hedges: Courts are, by their very nature, tackling e-discovery on a case-by-case basis and courts rely on the general principles of the amendments to make very fact-specific decisions. Emerging trends? Courts requiring requesting parties to be specific in their requests for ESI, courts requiring parties to work very hard to resolve e-discovery disputes among themselves, and courts shying away from deciding what is really NRA ESI and proceeding to a proportionality test.

Deb Logan: That’s a tough question for a non-lawyer to answer, but I’ll give it a go. Consistent information management policy consistently applied seems to be the Golden Rule. Unless there is legislation or regulation to the contrary, the courts seem to be of the opinion that



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you can run your email system (and all of your IT infrastructure) as you see fit. Generally speaking, rulings about accessibility, metadata preservation and spoliation have been on a case by case basis, with opinion varying widely, depending on the circumstances. I have personally been impressed by the rapidly growing sophistication of the courts in dealing with complex technical issues. I only say this because early on, I heard many in the legal profession saying, 'we are such dinosaurs, this will take years...' and that has certainly not been the case. I want to quote here a case and a judge, because I think this sums it up:

PSEG Power New York, Inc. v. Alberici Constructors, Inc., 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007)

Magistrate Judge Randolph F. Treece began his memorandum decision and order in this construction litigation with these introductory remarks:

With the rapid and sweeping advent of electronic discovery, the litigation landscape has been radically altered in terms of scope, mechanism, cost, and perplexity. This landscape may be littered with more casualties than successes and the discovery imbroglio in this case is a prime example of this observation. For nearly six months, the parties and the Court have been grappling with an electronic discovery monstrosity with the hope that it could be corralled and definitively resolved, thereby obviating the need for motion practice. Alas, attempts to resolve the issue in lieu of briefs fell woefully beyond the parties' grasp and, as the last straw, they have set the matter at our feet for appropriate resolution.

In other words? We are all learning together. Take the best advice you can from lawyers AND technologists and watch this space. I watch this space: <http://www.ediscoverylaw.com/articles/case-summaries/>

to stay up with what is happening. It's a blog written by the e-Discovery Analysis and Technology Group at K&L Gates.

George Marinos: Courts are increasingly willing to step into the fray and even hand down harsh penalties when companies don't meet their obligations regarding e-discovery.

In many ways, the courts are doing exactly what has been predicted for the last few years: punishing companies for failing to implement a legal hold when there's a reasonable anticipation of litigation; requiring companies to proactively preserve potentially responsive electronic data and requiring active involvement of counsel and IT personnel in overseeing e-discovery efforts. Courts continue their trend of



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reserving harshest penalties for companies that appear to flout their e-discovery obligations.

Nonetheless – as with any other area of the law – there are still times when courts will surprise you. Perhaps only the most prescient could have predicted the court’s ruling in *Columbia Pictures Industries, et al. v. Justin Bunnell, et al.* (the *TorrentSpy* case) that it was not “unduly burdensome” for defendants to be required to preserve server log transient data kept only in RAM; to the rest of us, however, it was unexpected.

Steve Whetstone: As far as I can tell, the courts are generally doing a good job of meeting the new digital challenge. I don’t say this to pander – I’m no longer practicing. But, I tend to find myself agreeing with most of the decisions I read (or at least don’t find myself in violent disagreement).

Clearly, cooperation is key, and courts are strongly “encouraging” parties to do just that – likely, so that they don’t have to deal with ESI! One of the first pearls of wisdom litigators are taught out of law school is that judges don’t like to hear discovery disputes. The technology variable only compounds that proven admonition. So, when litigants cooperate (or at least are perceived as cooperating) they seem to fare better.

Also, courts are grappling with the distinction between “accessible” and “inaccessible data,” and will continue to do so for some time. The rule makers purposely did not specify the types of data or media that constitute one or the other because they recognized that technology evolves, and so what’s inaccessible today, may be accessible tomorrow. Examples of recent decisions that wrestle with the accessibility question include *Columbia Pictures v. Bunnell* (concerning RAM) and *W.E. Aubuchon v. BeneFirst* (concerning imaged, but un-indexed, claims forms).

Somewhat related, several courts have had to decide whether parties must produce ESI in “native” format (e.g., MS Word in Word, Lotus Notes in Notes, etc.) or as static images (such as TIFFs or PDFs suffice). Depending on the facts and circumstances (and clever lawyering) in each case, some courts have ordered “native” production, while others have permitted image renderings. There is no clear trend yet.

What interests me most about the accessibility and production discussions is that it leads to a more nuanced analysis of what is ESI, what is relevant or potentially relevant, and what is admissible in a matter. Discovery has never been a perfect process – it’s always been



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true that “stuff” (and sometimes lots of stuff) gets missed or left out of document productions. But, so long as parties make a good faith and reasonable effort to find, review and produce information consistent with the Rule 26 discoverability standard, they should be OK. But, now the legal world knows (or should know) that ESI contains more obscure data, like tracked changes, hidden columns, hidden comments, embedded objects (known as “OLEs”) and various metadata such as last modified date, last print date, Bcc recipients (not shown on a traditional file print outs), etc. So, the overarching question is: Do litigants need to preserve, review and produce that kind of ESI – in all cases – and, if so, who should pay?

Another area that is getting some judicial scrutiny --- but, undoubtedly, will receive more – is privilege. The new rules did not do much (if anything) by way of privilege, other than the Rule 26 “clawback” provision which states that when an inadvertent production is made, the recipient must sequester, return or destroy the subject data pending the court’s substantive decision on waiver. So, for now, courts continue to look to the local privilege law to determine whether there has been waiver. But, federal legislation is pending that seeks to amend Federal Rule of Evidence 502, and, if passed, will standardize how courts are to decide a variety of privilege questions, including inadvertent waiver and “selective” waiver.

At the same time, courts have struggled with what to do about privilege logs, as the data volumes (and, concomitantly, the amounts of privileged data) mushroom. Must all files be listed on a log? When it comes to email, some courts have said “yes,” as laborious as that may be, each and every element of an email thread must be separately listed so that the recipient can determine if it facially satisfies the elements of privilege or work product (e.g., is a lawyer listed as a recipient or sender of each element?). So, for those courts, simply listing the last email in a long thread doesn’t reveal the answer. Other courts not have found listing each email element too burdensome, and accept thread listings. And, one federal court in Nevada last year (in a case involving the sale of Bob Marley T-Shirts) went so far as to say that no log was required at all where there were “hundreds and perhaps thousands” of privileged files. The court in that case instead accepted an affidavit from outside counsel that it had undertaken a diligent and good faith effort to identify and produce all relevant, non-privileged email. Of course, many civil disputes have hundreds, thousands and even tens of thousands of privileged files, so what does that decision portend for the future? But, as viscerally bemusing as the Nevada decision may sound, it is not without any foundation. The Advisory Committee Notes to Rule 26(b), both before



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and after the 2006 amendments, recognize that where it would be “unduly burdensome” to list “voluminous documents,” listing by “categories” or seeking protection by court order may be appropriate.

David Lat: In light of regulations stating that some documents must be destroyed while others must be preserved, confusion in this area is unsurprising. How important is it for a company to have a policy regarding electronically-stored data? What advice would you provide to companies regarding data and document retention plans?

Steve Stein: In a perfect world we would create strenuous restrictions on custodial use and classification of data, as well as on the ability of employees to store data off-network. It is very important for companies in highly regulated and litigated industries to enforce employee compliance with records management and usage policies, which must include electronically-stored information. At the same time, we recommend the companies’ retention policies and schedules call for the minimum retention periods required by legal, regulatory and business requirements. We also recommend that absent a litigation hold order, companies should rigorously enforce document deletion policies, particularly for e-mail, and consistent with legal and regulatory requirements, so that once the duty to preserve attaches there will be less data to collect, review and produce.

Courtney Barton: I can not emphasize enough the need for a policy. The issues are complicated, no doubt. This is especially true for multinational corporations, where following the law of one country might very well be violating the law of another. But a haphazard or “save everything” approach is not in a company’s best interest in the long run. My advice would be to just start a program going forward. I think companies get overwhelmed and think they have to go back to the beginning of time with a program. If you can take your information going forward and handle that, the backlog and old systems can be addressed in a much more meaningful way.

Ron Hedges: I am not sure that there really is confusion. But, in any event, corporations need to know where their ESI resides and, more fundamentally, what ESI they have. Corporations then need to know what, by law, they are required to retain and for how long. Then a records retention policy is needed for ESI that accounts for all this and recognizes litigation holds.

Deb Logan: Seek professional help from experts in the field of records management. There are companies such as Iron Mountain, Cohasset Associates, Information Resources Clearinghouse and many e-discovery firms including Fios, Renew, Kroll and others that have



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expertise here. I do not think this is a lawyer's job. Most don't know what to do and do not have time for the detailed analysis of a company's documents that is required. You can buy a retention schedule but it will not get you all the way there. You must customize it AND most crucially, you must match your documents and processes with what you see in the schedule. This is best handled by the business units themselves. They must take responsibility for classifying documents, which must then be matched by the professional records management person against the schedule and retention periods assigned. It's a long haul, but consistent policy, consistently applied, is your best defence.

George Marinos: A policy regarding electronically stored information is one core component of any company's records management strategy. The policy will only work, however, when it is part of a well-planned and well-managed records management program.

Identifying, preserving, collecting, reviewing and producing large amounts of electronic information in discovery is no longer an interruption to a company's regular records lifecycle; it is entirely expected and needs to be integrated into regular operations. The companies that are most successful in dealing with e-discovery understand this new landscape and develop strategies to manage all of their electronic information using best-practices principles of records management. When done properly, these strategies reduce the amount of electronic information they have in the first place (having defensibly disposed of some under a records retention schedule); and much of the data they do have is classified according to an appropriate records taxonomy, making it easier to find and filter.

Steve Whetstone: As discussed above, all companies – whether large or small – should adopt a retention policy. Most of the high-profile, headline-grabbing judicial decisions have concerned the failure to preserve data – not delayed or botched productions. You can't put the toothpaste back in the tube – at least not neatly, so parties need to get it right the first time. You also can't produce what you don't have. So, it all starts with preservation (which helps explain why there is so much data lying about as most companies don't dare get rid of it).

But, companies can get rid of their data in the ordinary course of business, if they are careful about it, and create a clear audit trail and rationale for their policy and procedures. The key is that the destruction policy not be seen as "gaming" the system, whether based on the timing of its adoption (e.g., just prior to the onset of a major litigation or investigation) or by targeting information that the company clearly deems potentially relevant in future litigations. There



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is case law on these points. An effective way to avoid the gaming perception is to create documentation which sets forth a legitimate business rationale for getting rid of the data and that sets a “go live” date at least a few months in the future, which can help negate any inference of purposeful destruction of relevant data if, by coincidence, the duty to preserve were to trigger the day after the plan’s adoption.

David Lat: **Electronic discovery will surely continue to be an issue in the future, especially as technology evolves. If you had to make three predictions about the future of e-discovery, what would they be?**

Steve Stein: (1) Corporations will continue to in-source people, process and technology to deal with legal eDiscovery requirements. (2) Corporations will increase enforcement of data usage policies through the use of technology tools. (3) Corporations will attempt to reduce the amount of data that is retained under records management policies, consistently with their legal and regulatory requirements, in order to reduce the cost and risks associated with eDiscovery.

Courtney Barton: We are going to continue to see e-discovery evolving into an enterprise process. We are already seeing the industry move in that direction, as service providers offer end-to-end solutions, everything from consulting, to archiving, to collection, processing, all the way through review, and specific solutions for companies that are constantly in litigation, such as repositories.

We will continue to see the need for expertise in this area. Law firms will need to become much more nimble and sophisticated about the way they handle clients’ discovery issues. The costs are just too great to continue with the same models.

Although we have been saying this for years and it has yet to happen, we will continue to see consolidation in the industry, such that there will be a few big players. The stakes are so high that parties will only want to partner with trusted, reliable providers.

Ron Hedges: (1) We will continue to see little appellate case law, which decreases the predictability of how trial courts will address ESI. (2) We will see a continued refinement of what may be NRA as technology changes and costs go down. (3) The so-called “safe harbor” of Rule 37(e) will be recognized to be more a trap than a help.

Deb Logan: The most litigious companies will manage identification, preservation, collection and processing themselves and have legal-IT hybrid specialists to do it. It will become a managed business process



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like any other.

The dominant model for sophisticated analysis of documentary evidence will be an outsourced one, in which the data is hosted on a third party system and everyone can access it, defendants, plaintiffs, judges, regulators. The interesting technology innovations will happen here, with ever more sophisticated search and visualization techniques becoming mainstream.

The cacahpony from from the vendors will continue to increase this year and next year, with real market consolidation happening mid 2009, as end user companies become more and more sophisticated in their understanding and use of technology. The permanent alliance between legal and IT inside large litigious organizations is one that outside counsel must deal with in their business planning. Like any major shift, there is opportunity here, as well as a threat to accepted business practices.

Technology has created the problem the legal profession is seeing. The volume of information, the scope of networked communications, the ever increasing amounts of storage available – these are wonderful things that technology has allowed. But we risk losing sight of what is important and meaningful in that mass of electronic data – we risk losing sight of the truth and therefore we risk that our system will not be able to administer justice. Technology has created the problem: Only technology, working within the principles of the law, can solve it.

George Marinos: i. Corporations take control. Companies in litigious business segments will take the proactive approach to e-discovery by developing policies, procedures and leveraging enterprise technology to reduce risk and control costs.

ii. Enterprise Discovery Management. Discovery management will evolve into an enterprise business process in coordination with an organization's legal, compliance and information management approach. As e-discovery vendor consolidation occurs, discovery management outsourcing models will take hold. Organizations will continue to address the balance of their money spend regarding outside counsel, consultants and vendors, and a new services model connecting these three entities will begin to be introduced to meet the needs of cost reduction and risk mitigation.

iii. Remediation of historical data will move to the forefront. The majority of organizations possess a considerable collection of digital media in various formats. The media may contain legacy data from enterprise systems, a backup of a current system prior to a major



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upgrade, or simply some form of unstructured data. Organizations may not know the contents of the media and can then be forced to preserve the media during litigation or an investigation. Consequently, they may also need to sample or completely process the contents of the media. There are also risks to keeping data that could have been destroyed. Corporations will recognize the need to evaluate their risk and exposure to unnecessary costs.

Steve Whetstone: First, I suspect companies will become more aggressive in managing and destroying data to deal with the massive data propagation and costs, but, contrary to current popular belief, they generally will opt to externalize the eDiscovery cost structures because of the overwhelming “people, process and technology” challenge. While many companies today like to think that the antidote for escalating law firm discovery costs is to internalize the challenge, I suspect most will eventually conclude that it’s too expensive to hire a legion of folk to run the programs; too hard to manage the entire eDiscovery value chain (and already hard enough to manage existing record management programs), and too costly and burdensome to install (and continually update) full internal eDiscovery systems, particularly where they would need to build out capacity to meet periods of maximum load and then carry that excess capacity (and cost) during quieter times. So long as external (i.e., off site archival and web-hosted review) solutions are priced appropriately, they should remain better alternatives (i.e., they will be cheaper, simpler, more scaleable, and technologically more current). But, for the externalized model to succeed, it’s essential that companies, outside counsel and third party providers work together to put in place appropriate processes and work flows, and measure performance.

Second, I expect that courts will accept reliance on proven advanced technology solutions as a reasonably defensible means for reviewing and producing large data volumes. We already have seen some foreshadowing of this, though there has been no definitive decision yet. For example, the FRE 502(b) Advisory Committee Notes state that “a party that uses advanced analytical software application and linguistic tools in screening for privilege and work product may be found to have taken ‘reasonable steps’ to prevent inadvertent disclosure.” Also, June 2007, Magistrate Judge Facciola ruled that the defendant must produce data from back up tapes, directed the parties to meet and confer on how best to accomplish that, and, in so doing, urged them to consider “recent scholarship that argues that concept searching, as opposed to keyword searching, is more efficient and more likely to produce the most comprehensive results.” So, lawyers and courts today routinely accept keyword and Boolean search as



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defensible methods for finding relevant data (though I suspect few of us could really explain how it works or why different search engines using the same queries yield different results on the same data sets). Soon, that will extend to more advanced technologies and methods.

Third, people will continue to say the damndest things in email and elsewhere no matter how many other companies or individuals get caught and sanctioned for it. So, the lawyers and eDiscovery support providers will stay very busy for a long time.