

E-DISCOVERY, PART II



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In Part I of our E-Discovery discussion inserted in the April 20 issue of *Texas Lawyer*, the panelists provided lawyers' perspectives on the issues with E-Discovery, from the issue of cost, to the meet and confer. Because of the intricate relationship between attorney and IT professional with regard to E-Discovery, *Texas Lawyer's* business department held a second session to address these issues from the technical point of view. The following panelists are data discovery experts and vendors. Below is a transcript of that discussion. It has been edited for length and style.

MIKE ANDROVETT, moderator, attorney and owner of Androvett Legal Media & Marketing, Dallas: *Panel members, please introduce yourself and tell us a little bit about who you are, your company, and the nature of your work.*

MARK E. HARRINGTON, corporate secretary and general counsel, Guidance Software, Inc., Houston: Guidance Software is the developer of the EnCase® technology, which permits companies to do internal investigations of their data for many purposes; employment, data intrusion and most importantly for the reason why we're all here, E-Discovery. The history of Guidance Software is rooted in computer forensics and helping law enforcement and the military — in helping put away the bad guys and the terrorists. And the current focus is definitely on helping corporations. As far as my own personal experience, I wear two hats at Guidance. I am their corporate attorney, and I also am a user of our technologies and have to respond to the same sort of questions you have to respond to each day. My background is in intellectual property and corporate law: I just found out that one of my co-panelists and I actually worked in the nascent stages of E-Discovery back in the mid-'90s on discovery matters related to the big tobacco litigation. So, very nice to see him again.

AMY MAXWELL, corporate electronic discovery specialist, Applied Discovery, a division of LexisNexis, Dallas: Applied Discovery is a division of LexisNexis.

I'm sure you're all familiar with the legal research side of the house. Applied Discovery is the E-Discovery side of the house. We help corporations and law firms across the country navigate the minefield that's associated with E-Discovery, all aspects from data collection, preservation, best practices, workflow, processing the data, and helping the firm and the corporation work in concert to achieve their goals with cost efficiency as quickly as possible. My experience: I was a paralegal and was baptized by fire about six years ago in E-Discovery when I received my first CD full of Outlook e-mails. I made every mistake in the book you can make when you're brand new and trying to navigate a new technology. I grew passionate about the light bulbs that went off in my head as I learned how to address, and eventually avoid, all my initial mistakes. After developing the knowledge it takes to skillfully manage a document review project, I came to Applied Discovery to share what I've learned with legal professionals at corporations and law firms and hopefully provide some guidance.

RYAN D. MURPHY, vice president of business development, Equivalent Data, Houston: We provide electronic discovery software and services to corporate legal departments and law firms. Prior to coming to Equivalent Data, I was the director of Business Services, administration and technology at ChevronPhillips Chemical Company. I worked for the general counsel in the legal department. Before, that I was in-house at Fisher & Richardson. And then I was on the other side with Baker Robbins & Company, a law firm automation technology consultant.

ANDROVETT: *Granted, we covered a lot of ground in the first panel the first 90 minutes. Is there anything that you heard that you wanted to either take issue with or extrapolate on or comment further on in that first panel?*

HARRINGTON: There actually were a couple of things. I loved the fact that the panel was so proactive on the needs of attorneys and corporations to get their act together as it relates to their data and their client's data. The seven points of light that she mentioned, I couldn't agree more. To me, what that says is you've got to do a lot of work up front these days. You can't

wait. The second thing I found a little surprising is not one person mentioned the concept of metadata and whether or not that's relevant and whether or not you need to preserve it and collect it. There are a lot of cases these days on that very point. And maybe we can talk more about it.

ANDROVETT: *You can be sure we're going to get into metadata in this panel. What else?*

MAXWELL: I'd like to echo the sentiment when the panel was talking about choosing an E-Discovery provider. There are thousands of them out there — not every provider is suited for every case, as stated. But developing a relationship with the provider and to have that person come in and be able to get the IT department and project management side of the house to work together is extremely important, especially in today's economic crisis where the law firms are laying off support staff. It becomes ever more important for your E-Discovery provider to have that level of expertise when in the past it was the normal for corporations to solely rely up the law firms. That's very important.

ANDROVETT: *Let me share with you two comments that I heard in the break. One was a gentleman who said, "I'm hearing all this stuff and I'm already overwhelmed. And then there at the end you start talking about text messages and that stuff. It's just too much." And then a lady came up to me and said, "Well, we've sort of identified the problem and, that there is this voluminous information, but I'd really like to hear more about is what do we do with this information? How do we attack what is much more of a business time problem for many corporate officers and executives than it is the legal problem that the lawyers see?" So, starting with the sort of the over arching theme derivative of a question that I asked in the first panel, how do you create order out of seemingly chaos?*

MURPHY: It really starts with the records retention policy. I can say this having been on the corporate side of it, we need to look at on the client's side, from the perspective of exposure? And we talked a little bit about it in the last session about how we manage the volume and the connotation that it could be extraordinarily destructive. But if we think back to before December of 2006 and we start to talk

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about what individuals were saying about Sarbanes-Oxley, it was so burdensome and it was going to be extremely costly, well, that didn't end up happening. I don't know of a single company that raised the Chapter 11 protection flag because of S-Ox. So as we start to evolve through and apply the responsibilities that the changes in the Federal Rules really made us start to address and are afforded ourselves the protection on those issues that we get when it comes to being able to protect the evidence to come up with the policy, if in the event we're going to raise the cost flag, we've got to start saying this information, these conversations, and the intent that's associated with the content, could be used as evidence. So we really need to start to formulate the policies to either help defend the fact that we kept them or defend the fact that we deleted them. So in my opinion it has to do with coming up with that defensible records management policy and records retention schedule and destruction policy.

ANDROVETT: *In defending these policies, are there some touch points? If we're killing e-mails, we're doing it the same way at the same time at the same intervals. Is that what you're describing?*

MURPHY: If you apply the business rules that you're always following as it relates to what are we trying to protect, when we set out at CP Chem to design a records management policy, protect three things. We wanted to categorize whether this communication or this particular piece of information was an official record, a personal record, or a convenience record. But we also used what we knew we could defend, and that is to go back to the Sarbanes-Oxley reporting requirements and use that as the bedrock in which to formulate the answer to the question: "Do we keep these types of things?" And so there is no real magic silver bullet. There's no real thing that you can go to standardize what that retention schedule looks like. You've got to go back to your business policies to be able to defend it.

MAXWELL: To me the heart of the question is how do we create order out of chaos. Starting with that that document retention policy is a great thing — a critical foundation. How many of you out there use folders in Outlook to get to

the emails that are important to you? Do those e-mails, did they get deleted ever or are they on your hard drive somewhere? Does anyone know the answer to that? Mine are set up so that they're stored on my local computer. So does that automatically fall into that 30-day delete? What happens? No. You have a record of those e-mails. Ultimately most of us have all of this chaos. I'm going to call us all rogue employees, because that's what we are to some extent. To create order, your legal team has to come in and start with a list of identifying criteria. What is the pertinent time frame for this litigation, for example from 2001 through 2007. Who were the custodians in 2001 to 2007? By starting with small steps to create order, you can avoid some of the chaos which can also help you avoid having to run around to every server and image everything. Then start thinking about your search criteria before you go to a Rule 26 conference. It is extremely beneficial to have an idea about what's in your data set to begin with. Try a sampling approach: check out your top two or three custodians just to see what they have so that you're not going into the conference blind which often leads to parties agreeing on overly broad search criteria. That's how I create a little bit of order out of the chaos of all of this E-Discovery. Start with a plan. Although it is a good best practice that the plan uses the document retention policy as a foundation, it's important to take into account employee behavior. People save things regardless of the retention policy. Take me: a year from now I know I might need that e-mail with that proposal attached but I know that it will be automatically deleted from the email servers due to the retention policies? Thinking about actual employee behavior will help you steer clear of having to go back and recollect data that could have been captured in the first go-round.

HARRINGTON: My point on bringing order into chaos would lie somewhere right before Ms. Maxwell's reference and right after what Mr. Murphy mentioned. And that would be taking an inventory of your "world of data." And I know it's always hard for us lawyers to take an inventory of what we're working on. Get a checklist. Sit down with your

IT department. I want to understand the world of data in our company or in your company. I want you to trace for me an e-mail. What happens for every e-mail that's sent or received in this company? Where does it go? How many copies are made? How is it ultimately deleted? I want to know these things. I want to be able to have a visual. I want a Visio chart, because I'm going to have to explain this at some point possibly to a judge. And I want to show that person how we do things and how we did things in this case. So have a good inventory or your "world of data." And then what I'll do as a form of redundancy is I'll maybe have my deputy GC go talk to another person in IT and ask the exact same questions. And we'd better get the same answers or we've got to do some cross-checking. So the key for me is knowing your data, knowing where things are stored before you even get to the actual claim that comes in, and then you are better prepared to apply your custodians and key word searching terms to the right data..

ANDROVETT: *I want to get into the weeds a little bit. If I'm a trial lawyer, I might be inclined to say to you: planning, document retention, all of that is great. Come to you early. But I've got this thing that's just landed on my desk. I don't even yet really clearly know what the issues are. Can you help me understand, if I accept the premise that we heard in Panel 1 and here again about getting in early, identifying your sources of data, if I'm the trial lawyer who's still trying to struggle with this cause of action and what my defenses might be, how can you help me?*

HARRINGTON: Yes. I'll tell you how I do this just from experience. Real nuts and bolts stuff that you're talking about. I'll get a claim. Luckily not a lot of them, but we'll get a complaint that comes in from time to time. Immediately that day I'll sit down, and I'll write down all the people named in the complaint, literal stuff, the date ranges that are mentioned, the places, the people, certain key words, the causes of action, the elements that go into the causes of action, the possible defenses to causes of action, and various key words. This is where you have to show a broad scope of preservation at this point. So I will take that maybe to the next highest

level or the next lowest level. Okay? If this person is named in the complaint, well, probably their boss or their subordinates might also have some relevant information. So they're on my custodian list. If this is the date range, well, I know how claims like to evolve so maybe I expand that date range by a reasonable period of time for preservation purposes. I also try to get a sense of the types of data that might be relevant — is it emails, spreadsheets, structured data? Since I have previously identified and now understand my “world of data” I am pretty clear about where those data sources might reside. Again, we're just talking preservation. No heavy lifting at this point. Then I call my guy, my person in IT, and I say, “Here are your parameters. Start preserving today, the same day we got the complaint. Do it over the weekend. Let me know what kinds of volumes we're looking at.” I combine that effort with normal litigation hold efforts of notice, questionnaires and interviews to hopefully get the broadest scope of potentially relevant information to preserve for the claim.

ANDROVETT: *Would either of you add anything to that? And I like the way you set it out because that helps us maybe create a little bit of an outline, that being Step 1. What else would you add to that?*

MURPHY: We talked about the client's duty to preserve. And that's really the fundamental duty that the client has is to preserve the evidence. The next step is to determine what of that evidence is relevant. So the next phase of that is to load the evidence based on who provided it. So in our case we always go back to the possession argument. And we say where did this evidence come from? We will talk about sanctions and how do we avoid sanctions in a little while, but the thing that we've got to start remembering is that information provided in request of a lawsuit by an individual is really evidence until it can be determined, based on the merits of the case, that it is not relevant. So in essence what the clients are doing is giving us evidence. And it's our responsibility as your vendor to help you decide, based on the merits of the case, to either include or exclude the evidence that was presented. And so the culling part happens after the preservation has

been accomplished. And then we go into either using search terms to meet our production obligations or using the facts that are contained within the metadata of the evidence, and then using the merits of the case to make defensible legal decisions to include what has been presented

ANDROVETT: *How do you do culling? What's the philosophy? And what sort of tools do you use?*

MURPHY: There's really the default standard today in culling, which is to search across evidence using a magic formula of key words that we search across the evidence to provide results back. That's the standard of which the search words are really what we're using today to meet our discovery obligations.

ANDROVETT: *So search words I might use — I understand the methodology is different and the form is different — are the same way I would search for things on, say, Google?*

MURPHY: Exactly. So who would imagine that today the legal standard of which discovery is produced in the civil litigation case is Googling. It should be more complicated than finding a song on the Internet.

MAXWELL: Your search criteria can be as complicated as you want to make it. I had a client send me their search criteria yesterday, and it was 11 pages and 7 searches. And it was the most complex thing I've seen in a very long time. So you can get as simplistic or as complicated as you want to with your search criteria.

HARRINGTON: One of the things you're going to need to draw at some point in your case is a map or a connection for the Judge or whoever it is. Here's what we knew and when, and here's what we preserved in that time, given reasonable information. Discovery is not perfect. And as the case evolved, you should be able to clearly show how you did supplemental discovery as you obtained more facts, more claims, et cetera.

ANDROVETT: *I guess as sort of a default, if a lawyer is calling one of your firms, well, they're certainly interested and they probably have a little knowledge. But as a general proposition I had posed that question in the first panel about a lack of knowledge among many lawyers about E-Discovery issues. What are you seeing in the marketplace and*



As corporate secretary and general counsel, Mark E. Harrington oversees worldwide legal responsibility for Guidance Software. He brings 15 years of business and legal experience to the position, having held previous senior management and legal positions in the software and technology industry. Previously, Harrington held the position of associate general counsel, where he managed a variety of legal matters including licensing, insurance, intellectual property, export compliance, marketing, litigation and general corporate activities. Prior to joining Guidance Software, Harrington was a senior attorney at Intel Corp. where he worked on complex IP agreements, mergers and acquisitions and general corporate matters. Previously, Harrington worked on E-discovery and litigation matters for the law firm of Munger, Tolles and Olson in CA. Harrington received baccalaureate degree from the University of California, Los Angeles and his Juris Doctorate degree from Southwestern University School of Law. He is an Adjunct Faculty member of the Los Angeles Community College District and Vice President of the Southern California Chapter of the Association of Corporate Counsel.

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in your work right now?

HARRINGTON: Just my own personal experience as a lawyer as to what I see with outside counsel. I'm flabbergasted at how lightly meet and confers are taken these days. I know traditionally meet and confers were kind of: "Yeah, I've got to sit down and talk to the other side's lawyer about the case but I doubt it will really change anything — just an administrative hurdle that we have to do before we can prepare a motion to dismiss." Nowadays, the meet and confer is a critical aspect of the case. And it needs to be taken seriously by outside counsel, inside counsel and your litigation support and E-Discovery professionals. It can really set-up one party or another for victor or defeat. And as the seven points demonstrated, the party that can come to the meet and confer with substantive knowledge of the data that exists or potential discovery costs of the case, has a huge advantage. My position on those meet and confers is you need to be in a negotiating position. You need to have your act together and be able to come in with a proposal that a judge could sign off on, even if your adversary does not. And if the other side is not prepared, you've got a strategic leg up. If the other side is prepared, then at least you're able to talk about what is relevant in terms of actual production in a case, because you have an awareness of the volumes and the cost that you're looking at in the case. My opinion is that the courts should move the meet and confer dates back, because there's so much more preparation that has to happen now before these meetings.

MAXWELL: There is a tremendous amount of work that has to happen before the meet and confer. I don't know if any of you have read the Maryland protocol, but even just using that as a skeleton, it's quite lengthy. If you have a client that has a very intricate network, it's going to take a lot of digging to find the answers to every conceivable question that could come up in the meet and confer. And it could take you several days to get down to the right person at your client or to get all the answers. I've helped a couple of clients with the hard legwork, because I'm familiar with corporations and have worked with corporate clients in the past

on several matters. I knew somewhat more than outside counsel knew about the internal workings of the corporation. We have been able to help them understand where all the data was located and what kinds of systems were in place and what Legacy systems the client had. It can be a lot of work, to prepare for the meet and confer. The corporation should start by having a document — a skeleton — from which they can expand, because there is no reason to re-create the wheel every time. You have to assume that every litigation matter and every outside counsel is going to have a meet and confer. Help those people by having a document put in place or a skeleton you can send them to get them ready for that meet and confer so that they're not panicked and starting from scratch.

ANDROVETT: *Is that part of the advice and counsel that you give companies or law firms that would hire you is here's how you get ready for the meet and confer?*

MAXWELL: Yes.

HARRINGTON: It all comes down to the early case assessment. Not only do you have to have a systematic and defensible process in place, you need to be able to demonstrate it throughout the course of the case. You need to be able to have — from a strategic or tactical standpoint, I guess, you need to have an awareness of what you're looking at from a qualitative and quantitative approach. In the old days, it used to be we had a thousand boxes of paper. And you kind of had an idea of how much it costs to produce a box of paper and go through it. Nowadays, you need to have an idea of how much it costs to go through a gigabyte of data and how many gigabytes of data you're looking at. If you can't come to agreement with your adversary at the meet and confer, you ask to present your defensible plan to a Special Master and demonstrate how certain data is or is not needed for the claims. You can demonstrate how certain data is not needed, because here's how responsive it's going to be to the case based on how many keyword hits or custodian hits are produced when it is electronically previewed. Even if you lose the relevancy argument, because you are armed with the volumes of data that must be searched, you are in a much

better position to argue for cost shifting, which is a great point that was brought up earlier. It is amazing how quickly your adversary will agree with you that certain data is not relevant — if they are going to have to pay for the collection, processing and production of such data.

ANDROVETT: *I guess this kind of goes to what's the worst sin if you're a corporate client. Is it to not produce enough or is it worse to not ask for enough? It would seem to me — and I'm surprised that I don't hear this more — that someone with the expertise to cut through the millions of pages of documents would actually save a company money by being able to more surgically identify what it is that you're looking for. Is that right?*

MURPHY: It's absolutely right. Let me give you a great example of just that. We had a client who had over a ten-year relationship with a customer buying product. And they entered into a contract dispute that was specifically related to the interpretations of the warranties within this agreement. And when the client came to us, they were the defendant. The customer was the plaintiff. They said: Look. We do not want to destroy this relationship. But we really believe that they understood at the time that the contract was signed what the intent of that warranties paragraph said. So our client needed to meet their discovery or their preservation obligations. They sent us all the evidence and, therefore, met their preservation responsibilities. But instead of searching using the words that could or would or might have been used in the evidence, we narrowed it down based on the facts that are contained in the metadata. For example, we narrowed it down to the communications that our custodians had with that potential customer. And because we knew the date that the contract was signed, we chose not to include anything after that date. Then, using the information we learned from the facts in the evidence, we interviewed custodians, and found that the material discussions that would have related to the warranties clause of that contract happened on or about 90 days from the time that the contract was signed. Now the bad news for the opposing side was that the individual that was involved in the negotiations and the specific communications

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related to the warranties was no longer employed by them. But by providing the evidence, the material evidence, that it was indeed discussed across three days, our client was able to go back to the customer and say, "Look, we did have a material understanding as to the interpretations of this." And that case went away. And now we still have a great client and a happy customer. But that's using these facts. No speculation, conjecture, and hearsay, to provide that type of a result.

ANDROVETT: *What other insights might you have on this, Mark or Amy?*

MAXWELL: The amount of data that a corporate client produces or doesn't produce is typically determined in the end by their outside counsel based on a strategy developed prior to document review. It all goes back to the strategy of the case and can be greatly impacted by how much data they do based on the document retention plan and how that plan is followed by the employees.

ANDROVETT: *Does a corporate client ever ask their lawyers: Is there a way we can really, really narrow what we produce? Not so much we're afraid of the smoking gun, but give me a break, guys. We've got servers all over the place. This will shut us down?*

MAXWELL: Corporate clients are extremely concerned about business interruption. In today's economic environment, the cost of E-Discovery and production can determine whether it might be better to seek a settlement for a case that two years ago would have been actively litigated.

ANDROVETT: *I guess what I'm striving to see is if it's possible to identify what's the balance? How does someone who runs a medium-sized company make that balance? Sort of strip away the emotional aspect of litigation, generally.*

HARRINGTON: Your approach from the beginning has to be one of over-preservation — but when it comes to actual collection, utilize efficient, targeted collection practices designed to get that stuff which is potentially relevant. For example, 80 percent of data that's on a hard drive at any given point in time is junk. So if your outside lawyer or your in-house lawyer is preserving a full disk image of a hard drive, who is going to review that data? You're going to pay for that. Okay?

What you do is, in most cases, depending on the claim, obviously, but most of the time the real juicy data is the user-created data on a hard drive or data storage. You want the stuff, the hearts and minds, of the people that created the data, because that's going to be the evidence that proves the legitimacy of the claims in most cases. If you can focus on the user data at the outset of a claim, right then and there you're culling right at the point of collection, a much smaller universe of data and a much smaller discovery bill for you. To make the process even more efficient, you carve up and collect only that user data that is responsive to the keywords, date ranges and criteria you agreed to with the other party. Do you need 50 copies of the same document that was attached to an e-mail? No. You collect one copy, and then you do a report detailing the 50 people that received that document. Just by knowing your data volumes, being able to target collection and doing some basic de-duplication early in the case, you will be able to strike a good balance between burden and relevancy.

ANDROVETT: *I used to have a civil procedure professor who used to talk about a compelling question in some jurisprudence was not who decides but who decides who decides. And I liken that to this a little bit. I wonder, who decides the search terms? Is it the company? Is it the lawyer? Or is it you guys?*

MAXWELL: It should be a combination of both parties, perhaps a judge making an order on what search criteria should be used, and to some extent the knowledge of your E-Discovery provider. Every search system is different and has different nuances for syntax and Boolean operators or proximity. So to some extent there's that collaboration — or should be that collaboration — in all parties to make sure that you're searching within that system as efficiently as possible.

HARRINGTON: Yes. It's different in the preservation stage before you've even had any sort of meet and confer. You have to be conservative and preserve a broader amount of documents than you anticipate actually having to collect and produce.

ANDROVETT: *So then you're going to put your arms around a big subset?*

HARRINGTON: At the point of your Litigation Hold, you will have your biggest



Amy Maxwell senior electronic discovery specialist in the Dallas office of Applied Discovery, a division of LexisNexis. As one of Applied Discovery's most experienced discovery consultants, Maxwell consults with clients on a wide variety of discovery matters including data gathering techniques, maintaining proper chain of custody, identifying potential sources of relevant electronically stored information, negotiating scope limitations and producing documents to requesting parties. Maxwell works closely with her clients to develop cost saving strategies concerning collection, processing and review of email and other electronic data. Maxwell is a frequent speaker on the topic of electronic discovery. She received her B.A. in Psychology from the University of North Texas in Denton and is a certified paralegal.

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bucket of data. Outside counsel can help you frame the broad parameters of the litigation hold and preservation. When you get into the finer points of actually having to search, collect and bucket the data into issues, engage with the other side as quickly as possible. Transparency with the other side and with the court, is key — here is our world of data, here is your claim, here is what we identified as potential custodians, keywords, date ranges etc. Show reasonable process and reasonable thought, because if the other side is not dealing in good faith and cooperative with you, as the Sedona Conference's Cooperation Proclamation is strongly pushing these days, you're going to be in a much better position from a process standpoint when you have to demonstrate that your efforts were reasonable given the circumstances.

ANDROVETT: *Now, when an E-Discovery vendor is engaged, clearly one attribute they bring is expertise and experience. How much of this is software? Is there a sort of a magic button here, magic solution, or is that another issue that we should all consider very carefully if we're faced with E-Discovery type issues?*

MURPHY: First, there is no magic button. Let me repeat that. There is no magic button. Having been somebody that has actually run an electronic discovery lab before and processed about ten terabytes a month, there is no magic button. And the issues that are associated with our responsibilities to produce relevant information are related to our ability to cull out those issues that are responsive to this lawsuit. So it's as complicated as an attorney's responsibility to litigate a lawsuit on behalf of their client, as it is to provide to you what it is that you need to meet those obligations.

HARRINGTON: Any piece of software is as good and relevant as your ability to use it and for its ability to produce what will hopefully be defensible document production. But, yeah, I agree. No silver bullet. If you're familiar with the EDRM model, there is generally not considered one perfect solution for that model. There are a few providers that come close. And the other thing with software is how proactive do you want to be in your corporation. If you bring the software inside,

yeah, maybe there's a little bit more investment up front, but you're in a much better position in terms of managing your own data if and when litigation comes. If you don't have something in-house, you're essentially deferring to an outside service provider, who will do a great job for you as well. It's just a different cost dynamic.

ANDROVETT: *We talked about key word searches. Are there other kinds of searches? And if there are, where do they lead you? Why would you use them?*

MAXWELL: There are other kinds of searching. One that's new on the market, I would say within the last two years or so, is a type of concept search using the idea of clustering and the ability that some concept search methods can give you to either pull in a bunch of relevant data or dismiss a bunch of extraneous data that may not be relevant to the claim.

HARRINGTON: Yes, there are different models of key word searches, like proximity searches. I don't want the word "taco," unless it's near the word "George." There's what's called fuzzy hashing where you can decide on the relevancy. Here's the original document. I want to find out all the different flavors of how that document traveled throughout my organization. Search with this fuzzy hashing and tell me the degree of relevancy that other documents might have to that one. It is a little less literal. The key point, though, is whatever your software technology is you had better be able to understand it and explain it at some point. Having a great algorithm is only as good as you can trust its results and explain how it works. If you're going to walk into court and say that your software is "a black box. We put the data in and here's what came out of it," that's a hard position to defend if the other side wants some authentication that the evidence you are producing is the best evidence. Using a software technology that has been validated by numerous courts will help you do that job.

MURPHY: There's another concept to the production of discovery, and that's what's called fact-based culling. Fact-based culling uses the facts that are contained in the metadata. So let's talk about metadata, for example. Metadata has been defined as data about data. How much sense does

that make? So let me offer to you another definition of metadata. Metadata are the facts that define the content of the files. They can tell you when the document was created, who created it, whether it was modified, who modified it, whether it was sent to somebody else, who sent it, when they sent it, who received it, what did they do with it after they got it. Those are, when done in conjunction with a legally defensible methodology on the collections side, are almost irrefutable facts. So if you think about it for a second, this by definition is the best type of evidence we have ever had. It was created prior to anybody even thinking that this was going to be litigation. So the decisions that we can make using the facts that are contained in the metadata of this evidence in conjunction with the merits of the case, allows us to defend the decision on whether we need to look at or further scrutinize based on the legal merits of these files, whether they could even be relevant to this issue.

ANDROVETT: *And, Ryan, anymore in conducting searches? Is that just the best practice is every client also examines the source of the metadata or is that an extra step?*

MURPHY: Well, it's really not a legal standard of which discovery is produced today. But it's the nature of the sanctions and summary judgments that the courts are writing their opinions about. And it has to do with our ability to come up with these words. At the end of the day when we look to the changes in the Federal Rules, we've got to understand that the Federal Rules were amended to include the electronically stored information. So what that means to us is that the same level of due diligence and the same thought process that went into producing discovery in a litigation case prior to the ESI, that level of due diligence should still be applied to the electronic records. So we need to think about things like who were these individuals that produced this information? What were the roles and responsibilities of the communications between the people who were under legal hold and these individuals they communicated with? So if this is a contract dispute and our custodians are having communications with human resource individuals, if there's no reason to believe that those communications with HR and

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our custodian could remotely be related to this contract dispute, then why even consider them as relevant. You would have never have interviewed the HR individual in a contract dispute. Why search it? So that's the fact-based culling, but it also gives us the ability to defend the decisions. So if we find out that the real brainchild behind this contract issue is human resources, well, we had no reason to believe, no knowledge or aforethought, of the fact that the mastermind is the human resource director in this contract dispute. It is the same type of logic that we would have previously used to defend decisions on why we didn't interview or depose individuals.

HARRINGTON: It's extremely risky for counsel not to preserve metadata, under any definition of ESI, counsel should at least preserve it as a part of your process. Now, whether it would be relevant or not, you don't know. But a lot of what might make it relevant can come out of your process itself. If you have to defend against a claim of spoliation or document destruction or fraud or something, you're going to want to go back and maybe look at that metadata. There's been a lot of back and forth by the courts lately as to whether it's relevant or not. But the great case on this point is the *Aguilar* case, which if you need some good light bedtime reading, goes into a lot of detail about metadata, when it should not be produced, when it should be produced. For plaintiffs, the lesson I get out of that is that you better ask for it specifically. And for defendants, it's that best practice might be to preserve it even if it's not going to end up being produced — sort of a "just in case" preservation.

ANDROVETT: *Some of the folks in the room here today and who are going to read your comments in Texas Lawyer, represent small companies. They may not have an in-house software solution. Is there an alternative to hiring an outside vendor in that situation? Are there things that a small company can do?*

HARRINGTON: I don't care how small your company is you can put in place processes on how you handle data. You can identify your world of data. You can trace an e-mail from start to finish. And you can be prepared. Even if you don't

have a robust technology, a lot of these service providers out there aren't going to charge you anything to get their technology. They just want you to use their technology. So look around. There are all kinds of models out there and several good solutions that can scale to the size and scope of your company and the legal matter at hand.

ANDROVETT: *We had a fascinating thread in the first session where we started to talk about the obligations that are slowly evolving and placed in the lap of either the in-house lawyer or the outside lawyer to know not only the E-Discovery rules but to get their arms around what the data is and how to retain it and when to purge it. Do any of you have any thoughts, based on your own interactions, about the responsibility of the in-house and outside lawyers to have their arms around these issues? And if you do and you think it's lacking, what can they do to get more up to speed?*

MAXWELL: Outside counsel today have a lot of weight on their shoulders making sure that they are asking their clients the right questions and they are getting complete answers as to where data exists. It's not appropriate any longer for corporate clients to say, "We don't have it." Well, okay, if you don't have it, where did it go? Where would it have been? It's a very slippery slope when your client tells you: I don't have anything related to this. So you should be asking a lot more questions to those points and interviewing more than just the person, perhaps, that's telling you they don't have it, because maybe somebody else knows where it's located and what they have.

MURPHY: How are we going to handle a terabyte of information? And we don't really enjoy the discussion with you on what is it going to cost to process a terabyte of evidence. That's not fun for me, it's not fun for you, and it's not fun for the client. But the reality of it is that we need to let the clients know that in order for us to decrease the amount of evidence that is being presented to us as ESI, they've got to take on a burden of responsibility to provide us with only that which they believe can be relevant evidence. Because if you give it to me and I process it, then that means that eventually some day I may be asked to testify as to what I did



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with the evidence that you gave me. So if you give me computer files and if you give me executables, I've got to keep track of that. And in order for me to keep track of it, I've got to ingest it into our application so that we can defend it. So if we're looking for the ability to make decisions that affect the cost associated with the discovery, then we've got to be in this together. So on a client side, we've got to say if this doesn't have anything to do with a file that could not have been created by a human being, and the merits of this case deal with what humans did, then let's together not give me the computer or computer created files. And that's an easy ability to go back and defend the fact of why we didn't load or process computers or files that were created by a computer.

HARRINGTON: It's just the same thing of competency. And part of how I interpreted your question is how do you become competent, and what are your obligations there? And what brought it up this morning was there are various ethical responsibilities that attorneys have to become competent. This is very scary. Are you asking me now to be a technologist? I don't think so. Basic competency,

knowing your client's data, is analogous to knowing where things were stored 10, 20 years ago, where are the files kept. It's just a different type of form. What we see in the marketplace, too, is there are a lot of companies that are recognizing the sort of the schism between the legal mind and the IT mind, and they're creating sort of hybrid positions within their companies. These are people who can hopefully play both sides, act as the intermediary, and also serve as your 30(b)(6) witness at that point in time when you're going to need someone. You don't want your lawyers testifying. And no offense to the IT people, but most of the time you don't want those guys doing it, either. So we see a hybrid kind of "Director of E-Discovery" position being created with many of our customers.

ANDROVETT: *And from the judicial point of view, a similar person has evolved, and that's the Special Master. And this was touched on in the first roundtable, although I will say not nearly as much as when we did this last fall — and that is the state of mind of the judges, not only at the federal court level but these rules have migrated down to the state courts. The complaint that*

I've heard for years is a lot of these judges just don't get it. And if they don't have a law clerk who gets it you're going into a minefield when you're discussing E-Discovery issues. I guess, first of all, what do you see out there in the judiciary in that regard? And then I'd be interested in your insights how you can help the lawyer educate the judge, if that's an essential part of the case at some point?

MURPHY: Well, having been somebody that's been asked to testify at the state and federal level, I can tell you that they are struggling with this. And it is truly an invested struggle, because the reality of it is, what they're trying to weigh is what they've always known — the burden of proof in a civil litigation lawsuit is a preponderance of the evidence. And so when they're given evidence that is obviously responsive that a client did not produce, they ask themselves how did this happen? And then we go to them and we try to explain that we formulated and applied these extraordinarily complex series of words across the evidence, and we did not get back what you would have deemed as responsive. The courts can't get their heads around that.

ANDROVETT: *Is part of that sort of a judicial reluctance that they feel that somehow this technology is preempting their right to decide or it's somehow intruding? Because in many ways this is a totally different discipline.*

MURPHY: I don't know whether they're thinking of it as intruding. What they're trying to figure out is how we hold it to the same professional standards that we've always used to hold attorneys accountable for production of discovery before December of 2006? That's the fundamental principle that everyone is having difficulty trying to force into ESI.

ANDROVETT: *But I could see where having the judge understand not only the technology but how you get to certain conclusions is really dispositive of the case. So how do you go about educating those judges, if they will be, and I'll assume for the question that they will?*

HARRINGTON: The Special Magistrate is a great, great invention for E-Discovery purposes. Most judges were not brought up in a technology environment. They're going to defer to their own expert, if you will. In the federal courts especially, you're



starting to see a little bit more sophistication. But for every Judge Facciola out there and Judge Grimm, there is whole lot of them that are not well versed in technology and ESI. And even at the state level the lack of expertise by the courts is even more pronounced, because a lot of states haven't really implemented their version of the Federal Rules. California just passed something this week. So it's an educational process. I see constant struggles over what is the appropriate standard for ESI discovery. Is it good enough to do a reasonable investigation or do you have to be perfect? And there's a constant struggle between those.

AUDIENCE MEMBER: *I'm hearing a lot about the importance of selecting the right vendor and comments about how not every vendor is right for a particular case. But given the economic climate that we're all in, how do we as the lawyers know whether the vendor is telling us the truth, when we know that every vendor is going to answer, yes, we can help you with this? And how do we discern a correct yes from a yes that will hurt us in the long run?*

HARRINGTON: As one that hires vendors myself, for my own internal legal purposes, I want a trial basis. I do this with my lawyers. They get me on a retainer of 200 bucks a month for an hour of consultation. I get a feel for how they work without a major investment. So if I'm going to buy a technology or use a service provider, I want to see what you're all about before I'm totally sold. Maybe I'll give you a small employment case and see how you do on that. And I want a low up-front cost. This is your cost of doing business. You've still got to convince me. Let me pay for your services or software, as I use and find value from them — that is customer centric. So I look for those sorts of things.

MAXWELL: Ask to meet the people that are going to be working on your case. Ask to talk to the project manager that might be assigned to your case so that you get to know that person to see if you can work with them. Ask to see a demo of the tool. Ask to talk to the people that are going to be performing your data collection. It's within your right to speak to every single one of those people, since their hands, if you will, will be touching your project.

And if you're not comfortable with those people and the competency those people are providing to you or showing to you, then move on to another vendor.

MURPHY: I'd say use the same level of caution that you would have used to select an attorney. The information that we give you to do your job is going to be almost as important as why the client chose you. Let me just add one more thing. I really like what Mark said about going and talking to and seeing if you can give not just a cerebral idea of what the case is about and see what the answers are, but you've also got to afford yourself the ability to do that. So what we can't do is to wait a week before the production is due and then start doing the due diligence that's associated with all of the nice things that we just said that you need to do. Oftentimes we're up against a wall, and we've got 24 hours to print out hundreds of thousands of pages or provide gigabytes and gigabytes of evidence to meet your discovery requirements.

ANDROVETT: *Mark, editorial comment on my part here, but what I like about your approach is in my business we talk about trying out the client. My advice to a client is always better after I've gotten to know them a little while, and that model that you suggests there also gives the vendor a chance to get to know you at least a little bit where you can start to make judgments based on the advice and counsel that they're giving you. And that's always going to be better once they're a little bit immersed in your culture and your system. So that's just an editorial comment.*

HARRINGTON: It's not just a software or technology you're buying. You're entering into a relationship. And litigation takes forever. So this better be a long-term thing. You've got to like the people you're working with; you've got to trust that the technology you are using has been vetted by the courts. A trial or a pay-as-you-go model is a great way to do that.

MAXWELL: There's not a lot of time in a lot of cases, though, to have that trial. How many of us in an ideal world get a call: Oh, litigation is happening in two months, and I'd like to try you out. I personally get phone calls that say, "I need your proposal in an hour, by end of business. Help me." In a perfect world that would be great.



Mike Androvett is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience is essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. He can be reached at 214-559-4630 or mike@legalpr.com.

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Let's do a sample, let's set you up, or even put you in a database that's appropriate for you to just go and play around on. That's certainly acceptable, and most providers will do that as well. Doing the sample and trying you out, that requires a little more forethought where perhaps you develop a long-term relationship for further on down the road. But maybe in this case specific litigation needs to happen right now. So do your due diligence before. Start evaluating your electronic providers so that you can do what he has suggested and have a sample or a trial run, if you will.

HARRINGTON: That's an excellent point. And so that goes back to the point of knowing thy data. If you know your company keeps 80 percent of its data in a certain file format, like Excel spreadsheets or PDF spreadsheets, that's your No. 1 question for all your vendors from start to finish in the E-Discovery process. How well do you handle the data that is most relevant to my company? Some solutions are great on e-mail, but not too effective with PDFs.

ANDROVETT: *I know that this is something that all lawyers and all corporate executives struggle with. And that is how do I know that I've got the right people on my team? We chuckle about this in my office all the time. Our work is much the same. People call us when there's an immediate need. And we all kick back and say: Boy, wouldn't it be great if they called us with plenty of time? So let's create an image of what that looks like. If someone is calling you and it's not an emergency — and I'm not foisting this issue on you as much as reacting to the first panel, because the lawyers were saying this, right? They kept saying: Boy, if you get there and you have a chance to look at these issues early. So help us understand if someone is being proactive and they come to you, the services that you will provide, what does that look like? And forgive me if we find ourselves repeating ourselves, but it's probably a good time to try to put it all back in the bag and give it an outline.*

HARRINGTON: It really depends. We all share. My company is primarily a technology company. We're a software developer. Our whole point is to empower our customers to be able to manage their data. Now E-Discovery is a huge component of

that, but managing your data from day to day, from data auditing, compliance, employment investigations or fraud, transcends all of the litigation stuff. The same basic competency must be present in a company — the ability to quickly preserve, identify, search data in an efficient manner that gets you your answers in a manner that is legally defensible. So if you have that technology in place and you get hit with a lawsuit, it's that much easier to sort of switch gears and focus the technology for lawsuit purposes.

ANDROVETT: *So, at least as it relates to you, Mark, they come to you. Then what you do then is you map their data, I'm guessing. There's probably a better term for it, but you get your arms around who is doing what, where is it stored?*

HARRINGTON: Yes. The world of data, if it's a case-specific, reactive thing what's going on, who's suing whom, what are the issues, we jump in the trenches with the customer. If it's not reactive — if a customer is being very proactive — which we're seeing a lot more with our customers — and they just want a platform, then we work with them on that. What are the issues at your company? Are you in the IT world? Are you afraid of employees leaving and taking data with them or IP? Do you have a lot of infringement stuff? Do you do a lot of M & A work? There are a lot of investigations just related to that kind of stuff.

ANDROVETT: *What does success look like, Amy, when that prospective client comes to you and says, "Hey, no emergency. I just want you to do your best work."*

MAXWELL: At Applied Discovery, we have a whole team of arsenals. We're a service base. We're not a technology based company. We're service oriented. We do data collection on our side. We have a data collection team. Almost every single one of those guys and gals on the team have some sort of government experience with the FBI or Homeland Security or something in that nature. They have very nice pedigrees associated with them. Just by taking a look at these individuals and talking to them, you'll know that they do understand the importance of preservation of data and what that's going to mean for the success of your case further down the road. We also have a team of

individuals who act as project managers. Those people are ex-litigation support personnel or ex-attorneys or ex-paralegals, who have walked in the shoes of every one of you out there. They've lived that litigation world. They've conducted those reviews. They understand what it takes to go through a document production. Our technology has been around for 10 years. We were built by attorneys who were struggling to figure out a better way to get through the electronic data that they were reviewing. And we have a team of production professionals who can help you take a look at what the best format may be for you to produce your data in, your search criteria, to make recommendations for you. In the grand scheme of things we help our clients, law firms and corporations, kind of from beginning to end, soup to nuts, if you will, all the way through the litigation. If you need help with protocols for litigation holds, we can come in and talk to you about that. If you want to figure out what the best way to do some data mapping in your environment, in your technology, we can come in and help you with things like that as well. For all of the areas that touch litigation, we are able to offer support.

MURPHY: Bottom line, if this is already a lawsuit waiting to happen, what we want to do is to find out what the exposure is to your client. So we will, depending upon the merits of the case, if it's a known party dispute, seek to find and expose all the communications that your client had with the people who are suing you. If it's an unknown party complaint where the exposure to us is the internal communications between colleagues and that really was going to represent the entire universe of information that we're going to produce, I want to know at the very highest level how much evidence are we talking about so that I can get the cost associated with the production of that information back into your hands so that you can go back to your client and give them a ballpark on what is that going to cost. That is my best case scenario.

ANDROVETT: *I'm still in pursuit of cutting costs. The largest cost is going to be the document review. You may have noticed in the first panel — and it wasn't exactly a disagreement — a different take on the*



notion of outsourcing. And I remember David's making the point of using them as a resource. They really transcended that notion of document review. They started to inject into the strategy and the information and the questions to be asked and the issues that arise. Do you have any opinions about the use of outsourcing attorneys for document review?

MAXWELL: It can be extremely successful. For every dollar that your corporation will spend on the E-Discovery provider, \$5-8 will be spent on the review. So when you get your estimate from your E-Discovery provider, you might panic a little if you think it's going to cost you \$75,000. That may seem expensive. But, then you have to add an additional multiplier of \$5-8 on top of that for attorney review. What we're finding is that there are a lot of excellent staffing companies out there who are very skilled at helping law firms and corporations with the review. Attorneys that are not only subject matter experts, but they're also attorneys that are used to working in some sort of online review platform or with a specific software. So you get the expertise on both ends. Especially now

with so many attorneys being laid off, that contract pool of attorneys and competent people has grown exponentially in the last six months, even. So there are a lot of great ways to harness that outsource staffing company's project management ability to help reduce the costs of the litigation because they can specifically provide internal reporting structure. For example, in a pool of 50 attorneys, they know who is reviewing documents the quickest, who's making the best calls for responsiveness or privilege, so that they can make assumptions or they can cut people that aren't pulling their weight so that they're getting through the documents as quickly as possible.

And I know that they mentioned the daily review at 5 o'clock, where everybody comes in the room to talk. That's very much true what happens when they have a large outsourced review. They typically have a daily conference call or meeting where they talk about the types of documents that they're seeing, the issues that they're seeing arise, and they have reporting procedures in place, especially the established staffing companies that have been at this for years. They know what they need to do to come back to the law firm and the corporation with their deliverables for the end of the day. It can make a huge difference for that first pass review, especially when you're dealing with hundreds of gigs of data when you've got attorneys who really only need to get at the nitty-gritty heart of what's relevant. Sometimes your attorneys cast a very, very wide net so that you're very, very careful that you don't miss anything. And in today's world, people e-mail from work friends, they e-mail non-business stuff. It is a fact of life. It happens out there. So you're going to get a lot of junk, even if you try and filter. Sometimes things are going to sneak through, and you're going

to have an overly broad pool for criteria to look at. So that's where your contract attorneys can provide an enormous benefit by saving time up front and allowing the law firm attorneys to put eyes on what's important.

MURPHY: There's nothing I would add to that. She's right on point with that.

HARRINGTON: I agree, except my focus as an in-house counsel who has to pay for these contract lawyers is, I want to know how many of these lawyers are wasting their time looking at the same document or other junk that is not relevant? I want quality control in my processing and my culling that happened well before the contract lawyers got the data. Is this good data? Has it already been "bucketized" for paralegal review for the claims in the case?

MAXWELL: And that goes back to how you set up your review. That's not necessarily a function of the contract attorneys. That goes back to how the data has been collected and what your strategy is for duplication and what the tool can provide for you or what the project management side of the house can provide for you in possibly pre-populating some collections at the beginning.

HARRINGTON: The cost of an attorney to do this goes down remarkably with the higher level of quality data that is actually going to be reviewed in the first place.

ANDROVETT: *I'm really struck how your opinions are much more aligned with the so-called lawyer panel than when we did this panel four years ago. And we talked about that before we started today. I was really struck when we first did the very first E-Discovery panel. There was almost animosity in terms of the lawyers' perspective —*

MAXWELL: We've brought them around to our way of thinking.

ANDROVETT: *Well, it probably does reflect, right, an evolution and more people are on board.*

MAXWELL: It's a partnership now. It has to be.

ANDROVETT: *I remember a derisive comment from a member of the vendor panel the first year we did an E-Discovery roundtable who basically said, "All of this advice that we're giving lawyers is great. But it's really no help if we're still working with the head of litigation, who thinks that he*

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or she still has to read every document." Are you still finding that sort of mind-set in and among some trial lawyers?

MURPHY: Well, and it's the same thing that the courts are really struggling with. It's the same type of logic. And how can we let go of this? To what degree can we send evidence to a vendor, they do their magic, and then it comes back to us, and we don't have any ability to do the systems of checks and balances that we've always been accustomed to being able to do, either through interviews or depositions? Well, the reality of it is that gap is closing because of the tools that are becoming available. It's no longer just the roll of the dice, throw it out there, whatever gets hit, comes back. We are advancing in areas of technologically like duplications and conversations keys attached to communications or e-mails. We can actually rebuild the DNA or a chronological order in all the individuals that were associated with that communication. The technology has started to catch up with the methodology that the attorneys are comfortable with. So that's a good thing to say. We're starting to see less and less of that.

ANDROVETT: *And not to belabor this to death, but I could see someone who has tried cases all their lives saying what you guys are talking about is data, but what I see is insight. I look at all these documents because only I know, based on my experience and knowledge and insight, that that fact is determinative. So how do you reassure that lawyer who, if you could only get him over that hump, that you could really help him and get him working on the stuff that maybe he or she should be working on? Talk a little bit about that, because I know you must be encountering it.*

MURPHY: We actually designed our software to let the attorneys make those decisions, using the facts that are contained in the metadata. So it's not a leap for us. So they actually go in, apply the legal knowledge, they apply the Rules, we can define potentially privilege, any communication that these custodians would have had with an attorney who could have worked on a matter like this. Those conversations are by almost definition potentially privileged. And so we allow them to go through and apply that logic to the evidence.

MAXWELL: I worked for an attorney who wanted to put his eyes on every single thing, bottom line. But what that translated into was: Amy, you need to read everything, and then come back to me and tell me what I need to know about this case. And so that's much the same thing that's happening, and what's going on with contract attorneys. And partners are delegating to senior associates, right? What's going on? And senior associates are telling the partner what's happening on the case. And to some extent depending on the litigation, they might feel comfortable enough running some search criteria and say, "Okay, what if it meets this criteria, but not this criteria." Then it could be produced. It all goes back to what you're trying to accomplish and what kind of litigation you're looking at. The other extreme can be true, too. I've heard of companies that have dumped hundreds of terabytes of information, run some search terms and they've produced everything that came back with a hit without anyone laying eyes on them. They've got an agreement that if something comes back and it's privileged, they have some sort of claw-back agreement in place. But that's not very common. Most attorneys feel like they have to read everything.

Because it's technology, and technology is evolving, it can be difficult to find the comfort level. In my experience, because of how they're built and what they're trying to accomplish on their case, most will never really going to be comfortable with not looking at everything.

ANDROVETT: *Amy, you touched on something I wanted to make sure we jumped into. And I say this as a lawyer and with all the love in my heart, but with my lawyer clients, if something good happens, it was their idea. If it goes south, it's my idea. And so I wonder how much responsibility is placed upon you either in the development of the software or in your counsel and guidance? Don't let something out there that they shouldn't have*



because it's not always so easy to bring it back, is it?

MAXWELL: It's difficult.

ANDROVETT: *What sort of assurances can you provide in the course of your work? What do you need to get from a lawyer to make sure only the stuff the other side is entitled to get, gets there?*

MURPHY: It just depends upon how much trust they've put in us and allowed us to be part of the process. We can't do anything that we weren't asked to really do.

MAXWELL: You have to be careful as a provider. There's a fine line between counseling the attorneys and practicing law. You do have to walk that line and be careful what kind of advice is given and how much you're involved in a specific matter or not, depending on what kind of a company or vendor you work for.

ANDROVETT: *I agree with that, but I can also hear the lawyer saying: Cover my back. You've been down this road before. I haven't. We're going to expel out of our system huge volumes of information. Make sure we're not giving them stuff they're not supposed to get.*

MURPHY: I'm sure everybody on the panel will agree with this. We relish the opportunity to do that. However, unfortunately, we are not given the opportunity to become that involved for either time constraints or knowledge sharing constraints or sometimes just semantical constraints.

ANDROVETT: *And based on your experience, then, at the other end of that equation, what can the company or what practices have*

you seen the outside lawyers employ to make sure that privileged information remains in the system and is not turned over?

MAXWELL: That goes to work flow that the firm establishes for how they're conducting their review inside of the tool and what processes they're putting in place to correctly identify documents that are privileged or potentially privileged. Most providers will work use what we call a "production spec" that is created with and can be used to establish review protocol throughout the process to help determine how to handle documents based on particular criteria: What should be done with this document that meets this criteria, but not this criteria? If it meets this criteria, then include it in the production set, apply a Bates label, a confidential stamp, etc.. Finally, it's also important to institute a series of checks and balances so that outside counsel can look at documents on the tool, and ensure they're then coded appropriately before production.

ANDROVETT: *What's your take on the next phase of electronically stored information? The audio that exists, the video, the social networking sites, Twitter, which as an aside, it's interesting to me that a few federal judges now are letting reporters Twitter from their courtroom. Having been a reporter, I can tell you that every other technology has been rejected soundly. What do you make of that? And what sort of challenges do those mediums pose to companies and lawyers?*

HARRINGTON: One of the beautiful things about a lot of these evolving types of data, whether it's video, audio, etc. — is ultimately it's put into a digital format at some point. And digital format is going to have metadata associated with it for the most part, whether it's a file type or how you named it or when it was created. And so a lot of the technologies that we utilize to search word documents, would still be appropriate for some of those types of data. The metadata is critical. I think you're going to start seeing more and more discovery-related case law where the court is asking why a party did not treat these other forms of ESI in the same manner that it treated, say email files. And the argument of it's too burdensome, we couldn't produce it, we couldn't search it it's a voicemail — these arguments will get weaker and weaker over time because

No. 1, there are some technologies out there that will let you do it. No. 2, there is metadata associated with that electronic file, and you can search that.

MAXWELL: For every new type of data that is produced out there, there's a company trying to figure out how to get it and how to make it so that it can be interpreted and read for whatever purpose it might be. There are some huge privacy concerns for Facebook sites. There are some employment matters that we've seen Facebook sites come into play. And definitely corporate material or pictures are being posted on people's Facebook sites. And those are all issues that should be addressed at some point.

ANDROVETT: *But what I'm hearing you say is that the medium is really not the message, that really this is just another form that can be identified and located and retained.*

MAXWELL: Absolutely.

MURPHY: No doubt about it.

ANDROVETT: *Looking down the landscape five years from now, provide some guidance for the folks here in the room and the folks who will be reading your comments in the Texas Lawyer newspaper. Do you see, either in a case or legislation or evolution of technology that will change the paradigms a little bit over the next five years? What can we expect going forward under this huge umbrella called E-Discovery?*

MURPHY: I really think that the law is going to start to inject itself into the discovery of electronically stored information. I believe we're coming to the point at which the existence of words within the body of electronic discovery in a civil litigation case is not the level of due diligence that's required when a burden of proof is a preponderance of the evidence. We're going to have to sit down, take a look at possession, roles and responsibilities of the individuals that these custodians communicated with, and be able to disseminate whether they were involved based on the merits of the facts of this particular case to defend the decisions on whether we need to continue to scrutinize further for legal merits, that information. That's the piece that is really missing today that is causing all the cost overruns and the fear, uncertainty, and doubt, that's not just within the attorneys' environment but in the courts as well.

MAXWELL: Before I look ahead, it's interesting to look back five years ago to see where we thought we'd be today. Earlier today we talked about how it seems some judges and special masters are still far behind. Looking forward, I still expect to see that the courts will be ramping up to handle more electronic evidence and to better understand the technology and challenges. There will be more case law out there hopefully to provide guidance on a lot of these issues so you're not out there searching blindly to try and find something. But I definitely don't think the amount of data is going away. If anything the amount of data that produced on a daily basis will increase exponentially. And hopefully technology will continue to evolve to will help us deal with it in a more expeditious manner.

HARRINGTON: I'll be surprised maybe not in five years, but shortly thereafter, if we're still talking about E-Discovery in terms of the E. At some point this is discovery and this is the legal field and here's how it's done. You're going to start seeing some higher profile cases. You've already had some pretty high profile ones. But maybe the Supreme Court weighs in on something, some electronic issue at some point. And from a technology standpoint, there are going to be more and more standards of what's considered reasonable. I also think that improved technologies will mean that the concept of "burdensome" will continue to weaken as an defense for failing to conduct appropriate discovery. Evolving technologies will constantly test the question as to what is the appropriate standard a party must comply with in E-Discovery — it is one of perfection or, one of reasonableness? ❖

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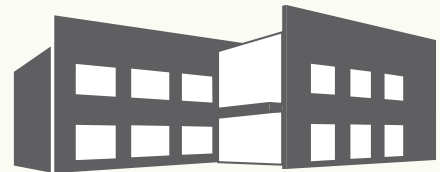
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