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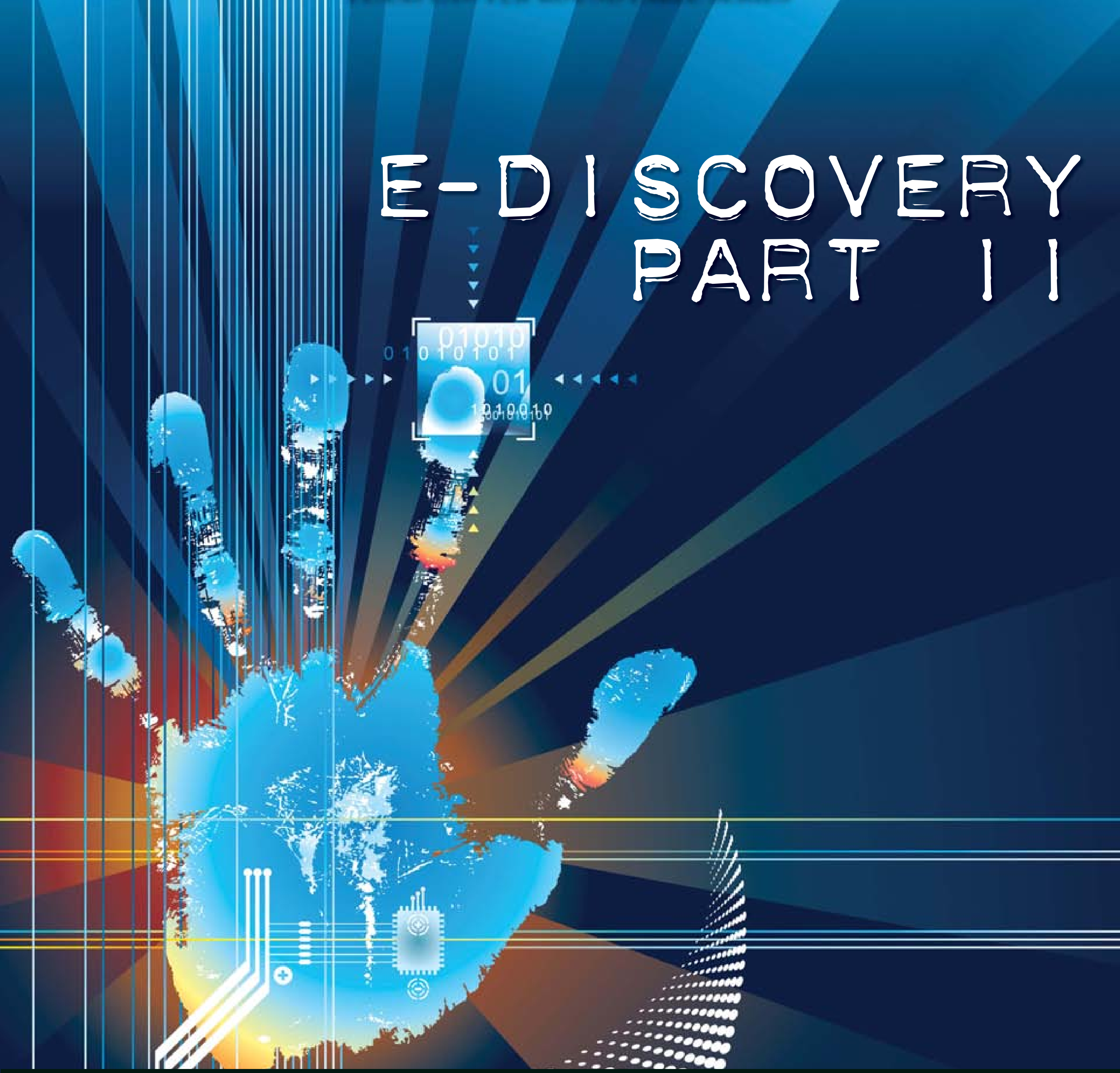


Chuck Kellner


Daniel Lim


Ryan D. Murphy


Brian Weiss


Wayne Wong

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In Part I of our e-discovery discussion that was inserted in the Oct. 26 issue of *Texas Lawyer*, the panelists provided lawyers' perspectives on the issues with e-discovery, from 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: *If I might have each of you, as we did in the first panel, introduce yourself to everyone here and talk a little bit about your company and the nature of your work.*

RYAN D. MURPHY, vice president of business development, Equivalent Data, Dallas: We are a software company that writes NeedleFinder electronic discovery software. We are pioneers in fact-based culling that doesn't just use the keywords and search terms to meet your production obligations. Prior to coming to Equivalent Data, I ran the legal department at Chevron Philips Chemical Company. I helped to write the records retention policy and destruction schedule within that corporation. Before that, I was in-house at Fish & Richardson, so I've worked in-house as well as an outside counsel. And then prior to that, I was a law firm automation technology consultant at Baker Robbins & Company.

DANIEL LIM, senior director and assistant general counsel, Guidance Software, Inc., Dallas: Guidance is the maker of EnCase. And don't worry, I'm not going to mirror anybody's hard drive today. We are a software company, but we also do professional services and training, particularly in the collection, preservation, processing, and creation of load files for electronically stored information. We are a digital investigations company, focusing on e-discovery as well as cyber security solutions, and we have about over 30,000 users of our software. I came from Jones Day and this is my third year with Guidance. Part of my responsibilities include serving as a consultant to our clients for e-discovery issues.

CHUCK KELLNER, vice president of e-discovery consulting, Anacomp, Dallas: Anacomp is involved in data identification, collection, preservation, processing, and hosting and review with CaseLogistix software. I've been involved in law and technology issues, well, back since when I had hair, maybe about 20-some years ago. I collected my first hard drive in 1997, and maybe the first e-discovery CLE seminar I did was in 1999. I've been involved in the electronic discovery reference model and two different Sedona Conference working groups. In the area of consulting for e-discovery, I'm most concerned with the earliest conversations that general counsel and outside counsel have with each other regarding primarily their intent for the case and then, within that, the intent and scope of electronic discovery to try to make some sense out of the huge volumes and costs that are associated with it.

WAYNE WONG, managing consultant in the ESI/computer forensics consulting division, Kroll Ontrack, Dallas: Kroll Ontrack is one of the premier e-discovery vendors, probably most or best known for InView — our hosted review platform. But we also do a whole range of services from data recovery and computer forensics to consulting in terms of strategy, as well as proactive consulting for corporate clients so that they can get their document-retention policies in place, as well as understand how they should respond to litigation.

BRIAN WEISS, vice president for information governance and e-discovery, Autonomy Systems, Dallas: Autonomy is a global software company that specializes in processing unstructured information. Our fundamental technology makes computers a whole lot smarter. And what we do is we bring that core technology to bear in different market applications, specifically what I focus on is legal compliance and e-discovery, that includes our Introspect platform for review and production. I focus very heavily on the impact of advanced search processing for early case assessment, both in a hosted and an on-site review capacity, my role at the organization is really to do consulting with our largest clients, both corporate and law firms. Recently the most recent addition to the Autonomy family of companies and software is Interwoven iManage, which many of you may be familiar with. So I'm here today, really, to provide some insight into what I do with my clients and how Autonomy brings our technology to bear on their process.

ANDROVETT: *What I'm about to ask will sound very self-serving in that it sounds like I'm teeing up a softball for you, but it really comes from a level of confusion that lawyers and their clients have in the marketplace. I'm sure you cringe when people say things like there are too many of e-discovery companies; these e-discovery guys,*

Chuck Kellner is Vice President of e-Discovery Consulting at Anacomp, a leading provider of e-Discovery services and solutions. Chuck works onsite with corporate and outside counsel and IT personnel to preserve, collect, search, and produce electronic data used in litigation, mergers and acquisitions and government investigations. He assists in early case assessment, negotiating scope of discovery, and preparing for meet-and-confer. He helps Anacomp clients to reduce discovery costs through defensible methods to search and cull, and through optimizing reviews for production. Chuck's career experience in litigation practice, technology, litigation support, and electronic discovery contribute to his consulting, CLE programs, published articles, and his work with several industry groups. He has developed protocols for exchange of electronic data in myriad proceedings, including those before the Justice Department, the FTC and the FDA. He has testified on issues of cost and burden, cost shifting, scope and sufficiency of discovery, and on computer forensic findings in fraud and trade secrets litigations. Chuck holds a JD from Lewis & Clark Law School and BA from Brandeis University.

they're all the same in different packaging, you can't tell one from the other. So with all of that as the voluminous predicate, can you talk a little bit about what your prospective client should be looking for in an e-discovery expert or company or solution? What should we be looking for in you?

KELLNER: There's a lot of whiz bang in the marketplace. There's a lot of technology out there. The technology differs from company to company. I think that there is a need to match technology to the needs of the project, but in looking for electronic discovery vendor, it's important for clients to be comfortable with whom they're talking to about their case. It's important that as a vendor, as a service or a consulting community, that we understand our clients' intentions with respect to their litigation or their dispute. And then secondarily, it's about the electronic discovery. And that in merging, then, those two aspects of the work — the vendor is really the third wheel in that — with outside counsel, they're going get the best result.

LIM: A lot of the messaging that we all put out there, we realize, is very similar. And it's hard to distinguish who does what. And we all spend a lot of marketing time trying to distinguish ourselves from each other on what we do and how we work. The first question really that needs to be addressed is: Are you looking for a service provider, or are you looking for a software to enhance your in-house capabilities? All right, so that's what I would suggest as being the first question. And then a lot of this is also going to depend on educating yourself on what technologies and what services are now available because, as somebody mentioned earlier, it's a moving target. As data systems change, as the way that people store their data change, we've got to change, and we've got to move fast. Different people will have different strengths at different times. So really, the first question is: Am I looking for a software solution, or am I looking for services? On the software side, I think a useful model that's out there is the EDRM [Electronic Discovery Reference Model], which Chuck was mentioning, and we have some people that are on it. It breaks out the discovery process, and most of you have probably already heard about it. But in terms of strategically how to think about it, think about what area of that model you want to address. Are you looking at addressing information management? Are you looking at doing collection, preservation, analysis, processing, creating of the load files, review of that data, pushing it out the door, production capabilities? And so if you haven't started, that's a good place to start. And, really, in terms of who you should look for in terms of a vendor — once you've decided what area you want to focus on, it's good to get an overview first and then figure out where you want to go — look for good dialogue, I would say, and willingness to listen on the part of the vendor that you are dealing with. Obviously everybody's different, right? Everyone's got their own unique quirks and capabilities within their systems that make e-discovery records management a challenge. Also look into the experience of a vendor that you're dealing with. Make sure it's a company that's done this before and is not taking on something brand new when it comes to electronic discovery or records management.

WONG: From Kroll's perspective, we don't want our client to look at us as a vendor. We want to partner with you. And so in the same way you would evaluate any other kind of partner — whether it's a business partner or life partner — it's pretty much the same criteria. You want to look for somebody that's compatible with you, you want to look for somebody you can communicate with, and you want to look for like minds. As far as being a service provider, we have what we consider premier products and services for all the different aspects; but by the same token, we will the first one to tell you that there is no one product that fits all. And we will help you identify what your particular needs are, and if it isn't our solution that we feel is the best deal for you, then we will certainly, as a service to you — because we're interested in a lifetime commitment to our partners — is to help direct you into what are other possible products as well. So in terms of looking for a vendor, you want to do it ahead of time. You don't want to do it when you're already under the hammer of a meet-and-confer coming up. You want to pre-vet your vendors, so to speak, and look for a partner and just use the same criteria you would for anything else.

WEISS: From Autonomy's perspective, I would say it's absolutely true you want to work with a trusted and proven partner that's done what you're looking to achieve and has deep expertise both in the law and the technology, whether it's participation in the EDRM or as a thought leader, and establishing that partnership with somebody who's "been there and done that" with some of the largest cases or most complex needs you could have. On the technology side, I think that there's an inflection point happening now called the e-discovery technology market, which is that since the federal rules have changed there are a lot of different vendors that do lots of different things. And it's actually somewhat maddening to look at the EDRM model where everybody's tying themselves to this box or that box in the process. But if you take a step back and think five, six, seven years down the road to what you would like to have, and look a layer deeper when looking to invest, whether it's even just for a little piece of that process, target investing something that could be more than simply that, and ask what is the underlying technology? How can it help me integrate with the next step, either upstream or downstream, in my e-discovery process because that is evolving rapidly. There are some interesting choices to be made there. From Autonomy's perspective, we embed a processing technology of ours which, allows us to span every single one of those processes with very advanced search and processing. So I would recommend looking a layer deeper and try to avoid the noise of who's doing what in what box and ask what the underlying foundation is, and think forward a couple of years about what you're going to need.

MURPHY: Also, listen to the vendors who are interested in the matter types that you are working on because just as though prior to ESI being included in the discovery process, litigation cases are not exactly the same. And those people that want to talk to you about the merits of your case and those opportunities that you can afford yourself to implement legal discovery rules that existed prior to ESI being included in this process will help you determine what you need to include or exclude or what you can defend whether you're including or excluding based on the universe of electronically stored information that your client is giving you. One of the things in my mind that stuck out the most was the records retention. If you take a look at what the client is trying to do, they have a fundamental preservation obligation; their duty to preserve is going to determine the volume of ESI that these custodians are providing to you. And so, at that point, if a custodian provides ESI in conjunction with a legal hold letter, then we have to treat it as evidence and provide you the tools to allow you to determine whether you can include or exclude those files. So the records retention policy, along with the destruction schedule and the legal hold process, determines the volume of ESI that we have to bill you for to allow you to cull through.

ANDROVETT: *It occurs to me that a lot was said in that 90 minutes in the session before ours. Did any of you hear anything that, at the time you heard it, you thought to yourself: I really need to build on that statement or correct that statement or clarify? Were there any misconceptions, misperceptions that you thought were conveyed the first 90 minutes?*

LIM: One of the things I thought was a great point from the first session was in talking about the meet-and-confer. And the suggestion was made — I believe from the attorney from Greenberg — about being able to define up front, on a long-term basis, what are you going to do with your e-discovery, what are you going to do in a particular case our when an investigation comes in. I think that's absolutely a great point. And something that related to the first question, the buzz words under the federal rules are always systematic, repeatable, defensible process. At the end of the day, that's what you want. It's not about perfect searches, right? It's basically about showing that you've done it in a consistent way in a good-faith effort on the part of the

Daniel Lim is a Senior Director and Assistant General Counsel for Guidance Software, Inc. Lim consults with both corporate and public sector clients on e-Discovery and digital investigation issues. He speaks regularly on developments following the changes in the Federal Rules of Civil Procedure pertaining to electronically stored information and best practices in preparing for and responding to discovery requests. Prior to joining Guidance Software, Lim was an attorney at Jones Day, practicing commercial litigation and defending major energy companies in government investigations. As a member of the firm's e-Discovery committee, he oversaw the collection, review and production of electronically stored information. Lim is a graduate of Columbia Law School and former law clerk to the Honorable Vanessa Gilmore, U.S. District Court, Southern District of Texas. He also practiced commercial litigation at Beck, Redden & Secrest and McGlinchey Stafford.

Ryan D. Murphy is the Vice President of Business Development for Equivalent Data. Prior to joining EQD, Murphy was Director of Business Services, Technology and Administration for the Legal, Government Relations and Public Affairs departments at Chevron Phillips Chemical Company, LLC. Murphy began his career as a law firm automation technology consultant at Baker Robbins & Company in 1993 specializing in enterprise level law firm financial system and human resource system implementations. In 1995, Fish & Richardson P.C. hired him as a Project Manager of Systems Implementation where he developed software and processes that produced the first and second ever CD-ROM (HTML) briefs submitted to the Court of Appeals for Federal Circuit. In 1997, Murphy co-founded Employocity LTD; a network of national internet employment portals stretching from New York to Los Angeles. Employocity was purchased by Jobing.com in 2006. Murphy leads the consulting services group which provides clients insight into their evidence using EQD's latest technology.

corporation or the organization to assess and collect your data. It is a different legal standard than it is for hard documents because usually if you send out a legal hold notice and have that processed out, you're fine. With electronic records, in terms of a good-faith requirement, the courts are looking for more due diligence on the part of the corporation to secure that data up front. So I think defining that up front enables you to go to your conferences educated. And a hard part about those meet-and-confers is attorneys have to argue in a vacuum. They don't know what they have and the client doesn't know what they have. So from an organizational role, that's the long-term goal. Getting to a point where you can do an early case assessment. As an aside, "early case assessment" are buzz words that's out there in the industry. It means different things to different people. Here's what it means to us, — case assessment before you collect data. So just to kind of build upon that, have a way to assess your data before you collect — how much stuff is there that we're looking at and being able to go forward from there. That helps a lot in terms of your process and getting focus on what you want to do with your e-discovery from an organizational standpoint.

KELLNER: Phil talked about plaintiffs beating on defendants and trying to make a case about the discovery rather than about the case. This reinforces Daniel's point as well. The most cost savings that you can achieve for your client is in how well prepared you go into meet-and-confer discussions. And all of that starts from the earliest conversations you have with your clients about what data did they have, what are their intentions with respect to the case, where can you draw a dotted line to the custodian list and say here's what we're going to offer and why and here's what we're not going to offer and why. And all of the preparation, all of the metrics that you collect, all of the budget work that you can do, starting from early on and quantifying that volume of data, you have to collect and process and search and review, all of that goes into your negotiating strategy with opposing counsel or the government, whoever it happens to be, in those meet-and-confer discussions. And that's all homework leading up to that talk. And that's the best possible place to save clients a lot of money and a lot of those difficult discussions over the review costs.

WONG: To follow up on what Chuck is saying, there are studies out there. Forester did a study that basically showed that 75 percent of the costs of litigation overall comes from the review of the documents. And what that translates to is: you have to pare down the documents that need to be reviewed. And the starting point is the meet-and-confer and most people don't get that. Then the next point is you take your preservation and you start culling through those documents, whether you use search technology, whether you're looking for other automated means to make sure that you can cull down the resulting set that needs to be reviewed so that it's as small as possible. And that translates directly to the least amount of cost. The other point — back to the original question regarding the previous 90 minutes — "E-discovery" is almost a misnomer these days, it should really just be Discovery. And as you go into your meet-and-confers and everything else, remember that that there are not just the electronic documents. We tend to focus on that right now because that's the newest item. But it's really the conglomeration of what paper documents are there. What do they have in Iron Mountain in boxes that the client probably doesn't even know? So part of your production may end up coming from actual documents. Part of it may come electronically. And if you can have a review tool that can deal with all of that different kind of media, then you're great. So start thinking about all of this as just discovery and not worry too much about distinguishing: Well, this is e-discovery, and this is paper discovery, and we've got to do some scanning and this and that. As Chuck points out, start to think about the case and the rest of this is really just discovery.

WEISS: I thought it was really interesting, the examples that the previous panel gave around the strategy and the impact you can have in those early meet-and-confers when you really have your act together. I also found it very interesting that, a year ago, with the question "has something changed, are people evolving" and the answer was "no." And I'm thinking of specific examples where the companies we work with are not only intensely organized, but they've got very advanced technologies, very deep into their data, and can walk into a meet-and-confer and say "what do you need, here's how much I've got, this keyword is a bad idea and here's why, and here's what happens if you use that one." So the more prepared you are, the tremendous advantage you have early on to be able to know your data, understand it, help your client understand what they've got and what the cost impact is. And the technology now is available to give you that insight much earlier in the process. So I found that very interesting because I see a growing awareness to the advantage of being really prepared. What we can do, as technology vendors, is help you understand really what's possible at that very early stage with technology platforms.

ANDROVETT: *Did you agree with the suggestion that, when relevant, folks here or the readers in* Texas Lawyer *should begin contacting e-discovery vendors and trying out the software?*

WEISS: Absolutely. One of the things that is happening is that the movement of our culling and filtering technology from something which we've all been working with for years, which was keyword-based and the availability of these advanced technologies, what do they mean? What do they do for you? How do they save you money? How do they make you more prepared? How do they really help you mitigate risk inside your data? All of those things, I would encourage everybody to look at those and understand what's possible. There's a lot of very interesting options out there these days.

KELLNER: I would say with one exception. We all manufacture and sell software. And I think we all probably sell software as a service as well. It's important to make sure not to just look at the demo and the features and the functionalities of the user interface. That's only going to serve one constituency, primarily reviewers and possibly researchers. Make sure to look at what's going on under the hood. Can software handle the size of the project that you've got? Is it over-engineered for the size of the project that you've got? Maybe you need something with possibly fewer bells and whistles. Can it be hosted or deployed in a way where you can have access to it for the hours or the terms in which you want it? Or are you paying too much for that kind of service? Make sure that you're looking at the total software and service offering and the people and particularly the project management that's going along with it. And so certainly schedule that demo, but don't make your decisions primarily based on that.

ANDROVETT: . . . *I'm guessing that in many ways the value you bring is knowing the legal landscape; it's knowing the technology; it may also be in knowing how to do the search terms. So talk a little bit about what is possible. We've used phrases like "culling." In the other session, someone talked about clustering, keywords, concept search. If some of the attendees or readers are like me, we know just enough to be dangerous, but if my life depended on it, I couldn't explain how that kind of knowledge applies to this type of company case that I have. So this is not probably going to be a linear discussion, but I think it's a valuable one. What's possible out there right now?*

WEISS: The easiest way to think about it is that search is really about getting a computer to look and filter for something people understand, but machines cannot. So if I put D-O-G into a computer, it doesn't know anything about dogs. It looks for the string D-O-G. It doesn't know that my intention was to look for man's best friend, a furry animal. It doesn't know a cocker spaniel is a dog. So the computer is very dumb, and it doesn't converse in human-friendly terms. Now with the evolution of advanced search technologies, that has changed. Sometimes a tag will tell the computer what it's about, but the computer can now actually read and understand in human terms what it's about. So what that means is it changes the dynamic of search. So right now, a keyword search is like a game of Go Fish. It goes like this, have you got this? No. Have you got this? No. Have you got this? If you don't ask it in exactly

As the Vice President for Product marketing solutions with Autonomy, **Brian Weiss** serves as a subject matter expert for Information Governance and e-Discovery. His role also includes consulting with Autonomy's diverse client base as they manage the challenges associated with preservation, collection and analysis of electronically stored information (ESI). Weiss' particular focus in the Autonomy portfolio is on the evolving impact of advanced search processing, Early Case Assessment, Legal hold, the best practices for governing information and risk, as well as the absorption of new technology by the legal community. Weiss is actively involved in the Electronic Discovery Reference Model (EDRM) forum, speaks at industry events on technology trends and practices of Autonomy's most innovative clients.

Wayne Wong is a managing consultant in Kroll Ontrack's electronically stored information (ESI) consulting group. In this role, Wong ensures litigation preparedness for clients through the creation of discovery, data collection and case management strategies to support repeatable, efficient and reliable electronic discovery procedures. Backed by 25 years of technology experience and the industry's leading software tools, Wong works directly with clients to assess their electronic discovery capabilities and offers proactive solutions to manage ESI. Additionally, when litigation is imminent or already in progress, he advises clients on tactics for responding, including developing and implementing techniques and documentation for the accurate and complete identification, preservation, and collection of relevant ESI and ultimately providing guidance in all areas of records and information management to maximize efficiencies while mitigating costs. Wong holds a M.B.A. degree from the University of Puget Sound in Tacoma, Wash., and a B.S. degree from the University of Washington in Seattle.

the right way, you don't get what you're looking for. It doesn't come back and say, yeah, I've got this, but I don't have any of those. And you know what? I've got something else that's really close to what you're looking for. It's kind of the same idea, but you probably ought to look at these. And so the Boolean requires you say it in jus that way, and it's all a negotiation of how we ask the computer that exactly the right way. What if the machine came back and said, yep, you're looking for fraud and the term "fraud" really relates also to "cheating," "ripped off," and here's some people using the term "punked" that kind of looks like it might be the same as fraud. You might want to look at those. And by the way, here's a bunch of documents that are about fraud that while they have the term "fraud" in them, they're about a baseball game; you don't really want those. So that type of communication, with the idea that you can turn an advanced search processing engine on a group of data and ask it to just pile things up based on what they mean. So if you're looking for the term "shredding," it will say, great, here's a whole bunch of e-mails about shredding lettuce, here's a whole a bunch of e-mails about shredding documents, and for some reason, a bunch of these are about skateboarding. And then there's also the use of the term "destroyed," "destruction," seems to be related; I know you weren't asking for that, but may want it. So you end up in this conversation with your data which radically evolves your ability to investigate. We're no longer into making sure you ask exactly the right question in exactly the right way, otherwise you won't get what you want. That sort of encapsulates what I've been saying in laymen's terms. Under the covers of that, there's a lot of tremendous math going on and a lot of very advanced research into how to make computers do this, to do probabilistic relevancy matching and to understand how ideas are related to each other with only some text to go on. Autonomy is at the forefront of this effort. It's what we do as a company — evolving to every type of unstructured data. Also, there is no difference between a voice stream and a text stream or a video for that matter, to be able to search all of those advanced content types with the same type of probabilistic meaning-based understanding of the data. That's what's possible. Clustering is a great example of that. The other one is "find me things like this." If I'm in the process of e-discovery and I find 50 really hot documents, what if I could feed those back in and say do a quality control against everything that I haven't got with my keywords, and pick anything out that's like these. So you can keep training these engines to be able to understand and really go out and look for you in a very intelligent way beyond the five terms I think might be the way to ask for the information I care about. All of those things are possible, and that extends from early case assessment, deep into review and production.

WONG: Keyword searching is really pattern searching, right? They're looking for the actual pattern D-O-G. Concept searching, which Brian talked about in many words, to me, just ends up being the engine. You give them a word, and it doesn't look at that pattern, it looks at the meaning, and it has usually other inferences around that meaning. So if you said dog, it understands that a puppy is a dog and understands that a German Shepherd is a dog. And so if you do a concept search, you're going to get all these hits now or not depending on how you term it. And then when you talk about clustering, you're talking about bringing in all documents that have a certain kind of pattern, you know, or a certain kind of proximity to your documents so that you can look at a body of documents. If you look at an e-mail conversation, you get more out of it than looking at individual messages. So that's kind of the concept of clustering. And then there are other nice things that are coming about in the technology as far as how to display this because, again, you put in a search, you get hits, and then somebody still kind of has to look through that stuff. So now they're giving you graphical tools that will graph it out based on relevance. So it will say a thousand documents came back, but these 40 seem to be the most relevant. And then you can click into the less relevant ones and so on. And then there's other really cool tools now in terms of letting you load up all your e-mails and it will bring up a little chart that has little circles that represent each of the authors of your e-mail documents. And then it will draw a line representing conversations between the different bubbles. And then if you click on the line, it will show you how many instances there were. You can look, by looking at the lines, at who was talking to whom. It's very nice. And in terms of early case assessment or in terms of trying to determine what you have as data, we've moved millenniums beyond the pattern of keyword searching.

KELLNER: There are two main reasons why you want to apply search technology. The first is to select or deselect what you're actually going to review because you can't actually review everything. There's just too much in our client organizations to do it, and there's no way to collect it and to target it another way to just collect the responsive data. And then the second use of search technology is to group for review what you do plan to review to make your review faster. Here are two real-life examples: One pharmaceutical company over four or five years had 68 different products, patents, 17 terabytes of data and 20 different outside counsel on all of their projects. On each one of those projects, the lawyers submitted their favorite list of search terms and said, "Here, search this." In the aggregate, those search terms yielded 45 percent of those 17 terabytes for review. And then once the technology people got involved in those search terms and vetting it, which search terms are overbroad, what did we miss, did we sample outside the search terms to make sure that we didn't leave anything behind, they got all done with that and came up with a final list of search terms that was only 19 percent of that to review. So in just the vetting of the search terms, the testing and the validation of search terms to decide what to review, the technology people cut the size of those projects into less than half, so saving the client millions of dollars in review costs. Now, during review, using clustering technology, whether it's with Boolean searches or concept-based searches, if you can group content together for a particular reviewer so they're not looking at one e-mail about the sales budget, the next e-mail about the pension plan, the next e-mail about lunch, and you can group like content together, you can get reviewers to review from 50 to 60 documents an hour to 150 and, in some cases, well over 300 documents per hour. And so the cost implications of that for our clients are huge. So think about that in two different ways, search to select or deselect what you want to review and then search to cluster for review in order to make the review faster.

MURPHY: So that's the "keyword search meets your legal requirements" argument, the words did it. And so there's another camp that says, all right, the words really didn't do what my client is being accused of. The people either did or they did not. And so the thing that we have to look back on, as we always did prior to ESI being included in this discovery process, two things: people and dates. So when we take a look at each case individually. For example, look at the merits of a contract dispute, which is the easiest one for us to talk about, you have a dispute between two known parties. The universe of information that's relevant to the discovery in a case like that are the direct and indirect communications that those two parties have had with each other. So instead of throwing keywords and search terms at all of the files that have been provided by these custodians, why don't we look at the direct communications that these two opposing parties had with each other and then what did the opposing or the defendant do with the information that the plaintiff sent them internally that is not known by the plaintiff. And that gives you the ability to apply the legal arguments that you've always been able to use prior to ESI being included in this discovery process. And that's the piece of this puzzle that is missing. It's also the piece that adds to the cost associated with the attorney review because we're looking to these words. We're not considering whether the individuals that used the words that we've come up with were even relevant to the discovery in this case, the roles and responsibilities of the individuals. And so the test that I would ask that you use on how you determine what's

relevant and what's not. For example, would you have considered interviewing the individual at your client that was hit by the magic formula of words that we threw at it? And if the answer to that question is "no" and if this is a contract dispute between a supplier and a business unit and that word was contained within a communication that one of the custodians that was under legal hold had with IT, human resources, benefits, or accounting, then just as though you would have never chosen to interview any of those individuals prior to ESI being included in the discovery process, why consider any document that contained a word that you've agreed to as relevant to discovery in this case?

LIM: As to the question of what's possible today in terms of technology, basically our company focuses on what's called "optimized search technology." It's a targeted search strategy at the beginning of your case where, although a lot of people are using EnCase Forensic to go and get every bit and byte of data for e-discovery, what our e-discovery technology focuses on is just getting what's potentially relevant to your litigation. So in terms of process, the thing that I would take away in terms of technology, in terms of state of art today is to remember that there are different levels of processing. One of the issues that I have with the EDRM model is that processing doesn't necessarily have to happen just in the fifth box. We had a case where it was an 800-custodian collection, 146 terabytes of data; they were two months before their discovery deadline, and they hadn't started collecting anything because it was a government entity trying to get the case dismissed on jurisdictional grounds. The attorneys had negotiated 800 keywords to use, which we basically said go get everything. But you can cull that data on the front end just on user-created files. This is not a case where we suspect foul play. This is not a forensics case where we need to get at all the deleted fields and different places on the disk. Just go get me what the users created on their machines and make that cut first and maybe do some data restrictions on the front end. The other thing that we did on a processing perspective is that we de-duped as we collected with the technology. We set up two data centers, we launched the collection, we ran a de-dupe as it collected; we said if you see a match, note where it is and move on. And that's the only way we were able, with eight staff, to go through 146 terabytes of data, cull it to 17 and then to 7 within two months. That bench trial was over two months ago and there were no e-discovery issues. That's the result you're looking for in your technology, and that's what's possible today.

ANDROVETT: *Chuck, that 19 percent figure that you used to demonstrate the efficiency and effectiveness of these techniques. I can see a trial lawyer with years of experience flipping that on you and saying that is exactly why you guys are not thorough. I know the magic of that case is somehow in the other 81 percent. What I'm trying to get at is: Are there strategies or techniques that you-all use to sort of change the mind of the client who says win at all costs? And I'm wondering if the current economy and pressures from the client's client is helping you make those cases?*

KELLNER: In that whole vetting process, there is a methodology to actually test and validate to make sure that you're not leaving responsive data behind. And that's something, whether you're using Boolean logical search terms like we're all familiar with searching case law or you're using concept-based search engines, you have to do some sampling and some checking on what you're choosing to leave behind so that, number one, you're not missing responsive data. Number two, so you can explain to the other side that you've done defensible search. On the discussion about discovering intent, there's a lot of talk in the marketplace about early case assessment. And I think that we all have to keep track of the fact that early case assessment is not a software engine or a technology tool. Early case assessment is something that lawyers do to talk about should we proceed or should we settle? What's this worth to us? Have we had other cases like this? How much did we spend on legal costs? How much did we spend on judgments or settlements? Did our insurance company reimburse us or indemnify us on litigation costs and settlements? And from the corporate client standpoint, they go through that whole analysis and then get outside counsel. The way some of the software tools can help in terms of early case assessment is to get some metrics to inform that process. If we do have 20 custodians, how big are their data collections? What percentage of it might we have to review? Can we use that percentage of review as a model for how much review is going to cost overall? Can we use those numbers to inform how many custodians we want to offer in terms of production at meet-and-confer? So that in the early case, it's not just about vetting the data or bringing 3 terabytes down to 20 megabytes. It's about getting the matrix to help inform the process. And I think the earlier there is that convergence on the definition of early case assessment and that discussion takes place, I think the better result the business client is going to get from both their legal team as well as their technology team.

WEISS: I would follow up on early case assessment by adding we see an interest in how early and how much you can do. So if it's about vetting what it could cost, the more you know about your data ahead of time, the more able you're going to get at exactly the right metrics. Here's what it will cost, and by the way, here's how much we know about the data : here's how much is voice, video, foreign language if we use the following 14 terms. People are very interested in getting those types of details now as a defensive measure. By embedding a technology deeper into your upstream process, and making that data is immediately searchable you don't have to collect. You can actually just go directly at the native source. So you can take the technology and drive it into that early process and get much, much tighter information on what you need. We see the corporate side really pushing to have that be the case so they can bring more of that process in-house, collect less review less. They don't have to go get these five custodians, why collect them if I could just search that data directly? The common trend is to push that process upstream by our large corporate clients to be able to save costs and understand risk early on in a case.

WONG: Don't get trapped into thinking that: if we buy a particular technology, we've got it licked. I mean, the technology is the tool. And so as you decide what vendor you're going to use or partner with, make sure that it's somebody that you can work with that helps put the right perspective on things. Chuck made a really great point about this whole thing of early case assessment is not a technology. Early case assessment is a process. And you're driving towards a process. The technology is there just to help you get there.

MURPHY: We're looking for two things as it relates to early case assessment: What is it going to cost? What is my client's exposure? And depending upon the type of the case, the merits of a contract dispute, for example, would be like I described earlier, what did these two people say to each other and then what did we do with it internally after we received it from the plaintiff? And the same type of logic applies if it's a patent infringement case where your client has never had direct communications with the opposing side. The exposure your client has is within the social network that is contained within the players that are currently under legal hold, the exclusion of those individuals that they talked to every single day that have nothing to do with this case. So you're making this universe based on those facts much smaller and more relevant. And so the key to that is cost and exposure. So when you sit down and you really try to assess what an early case assessment is, ask those vendors how they can help you with those two questions: What is the cost associated with this evidence and what is my exposure to this case based on those merits?

WEISS: I have a great client example to sort of make the same point. An energy company we work with gets sued a lot. As counsel to corporate, it's important to understand sort of where it's moving. But they spend an awful lot of money on trying to find out what's going to cost, and they've paid out a lot of money. And they took a fraction of that and invested it to make all of their data immediately searchable at any given time. Now, they're pretty advanced, on the cutting edge of doing things. But they go into a meet-and-confer and say, "What do you want to look at? What do you need?" I don't have to collect it. They can search the desktops with a push of a button. Every single piece of content they can hold, collect and search. They walk in and say, great, you want to know these terms, and I can deliver that, by the way, in four days. So it's not about here's what it's going to cost to collect it, here's how much data, it looks like we're going to get 50 terabytes, then we're going to have to pay to process that. You don't add up all of those costs. They can do that by pushing buttons. They walk into a meet-and-confer so prepared it is scary.

ANDROVETT: *Strategically, what is the value of that to the other side? Do they say, "Oh, we can't run these guys through the mill?"*

WEISS: Exactly. So they got so tired of that, that they made it frightening. They say, great, what do you want to know? Super, I'll deliver it in five days. And then it goes away. Because they came in thinking they're going to do the calculus, it's going to cost millions of dollars; we're going to settle for half of that. And they got so tired of paying those out that they invested a bunch of money to make it possible to get all of it right away on demand with very advanced tools.

LIM: In terms of cost strategies in connection with technologies, what clearly doesn't work is waiting until the last minute and hoping e-discovery is not going to be an issue. That is what's getting companies in trouble. As lawyers we go after the low-hanging fruit. What's easy, what we can get out the door, what can we get people to review quickly, and what can we get to opposing counsel so they can start looking at it. That's suicide if you're dealing with electronic documents and in trial five years later. The one suggestion I would have in terms of strategies with the technology is consider tiered collections. So what these are is not necessarily treating all your custodians the same, but if you have a collection, particularly a complex commercial litigation, maybe your key custodians, you do full forensic images, you get everything for them because, who knows, it may turn into a DOJ investigation. So you start with that. And then, from different levels from out from there, maybe try to do some of these culled search strategies up front, maybe at the second level just do user-created files. If you don't suspect your second-tier not-directly-involved witnesses to have deleted anything, isn't going to turn into a forensics case and you've got to figure out what's going on, you can just click the user-created files. That will cut your data percent down by 90 percent off your hard drive at a minimum right off the bat. User-created files, no keywords, no data restrictions. And then from there, you go to the next level, maybe use keywords. And there's a lot of debate about keywords. My only point is the Manual for Complex Litigation has a proposed order in it. It talks about preserving data. The fields that it talks about is by keywords, times, dates, users, custodians. Keywords have been something that's been around. The courts have validated it. They understand that it's overinclusive and underinclusive. And there are still a lot of debate, especially around Rule of Evidence 502(e), what's required in terms of privilege and search and if you use keywords, and it will continue. And there are good points on both sides. But in terms of a tiered collection strategy, it is something that you should think about for your electronic discovery collections.

ANDROVETT: *Let's go back to our good old reliable contract dispute. On one level of inquiry, what is said in the document may be dispositive of the case. But I can think of scenarios where when the document was changed and who changed it may be dispositive. It may not be immediately recognizable from looking at what you've uncovered. I'm getting us into this notion of metadata. Can you talk a little bit for all of us about the nuance of metadata and how it plays into litigation strategy or, at the very least, your inquiry into that.*

LIM: Since we're a forensics company, I'll start off with metadata. So metadata is interesting because, as everyone knows, we're talking about data about data, the last accessed dates and the changes to a document, etc. There are different types of metadata that are out there. From an attorney's perspective, metadata is metadata, anything that's not already on the face of the document that's about the file. And it's been an evolving standard as well. In 2005, if you read the Sedona Conference principles, the default basically was they didn't advocate production of metadata unless there was a good reason up front. That's what was in 2005. In 2007 when the Federal Rules of Civil Procedure changed, Sedona changed Principle 12 in line with the changes to the federal rules. And what the standard is, from a federal rules perspective, is you need to be able to at least preserve it and produce it in the ordinary course of business in which it is kept. And the other aspect of it is if you cannot produce data, if you have a form that is searchable to you, you cannot produce it in a form that is less searchable to the other side. And that "searchability" function is, a lot of times, a function of the metadata. When you create these Concordance and Summation load files, what you're doing is you're uploading some of the relevant metadata fields so you can sort through the files and figure out what files were created. For example: give me all the files that were created, accessed, or modified by this custodian. So it's a changed standard. There was an opinion that was written recently where they discussed metadata and the applicability, even for the government. And basically the gist of the opinion was they recognize the key is where parties ask for it at the beginning of the case, courts are much more likely to enforce that. And if you don't want to produce it or if you don't think it's relevant, you've got to fight that battle up front, particularly in federal court. So from a best-practice perspective, what we advocate is at least collect it in native with the metadata fields preserved because that's what you're going to need for chain of custody and authentication. If that file comes into question, it's the metadata that you're going to use to prove it up. So be very careful. It's becoming more in the state and local cases, and its coming up more in the federal cases.

MURPHY: I want to offer just a quick different definition of metadata, other than the famous data about data definition because that may not be clear to all of you. I would like you to look at metadata is this: The facts that define the contents of the files. If you think about that for a second, as long as the evidence has been collected using a forensically defensible methodology like EnCase, for example, those are irrefutable facts. And then for the first time, we have, in electronically stored information, prima facie evidence that we can base decisions off of. So if the evidence was collected using a forensically defensible methodology, then the dates are 100 percent relevant. Then the people who our custodians communicated with can't be argued about. Then the times and the dates and the things in the contents of the documents that have been changed are really the facts that are contained that define the contents of these files. And if you think about that in relationship to the merits of the case that you're working on, that allows you to defend whether you're going to include or exclude files for legal review. And so the metadata is really the most important piece about this. Yes, metadata contains words, and we can determine whether we can search for the words that we're looking for or not. But the facts that define the contents of the files are the things that allows us to implement those ideas the case law gives us the opportunity to use prior to ESI being included. So metadata is extremely important as it relates to your ability to defend whether you're going to include or exclude files for a legal review.

ANDROVETT: *What about so-called "rich media." I'm thinking of voice mails and Web conferencing. In my line of work I see more and more entities relying on video and live streaming. Can that all be collected and gathered and synthesized and analyzed?*

WEISS: Yes, it can. We are seeing that as an evolving trend as well, so we're all communicating through different channels now, the conversation about BlackBerrys and, of course, now we're doing Twitter, video files and Facebook. By the way, more people spend more time on Facebook than they do on e-mail hour for hour on the Internet. I think audio is a key one now for e-discovery, especially with the move to the integrated mailbox and voiceover IP. We see an awful lot of that coming, and it is absolutely possible to process that in the same batch as text. So you search for something and you find both the audio file and the e-mail that contains that, and you drill right into the point where that person says that term that you might be looking for if it's part of your case. So it is very much becoming part and parcel of requests, and obviously, the federal rules don't make any differentiation. It's electronic media. It doesn't matter. It doesn't stipulate only text-based files.

KELLNER: Looking at the kind of case that you have, you've got to decide and make sure that you don't overlook digital voicemail and unified messaging where the e-mails are stored inside the Outlook mailbox, for example. In certain kinds of cases, you've got marketing claims or marketing materials, and you've got all the digital files, multimedia files that the marketing group put together for, say, commercials or something of that sort, radio spots and those sorts of things. You can't overlook that. One of the things to watch out for is what's going to happen with all of that. The likes of us end up with all of your clients' MP3 files and all of your iTunes. We don't want to process all of that. So there has to be some triage to take a look at that because it's not immediately searchable in the format that it's in the same way that e-mail and work files are. We need to triage that by source and data type in order to figure out what to put into a text translation or before we subject people having to listen to or watch all of this stuff. There can be a steep spike in costs in terms of what you're going to do with multimedia files for the purposes of extracting text from it. And so those are some of the practical decisions that you need to talk to the IT folks and the experts and decide what level of treatment do you want give to those files before turning it over.

WONG: You can do your clients a huge favor by proactively alerting them to this because if it's there, it's in play. So like everything else from a corporate standpoint, you start with the governance, roll it into a process, and then it rolls into technology to help you to do it. So you want to make sure that they understand that these things are generated, they are discoverable; so they better have policies about how they allow the use of it to happen and what and how they're going retain it. Just take instant messaging, you can allow instant messaging, but not allow logging. And if you don't allow logging (of conversations), it's not going to be there to be discoverable.

WEISS: Absolutely. A great service you can do for your clients is making them aware of the risk. And we do have large corporate clients now who, because of outside counsel alerting them, have changed their implementation of integrated messaging voice mails dropping into e-mail until they have an executable retention policy, such as, "If it's a voice mail, we're only going to keep it for two weeks." And they literally have had legal stop deployments saying, "We cannot deploy this until we have a policy because we're going to end up with years of voice mail which are then immediately discoverable." On the technology front, it is very much possible to make voice immediately searchable these days. We provide that through our hosting service. People are sending us more and more voice mails. There is an interesting conversation happening in that about how you do that, and I don't think it will happen for another few years. But you know, everybody says, "Great, we're going to hire somebody to transcribe the text." Now, if you think about it, that's the definition of spoiling the data. So I'm going to take your e-mail, and I'm going paraphrase it. I'm going to take the sentiment, I'm going to take the irony, I'm going to take all of the context in which that was delivered and put it down into a flat black-and-white. So what we're offering is the ability literally to review the native voice file without a text translation requirement.

ANDROVETT: *To the extent that we're talking about volume of information and the cost and the commitment by the legal team if they're not well-versed in these areas to become so, there's almost an element of mutual assured destruction there. And I'm wondering, in the subset of lawyers and experts such as yourselves, does there arise a new level of cooperation when you all wind up on the same case together? I guess what I'm asking is: Is a new paradigm sort of evolving because there is this expertise and this knowledge that, if you don't go down this road you're going down the mutual assured destruction and huge legal budgets?*

KELLNER: I was on a panel in Chicago a couple of months ago; and on each of the four panels that morning, there was a federal judge from the Northern District of Illinois. And they are actually prescribing a training program for attorneys who appear in the Northern District of Illinois. Anyone who signs a 26(g) certification is going to have to get trained in electronic discovery because the judges are tired of hearing about the discovery disputes. They want it handled in meet-and-confer. There was, just a couple of weeks ago, a Third Circuit decision in which the Third Circuit and the trial judge both pressed down on the litigants for filing discovery motions, preliminary objections, definitions of terms. Basically the courts are saying get rid of that, sit down and talk about it, and if you don't understand what the other side is saying, get your expert in there to talk about it. So in streamlining the process, becoming better informed and doing it with the experts will speed things up and create certain economies in terms of getting a proportionate result out of discovery. And I agree, I think that the opposite is being back on your heels tactically in front of the court by either not cooperating or appearing not to cooperate and not being ready. And that's really what it boils down to.

LIM: I tend to be sort of more of an optimist and think that we can all get along. It's interesting that the Sedona Conference has come out with what they call the "Cooperation Proclamation," which is supposed to be this grand statement among the attorneys, judges and vendor providers about cooperating with each other, both in discovery and providing solutions. I will tell you, just as a result of the economy, people are getting along better. People aren't litigating as much. They're settling early. And even among the vendors, I know our company is much more open to partnerships with other technology providers that do what, perhaps, we don't do as well. Forsythe is a great example. They're cosponsored with us here today. But recognizing that, we all said that we all don't do everything, so we are seeing sort of a shakeout in the market from a technology and vendor perspective, and people are figuring out who they need to be friends with. So there's definitely more of a cooperation going on, both with technology as well as in-house and opposing counsel as well.

ANDROVETT: *I hope this isn't an uncomfortable question, but I know that these are complex dynamics. Say we have a potential client here who is really listening to this and wants to come to you. It seems to me they're going to want to know what's it going to cost; and it seems to me that you're going to have to do a little bit of initial inquiry to have an understanding of that. So now you're investing your own intellectual capital and the like. Is there a free upfront consultation? Is that relationship structured in such a way that* *a client pays for the initial start-up and then a subsequent "road map" as you see it? Talk a little bit about how you structure the client relationship. And I'm aware that all of you probably do it maybe a little bit differently.*

KELLNER: I and our project engineering folks have spent anywhere between hours and days scoping projects and asking questions about it just so that when it comes to pricing, everyone understands what the assumptions are. I don't think that there's any other way to do it. Twenty custodians isn't enough information to price, not even 20 hard drives or 10 e-mail accounts. It needs to get more granular for all of that. And most of us are willing to climb in with a lot of upfront project engineering, which I think is helpful to our clients in even assessing their cases before anyone signs on a dotted line.

WONG: At Kroll we do exactly the same thing. We basically understand that clients want predictable pricing, so to be able to walk in and say here's my pricing schedule, that doesn't really cut it anymore because it's unpredictable. It's just X per some volume or so many hours. We go in and we do a lot of project engineering, helping both the law firm and their client understand here's what we feel you need to do, here's the steps we're going to go through. We anticipate, given what we know right now and maybe with a few more interviews, here's the volume we're talking about. And we can give them a predictable range of this is what's going to cost you to do these things. And it helps a lot because, again, that's all part of steps that end up in the early case assessment to make a decision, do we go to trial or do we settle. Should we argue for this in the meet-and-confer or shouldn't we argue that? So we do the same thing. It doesn't cost anything. It is part of what we do in order to partner with you.

KELLNER: Like we said, don't just look at our demos. Also, don't just ask for our price sheets because it's more complicated than that.

WEISS: We do the same thing. We provide as much consultative care up front to our clients because we're really interested in that long-term relationship around your processes, what you're doing and how you're doing it and how we may help you. Our law firm clients are very often on the fence as to both size and scope around hosting versus in-house review. Review in particular. So we do a lot of consultative work. At a certain point, if it's small, it makes sense to manage it in-house and handle this review. If not, it may be of the scale or broader scope necessitating jumping to a hosted platform with outsourced review options? We see a lot of our clients having an on-demand on-site versus off-site processing and review conversations with us an example of some of the consultation work we do.

MURPHY: As far as pricing is concerned, I think we'll all agree, we are putting a maximum amount of pressure on each other to come up with equitable pricing for everybody. So it's part of the free market economy that we operate under today. So what I would say to you is to look at — and just to expand on what was said a minute — the services that are provided and the costs that are associated outside of the gigabyte pricing, outside of the hourly pricing. What are those ancillary items that are going to be added on top of a gigabyte pricing model that you would have been quoted?

LIM: The pinpoint usually that comes, particularly when we're talking about software versus services, is typically software is sold on a perpetual license basis, and that's the initial sticker shock that people typically talk about. There's all kinds of ROI case studies that all of us can talk about in terms of how much the investment is worth. As a result of the economy and us beating each other up, there are a number of hybrid options that have developed as well. So from a services perspective, for example, we'll do a software lease option with services. And so everyone's coming up with different options that they'll do to try to defray some of the upfront cost of getting in with some appropriate tools to help you do the technology. And, again, everyone's coming up with a hybrid set of resources that are out there. We'll all be glad to talk to you about what we feel is best practices long-term in terms of pricing and what to do with your solutions. But there are more hybrid solutions that are coming out that are helping with that initial upfront cost.

ANDROVETT: *Where is the e-discovery industry or field going? Where do you see it going five years from now? And if I could throw in another element to that, hearing you talk it sounds like the technology is getting cheaper, maybe easier to work with, so I could surmise that maybe more and more companies and law firms will bring it in-house? Will what you do and who you are look different five years from now than it does now?*

WEISS: I think consolidation of the various processes. With the old string of the discovery processes, you've got so many different vendors doing different moving parts. When you think about the flow of a piece of data from, okay, I've got lock it down, I've got to figure out where it is, I've got to collect it, that could be a vendor; I've got to then process it, that could be a vendor; I've got to then load it and review to where maybe I do some early case assessment, so that's another process. I've now touched and moved and maybe mailed and reprocessed the data about four or five times, so what I see will happen here is that people are growing tired wondering why I have nine of these? Why can't I have a process where I don't move the data yet move it through my e-discovery cycle in place? And for data I don't have control over, I have a quick and easy way to go and get that information. If you're familiar with the boxes on the EDRM model, one of my clients I work with a lot said, "The problem with that model is it was invented based on technology and processes that were available four years ago." So the model is actually starting to be a little outdated from what's possible, my opinion is you'll start to see that stuff collapse. You'll truly be able to do it on a single platform with varying degrees of advanced technology. Also, I think that this overriding trend is for the ounce of prevention versus a pound of cure. The earlier panel talked about everyone that's paid millions for e-discovery realizing that with just a little bit of governance up front, if they had a little more process about what they kept, where they kept it, and if they deleted it on a regular basis, then it wouldn't be nearly as painful to have to go through this discovery process. And attorneys, inside and outside counsel alike, are very much involved in that now. That's a change. It didn't used to be the case.

WONG: I don't think it will take five years. I think it will take a little bit longer. But I think what will happen is that the corporate world needs to start to take responsibility for managing their organizations, and that means organizing and managing their information. And I think what you start to see is the board room finally getting it and IT departments finally getting it. There's a sort of dirty secret in IT in that they feel their job is to provide capacity and capability. They don't manage data at all. And so when legal comes to them and asks about data, they're generally flustered and they don't know what's going to happen. IT's got to start taking responsibility for the management of that. Once all of that happens and the corporations start to clean up, they get to understand that this is a multidiscipline problem. And there's already a model out there. When Sarbanes-Oxley came out, all of a sudden they started to form these compliance committees, new roles, chief compliance officer. Litigation readiness is almost the same problem. And it can be solved with sort of the same infrastructure. So once corporate internally starts to manage their own stuff and they have a distinction between disaster recovery versus document retention and archiving, once they realize all of these things, then I think what you'll see happen with the discovery vendors is going to be that they will then start to provide services for specialized conditions such as scaleability. So every corporation should be able to handle their own litigation if it's small or if it's serial-type litigation where they always do that, get that same kind of litigation all the time. It behooves them to get into that business. But if, all of a sudden, something comes out of left field or, all of a sudden they're getting sued and now they need to collect from 2,000 custodians around the world, then it makes sense to bring a vendor in. So in terms of long-term, I think that's where we're eventually going to get.

KELLNER: Anything in this industry that takes a lot of time or costs a lot of money is ultimately going to yield a solution in technology. Just look at everything from automated Bates stamping through concept-based searching across an entire enterprise. I think a few years down the road, most organizations, particularly those that have repetitive litigation, will have search engines available to them that connect in to their various data stores to be able to identify and pull for attorneys' reviews those sources of data that they're looking for and to be able to do it in a consistent and a repetitive way. I think that for the smaller organizations that aren't necessarily put up to the costs of electronic discovery all that often, that change will come a bit slower and they will continue to add server space and collect and keep things indiscriminately. But still, we've already seen a reduction in the keeping of backup for the sake of backup simply because of this and people having much shorter retention periods for that. The cost of litigation is going to drive the technology, the deployment of the technology and the implementation of it, to make these jobs easier in a very short period of time.

LIM: What happens with e-discovery is obviously going to depend on what happens with the technology. So it depends on what corporate America and what our public sector decides to do with their information storage, how they're going to manage data and how they're going to talk to each other from a business perspective. There's this whole talk about cloud computing that's out — about whether we go from less structured environments to more structured environments, I don't think in five years we're going to be out of unstructured data sources. I think the PC movement is here to stay. People like the ability to take their stuff with them. Virtual desktops are interesting developments, but unstructured data is still going to be an issue. You're going to need to have a way to deal with that from an organizational standpoint. The other driver in the next five years that really has come up, though, is more from a security aspect. So we see a lot of talk about red-flag rules issued by DHS and the Federal Trade Commission. And even the Obama administration is talking about putting together cyber security standards for all government entities, which, barring some constitutional issues, may apply to state and local entities. What organizations do in response to their security for their data is also going to affect what happens with e-discovery and how they're going to secure and manage that data. So I would definitely say watch what happens on the security and the privacy front as well. Because it's all about managing the data, whether it's for e-discovery, digital investigations, internal audits, and of course for business uses, the original reason why it's there.

MURPHY: I couldn't agree more on the records retention side. The volume of information that custodians or employees are creating is phenomenal. Half the issue hangs around that exposure. So I agree totally on the records retention piece of that, as well as the security piece. But I'm going to make an incredible prediction that, in the next five years, the "legal process" is actually going to be inserted into the electronic discovery process. So those people that win this game are going to allow you to use your skills, knowledge, and ability along with the 71 years of evolution of the civil litigation process to allow you to apply the law to this discovery. I think that we're starting to talk about the validity of coming up with the acronyms. How do we come up with what these words mean? And we start to talk about the people and the dates that are associated with the items that we've always defended. And so my prediction would be that the law is starting to encroach onto the electronic discovery process. ❖