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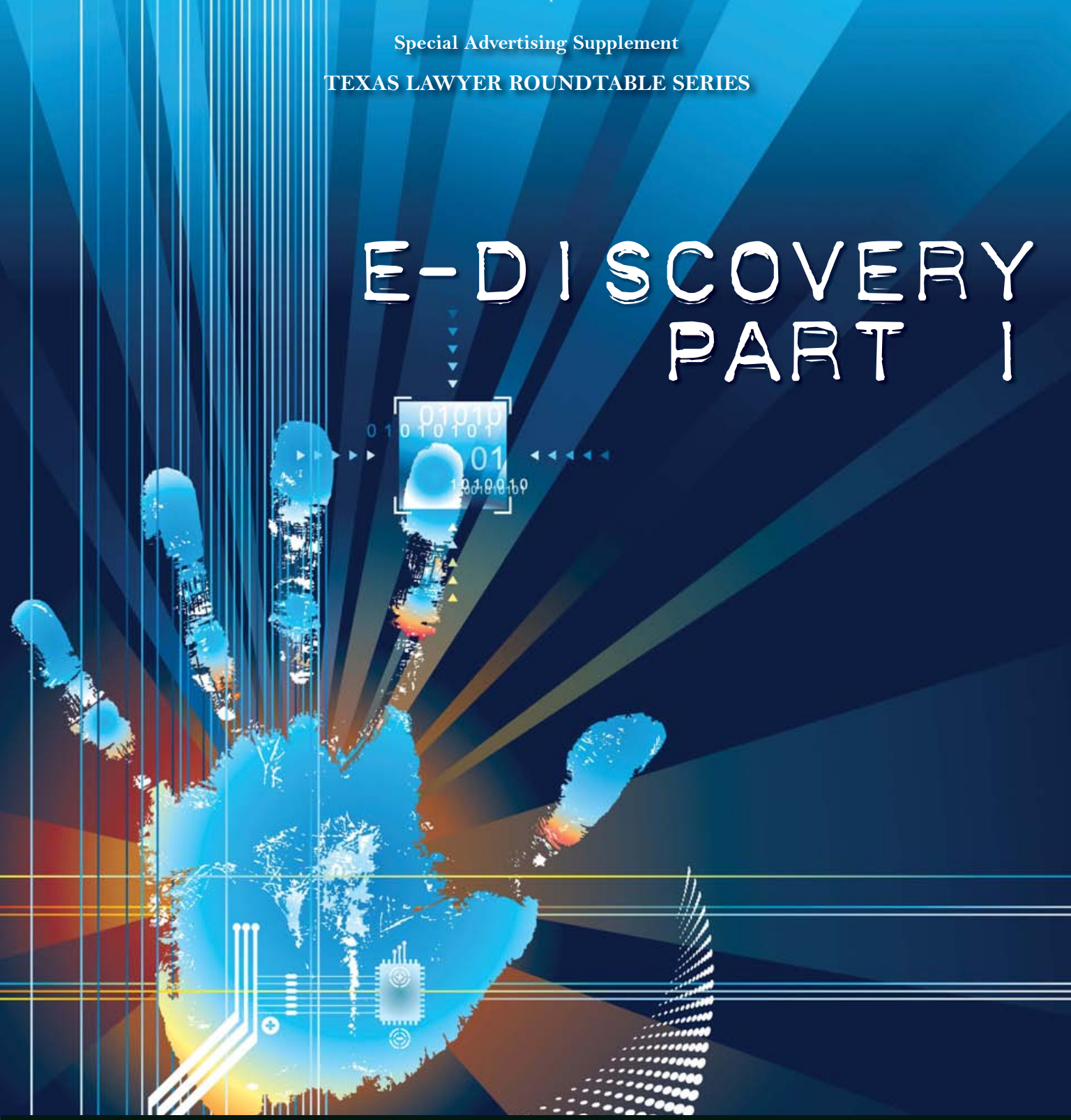
TEXAS LAWYER ROUNDTABLE SERIES

E-DISCOVERY PART I



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Experienced eDiscovery and eRetention Counselors and Litigators

Recent court decisions have imposed heavy sanctions on corporations that were unable to respond effectively to discovery requests. Our team helps clients manage information cost-efficiently, comply with the law and reduce litigation risk. eDiscovery is vastly more powerful and more cost-effective than traditional paper discovery. Our attorneys have the experience and skills needed to understand the unexpected sources and diverse uses of electronic data in litigation.

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E-discovery is now a part of every lawsuit and affects every company. And companies have questions concerning document retention, managing e-mail, handling an e-discovery challenge as part of a civil matter or regulatory investigation, and the looming issue of cost. Because these issues face all companies and their counsel, Texas Lawyer's business department gathered leading e-discovery experts to help answer these, and many more, questions. The following discussion has been edited for length and style.

MIKE ANDROVETT, moderator, attorney, owner of Androvett Legal Media & Marketing, Dallas: . . . *I have asked our esteemed panel today to introduce themselves to you and not only talk about who they are and where they work, but about the nature of their work. And so, Philip, maybe if I could start with you, can you tell us a little bit about who you are and what you do.*

PHILIP H. COHEN, shareholder, Greenberg Traurig, NY: I work in Greenberg Traurig's New York office, and this is my first trip to Dallas. And I had a great steak last night. So it's great to be here. I am the co-chair of the firm's e-Discovery and e-Retention Practice Group. I counsel clients on preservation plans, record retention programs, and how to deal with electronic discovery in litigation. So it keeps me busy. We've got an active practice. And because I'm part of the national practice group, I work with my colleagues throughout the country on these issues.

MARK HABBINGA, director of e-Discovery Solutions, Epiq Systems, Dallas: I am a licensed attorney here in Texas. I work with some of the top law firms in Texas to provide discovery solutions, everything from the collections and the forensics side through to putting together strategies around data reduction and accelerated review, on filtering processing and hosting, and then, ultimately, as necessary, providing document review services on the back side of that equation for our law firm clients. For our corporate clients, the majority of our work centers around helping to put together various e-discovery solutions and strategies with a focus on cost-saving strategies that might span across the case loads. And so we work with a lot of corporations in that capacity and ultimately their outside counsel.

PETER D. MARKETOS, partner, Haynes and Boone, LLP, Dallas: I have been practicing here in Dallas for ten years. I have a passion for using evidence that I've discovered through e-discovery and computer forensics in my cases, both in defending my clients and on the plaintiff side. We've sort of made it a concerted effort at my firm, both with our in-house litigation support staff and, externally, with our computer forensic experts, to find ways to improve the processes for clients to collect electronic discovery, electronic evidence, and also to use that evidence to our benefit when we're representing a client. It's a combination of time-tested vendor support and essentially improving our processes as we go along to make sure that we're not missing anything when we're collecting evidence and that we're also using technology to make sure costs come down for our clients. So hopefully we can address all those angles during the roundtable discussion today.

ANDROVETT: . . . *I'd like to start with some issues that really implicate business and economics. First, do you think it's fair to say that if you are not doing e-discovery today you are not doing discovery?*

COHEN: Yes. The fact is that most of our clients' records and most of the records in the world today are electronic records. So if you're thinking of discovery as being all about paper, you're not really dealing with discovery. You certainly aren't dealing with it very often because that is the way that we have to deal with discovery and litigation. So I think the answer to your question is: absolutely. And then the question is — as Pete pointed out — how do you deal with it in a way that's cost efficient? And there are a lot of scary stories out there about corporations and individuals getting in trouble for not doing it properly, and how do you balance the risk with the business concerns? And that's something that we counsel our clients on all the time.

HABBINGA: I agree with Phil. I think that the devil is always in the details, and e-discovery, fortunately, is where you find a lot of those details. And most people think of, well, I've got electronic documents, I've got Excel spreadsheets. And with the evolution of e-discovery and e-discovery law, we're finding that it's not just the documents itself; it's the data within the data, the metadata that often holds who knew what and when they knew it. And it's really being able to bring all of the different electronic forms together to try to put together your case and to defend against a case. And often, again, the devil is in the details, and that's why e-discovery is becoming more and more of a complex practice.

MARKETOS: In this day and age, the term "e-discovery" is somewhat outdated. E-discovery is discovery, and the large vast majority of the documents that we're collecting and gathering and preparing to produce is in electronic format in almost every case that we see. And we, as lawyers, are obligated to dig in and somewhat learn the science behind it,

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not in terms of forensic analysis, but at least in terms of what's out there, what formats our clients keep their files in, and how data is stored and most easily produced. And I think that we owe it to our clients to make sure that we're at least somewhat on top of that.

COHEN: And I would add that not only do we owe it to our clients, but to ourselves as professionals, that we have an ethical obligation to be able to represent that we have an understanding, when we go into a meeting with an adversary, that we've done our due diligence. And, I agree with you, Pete — it should all be "E" at this point.

ANDROVETT: *The old paradigm was the 10,000 boxes and the army of associates that go through every document. We've had these roundtable discussions on e-discovery over the last six years and I hear less complaints about that kind of dynamic. But let's overlay that a little bit with the economy. Almost always lawyers and their clients are griping about the cost of e-discovery. And now, a lot of law firms are losing clients, they're losing business. Talk a little bit about how e-discovery plays into that pressure that law firms are feeling to get away from that old billable-hour paradigm and the pressure to make their bills smaller, not larger.*

HABBINGA: In talking with corporate counsel, it is the economics that are driving a lot of their decisions in litigation. And often, just the sheer cost of what the potential litigation is going to run can drive settlement discussions and how early those discussions will happen. As far as how e-discovery plays into it, really, there are three ways, in my mind, that corporate clients can control the cost of e-discovery. Number one, they can control the amount of data that's going into the process by focused collections, better filtering procedures, and using numerous early case assessment techniques that are available. And there are a lot of control factors there, and a lot of corporate clients and law firms have a lot of good strategies around that. Secondly, corporate clients can really look to their outside counsel to find ways to be more efficient and to use the technology that's available to get through a higher percentage of documents that actually gets to review at a quicker rate. And then the third alternative, really, for corporate clients is not an alternative that most of us as lawyers care to hear, and that is to find cheaper sources to do their discovery. And GCs are exploring a lot of alternative ways to do that, whether it be to new law firms with alternative billing structures, using different firms for different pieces of a litigation, outsourcing review to companies like Epiq for review, or offshoring some of the document review to places like the Philippines and India. There are a lot of pressures that push law firms into trying to evaluate and better control the e-discovery early in the case.

COHEN: On the cost issue, you know the saying, "garbage in, garbage out." I think that if clients are making an investment in records management in the corporate environment and if they're doing a good job with respect to their in-house archiving, preservation and in-house efforts, there's a lot less for their outside counsel and their outside vendors to do. And the trend that I'm seeing with our clients is that they're taking more and more responsibility for their own records management and investing in that because the cost savings are huge. If the client's records are balkanized all over the enterprise and they don't talk to each other and they're not stored in a way that's easily retrievable, it doesn't really matter whether you're working with a U.S. vendor or a vendor in India or Malaysia, it's going to be expensive, it's going to be difficult, and it's not going to be efficient. So I think that while a lot of people will focus on legal bills and legal costs, what I'm seeing is that clients are really taking responsibility for their own records and making that investment. And in this economy it's a difficult time to make an investment in records management, but what I'm seeing is the clients that are making the investment are finding themselves ahead of the game in the long run. That being said, the one thing that I take issue with what Mark said is that, as a law firm, we look to have ways of working with clients that work for both the clients and for us. We want to have long-term relationships with them. We want to be working with them. We want them to feel like we're taking care of them. So if that requires creative approaches with respect to electronic discovery, we're there for

them. I've run many RFP processes where we have various vendors who are happy to do road shows and show their tools and run the data and show why what they can do is terrific and how they can out-beat the competition with respect to pricing models. The key thing for us is to give the client a realistic sense of what it's going to cost when they go in so that the sticker shock doesn't happen at the end of discovery, but that they figure it out at the beginning of the case of what this is going to be, because otherwise it's terrible for the client relationship. It's terrible for the client, the CFO, and everybody else. You need to be able to plan and try and bring predictability to this, and that's the challenge that we all deal with. And there are always going to be surprises. Someone once described e-discovery to me as an onion and every layer you peel makes you cry. And I think that's a pretty good description about what happens.

MARKETOS: The one thing I would add to that — and I'm glad you said document management policy, Phil. Document-retention policy is the way it's been described historically. Everybody has a document-retention policy. And for some reason, the connotation that it carried with it for a number of years was how long can we retain our documents for, when, of course, a document management policy, we could spend an entire day on, but the beauty of it is it tells you how long you can retain it and what you can purge from your system. It is so important to be on top. Anyone who has that as the last item on their list because it involves documents, which many of us detest, you're not doing yourself any favors. You need to move it to the top of your list and make sure that you're bringing your document management policy to the forefront of your company's goals. And the reason for that is we want to make sure, when we're going into the e-discovery process, that we've prophylactically and from the very beginning made it as easy on ourselves as possible. That means that the documents that are 14 years old that are sitting in three warehouses don't need to have 14 associates descend upon them for three months because you can't search for what doesn't exist. And they don't exist because there's no need for them, and all they are doing is hanging like an albatross around your neck when somebody sends a document request in a big case. So I think that's well said, Phil, that the document management policy can preempt a lot of the costs associated with e-discovery.

ANDROVETT: *If I'm a businessman sitting in the crowd today or in-house counsel I get it: If I don't have stuff 14 years old it's something that no one's got to look through. But there's also that tug of, well, I don't want to be accused of getting rid of something and then later getting hung on a hook for that. Let's talk about this document management policy. What does a good one look like?*

MARKETOS: The best document management plans are not designed around e-discovery plans. They're designed around your business. And the reason I say that is, people are concerned that if they throw things away that they're either going to be accused of spoliation, that word that strikes fear in the hearts of all in-house counsel understandably, or that they're violating some type of statute. So the best types of document management policies are those that first consider what rules, statutes, Sarbanes-Oxley, industry-specific or otherwise, apply to the specific materials that are kept and retained both in data storage and in paper files at your business. And then once those statutes and laws are identified, you work inward, from a shorter time frame in, and try to identify how long, practically, we need documents before we can purge them. Once those documents sort of have been identified — we only need e-mails for two years or we really only need drafts of contracts for three years or the statute of limitations on a contract dispute is four years, so let's make that our outside parameters — everything else can fall to the wayside. And a document management policy protects you from allegations that you have improperly deleted or destroyed evidence when litigation arises because you've been following it historically. Now, of course, you have to suspend it to the extent it calls for routine deletion once litigation ensues. But the idea is that you've created a reasonable basis for destroying documents, and that makes things a lot easier in terms of retaining and then also

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Peter D. Marketos is a partner in Haynes and Boone, LLP's Dallas office. As a trial lawyer who practices commercial litigation, he represents clients as both plaintiffs and defendants in business disputes from trial through appeal. Marketos has tried many cases to juries and to the bench, obtaining favorable verdicts in disputes involving corporate fraud, breach of contract, breach of fiduciary duty, and theft of trade secrets. He has developed substantial expertise in the discovery and analysis of electronic evidence through the use of technology and computer forensics. Most important, Marketos puts a premium on oral and written advocacy. He believes the best trial lawyers excel both on paper and in open court—and they represent their clients with dignity, professionalism, and respect for their opponents. As an Adjunct Professor at the University of Texas Law School, Marketos teaches the skills and ethics required of the modern trial advocate.

for employees to make sure that they're properly managing their electronic data so that they're more easily accessible.

COHEN: From my point of view, the most effective plan is going to be one that has real buy-in. It's one where it's coming from the CEO or your General Counsel or whoever is in the position to communicate that this is the culture of our organization, and we believe in records management and it's important. If you're going to be a good citizen in this corporation or in this not-for-profit or whatever your institution is, this is part of what it takes to be a good citizen in our enterprise, this is what we expect. And it has to come from the top, and it has to be communicated throughout the enterprise because having a great policy is terrific, but if you don't live with it and it's not part of what you do, if you don't understand it and you don't comply with it, it's going to create as many problems as it's going to solve. So it can't be something where you retain a law firm, you put together a terrific retention program, and then it's done. There has to be auditing. If you do not comply with a rule, is there training? Do people understand what's expected of them? Are expectations clearly communicated to them? If you can create that kind of environment, it protects you in so many different ways because, if there is a mistake made, you're able to go into a court — and the courts in Texas clearly are interested in hearing about what you've done to be reasonable — and you will have a great record for establishing you have acted reasonably with respect to your records management. The law does not require perfection. There are a lot of vendors and people who go to conferences who try to scare the pants off of people, saying that you're not perfect, you know you're not perfect, and you're going to get sanctioned for not being perfect. And that's really overdramatizing the situation. What the courts are looking for is for parties to work things out and to say we understand what our records are, this is what we've got, this is what we don't have, this is what we can give you, this is what we don't have, and how's that? Then the other side can say, okay, let's start with that and let's work together. If you can cooperate and if you have a reasonable program in place, you're really doing a great job for your enterprise.

MARKETOS: Can I throw in a concrete example really quickly? We had a multibillion-dollar client a few months ago facing an EEOC charge; and they told us, well, we've got great news: you don't have to worry about us having lost any documents, we keep all e-mails for nine years. And so the concept of searching for any discrimination-related material on a multibillion-dollar corporation's firm-wide server and then determining whether or not they've been kept for longer than that, there are no favors. Yes, you'll never be in trouble for having potentially spoliated something, but what you have done is added years upon years of material to review that no one but the plaintiff or the opposing party would ever think would be worthwhile to search. So that's what we're talking about, paring that down and making sure you don't have that material to search because, frankly, it's not doing any good for your business.

ANDROVETT: *Is there a physical component to this? How difficult is it to access this information? Is it on remote servers, far away? Is part of this effective management program to come into a company and say you need to change the physical construct of your document management? Is that part of this?*

MARKETOS: That's always difficult. The first thing is you meet with the client's IT, generally, and you bring your own litigation support and IT help, which we're fortunate to have a great deal of at my firm. But it's true, there are often cases when you're thinking to yourself: how do I collect this data? And what you're really thinking to yourself is: how in the heck did they run their business? But look, that's not being facetious. Everybody's got that problem. Companies grow. They grow by acquisition sometimes. Systems they don't always get integrated or centralized. You don't have a centralized nerve root. You've got somebody who's operating on a UNIX-based system or Linux out here in California, and you've just acquired a company that's doing all its own in-house IT on this side. And you've just got to be creative. Hopefully while you're working through the process, it assists the client and you can explain to them how they can help for the next time it happens. Because

once it's happened, it's too late, you have to go out and get the data. But for the next time, centralizing, integrating data, and keeping a routine.

COHEN: The way to communicate this is that it really is good for the client's business. I mean, separate and apart from our selfish interests in representing clients in litigation and making our lives easier and it being more efficient for our clients, I think it really makes good business sense. I mean, there are a lot of assets for businesses in their data. And if they can manage their data properly, for example, if they have successful, historia programs that are easily accessible, those programs can be shared efficiently with their business people, so the business can leverage that asset to help the business run more efficiently. So there are all kinds of benefits. And when you talk to our clients, that's the kind of bottom-line business reasons for doing this, separate and apart from the legal reasons.

ANDROVETT: *Back to this buy-in that you suggested, Philip, identify this team of people that are required to really get their arms around a good management policy. Is this the IT person, HR person, general counsel? Who are these people?*

COHEN: It's got to be all the stakeholders of the enterprise, so if it's your business people, you have to get them in here, and ask them what do you need to run your business? In order to do your job well, what records do we need to keep in order for you to be effective? Risk managers have to be involved. CFOs, they have to understand the costs related to what's going on. General Counsel, either in-house or outside counsel, should be involved to make sure that it looks like you've hit your key regulatory requirements and legal requirements and to know that if there's pending or threatened litigation out there that you have set aside those materials or have a reasonable process in place to protect them. So the short answer to your question is: all the key stakeholders with respect to the enterprise have to be involved, it has to be a true buy-in from the entire enterprise, and it really shouldn't be just the top down for it to work. Also, when it comes time to make a change, consider rolling it out in a department that you believe is going to be particularly compliant, people who you think would take to this well and would not be resistant to change. Roll it out there. If they like it, you work through it, you audit it, and then you roll it out through the rest of your enterprise.

ANDROVETT: *At a sophisticated company that has an IT department, I've heard the complaint from lawyers that they are trying to get rid of this stuff and then they come up on this IT person who has saved everything for the last 35 years. Not so much a comment on that, but talk a little bit about how you fold in the IT person and the IT department who may view their role as decidedly opposite what your role is.*

COHEN: Well, that happens. There are people in IT who think that if they find the missing thing that everybody's trying to find that they are the hero, and it doesn't matter that they were supposed to get rid of certain things on a certain schedule. They've got underneath their desk the tapes that go back to the dawn of time, and they're doing it because they're going to look really good one day when those tapes turn up. That really does happen. You know, it helps to have people who know IT speak who can get involved on your team to talk to them because there are different languages that people speak, and IT speak like accountant speak, like lawyer speak is a kind of speak that a lot of people cannot talk that language. So it really helps. We at Greenberg Traurig have people on our team who are involved who can talk that talk. My co-chair of my practice group is a former computer programmer, and he is terrific at talking to the IT people when we go through there to try and minimize that risk. But people are people, and people do funny things. And you can't predict what's going to happen. And that's why I think the analogy of e-discovery being an onion and the deeper you dig, you know, the more tears you shed is a good one, because things are going to happen. But that's why, if you have a reasonable program in place in your enterprise, you're going to be insulated somewhat from when that unexpected event happens.

MARKETOS: Right. It's no different from the CFO who has been adhering to the document management policy scrupulously on his work laptop, which he

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downloads to his personal laptop every night, and then has 15 years of financial information at home. It's just all about buy-in and explaining from the top down that, look, this is something that's going to help us. If we can't find a document that's six years old, so be it. We just don't want to find one that we didn't know existed before. And that really just takes buy-in when you're implementing the policy.

ANDROVETT: *Forgive me if this is an elementary question, but is this further complicated now with everyone having their iPhones and their BlackBerrys? And are there certain disciplines that apply there, either legally or technically, that don't apply to walking into the place and saying let's look at your servers.*

HABBINGA: Data is everywhere these days. In the old days, we used to have actual physical files that had dates on them so we knew when we needed to destroy them. We actually went, for those of us that are old enough to remember, tickling the file to get to the files that we needed to pull for instruction and/or to archive. We at least knew in the paper world where those documents were, and there was a lot more control around that. Today we have the ability to store data and documents virtually anywhere. And so when we're digging into any given case, it's not just necessarily the PCs or the servers, but we have the ability to have jump drives, backup tapes, iPhones, and personal e-mail addresses, aliases, et cetera, that all come into play. And that creates a lot of logistical nightmares when you actually get to the litigation phase, trying to locate all of the potential sources of data and then working through the volume of data that can come from those sources, specifically duplicates and documents that are virtually the same that are in multiple sources.

MARKETOS: Nightmare is right. With The proliferation of handheld devices, iPhones, BlackBerrys, it is a necessity in the way that we conduct business today, and it just creates a gold mine for the digging plaintiff's lawyer or opponent who wants to make sure that they get every ounce of data possible. There are text messages stored on BlackBerrys that don't cross company servers. There are ping messages. There are BlackBerry to BlackBerry specific messages. In some companies, that's how they do business. They use their BlackBerrys amongst employees almost like a walkie-talkie. And of course, with each advance of technology, the more instant it is, the less formal the language used surrounding the business discussions, as we all know. And so some of the more horrible admissions about "how this rollout is going terribly, our new product stinks"; that's something you don't often find in a letter. You rarely find it in e-mail, but you might often find it in somebody's instant messaging log. An astute opponent is going to ask for those, and you're going to have to know how to get to them.

COHEN: In my experience, I found that most of the handheld devices that we've seen for our clients are synced generally and that you can ask questions to determine whether texting and other communications that may not be synced are used for business purposes. Certainly, doing business in texting and that kind of thing is problematic. But when it happens, it's really our duty, as outside counsel or the consultants with whom you work, to do the interviews to determine whether that is a situation. You need to talk to the key players, the key record custodians and determine whether the potentially relevant information is, wherever it may be. And you know, Pete, I have to say, I think people say just about anything in e-mails. It just puts a great deal of burden on the outside counsel or the in-house counsel, whoever is running your records collection and review, to determine where are those potentially relevant records. And you can't simply say, "Do you have a laptop, okay, great." Do you work at home? Most people do. I mean, that's just the way things are. Well, where do you store it when you work at home? How do you handle that? Do you save to external hard drives? Do you save to thumb drives? And again, the better centralized people are, the better centralized corporations and enterprises are, the easier it's going to be, the cheaper it's going to be. But you need to do that due diligence.

MARKETOS: One additional piece of practical advice. For an in-house counsel who is facilitating a document management policy, obviously you're going to want to make sure there's a limit on the amount of information that continues to be stored on handheld devices because they can retain years of information. You think you've purged it from your system and, if it's not synced, there it is on your CFO's BlackBerry. But also make sure that your employee handbook and company policies permit you and provide that any business that is conducted on company equipment, company-issued equipment, or equipment that's used to access company information can be accessed by the company in times of litigation and to perform routine checks, both to make sure you're adhering to document management policy and to make sure that you're compliant with law. Because otherwise, you're going to run into a situation where the employee has their own iPhone or their own BlackBerry and you really need to get the information that's on it because it's business-related and it's got firm e-mails or company e-mails on it, and you get into a privacy dispute. And it's a lot easier to do that if the employee has signed off on your right to access that information if needed.

ANDROVETT: *Let's talk a little bit about what happens when you're sitting in the corporate suite and you have some reason to think that there may be a threat of a lawsuit. The rules change regarding the document management. Let's talk about the best practices at that point where you anticipate litigation, but also maybe we can start by offering some guidance. How real, for example, does this threat have to be? Is this a heated conversation with a rival who says, "I'll sue you"? Can you do your policies as you've always done them until the day you're served? Talk a little bit about that.*

MARKETOS: The touchstone and the catch phrase is always when litigation or government investigation is reasonably anticipated — and that, of course, is the ultimate jury question. Reasonably anticipated is the point at which your document management policy gets turned off and your hold letter goes out for me. If I'm advising a large company, it goes immediately out to the IT director and to the key players to make sure that we're not

now doing what we've been protecting from by using a document management policy; we are not now putting ourselves in harm's way by allowing documents to be destroyed. Everyone says, well, that's great, what is the practical answer to the question "when is litigation reasonably anticipated?" And for me, there are a couple of them. One is you pick up the phone and tell somebody, uh-oh, we might get sued over this. When did you contact outside counsel? So when did you think, oh, jeez, this can turn into a lawsuit, and just pick that date and go with it. You don't have to have anything that's set in stone. The point is after that date, no one's going to challenge the fact that you should have done something 90 days before that. One thing to watch out for in litigation — this is another practical tip — is the work product rules can protect a company from having to divulge internal discussions about a dispute, about a problem that's arisen. And a lot of times, companies will raise that in defense of producing communications in-house between officers, maybe involving in-house lawyers, on a certain date, saying, we reasonably anticipated litigation at such and such a point. And people can be very aggressive with it and say I reasonably anticipated litigation as of May and you're not getting these e-mails. Well, watch out because you better have started holding off on your document management policy at that point, too, and sent out the hold letter and made sure that you were preserving backup tapes or whatever the case may be from that point forward, or you may have just shot yourself in the foot. You can't reasonably anticipate litigation for work product purposes, but not in terms of ceasing the destruction of documents. So that's a pitfall that I've seen companies accidentally fall into.

COHEN: There is an interesting case that was decided by a federal circuit court involving a railroad where the railroad had frequently above-grade accidents where cars would get into accidents with trains because they ran the light or ran the gate and they got hit and major injuries ensued. And the railroad had a policy of recycling their audiotapes every 90 days, communications between the engineers and the depot about the trains that were being dispatched by the railroad. And there was an above-ground collision. People were seriously injured, and there was no complaint, nobody sent a letter, nobody served a summons or anything like that. And then every 90 days, recycling the tapes between the engineer and the dispatcher are erased in the ordinary course and they get sued. And the court held that even though there had been no summons and complaint, this was a railroad, they were in the business of knowing that it was reasonable that when someone got badly hurt, when a car ran into one of their trains that there was likely to be lawsuit that followed so that, in a situation like that, what's reasonable anticipation of litigation, they should have reasonably anticipated that they were going to get sued, that this was not just going to go to some car insurance carrier and that would be the end of it. And the court sanctioned the railroad for recycling their tape and had an adverse inference that you could assume, ladies and gentlemen of the jury, that, on that audiotape, it might have said something like, "man, we should have maintained our brakes better on this train, I could have stopped, I feel terrible about this," whether it existed or not, and they could assume that the railroad purposely destroyed those audiotapes because it would have been harmful to them in the litigation. So, do you need a summons? Do you need a complaint? No, you don't. I agree with Pete, if you're concerned enough to be asking your outside counsel for legal advice about a possible lawsuit and how to get ready for it, you should be thinking about preservation.

MARKETOS: And as a general rule — to follow up on what Phil said — if a car runs into anything that your company owns, go ahead and think about litigation.

ANDROVETT: *I want to identify that defensible and thorough, well-thought-out preservation policy. But before I do, are there any differences in how a plaintiff is treated on this question of anticipation of litigation? I can think of any number of areas where there are entities whose purpose-in-being is to file litigation. What are the standards that are imposed on plaintiffs in that regard?*

MARKETOS: Generally speaking, they're actually not de jure, but de facto held to a higher standard and probably rightfully so. If you have any reason to destroy documents that actually help your cause, you should suffer the consequences. But more specifically, if you are anticipating filing a lawsuit, you're in control of it; so of course, look less favorably upon a plaintiff who is, at all times, in control of their own thought processes. Well, when you anticipated litigation, you are, again, in the driver seat. So if you've lost some type of hard drive or some computer version of a computer program and you're suing over a copyright violation, you're going to be

in a much tougher spot than you would be if you are a defendant and you had no idea you were going to be hit with that lawsuit. It's not in the rules anywhere. Again, it's reasonable anticipation. But it's just the standard of reasonableness is heightened when you're talking about a plaintiff. And that's as a matter of how the courts have ruled, not as a matter of any written rule.

HABBINGA: I think from an e-discovery subject as a whole, plaintiff's are being forced to consider the ramification of technology in e-discovery earlier in the process and start asking the questions to both themselves and to their clients on not only what electronic data that their client may have, but also start asking questions about the corporation and where certain data may be found within the corporate structure, who might be potential custodians of that data (supervisors, executives, IT folks, etc.) and just some of the business practices that affect the potential relevant data. I think overall, plaintiffs are learning and are finding that they have to cope with the discussion of e-discovery very early on in the case in order to be successful.

ANDROVETT: *And, Mark, is some of that just an element of being careful what you ask for, you just might get it?*

HABBINGA: There is that, and if you have an overly broad production request and the defense decides to give you what you want, then you actually have to filter through it. You have to be able to deal with it. You have to handle the cost that's going to go along with managing and hosting and reviewing that data. But additionally, I think that you, as a plaintiff, need to be prepared to meet the same requirement or request or standard that you're expecting the defense counsel to meet. So plaintiff's need to be prepared for defense counsel to come back and ask for some of the very same types of information, which the plaintiff's counsel may or may not have thought about collecting at that point.

COHEN: In most of the cases I'm seeing, you're dealing with plaintiffs that have precious little data, and they basically use electronic discovery as a hammer to just beat on defendants that have lots of information because it seems to most plaintiffs and their counsel that there's little downside to being as aggressive as they can, to just go after defendants. And I think the courts are not impressed, necessarily, by that behavior. I think that there is some pushback. I think that the federal rules and the comments the federal rules are seeking proportionality and reasonableness, and I'm not saying magistrates and judges are all that impressed when plaintiffs ask for the moon and stars when all they really need is certain discrete information in order to get to the heart of the matter. And it's something that defense counsel is able to use effectively when plaintiff's overreach.

ANDROVETT: *Talk about the decision process. Say you're served with a lawsuit. Now you have to hold. Now you have to retain. Now you have to make notice, alert people. Talk about what that looks like when it's done well and what are the pitfalls.*

MARKETOS: A rule of thumb would be: as soon as you get a lawsuit the matter has landed on your desk. And this is sort of the practical question we get asked a lot from in-house counsel: Okay, now what? Do I just call outside counsel? Do I tell everybody in the entire company to stop pressing buttons on their computer for fear that we're going to delete something? And really, you can take some methodical steps to make the job easier on yourself. First thing's first: The data, generally speaking, is not going to be deleted in the next five minutes or by the end of the day. If it does, you can handle that. But make sure you're identifying, first and foremost, the key players, because in your rush to go out and make sure that you're not going to be accused of spoliation, you may create a little bit of a panic in publicizing a lawsuit that the CEO or somebody else wanted to keep a little bit more confidential. But in the process of doing that, identify the key players and send out your litigation hold letters. It doesn't have to talk all about the lawsuit. It says there is litigation involving X subject matter. Send it to the IT personnel and meet and discuss each of the key players, sit down and discuss with them where information is kept, and direct that they keep it. Now you've got yourself out of the document management box and into the preservation box. And once you've got preservation, you've got it tightly wrapped in a neat little bow, reviewing it and the cost of reviewing and what you're going to review, you can deal with that at a later date. How much are we going to spend, is the plaintiff or the opposing side going to lose steam and decide to drop the lawsuit, do we have to go through the process of spending and reviewing and hiring outside counsel, there's way too much data. You bifurcate that process. First, it's preserve; and then review and assessing how much you have to review is for later. I think that if the nature of the alleged misconduct is actually tied to electronic evidence, something like a copyright dispute or a theft of trade secrets or computer fraud and abuse act, obviously the amount of information and the levels you'll go to preserve are heightened. If it's a contract dispute, you just make sure you go through your e-mails and your e-mail server and make sure that, generally speaking, your normal business records are preserved.

COHEN: Two things. Not only are the obligations heightened with respect to an IP theft or a misappropriation of client information, but the need to act quickly is also critical there because you want to preserve that information, that hard drive, that electronic information that's going to be the key the case that's only going to get older and may change as soon as you can. I agree that is an important fact scenario. I think it's critical, for it to be an effective plan, for it to be well documented. I mean, time's going to go on, years are going to pass before discovery is over in your case, if it doesn't settle, if it goes the trial and this all comes out. And no one's going to remember what you did, how you did it, where you kept what you kept. You need to have a record of who did what. You need to document your diligence, and you need to make it clear that what you've done was reasonable given the nature of the case and the people who had the information. So documenting your diligence, laying it out there, and having it put aside is something we recommend when we work on preservation plans with our clients. Also, once it's done, it should be done

again. And finally, in terms of collection and preservation, it's all over the map. I have clients that think that they can do the review in-house themselves and they don't need outside counsel to do it. Some want to have it done by an outside vendor. There's a myriad number of ways that you can handle the actual review collection. And there is no one review tool that fits all There are review tools that are I'd call them cheap and dirty. You can get it, you can get out; they don't have a lot of bells and whistles, but they tell you some basic information about what you need to know about data sets at a relatively low per gigabyte cost. There are some really fancy tools where you can look at millions and millions of records graphically and see who has what where, who communicated with whom, absolutely beautiful tools that cost a lot more money. And then there are a lot of things in between. Some are designed only to be done by outside counsel who are experienced in doing reviews, and some are done in way that your client could do it themselves. So there's a wide range of tools out there, and technology is changing incredibly rapidly.

MARKETOS: One minor thing to add to that. I do agree with Phil that clients often want to have their in-house IT handle or do the search for e-mails. I prefer, generally, as a practical rule, to have the preservation done by outside consultants, forensic experts. And here's why: Consider that the cost of imaging a laptop computer is anywhere between 6 and 800 dollars now, industry standard, that's for an 80 gigabyte laptop. And then consider the amount of prep time the attorney is going to have to take to prep your in-house staff for a deposition. And you definitely, if something goes wrong during the process of preservation, my preference is to have that fall on an outside expert whose credentials are not going to be questioned and whose motivation or whose motives are not going to be questioned if, for some reason, data goes missing. That's my view. Now, if you've talking about 200 laptops and that's just outside of the budget, understandably, that's just a cost benefit if you'd rather hold that inside. But as a rule of thumb, I generally prefer that the preservation be done by outside consultants.

HABBINGA: I think that also depends on what kind of case you have. Obviously, if it's a small sexual harassment case, that would be one scenario. But if you're dealing with a DOJ investigation where the scope can be very large and the liability relatively high, you'll want to make sure you've got experts that are doing that and that you're not relying on your IT folks to end up on the stand.

ANDROVETT: *Maybe there's no magic software or platform, but as a general rule, are there certain elements that you recommend to your clients if they want to do in-house review that whatever they're using should have?*

COHEN: I've had clients where there are data security issues where because of the nature of the information that even people within the enterprise are limited to who has the right to even review the records. So when I look at the different platforms for clients, I try and put myself in the client's shoes and think, who is the person who is going to be using this tool and is it intuitive, is it something that makes sense to a person who's not in the business of reviewing records? I think about who is going to be a records manager? Is it going to be an IT person? If it's an IT person who is a highly technical person, they may not need the most intuitive tool that's out there. I'd like to see a tool, personally, that has sort of like a Microsoft Exchange format. People are used to seeing it that way, and they understand how that works, and they're comfortable with it. Some people like tools that look like Petri dishes where they can take everything that relates to one topic and put it into that dish and put it into this dish. And so there are tools for all different kinds of reviewers.

HABBINGA: I think that there are a number of things you have to look at when considering a review platform, whether it's being handled in-house or by outside counsel. Specifically to in-house counsel, you're really looking for a tool that's going to allow you to speed up review and to very quickly see documents in context — thus reducing the cost of review. You'll hear plenty of this in the next presentation, but to give you a few of the latest and greatest technologies, there are three that come to mind: the ability to cluster (finding trends in the data), benefits of using categorization (which is "find more like this" technology), and prioritization technology — which is the ability for a knowledgeable attorney to train the review software to identify relevant documents and send them ("prioritize") to the front of the review queue so that the most relevant documents are looked at first and less relevant documents can be reviewed by less expensive sources. But at the end of the day, for most attorneys — and especially for in-house counsel that are doing a lot of their internal reviews themselves — they need the ability to be able to look at a document in context. And when I say "in context," they need to have the ability to get to the information they truly need earlier, which is the "what happened, when and who knew about it" of the case. This should include the ability to quickly look at the metadata of any given document, find out who the author was, what date it was authored, if there were changes made, whether there was track changes. Counsel also needs to be able to identify whether there are different versions of that document in the data set and very quickly compare those different versions in a feature such as a red-line compare window. But it is the high volume of e-mails that need to be reviewed that is the most burdensome today. The real time savings on e-mail is having the ability to look at an e-mail in its conversation thread and be able to quickly drill down to the inclusive e-mail (the e-mail that includes all the other e-mails in the thread), read that e-mail once and make a coding decision either across the e-mail family or on the individual e-mail level. With the right e-mail threading technology you can not only accelerate the review and reduce cost, but you should be able to immediately find out whether that document is relevant or privileged as well as see it in context compared with the other documents. Clustering, categorization, e-mail threading, near duplicates, and prioritization tools are all features that you should look for in a review platform.

ANDROVETT: *There has been a timeline in conducting the e-discovery roundtables*

for Texas Lawyer. The first one was before the adoption and implementation of the amended rules in 2006. And in that discussion, the lawyers didn't think the vendors knew what they were doing and the vendors were highly critical of the lawyers. Add to that, the feeling that judges don't like this stuff. And since then, there has been a real evolution. There is more discussion about collaboration and sophistication, even among the clients. But I do remember in March, when we convened for the most recent discussion before today, and we got to talking about the meet-and-confer. And I remember asking the panel at that time: is that having real value? Are you finding that you're really getting these issues hashed out? And generally the panel members went, no, it is kind of a waste of time. So I'm wondering, number one, has that changed at all? And number two, is that more of a function of lawyers who know the rules better, know how to make that meet-and-confer work?

MARKETOS: Today vendors don't think lawyers know what they're doing; lawyers don't think vendors know what they're doing; and judges think we're all crazy, so nothing's changed. The truth is I think that, as e-discovery, if you just see the proliferation of CLEs on this topic, everybody wants to know about it. Everybody is interested in it. But unfortunately, the way the process is supposed to work in our adversarial system, it really only works well to discuss it on the front end if both counsel are cognizant of the rules, cognizant of their responsibilities, and have a basic understanding of why we're undergoing the process. That is, the better the quality of your opponent, the better the process works, frankly. That's not always the case. It's not always the case unless you're dealing with large either bankruptcy disputes or big disputes in federal court. And sometimes, frankly, people are distrusting of the process. They want to know why you're talking about computers. And you say, well, we're required to. Okay, I'll get back to you in a month. And so you really have to push. But people are starting to understand, I've noticed, at least in larger cases, that the quicker we talk about these topics and the quicker we resolve them amicably, it's going to save both our clients a lot of money. And so in that regard, I think there have been great strides.

HABBINGA: Really, the push is coming from the bench. I think in the federal courts there has been a lot of dialogue about what expectations should be in the meet-and-confer, and they're really pushing very hard to have the meet-and-confer actually mean something. Obviously, it depends on what type of case it is, but even on a local level, we're getting pushback from the judges to counsel to get together, mutually agree, and if it can't be mutually agreed, then the judges will step in. I am aware of one corporate counsel who had a plaintiff who asked for every .docx file extension, which is just a huge volume of data. And they've been fighting for a year-and-a-half over just what the true request for production needs to be. And even the local judge said, look, if you guys will go and conference right now, you will work through these issues and then come back in and report to me on what you guys have decided. And so even on a local level, I think there's a little bit of frustration on the lack of cooperation when it comes to e-discovery.

COHEN: If you have a trusted vendor on your team, someone who you can really rely on and bounce things off of, that makes for a better team. It's very helpful to me, in trying to give advice to my client, if I can bounce it off vendor who I respect. It gives me additional confidence when trying to put together a good plan for a client. So there's definitely a role for vendors with respect to pre-discovery conferences. I think they make sense. Judges and magistrates hate electronic discovery disputes. There are a handful of judges out there who have written extensively on the issue. The Texas Supreme Court just issued an excellent decision from August of this year in the *Weekley Homes* case. The theme that runs through this decision is that litigants should work this stuff out themselves, and they're going to punish everybody if you don't. The feeling is a "pox on both your houses" if you can't work out your electronic discovery disputes. You don't want me to decide this electronic discovery dispute because you're all going to be sad. So figure it out; be big boys and girls and work it out. And that's clearly what the new federal rules are intended to do. It goes back to records management. If you know where your records are, if you know what you've got, if you know what you don't have, you can put me or Pete or whoever your representative is at that conference and say, now, this is what we can do and this is what we've got, and what you're asking for is ridiculous because it's going to cost us X amount of dollars. And it's not going to cost X amount of dollars because my IT guy tells me it's expensive; it's going to cost X amount of dollars because my IT guy talked to my consultant and we know exactly what it's going to cost if we're going to have to go and restore this, that, and the other thing. It's not like you're just saying something that's not true. If it turns out that the thing that you said was so expensive and so hard to do is actually really easy to do with inexpensive technology, the judge isn't going to be impressed with you. You're going to look bad and your client is going to look like it's trying to hide stuff, and everyone's going to get burned. So I agree with Pete. There's an important place for these conferences, but I think that even if you have an untalented adversary on the other side or an inexperienced adversary on the other side on an electronic discovery issue, if your house is in order, you can use this as an offensive weapon with the other side. And sometimes they'll work with you and they'll say, well, maybe we want some of that stuff and you can get an agreement with your adversary. And you're protected because you've been forthcoming, you've said what you're going to do, you've said what you're not going to do, and the burden has been shifted to your adversary who has to get judicial relief if what you're suggesting is inappropriate.

HABBINGA: One of the things that jumped out at me when Phil was talking is that he said meet-and-confer *sessions*, and I think we're seeing that most attorneys don't realize that this is an ongoing dialogue. And the cost savings from a defense standpoint and getting what you need from a plaintiff standpoint is ongoing. And a perfect example of that is when parties are working through search

terms and the ability to run reports and look at your data and do sampling and come back and tweak things as necessary as you're going along. And it's vitally important to be thinking that it's not only a box to be checked where you have a 30-minute meeting, where perhaps somebody that has some sense of IT knowledge shows up, but that it's an ongoing process that you need to be working with your opposing counsel on to get to the data that you truly need.

ANDROVETT: *I understand that the underlying dynamic is sort of a "push me, pull you" on this notion of what we give up, what you give up, what we accept. But in general terms, a short list at the meet-and-confer, are there other things that you want to accomplish in that meet-and-confer?*

MARKETOS: At the meet-and-confer, first thing you want to accomplish is to communicate to your adversary that you're well on top of your client's technology and you know what's out there and that you have a good sense of what they might be holding. If you can communicate that you have done an early case assessment with your client before you meet with the opposing lawyer, and have identified what forms of data are out there and that everything that they ask for on the push-me side you will be requesting for on the pull-you side, generally speaking, the conversation becomes a lot more civil a lot more quickly. So first and foremost, it is what data exists, in what format and where, and then, finally, from whom. The fifth question we ask is: What is the method by which we're going to gather it? Are you going to do it internally, or do you want me to bring in my consultants? Sometimes you'll be surprised, and a company will say they don't care, and to bring in whomever you want, provided they can watch over the process. And that may be the more cost-effective solution.

ANDROVETT: *Regarding the* Weekley Homes *case. When this ruling came out from the Texas Supreme Court, the March panel noted that this was the first ruling on the Texas e-discovery rules — not the federal. And, by the way, those rules predate the federal rules. There seemed to be a lot of little tributaries in this decision. There was an emphasis on experts really knowing what the other guy has in terms of systems. It seemed like a big dynamic here was to actually get hard drives and image them. Can you help us make sense on how relevant this case is in the overall discussion of e-discovery and how it might be distinguished from the federal rules?*

COHEN: It's an interesting case because it talks about how, as you indicate, Mike, that Texas rules have long considered electronic record, as documents that are properly discoverable. Then they consider the discovery of hard drives of custodians in this case. What was interesting is that the Texas Supreme Court really looked to federal cases across the country interpreting the new federal rules and found that there was nothing inconsistent with respect to the federal rules and the Texas rules. They looked across the country for rulings in this area to try and look at reasonableness and proportionality as to when it's appropriate to get access to a custodian's hard drive. The analogy they made is that, just as we've been concerned about giving access to file cabinets where we wouldn't simply just let an adversary go rummage through filing cabinets, we feel the same way about a hard drive of a custodian. We're not simply going to say because there is some testimony that the corporation hadn't done the world's best job with respect to preservation, that you can now get free access to 25 custodians and all these search terms and a free run by bringing in your expert consultant to go through your adversary's hard drives. And the Texas Supreme Court put some serious brakes on its precedent from an earlier decision. They focused here on reasonableness and proportionality. Do you need *this hard drive* in order to get to the facts of this case? The example Pete gave us, when you have someone who has stolen intellectual property or a client list and it was stolen by this person using this computer, likely loaded to that laptop, that's very different from just a generalized sense that this company could have done preservation better. That doesn't get you there. You really need to make some showings. And I think the court was offended by the fact that a party its own expert consultant in to look at an adversary's hard drives. Having a neutral consultant would have made the Court, probably, a little bit less concerned about the scenario. But it really goes back to the idea that, in electronic discovery, you need to be reasonable and proportionate in an approach and, before we're going to give you wholesale access to your hard drives or your file cabinets, you've got to go through certain showings. And I have copy of the decision. It's Case Number 08-0836. And it lays out a standard which — I'm not going to go through now — includes some significant hoops that have to be jumped through by anyone who wants to get access to the hard drive of an adversary. Again, we're not talking about a limited search which has to be done by an adversary and turned over. This is actually going into your adversary's hard drives and just having your way with it.

MARKETOS: And that makes sense, Phil, because, again, e-discovery is just discovery, and it should be. And that analysis and parallels are drawn by the Texas

Supreme Court. It will be interesting to what the repercussions are of this case. I don't want to overstate its importance, but it is the only Texas Supreme Court case that is managing trial courts on how e-discovery is to be conducted. The parallel with not having somebody come into your office and rummage through your drawer is a good one when you're talking about simple e-discovery. If we're in a dispute over contracts and I've done my best to locate e-mails and there's nothing to suggest that I've done anything wrong, why should my adversary be able to send somebody in and get a hold of my equipment and start running search terms again just to make sure I've not missed anything. That would be like sending your paralegal into my CFO's office to go through his file drawer. The distinction is between e-discovery and forensics; and that is, when there's a dispute as to what data I can obtain off of that person's laptop beyond the mere existence of an electronic file. If I make a showing to the court that a file was deleted on a certain date by a certain person, it was transferred to a thumb drive, it was e-mailed to a personal account, that's information I can obtain through a computer forensic expert. And I would argue to the court that I should not have to rely on my opponent to provide that information to me. That would be like asking to test the scene of an accident and having the company say, "You know what, we'll test it with our experts and we'll send you the results." That's the distinction that I would make is, look, on standard e-discovery disputes there's no reason why I should get your laptop. If there's a dispute as to electronic data that we've shown should exist on that laptop, then we should be able to inspect it.

ANDROVETT: *As we segue into our break and then our follow-up panel, if we agree that e-discovery in all of its manifestations — practical, technical, and legal — are evolving, can you share with us your insights on what this might look like, say, five years ago? What might be the hot spots? What might be the potential pitfalls that we should keep an eye out? I realize it's a painfully open question, but I find that often we draw very excellent information when we allow you to just riff a little bit.*

MARKETOS: I would say experiment. If you're outside counsel, experiment with the vendors' programs, the review tools, get familiar with the technology. You'll be amazed. I know that's making a lot of our vendors happy who are here today, but their products are truly amazing and can save a significant amount of your time and your clients' money. So get familiar with their products. And what you'll learn during that process is the formatting and the processes by which your clients store information — which is changing. It's not the same; everything's not stored on tape like it used to be. And if you familiarize yourself with the basic technologies for preserving, storing information, basic information technology, and then reviewing it, you should be on top of your game. As in-house counsel, I would say similarly, get familiar with how your company stores data, the formats by which it does, and then which review tools are best for certain cases. You don't need a concepts-based review tool that will charge you by the terabyte for a case that's going to involve 500 pages of documents in a dispute over a contract interpretation. You may need one for that SEC investigation where they want every document under the sun. Familiarize yourself with what's out there, and then select the best tool.

HABBINGA: From a technology standpoint, I think that the e-discovery tools that are being produced and created by vendors are evolving as quickly as methods to create business records and electronic evidence. Some of the things that are on the cutting-edge, are the use of clustering and categorization, as I stated earlier. But I'll tell you, from historic data, only about 10 percent of the clients out there actually use these advanced tools and primarily it is because they just don't understand it or they don't trust the technology. One of the technologies that is on the cutting edge right now is "prioritized review." Prioritized review is where an attorney can actually sit down and perform relevance review on a set number of documents and train an algorithm to actually identify relevant documents across the set, bringing the most relevant documents to the front of the review queue (prioritizing). Now, every attorney in the room shudders at that thought, but that technology is going to be utilized in the future to help categorize documents once they've made it through the filtering and searching so that inside counsel or law firms can determine which data can be reviewed by what source. So if, indeed, a corporate client is set on outsourcing the review or sending the review offshore, perhaps they only send the documents that fall into the low-relevance bucket having outside counsel review the high-relevance bucket. So there's a lot of interesting technologies on the forefront. You'll probably hear a bunch about that in the next session. And along with Pete, I just recommend that you at least look at them because they may apply to some of your cases. They're unlikely to apply to all of your cases. They will never apply to all your cases. But there are advanced tools out there that can help you meet your clients' budget needs and help you find the evidence quicker and faster.

COHEN: I think in this space, when we're talking about technology, the thing that I'm seeing and we're going to continue to see is that costs are coming down, that tools are getting better, cheaper, and it's becoming more common for enterprises to be taking better control of their records. So in the long-term, five-years-from-now view, I think this is going to become a lot more routine, and the costs are going to be a lot better understood and more reasonable. That doesn't mean that we should be complacent, though. I think that we really need both outside and in-house counsel and business people to be thinking proactively about how they're going to be dealing with these issues because, otherwise, they're just not going to be serving their clients or their corporations well. ❖

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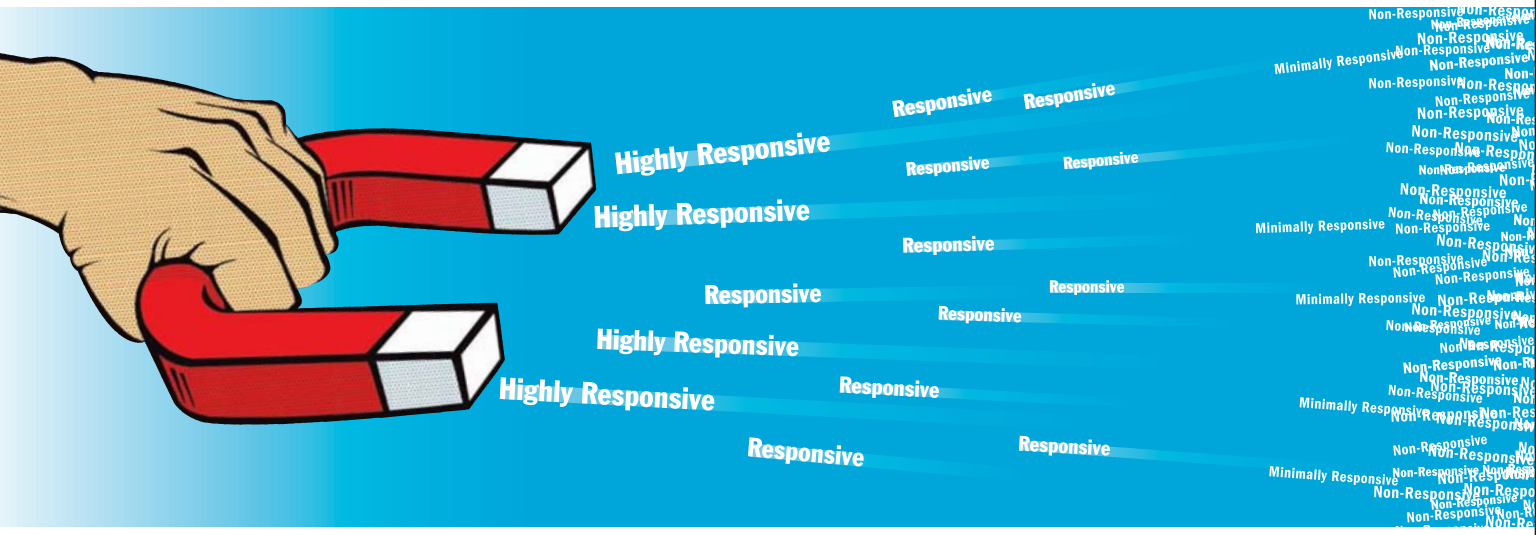

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