E-Discovery
ROUNDTABLE

Part 2

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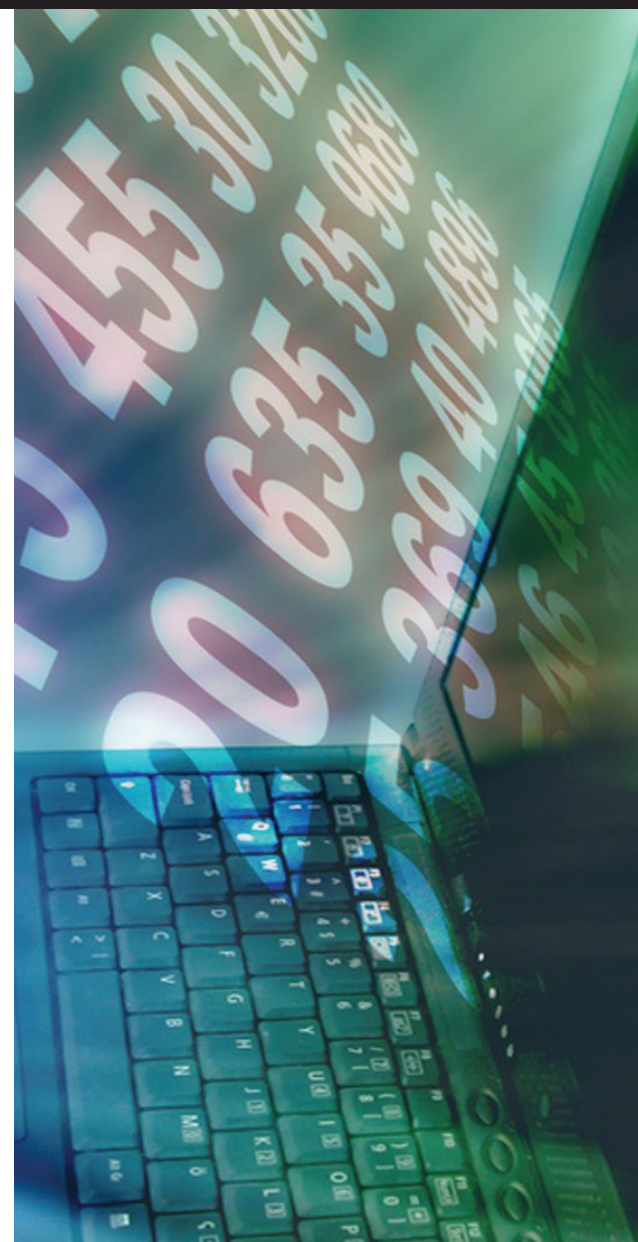SPONSORSHIP
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ROUNDTABLE

E-DISCOVERY ROUNDTABLE

IN PART 1 OF OUR E-DISCOVEY DISCUSSION THAT RAN IN THE OCTOBER 16TH ISSUE OF *TEXAS LAWYER*, THE PANELISTS GAVE US A LAWYER'S PERSPECTIVE ON HOW TO CHARTER THE NEW WATERS OF E-DISCOVERY. BECAUSE OF THE INTRICATE RELATIONSHIP BETWEEN ATTORNEY AND IT IN REGARDS TO E-DISCOVERY, TEXAS LAWYER'S BUSINESS DEPARTMENT DECIDED TO HAVE A SIMILAR ROUNDTABLE FROM THE TECHNICAL POINT OF VIEW. THE FOLLOWING PANELISTS ARE ALL DATA DISCOVERY EXPERTS. BELOW IS A TRANSCRIPT OF THAT DISCUSSION. IT HAS BEEN EDITED FOR LENGTH AND STYLE.

MIKE ANDROVETT, **moderator, attorney, journalist and owner of Androvett Legal Media, Dallas:** . . . In our initial panel . . . we were sort-of getting a view from high up the ivory tower. I think now we're going to get more of a view in the trenches, if you will. These are data discovery experts, . . . and I think it will be interesting for all of us here to hear their take on what is happening now. . . . So as we did in the last panel, if you don't mind, I would prefer if you introduce yourself to our group today. . . .

ASHLEY GRIGGS, **senior consultant and director of project engineering with Electronic Evidence Discovery, LLC, Dallas**: I've been involved in litigation support and discovery management for over 18 years. I started out actually in the software development . . . for a litigation support database package, and my official schooling is in computer science. I [then] came on-board at Arthur Andersen. I was in their legal business consulting practice for about nine years and got more and more involved in the consulting side. I actually started an e-discovery practice there designed to be proactive and work with corporations to be prepared for e-discovery. After leaving Andersen, I went to work at Fulbright & Jaworski [where] . . . I was their national manager of litigation technology. . . . After that I was at FTI Consulting. At FTI, I was the director in charge of all of their e-discovery processing, so I got much more involved from the operational side of things. And now at EED, I'm involved with the sales team. . . . and hopefully one of those rare breeds that . . . can communicate and understand technology and the legal requirements. . . . I also am a senior consultant, so I . . . meet with clients to do strategic consulting, as well as going in reactively on particular matters where they may need to defend what they've done or be prepared to defend what they're doing. . . .

DEAN KUHLMANN, **national director of e-discovery services for RLS Legal Solutions, Dallas**: My background comes from the technology side. I grew up as a hardware engineer. I'm a computer information systems major and really have spent my life running around central Texas with . . . a van full of parts and tools in my truck fixing mainframe computers for IBM, Digital Equipment [and] a number of other big vendors. And so my background growing up in the hardware environment has really helped me a lot to kind-of leverage different technologies as we work through the legal markets. I've been in the legal space now for about 15 years and really, much like Ashley stated, kind-of bridged the gap between technology and clients who would understand technology and helping solve a business solution. At RLS our real focus right now . . . [is] the e-discovery world, . . . and we find that following a reference model around reviewing, collecting data, processing data, dealing with the large volumes [and] focusing on each individual thing as a task, is really the critical piece. So

ASHLEY GRIGGS, senior consultant/director of project engineering for Electronic Evidence Discovery,

brings over 18 years of litigation support, technology and discovery management experience to his position. Griggs is responsible for providing strategic pre-sales consulting to EED's clients and potential clients. He provides technology and discovery expertise to compliment EED's sales and business development in the Western and Central regions of the United States. Prior to joining EED, Griggs has held litigation technology positions at FTI Consulting, Fulbright & Jaworski L.L.P. and Arthur Andersen. For FTI, he was the director of electronic discovery processing, managing the E-Discovery processing division. At Fulbright & Jaworski, Griggs filled the role of national manager of litigation technology. Griggs' 8+ years at Arthur Andersen included multiple positions including software developer and product manager for their litigation support database application, manager in charge of their discovery management consulting practice, and developer of the electronic information exposure management (e-IEM) practice. He holds a bachelor's degree in Computer Science from Iona College.

we really try to . . . understand what the need is before we proclaim an answer and then go from there. . . .

WILLEM VAN DEN BERGE, vice president for technology services for Altep, Inc., Dallas: We are a full service litigation support company based out of El Paso, Texas, with offices throughout the south of the United States. My role . . . within Altep is, among other things, . . . the day-to-day oversight of the electronic data discovery consultancy group, the solutions development and the processing group. We've been around for . . . about 14 years, [and] been heavily involved in the EED market for the last four or five years. My personal background is, like my two colleagues here, IT. I've worked for several large consultancy groups both in Europe and here in the United States. . . . I've only been involved with the legal market and with Altep for about four years now. Before that I've had several run-ins from the other side of the process where I was forced to respond to requests like that. And I've looked at the process from the other side, and . . . it's been a very interesting change for me. . . .

MIKE SIMON, **attorney, client developer and strategist for Stratify, Inc. Dallas**: I have been a practicing attorney in litigation and labor employment. I've been a dotcom CIO. I have been in-house at an AmLaw 50 law firm as an IT person, and now I'm doing this: advis-

> [T]he fact that you wrote a **policy** made it clear that you were aware that you had an issue, but then if it's proven that you didn't follow through on it, it's actually more of a **liability** than not having a policy at all.
> — Ashley Griggs

ing the company and our clients on how the law and e-discovery affect each other and things like the rules and all. Stratify is an on-line view system. We have artificial intelligence that takes your documents and categorizes them for you, puts then into folders of like minded concepts and such, identifies duplicates and near duplicates. The idea being making this much faster for people to review, which is where . . . much gets spent. . . . I was involved back when you could simply impress the heck out of everybody and turn a case on its head by taking an employee's computer . . . and just un-deleting it and say, "hey, look, here's the memos that you wrote." . . . [N]owadays it's a lot different, you have to do the right forensic things. You have to have the chain of custody. You have to have the proper evidence and comply with the rules. So things have very much changed, but I've been in it since the start from the legal perspective, and I try and bring that to our clients and our company.

JASON PARK, **certified computer examiner for Litigation Solution, Dallas**: We have an office in Dallas and an office in Fort Worth. I've been involved in helping attorneys use technology to their advantage since 1994. I am a certified computer examiner, which means that I do computer forensic work and expert testimony services. At the moment I am involved in building our computer forensic practice at Litigation Solution.

Litigation Solution is a full service litigation support company. We understand that not every case is 100 percent electronic, nor 100 percent paper. . . . [W]e have committed ourselves to be equally as good, whether we're dealing with paper documents or electronic documents in helping you manage your document collection, whether they're paper or electronic. Texas has an interesting law regarding collection of evidence. It requires that people who are involved in the collection of evidence be private investigators. And so LSI is a private investigations company. And I am a private investigator, as well as a computer forensic expert. . . .

TOM MILLER, **partner and the senior technical consultant at Open Door Solutions, Dallas:** We're a litigation support company. We, unlike most of my compatriots here, do not focus on e-discovery. We focus on discovery, production, [and] documents from any source. I've been doing this for 22 years. I started way back when in 1984 working with Merrell Dow Pharmaceuticals in Cincinnati on the Bendectin litigation, which set a lot of the standards for how litigation is handled today. I spent that 22 years doing all kinds of litigation, big and small, writing systems, developing systems [and] putting things in place. But primarily . . . I

consult with my clients on the best ways to handle document management solutions, the best choices they can make for document management, and then, as an equally important task, to communicate those choices to the project management and technical staff required to

implement them. . . .

ANDROVETT: . . . One constant theme from Part I of this discussion was that corporate clients better get their document retention plans in order, and lawyers generally must make strides in understanding how electronic informa-

DEAN KUHLMANN is the national director of E-Discovery Services for RLS Legal Solutions.

DEAN KUHLMANN is the national-al director of E-Discovery Services for RLS Legal Solutions. He routinely works with corporations and law firms in determining the best solutions to meet their needs with regards to all aspects of electronic data discovery. Kuhlmann has held numerous man-agement and technical consulting positions as a hardware and software support engineer for technology companies, including: Digital Equipment, NetSolve, Excalibur Technologies and Cataphora and has also managed a large production facility for IKON. His knowledge spans network architecture, client/server applications, operating systems, storage sys-tems, database technologies, and server plat-forms. With over twenty years of experience in delivering technologically complex hard-ware and software solutions, twelve in the legal industry, he has extensive experience in all aspects of automated litigation support and routinely speaks at legal events on e-Discovery topics. Kuhlmann has a bachelor's degree in Computer Information Systems from St. Edward's University in Austin, Texas.

tion is stored, preserved, moved around, [and] produced. On October 23rd, 2006, what is the landscape? Or maybe more artfully said, "In your everyday experience right now, what are you seeing? "

MILLER: I think that what we see in our busi-ness is that electronic discovery is real. It hap-pens. It's required [and] it's not going to go away. But what we're also see-ing is it doesn't necessar-ily change the way the attorney does their busi-ness. The requirements for production are pretty much the same. Some of the names have changed to protect the innocent, but you still have to go through and do your due diligence. You have to re-view documents. You have to determine privilege. You have to do the same tasks that you've always done. The volumes are significantly different with electronic discovery because . . . you have a hard drive. My hard drive at home is 160 gigs. That's a tremendous amount of data. And that's my home machine. At the office we've got a tera-byte. What's a terabyte? It's a thousand gigabytes. . . . If each gigabyte is 75,000 pages of electronic documents, if you convert to pages, you're talking about a whole bunch.

PARK: 77 million.

MILLER: Thank you. That number of documents is going to take some time to deal with. And the technology to deal with it is going to be coming in the next

> **[You] used to be able to avoid technology, . . . But I don't think you can avoid it anymore. It's not a replacement so much as an augmentation of your traditional process.**
> **— Dean Kuhlmann**

couple years. Now, in terms of changes, it doesn't change what you do. It just says you work a little harder or work a little smarter. And I'm assuming that most of you would work a little bit smarter if you can.

SIMON: This will be, by the way, the first of my many disagreements with Tom. . . . I think it does change things a lot, only in the sense that there's a big difference in running a 100 yard dash and running a marathon comprised of 100 yard dashes. . . . [T]he volumes really are stagger-ing. That point I will agree. And you look at the kinds of data here and the kinds of requirements. We talked once to a . . . Fortune 500 company that has three pet-abytes of stored data. Just to get an idea of that, a pet-abyte, . . . is a billion gigabytes. . . . So if you took all that data and printed it, you would get one-tenth of the way to the moon, [that is] 27,000 miles [if] you would stack them up. Now, of course, they don't have to review them all in a particular case. But we're seeing cases coming in with terabytes of documents to be reviewed; its incredible volumes that have to be handled. . . . [D]oes it change the fundamental point of you, as attorneys, have to get the documents, review them for privilege, review them for relevancy, tag them, [and] consider how you might want to use them later on in the case? No, but I remember back when I was practicing and . . . the scary case, would be 100 - 200 boxes.

ANDROVETT: Can I ask a question about that? . . . [T]he model . . . is you've got the case, you've got the hundred boxes, and 12 poor associates are sent out to the warehouse . . . to go through each one of those boxes, [and] look at each document one at a time. . . . Now we've got a hundred million boxes. Are law firms going to send out a hundred thousand associates to go through those boxes one at a time? I guess what I'm asking you is, what is possible as an alternative to that sheer enormity of electronic information?

KUHLMANN: . . . [K]ind of along the same theme, dealing with both volume and change, volume is driving that change. . . . I've been involved in law firms forever that have said we review every document. We look at every page. We out-lawyer the other side. And there's been a resistance to technology along that path for a very long time. . . . [W]e saw it in the waves of imaging where we didn't even really want to put documents on-line to make it more efficient. Now we're to a point where . . . you just have to manage it a different and smarter way. It doesn't mean you're still not after the details. . . . Just an example, . . . I talk to clients all the time that say, "Oh, it's only 50 gigabytes." That's only 50. In reality, that's 800 to 900 boxes of paper. So . . . if you

tackled it the old fashioned way, a box at a time, you can't do it that way anymore. And from a review perspective, from a processing perspective, from . . . a TIF'ing perspective, I mean, whatever you used to do, you can't keep doing that. So filtering, culling, data process-

ing, sorting, all of those things to ferret out and use the right tools along the way are really where it's going. So there has to be a trust in technology to even continue to practice law. And I think that's the biggest change we see.
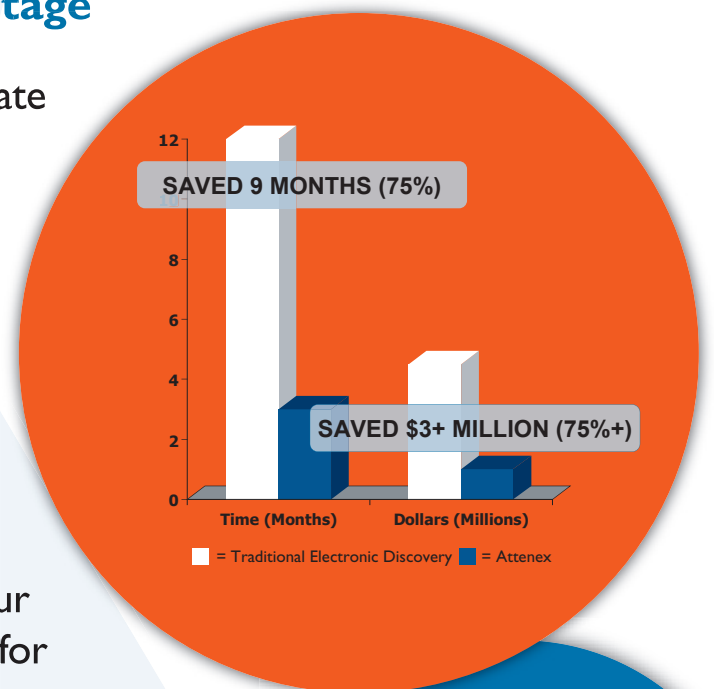
SIMON: Take a look at the Rules. . . . I

TOM MILLER

began his litigation support career in 1984 on Merrell Dow's bendectin litigation. He designed and built a document review database supporting over 2,500 cases in 50 states and a case/budget management system in use until 1998. Miller set up the evidence/transcript management system for the Consolidated Asbestos Insurance trial where court was held in a converted auditorium with multiple workstations to accommodate many law firms. He has worked on hundreds of large litigations including his first EDD application in 1987, collecting thousands of word processing documents from a Wang VS system. Law firms, corporations and government agencies have relied on Miller's experience in creating innovative, image-enabled litigation support solutions for clients such as Ford, BFI, Searle, GulfSouth, Bureau of Indian Affairs and the EPA. Miller remains in demand as a resource for litigation lawyers needing creative solutions. He is currently a partner with Open Door Solutions, LLP, in Dallas, Texas.

won't say it lightly, agree with the other side, work with them. . . . I know what happens in discovery at times; you're at each other's throats. And then you end up before the judge, and the judge hates you all because you're wasting their time with discovery disputes. But there is a theme in the Rules if you look at them, . . . and one of them was discussed on the panel before, which is, as attorneys, you've got to get a better handle on what all this fancy computer stuff is about and learn where documents are stored and how your clients are handling them. But the second point is it's time to get serious about cooperating with your opponent. . . . [F]or example, with SEC [Security Exchange Commission] investigations, we're seeing this now with the massive volumes of the options backdating scandals. The SEC is very reasonable and very open to talking about an agreed list of custodians, dates and ranges of where to pull the documents from [and] search terms that you can work out with them. . . . Why? Because, again, . . . you can't get the warm bodies to review a terabyte of data or 50 gigabytes of data for everything. . . . [A]nd if you look at the new rules, there's the potential of working that out before in the meet and confer going into the initial pretrial and getting that memorialized into the order. Work out the terms. Work out some deals. Otherwise, you can't out-lawyer

> **When you start with a hundred million pages, it's a little bit more effort. But your end result is going to be the same, unless you want to cause pain to your opponent, which, of course, is part of the game as well.**
> **— Tom Miller**

the other side. There are not enough warm bodies out there to do it.

GRIGGS: I think we're dealing with all these things that are being discussed here . . . as far as the changes in the e-discovery industry, as well as the rules that are coming up . . . but I'm also seeing a very significant change to the arguments that are being made and the strategy that's being made in order to make life difficult for parties based on the e-discovery that they may have to do for litigation. And I think that's where one of the pieces of the rules, as far as the early meet and confer, [is] to lay down those ground rules ahead of time to try and prevent that down the road. . . . [P]eople are shifting the cases away from the merits of the case to . . . e-discovery and the pitfalls there in trying to get . . . bias toward one side or the other. As far as the volumes today . . . I would definitely agree with Dean as far as . . . utilizing technologies and coming up with reduction strategies . . . to reduce that basically impossible volume up front. . . . But then things are also being done with the technology to make that review more efficient, as well as the fact that most of these, you can access . . . from anywhere. . . . So it's not like you've got to send a team to a warehouse, . . . you can have people working from all of your offices. You can hire a temp review . . . that can all access this one repository from basically anywhere in the world. . . . [T]hose are some of the ways that technology is

helping as well.

ANDROVETT: Forgive me for this question if it's too simplistic, but it is true that many lawyers say, "I want to read every document and, frankly, I don't trust someone else to read it for me." How do you persuade those lawyers that there is a better way? And could you talk a little bit about what that better way is? . . . How do you persuade a lawyer who has done things a certain way for a long time with great success, and really the reality has changed and you can't continue to do it that way?

SIMON: I think you start with the simple reality of, "Are you going to personally read 800 to 900 boxes of documents? Who here wants to do that? . . . I mean, you can't. And that's the first situation. That second thing, of course, is you can throw the various scary cases at them of things that weren't reviewed properly. But it comes down to showing them. . . . [Y]ou've got three different vendors up here who have technologies that can help you with your review. . . . You've got systems that can take your documents, . . . automatically categorize them, classify them for you, put like documents together into folders, give you a handle on what documents are duplicates of each other, [and] what documents are near duplicates of

each other. So you can . . . start pulling out the stuff that's not that important. . . . [Y]ou can all cite various scary statistics, a trillion e-mails a day or a minute or a second or whatever, but, . . . how much of that is spam? I think the numbers I've seen are 50 per-

cent, 75 percent. . . . Those will [all] be put together. Get rid of them, or at least assign them to somebody who . . . can do them fast and cheap.

MILLER: . . . [W]e used to have that technology when I was a young man, or at least a younger man, it was called a

JASON PARK

JASON PARK is a certified computer examiner (CCE) and is a licensed private investigator in the State of Texas. He is a member of the International Society of Forensic Computer Examiners, and has been involved in the digital litigation support field since 1994. His experience includes: managing all aspects of forensic data collection and analysis of multiple "Terabyte Sized projects;" co-ordinated the incorporation of multiple "Million Page" paper documents with their electronic counterparts in these projects; Web based collaborative extranets and repositories for document review; computer forensic analysis and electronic data discovery; and litigation database design, relational database structure design and SQL programming. Park has been a presenter of State Bar of Texas approved Continuing Legal Education Seminars, a guest speaker for a variety of legal associations, and a publisher of articles of interest in legal publications.

paralegal. . . . And the paralegal went through boxes and boxes and boxes and culled down to a set that the attorneys reviewed. It doesn't change. The volumes have changed. The technique doesn't change because . . . your computer now is doing the same thing your paralegal did twenty years ago, ten years ago. The question becomes, as an attorney, are you willing to produce a document that an attorney has not read? Can you produce a document that an attorney has not reviewed? It's a scary world out there, because it's happening every day . . . And everybody says, well, what about the callback provision? . . . [T]hat comes with the mandatory memory wipe as well, right? Because even if you get this document back, it's been read . . . understood and used. . . . [T]echnology just does something that you've been doing all along, which is culling down your collection to something that is manageable. Now, when you start with a hundred million pages, it's a little bit more effort. But your end result is going to be the same, unless you want to cause pain to your opponent, which, of course, is part of the game as well.

KUHLMANN: . . . "[C]onceptual review," is a new term for a lot of people, . . . we're used to doing document reviews one page at a time, one box at a time. . . . [I]f you had 400 boxes, you got a lot of people and you distributed stacks of documents and say when you're done, give me the

> **I think attorneys who work for firms that use document management systems and have for years don't understand that corporate America, for the most part, doesn't use document management systems or haven't until very, very recently.**
> **— Jason Park**

next box. And you kind of linearly go through that one at a time. With technology, . . . the key here is searchability. . . . When you've got things on paper, there's not a whole lot of search techniques involved. You look at it and read it, and you might make a stack after you read it, and you have these piles lying around. We can use technology to sort everything and put them in files before you even review them. So conceptually, if it's . . . an accounting case or a white collar case, . . . you can put information in bundles and give it to that expert. So if it's an accounting case around accounting procedures, I can even organize this information electronically, conceptually, so when I have an accountant, I don't waste their time looking through spam. I can give them a stack of documents . . . electronically that are very relevant to their area of expertise. So not only am I conceptually aligning the data with my user, but I'm being very efficient on how I'm spending those dollars. . . .

PARK: . . . [T]hat's a good point. And a part of the technology that hasn't been mentioned so far is e-mail threading. How many of you-all like reading threads of e-mails, especially when you've got the first part of the thread in Box 1, the second part of the thread in Box 3, the third part of the thread in Box 5, and you've got different people reviewing Box 1, 3 and 5? Trying to get a handle on what's privileged [and] what's not privileged can become a real nightmare. Luckily now we have technolo-

gies that can re-thread e-mails so that you can parse out entire e-mail threads to certain individuals to do the review. . . . [O]ne person can quickly understand what's going on in an entire conversation and either deem that entire conversation relevant, privileged or whatever your other review issues are.

ANDROVETT: So, panel members, what I'm hearing is when the lawyer says, "This is my objective," your responsibility, in part, is to say, "Okay, let's talk about some of these issues."

MILLER: And how to communicate them to the people who have the data. How do you get this information across from the attorney who knows what they want? . . . [T]o the IT, corporate counsel [or] corporate people who know what they have? Because that communication does not happen very well.

KUHLMANN: . . . A lot of times there's a tendency to start working through a case and start working through the issues, and at some point, . . . you think you've got it all wrapped up and hand it out to somebody to help me. And the earlier we get involved is really when it goes much better. Only because we can get in front of these issues very early on. . . . [I]f you come to me after a meet and confer

and after all these decisions have been made, you might walk out of there saying, okay, great, we both agreed to produce native files. Okay. Good. That's a good start. How are we going to do this? Did you-all talk about embedded refer-

ence IDs? Did you talk about the depth of how you're going to handle documents that were attachments? . . . What kind of e-mail systems do they have? They may produce something in a format that's native, but it hasn't been through an

MICHAEL S. SIMON, Stratify's

legal associate - client development and strategy, is an attorney and a former member of practice support and IT project management with the Chicago law firm of Winston & Strawn LLP. At Winston, Simon designed and implemented cutting-edge practice and client support solutions including a highly successful on-line case management system. Prior to Winston & Strawn, Simon was the vice president and chief technology officer of Oliver's Cases, an Internet automated legal research firm. He has more than six years' experience as a practicing litigation attorney in Chicago. He was the general editor of the award-winning "The Internet, Law and Business," by the Illinois Institute of Continuing Legal Education. He has been the featured speaker at numerous seminars and events.

industry standard e-mail system for the past five years. . . .

SIMON: And often for attorneys in the bigger firms [and] medium firms, you've got yourself some great resources. Who are they? They're your tech people. Get to know them. Start talking to them. Get them involved early. About three months ago I co-authored an article with ILTA. It's the International Legal Technology Association site. And it's also on our site at Stratify.com. And it talks about how and why to get your tech team involved early. Work with them if you have them, because they will be used to dealing with attorneys. They may or may not like you, but at least they have to deal with you, and they may be able to help you with that. . . . .

PARK: And don't forget neutral third parties like vendors. Taking a vendor along can be very beneficial to you. Especially if that person is equipped to testify as to what was done to the data from the time . . . they got their hands on it. A lot of corporations try to save costs when they're collecting data by getting their own IT people involved. And while most corporations hire very, very good IT people, these people are not trained in the forensically sound acquisition of data. And we find that when we end up receiving data that has been gathered by internal IT folks, the documents have been tramped all over. The metadata is changed. The documents

> **Often for attorneys in the bigger [and] medium firms, you've got yourself some great resources. Who are they? They're your tech people. Get to know them. Start talking to them. Get them involved early.**
> **— Michael S. Simon**

are substantially different than they were when they were kept in the regular course of business, which is problematic, as you can imagine. So having somebody gather the documents who is fully aware of what the forensically sound methodology of doing that and being able to testify to that is critical.

ANDROVETT: I'm still trying to get a good picture for where a lawyer's [work] ends and your work begins. Let me throw a hypothetical at you. Going back to this notion of not being hung-up on the technique but on the objective of the lawyer, a lawyer may come to you and say, "I've got this labor and employment case, I know if you guys can help me that there is a damaging e-mail in there." Does it ever happen that really what's damaging might be the fact that they had rewritten their employment handbook and you can track the changes by looking at various documents . . . ? It was an obvious attempt to cover up. My point is, is part of your job saying to a lawyer, "Well, I know you think this is your objective, but really this is your objective?"

KUHLMANN: I don't think it's telling the lawyer . . . what their objective is, but . . . it's our job to look at the lawyer and . . . guide you into the right tool. For example, if it's an investigation into a white collar case, . . . and there's something incriminating in an e-mail somewhere, or I really suspect the CFO. . . . [I]t's very different from an

IP case where we're sort of doing a document review and looking for more factual finding through a traditional document review. And we might choose and represent different tools to that case because of it. . . . Just because we represent Attenix doesn't mean that's the right product for every case. But if you start saying things to me like, "I'm really looking for e-mail." We really think that this individual was, you know, secretly sending data outside the company's network, those types of things tend to gravitate you towards a different size hammer or a different screwdriver . . . and to help guide that. Because we can't let them say, "Well, we're just going to put it in Summation, because that's what the firm uses." I mean, it's the wrong tool for the wrong time. And I think that's our job.

MILLER: The other part of it is that this hasn't changed a whole lot. And the attorney knows what kind of documents they're looking for. They always have. Employee manuals, e-mails. And what's an e-mail? An e-mail is a correspondence. It just happens to be an electronic correspondence, but it's just a correspondence. If the attorney is going to be looking for evidence that something changed in a period of time, what they used to say is, "Okay, give me all the letters or memos that refer to these, and give me all the manuals that refer to this." The change is not in what documents you're looking

for, . . . [it] is how you look for them. In order to find them in an electronic system, you have to have tools. There's a variety of tools represented up here . . . and I'm sure that all of them do a very good job. The tool then becomes a mechanism of getting to the document.

It is not a strategy of how to handle the document.

GRIGGS: . . . [T]here's truth to all of this, but kind of going to your initial question of where does the lawyer end and we begin, I think when you do this properly, that transition is very blurred.

WILLEM VAN DEN BERGE,

vice president for technology at Altep, Inc., is the company's technology leader and senior solutions architect, with more than twenty years' experience in application development, network design, project management and technology consulting. Van den Berge's responsibilities include infrastructure design and management, information security, data analysis and strategic planning. His leadership in these areas is a driving factor in Altep's ever-increasing ability to provide innovative, reliable and cost-effective document processing, hosting and discovery alternatives for our clients. Van den Berge is an iCONECT™ Certified Administrator, a Microsoft Certified Systems Engineer, a Cisco Certified Internetwork Expert and a Certified Project Management Professional.

Because it's really kind of a teaming. And a lot of it is educational. . . . [E]verything from where the data is? And what is ESI? . . . [T]he plain piece of paper that was a printout of a Word document is one thing. But if you can see it electronically and natively and look at all the various revisions that were in there and comments that were in there by earlier reviewers, things like that, if they're not educated on how to look at that information, how to search that information, how to find it, then they won't . . . necessarily know it's there to even look at it, so they won't necessarily know that should be part of their strategy. . . . The other piece of it is . . . looking at the different types of data and going to, what Dean was talking about, the right application or tool to use for these. . . . [T]he standard good old document review was good for certain things. There are transactional databases out there and things like that that don't make sense to try to do in a normal document review. You need someone in there that can analytically . . . go through this information, put it into a system that allows you to slice it and dice it and look at it in different ways. And you can vastly change how that data and . . . evidence looks, depending on the tool you use and how you use it.

ANDROVETT: Is one of the lessons we should take away today that we shouldn't be overwhelmed by the volume of data

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>
> **— Willem Van Den Berge**

but that actually technology is giving us some opportunities to find things maybe we wouldn't have found in the old days of looking through a hundred boxes?

GRIGGS: I think that if you get too overwhelmed, you're in trouble. Because then you kind-of get frozen. I think breaking things down and looking at them in manageable chunks is really important. But in order to do that . . . successfully and not be overwhelmed by it, you do have to embrace technology and what's out there. . . . Perhaps what might be considered non-standard in the way you're used to practicing law so that you have to bring in some people to understand how you can use this technology to the get through the huge volumes you might be dealing with. . . . [D]oing some of these things early on will help, . . . so you're not a good chunk of the way down that road when you're trying to have this discussion with the other side and . . . have already put your foot in your mouth because you agreed to something early on without understanding the ramifications of it. So, again, to understand your data set up front, to understand what your options are and have a strategy around it all coming into that meet and confer is really crucial. . . .

SIMON: I think that's a very good point. And this is another one of my disagreements with Tom. He talks about this great technology called the paralegal. Well, . . . looking back to the golden age of way long ago, maybe like 2002. . . . If you're talking about volumes of data

that are [the] equivalent of 800, 900 [or] thousands of boxes, what paralegal is going to be able to do that? This is not an infinite number of paralegals and an infinite sized room situation. If you're approaching it from the standpoint of we can just manpower our way through this, . . . that's where you can get in trouble. And Ashley's point about . . . the technology can help you here, but you have to embrace it from the beginning and stop thinking that you can throw an infinite number of warm bodies at this.

KUHLMANN: I also think . . . it's important for all of us who are trying to embrace technology, implement it, use it in a firm, [and] represent it as a tool, to pit it against the old way. It's not [that] we're going to use technology to replace the attorney's review process. That's not the message here. The message here is you've got to embrace technology to help get through that. You can no longer avoid technology. [You] used to be able to avoid technology. And a lot of companies never went to imaging because they were scared of it. But I don't think you can avoid it anymore. It's not a replacement so much as an augmentation of your traditional process.

AUDIENCE MEMBER: . . . Obviously, every case is different, and in your initial consultation with the attorneys, you're going to respond to a lot of questions with questions, but is there a baseline set of information that

you would love every attorney to have in hand before they place the first call to you? . . .

PARK: Yes. If you go to LSI.com, we have a list of those questions available.

ANDROVETT: And for the folks here

today and those who will be reading *Texas Lawyer*, can we sort of create a little checklist of those bare essential things that you want?

PARK: One of the very first things you should find out is who, at your client's office, actually does the work on a spe-

MIKE ANDROVETT is in busi-

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

cific piece of technology. The CIO may be a good starting point, but until you talk to the guy who actually does the exchange backup on a nightly basis or the person who manages the rights of folders on the network and things of that nature, you're not going to really know what happens at the nitty-gritty level. So knowing who those people are at your client's office and then paying them a visit . . . to watch these people do their job, will be absolutely priceless to you, because you'll see what actually happens to these documents on a daily basis.

MILLER: The deafening silence you hear up here in the answer is, "no, there is no set of things that we should know going into this." There are . . . too many questions to ask. You know, what Jason just said, the CIO, give us his name and we'll talk to him. That may be a good start. The problem is that everything involved in the case has to be identified. Are you going to be dealing with instant messaging? Are you going to be dealing with blackberries? Are you going to be dealing with cell phones? Are you going to be dealing only with e-mail? All of those things are part of the equation, and they require usually more than one person to give the answers. There's usually a whole group of people in your client's organization who are going to be required to give answers to those questions.

GRIGGS: I agree on both sides. There is kind of a list, but at the same time, it's extremely dynamic. And a lot of it comes down to where you are in this matter. Is it . . . just an initial . . . feeling this is going to happen, so you need to start perhaps looking at preservation and thinking about it down the road? Have you already gotten a request? . . . [O]bviously start-

ing December, hopefully, . . . the meet and confer is coming and sort of some structure to this, some organization. But I think there is a certain amount of information that you can gather. Definitely establishing the right contacts . . . such as IT representatives . . . are crucial there. There is some information you can get as far as . . . systems in place for some of the things like Tom was mentioning, like e-mail, instant messaging, things like that, understanding the issues that might surround the longevity of the time period that you're looking at for this case and how things may have changed during that time. But the thing to realize is whatever you get is great and it helps feed us, but it's definitely not the end of the conversation. It's just the very beginning. Because whatever you give us, we are going to have more questions about and we are going to have to dig a little bit deeper. So along those lines, . . . the more educated you become, you can start to . . . get some of those answers, but understand it's the tip of the iceberg.

AUDIENCE MEMBER: Call me a skeptic, but we generally assume when you're asking for discovery from some other corporation . . . that all of those smoking guns are still going to be there when we ask for them. . . . [S]ay the IT guy was asked to remove a few, change a few, delete a few, how are we going to find out if that happens through your services?

MILLER: Well, there are a couple of things involved here. One is the reality of electronic data is that it is, much like paper, not the only copy. . . . [I]n a large corporation, to remove all of the evidence of anything is almost an impossibility, because . . . it's out there 100,000, 10,000, maybe even more times. The re-

ality is that's not as big an issue as most people think. Now, can we discover that? Potentially. For example, I had a case once where we had . . . retrieved e-mails, and there was a two-day period where there were no e-mails. None. Does that make sense? No, it doesn't. So you have that evidence there. There are a variety of things, but that is truly a forensic effort. . . . [T]he investigator goes out and does more than just accumulate and collect data. That is somebody who goes out and evaluates what you're looking for and what the systems will allow you to see. And it requires a significant amount of effort to do so.

SIMON: . . . Look at what got UBS busted in *Zubulake* [*Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003)]. It was that you had e-mails referring to other e-mails that weren't there. . . . One of the points is you've got paper, and yet paper doesn't disappear, but paper is fairly easy. I mean, here's one document they gave to us. And there's a few of them. And let's say this was all typed up on a typewriter. I could gather these all up and throw them away. And if I give a copy of this to Tom, the fact that I'm passing it by Jason doesn't create a copy. But e-mails are so hard to get rid of. And even if there isn't something in the content of those e-mails or documents

referring to other documents, the e-mails themselves, the documents themselves, are in so many different places. . . . [M]any systems out there can show you how those threads come together so that you don't have person one reviewing part of a thread and person 12 reviewing another

part of a thread. If you can get them all together and review them by thread, you can see they're missing. Also, [they] can identify near duplicates and how documents were altered. . . .

KUHLMANN: I think the electronic data is pervasive. It's everywhere. It doesn't go

away. To your comment about one piece of paper, it used to be much easier to destroy this than it is to get rid of an e-mail today. And the other thing, the technology right now is still in its infancy. But on the investigation side, I can load up 40 different custodians worth of e-mail spanning five years of time, and without ever looking at a document, start clicking and bringing up graphs, bringing up charts that show time. If I'm interested in what happened on January 3rd, 2003, I can click on that. And I just keep drilling. And I've never looked at a document yet. But [with] some of the tools that are available, I can also see whose blind copying other people to an address out at Yahoo?. . . . I can see all behind the scenes of communication that I perhaps never could tell before. So you have to know a little bit about some of these tools as you go down this path, but the idea of deleting an e-mail and getting away with it, using the right technology, is much harder to do in today's world than it ever was in the paper world.

ANDROVETT: Dean, my company is going to have a radar out there, and the second we anticipate any litigation, we're going to do the right thing preserve everything. But should I hire a company to not only make sure that I've deleted e-mails in a systemic, good faith, organized way, but should I have somebody come in who can scour those e-mails so that they never appear, if that's even technologically possible?

KUHLMANN: I think for your typical 15 person business, they need to run their business. And they need to put the policies in place and adhere to the policies. . . . [A]nd that's not the majority of

the world, by the way. . . . What is going on is the document policy gets written, the retention policy gets written, there's some energy around it, and there's a lot of meetings and all that, but then the document goes in the drawer or . . . people just don't execute it or . . . they don't follow through on it. . . . [I]f you build nuts and bolts for a living . . . you're not really worried about a bunch of lawsuits. So you're just managing your process and trying to run your business efficiently. To the extent that you go hire experts to come validate your internal workings in process, . . . I think it's a business call on what you do. I just think if you're prudent about the way you're managing your business and you're following your processes, if a lawsuit happens . . . you deal with what you've got. I just can't see spending lots of money worrying about that every day of the week for the typical business.

PARK: I think attorneys who work for firms that use document management systems and have for years don't understand that corporate America, for the most part, doesn't use document management systems or haven't until very, very recently. In a law firm, it's impossible for you to save a document somewhere unless you have the rights to do that. In corporate America you can save a document wherever you want for the most part. And corporations have done a very good job of managing document retention policies on paper documents for the most part, because they've had hundreds of years to perfect the practice. But with electronic documents where they're allowed to be stored anywhere for any length of time without any way of clas-

sifying whether the document meets a certain regulation or not, it's a very, very difficult task.

GRIGGS: I think we just heard two really good points. . . . [C]oming up with these policies actually can be a little bit of a liability if you're not going to implement them, if you're not going to audit them and be able to defend them later on. . . . [T]he fact that you wrote a policy made it clear that you were aware that you had an issue, but then if it's proven that you didn't follow through on it, it's actually more of a liability than not having a policy at all. . . . [H]aving that policy and, therefore, having a little bit of organization around your data, leans into the next point, which is . . . [t]here's another whole wave today which is being much more proactive in corporate America to get your data organized so that you can be more responsive, so you can have some of this information up front, and so that you can properly implement . . . a retention and destruction policy if you have it. Because if you don't have any organization to your data, like Jason was just talking about, how can you implement any of this? How can you know where that data is? How can you know where your exposure is? And how can you get rid of it when its life cycle is up?

AUDIENCE MEMBER: . . . I have been working in litigation for a number of years, and even with paper discovery, I've seen, time and again, where attorneys have done a fantastic job of collecting responsive documents and producing documents, but, nonetheless, they . . . frequently have difficulty successfully resolving discovery disputes

because they didn't keep good records with regard to what they did and how they did it. And I'm wondering if you can talk for a couple of minutes about what records do you recommend attorneys be creating and keeping with regard to their electronic discovery efforts so that they can defend what . . . they've done. . . . I'll ask you to go beyond just chain of custody records, because I think everybody knows that needs to happen. But are there other records they should be creating and documentation they should be maintaining on their efforts?

KUHLMANN: . . . I'll answer two ways. On the attorney side, the chain of custody is the key, especially when we're talking about electronic media. If you're taking data and moving it from Point A to Point B to Point C, the way it was copied, the way it was imaged, [and] the way it was transferred is all critical. And the chain of custody becomes the standard document. . . . I think everybody keeps chain of custody documents hopefully, but you struggle with the depth of what they documented on that. . . . [W]e now get disk drives in our house, and we start this filtering process. And that's where it gets really touchy on a defensibility track, because there are products and tools on the market that [when] you put a gigabyte through a process, a half a gigabyte comes out. And at that point, we're removing these from the case . . . and we're presenting the bad stuff or the garbage on the side, if you will. There are lots of tools, lots of processes, lots of vendors who don't track that, who don't log that. . . . [J]ust half of it came through the filter, so now we're running with this half. And that [could] become a huge de-

fensibility problem downstream. So the concern becomes not only just chain of custody, but at the file level. . . . [W]e talked about a hundred gigabytes, how many files that represents and why are you only processing some of those. That process in that log is very dependent on the tools and the processes of the vendors that are doing that. . . . That information should be fed back to the attorney. That becomes part of their chain of custody that says, "Judge, we filtered out all the JPEG files because we didn't need them." . . . And I think that's where the chain of custody documents fall short in a lot of cases, because you're not demanding that from a vendor or from somebody processing your data, therefore, you're inept in explaining why you have the following data that you have.

GRIGGS: . . . I think Dean's hit on a key point. That's the kind of centers around reduction strategies, . . . and that's the one thing you're going to have to defend, because you're taking data out of this potential universe, and you need to defend why you're doing that. And there's the automated side, which was primarily what Dean was talking about, which is, . . . your automatic filtering of file types, knowing that they're . . . non-user files, things like that. But then you also get down into statistics and things that might be utilized for strategies for reducing your document population. And you need to retain those statistics . . . and be able to defend the steps that you took and what you went through in order to get to that point and made a reasonable decision going forward. So I think there are the two sides of it. There's the automated side, being able to get those logs of what went on and why things were

taken out, et cetera, as well as the ones that are truly conscious decisions, but they're based on statistics that were taken from your database.

SIMON: Ask your vendors what logs they're keeping. Because, not only can you keep it for culling and filtering, — and this is another difference between electronic discovery and the paper world — you can keep it in terms of the tagging decisions. Let's say we're doing this on paper, and I tag this document as responsive. And someone comes along senior to me and goes, "Mike, where are you coming up with that?" And un-tags it. Well, what's the record of that if someone doesn't write it down somewhere and memorialize it? Well, for a system, a database, where you've got your documents in that database, the tagging decisions will be recorded. They will be logged. The un-tagging decisions, the changes, the filtering, the culling, the tagging, the way it's put in terms of different work folders [and] the way it might be organized, . . . can and should be logged. Ask your vendors and make sure they're doing that. Because, again, we're dealing with electronic discovery, everything is trackable . . . if they do it right.

VAN DEN BERGE: Not just the tagging decisions, though. . . . The process of having documents in a database in a system that allows you to tag and log the tagging decisions also allows the reviewer to memorialize the reason why that tagging decision was made. And very often, especially for privileged documents, that makes the process of creating a privilege log, or figuring out why a specific tagging decision was made many months after the decision was made a lot easier and a lot more defensible.   ❖

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