

Balancing In-House and External eDiscovery Resources Webinar

Barry: Hi everyone, I'm Barry Murphy with eDiscovery Journal. I think quickly we'll have each of the panelists introduce themselves so that you get a sense of who we are and what our backgrounds are.

So I'm Barry Murphy. I've been with *eDiscovery Journal* for a couple of years now. I have worked in the e-mail archiving software world and also was an analyst at Forrester Research covering eDiscovery records management and archiving.

And I also have with me Kevin Esposito and I'll have Kevin introduce himself.

Kevin: Good afternoon, everyone. I'm Kevin Esposito and I'm the managing director of a firm called Rivulex in the New York City area. We are a consulting firm that handles eDiscovery process issues for mid- to large-size organizations. Prior to founding Rivulex about four or five years ago, I had worked for both United Parcel Service and Pfizer, taking care of eDiscovery operations and preparing a lot of work along those lines. Now I do that for other organizations and I do contribute to eDiscovery Journal.com as well.

Peter: And hello, this is Peter Livingstone. I am Vice President of Technical Services with Digital Reef. In that role, I have been working with a lot of corporations who are planning and restructuring their eDiscovery practices. At Digital Reef, I manage the presales engineering team, the post-sales customer service organization, and our own Discovery Center, where we are processing matters for law firms and enterprises.

Barry: We've got a great, diverse panel and I think we'll talk through a lot of issues around today's topic: Balancing In-House and External eDiscovery Resources.

Before we dive into the content, I wanted to pose a question to Kevin because he's been deep in the weeds of eDiscovery on the corporate and consulting side. There are two trends that keep coming up in my interaction with folks that I think are very much related to the discussion that we're going to have today. One of those trends is the need for law firms to actually certify, as part of the rules of procedure, the information management efforts of their clients when it comes to the steps that they took to manage the information for eDiscovery. That, coupled with the trend of law firms getting involved in matters earlier and earlier, which I think puts some corporations in a difficult place because they are not great in collection and preservation just yet. But I wanted to pose that to Kevin: do you see those two things as being issues that are coming up for your clients today?

Kevin: Well, it's something that everyone *has* to deal with. The case law that's out there clearly indicates that there's a preference from the courts for something that's very Reaganesque in the sense that they're saying, "trust, but verify." So the case law indicates that you can no longer just trust the information that is provided to you by

a corporate client; you need to verify what it is that they've done internally in order to prepare all of their information for discovery and ultimate production. So if you're going to be verifying it, it's best to be involved earlier in the process rather than later. You don't want to be brought into a case further on down the road when the collection's been done and perhaps some processing has also been done. It's very hard to object at that point as to any steps that have been taken, because the client's going to push back and say, "Well, I've already done all this work and spent all this money." So it really behooves the clients to make sure they get their law firms involved earlier in the process. And then you're going to have to have the balancing act of how many things does the outside law firm take care of and how many things do the inside people take care of. There have been a number of eDiscovery conferences over the past 10 years or so where everyone was being told "bring everything in-house, bring everything in-house" for cost savings and other issues. You need to balance both your internal and external resources—the whole point of this presentation today. ==T the law firms need to get in there earlier in order to take care of their obligations, and it behooves the clients to make sure that they get the law firms in there before they've done something that's a misstep.

Barry: Great perspective and I think we'll probably hit on some of these points as we go through today's content because all of these things are interrelated. You make a really good point, that it's about balancing resources and taking control of eDiscovery. You mentioned, Kevin, that the high costs have forced people to say, "Okay, we want to take control of eDiscovery; we want to move some of this in-house." It's very simple to say "I'm going to own the eDiscovery process," but it's not necessarily easy to do when it comes to actual practice. Organizations recognize the high cost and the risks. That's just the constant. But they don't necessarily know who owns eDiscovery in their organization. [Fuzzy sounds.]

David: I think we may have lost Barry there for a minute.

Kevin: Yeah, it appears so.

David: Okay. Kevin, are you able to pick up a little bit here?

Kevin: Yes, we'll take over there....

I think the point that Barry was trying to get to is that eDiscovery is a process that has got a lot of moving parts. You obviously have legal involved, you have IT involved, and you have your records managers involved. Who owns the process changes depending upon the corporate culture and the type of industry they may be a part of. There are a lot of different owners of the process in the sense of there being siloed events that happen without having a lot of connection between the others. But what you're going to need is one person to overarchingly take care of the process. In most organizations we find that's legal. The legal people own the process and they work with their IT players and the people from their service providers in

order to make sure that all of them are working together in order to get information extracted from the organization and are then prepared for presentation.

So, Barry, are you back now?

Barry: I am back. Interestingly enough, the winds here in Massachusetts knocked out the phone line, but thankfully my cell phone is working. I apologize for that. It's always interesting with Mother Nature.

Kevin, you were probably making the point about the confusion around eDiscovery and who should own various aspects of eDiscovery, whether it's legal, IT, or records management. I think the point I always make to folks on this one is that the definition of ownership is interesting in and of itself because there are various owners of different pieces of the process, but someone needs to stand up and take responsibility and the data shows that it tends to be legal. But a lot of times in terms of budget, IT needs to be very involved as well.

The other aspect of confusion stems not only from internal confusion but confusion around what various entities within eDiscovery have ownership. So we did some questions around who owns document review. Is it the corporation; is it the law firm? And there was actually a 50/50 even split. This gets to the heart of the question of when you in-source eDiscovery, are you negating the need for a law firm? And we're not saying that's the case at all, but rather every organization is going to have to determine for themselves who owns what pieces of the process and who's going to be conducting various pieces of the process. We'll explore these issues a little bit further as we go through this.

Peter: I'll just add that it has been my experience with our customers and meeting with a lot of enterprises that the general counsel's office is definitely driving the initiative. The chief information office is being invited to the meeting more, so I don't know if that denotes ownership, but definitely it's being driven by general counsel.

Barry: Peter, a quick question for you on that. When you're in meetings with folks and it comes time to close the deal, so to speak, who do you find that you're actually closing it with—is it legal, is it IT?

Peter: That's a good question. IT is being brought into these meetings because ultimately they do own the infrastructure that the customer is putting in place to solve these problems. So their responsibility, of course, is to stand up applications for the business users—the general counsel's office is the business user—but IT ultimately owns it. So when we get to that stage of the process we're mostly dealing with IT with the GC's office being a very strong influencer.

Barry: Interesting. Yes, we're seeing a lot of the same types of things. From a pragmatic perspective, in terms of really getting started, what we see is that to

optimize eDiscovery within the organization and to balance those resources, there are three trends that organizations have to put together as they manage eDiscovery.

The first trend, and we'll dive deeper into this as we go, is what we call managing the triangle. Because the fact is there are really a lot of important players within eDiscovery. We lump them into three categories: the corporation, the law firm, and the service provider. All three of those play very important roles and you need to have both a process that identifies who plays what role within the discovery initiative and an infrastructure that supports managing the collaboration between these three, because you want to minimize data movement and risk within it.

We also have the rise of the eDiscovery process management and platform coming up. Everyone recognizes what the eDiscovery process is, but they're getting more defined about saying what it is for their organization and putting in place a platform that can help them manage across the whole process. It's really about managing eDiscovery as a business process. I often like to say to people that eDiscovery is like any other business process: you have to marry people, technology, data, and business intelligence together.

And then there is the trend that is very hot right now in terms of formalizing what's going on in-house and that tends to focus on two pieces. One is defensible preservation and collection—making sure that your legal hold and collection can be done more efficiently and quickly and is, very importantly, defensible. And married with being able to make faster, more intelligent decisions. It's often called early case assessment. But the reality is, as Kevin mentioned earlier, there is a need to be able to reduce the costs of eDiscovery and reduce the risks.

So, Kevin, what's your perspective here?

Kevin: Well, I think the interesting thing here is the fact that none of these organizations can operate in a vacuum. If you're effectively going to manage your eDiscovery process in-house, you're going to need to make sure that the corporation, the law firm, and the service providers are working together. You mentioned a little bit earlier that this is a business process like any other, and we all understand that any business process can become very inefficient if you don't have the proper links between the different organizations. So you might be looking to do something to support the law firm side of the house in order to make sure that there is additional metrics or analysis being done there, but if they don't have the proper feedback from the corporation, or if they don't have an opportunity to go to an outside service provider for things that are outside the law firm's area of expertise, they're going to start having hiccups. The important thing is to make sure that all three of these organizations are focused on making sure that the parts are moving properly.

Barry: Great points. Let's dive a little bit deeper into what we call managing the triangle. There's a recognition that corporations are always going to use law firms

and there's always going to be a need for service providers within the eDiscovery process. Now, to be as efficient as possible, those three pieces of the triangle need to be able to collaborate effectively, make efficient decisions and have the eDiscovery project managed throughout. You also need to be able to manage the ethical issues between how these entities work together and then manage the transfer of data. One of the hidden risks in eDiscovery—and it's not necessarily hidden, but it's just not that often talked about—is that every time you move data, you introduce a higher risk of spoliation, of losing the chain of possession and the chain of custody. It's very important to be able to identify the data transfer points and minimize them. It is also just as important to recognize the point when data has to go from the corporation to the law firm and know how it's going to go, or have an infrastructure in place where your law firm can come in and access your data. All of these things need to be managed and talked about up front. Then we also have the shifting of business models within the service provider and law firm realm. I'll let Kevin talk a little bit more about how that introduces a challenge to the process.

Kevin: Well, the thing to understand is that although it is an equilateral triangle on this particular slide (TIMECODE 15:09 for Managing the Client, Firm, Provider Triangle”), in practice it is not an equilateral triangle. You are going to have varying levels of support and capability within the corporation, their law firm, and whatever service provider they might try to use. You mentioned there are ethical considerations here because of not only the movement of data and the security of data, but also because of the fact that these are business processes, not just for the corporation, but really for all three entities. There are some business things that underlie each of the processes for the service provider and the law firm, as well as for what's done within the corporation.

I happen to be speaking from Minnesota. I'm the co-chair of the Model Conduct Subcommittee of EDRM. We've done a lot of work on trying to provide guidelines as to how a lot of these ethical considerations can be tackled. When you're working with corporations and law firms, there is going to be a certain amount of 'push-me, pull-you' there because the corporation is going to be looking for the best cost-effectiveness and the law firm is going to be looking for the best legal defensibility. Those two things can sometimes be in conflict and you need to work them out. Then, if you come to the point where the corporation doesn't have assets available in order to take care of whatever work needs to be done, or the law firm says that this is a particular type of processing or collection that they don't feel comfortable doing themselves, they may decide to work with a third-party provider. That third-party provider has a lot of different customers that they're working for, so you really need to make sure that all of your processes are nailed down and, that you've minimized the movements of the directionality of the data, as you've talked about, Barry, where you're having information going back and forth between the corporation, the service provider, and the law firm. You know exactly where the data is and you're able to put your fingers on that information at any point during the whole process. The various levels of support are going to be different. One size doesn't fit all and that relationship needs to play out throughout the matter.

Peter, I don't know what you've seen along these lines.

Peter: Yes, we've seen a lot of corporations implementing the first parts of the process with hold and collection which, of course, is a very, very critical part of the process. And more and more they've been taking the next bite of the apple, as I like to say. They've been bringing more of the initial indexing and culling of the data in-house, to reduce it before it moves outside of their premise, which has to be done with appropriate decision-making. So they've been looking for tools where outside counsel can be involved very early on at that ECA stage, where they're reducing what is sent outside. The service providers are becoming more specialized in handling the exceptions, the more advanced culling and the other responsibilities such as production.

Barry: Peter, you made a great statement in terms of being able to make an informed decision on when they can and can't do certain aspects of processing. It's absolutely true that more of this goes in-house because it's efficient to do that. But early case assessment has traditionally been all about advanced analytics on data, so that you could find your smoking gun earlier, or you could do a first-pass review to see what your case looks like. That's an important component of things, but it's also about being able to determine early on whether or not our law firm should handle all of this, or is the data so diverse and is the case so important that we want a third-party service provider doing all of the work because we've got a lot of very tricky data. I think you make an important distinction about being able to insert real intelligence at the right checkpoint within the process, which I think speaks to the fact that, as an enterprise, it's very important to have what we're calling an eDiscovery platform to help you manage across the process.

In terms of what that process is and what goes into it, I think everyone here is familiar with the EDRM—the Electronic Discovery Reference Model. It's really the standard process description of what happens within eDiscovery. But it is an abstract model, and too often people look at the EDRM and they say, "Okay, this is what my process is going to look like in my organization." The EDRM is an abstract of a very detailed process, so I want to spend a couple of minutes showing that there are a lot of things that happen within that EDRM cycle.

Just within information management you have some very broad things that are happening. You are giving people the ability to create information and access it. You are putting some policies around how it is used and retained. When you get into the right side of that EDRM model—the identification, collection, and preservation cycles — there are a lot of things that are happening. First, there is data mapping, which may be both a manual and an automated exercise of understanding what types of data that there are, and being able to do both search and forensic collection of data as necessary for a given case. And then there is the managing of legal holds, the notification and the actual lock-down of data, however you choose to do it. It's not as simple as just saying "We're going to implement the preservation node of the

EDRM." Across the board, you need to be thinking about the scope of your efforts and defining the custodians and sources that you're going to be able to manage proactively, and then determine when you're going to need to do a deeper forensic collection, versus being able to do a search. Throughout this whole process, you're going to have to manage the chain of custody.

And the process doesn't end there, right? It keeps on going. You now get into the processing, analysis, review type of thing, where you've again got a lot of different things happening. You're indexing all your content; you're converting it. You're extracting the metadata; you're culling it down. You may be running deeper analytics on it and you may be doing things like predictive tagging or bringing the responsive population down through near deduplication. And you've got linear document review and all of the tagging and potential redaction that's going to go on and, again, you've got to export and convert this data for production. So the point here is that it's not as simple as just saying we're going to implement this node of the EDRM. You've really got to define which of these activities fall under the various nodes. You want to take ownership of, or control of, the process and decide how you want to do that—whether you want to use internal or external resources. Because, let's face it, eDiscovery is not a linear process. It's not as simple as saying, "Okay, let's just draw this out on a Vizio diagram and we'll assign this linear process." There are a lot of things that are happening and there are a lot of players. There's the whole triangle—the corporation, the law firm, and the service provider. Each of those may play a role at various points in the process.

Kevin: Hey, Barry?

Barry: Yes?

Kevin: To that point, can you go back a couple of slides for me please, to the first one where you're breaking down the processes a bit more. I think one of the good points that you've made already is the fact that when people take a look at the EDRM model, it's just that, a *model*. And if you take a look at the model itself, you'll see that there are a lot of circular processes there in the sense that it's really an iterative process; whether it's doing preservation or collection or processing... all those things are done multiple times. And each time you complete the process, that's going to influence every other issue after that. And to your point about who owns which pieces and how they're handled, this very first slide, are the kinds of things that I find corporations getting better at. A lot of these things in the first four chevrons are issues that are near and dear to the heart of the corporate client. They're looking at information management simply because they are the ones that are creating all of the information; they are the ones who have to manage the information. When you're looking at identification, the law firm is not going to handle identification. The law firm is going to turn to the corporate client and say, "These are your systems, these are your people, your custodians; you need to provide me with information here." And then when we get into collection and preservation, that's really the first area where you're going to have some level of cooperation or

collaboration between the law firm and the corporate client. Some law firms are going to say, "Well, in order to take care of this, I really think that we should handle the collection or we should find an outside third party to handle collection and preservation." And some of the corporate clients are going to say, "No, I'm a multinational, multi-billion dollar corporation and I have IT professionals." And this first section really highlights the areas where IT and records managers get involved, and it plays to their strengths. IT is out there and they are flexible, have rapid deployment methodologies, and they have a lot of the tools available to them already. IT is used to being a duck on water. They're used to responding to a fire and appear to be doing things very smoothly, very calmly; but underneath everyone's paddling like hell in order to make sure that everything's taken care of. They're used to that sort of "drop everything, let's address this issue" sort of situation. That's their strength. The records managers are the pros at both information management and handling the identification of information sources when they're needed.

This first slide is a lot about what those corporate strengths are. So if you go to the next slide for me?

Barry: Sure thing.

Kevin: Then, if you take a look at the production, analysis, and review, this is where you're getting into both the strengths of the outside law firm and the strengths of the service providers. The processing is usually going to be done by an outside third-party provider. The analysis and the review, although you may use the services of an outside provider either for hosting or for bringing in per diem attorneys in order to do some review work, are going to be done under the umbrella of the direction of the outside law firm. This first slide tended to play to the strengths of the corporations. This second slide points out those chevrons that are really more to the strengths of the law firms and the service providers. There are an awful lot of individual processes that happen with each one of these items and each player has their role, each player has an opportunity to use their strengths to bring the eDiscovery process to a successful conclusion, as long as there is communication throughout that process.

Barry: It's a great point and I think ... Oh, go ahead, Peter.

Peter: If I could add very quickly there, Kevin... I agree, and what I'm finding is that info management, unfortunately, isn't done well. A lot of times when we're brought in they're at the identification stage and they're more or less starting from scratch. So they're looking for tools that can help build the data map, help them understand the big picture of what's out there and where it is so that they can collect and preserve it. Because, as Kevin said, those are the things that they are addressing immediately.

Barry: Yes, I completely agree with you about the practice of information management being immature and needing to be better addressed. And I think to underscore Kevin's point that this is not necessarily a linear or iterative process—each organization is going to determine things differently and have their own initiatives. So, for example, a lot of organizations want to do early case assessment. And early case assessment can run all the way from the identification and collection phase all the way up through review and production. But you may or may not do all of those things within your early case assessment initiative. You may just be bringing in a file inventory tool that helps you make some quick determinations on how much is potentially responsive. And all along the way, you're going to potentially need help and expertise from your law firm, as we talked about earlier - getting your law firm involved earlier and earlier in the process. Not only to certify the information management efforts, but also on a matter-by-matter basis to sort of help you understand, "Hey, we've noticed you've collected, or could collect, a lot of data for this matter. I think you should argue undue burden because this is bigger than any case you've had." Being able to get that kind of legal advice throughout the process is important, You need to determine how you are going to bring them in to that process. You also see law firms becoming service providers and doing some of the project management and advanced processing themselves, and maybe even providing a hosted review platform and conducting a linear review. So the point is that there are multiple different ways that you can go. What's right for one organization won't be right for another. You need to look holistically at the process, determine what resources you have to manage, and where you need the external expertise. So...

Kevin: Barry, you must mentioned the word holistically, and I think the one thing you have to keep to mind is, that is something that I see lacking many, many times in the engagements that we're pulled into. There is no holistic view of the process that's similar to the slide that you've got in front of us right now.

If you take a look here, you've got a number of streams of work and you've got project management in each of them. Arguably, you have project management in the early case assessment, you have it in the law firm side with the linear review; you have it for the service provider. But too often, the effort is siloed just the same way as it is on this slide. You've got three swim lanes that are going on. Each group is working very, very, very hard in their particular lane. But the problem is this is not just an individual event; this is a team event. And each of these pieces that you have up here—whether it's assessment or whether it's review or whether it is strategic consulting—each of those things have points where they touch the other processes. And if there is one area where I find that people are doing very poorly, it's having someone who is looking at the overarching issue. I remember when I used to do IT work and we used to have a mainframe system and users would call into the help desk and say, "Hey, I can't access the application." And you'd call the database people and they'd say, "Well, the database is running." And then you'd call the communications people and they'd say, "Well, the communications lines are up." And then someone says, "The application is running." And there had to be someone

to pound the fists on the desk and say, “You guys, they’re calling because they can’t access the application. Something is wrong.” Someone has to have that view of everything and say, “I don’t care if the individual pieces appear to be working; there’s a problem with the overall process.” And that’s one area that really doesn’t happen all that much in the eDiscovery world. You’ve got everyone swimming as fast as they can in each of these individual swim lanes, and then they’re always surprised when they reach the end of the process and say, “Wait a minute; where is everybody else? Why don’t I have enough information in my review room?” Well, it’s because collection hadn’t begun and nothing is being produced because the review hasn’t been completed. A lot of those things happen individually, but the key thing here in what I advocate the corporation should have, because they’ve got the most skin in the game, is somebody to look across all of these chevrons and say, “Okay, where do each one of these individual work processes stand and how are they affecting each other.” That’s just something that you don’t see all that much of.

Barry: Yeah, great point. And I think we’ll come back to that a little bit when we hit upon some roles and responsibilities, and how defining those will help you ultimately look somewhat more holistically at the process and assign ownership at the right points. As you mentioned earlier, Kevin, it’s all about tracking and auditing and having a centralized view of who’s doing what. Is it completed? And that’s where this rise of the eDiscovery platform really starts to come into play as you can look at least more centrally across the whole process and see what’s happening.

What Leading Organizations Take In-House

Barry: As I mentioned before, every organization is going to look at this somewhat differently and have various viewpoints on what they want to own and what they’re capable of owning. But it is helpful to think about the leading organizations that we see out there; what are they doing and what are they taking in-house? I think what’s really been a trend and taken hold in organizations is the ability to do that legal hold management in-house. Because, at the very least, the case law calls for making sure that the notification process happens. And what I see from decisions that are coming out is a deepening amount of incredulity when an organization argues, “Well, I didn’t know that I had to let people know not to delete their stuff.”

Notification is great and it’s fine, but organizations want to be able to do the actual preservation—the lockdown of content— because most of the forward thinkers out there understand that even though the case law today might only specifically call for managing the notification process, if you don’t connect that to the actual lockdown, there’s going to be a problem and you’re going to get laughed at because it is technically possible. And again, the eDiscovery platform can help with that.

There is also what I would say is a focus on defensibility. If you’re going to do the identification, collection, and processing, you’ve got to manage the chain of custody. You’ve got to make sure that you don’t have spoliation, because that’s just inviting a sanction. There’s also the need to determine when to do a forensic collection or take

someone's hard drive because they're a noncooperative custodian, versus the ability to do a search across, for example, custodian ambiguous sources, like file systems. You need to be able to do some searching there because it's not as simple as saying, "Go get me Kevin's content from the file system.". And again, managing the metadata, especially around new types of content like dynamic web pages or social media, where there's a lot of context that's not necessarily part of the content as we think about it. It's really about making that identification, collection, and preservation effort manageable in-house and defensible.

The other big piece that companies are starting to "in-source" is early case assessment, simply because it can really provide that fast ROI by allowing for cost reduction, by avoiding litigation spend and making faster, more informed decisions. Now, that's not always going to appeal to an IT person who has to spend money., But when they want to go to legal and get some money, being able to say they're going to be prepared for the meet-and-confer sessions because they're going to have a view into the data very quickly and be able to collect and preserve it, almost immediately synergies start to happen and there is budget that can come out of the legal realm.

So, these are the types of things that I'm seeing organizations take in-house. Let me turn it over to my fellow panelists for their take on this.

Kevin: Well, I think one of the things you're seeing with the change in what's being brought in-house is a function of changes in the law and changes in technology. Because quite a while ago, the legal hold process was usually managed by outside counsel. In-house counsel, if they were available, might have had an advisory role in that process, but for the most part you would get a letter from the outside organization, the outside counsel, saying, "You've been identified as being a part of this litigation, or a person of interest in this litigation. Please do the following..." As information systems have grown within organizations, it's really the organization's responsibility to continue to manage those systems. There's very little that outside counsel can do in terms of making sure that notifications are going out rapidly and people understand what the requirements are, and then that information is being collected. I think the movement in-house of some of these activities is just a natural reaction to the way information systems have changed over the past 10 or 15 years. As these systems have evolved and matured, you've had an opportunity to have better collection methods, better lock-down methods, ways of making sure that as long as proper process is used—and IT people are all about process, so they should be able to handle that—they're able to make sure the information is protected in an adequate manner. In the past, it was a little bit more haphazard; people had open access to systems, you didn't have user-based or role-based authority on systems, and the outside law firm really couldn't take the chance on behalf of the corporate client that someone wouldn't do something that would damage some data. So they took a much more active role in making sure that those things were taken care of.

The growth of the ECA is again just an outcropping of everything that's been done. As people do more collection, and as people do more preservation in-house, they

find, "Well, I have all this data right here at my fingertips." It's not unusual for the general counsel to turn to the CIO and say, "Well, wait a minute, you've got all these analysts that work for you, and you've got all these people who do all this business information management, and we have data warehouses ourselves, and we mine data every day of the week. Let's look at this data ourselves before we go outside." Couple that with the kind of cost savings that has been touted by both service providers and the people who create some of the tools that are out there, and there's a lot of incentive there for people to say, "Okay, rather than ship all this outside to a third party, let's take a look at what we can do here and focus in-house on the things that we can do without creating too much risk." And that's really where in-house counsel needs to work in lockstep with outside counsel. They need to understand what the potential legal defensibility issues are and know their own situation. You know, a famous law enforcement person once said, "A man's got to know his limitations." And that's the same for corporations too. You've got to know exactly how much you can bite off and chew internally, how many things you can handle defensibly in-house, and when you need to cry uncle and say, "No, we don't need to do this in-house; we need to take a look at this with somebody else." So the evolution of the process and whether that's going to go further; that is the debate that we're in right now, and how much of this is can continue to come in-house and how much is going to be taken outside.

Peter: Yeah, I would agree. I've worked with a lot of corporations that have processes in place to handle certain data sources and they are very good at collecting certain PC images, e-mail repositories, home directories. But when it gets outside of those common sources into, Barry, what you call the custodian ambiguous sources like departmental shares or share point farms, that's where it gets too difficult for those traditional tools. And they're really looking for something that can help them understand at a deeper level, in those the very, very big data sources, if they need to do collection or if there is anything there that is responsive to the matter. For example, one corporation we worked with had about four terabytes of departmental storage and general network shared storage, and a couple of years ago that would have been so large that they'd be talking to opposing counsel about the burden to even search that. But now tools are available which allow them to quickly, in the course of a day or two, get through all of that data at a very deep index level, so that they can test the key words, the date filters, the ownership of those files and find out if they are potentially responsive to the case; do they have a responsibility to actually collect some of that. And that's kind of the next step of bringing something in-house, that's beyond the traditional imaging tools, to something that can actually go after those large repositories very rapidly.

Barry: Yes, I think that speaks nicely to the point that an eDiscovery platform really enables the more efficient collaboration amongst the parties. So, for example, if you know you can go through those four terabytes fairly quickly, a law firm can understand what kind of data you have and how you can make decisions. It's being able to bring all the relevant players into the process and feed them the information that they need. And that's what we really see the leading organizations doing.

But, as always, in eDiscovery it seems like it's particularly true, there's some semantics involved. When we say "in-house," it doesn't always mean that you're using internal resources only. I think that what you really need to think about is; what do you want to do internally, what are you capable of doing internally and where do you need some external resources? And it's important to remember that external resources provide some real benefit. For example, you might own the collection, but you might bring in project management from a service provider to actually conduct some of the collection because they've got documented methodologies. They've got experience working with litigators, they know what's going to happen if they're deposed or if they have to provide expert witness testimony. This is not something that the average IT person wants to be doing on a regular basis. So don't think that simply because you take something in-house, you're actually executing every single piece of the process. It's really an issue where you're determining what you can do internally and where you need external resources, but still have control and be responsible for the execution of the process. And I think that is an important thing to consider here.

Kevin, what's your perspective on that?

Kevin: Well, I agree with what you have said thus far. When you're working in-house, the one thing you want to make sure of is that you're handling things that you can maintain internally without having to worry about sleeping at night. You don't want to be doing something for a cost-savings method, only to find out that you've sacrificed your legal defensibility. It's a question of making sure that you're using the proper tools for the proper situations.

I talk to clients all the time and they'll call me in and say, "Oh we want to bring this stuff in-house." And you find out that their IT organization is maybe five guys in a server room somewhere. There's no way that those kinds of organizations can support bringing all these kinds of processes in-house. On the other hand, I have worked for a serial litigant and that necessitated bringing a lot of these things in-house from the sheer scope and size of the things that were being taken care of. It's really matching the processes and the tools to the kind of client that's out there or the kind of situation that's out there. You have to make sure that people understand that this is not something to be taken lightly. It requires a lot of time, a lot of effort, a lot of hardware, and a lot of people. If you've got a litigation docket that supports that kind of investment, then it's absolutely something to consider; but if it's not, then you should leverage your outside resources. When I was in-house, it was easy to get tossed out of my office to have a service provider come in and say, "I can take care of all of your discovery from soup to nuts;" because in the end they couldn't. No one can take care of that for most larger organizations. By the same token, don't think you can bring all this stuff in-house because you went to a conference or you listened to a webinar and everyone was saying, "Oh these are the kinds of things that you can bring in-house." You have to match your litigation profile and your internal resources and match those with the great people that are on the outside—

from the service providers and the law firm side—who are working at the same point to try to make sure they're defending you.

Peter: Yes, I would agree completely. And actually, our customers are benefitting from bringing something in-house that actually makes it more transparent to outside resources so that outside resources can come in and get involved very, very early in the process. Through that early involvement, they can help identify what should leave the building, what data really is responsive to the case and isn't a known technical reduction—like known files and dupes. And what ends up leaving the premises is a much smaller data set, yet they were guided along the way by outside counsel, or in some cases even outside service providers, who are placing Digital Reef technology at their customers so that they can help them manage the cases as a managed service. So just because it's in-house certainly doesn't exclude external resources. In fact, you really need platforms that include external resources as much as possible.

Barry: You mentioned giving your law firms access. I've dealt with corporations that had the wherewithal with how they worked with their law firms to tell their law firms, "We've got our data ready for review. You're going to come in and use our platform, because guess what? We're going to govern your review process; we're going to look at what associate is doing what and make sure that you're putting us with the right cost review associate for the matter that we've specified." Not many organizations are mature enough to do that or have that relationship with their law firm. And so my advice to any organization is you need to determine what you want to have the capability of doing and make sure that what you bring in meets the requirements of what you've determined up front.

Key to determining what way you're going to go is really getting the roles and responsibilities right. I probably beat this to death in various presentations that I do, but the reality is any process is only as good as how well you define it. And to define the process you need to have the right people doing the right things. You need to have legal approving retention policies, really coming up with your eDiscovery strategy in terms of how to work with legal firms. How are we going to identify custodians for legal hold? How are we going to manage the cost of review? Those are the types of things legal should be doing. I like to think of them as the business owner of the eDiscovery process. Whereas IT is going to be talking to legal and asking how to get technology to execute what legal wants to do in terms of eDiscovery. In many organizations people think that their CIO or their IT department owns eDiscovery simply because they might be the purchaser of tools, but oftentimes legal is still defining the requirements. And in many successful organizations, the eDiscovery IT operation sits within information security and I've seen that work out pretty successfully.

The other thing I always think of in terms of roles and responsibilities is *do not, do not, do not* forget about your business end users. Because at the end of the day, they are the ones that are creating information and they need to have an environment in

which to create and collaborate. They also know the most about their information assets and whether they have long-term value to the organization or whether they're junk, and they play a big role in classifying the information. If you set up an information management environment that is overly strict and doesn't allow people to do what they need to do with information, you will force them into underhand archiving. And the one thing that's been a constant is that the end users are always smarter than the organization. If they want to keep information that they're not supposed to have, they will do so. So, in the interest of transparency and the ability to actually discover the data, it is better to set up the systems that allow people to get information in the way that they need it and keep it where they want to keep it, so that they can do their jobs.

Kevin: Barry, I think there's one thing that might be missing from that title there. And that's "Set Clear Roles and Responsibilities—and Then Enforce Them." I've had quite a number of engagements that I've been pulled into where the roles and responsibilities may have been set at the very beginning and then get muddy. One of the big problems that I see is that lawyers get very irate when IT people try to practice law. But the lawyers think absolutely nothing about practicing IT. The lawyers will come in and start making proclamations as to, "Well I want this kind of a system and that kind of a database; this sort of a hookup." And a lot of times I'll find they are just power users that have had a smattering of IT interactions. On the basis of that, suddenly they're telling their next client exactly what they should be doing in their IT operation. And likewise, IT has a tendency of starting to make its own decisions as to what is legally defensible. "Oh, this collection process is just as good as the other one. Yeah, I know you told me to use RoboCopy, but I've got this really neat tool that I picked up at the last Microsoft conference and they say it's fully defensible." And then they go off and start doing something on their own. And most of the time, business users just want both legal and IT to go away. They want to go on with working with their business and they want to make sure that they minimize their time in anything related to litigation. So if you don't have clear roles and responsibilities that are adhered to, that's a recipe for disaster, that's where you're going to have a lot of conflict between the outside law firm and your in-house IT organization, and it's just something you want to avoid at all costs.

Peter, I don't know if you've seen something different, but that's what I've seen.

Peter: Yeah, and I'll add that the benefit of clear roles and responsibilities is that when the case progresses, it's clear who made what decisions along the way. For example, IT wants to do what they do best. They want to install and configure and maintain applications for their users—the legal users, the business users. They don't want to end up on the stand in front of a judge discussing evidence identification and collection. So if they can implement infrastructure that allows legal to pull the case data together and make all the decisions as to what moves forward and what doesn't, then IT is no longer in that chain of custody, as far as the decisions that were made on the data. They can help build the maps and essentially put all the resources and tools in one place so that legal can leverage them. But now legal can

do what legal does best, which is practice law and make those decisions. By maintaining these clear roles and responsibilities, you can avoid some of the things that you both discussed around the muddiness of those roles.

Barry: And it sounds sort of soft, but oftentimes, if you don't nail this at the beginning, it's going to impact the effort negatively all the way down.

So, we're coming up on time and we want to leave time for some questions, so I think that the message I like to leave folks with in terms of what you should be doing this year is really about defining *your* eDiscovery process. Because it's not defining *the* eDiscovery process, it's what yours is going to look like; it's what you are capable of doing. Getting the alignment of the team players, as we talked about, is critically important, and we've seen a lot of organizations either evolve a records management department into a broader information management department and have kind of central ownership of eDiscovery in terms of bringing all the right players together and helping them to speak the same language or creating a specific eDiscovery team. Because it's hard to get legal and IT on the same page and speaking the same language.

I think this year should be a focus on defensibility. So whatever you do bring in-house - that preservation, collection, early case assessment - make sure it's defensible and that means the marriage between forensics and search. Because there are going to be times when you're going to need to go out and image a laptop. But you're also going to want to be able to search those custodian ambiguous sources and make decisions quickly.

This is a year when you can actually go for some of those efficiencies in terms of how you manage the triangle. You can lay the groundwork for predictability. Everyone says proactive eDiscovery, well eDiscovery, is always going to be somewhat reactive, but you want the process to become predictable so you know what the costs are going to be and you know what the time is going to look like. And then really prepare that in-house framework, so as you define your process, you decide "What am I going to own, what do I have the resources to own?" Set up a platform that's going to help you manage this process, and be able to make very good decisions on whether or not you need external help or you want to handle things internally, because it might differ on a matter by matter basis.

These are the high-level things that you can be thinking about in 2011.

So let's see if there are any questions out there from the audience. If we go beyond time, we can always get back to you by e-mail afterwards.

David: Yeah, Barry, I think we've got time for just one or two here. We've got a question from a corporate attendee.

At what point does it make sense for a corporation to in-source everything, including review and production?

Barry: Well, I'll give my perspective and then turn it over. I think it's very rare that it makes sense to take everything in-house, unless you are a serial litigant where you've said, "Look we're going to have 100 staff attorneys in our general counsel's office." The chances of wanting to be able to do the full kit-and-caboodle of review and production and own everything are slim. It's only going to make sense in certain cases, but that's just what I've seen out there. Kevin might have a good perspective on this as well.

Kevin: I think I mentioned earlier in the event that serial litigants will have critical mass that will provide them with the cost justification of putting some of these processes in place and some of these tools in place. But I don't think I have actually seen anyone, even in the Fortune 50, who has taken the entire process in-house. And part of that is because of the legal defensibility. You don't want anyone accusing you of playing "go fish" with the data. You know, if you've got everything and you've collected it and processed it and reviewed it and you go back to the court and you say, "Nope, we don't have anything," I don't think that's going to carry the same amount of weight as if you said, "Look, we did all of the beginning parts of the process, and eventually when we got to the analysis and production side, we turned it over to our law firm along with other people who took a look at that information and here is the subset that they came up with." Marry the two things together; the justification from the cost standpoint with the legal defensibility. There's always going to be some line of demarcation between analysis and review. Maybe begin doing a little more review in-house and then turn over a subset; but I think there is always going to be that external component in order to maintain your defensibility.

David: Okay, another question: Should law firms mandate the review platform?

Kevin: Speaking as a former corporate person, I would say that the law firm shouldn't be mandating anything. The thing that doctors, lawyers and automobile mechanics sometimes forget is that they work for the client; it's not the other way around. On the other hand, the corporate client can't go mandating anything themselves. This has got to be a partnership; this has got to be collaboration as we have said all throughout this event. I think the law firm should probably inform the client as to what their preferences are, and if it's because their people are already trained on a particular platform or they've got platform available and it's going to reduce the cost, fine. You don't want to go off with some boutique platform that they've never seen before and then the client is paying for the education process to get everybody up to speed on this other platform. I don't think anybody should be mandating anything and it really should be a marriage of equals in the sense that you've both got to make sure this thing works properly and you've got to work out between the two of you which of these things you can handle equitably.

David: Okay and we have someone here who works in IT. “I work in IT. How can I engage legal to understand what they need so I’m not constantly reacting to their requests over and over and over again?”

Barry: Yeah, I think that it is difficult to get legal and IT speaking the same language. I’ve seen IT folks who can not only talk about how they’re going to potentially reduce litigation budgets, but also bring up a lot of the news around sanctions, brand protection of not having eDiscovery issues and how it’s going to make them better at their job. In general, people respond to what’s going to be good for them. If I’m an IT person and I want legal to get off my back and make eDiscovery a more predictable proactive process, I may talk about “Look if we do this, you’re going to be able to get early access to the data and you’re going to rock in your meet-and-confer session.” So it’s not just, “Hey, we’re going to save you all these processing costs,” to which some of them might respond, “Well, you know what? Our litigation budget is covered by insurance.” It’s really about saying how they’re going to be better at their job. They’re going to make better decisions. They’re going to look good at their meet-and-confer session. I think those are some of the big things.

Kevin: You know, I was an IT person for 17 years before I became an attorney, so I’ve worked on both sides of the house. I agree that the lawyers do a good job, oh sorry, do a very bad job of stating exactly what they need from IT. But part of the problem is IT is used to being an order taker. IT is used to getting a specific sort of question or request in and then they go off and craft a solution. And that’s really not the way that eDiscovery works. There is an education process on the IT side as well. IT people need to become better educated as to what the whole litigation process is about. What I’ve actually seen some corporations do is to put together a small training class to explain to the IT people, “Here is what we’re talking about; here is where this weird word “spoliation” comes from; and this is why we get all heated up when somebody decides to do a drag and drop when giving us some files or something of that nature.” The IT people are always being reactive to the requests of legal, that’s the name of the game. That’s the way litigation works. The lawyers don’t know before the case comes in what the other side is going to be looking for. And when that discovery request comes in at some point after the matter has been filed, they are going to say, “All right, I want all of your sales data.” So then the lawyers are going to turn to IT and say, “Okay, well I want all of your sales data. Give it to me.” That’s not the time to start having semantic discussions as to whether you mean all sales data, partial sales data, or sales data only within the U.S. Some of those questions can be answered up front if the IT people have a little bit better understanding as to how litigation itself works. Because once they see the kinds of things that the lawyers are going to be looking for, the light bulbs are going to go off, and IT is going to do what IT does best—craft a new solution. And a solution doesn’t have to be hardware and software, by the way; it can just be process. It can be being available for interaction and advice. So IT is going to have an opportunity to be more proactive once the legal people learn a little bit more about what IT does and IT learns a little bit more about what litigation is all about.

David: Well, this has been a very informative session today. Gentlemen, I appreciate all of your input and insight. For our audience, thank you very much for attending. We went a little over today, but I hope you definitely got some value. There was some great information there.

If you have any questions for our panelists, there are their e-mail addresses. By all means, let them know any questions you might have. We'll be sending out a link to this recording within the next day or two, as well as a link to the slides.

Again, thank you very much, everyone, for attending and have a great day.