2016 Legal Holds and Data Preservation

The Proceedings from the 2015 Conference on Preservation Excellence

Edited by Brad Harris

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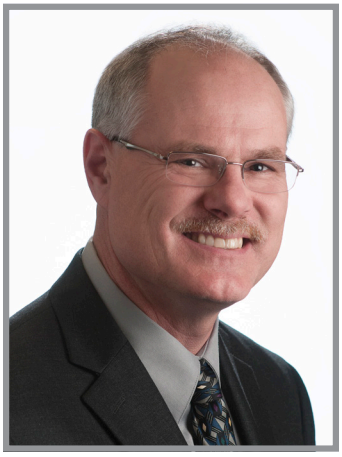

ABOUT BRAD HARRIS

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Brad Harris has more than 30 years of experience in the high technology and enterprise software sectors, including assisting Fortune 1000 companies enhance their e-discovery preparedness through technology and process improvement. Brad is a frequent author and speaker on e-discovery and preservation issues, including articles in National Law Journal, Corporate Counsel, and KMWorld and presentations at leading industry events such as Legal Tech New York. Prior to joining Zapproved, he led electronic discovery readiness consulting efforts and product management for Fios, Inc., from 2004 to 2009. He has held senior management positions at prominent public and privately held companies, including Hewlett-Packard, Tektronix and Merant.

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ABOUT ZAPPROVED INC.

Founded in 2008 in Portland, Ore., Zapproved Inc. is a pioneer in developing cloud-hosted software for corporate legal departments. The Z-Discovery Platform returns power to in-house corporate legal teams and helps them navigate electronic discovery with minimal risk and cost, and it sets new standards for scalability and intuitive design. The company's flagship product, Legal Hold Pro, is widely adopted by Fortune 500 and Global 2000 corporations and has earned recognition as the Best E-Discovery Legal Hold Product at the 2015 Legaltech News Innovation Awards, in the 2014 and 2015 Best of the National Law Journal and the 2013 and 2014 Best of Legal Times. Zapproved was recognized in the 2014 Inc. 500 as one of the fastest growing private companies in the U.S. and was named as a “vendor to watch” in the 2015 Gartner Magic Quadrant for E-Discovery.

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Introduction

The Key Topics in Preservation Today - Data Security, Rules Changes, Transparency, Cost of Preservation and Building a Culture of Compliance

PREX15 is the fourth annual Conference on Preservation Excellence that brought together an outstanding group of speakers and panelists. They offered many insights into the latest trends, tools and challenges corporate legal professionals face when dealing with e-discovery, legal holds and litigation readiness.

The two-day conference, held in Portland, Ore., on September 17-18, 2015, was packed with informative sessions that drilled down deep into such subjects as the global data protection and preservation, the emerging prominence of the corporate law department, a look into collection best practices, information preservation strategies, characteristics of the preservation ready organization, cooperation versus adversarial behavior in e-discovery, and preservation and the evolving IT landscape.

Two keynote speakers anchored each day's proceedings. On Day One, Amazon Web Services' Scott Ward offered his thoughts on why data storage is moving rapidly to Cloud-based solutions, and outlined many of the security issues associated with that trend. On Day Two, Intel's e-discovery architect, Steve Watson, laid out the future of data collection that gave an entirely new spin to the e-discovery adage, "Follow the data."

Another highlight of this fourth annual PREX conference was the distinguished judicial panel. Spirited as always, this insightful panel tackled such issues as the effects of new amendments to the Federal Rules concerning preservation and e-discovery, a discussion on proportionality, the need for opposing counsel to cooperate during discovery to facilitate a fair process, and what the bench expects from a corporate preservation strategy.

In summary, PREX15 upheld the tradition from past events of presenting a strong and focused curriculum where participants learned and shared best practices, gained insights on the latest trends and took a moment to reflect on how the future of data will affect the ongoing challenge of data preservation and managing e-discovery affordably.

This volume of *Legal Hold and Data Preservation 2016* encapsulates highlights from the rich content sessions that were shaped by the nation's e-discovery and legal experts and records the wealth of knowledge that was shared. It is our hope that this document serves to educate, inform, and inspire its readers as they explore preservation best practices, seek to improve their e-discovery competence, and share with their corporate legal department colleagues new strategies to improve litigation readiness.

State of Preservation Today

Panelists included:

- **Michael Arkfeld**, *panel moderator, Director of the Arkfeld eDiscovery and Digital Evidence Program, Sandra Day O'Connor College of Law, Arizona State University*
- **Robert Owen**, *Partner, Sutherland Asbill & Brennan LLP*
- **Hon. Xavier Rodriguez**, *U.S. District Judge, Western District of Texas*
- **Ariana Tadler**, *Partner, Milberg LLP*

Three trends are shaping the e-discovery world today: big data, the cloud, and mobile. These trends have created an environment where e-discovery is once again in a state of accelerated change, one moving so fast and in so many directions that the traditional means of managing and tracking data won't get the job done any more.

These trends also mean organizations are at greater risk than ever from an e-discovery crisis created by a preservation lapse. Teams need to be in rapid-response, even first responder mode to effectively serve the enterprise. By describing the state of the industry, panelists and audience members set the tone for the rest of the conference. The state of the industry today includes elements that do not move e-discovery forward, such as the pace of change itself, and a stubborn refusal by many in the bar to cooperate during discovery.

Panelists at the 2015 Conference on Preservation Excellence led an analysis of the current state of data preservation and how big data, the cloud and mobile have influenced that environment.

Arkfeld noted that the pace of change in discovery, driven by a technology culture that loves more data, has historically not been matched by the pace by which lawyers ingest and integrate new factors into their work.

"We're going through change again," he said, "and while I hear people telling me, 'The rules came in effect in 2006, and so things have kind of settled down.' They haven't. The first desktop computer hit our world in the 1980s, and the legal profession did very little, if anything, in response to them. We didn't pay attention to preservation until 2006, when the Federal rules were interpreted in the *Zubulake* decisions."

He sees the same lack of urgency in the profession's response today, despite the surge of data, as the cloud and mobile pile up even more than can be discoverable and should be effectively preserved—or at least retrievable.

"There have been comments that the Federal rule changes are the most far-reaching than they've been in 40 years," Arkfeld said. "So we're seeing a

huge impact on how those rules will impact litigation in the Federal courts."

Hon. Rodriguez pointed to an an extremely controversial footnote to the rules—one encouraging, but not compelling, parties to cooperate. "What's not in the rules is almost as important as what's in them," he said. "There was a proposal to include a cooperation aspect into the rule. That was deleted from the text and delegated downward to a footnote, because the fear was if we put in the cooperation aspect in the text, it would lead to satellite litigation and sanctions and fights in the courthouse about whether or not somebody was cooperating or not."

Judges and plaintiff attorneys have a strong preference for cooperation during e-discovery. They argue there's a clear way to handle e-discovery, and that parties can agree upon a way to do so in a relatively short time. The very fact that it was included as a footnote augured it well for the future—but as a note, it carries little weight.

Still, the note represents a judicial expectation for cooperation in discovery, said Tadler. "Although cooperation is only in the notes at this point, the fact of the matter is, lawyers are going to have their feet really held to the fire because judges are going to expect that parties are working towards a just, speedy and inexpensive litigation. However, I do suspect that there will still be many objectors to the concept of cooperation. And they'll look to denigrate what many of us know is the meaning of cooperation."

Lawyers who fail to cooperate fully in discovery aren't necessarily just running the meter, as some suggest. Oftentimes, they are wary of incurring cooperation-related litigation down the road.

"The danger of cooperation being its own source of collateral litigation is on everybody's mind," said Owen. "Cooperation's great when it works. I aspire to it. It saves money. It speeds things up. But the constant drumbeat that 'You've got to cooperate, you've got to cooperate,' ignores the reality that not all adversaries will do that."

So, while cooperation is now under the tent of discovery, panelists agreed that cooperation in discovery will not be the norm any time soon.

Another component of the new state of the industry is that the rules deleted the notion that something that could lead to discovery is discoverable. That was a gateway to data hell in the past, and none of the panelists was unhappy to see an end to that particular device.

"The idea that something might lead to the discovery of something, and therefore it's discoverable, is gone, and I think that's a big plus," Owen said.

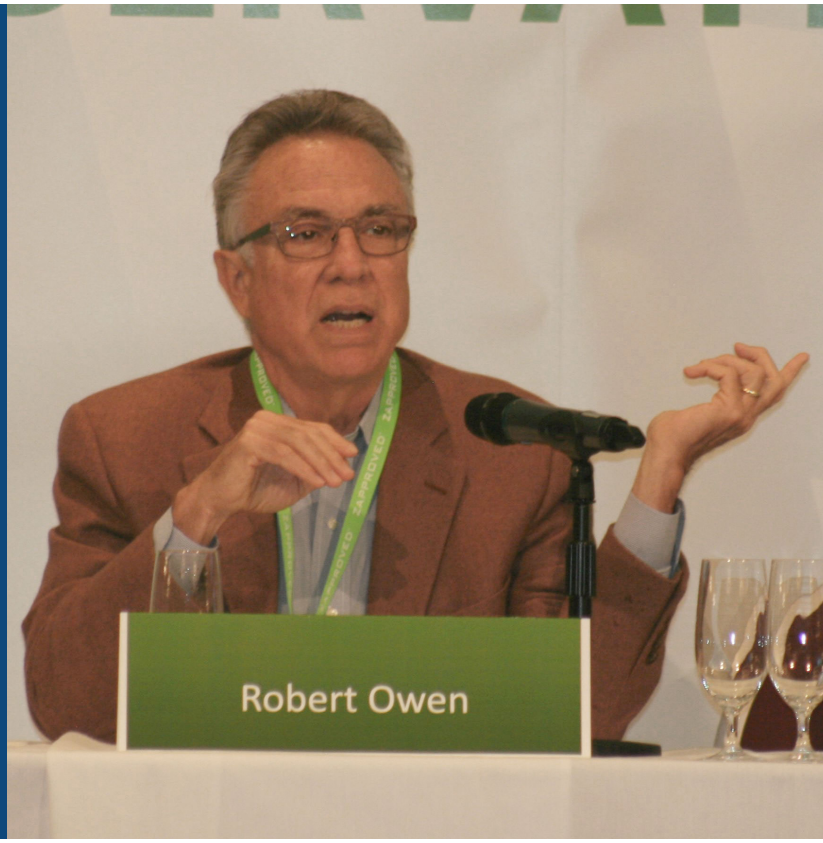
As with cooperation, proportionality is currently up in the air and more open to interpretation than before. The courts and rules committee are attempting to narrow the scope of discovery to facilitate the process, but for massive amounts of data continue to be made, particularly of large companies.

> "Although cooperation is only in the notes at this point, the fact of the matter is, lawyers are going to have their feet really held to the fire because judges are going to expect that parties are working towards a just, speedy and inexpensive litigation." *-ARIANA TADLER*

As with cooperation, the good news is that proportionality is receiving more attention from the courts.

"Now that we have this enormous volume of data, and we have the philosophy of full disclosure, I think this is a very important change," Owen said. "People reflexively want more, more, more, regardless of whether it's relevant to the case. We should all aspire as litigators to narrow the issues with our

> People reflexively want more, more, more, regardless of whether it's relevant to the case. We should all aspire as litigators to narrow the issues with our adversaries. What's really at issue? What really do we want to look at as a first wave matter? What are the central issues that are in contest?" -*ROBERT OWEN*



adversaries. What's really at issue? What really do we want to look at as a first wave matter? What are the central issues that are in contest?"

"But how do we implement this on a practical level?" Arkfeld asked. "If you have a case that talks about proportionality and you're representing a large defendant, what are you going to do in terms of when you meet with opposing counsel initially? He's asking for 100 gigabytes of information, and you say there's only 10 gigabytes. How, practically, are you going to convince him or the court to limit the amount of discovery?"

The concept of disproportional discovery—a request that is simply too broad—is now beginning to receive a bit more scrutiny from all parties. The days of the broad request, rubber-stamped by the court that deals a death blow to arguing the merits, may be over. Certainly, the matter will be hotly debated. In today's preservation environment, the likelihood is that the courts will be looking for a narrower, not broader, process.

Said Hon. Rodriguez: "Lawyers ought to be having those conversations in the meet and confer session about proportionality in the preservation. That's where this should be discussed. It's supposed to be a dialogue about how to structure the case, not an evidentiary hearing."

"The point, though, is with proportionality, what you're going to see are several issues being raised during litigation, pre-trial, Rule 16, meet/confers. So we're back into a lot of collateral discussion, collateral litigation through this whole process, added Arkfeld.

Another consideration in today's e-discovery climate: sanctions are now becoming more important in shaping discovery than is a preservation structure. Again, new rules will be in effect soon that will stipulate sanctions for failing to properly preserve. The rules were created with no preservation structure guidelines as a companion. In a way, it's a cop-out—specific penalties for fuzzy violations.

"Where do we end up, after years of attending many conferences and rules committee meetings and looking at drafts and 2,300 public comments? We don't have a preservation rule. We have a sanctions rule," summed up Tadler.

Panelists agreed that the new rule creates a situation where the court can find the preservation lacking and order sanctions. The court can order the producing party to take measures to remedy the situation—but, Tadler said, the rule "doesn't specifically tell you what those measures are. It just says measures no greater than necessary. It's a very interesting quagmire that I think we're going to find we're going to have some difficulty trying to navigate."

Hon. Rodriguez was clearly frustrated by this turn of events. "The first question I have is, 'Why?' Why are we having now a separate sanctions rule that all 800 of my colleagues can apply differently across the United States? Secondly, why should the court's inherent authority that each of us have, be deleted for ESI spoliation? That doesn't make a lot of sense to me." Further, he said, the rule appears to be an attempt to force judges to adhere to specific sanctions rather than imposing their own. "I'm not sure all my brethren and sisters are going to agree with that," he said.

Just to add a bit of sporting interest to the current state of preservation, panelists pointed to a recent opinion from the Texas Supreme Court in the case of the slip-and-fall of former NFL halfback Jerry Aldridge. A decade ago, in *Brookshire Bros., Ltd. v. Aldridge*, Aldridge slipped and went down, not on the 40 yard line, but a few feet from the rotisserie chicken station in a convenience store.

How did discovery enter the case? The chain that operated the store carefully preserved the section of video tape that captured the fall. The company immediately began paying Aldridge's medical bills. The store then stopped paying Aldridge's bills after the store video tape was allowed to be written over. When the case began to wind its way to justice, the plaintiff's attorney argued that the store preserved too little. The attorney argued that, to prove the case, footage capturing the maintenance of the floor two hours earlier and a half an hour after should have been preserved.

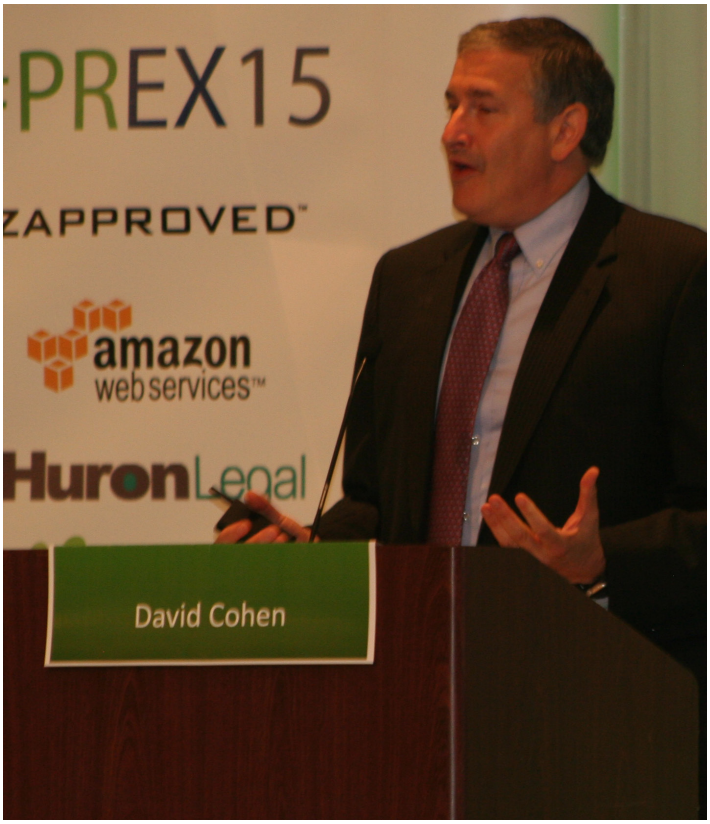
The district court said that the jury should be instructed that the spoliation of the remaining video could be considered in the jury's deliberation on liability. The appeals begin. Finally, a decade later, the Texas Supreme Court comes down with its ruling, zeroing out the jury's verdict of one million dollars.

As Hon. Rodriguez told it, "The [Texas] Supreme Court says that, as a matter of law, the trial court erred by allowing jury consideration of this adverse instruction. So as a matter of law in Texas, issues of spoliation are for the court and the court alone. The jury should not consider any of those kind of satellite litigation issues. The law in Texas state courts are taking a completely different and limiting approach than what is being considered under new Federal Rule 37."

There you have it: The state of preservation today, a few steps up, a couple steps back. Still full of minefields, conflicting views from the bench, idealistic proposals from the experts, bad behavior by the players who have to do battle with one another every day in court.

Be careful out there.

Preservation and Enterprise Information Strategies



Panelists included:

- **David Cohen**, *panel moderator, Partner and Practice Group Leader for Global Records & E-Discovery Practice Group, Reed Smith LLP*
- **Matt McClelland**, *Manager of Information Governance Office, Blue Cross Blue Shield of North Carolina*
- **Christopher Starr**, *Senior Director of Legal Technology, eDiscovery, Comcast*

E-discovery has come miles since the days of "What do they want? Really? Where the heck is it?" Corporations now have e-discovery teams and tools in place to give structure and weight to the preservation and collection process. Yet, specific strategies vary from company to company.

To assess the current e-discovery climate with respect to preservation strategies, the 2015 Conference on Preservation Excellence assembled a panel of experts to share their views and experiences on what works and what does not.

The objective was two-fold: to share ideas about how a strategy should look and to brainstorm ways to sell the strategy to the C-Suite so that it will carry weight within the organization. To do this, the session considered three topic areas:

- Identifying risks, i.e., the risks of not having good strategies in place, the risks of retaining too much information that the company doesn't need, the risks of not having C-Suite buy-in.
- Motivating change within your organization.
- Practical steps to implement information preservation. In other words, once you have established a strategy and have positioned the organization to accept change, what needs to be done to make sure it works well.

Identifying the risks

Having a poor strategy, or none at all, is risk number one. Panelists agreed that few large corporations today would say they have no e-discovery plan in place. Flawed plans, that don't have internal support, or plans that have no subtlety about them, however, can be found everywhere. One of the most telling signs of a preservation plan that's not working is too much data stored in too many places.

"One of the problems with having too much information is that it's hard to find what you actually need. There's too much junk there," Cohen said. "You're doing searches, and you've got too much to search. Your searching ability slows down. You end up hitting on a lot of information which isn't actually what you're looking for. A lot of it is irrelevant."

The giant and randomly sorted data universe greatly increases the cost of litigation as well as requiring far too much to be spent on collection. Litigators must defend why it was stored the way it was stored, and battle unnecessary fires that can be lit by irrelevant data. Beyond these costs that are directly related to legal actions, the "save everything" non-strategy has other cost components. Among them:

Storage costs
Companies believe that, because storage itself is getting cheaper, they may as well use it. Wrong. The space isn't free yet. It's still costing the company money. A strong preservation strategy can free up space, thus saving storage dollars.

"You're spending a lot more than you need to on storage costs," advised Cohen. "You can cut down those storage costs, both electronic information and hard copy storage if you reduce what you hold onto. It degrades network performance when you have too much information."

Data breach
Data loss—a breach—is one of the biggest considerations. "We've seen some very high profile data breach cases," Cohen noted. "The less information you hold on to, the easier it is to store and to protect what you really need, and the less you'll risk when it comes to data breaches."

Embarrassing data
It's in there, among the text messages, emails, chat room discussions and voicemails. "It can cause great pain or harm to the company, particularly if you hold more information than you need," said Cohen. Another compelling reason to have a deliberate and consistent preservation policy that strives to narrow rather expand how much is stored.

"Too much data makes it impossible to respond effectively to litigation," said McClelland. "It makes it very difficult for us to know what we have and where we have it. The proliferation of repositories and data can place you in a position of risk that's going to cause exorbitant amounts of hard cost in terms of money spent, but, also money lost due to lost opportunities. You're wasting the company's time, money and ability to move the company's bottom line forward by dealing with all this risk."

Starr pointed out that some companies that have been burned by too much data have pendulummed back in the other direction, to deleting everything That's not a strategy, he said. It's a fear-based reaction that can only lead to a disaster in court.

"One approach that's been expressed is to purge all the data. The idea being if the robber breaks into the bank and the vault is empty, we really don't lose that much," Starr said. "But you can't just go out and purge all the information. That in and of itself is a huge risk, one that will never serve the company not only in legal matters, but for business continuity purposes as well."

Cohen noted that strategic preservation plans are consistent and defensible and respect the legal hold. "We're not talking about getting rid of any information once litigation starts, once an investigation starts or

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once it's reasonably anticipated. What we're talking about is a policy that does not retain outdated information that's not relevant to any currently anticipated litigation or investigation."

Motivating change within the enterprise

This continues to be a challenge at many corporations. As the panelists noted, e-discovery is not a revenue source, except in terms of the revenue it can prevent from being wasted on needless litigation. Still, the fact is, departments that produce revenue get the ear of the C-Suite before those that do not. Thus, it is incumbent upon the e-discovery team to have a strategy for gaining the leadership's backing for its preservation plan.

"The examples of the Sony and Target breaches will certainly motivate the change if you outline the situations and explain why they happened," Starr said. "You explain to stake holders that these are the unexpected costs that you expend on this data that sits around forever and ever."

It sits there, in other words, until it bites you. This would be the fear motivator—designed to create anxiety in the corner office. The investment in a solid and defensible preservation strategy is peanuts compared to a couple of disasters caused by shoddy data management.

"There's a risk factor in there that, when you take them all together, all these bad things, they can be helpful in motivating change," Starr said.

It's often useful to offer a concrete, easily understood, example of what can go wrong and why the organization should adopt a more cohesive, rational data management system. Everyone understands email, everyone has heard the horror stories. A plan that effectively preserves emails is an excellent spearpoint for the full strategy.

Starr said companies can effectively use email to illustrate best preservation practices. He laid out the risks inherent in systems with too many saved emails or other file types that are no longer needed for business continuity or for legal hold purposes. They illustrate the problems that can occur when there is no clear preservation policy such as too many risky emails sitting in remote or obscure folders, just waiting to explode — or can't be found when performing collections. He then pointed out the advantages of having a plan to reduce risks and making it easier to identify relevant information relating to legal matters.

"We had to motivate that change by showing them all the bad things and all the bad practices that could occur," he said. "But that's just one example of what I would call data remediation—to try to deal with email first." He also added the new process must provide practical solutions that don't interfere with people's ability to do business, or they will work around it, setting up the company for a discovery disaster.

The fear factor may get someone's attention. To truly get buy-in and support—not just from the top, but from other departments as well—one must explain the integral, on-going role e-discovery and preservation play in the organization's life.

"You have to make everybody aware of what is going on with preservation and why it matters all the time," Starr said. "Providing such awareness will promote the desire for others to change."

"It's essentially a sales job," McClelland said. "You have to be willing to find what matters to the different executives at the top. Sales and marketing is going to have a different driver than legal, than operations, than information governance. You have to be able to tweak your message to what matters to them and sell it to them as a benefit."

A big piece of that message has to be the ROI of a strong plan. That is something everyone in the C-Suite gets. This time, however, it has to be outlined in terms of preservation of company assets, as opposed to revenue generated compared to dollars spent on the process.

"If you can show them that, in fact, the money that they spend now—that ounce of prevention taken—is worth the pound of the cure, then that's one way of getting people on board," McClelland said. "Just the cost reduction or the cost avoidance for one major litigation can be huge. If you have no process in place, then you are going to spend exorbitant amounts of money just pulling data and then having outside counsel review it at four hundred dollars an hour. That can be a driver from a legal side. If you're in a highly regulated industry where there's a

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lot of litigation, the better you are at information governance, the less you're going to spend on discovery as a whole."

Practical steps for implementing the strategy

Panelists suggested six steps organizations can take to ensure that the best practices preservation strategy is successfully implemented.

1 Adopt sensible information governance policies

Such policies have to allow for the retention of information that people need to do their jobs. "You don't want the tail of information retention to wag the dog of doing the job and being efficient," Cohen said. "So coming up with sensible plans going forward is important."

2 Create and update retention policies and schedules

Once the new policies have been adopted, the old schedules and policies need to be updated to reflect this much stronger strategy for preservation that will govern storage going forward. In some cases, there will be no existing policies. That can be a good thing, since the absence of updating can yield less confusion about how the new plan should be rolled out.

The most critical element of updating is that it should "reflect the reality of the day that the vast majority of documents are created in electronic form and are never in paper form," Cohen said.

3 Create an implementation plan

You've got the policies and schedules in place and updated. Now, how do you roll it out through the enterprise? This has to be a long-term program of education, training, testing and reinforcement of key messages. Implementation is where e-discovery and preservation strategies become part of the corporate asset base, where it enters the DNA of the workplace from the top down.

4 Have a discussion of data remediation

As the plan is implemented, what will the impact be on the data? How do holds interact with data retention policies and how do you determine when to release a hold?What data do you have that needs to be restored and do you have access to that data? The policies you have that affect data remediation is one thing. How it plays out in the company's culture is what you need to pay attention to here because

remediation can be expensive and if the data is irrelevant, you have a costly problem on your hands.

5 Cyber-security planning and preparedness

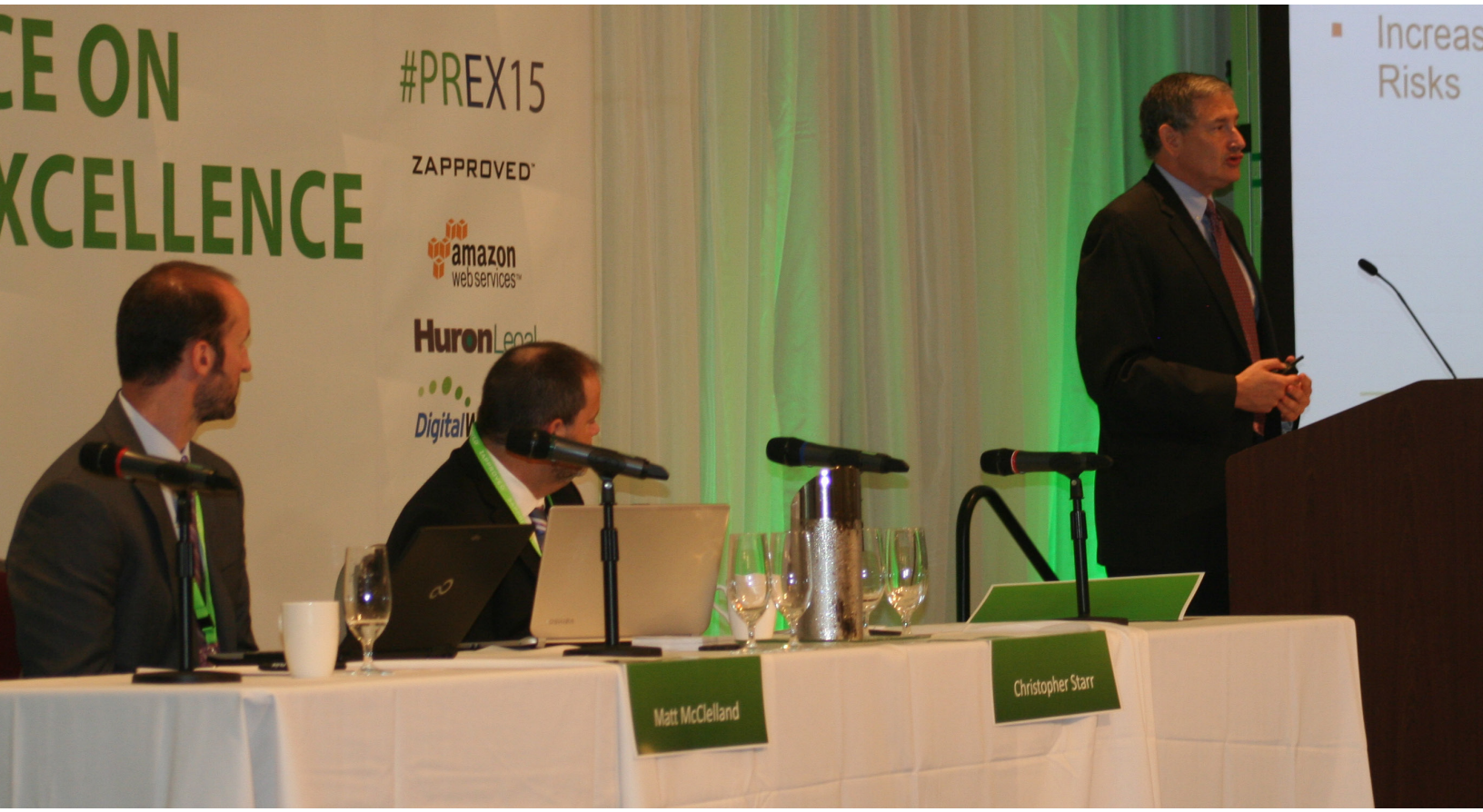
With so much data stored on the cloud, or elsewhere beyond the organization's direct control, how does the preservation plan anticipate hack attacks, data breaches, and data that is hidden from view that could turn up in discovery? A new, expanding and very troubling data world for companies that have not kept pace with its explosive evolution.

6 Being ready for e-discovery

This almost seems too obvious, yet e-discovery is more than having a preservation plan in place. Legal hold plans and policies need to be updated and inspected. Policies and action plans for preserving and collecting off-shore data must be in place. What does your software look like? Do you have the tools to make the plan work effectively? Are key managers and custodians fully briefed on the new policies?

Asked to identify significant takeaways from the session, panelists offered the following:

- Motivate the people high up first, and keep them motivated to support change. The best champion is the CEO.
- Take small steps in the motivation process rather than no steps or, worse, failed giant steps.
- Explain the potential damage of a poor strategy in terms of how it could affect one's own career. C-Suite residents can relate instantly to visions of a career destroyed by poor preservation.
- Understand and monitor social media channels that transmit company-related data.
- Develop reasonable, defensible and repeatable processes that will actually provide value.
- Use outside expertise to help navigate the strategic preservation and e-discovery process. Reach out to someone who has been through this process and can guide you through it to successful implementation.



The Essential Preservation Plan

Panelists included:

- **Paul Weiner**, *panel moderator*, *National eDiscovery Counsel, Littler Mendelson, P.C.*
- **Craig Ball**, *Craig D. Ball, P.C.*
- **Bill Butterfield**, *Partner, Hausfeld LLP*
- **Hon. Frank Maas**, *U.S. Magistrate Judge, Southern District of New York*
- **Dawn Radcliffe**, *Manager, Discovery and Legal Support, TransCanada*

Preservation in the e-discovery era either works, or fails, on two levels: preservation of relevant data, and preservation of corporate assets. Defining best practices, and citing costly and all too common preservation lapses, was the subject of the 2015 Conference Preservation Excellence panel entitled "the Essential Preservation Plan." The panel's composition offered preservation perspectives and tales from all sides: Judicial, plaintiff bar, corporate legal counsel and outside counsel.

Panel moderator, Weiner set the format by asking each panelist to offer three basic components of the essential preservation plan. As might be expected, the request revealed the various, sometimes competing, interests represented by this diverse group. The members were also challenged to recount preservation actions, or lack of action, that they believed did not further the cause of efficient and effective e-discovery. Again, their responses reflected the vantage points from which they experienced the preservation process.

From the bench's point of view, preservation plan progress has been made—but there's still plenty of room for improvement. Maas told the audience that he continues to see far too many cases come before him in which the basic tenets of preservation haven't been followed.

"On the plaintiff side, it always astounds me the number of cases I get…where plaintiff's counsel waits weeks or months to sit down with the plaintiff and say, 'By the way, there's a need to preserve your Facebook information and the like,' rather than attending to that well before the complaint is filed," Maas said.

On the defense side, Maas has witnessed far too much emphasis on crafting a response to the plaintiff's complaint, or on the motion to dismiss, with little thought given to data preservation until further (perhaps too far) down the line. This, he added, happens more frequently with smaller employers than with enterprise defendants. Thus, his advice was to improve preservation practices overall, to make sure key managers and custodians know the plan and know how to respond when the clock starts ticking.

Understanding the implications of preservation across international borders is another area cited by Maas where legal teams in general need to improve their game. "Because of the complexity of international and cross border discovery, there's typically a need to front load that discovery," he said. "If you're going to be making requests through the Hague Convention, or somebody will be asking you for documents that are at a foreign subsidiary where there may have to be a higher degree of consultation with those employees than would ordinarily occur in the domestic context, all of that is going to take time. Both sides in the litigation ought to be thinking about that and alerting judges to the fact that there are these issues, and how much more time it will take."

Both Maas and TransCanada's Radcliffe cited a practice that could be overlooked, especially early in the game: the need to document each step of the preservation process. What documentation may lack in glamour, it can well make up for in impact down the road, if it has not been done correctly.

> “Because as we know some of these cases can go on for quite a long time, if you’re not documenting your early decisions or reasons why you did something or didn’t do something, by the time you’re in depositions or in court, you can get into situations where you’re being asked questions and you don’t remember the answers.” *-DAWN RADCLIFFE*

“Because as we know some of these cases can go on for quite a long time, if you’re not documenting your early decisions or reasons why you did something or didn’t do something, by the time you’re in depositions or in court, you can get into situations where you’re being asked questions and you don’t remember the answers,” she said. “You don’t remember why you did something. You don’t remember why a group wasn’t included, or was included.” That leaves your side vulnerable to sanctions and worse.

Maas agreed, adding that constant turnover within a corporation means that custodians are changing and the thread of litigation can get lost in the transition. “People leave companies. Custodians move on. Paralegals leave law firms. It’s critical that you have some documentation that explains what you did and why,” he said.

Plaintiff’s attorney Butterfield cited open discussion about data between legal teams at the outset of a case as one preservation practice that would ease the discovery burden for both parties so that litigating the merits could begin. He said too often he asks the opposing party early on to share information about where the data lives and who the custodians are, only to be rebuffed with a “we know our role” attitude.

“The smart defense lawyer is a friend of mine because we can start that negotiation and try to reach reasonable agreements, so that we don’t have to run to court and say, ‘Judge, we need a preservation order because the other side won’t talk to us. We’ve asked them to preserve, all they’ll tell us is, ‘Thank you very much, we know our obligations, go away.’” So there’s a little bit of a give and take on each side. I suggest that give and take is in our mutual best interest,” Butterfield said.

Ball argued for better practices around the legal hold notice itself. “A pet peeve of mine is that legal holds tend to be written in an omnibus generic fashion, principally by attorneys and sort of sent out in a flurry of holds mostly for the purpose of being able to say, well, we put a hold in place, and for the lawyer being able to say that he or she told them to hold everything,” he said. The end result all too often is a

> "...legal holds tend to be written in an omnibus generic fashion, principally by attorneys...mostly for the purpose of being able to say...we put a hold in place, and for the lawyer being able to say that he or she told them to hold everything....The end result all too often is a hold that may meet a legal standard, but fails to preserve the proper data." *-CRAIG BALL*

hold that may meet a legal standard, but fails to preserve the proper data. Worse, that superficial treatment of the legal hold process doesn't make for a process that becomes part of a healthy e-discovery culture.

"I believe that the hold notice is often built so broadly as to prompt it's knee jerk distribution even to people in very different roles," he said. "IT does not deal with content. They deal with data. Users deal with content. They don't deal with devices and data. If you don't approach the various key custodians and speak to them in the language and purposes that they understand, the notice is simply noise."

As part of a truly effective preservation process, Ball encouraged the audience to take the plan a step further and personalize the call to action.

"If you're writing to a few uber key custodians that hold key roles, take a moment if you are the person sending the notice and put a short paragraph that calls them by name. 'Joan, you were the controller so I'm going to expect you will have certain kinds of records. It's very important that these records be maintained.' Suddenly that's a wake-up call to the custodian. 'Wait a second, they're talking to me. This isn't somebody else's responsibility. This is my accountability.' I think reshaping how we approach legal holds, at least those uber key custodian holds is a key better practice," he said.

Other preservation practices of importance cited by panelists included:

Third party preservation: Having a process in place with key third party data custodians that stipulates the roles and responsibilities of these third parties. An effective plan will avoid confusion and delays over what data will be produced, how it will be produced, when it will be produced, or even if it will be produced.

Interdisciplinary teams: Preservation is a shared responsibility, not the sole province of legal or a legal/IT team. Human resources, sales, finance, C-Suite—all have a job to do if preservation is to be done effectively. They must be part of the plan from the outset. Everyone needs to know what they are accountable for and the plan must be workable for all parties, not just legal and IT.

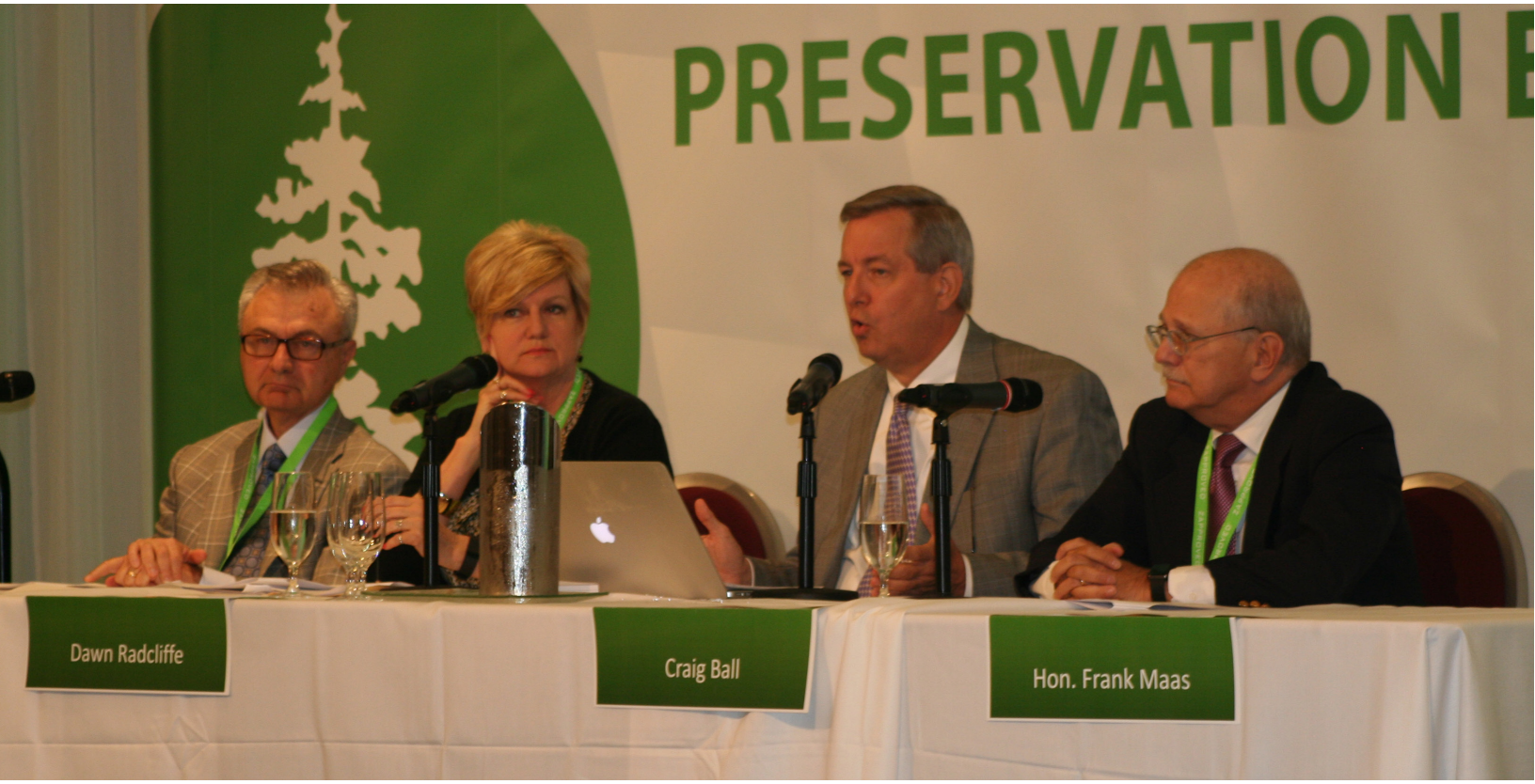
Legal and IT legal hold collaboration: Legal and IT need to develop a process to ensure that the instructions that are given to IT are actually being followed and implemented.

Asked whether he had seen great strides in any particular part of the preservation process, Maas said one stood out: management of email systems. "I do think that increasingly counsel, and therefore their clients, have a pretty good handle on the need to preserve email," he said. "They may not do it perfectly. There may be a lot of, bumps in the road. However, unlike when I first went on the bench sixteen years ago, there is a recognition that that's going to be one of the critical items that needs to be addressed. Counsel does seem to be dealing with that. "Also on the positive side, I do see an

increasing tendency of counsel to confer cooperatively; although, if I were to graph that, it would not be a very steep slope in terms of the increase—but hope springs eternal."

In summary, Weiner asked Radcliffe how a corporation can develop a preservation plan that truly serves the greater good.

"When you start to make your legal holds and your preservation efforts part of how your company does business, it's much easier to build that culture," Radcliffe said. "It's much like our ethical obligations and our regulatory obligations. Everybody knows in the company what they're supposed to do, what they're required to do, what their obligations are to protect the company. If you can build in your legal hold and preservation obligation in the same ways into your training programs, into your performance appraisals, if you can go that far, it puts it in the forefront of everybody's mind, along with their other obligations to the corporation and it just becomes a natural thing to do. Once you start spreading that message every opportunity that you get, it becomes second nature to people and they thoroughly understand what they need to do to help the corporation comply with their obligations."



The New Law Department Professionals and Big E-Discovery

Panelists included:

- **Charlotte Riser Harris**, *panel moderator, Manager, Practice Support, Hess Corporation*
- **Woods Abbott**, *Legal Operations/eDiscovery Lead, Raytheon*
- **Dan Christensen**, *Counsel of IT, Privacy & Security, Intel Corporation*
- **Christopher Starr**, *Senior Director of Legal Technology, eDiscovery, Comcast*

Corporate law departments today can no longer afford to operate and view themselves as consumers of revenue, set apart from the rest of the enterprise by the special knowledge and skills they possess to rescue the company from legal threats. Rather, the general counsel is expected to manage the department in ways that demonstrate its value to the whole as a team player that conserves assets and can prove its worth.

Doing so requires philosophical shifts in department expectations and evaluations. Two key areas need to be examined as a starting point: viewing the overall departmental mission as avoiding risk and mechanically delegating tasks to outside counsel or vendors. Once those shifts have been made, metrics must be established to measure departmental activities so that the C-Suite can see in black and white what returns it's receiving from its investment in legal. Creating such a law department was the subject of a session at the 2015 Conference on Preservation Excellence.

"We are here to talk about ways that the law department can help drive change in our corporation and become more efficient, becoming less of a drain on assets and resources, finding ways to add more value and reduce some of the expenses," Harris said.

Christensen said the department's internal mission statement offers a compelling window into its perceived role within the enterprise and can do much to influence both its direction going forward and its reputation within the enterprise.

"In the 15 years I've been with Intel, we've changed our mission statement for the legal department at least five times," he said. "Interestingly enough, we've primarily focused on one word. Initially, our mission statement said the legal department facilitates business and eliminates risk. The word 'eliminate' was then changed to 'we minimize risk.' Then in 2005 it was changed to 'we mitigate risk.' Then four years later, it changed to 'we manage risk,' and now, last year we changed it to 'we optimize risk.' Today, we've embraced risk as a potential advantage and opportunity rather than as something to be necessarily avoided or completely mitigated."

That's a huge evolution, one that completely redefines a law department in the eyes of other

departments and the C-Suite. "It goes from the reactive environment to the proactive environment," Harris said. "The department is challenged to think creatively and innovatively about what its role within the corporation can be."

Panelists offered practical advice and illustrative war stories on rebuilding the law department to put it on even par, or better, with other major departments within the corporation. Topics of particular focus were:

- Evaluating and improving department processes
- Being part of the corporate team
- Enhancing the department's stature within the C-Suite

Evaluating and improving processes

Noting that such phrases as "lean" and "Six Sigma" have entered the corporate lexicon to describe systems for improving efficiencies, Harris said the bottom line is "to start by identifying what your processes are currently, in order to be able to figure out how you can make them better."

This task, a process in itself, mirrors the way manufacturers constantly examine their systems for inefficiencies. It sends a message to the top that the law department is no longer a voracious and unpredictable consumer of corporate assets. Instead, it is fine-tuning its processes to manage them at the micro level. It now takes budgeting seriously. When the general counsel lets it be known that each section (litigation, patent, compliance, etc.) is responsible for what it spends on each separate activity, efficiencies begin to emerge. Abbott offered an example of what can be done to turn a mundane departmental activity into a cost-saver.

"One that comes immediately to mind for me is invoice control," he said. "Everybody has an outside counsel policy, or at least you should have an outside counsel policy at this point. The problem is, outside service invoices come in, and they need to be reviewed and approved. That's the last thing an in-house attorney wants to do. As a result of a Six Sigma review, today, our matter management and invoicing process will not allow you to enter an invoice into our system if it doesn't meet certain guideline criterion. Those criteria are applied against each invoice and when we find errors, it kicks them out."

His strategy: First, he put one person in the department in charge of all invoices. Then, he mandated that invoices had to refer to one matter only, to eliminate the back-breaking work of plowing through a monster invoice that combined multiple matters. Next, he required monthly invoices—even if it was for zero dollars—which allowed the department to more closely map expenditures.

"If you give me two zeros in a row, I close that matter. You've got to come back to me to tell me why we need to open it up, or why there is a charge that showed up sixty, ninety days later that I should pay," he said. With that system in place, costs can now be closely tracked and useful metrics of spending on outside counsel are being created.

Christensen said, at Intel, legal adopted a team, or project management–approach to managing the work.

"We decided that we would employ the rapid model —RAPID— for decision making," he said, referring to a specific form of corporate decision making streamlined by assigning each team member a specific role. "That was really what we pinpointed as our anchor—the 'Right Team.' People either are part of a 'Right Team' with an assigned role to add value, or they aren't part of the team."

Measurable objectives are set for each project, and expected outcomes are clearly outlined.

"Without these written types of objectives and key results that are measurable, definable, you have basically a mob," he said. "By embracing that sort of process and 'Right Team' approach, we've been able to find from the ground up that we're more efficient."

At Raytheon, legal embraced the Six Sigma process theory, which traces its roots to manufacturing. However, it took time for legal to understand how to incorporate the method into its operations.

"It really became a head-scratcher for an intellectual based process like legal. Attorneys push back on it, and rightly so," Abbott said. "They said, 'If you're going to turn around and implement decision making out of a three ring binder, we can have monkeys do our jobs because whatever issue comes up we flip the

“I took all the technology pieces, all the support aspects of what made our attorneys great attorneys, and tried to give them the best products that we could. We took out as much white noise as we could, with products that gathered data, managed invoicing, things like that. We pushed those off to the side, automated them as much as we could, so that we could have our attorneys do real attorney work.” *-WOODS ABBOTT*

page, look at what the decision tree says and make the decision.”

Undeterred, Abbott set out to show his team that it would free them up to do what they did best—practice law.

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Six Sigma offered insights into every departmental activity by mapping the activity, revealing its current status, offering pros and cons of actions, and tracking results.

“At the end, we were able to quantify what happened. What was the improvement? In some cases, a two percent improvement was a monumental improvement. In most cases it was hundreds of percent better. We saw improvement everywhere, with how we communicated with our internal clients, how we communicated with our outside counsel, how we even engaged in our experts and our e-discovery vendors.

“The takeaway is, you don’t have to know Six Sigma. It’s more common sense, measuring out what the process is right now, utilizing a good team of people to figure out what you can do in order to cut out non-value add, and then mapping out and measuring the improvement. That becomes how you go back to your management team to be able to say, ‘Here are other types of inefficiencies we see throughout the department or throughout the organization that we can utilize either this team or this kind of methodology to help move forward.’”

“It doesn’t stop there,” he added. “You’re always sitting there tweaking it. You now know what these inefficiencies are. You’re going to see them try to creep their way back into your process. Now, you can find a way, either through new technology or through new process control, how you would mitigate them off to the side and be able to keep a good process moving forward.”

Being part of the team

In recent years, the general counsel’s position has risen in prominence. Legal, however, is still too often seen as a department set apart, one that bails others out of legal difficulties or, worse, constructs obstacles to valued initiatives. One often hears, it consumes resources that we all work hard to bring in. Among the critical elements to elevating the department’s reputation as a team player rather than an outsider are strengthening relations with other departments, especially IT, and becoming part of the corporate decision making team.

The general counsel's first job is to "get a seat at the right tables." Does your GC sit in on all the high-level C-Suite meetings? Legal teams that are considered progressive and proactive have that representation. Legal should be included in meetings with IT, since many of the downstream activities that pass through legal's threshold were born in IT. Be sure to bring something to those meetings, or there may not be another invitation.

"The legal department can be a thought leader in data," Christensen advised. "We have plenty of data to work with. You can take data and find opportunities in managing it."

Being at the right meetings establishes legal as part of the team, dispelling the old notion that it was a department set apart with different rules and customs.

"Bridging that gap between the office of general counsel legal and the IT department is, quite frankly, probably my main responsibility," said Abbott. "I have an interface with IT that I meet with regularly. It used to be that they were kind of afraid of having legal have a seat at the table because they thought we were going to say 'no' to new systems. I'm not approving your systems. I only need to know what the systems are, what their capability is, and then where do they keep the data."

When legal begins to adopt practices of other key departments, such as careful budget management, measuring outcomes and proactively working with other departments to help them achieve their objectives, the department will be the first, not the last, to be alerted when its services may be required.

Harris said regular meetings with IT can go a long way to creating a cooperative relationship with that key department—and the collaboration will impress those at the top.

"Have meetings with your IT department and go through the Federal Rules with them. Tell them what you're looking at and why you're doing it. Go through case law with them. Let them understand what you're doing."

The significance of a relationship with another related department as a pathway onto the corporate team can hardly be overstated. Starr said his department has spent the last couple of years building a new rapport with IT and procurement, and it's paying off handsomely. It all began with an internal failure that probably could have been prevented if the departments had had better communications earlier on.

"We started working very closely with the IT security folks and then the procurement folks to bring everybody together. We had to realize that what we were doing wasn't working overall. It needed to be better," he said. "We have spent the last couple of years really working heavily with IT security, our procurement group, some of the other IT groups that are out there, to make sure that everybody is aware of what is going on within the organization...They realized they also needed legal as a very good partner as well. When issues occur, we all need to coordinate our efforts and address any concerns. Today, as a result of that work, we have a much greater relationship with those groups."

When legal begins to adopt practices of other key departments, such as careful budget management, measuring outcomes and proactively working with other departments to help them achieve their objectives, the department will be the first, not the last, to be alerted when its services may be required— and that's a good place to be.

C-Suite support

"Getting the C level buy-in on your departmental strategy is something I think we all struggle or have struggled with," Harris said. "It's vital that they see the

> “Find out what your other departments in your company are doing in order to document their work and prove the value of what they’re doing.” *-CHARLOTTE RISER HARRIS*

department as more than a user of revenue. That’s how you can get them to invest in the department so that you can actually take action.”

There’s no secret to winning over the C-Suite—all you have to do is prove that your department offers a good return on investment. That has been a foreign notion, however, to legal in the past. The defenders of the corporation only had to prove their worth by protecting patents, holding off litigants and making sure contracts were properly written.

No longer. The bar has been raised. Now, managing the budget is all important. Metrics are all the rage, and the panelists agreed. Legal can do both, if it has the determination to shift from a reactive to proactive mode. First, as mentioned earlier, legal has to be involved in the critical decision making meetings at a high level.

“We have to have a seat at the table,” Abbott said. “We can’t be this reactionary group that you come and ring the buzzer down in legal when you have a problem. By the time you get to that level, money is going out the door. We’re actually sitting there trying to mitigate risk and help the company come up with business decisions.”

As an insider, legal can display cost-consciousness by partnering with others. Christensen recounted an instance in which his department was able to internally partner with IT to create a new document management system, rather than going to an outside vendor for the job.

“The cost savings was about $8 million. We showed it to management and we said, ‘We saved the company $8 million.’ This was one of about 20 line items for the quarter….Management said, ‘That’s of value to us, that you took the time to do this and work with IT to do it yourself, create the document management system and test it yourself rather than getting the old silk stocking legal way of saying, ‘We don’t do that.’ Those kinds of things get you noticed.”

Evolving departments now track external costs much more closely, giving more consideration to whether work needs to be handled by outside counsel or an outside vendor. That data can also be shared with top management as a way to demonstrate a commitment to conserving company assets and being a can-do member of the corporate team.

Another similar practice is carefully tracking internal hours and comparing those hours to historical outside counsel hours to show the work now being done in-house. There are metrics aplenty by which legal can make its ROI case to the C-Suite. Sometimes the best way to find those metrics is to walk down the hall and ask.

“Find out what your other departments in your company are doing in order to document their work and prove the value of what they’re doing,” Harris said. “You can see how they’re doing it so you’re not coming up with some brand new way of presenting things. Instead, you’re working within what’s going on.”

While metrics can address questions about whether legal cares about outcomes, the emerging law departments are working much harder overall to hold down costs wherever they can.

“The general counsels of today are being challenged by their peers to been seen like the other C-level’s as being a business professional,” Abbott said. “This is especially true with budget management. Now, there

will always be situations that come up that we can't foresee and then cost control will go out the window. It is really the litigations that are fraught with the unknown. A lot of your labor type cases, your intellectual property, your business transactions, are foreseeable, and it's up to us to manage them better."

Even e-discovery, once viewed as an unmanageable line item, is now far more predictable and should be budgeted accordingly.

"A lot of that can be managed in-house," he said. "My savings actually have to be reviewed by finance auditors because it goes into our overhead numbers that we charge back to the Department of Defense. So I have embedded in my department an accountant who works with me to show my savings on every matter I do, to be able to quantify that at the end. The baseline costs of e-discovery are actually very easy to find. You can google it."

Metrics, budget management, working more closely with other departments, getting the right seats at the right tables—all these steps will win favor with the C-Suite. Another action is available that the department can take which will demonstrate another side to the profession that often gets lost in the corporate world: Philanthropy.

As Christensen noted, every attorney with a law firm has a budget to be spent on doing good deeds in the community. Why, he asked, does this spirit of giving back not come with the lawyer who moves to the corporation?

At Intel, it has taken root. Christensen offered several compelling examples of legal department philanthropic initiatives, including ones in which the attorneys themselves were part of teams taking part in community projects abroad.

"There's a part of social responsibility that comes with being a lawyer," he said. "You do some good work, it gets into the papers, and our C-Suite starts to say, 'Wow, are you doing this for the under-served?' Well, we took an oath like every other attorney in every law firm. Why not use our legal degrees for that purpose too?

"So why is our legal department involved? Because our GC wants us to be. As does our CEO now—and we should be. We should be there right on the front lines with our technical IT folks. We should be there with our sales and marketing folks. We should be showing that our legal departments are on the front line doing this with them, helping motivate and move the message worldwide for whatever product you're selling. That we're part of the solution and not just a traditional naysayer or rubber stamper."

Building the Preservation-Ready Organization

Panelists included:

- **Jeane Thomas**, *panel moderator*, *Partner, Crowell & Moring LLP*
- **Charlotte Riser Harris**, *Manager, Practice Support, Hess Corporation*
- **Dawn Radcliffe**, *Manager, Discovery and Legal Support, TransCanada*
- **Sonya Thornton**, *Manager of eDiscovery/ Compliance, Sprint*
- **Dave Walton,** *Managing Director of Electronic Discovery Practice and Advisory Services (ePAS), Cochair of EDiscovery Task Force, Cozen O'Connor*

More than a decade into the e-discovery era, litigation readiness continues to be a challenge for most major employers. The good news is progress has been made, and will continue to be made, as the need to pay attention to e-discovery in practice as well as in theory evolves. Building a culture that respects best practices in electronic records retention was the subject of a panel discussion at the 2015 Conference on Preservation Excellence.

Panelists agreed that they are still addressing many of the original obstacles to company-wide compliance with records retention and legal hold policies. Custodians still don't understand their obligations to preserve. Employees are unaware of or ignore the details of legal hold requirements. Records retention and deletion practices continue to be inconsistently adhered to and C-Suite support is spotty.

With time, those in charge of crafting and managing e-discovery practices and policies have developed new strategies for engaging IT, human resources, the C-Suite and the workforce in general in the effort to properly manage electronic data. At this hour-long session, panelists shared what had worked—and what has not—for them. Among factors cited as critical to the successes associated with e-discovery, new tools that have become available that offset some of the human failings that can undermine an e-discovery program. Tools must interface with relationships, though, and it's the relationships with the various departments that still consume much of legal's time. For instance, Walton said, it's much easier to get the attention of upper management when they've lived through an e-discovery crisis.

"The support often depends on how much pain they've suffered in the past," he said. "They're ready to become litigation ready once they've been burned."

Don't overwhelm upper management with a laundry list of e-discovery actions, he cautioned. "You have to take the long view on compliance. Take one bite at a time. Keep moving it forward."

TransCanada's Radcliffe said one strategy she uses to gain C-Suite buy-in is to appeal to the CFO's desire to conserve dollars. With gas and oil prices at 20-year

lows, most gas and oil companies are in a cost-saving mode. Now CFO's are ready to listen to actions that will avoid downstream costs, such as company-wide adherence to records retention and legal hold policies, she said.

Collaborating with IT has been a historic struggle as the e-discovery field has emerged and matured. While all agreed that no retention or legal hold plan can be effective without IT's cooperation, all expressed at least some frustration with the relationship. The sheer size of most IT departments in comparison to the legal team creates a challenge, said Sprint's Thornton.

"Our relationship is more project-based now," she said. "We've got to merge. We are breaking down the silo walls. Really, anyone involved in privacy and risk should be at the table.The need for a smooth collaboration between IT and legal to manage the risks of e-discovery is not going to go away, no matter how uneasy the relationship may be at times."

"My boss says IT and legal are joined at the hip," said Harris. "And I think that's true— it's absolutely critical. I don't think that we can do our jobs without having IT informed about what we do and involved in what we do. I don't think that IT can be successful and help the company use technology without incurring extraordinary risk without heavy involvement by legal."

If that joining isn't seamless, it can be painful when IT fails to take litigation readiness seriously. How does legal get IT's attention? Explaining the risks involved is one way. The problem with that approach, panelists agreed, is that until a company experiences an e-discovery crisis, the risks just aren't real. An important lesson for Harris was understanding that the IT mindset and that of legal are often quite different.

"In IT, no one flies by the seat of their pants," she said. "I fly by the seat of my pants all the time. They do project plans instead. I had to learn to work with them on a project basis. Now, they don't see me as an obstacle." However, she added, much of her success in collaborating with IT has been built upon constant communication of key issues.

"It might be a new group that's never been involved. It might be a new technology. It might be a new issue. Whatever it is, it's really important that that dialogue happen," she said.

Just as important as understanding the IT mindset is staying informed about any initiatives that run through IT. "The project management office is a great place to start," said Radcliffe. "You want to get involved in planning early on, instead of coming in when the project is well down the road and they want you to sign off on it and I can't. The project comes to a screeching halt and everyone is ticked off at legal. It can be easily prevented by being involved early on."

That "everyone" extends beyond IT. While the IT-legal relationship is perhaps the most important in terms of litigation readiness, there are many individuals and departments within the enterprise who need to be educated about the critical role they play in the e-discovery process.

A good starting point, noted Thornton, is the IT realm beyond department leadership and key—managers and staff. "IT is big. They're bigger than legal," she said. "They have backup teams. They have hardware teams. They have all these teams."

Diving deeper into the organization, Thornton connects with anyone who may be an ally—or an obstacle—to maintaining an effective legal hold. "On my team I also include HR, records, sales, and other business stakeholders so that we can

While the IT-legal relationship is perhaps the most important in terms of litigation readiness, there are many individuals and departments within the enterprise who need to be educated about the critical role they play in the e-discovery process.

No organization will ever achieve 100 percent litigation readiness, panelists agreed. It's just not possible to get there. It is possible to create a culture of litigation readiness where all departments understand what a legal hold implies, how their data can affect the larger organization, and who to turn to if they have questions.

understand their needs and we can partner together. We have monthly calls. I send out emails. It was geared around litigation, but it's morphed into projects and project management. What time do they need to shut down the data center? How will that impact the data that's on hold? They have to pull out a server and store it in my office for a week until the hold is lifted. All those things impact how we do business."

Then there's one more key partner, the one that can truly help create a culture of litigation readiness: the C-Suite. While the C-Suite doesn't need to be involved in the process on a day-to-day basis, its buy-in cannot be understated. It's not hard to get the C-Suite's support when the company has been through an e-discovery crisis, Walton said. Then, they get it and don't want to feel the pain again.

When Walton works with clients who haven't been through the wars, however, he has to turn to different tactics. Laying out the risks in graphic detail is one good way, he said.

"If your company hasn't been directly involved and burned by an e-discovery crisis, I guarantee you can use Google, you can use anything you want, and you can find one of your competitors who has been burned and that's a great way to get the attention of the C-Suite. This could happen to us. We need to be proactive."

Another strategy that emerged from the panel is access the C-Suite through the CFO, who is far more likely to respond to the potential for economic disaster. Both legal and finance share a common goal of preserving company assets, so let the CFO make the e-discovery case to the rest of the leadership team. No organization will ever achieve 100 percent litigation readiness, panelists agreed. It's just not possible to get there. It is possible, however, to create a culture of litigation readiness where all departments understand what a legal hold implies, how their data can affect the larger organization, and who to turn to if they have questions.

New tools that remove some of the human error from the e-discovery/legal hold process play an ever more important role in litigation readiness, Walton pointed out.

"As more tools are developed to automate that process and take the individual decisions as to whether to keep a document or not out of the individual's hands, that's when you're going to have greater compliance," Walton said.

Good tools are not a replacement for a culture of litigation readiness. "Judges aren't looking for perfection from a litigator's standpoint," he said. "They're looking for reasonableness."

A culture of readiness is created through on-going education and training, updating systems and processes, and relentless communication with key partners within the enterprise.

Companies need to "have a long term view," Walton added. "If you go to management with a list of 'I want to do all these things,' you're going to scare people. What's the old African proverb? The only way to eat an elephant is one bite at a time? Well, take the bites when you can get them. Plan ahead. It's not going to happen overnight. If you can get buy-in on small bites over time that's going to make a big difference."

Preservation and Information Governance

Panelists included:

- **Hon. Ron Hedges,** *panel moderator; Principal in Ronald J. Hedges, LLC and former U.S. Magistrate Judge, District of New Jersey*
- **Matt McClelland,** *Manager of Information Governance Office, Blue Cross Blue*
- **Charisma Starr,** *Legal IT Manager, Exelon*
- **Brett Tarr,** *Counsel, Litigation & e-Discovery, Caesars Entertainment*

For the enterprise, managing data is akin to herding billions of very active cats. As corporations moved from paper to digital data (but still retaining mountains of paper files), the sprawl initially shocked and disoriented those responsible for knowing where the data was kept.

Fast forward to 2015, and the shock has worn off. That is not to say that information management is no longer a challenge. Technology continues to crank out new devices that create more data. Meantime, employees mingle personal and work data on personal and work devices, sending bits of digital information around the globe.

Governance in theory remains much tidier than governance in reality. A panel assembled for the 2015 Conference on Preservation Excellence shared experiences on their information governance initiatives which illustrated both the progress made in the age of e-discovery, and the constant challenges that test their policies and their patience.

Panelists shared nuggets mined from the information governance world designed to offer beacons of hope to those assigned the governance task.

Tarr: "Information governance is not about a particular project. It's not about a particular policy. It's about a change in culture. It's about communicating and training people to rethink the way that they're using information to make themselves more efficient and to reduce risk enterprise wide. All of the policy in the world is only as good as the enforcement, updating and monitoring that's going on."

"Information governance is not about a particular project. It's not about a particular policy. It's about a change in culture, and it's about communicating and training people to rethink the way that they're using information to make themselves more efficient and to reduce risk enterprise wide. All of the policy in the world is only as good as the enforcement and updating and monitoring that's going on." *-BRETT TARR*

Hon. Hedges: "Consistency counts. I expect it's going to be more important after December 1st, which is the date the new rules amendments are going to go into effect. So you ensure consistency by training. You let people make individual decisions, though, to get rid of information."

Starr: "With regard to information governance, the critical thing right now is technology and the synergy across cyber security, the records group and the e-discovery group. We're all trying to do the same thing: to get a handle on the data, figure out how long we need to keep it, and get the information regarding the data together in one spot so we can make an educated decision."

McClelland: "You have to get buy-in from your attorneys and from your compliance folks because this is an enterprise issue, so it has to have enterprise engagement. It's okay to have a champion that is going to push this and keep it in front of the decision makers, but you have to be able to get that tailwind with the decision makers to do this work and to show them that it has to be done. Otherwise, you will keep everything forever and it's unsustainable. At this point in time I think it's unsustainable to keep everything forever."

Panelists sorted the challenges out into essentially the following areas:

- Developing a consistent, reasonable, defensible policy for retaining and deleting information;
- Moving away from a save-everything to a save-strategically philosophy;
- Engaging the C-Suite and the troops in policy implementation;
- Mapping the information sprawl to facilitate legal holds and collection.

Although all agreed that less is more in records management, they also admitted, given the onslaught of new data, keeping a handle on the sheer mass of digital data is daunting. That's why they advocated for a consistent, defensible policy rather than save-all or save-nothing, either of which can land one in trouble during discovery.

Each panelist, except Hon. Hedges, offered a window into the process at their firm. Tarr said

[A]ll agreed that less is more in records management, they also admitted that, given the onslaught of new data, keeping a handle on the sheer mass of digital data is daunting. That's why they advocated for a consistent, defensible policy rather than save-all or save-nothing, either of which can land one in trouble during discovery.

Caesars poses a special challenge because of the countless bits for information the gaming company retains on its customers as well as its employees. He said retention policies are reviewed annually and financial cardholder information that might be on file is reviewed quarterly, by law.

"So one of the steps that we've taken, aside from providing training to people, is we've actually involved the internal audit function within our organization to go out and periodically audit individual groups. They have to demonstrate that they are following these policies, and they have to show their workflows to show exactly what they're doing," he said. "We're still in the early stages of our information governance program where we're just putting policies and programs in place. We have to figure out where to start, what forms of information are the easiest to tackle and which ones require collaboration with multiple business units and multiple decision makers to really understand what's going on. It's very challenging."

"Defensible deletion is a really important topic for us," Starr said. "Defensible deletion goes hand in hand with having policies around how you manage records and information within your organization. So if you're

going to be talking about what are the prerequisites to defensibly delete data, you have to actually have undertaken a process to understand what information you have within your organization, what systems and applications you're using to create and communicate that information, and to store it. You need to know what information you have, where it exists, what categories it falls into, what buckets, and what the retention periods are for that information before you can really defensibly delete anything. It's very hard to say, 'This is something that can be discarded or deleted without having the ability to audit it back to a policy, a schedule, or another document that says this category of information is kept for five years.'"

Additionally, she said, "you need to understand your preservation environment, active legal matters, litigation, regulatory, compliance, EEOC, and administrative issues. You need to know the information that is at the end of its record life cycle and eligible for deletion, 'Is it something that's under a separate preservation order?'"

McClelland, like Starr and Tarr, manages information in a regulated and sensitive field that creates challenges for maintenance. His advice: choose a system of record, button it up well, and keep it as lean as possible.

"We have very long retention periods. You need to know what is your system of record. Typically in classic records management, you don't have to keep all copies. You can get rid of the duplicates or the convenience copies. You have data, regardless of whether it's structured or unstructured, or strewn across multiple repositories. But if you have an assigned system of record, and that is the place where you are maintaining your official records then you can, I think defensibly, through policy and categorizing that as the system of record versus a system of reference, get rid of some of the stuff ."

Starr said Exelon recently implemented a new information governance policy designed to guide employees through the delete/retain process. The policy was rolled out in the legal department, where, Starr said, the expected reluctance of lawyers to get rid of anything was encountered.

Through training and the use of tools to assist with the process, however, the policy has been successfully implemented.

"We built a tool to provide a solution for them and they were able to take the data and move the data they needed into a data management system," she said. "We just closed this last month. We went from five million to 1.5 million files, and I have ninety-eight percent compliance—no one's mad at me."

Educating the workforce and guiding them through the process works, Tarr agreed. Tossing a policy at them and saying, "Comply!" does not.

"We're actually facing that challenge right now because we implemented a records retention policy in February of this year. It replaced an old policy that was from 2003. So if you think back over the last 12 years you can imagine that there are huge areas that didn't even exist, the types of systems that we're using, the types of records that we're creating," Tarr said.

To introduce the new policy, Caesars has designed a training program to explain why the policy is important to the company as well as the individual.

"The importance of communicating the message, not just globally, but each individual business unit, is huge," he said. "Part of those trainings is to help people understand what their obligations are and how to actually comply and how to delete information. We're educating people about very simple things that they can do. You can name the file with the date of creation. You edit a file and you put a new date on it. You can add in the footer of a Microsoft Word or Excel document created on x date so then you have ways to identify when records are right for deletion."

Practical solutions to make the job seem less ominous, to help walk employees through their fears around data deletion. Each company represented on the panel chose its own process for crafting an information governance policy and process.

Blue Cross assembled a 14-member executive level committee. "The committee comes together once a month and helps set the direction, helps set the road map, and everybody gets their say and then items are put to a vote. That committee makes the decision, and then my group's charged to go out and make those decisions happen," McClelland explained.

Starr said Exelon's approach was a cross functional team composed of cyber security, records management, her team, and representatives of users. "We need to consider the different business requirements when we're architecting solutions."

Caesars deployed a hybrid decision making group that includes legal, compliance, data security, IT, marketing, HR and finance. The team will meet quarterly to review the policy.

"So while technically we don't have a decision maker, all of the processes that were put into developing retention policies and schedules took input from every business unit to create the policy," he said.

The degree to which companies delete data, the length of time they will retain, how they will delete, all vary depending upon corporate culture and the industry in which the company operates.

What's important is that, increasingly, companies are crafting defensible information governance policies and processes that will stand up in court and serve the greater corporate good.

As noted by Hon. Hedges, the court today understands that individuals may refuse to follow, or fail to follow, corporate policy on information management. That's okay, he said, as long as the company created the policy in good faith and makes an effort to see that most adhere to it.

"There will also be someone who just can't stand to delete a favorite file," McCelland said.

"Some people struggle to dispose of anything because they get a personal attachment to it. For example, maybe it was part of a project that made them look good to their boss. You have to change people's mindset that it's the company's data. It's not the user's data. You have to educate your workforce that there are laws in place that dictate retention guidelines for certain types of information, excluding holds, and educate them on how the company's policies mirror the guidelines, otherwise, you'll never get rid of anything."

Global Data Protection and Preservation

Panelists included:

- **Bill Butterfield**, *panel moderator, Partner, Hausfeld LLP*
- **Woods Abbott**, *Legal Operations/eDiscovery Lead, Raytheon*
- **Dan Christensen**, *Counsel of IT, Privacy & Security, Intel Corporation*
- **Hon. Elizabeth Laporte**, *U.S. Magistrate Judge and the immediate past Chief United States Magistrate Judge for the Northern District of California*
- **Jeane Thomas**, *Partner, Crowell & Moring LLP*

Law and practices around e-discovery are unfolding rapidly in the U.S.. Keeping up with the latest U.S. court decisions and integrating them into firm policy, challenges most e-discovery practitioners. Those who manage litigation for global clients, however, face many additional layers of laws and policies that can frustrate the most thoughtfully crafted e-discovery strategy.

For the 2015 Conference on Preservation Excellence session on Global Data Protection and Preservation, a panel of experienced global practitioners and jurist assembled to share their insights on this subject. Their discussion touched upon the latest trends in global e-discovery practices, offering audience members a roadmap for navigating this difficult landscape.

Because e-discovery, and discovery in general, is far less developed as a step in litigation outside of the U.S., it is often incumbent upon the international practitioner to serve as a bridge between the U.S. office and foreign offices, and the U.S. jurist and legal statutes abroad. Lessons are often learned through bitter experience. One panelist admitted to still having nightmares about his first experience with one European nation's notion of how to handle discovery.

"Twenty-six EU representatives arrived in several vans at the door for a dawn raid" on an off-shore office, he said. The raid caught him and his team by surprise. "They took laptops, they took whatever they wanted as they came in and they had broad jurisdictional rights even in the EU to do so." End result? A massive fine for anti-trust violations.

Most global e-discovery lessons recounted by panelists couldn't match that one for drama. Nonetheless, each had a tale to tell of the difficulties involved in managing discovery effectively when global operations are involved. The session began with an overview from panelist Jeane Thomas of Crowell & Moring. She promised to outline "the nature of the tension between discovery demands and U.S. litigation on the one hand, and international data protection laws of various types on the other hand."

She identified two key distinctions between e-discovery in the states and abroad:

1. Discovery is extraordinarily broad in the United States in civil litigation and a preservation obligation is triggered very early and very broadly in the U.S. Few non-U.S. nations have a similar legal approach to discovery.
2. The U.S. has a sector based approach to privacy, so there is no single uniform, broad, comprehensive privacy law here. Many foreign nations take a very different approach to privacy, which directly affects e-discovery.

In the U.S., she noted, "You can basically get discovery of anything that is both relevant and proportional. Proportionality is becoming more significant with the new rules amendments, but still, it's a very, very broad standard. In addition, you can get discovery of anything that is within a party's possession, custody, or control. So, if the company has possession, custody or control, it's usually fair game in discovery no matter who the information is about. That is much different than litigation and preservation obligations outside the United States."

Privacy laws vary widely abroad. In many foreign jurisdictions, the individual's right to privacy—and to protect her or his data—is fundamental. The U.S., by contrast, takes a sectorial approach to protecting personal information. "We have some laws that deal with health care information, some laws that deal with financial information, some laws that deal with customer credit card information in the hands of retailers, etc. So it's kind of a piecemeal, patchwork approach," Thomas said.

In Europe, Thomas said, "It is a fundamental right that individuals have the ability to control what happens with their personal information and it is the right of the individual. So they have rights with respect to how the information is collected, how it is stored, how it is used, how it is processed, how it is transferred and for what purposes. They also have the right to have transparency with respect to their information."

It's a trend that's spreading around the globe, Thomas said. "There are an increasing number of countries, including in Africa, South America, and Asia, that are adopting European style approaches to data protection. There are now more than 100 different regimes around the world that have some type of comprehensive data protection law or regulation," she said.

In fact, Europe is stepping up its data protection enforcement efforts. "Europe thinks the rest of the world doesn't really take its data protection directive seriously enough and they want to actually put some teeth behind it. So it's not inconceivable that might happen somewhere down the road, we could see parties being fined for transferring data out of Europe to respond to discovery demands in U.S. litigation," she said.

The takeaway for U.S. litigators is that they should anticipate a possible conflict when they seek to apply U.S. discovery principles and practices on foreign soil. "It's literally the proverbial between a rock and a hard place. How do you reconcile those two irreconcilable legal obligations?" she said.

She listed five common misconceptions about global e-discovery:

1. "If the company is subject to the jurisdiction of the U.S. courts then any data that is in the possession, custody, or control of that company is fair game in U.S. litigation. The problem is, that works with respect to the company but it doesn't work with respect to the individuals whose rights are impacted by the data that is being demanded."

Discovery is extraordinarily broad in the United States in civil litigation and a preservation obligation is triggered very early and very broadly in the U.S. Few non-U.S. nations have a similar legal approach to discovery.

1. "There's no violation of the foreign laws unless the data is transferred. That's actually not true. There are two different pieces of the Directive, one that relates to processing the information and the other that relates to transfer. For our purposes, preservation is processing. When you preserve information for a legal hold, it typically is processing of data. Also, if you collect it, if you image it, if you review it for legal purposes, even if you keep it in country, that's processing."
2. "If data is transferred to the U.S. for one purpose, then it's fair game in the U.S. for discovery and litigation. The law with respect to transfer specifically says that if someone consents to the transfer of their data for one purpose that consent it limited to that one purpose only. So if I'm a French citizen and I agree that my HR files can be maintained in California at my company's headquarters for the purpose of dealing with my employment issues, that is not consent to use that data for discovery in litigation."
3. "European law provides an exception if individuals "consent" to the transfer of their data if it is required to comply with a legal obligation. However, there are legal opinions in Europe that consent of an employee is not valid because the nature of the employee/employer relationship is such that that consent can never be freely given." So it may not be good enough to get employee consent."

"The European data protection laws are just designed to thwart U.S. discovery, and therefore U.S. courts shouldn't give them any deference. It is true that there are some 'blocking statutes,' such as the French blocking statute, that were specifically enacted to prevent data from being transferred for use in U.S. legal proceedings. Data protection laws are totally different animals than blocking statutes, and are not targeted toward U.S. litigation."

To demonstrate how one global firm handles the notification of a legal hold, Raytheon's Wood Abbott laid out his strategy for doing so across foreign boundaries.

"We treat the custodians across the company the same as they would be in the United States. We'll issue the hold. The hold will go out. We'll make sure that it gets to everybody. We'll make sure there's an affirmative response. I double check usually when I put out a preservation order internationally to make sure I get some kind of an affirmative response back that we can track, that we can be able to say that we reached out and touched everybody," he said, noting that time and scheduling differences among far-flung company personnel require a painstaking approach to getting sign-off throughout the enterprise.

Abbott maps out the company's foreign offices, he said, because oftentimes the location of the main office has almost nothing to do with the functioning of that regional base. Assets may be far flung; personnel may be in more than one country; data may be shared by colleagues who aren't technically employees of the company. With this knowledge in hand, the legal hold can be more strategically, and successfully, rolled out throughout the company.

> "It is a fundamental right that individuals have the ability to control what happens with their personal information and it is the right of the individual. So they have rights with respect to how the information is collected, how it is stored, how it is used, how it is processed, how it is transferred and for what purposes. They also have the right to have transparency with respect to their information." *-JEANE THOMAS*

"At the end of the day, what are we looking for? We're trying to preserve the data and at some point I'm going to have to go over and try to collect the data, if indeed it is legal for me to be able to collect the data, and figure out how am I going to get the data back so that the in-house counsel working with our outside counsel can actually glean whatever information we need out of it in order to defend ourselves."

Knowing the laws, mapping the foreign offices, having a solid process in place are all great tactics. Abbott noted, however, there are other key members of the organization besides custodians who can make or break a successful global e-discovery strategy. Among them:

Overseas IT team
They will likely have a style of their own, but they do know where the data lives, so it's vital to know who the lead is in each jurisdiction and communicate with them.

Security
In most companies the security team is responsible for anyone who's either traveling or overseas in case there is a catastrophic event, terrorism, or national disaster. It's a good place to be able to go to find data of where people are and how people are moving.

HR
They'll know, or should know, the local laws around privacy.

Public relations
Should it become apparent a negative news story may appear as part of the litigation, public relations needs to get ahead of the story. You really want to be able to get with your communications folks to make sure that you have standard answers to address the press questions. Should it appear the news might drive down the company's stock price, you may want to include investor relations in the strategy session.

Records management
These people now know where the true records are. These are the critical records that make your company what your company is. Those people can point you to where the relevant data could be that you're trying to bring back into the United States.

Global preservation strategies will evolve with time and experience. Each company may need to take a different approach, but the key, all panelists agreed, was to have a strong plan in place—a plan that assumes the boundaries of permissible e-discovery will be very different outside the U.S.

Snapshot of Collections Practices Today

Panelists included:

- **David Walton**, *panel moderator, Managing Director of Electronic Discovery Practice and Advisory, Services (ePAS), Co-chair of EDiscovery Task Force, Cozen O'Connor*
- **Ellen Buchan,** *Manager, System Operations, Legal Department, Sprint*
- **David Cohen**, *Partner and Practice Group Leader for Global Records & E-Discovery Practice Group, Reed Smith LLP*
- **Lisa Schaerer**, *eDiscovery Analyst, Procter & Gamble*

In a roomful of corporate lawyers, a discussion centering on data collection produced a wide range of practices. When the 2015 Conference on Preservation Excellence gathered a panel of experts to share their collection practices, several themes emerged. Among them:

- The days of all-or-nothing collection and preservation are disappearing;
- Collection close to the onset of litigation has many benefits;
- Collection should not be left unsupervised in IT's hands;
- Collecting the most important data first can greatly facilitate the e-discovery process and thus the course of litigation.

> "We know only about one percent of federal cases go to trial. The rest of them get disposed of in settlement or motions practice beforehand.
>
> *-DAVID COHEN*

Walton set the agenda for the panelists and audience right up front.

"How do you develop your collection strategy? When do you collect? What do you collect and why? Who performs your collections? What tools are in place and how do you keep track of your collections?" he said, posing the most critical collections questions.

For starters, panelists agreed that data mapping is pretty much a given these days. One must choose a basic strategy: targeted collections or full collections. This can apply to particular custodians or all custodians in a particular instance. The consensus among panelists: In most cases, do not collect until litigation is either imminent or notification has been received. Collect the most important data first. Postpone widespread collection as long as possible—again, with certain exceptions.

"Phasing of collection should be part of the strategy," Cohen said. "There are many cases that, if you start with the most important custodians and the most important evidence, that's all you end up needing to resolve the case. We know only about one percent of federal cases go to trial. The rest of them get disposed of in settlement or motions practice beforehand. Often, a collection delayed is a collection avoided. So figuring out ways to phase collection can be helpful."

Cohen said the new Federal Rules amendments, focusing on proportionality in addition to relevance, support more targeted collections.

"It's possible to do more targeted collections. They don't always have to be forensic," he said. "We try to avoid taking people's Smartphones and making copies of those when we can. I think you've got to look at the case and say, 'What's proportional to this case? What do we need to do? What's going to be the most important evidence in the case?'"

Collecting in a timely manner can be subjective—what does "timely" mean? Panelists said the decision can vary from case to case and, of course, company to company. In some instances, waiting until a case has been filed works out fine. In others, however, when counsel knows that a suit is coming, it may be best to get a head start by culling the most critical data first, so as to be prepared for the first discovery encounter.

"The rule of thumb, is only collect it when you know you're going to need it," Cohen advised. "I would say collect as late as possible, except when you need to consider the relatively short discovery deadlines for responding to requests for production. You can't really always afford to wait if you know it's coming. Once you know it's coming, you need to collect. If it's just that you anticipate that you may be sued, then it's a lot less expensive to preserve in place. You might not be sued. Or maybe the scope is going to be different than you think. So preserving in place is a good idea where that is a viable option."

Schaerer said her practice is to collect when litigation is imminent.

"The only data that we do preserve for somebody that's on a legal hold are emails. We do have an email hold system. So if somebody gets put on a legal hold, 99% of the time they're also put on an email hold. But other than that, we do not preserve any data in advance until litigation is imminent. Sometimes, not even until the discovery request has been made. We don't pre-preserve or pre-collect anything until we know we're actually going to need it."

Buchan said Sprint flags all assets for anyone who is on legal hold.

"So whether you're here today and gone tomorrow, we still know about it. We track it. Anybody that's terminated in the system, their asset is automatically routed to us. So we're watching that constantly. We do put systems on hold if there was something that they wanted to change. Frequently, the information is gathered at that point, yet, it's pre-served in place until we need it."

There are cases where collections must be made swiftly and comprehensively. Witness the case of the custodian accused of harassment.

"If you've got a custodian who's accused of sexual harassment, are you going to want them to be identifying where the most relevant information is? Judges do not expect us to be perfect but they do expect us to be reasonable. So you've got to consider tiered custodians. Some custodians, you're not going to trust to self-collect or even to preserve the relevant evidence. Conversely, it is reasonable to

trust other custodians to comply with preservation and to fully cooperate with collection. It depends on the nature of the case, and the identity of the custodians," Cohen said.

Walton said his experience with labor cases has made him a believer in rapid collection to avoid the disappearing data syndrome.

"On the employment wall, where we have somebody suing us for a retaliation claim but they're still employed, or they're suing us for sexual harassment and they're still employed, you've got to collect quickly and intermittently. You've got to follow-up on it."

Another potentially difficult collection challenge can be working with clients who want to "self-help." That means they want to do part or all of the collection, usually to save money, but such a system can have serious downsides.

Among them:

- In a case where outside counsel will be handling the litigation, outside counsel has a duty to see that the collection is done properly. Simply shifting that responsibility to the client because the client cried "Self help!" won't wash in front of the bench.
- If counsel knows the client is "cutting corners" while collecting internally, counsel has a duty to speak out—because a judge is not going to want to hear that poor collection was due to penny pinching.
- Internal collection can degrade metadata when inexperienced collectors are on the job.
- IT personnel, no matter how senior in their positions, are not attorneys and won't be collecting with the vagaries of litigation in mind.

"I think it's the most important question when you're dealing with a collection strategy. What do you do when a client comes to you and says we want to do self-help?" Walton asked. "I try to explain to the clients, that there's all types of lawyers in the world. There are PI lawyers, defense lawyers, will lawyers, and tax lawyers among others. Well, just because someone is a good PI lawyer doesn't mean they're a good tax lawyer. It's the same with IT. Just because somebody is good at running networks and keeping systems up doesn't mean that they're good at forensic collections. "

> "...the best way to get the other side to cooperate, when they're looking for information from us, is not saying, 'You're not going to get this.' Instead, say, 'Let's get you what's really important first." *-DAVID COHEN*

Cohen underscored outside counsel's responsibility to the case and the court in arguing for intervention with self-help efforts.

"If something goes wrong, you can't stand up in front of a Judge and say, 'That's not my fault because my client told me they would collect.' You, as the outside lawyer, have an independent ethical duty to help ensure that the collection occurs properly."

Cohen said such challenges are greater with clients that do not have the fire power in house to perform a proper collection.

"It's much more challenging if your client does not have as much experience in collections, if it doesn't have an in-house team. Then you really have to base the collection strategy on the nature of the case. There are "high stakes" cases where you need to make sure everything is done in a forensically complete way. In other cases a logical collection may suffice."

What is IT's role in collection? The consensus: a sharer of knowledge, not a gatherer of data, except in very basic situations.

"I think most of it is consulting," Schaerer said. "Letting counsel know where data sits. Do they know

if they're backing stuff up? Are they archiving email? Do we need to collect that? Can we just collect emails from the server, if they're backing up things on their hard drive, archiving?"

Another challenge: When litigators attempt to bypass e-discovery experts in the collection process. Panelists agreed that many litigators don't know what questions to ask to arrive at a successful collection. Yet all too often, litigators will forge ahead anyway in an effort to maintain control of the case—and the billable hours.

Transparency and cooperation should be part of a collection strategy. While litigators are understandably reluctant to over-cooperate with the opposition, all agreed that striking a chord of cooperation in discovery can lead to a smoother outcome.

"I've found the best way to get the other side to cooperate, when they're looking for information from us, is not saying, 'You're not going to get this.' Instead, say, 'Let's get you what's really important first. Don't you really want us to do that? They'll always say yes to that. If you're not precluding them from future discovery of other things, it's often possible to get cooperation and agreement," said Cohen.

While collection strategies continue to evolve, best practices are emerging. New tools are available to automate, cumbersome processes. The tension between in-house and outside counsel, between IT and the lawyers, between judges' desire for a speedy road to justice and plaintiff attorneys' desire for complete production dictate that collection strategies be flexible and adaptable.

The more that clients learn about e-discovery, the more likely it is they will defer to their e-discovery experts when it comes to crafting the collection strategy.

"Much of our success has to come from the educated clients who are saying, 'We need you to get your ESI people involved,' and I'm seeing that more often," Cohen said. "This is slow change, but it's all moving in the right direction."

Balancing Adversarial Strategy and E-Discovery Cooperation

Panelists included:

- **Ariana Tadler,** *panel moderator, Partner, Milberg LLP*
- **Hon. Dave Waxse,** *U.S. Magistrate Judge, District of Kansas*
- **Michael Arkfeld,** *Director of the Arkfeld eDiscovery and Digital Evidence Program, Sandra Day O'Connor College of Law, Arizona University*
- **Robert Owen,** *Partner, Sutherland Asbill & Brennan LLP*
- **Justin Underwood,** *Global Head of eDiscovery, Teva Pharmaceuticals*

E-discovery has reintroduced in a powerful way an old and often dismissed concept in litigation: cooperation among adversarial parties. Lawyers, and litigators in particular, are bred to fight, to rebuff and to confront their opponents. To be managed effectively, the e-discovery process requires at least some level of cooperation. E-discovery sets the stage for a collision of these two forces.

Balancing these two behaviors was the subject of a lively panel discussion at the 2015 Conference on Preservation Excellence. An impressive panel was assembled for the discussion in which all parties were represented. All panelists agreed, at least to a degree, that cooperation throughout litigation is healthy and can lead to an expeditious and judicious resolution of a case that can save the client time and money. However their discussion brought to the fore the many pressures that argue against a cooperative approach to resolution. They added, that e-discovery is not immune to those pressures to act with "zealous advocacy" on behalf of one's clients, regardless of the damage done to the process.

With that context in mind, the panelists discussed ways to introduce greater degrees of cooperation into the process, particularly with respect to e-discovery. Moderator Ariana Tadler framed the tension between zealous advocacy and cooperation in terms of how attorneys want, or should want, to be perceived.

"As officers of the court we are supposed to behave like professionals. So why wouldn't we engage in certain types of behavior that go directly to the concept of cooperation? It's really about behaving in such a way to move things forward, having a conversation, having a dialogue before you determine whether there actually is a dispute. When you have a dispute that is when the heat is going to get turned on. However, we don't need to turn the heat on before the door has even opened," she said.

Tadler asked Hon. Waxse to help define cooperation in a profession trained in adversarial behaviors. He admitted it's a gray area, largely because advocacy and adversarial behavior are deeply ingrained in the legal DNA.

"I've written some articles and opinions on the question of, 'Is there still an obligation of zealous advocacy for lawyers?' If you look at the model code, which used to have such an obligation, they took it out in the 1980s. Since then the emphasis has been on cooperation, not zealous advocacy. It's in our culture as a profession, but it's no longer something that's mandated by our ethical standards. I think we need to stop focusing on zealous advocacy because we don't have that obligation."

Hon. Waxse argued that the litigator's obligation is to seek "the just, speedy and inexpensive determination of any action." Zealous advocacy should be reserved for cases that actually are tried. Yet only a tiny percentage go to trial.

"So, one, I don't think there's an obligation for zealous advocacy, and two, the obligation is much more clear that it's to get just, speedy and inexpensive resolution, and that doesn't happen unless you have cooperation," he said. "It is clear to me, but it's obviously not clear to the profession."

Hon. Waxse raised the issue of how hourly billing encourages an adversarial relationship between parties, which the client ends up paying the bill for the dispute. The age-old tension between "making budget" and ethically serving the client can be destructive to efforts to cooperate, especially in discovery, where arguments over defining, collecting and sharing data can be lengthy.

Owen however, questioned the extent to which practices like hourly billing influence the relationship between the parties.

"I was never a zealous advocate because it was in the ethical canons. I was a zealous advocate because that's what my paying clients expected of me," he said. "They didn't hire me to be halfhearted."

At the same time, he said, many clients now have an eye on the bill and take it into account when deciding whether to use the same legal team next time a dispute arises. That opens the way for greater cooperation during the process.

"What's often overlooked is, how billing a case to the nines, will affect the ability for the lawyer to get the next case? The pressures these days on litigators is to get a good result without billing it all to the sky. I see cooperation as an advantage when it works because it helps me keep the bills down. If I can keep the bills down and get a good result, I'm going to get the next case. That is as important as anything to me and my partners."

Panelists noted that, while litigation readiness has been increasing rapidly, newly minted lawyers are getting very little education in either the importance of e-discovery or how to manage the process.

"We're not focused on digital evidence, the rules of civil procedure, reasonable accessibility, or those kinds of things," said Arkfeld. "I'll ask my law students how many of them know anything about metadata. I'll get ten out of one hundred who can talk about it. So clearly the educational environment still very much teaches zealous advocacy."

Tadler agreed that law schools aren't addressing the benefits of cooperation to the process. " How do you teach cooperation?" she asked. "I know what cooperation is, but how would you imagine a class that addresses that?"

Meantime, as new associates learn the ropes at their firm, they're seeing the high value star litigators place on advocacy versus cooperation. "It can be the case that junior associates are afraid to appear cooperative," said Arkfeld.

That's a situation that the more veteran attorneys in the firm need to address, Owen said. "For example, if you take the classic privilege log. It's the first year attorneys who are doing the privilege review. They're concerned with getting it wrong, so their tendency is to play it safe and say that everything is privileged. As a senior partner I've got to be alert to that and make sure that that's not happening, and make sure that my associates understand I expect them to exercise their judgment, and occasionally, when necessary, or when smart, compromise."

Although Hon. Waxse raised the issue of running the clock on a client, he refused to let clients off the hook when it came to how their hired guns were running a case. "It's not just lawyers that are doing the litigation in an uncooperative manner, it's clients, especially

> The point, isn't to give up advocacy for cooperation, but to cooperate judiciously to conserve internal resources while still realizing a favorable outcome. When that occurs, that's worth quite a bit to your corporate clients." *- JUSTIN UNDERWOOD*

in-house counsel, that are letting them get away with it," he said, calling for general counsel to take greater responsibility for case management.

Teva Pharmaceuticals' Justin Underwood said it's incumbent upon the legal department to be able to articulate a litigation strategy to outside counsel. "The point that kind of flows through a lot of this is educating your outside counsel, educating the opposing sides about the systems, the processes, and the technology, and making sure you have the right people to cooperate."

The ultimate goal for in-house counsel is, he said, "to make sure your outside counsel is efficiently representing your interests to get the desired result in the shortest amount of time."

"The point, isn't to give up advocacy for cooperation, but to cooperate judiciously to conserve internal resources while still realizing a favorable outcome. When that occurs, that's worth quite a bit to your corporate clients," he said.

Clearly, cooperation, particularly during e-discovery, can lead to a less costly and more reasonable outcome, the panelists agreed. If parties can set reasonable parameters for the data collection process, it becomes the gateway to a more expeditious settlement or trial on the merits, not the main battlefield.

The panelists were asked, "What about the costs of a lack of cooperation?" There's the obvious added financial burden of an unnecessarily protracted legal fight. Others also cited:

- When parties fail to work together to define parameters of e-discovery, either far too much or far too little data will be produced, complicating an already complex process;
- Parties can end up in a dispute over facts that are not in question, that are accepted by both sides, thus drawing out the process;
- That lack of cooperation can lead to sanctions, which fail to serve the interests of the legal team and the client;
- A firm can gain a reputation for zealous advocacy, for refusal to cooperate, which the bench may not appreciate and may not serve the client's best interests in more subtle ways.

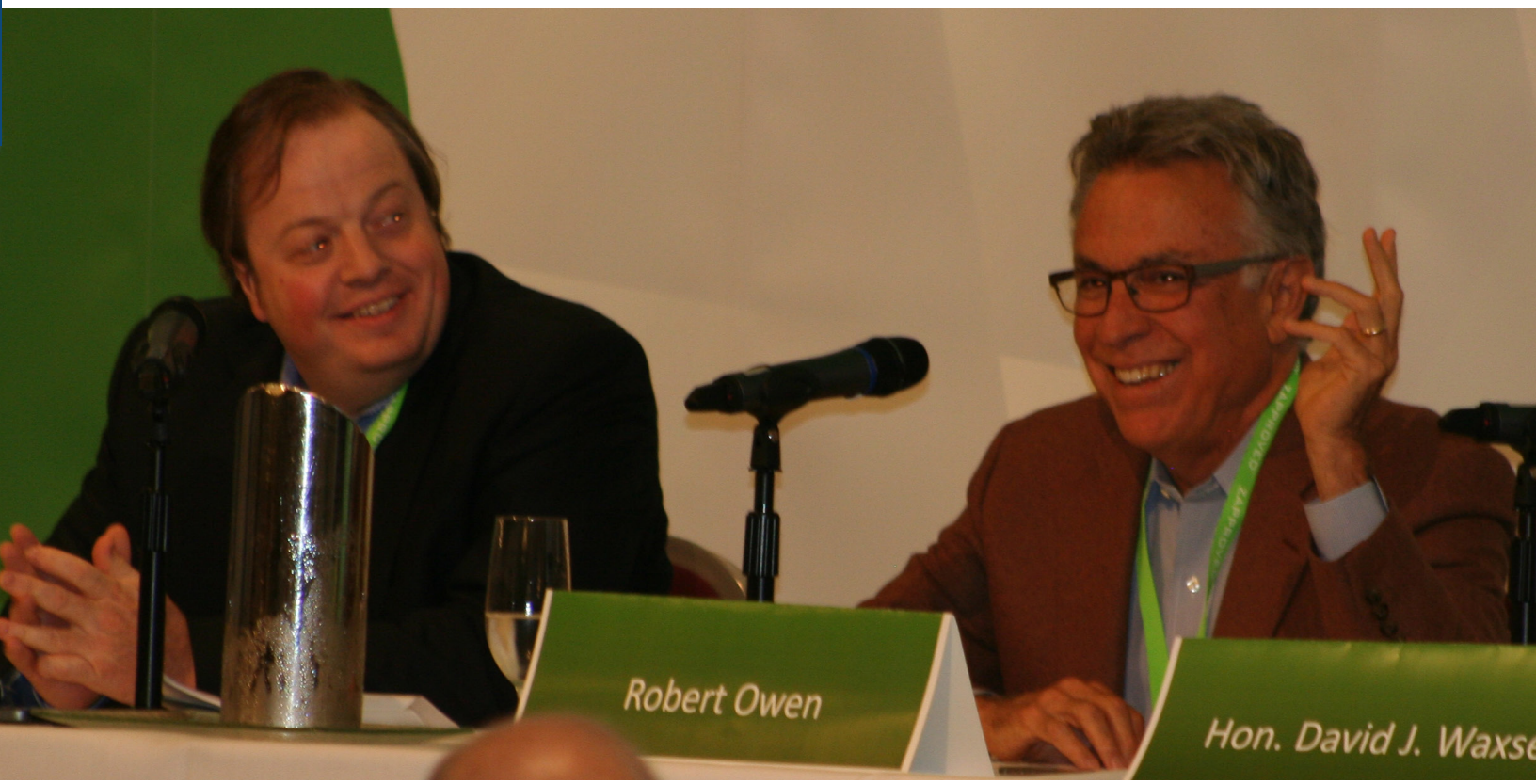
Arkfeld said he remains frustrated by the number of times he has witnessed the zealous advocate undermine attempts to move forward through cooperation.

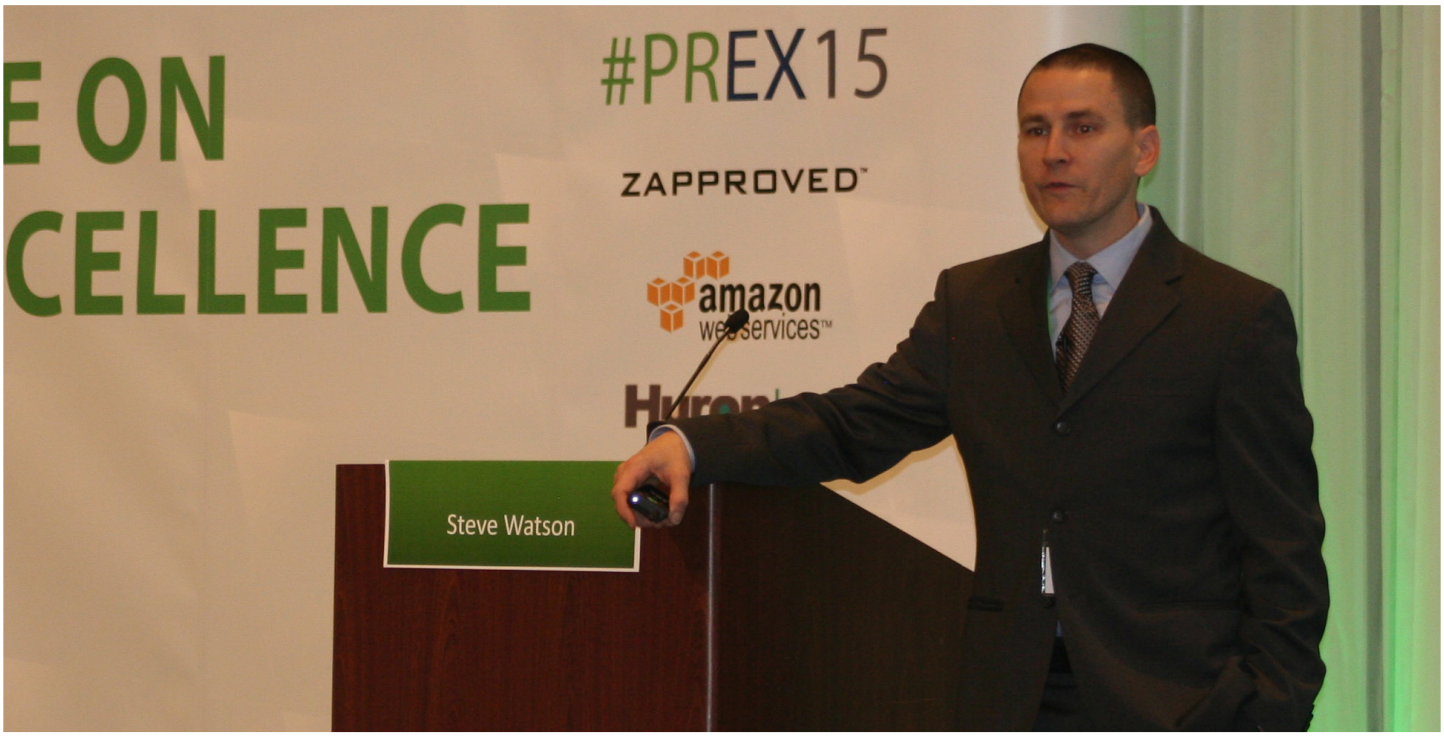
"I think we can sit down and within a short time say, 'Here's what's going on. What load file do you want? What kind of meta data do you want? What kind of systems are there? Let's just exchange it.'" Nonetheless, I find this battle going on all the time still," he said. "There are strategic reasons for it. I understand why you want to give somebody a pdf file as opposed to the native, or a load file and a TIFF. I understand that in terms of review platforms and data analytics, but I think we should be done with that because it's too expensive anymore. We should just be cooperating."

In fact, judges do have the power, at least in some

instances, to force cooperation. Hon. Waxse said he has discovered one tactic that has led to much greater cooperation among opposing counsel.

"One of the steps I developed years ago when I couldn't get lawyers to actually cooperate on these kinds of issues is, I said, 'I want you to go try one more time to see if you can get an agreement on this. This time however, I want you to video tape the discussions. Either send me an agreement or a video tape.' I've done this many times and have never had to watch a video tape," he said.





Finding our Data in the Year 2020

Conference Keynote by Steve Watson, *e-discovery architect at Intel Corporation, presented the keynote address at the 2015 Conference on Preservation Excellence. Steve is a technologist and prolific author who is focused in the areas of eDiscovery, forensics, risks and compliance. His career spans a variety of technology environments, from startups to his current role at Intel. He is a member of the Digital Evidence Subcommittee of the NIST Organization of Scientific Area of Committees where he serves as the Task Group Chair for the mobile device forensics. Steve also serves on the United States Scientific Workgroup for Digital Evidence representing expertise in mobile devices, emerging technologies and damaged devices. In his spare time, Steve is a PhD research student of digital forensics focused on new and emergent technologies at Glasgow Caledonian University in Glasgow, Scotland.*

Why are we talking about how we're going to find our data in the year 2020? Technology is moving faster than it has, really, at any point in history. We're starting to grapple with what that means in our enterprise environments.

What does that mean for my legal matter? How am I going to deal with this? Stuff that was science fiction years ago is now real. Now you can now walk into homes and control everything by voice. You can get in cars that have more computing power than the last space shuttles that we sent into space. Things are moving so quickly that, unless we pause and understand where things are going, and give you the confidence that people are thinking about how we will get data out of these areas, it can be intimidating.

For the last eight years I've been in an e-discovery role at Intel. I deal with legal matters, just like you. I've been boots on the ground getting data out of some of the largest matters that you can imagine. I'm the IT guy, the one you'd call at your company to ask, how are we going to get this data?

About a year and a half ago, I had two mobile devices that came across my lab bench. One was an iPhone 4S that had taken a bath in a swimming pool. They'd retrieved the phone out of the swimming pool

immediately, shook the phone off and tried to dry it. The phone wouldn't work. They needed the data. Then I got a Fitbit that had gone through the laundry machine. It wouldn't work either.

When I got both of those devices taken apart on my lab bench, I realized there were very different reasons why they had quit working. I did what any reasonable person would do, I went and bought a case of phones, and I threw them in a lake to figure out what was damaging the devices and causing them to not function? Through this test I identified five different variables that affect whether or not the device is damaged and how it's damaged. That spun into a whole damaged devices program, where now it's not just liquid, but ballistics, thermal damage, and impact damage. We're not just beating up devices, we're trying to get understanding of how to get data off damaged devices when necessary.

When researching how to pull data off of wearable devices such as Google Glass, we found the data can actually be found in a number of places. It may be on the device. It may be in the cloud. It may be in the phone that it's connected to. Then there's the Internet of Things. I presented the first research in the world on getting data off an Arduino, which is a foundational platform for the Internet of Things.

When we think about new technology, I consider Arduino to be one of the pivotal points in the history of humanity. It's about the size of a credit card. It costs $25. It was released in 2005 as an open source design. Nearly every new technology project that is started on KickStarter or Indi-Go-Go over the last few years is prototyped and based on Arduino. What's so amazing about this technology is, if we think about back to 1981 and the IBM personal computer when it was released, the barrier of entry was so high for people to be into it. Arduino has democratized technology in such a way that anybody with $25 and an idea can do things that have never happened before in history. You'll see why I think this is such a pivotal point in history. Because all of the new things we're talking about, the foundation is Arduino, and it moves from that into other technology areas.

Take automotive. Elan Musk said this year, we really designed the Model S to be a very sophisticated computer on wheels. When the Land Rover released, they disclosed that it had nearly eighty different computers in it. Here's the kicker. We only know how to get data out of four of them. The industry only has tools and capability to get data out of four of those computers despite being technologies that are deploying on the vehicles that are going out today.

How does this apply to your e-discovery? You probably aren't going to have to get data off of a car. What's happening with technology is that it proliferates out to all the other different areas and we're encountering a situation where it's moving so fast, that we're having trouble keeping up with how to get the data off.

How many of you have seen 3D printers before? Toyota released the iRoad that's available in Japan. You can download designs and print parts for your iRoad vehicle. Think of the malpractice implications

"How does this apply to your e-discovery? You probably aren't going to have to get data off of a car. What's happening with technology is that it proliferates out to all the other different areas and we're encountering a situation where it's moving so fast, that we're having trouble keeping up with how to get the data off." *-STEVE WATSON*

> Fifty billion is the number of connected devices that are anticipated on the network by 2020." *-STEVE WATSON*

of this. Imagine the battles in the event of a problem from the printer, to the design, to the material used. 3D printing of car parts is a capability that exists today.

Fifty billion is the number of connected devices that are anticipated on the network by 2020, on the global Internet, fifty billion connected devices on something called the Internet of Things. Another common description for the Internet of Things is the Internet of Everything. People often hear that word yet, they really don't know what it means. It's the idea that we can connect everything, instead of just connecting computers or phones or devices. If we want to know how many people came today, we have an IP address on every single seat. So when you sit in it, it's marked as taken. Every light bulb in the room can be set to a different color. The ambient temperatures in the room can be controlled and measured by how you're breathing.

Libelium is a company out of Europe that makes wireless sensor network technology that can measure what's happening in the environment and in complex or dangerous situations. An example of their technology is SmartRoad capabilities where cars are interacting with the road and climate conditions as well as traffic info so that you can be rerouted to different areas. Or for example, their sensors can be used to support Internet of Things applications that enable you to control any connected device in your home, such as as entertainment systems, appliances, security systems, lights, you name it. There are now SmartCities that are transitioning this direction today to be able to measure and control everything that's happening down to the light bulb level on the streets but that opens up liability.

When people ask about what new technologies the should be concerned with, I think for most enterprises, it's situations where you have technologies that are going into factories, cars, or transportation systems, where data that could point to liability or not, yet these organizations have no way yet to get the data. It's a very complex predicament for companies to figure out how to get data out of devices that were never designed to have the data retrieved out of them. The good news is that there's obsessed people on the job working to figure it out.

We often talk about the volume of data, but I'm more concerned about the fact that the endpoints are increasing. When I started doing e-discovery eight years ago, you had a custodian and he was probably carrying a Blackberry. He had a laptop. If he was an engineer, he may have had a desktop too. There was somewhere on the network that he kept data. Now that's exploded, and from those same devices, it's now going to cloud storage. It's now going to social media. So what was a very finite set of sources that we had to go and target has now expanded to these other areas.

The cloud. How do you get cloud data out? If you talk to the different vendors and it's rather hit and miss. They're able to get some data, but they are not being able to keep up with how fast the technology is advancing.

Encryption. The challenge with encryption from a collection perspective is that it's starting to be the default option in mobile phones and devices which makes it very difficult, if not impossible, to get data off the device without the encryption key. Federal agencies are very concerned that we can't get data off of our phones anymore. We can't get the data off of the iPhone. The concept of BYOE (Bring Your Own Encryption) is now coming to the cloud.

Amazon and Microsoft have announced hosted key management solutions as well. As we move forward and you ask the other party for data in their cloud, be cognizant that encryption keys are needed as well. Encryption key management for many enterprises around the globe, is a struggle. Ask your IT team about your company's policy regarding encryption keys, and how to get the data in the future?" Because the encrypted data in the cloud, without a key is useless.

Privacy. It really is a twofold problem. The bring-your-own-movement has caused us to see an intermingling of the user data that's existing on devices. The problem in this situation is the inability of the tools to distinguish the data. For example, a SQLite database, is a single file database that is running most of the applications on mobile phone platforms today. When you ask me to go get only the corporate data off of the phone, then we have a problem because those emails are all sitting in the exact same file. By co-mingling personal and work stuff on the same phone, the data is on the device and there's no way to distinguish between the two. It's a very real problem, with no clear answers.

Another problem is that there is other personal user data that is inadvertently landing in your preservations. Until a couple of versions ago, whenever you plugged your iPhone in, by default, it dumped an entire backup without even telling you. So you're probably sitting on preservations for active matters that you don't realize.

If we have people plugging in their wearables to send their steps or their heart rate up to the cloud, we have this intermingling and interweaving. It's landing in our systems but we don't know that it's there. So a question and a challenge for you to take back is, "What other data might be landing in your preservations? How are users using the systems in such a way that something may be landing there that they didn't anticipate and we don't even know?"

You probably want to be thinking about whether you want your users connecting their corporate phones to rental cars when they go out. Take this case, I have buddies that, as soon as they get in the car they connect the Bluetooth. Research has shown that even after three wipes of that infotainment system, the data is still there; contacts, text messages, calendars, everything. Your phone connects and just dumps it.

What technology should I be worried about in 2020? I'm not concerned about the technologies that will be created in 2020. I'm more concerned about the technologies that will mature between now and 2020. The preservation complexity increases over time. So the longer the device has been out, the harder it gets to obtain that data.

Preservation and the Evolving IT Landscape

Panelists included:

- **Craig Ball,** *panel moderator, Craig D. Ball, P.C.*
- **Charisma Starr,** *Legal IT Manager, Exelon*
- **Steve Watson,** *Group Chair, Mobile Device Forensics, NIST Digital Evidence subcommittee; Member, United States Work Group for Digital Evidence*
- **Paul Weiner,** *National eDiscovery Counsel, Littler Mendelson, P.C.*

Follow the data. That's what the e-discovery experts say—but which data? How much of it? Where can one go to follow the data, and where does one meet a roadblock? Which data, even though it may be relevant, is not worth following? How does one keep up with the sheer explosion of data from "personal" sources like Fitbit, iPads and smart wrist watches that may appear to be outside the enterprise domain, but manage to worm their way in and co-mingle with company data?

These were the issues panelists for the "Preservation and the Evolving IT Landscape" session at the 2015 Conference on Preservation Excellence addressed. Emerging matters that were especially significant were "BYOD", or Bring Your Own Device; mobile device data collection; fringe devices that may or may not be sanctioned for use by the employer; social media data; and the range of tools available to make the mapping, preservation and collection of the welter of data less intimidating.

Ball set the tone for the discussion by putting into perspective the data proliferation.

"The electronic toy you get in the Happy Meal at McDonald's has more transistors in it than the guidance computer for Apollo 11," he said. "Consider these things that we carry in our pockets, and how profligate they are in both pulling information from the world and then sending out information. Consider the number of sensors in the routine devices on our person all the time, and the fact that they have three separate radio systems that are constantly reaching out to find WiFi, or reaching out to find a Bluetooth device, or reaching out to find a cell tower connection. They are constantly saying, 'Here I am,' and they are generating data."

Our devices, he said, are creating "a digital record of nearly every aspect of our lives." Most of it can be tracked down, with the right tools and the right knowledge of where data lies after it has been created. Yet, how much does one need to win a lawsuit, or to defend one's client from litigation?

"Increasingly, we're going to see the development of devices that are going to record everything we hear and everything we see," he said. "Today it is not unusual to see law enforcement officers being compelled to carry body cams that record their interactions with the public at all time. We will soon see such devices on our own persons. Right now we

say, 'There's no way. It's not going to happen.' Trust me, it's going to happen.

"We see the operating systems creeping into the vehicles that we drive. They are becoming infotainment and communication centers. We will be deposing our cars before long. We think we're in trouble now because this is where we are (*7.5 billion terabytes*). However, at the rate of the growth of data accumulation, this is where we'll be in five years (*45 billion terabytes*)."

Do not be intimidated by this data tidal wave, he advised.

"It's not something to be scared of. It's evidence. If you are a lawyer or if you work with lawyers, it's a way to be able to get closer to the truth, to have a more objective record of what really happened instead of relying upon the self-interested and often erroneous recollection of human witnesses. As we all know, these aren't documents. We can't print them and we have to wonder how we will preserve them."

Ball directed the panelists to focus on the challenges to preservation raised by mobile devices. There's no stopping their proliferation. There's no effective way to bar them from work, or completely segregate business from personal data on them. The new generation of worker bees, millennials, are complicating the matter of data mapping and preservation.

Millennials are the coveted employees today, and many employers are hearing that, to attract and retain them, they must be allowed to come to work attached to their many mobile devices. What happens to all that data they produce and share throughout the day? After all, many of them never really disconnect from work, and may well be checking various devices to see what's up at work far into the night.

Even these bright young data-spewing workers can be managed through practices and policies that anticipate the risks represented by mobile without imposing arcane rules that will undermine productivity and employee engagement.

The panelists offered a wide range of insights into how they have addressed these issues in their own workplaces. Following are the key takeaways from this session.

Policies

"If you're in a corporation be proactive. Think about where the data is being stored. If you have a choice between a device that stores information locally on the device versus one that just passes the information through to your database, choose the latter. That will be easier to manage," said Starr.

"My clients have very explicit agreements and policies that control BYOD; after all it is a privilege. If you capitalize on that privilege, there are obligations that come with it. That means we may have to access your phone. You are giving up certain privacy obligations. For example, we have the right to monitor what you are doing on that phone.

"We see the operating systems creeping into the vehicles that we drive. They are becoming infotainment and communication centers. We will be deposing our cars before long. We think we're in trouble now because this is where we are (**7.5 billion terabytes**). However, at the rate of the growth of data accumulation, this is where we will be in five years (**45 billion terabytes**)." *-CRAIG BALL*

Additionally, we'll encrypt the phone, so if you lose it, we're not in a data breach situation. We're going to put software on the phone that will allow it to be remotely wiped in the case of loss or theft. However, we are also finding a number of clients where there's been a resistance to BYOD. For example there are companies that don't want their information out there in the world because it's the key to their product and their success. In this case, control over highly sensitive data is not something they want to release to their employees," commented Weiner.

Starr added, "At Exelon, we do support BYOD. It's something we transitioned to over the last year. We put in place a device management system that enables us to segregate the company data and the personal data. We encrypt the phone for security and we have the ability to delete the data if the device is lost."

"For discovery purposes, we do our best to make sure that any data that we need to collect is behind our firewall. We also do that for security as well. That's the goal. You can't always reach it. You have policies that tell people that they need to use the app on their phone. Do we, on occasion, have an executive that's using the text on their iPhone to text? Sure. Do we sometimes need to collect mobile devices? Yes, but the goal is to not do that, because companies that get in that situation, spend a ton of money addressing the mobile device collection and preservation," stated Weiner.

"We make sure that our data can't get out without us knowing about it. We have technology that helps ensure that personal information (PI) is protected. I work in an ethics and compliance group, that tracks what people are doing with the data. For example, using Dropbox is not allowed. If I'm working with a law firm, I can't use their share file to send them some data. I need to use the company resources to transfer any data. When it comes to personal data, I can't access my Gmail nor certain social media sites. By having these policies it not only protects us from a security standpoint, it also helps simplify the e-discovery," commented Starr.

Practices

"For the most part, preservation is always done through an outside relationship. Our firm doesn't want to be in the chain of custody. Options for preserving newer data sources have improved. It used to be very challenging to preserve social media. Now however, I get a social medial capture for under $100," said Weiner.

Watson commented, "One of the biggest challenges in mobile preservation is that people underestimate the expense. It's very common for those of us who work in the area of mobile to always run the device against more than a single tool. The reason you should run it against at least two tools is that the first tool may not be able to see everything. For example, perhaps it can get calendar and contacts but not the email. Nonetheless, running it against two tools increases the expense. Further, many organizations are still choosing to go outside— thinking it's the safer route."

"If a corporation can do it with the right resources, it makes a ton of sense to be able to address preservation and collection in-house. At Exelon, we have resources like a general data map and information about our systems that we can hand over. We have our own team that just gets the data, and then we involve outside counsel when it comes time to actually mining it. We spend a lot less time figuring everything out upfront, we can spend more time on the actual merit of the case and the actual data," mentioned Starr.

"Organizations need to train their people and keep them current. This area moves so incredibly fast that one training every three years in the area of mobile forensics is not enough. Don't rest on the notion that we're going to train a guy, and then we'll be set. Otherwise, you could be at risk to the opposing side bringing somebody like me along that knows this area and can dismantle what you've done internally unless real focus is applied," cautioned Watson.

E-discovery tools

"There are newer tools that are available that will allow you to click through and follow the data. Some tools will simply dump the information out as a report. I have found that to be useful. For example, you could simply query to get all of the Facebook messages in a report that you can read through and pass to the legal team," commented Watson.

On using tools to facilitate discovery: "If different businesses are creating different data points, inside

> “Technologies that help with quick indexing and understanding what data a custodian has are the future of this industry, because we want to be able to preserve in place. We don’t want to go to the mobile devices. We want the data behind our firewall. It needs to be accessible." *-CHARISMA STARR*

the corporation, and they’re able to get the data out, we need to understand all of that. Technologies that help with quick indexing and understanding what data a custodian has are the future of this industry, because we want to be able to preserve in place. We don’t want to go to the mobile devices. We want the data behind our firewall. It needs to be accessible. Then, on the rare occasion that we need to go to the phone, to the device, we will,” said Starr.

Cautionary Tales

In closing, Weiner offered three cautionary tales from the mobile world of work and e-discovery.

GPS data

Asked whether he thought GPS data on mobile phones had matured to the point where it was being used in investigations and litigation, he assured his fellow panelists that it had. If a corporation owns the device and has appropriate policies in place, some clients are using that information in investigations and in litigation, especially when the company has set up a database to track that information for business purposes. Thus, for example, in a wage and hour case where an employee claims they were working at a certain time, we can contradict those allegations based upon GPS data that tells us whether they were actually working or not.

Fitbit risks

“Somebody needs to ask the question: What are the legal implications of offering employees a corporate-owned Fitbit, perhaps as part of a wellness program incentive?” While wellness programs in general should be encouraged, and providing a gadget like a Fitbit may be great for morale, Weiner noted it may not be so great for discovery in litigation. For example, does the company really want to have access to potentially protected health information that it has a legal obligation to protect from disclosure? Does knowing how many steps someone took today serve the primary goal of your business?”

BYOD for everyone?

Weiner acknowledged the BYOD pressures companies face in that in today’s digital—and mobile— world many companies believe they need to offer some type of BYOD program to attract and retain talented employees. Nonetheless, he said, it’s important for legal to take responsibility for at least outlining the risks involved.

“For example, if you give the BYOD privilege to a nonexempt (hourly) employee, where they can check emails around-the-clock, you may be creating a situation where you need very strong policies in place to limit after-hours work so you don’t unintentionally create a situation where you are now paying significant amounts in overtime, i.e., the convenience factor may be outweighed by other risks. Moreover, as I previously noted, sometimes business factors—like protecting uber-sensitive, trade-secret and proprietary data—trump other needs like convenience. The bottom line is that companies need to critically analyze a host of legal issues through the lens of ‘Do I actually need this to run my business?’ before adopting and rolling out a BYOD program.”

Judicial Panel

Panel included:

- **Hon. Ron Hedges,** *panel moderator; Principal in Ronald J. Hedges, LLC and former U.S. Magistrate Judge, District of New Jersey*
- **Hon. Elizabeth Laporte,** *U.S. Magistrate Judge and the immediate past Chief United States Magistrate Judge for the Northern District of California*
- **Hon. Frank Maas,** *U.S. Magistrate Judge, Southern District of New York*
- **Hon. Xavier Rodriguez**, *U.S. District Judge, Western District of Texas*
- **Hon. Dave Waxse,** *U.S. Magistrate Judge, District of Kansas*

Members of the bench gathered to conclude the 2015 Conference on Preservation Excellence. Among the key issues they focused on: proportionality; sanctions; best practices; and more. Panelists discussed trends in e-discovery and offered their views on how rules changes and certain decisions would influence the future of e-discovery.

They made clear that e-discovery remains a fluid preamble to litigation, with states setting their own rules regardless of what's been determined at the federal level, and judges still grappling with such issues regarding what is reasonable, what merits sanctions, when is a legal hold or preservation system flawed but crafted in good faith, and when one is too flawed to be tolerated.

> "You don't want to create and own a subset of litigation over these factors in proportionality. It would defeat the purpose of proportionality, which is to try and hold down the cost." *-HON. DAVE WAXSE*

Proportionality

Proportionality received the most attention from members of the panel. While not new to the federal rules, an amendment to those rules set to take effect in December 2015 will bring proportionality directly into the scope of discovery and thus gives it more emphasis than it previously had. Panelists said, proportionality is good in theory, but very difficult to define and identify in practice.

"To paraphrase a Supreme Court Justice in a different context, I can't define it, but I know it when I see it," Hon. Maas said.

Hon. Waxse said he fears the concept will take on a life of its own, increasing the contentiousness and cost of discovery as parties wrestle with what it means and how it will be implemented.

"You don't want to create and own a subset of litigation over these factors in proportionality. It would defeat the purpose of proportionality, which is to try and hold down the cost," he said. "You're going to spend more fighting about proportionality than may be involved in the issue that's before you. So it's not an easy situation. It's a great concept, but I haven't figured out how to easily use it."

Because neither the bench nor parties have a lot of experience with proportionality, it's still a cause for uncertainty and even anxiety among the parties. Will the bench limit us so that we can't get what we need? Will the limit be so large that we'll have to settle anyway?

Hon. Laporte suggested tethering phased discovery with proportionality so that parties could gradually begin to identify what the scope truly needs to be.

"If there's a phasing where the core documents are concerned, you can get those documents for a certain amount of money and then you see what you have and do you really need more," she said.

One challenge: proportionality varies according to the type of case, size of the parties involved, and the number of unknowns that lie ahead down the road to litigation.

"You know, proportionality is really simple in a breach of contract case where we know what the damages are going to ultimately be calculated at," Hon. Rodriguez said. "So at least we have an outside perimeter. The harder kind of cases to measure are employment cases, the civil rights cases, a glass ceiling case, an awful racial discrimination case. Those become the harder cases. We're trying to be fair up here and we've got to provide the plaintiff some amount of discovery to be able to make and establish their elements. So there, it becomes very hard for us."

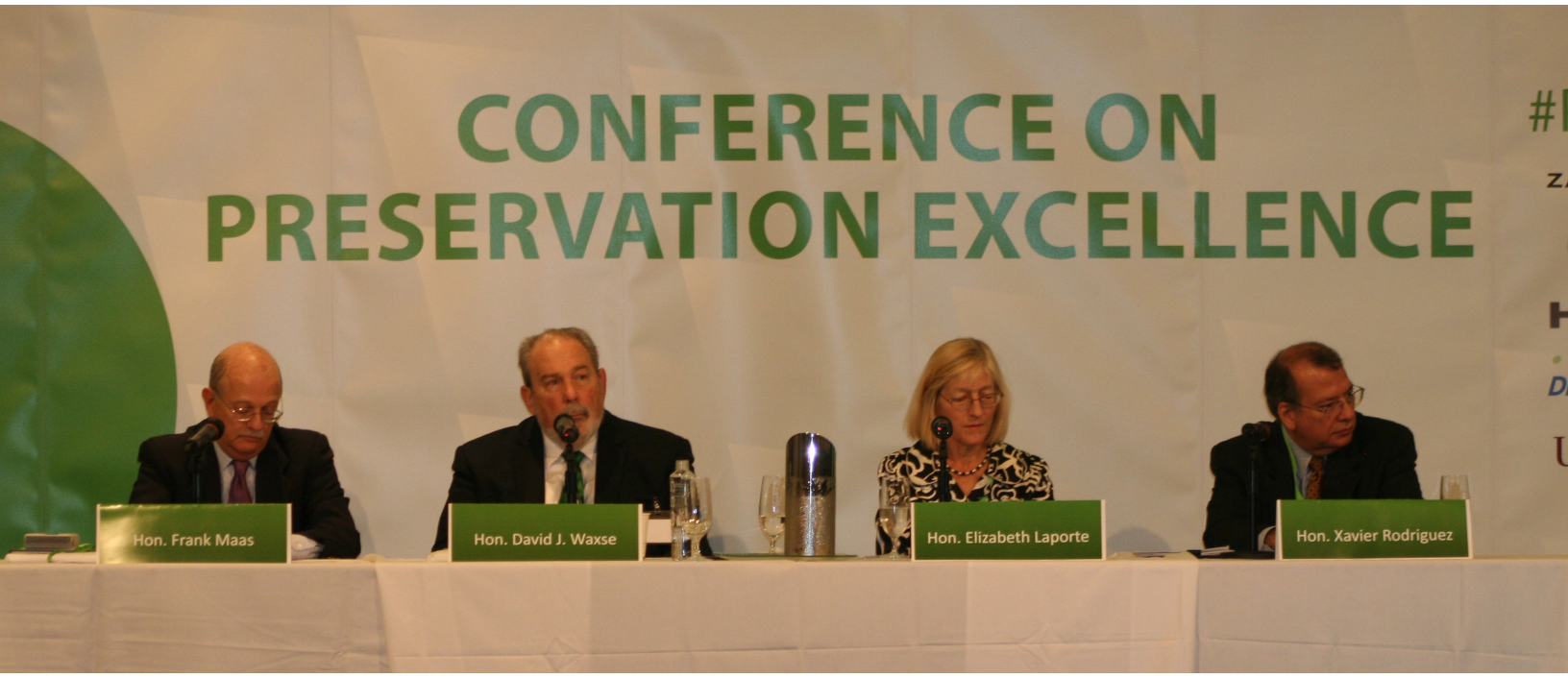
Because neither the bench nor parties have a lot of experience with proportionality, it's still a cause for uncertainty and even anxiety among the parties. Will the bench limit us so that we can't get what we need? Will the limit be so large that we'll have to settle anyway?

"There's fear on both sides," Hon. Laporte said. "While some degree of it is paranoia. Some of it may be justified if proportionality is used as an unfair club to basically deprive the party that needs the information in a situation where one side really has more of a monopoly on the information than the other of the ability to prove their case. Certainly, judges do not want to see that. After all that's the point of proportionality. If it's important to proving your case, then more money is arguably justified on preserving it and ultimately producing it. If it's not very important, and there are other sources that are more convenient, then that's what should be done."

Hon. Maas said he sees applying proportionality stands to preservation as being far more challenging than to production.

"If you're the defendant who thinks the lawsuit is worthless, then I suppose you could apply principles of proportionality and say, there's not a need to save anything because the claim is merit less. Obviously, that would not be a satisfactory solution. Except in circumstances where routine document destruction policies have actually been followed, leaving fewer documents potentially in play, and making preservation proportionality determinations much more difficult than it previously was for the courts and parties to make production proportionality decisions," he said.

The worst-case scenario, as cited by panel members: taking proportionality into one's own hands by subjectively deciding that lots of data doesn't need to be preserved, and so it is either not collected or is destroyed. Yes, over-preservation is burdensome, but no party should make the decision to not preserve in a vacuum.



Sanctions

With that in mind, the matter of sanctions was addressed. New rules suggest that the courts may be using the sanction option more judiciously. These jurists said that most courts already avoid sanctions unless situations turn truly ugly.

"The more we looked at the facts at the conference, there really haven't been that many sanction cases," Hon. Waxse noted. "The ones that have been, have received lots of publicity because somebody's paid a lot of money, or lost a lawsuit because of it. The conclusion a lot of us reached after hearing all that information, was that people just need to calm down. This is not the end of the world when a few people get sanctioned. Most people are not getting sanctioned. Clearly, the intent of these changes was to try and reduce the fear of sanctions by making it a little bit tougher to get them. So I don't know whether it's going to change anything, but, hopefully it will."

Hon. Rodriguez foresaw some slight improvement for those who are concerned about being sanctioned. "Being sanctioned should not be the driver of what you're keeping and why you're keeping it. There ought to be business judgment and litigation readiness that drives those decisions. I think most of us now have got the message that mere negligence is not going to be grounds for any kind of ultimate sanction. So that message has been clearly put out by the rules."

Third party rules

The jurists considered the difficulties that third parties have when faced with a large, and unexpected, request to preserve and produce. The Texas state court has made it simple: third party discovery must be paid for completely by the requesting party. However elsewhere, the lines aren't so clear.

Federal law has yet to set consistent rules for reimbursing third parties for discovery. Several on the panel said requesting parties generally understand they have an obligation to cost share.

"In my experience, usually the requesting party is savvy and realistic enough to work it out and offer to pay for some or all of it," Hon. Laporte said. "So it rarely does come up in court. When it does, the doctrine is to be very solicitous of third parties."

When, Hon. Hedges wanted to know, do third parties have a duty to begin to preserve data?

"The subpoena triggers that duty," said Waxse. "You can't, in the face of a subpoena, start destroying everything so you don't have to produce it. That is our position, in Kansas, that the first thing you need

to do is talk to the other side and see if you can't resolve the issues, whether it's third party subpoena or just discovery, by reaching an agreement on what's reasonable. I think you start, just like everything else in litigation, with trying to find a solution before you get real nasty and refuse to do anything because that will come back to haunt you."

Manual holds

On the subject of the onset of preservation, the panelists addressed the differences between manual holds and automated holds. All agreed that some sort of written notice is far more desirable than a phone call or office discussion, even when very small employers are involved.

Hon. Hedges: "Judge Maas, you're representing someone who was served with a subpoena. They preserved information. They produced information. The subpoena is gone and over with. The information is now subject to records retention policy, which means you can destroy it. Any reason why that corporate entity can't destroy the information?"

"Obviously not; the third party should first consult with the requesting party." Hon. Maas said.

"There are obviously lots of problems in terms of attorneys communicating what they believe is intelligible, and in terms of that which needs to be subject to legal hold. The client may not have perceived it the same way, perhaps misunderstood what the attorney was trying to get at. So I think it is, except as an initial step, precarious to rely on a verbal hold. I do think you can have a manual process, but I think it should be in written form. There was a stage where outside counsel were routinely sending CYA letters to inside counsel about what needed to be done. I think we're beyond that. Not only to protect everybody involved in the process, but also so that you can tell the court, a year, two years down the road what the initial legal hold request was. It's better to have the hold in writing and, preferably, acknowledged in some sort of recordable form."

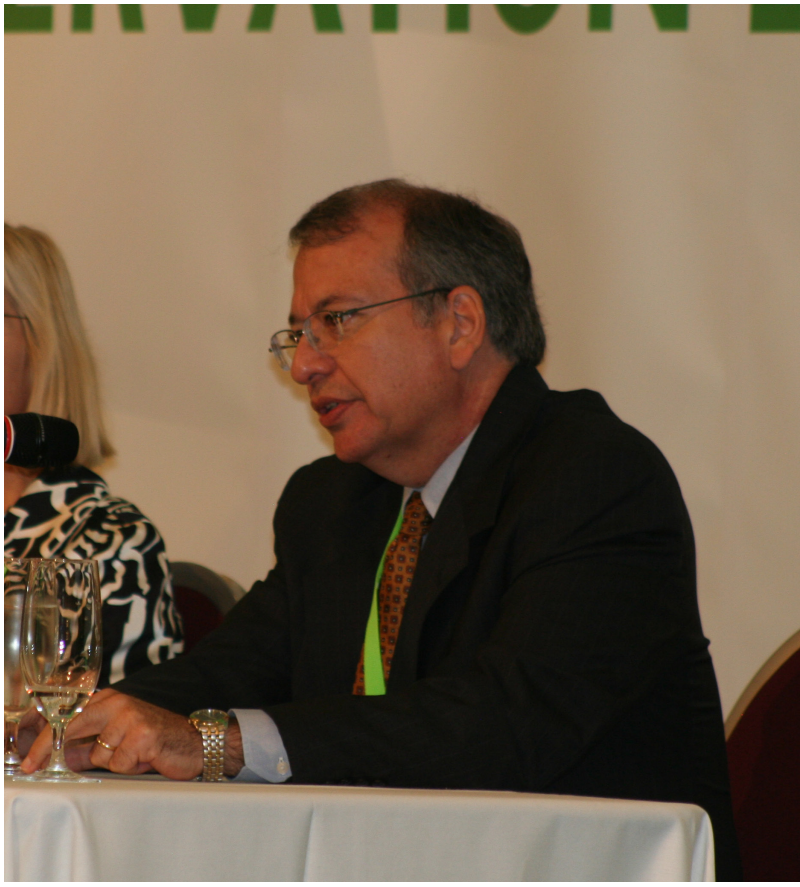
"Size of the company shouldn't matter," Hon. Waxse said. "It's just so much simpler to make sure you've got communications that document what you are telling them to do and that you can justify the process."

Best practices for e-discovery

The session was wide-ranging and lively, and at its close, panelists shared a few "best practices for e-discovery" that they fervently hoped the legal profession would follow.

Hon. Hedges offered these nuggets: "I have three litigation rules: Number one, don't guess two years ahead what the court may think of your practices today. Whatever you do today is not going to be judged for two years, at least. Number two, if you make a mistake, confess, because the cover-up is always worse than the original issue. It always happens. Rule number three, and perhaps the most important, don't anger the judge."

Hon. Hedges also endorsed three e-discovery guidelines California embraces: "Number one, if you're dealing with e-discovery, you should learn what you need to learn. Two, associate with someone who understands what's going on with e-discovery. Three, if you can't do one and two, you decline the representation."



Hon. Waxse's top "best practice" echoed the California guidelines. "I think the clearest best practice is competent representation. You can't come into court, like I've had attorneys do, and say, 'Well Judge, I'm going to try this even though I don't understand all this e-discovery stuff. So you'll have to let somebody else tell you that.' You know, that is incompetent representation. If you don't understand it, let somebody who understands it make the presentation."

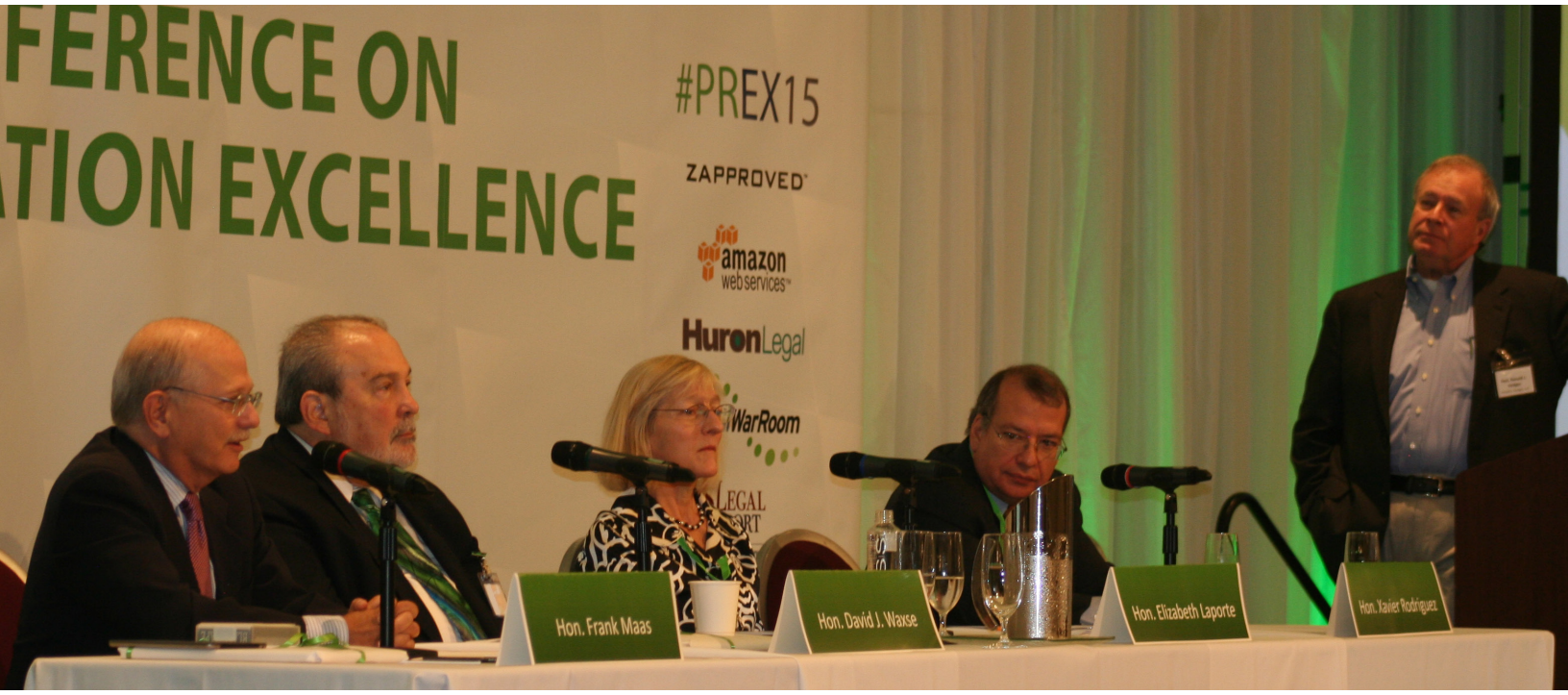
Hon. Maas spoke in favor of substantive meetings early on between the parties to honestly share what they need and what they possess. "I think an enormous amount of money could be saved if people spent a little time at the beginning analyzing what their claims and defenses truly require by way of proof," he said.

Hon. Waxse agreed.

"Once you've figured out what things look like on your side, talk to the other side and see if you can't get an agreement about that. Because it is so ridiculous to have discovery disputes over some fact that's not in dispute in the case."

Tiered discovery was championed by both Hon. Laporte and Hon. Rodriguez.

"I think an underutilized best practice is tiering discovery," Hon. Rodriguez said. "Let's start off with an employment case. Why are we going off to corporate headquarters in Atlanta? Are we sure that the data that we're going to need isn't just cited locally in whatever town we're in for this dispute? Let's take a tiered approach and start off first with what's here locally. Who are the initial set of key players that we want to take a look at who may be key custodians? Then once you've exhausted those efforts, if you think you need more discovery, you come back to us and explain where you're at, and we broaden from there."



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Conclusion

PREX15, The Conference on Preservation Excellence, provided a forum to learn and discuss topics that are affecting corporate legal departments today. As data grows in volume and fragments into new devices and repositories, such as mobile phones, tablets, the myriad cloud repositories, and IoT devices, preservation and litigation response are becoming more challenging. How to get access to data that is dispersed across these repositories and devices that weave their way in and out of corporate control and that have not all been designed to release the data, is an interesting challenge that legal departments will face more and more in the future as these data endpoints become more relevant. This expansion of the data universe and the shifting technology landscape presents corporate legal teams with real challenges that demand resourceful, new approaches and innovative processes moving forward.

Additionally we learned how the new law department is running their department as a business complete with ongoing measurement and incremental process improvement to focus on cost control. While much of this effort started with negotiation with outside law firms and investing in software to have visibility on billing and matter management, it is now expanding to automation of the process to improve the defensibility, improve the efficiency, and improve the overall communication with employees regarding their role and responsibilities in the duty to preserve.

Finally, we learned that focusing on preservation proactively as part of a corporation's litigation readiness initiative helps avoid problems downstream and makes available a wide array of options for more cost effective litigation response such as targeted and tiered collections. Through building a culture of compliance, employees understand the duty to preserve and become a partner to aid in the identification of potential responsive data.

We hope this volume of *Legal Hold and Data Preservation 2016* gave you a view of the insights shared at the conference and provides food for thought about how to improve your practices within your organization.

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