



# The Business of Discovery: Producing Results While Controlling Costs and Mitigating Risk

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ROBERTO SCALESE: Good afternoon. The Association of Corporate Counsel and SmartPros Legal and Ethics welcome you to today's webcast, "The Business of Discovery: Producing Results While Controlling Costs and Mitigating Risks."

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Our presentation today will be moderated by David Munn, General Counsel at Pramata. David will introduce today's topic and our speakers. David, take it away.

DAVID MUNN: Thank you, Roberto, and thanks to everyone attending. I'd like to welcome you to the Association of Corporate Counsel Law Department Management Committee webcast entitled "The Business of Discovery: Producing Results While Controlling Costs and Mitigating Risk."

My name is David Munn and I'm the moderator for today's presentation. I also serve as the chair of the webcast subcommittee of the Law Department Management Committee of ACC.

Our first presenter today is Nancy Jessen. Nancy is the managing director in the legal business consulting practice of Huron Consulting Group. Huron is also the 2009 sponsor of the ACC Law Department Management Committee. Ms. Jessen is based in Huron's Washington, D.C. office. She has more than 20 years experience working with legal organizations on a variety of strategy and organizational issues. Her focus has included the areas of organizational structure, cost containment, outside counsel management, process improvement and strategic technology utilization. And now let me turn the presentation over to Ms. Jessen, who will introduce the other panelists for today's presentation.

NANCY JESSEN: David, thank you very much for that introduction. I do feel like, having been in this business for a very long time, this topic is one that has been evolving

over the last several years, and I think it is very timely for many corporate law departments, and I hope that you'll find this a very productive learning environment.

So, in today's session we are going to go through our speakers. I will introduce them to you and then also, one of our speakers happens to be from State Farm, and, to provide you context for his comments, he'll give you a little bit of an overview of State Farm. We will then get into the meat of the presentation [and] really focus on the business of discovery. And that term, I think, is something that has really evolved recently; thinking about discovery not as something that you must respond to, but looking at the variety of options and how we can try to manage that discovery-related expense to get the best results at the lowest cost. So, we will be going through issues regarding discovery compliance: Facing issues regarding the expectations of the court, challenges that we're facing in discovery—really focus on the electronic issues and the global nature of many companies, as well as [asking], “What are some approaches?” What are some tried and true opportunities that we have to try to manage the cost problem related to discovery?

So, with me today, I do have Tim Crouthamel from State Farm. He is with the corporate law group and is part of the litigation support—he heads the litigation support group. He has had that role since 1999, so we can see that State Farm has taken discovery very seriously for quite some time. He has started his history actually, though, with State Farm much earlier, starting back in 1985, working in the claims group, and worked his way through as a claims superintendent and then divisional claims superintendent. When he moved to the corporate group in 1994, he was a founding member of the law department's Expert Contractual Litigation Group. He has been in his present position of Litigation Support Manager since 1999, and in that role he is responsible for all e-discovery related counseling at State Farm. He's also a member of the Sedona Conference and the Corporate Electronic Discovery Forum.

Now, the other speaker is one of my colleagues here at Huron Consulting Group. Chuck is the managing director in our Legal Consulting practice focusing on both discovery and records management-type of consulting, and really helping clients understand the connection between those two disciplines. Chuck helps his clients with management of electronic information and really providing proactive strategic and policy guidance on how to manage information and lower your litigation cost. Chuck is a charter member of the working group one of the Sedona Conference and has been a long time participant in the conference. He speaks frequently on a number of e-discovery—and also alternative dispute resolution—issues. So, with that, I'm going to now turn it over to Tim to provide us with an overview of State Farm.

**TIM CROUTHAMEL:** Thanks, Nancy. Most people are probably familiar with State Farm, and I'm going to talk about more about what the litigation and discovery challenges that we have here and that we've addressed over the years. [At] State Farm, really the challenge is big numbers. We have, as you see there, a lot of policies and a lot of lawsuits at any given time, and those lawsuits are spread out over all 50 states, and we have hundreds of outside counsel that represent us. So, when we're trying to get control over our discovery costs and the risk, we have some unique problems that we have to try

to solve. And today, later on in the presentation, we're going to talk about some of the ways that we've addressed those issues, and hopefully you can learn a bit about maybe some of your challenges through what we've gone through.

With that, I'll turn it over to Chuck to talk about a general overview about discovery.

CHUCK RAGAN: Thank you, Tim. On this slide, we have lots of information, and I just want to highlight a few points on it. First, I would posit that our collective experience with electronic discovery in this young century is sort of like Gaul; it's been divided into three parts. The first part, prior to 2002, e-discovery—outside of some of the notorious product liability cases involving tobacco or weight loss drugs, or cars—was largely unknown. Discovery was substantially confined to the center of this graphic: The hard copy processing. Then, between about 2002 and 2006, we worried about preservation, the left-hand side—Nancy, if you could just queue that next animation—of the slide, worrying about not having saved potentially relevant information, thanks to the emerging case law that is now famous.

The reason e-discovery was nascent until that time was the rules committee had decided in 2000 that there was no need to change the rules of civil procedure. There were some cases [issued] that were giving corporate counsel significant heartburn, including the Wal-Mart case in the Southern District in New York, the Phen-Phen case, and the Ford Motor case that was reversed in the Eleventh Circuit. 2002 also marked the beginning of that work group, one that Nancy has referred to and that Tim and I have been participating in.

The third part of Gaul, if you will, began with the advent of the new rules in 2006, and since then, we've worried about the extreme cost of dealing with the right-hand side of the diagram. And what we learned in this is that the processes surrounding e-discovery—the different little Chiclets or rectangles on the diagram—are far more layered, they're far more complex, than what was necessary for an old-fashioned hard-paper discovery, which has led to the need to adjust attitudes, techniques and strategies for dealing with discovery.

And this leads us to our first opportunity to check in with you as to your experiences. Nancy?

NANCY JESSEN: Chuck, thank you. With that introduction of e-discovery and the evolution of time, we head back to extend a couple of questions to the audience and ask for your experience. Roberto, can you please pose the first question?

And so we are hoping to find out from the audience, "Have you been asked to cut discovery costs in 2009?" In working with many corporate law departments, we are seeing this trend over and over again, either part of a comprehensive cost-cutting program for the entire corporation, specific to the law department, or specific within discovery. And Roberto, once you have those tabulated, can you share with us the results?

ROBERTO SCALESE: OK, Nancy. We have from our audience members 67 % say no, they have not been asked to cut discovery costs in 2009, while 33 % say yes they have.

NANCY JESSEN: And I think that's a trend that does show we are having more of an emphasis on discovery, but that often corporations continue to think about discovery as something you must do as opposed to something you can proactively manage: How do we spend those dollars? How do we ensure that we have compliance on our preservation requirements? How do we ensure that we are identifying and producing the relevant documents? But can we do that at a lower cost? And that's some of the questions that we'll be addressing within this session.

Roberto, can you please go ahead and pose the second question? And for those of you that are being asked to cut discovery costs, what kind of savings target do you have? And we have five different ranges for you there. And Roberto, when it's available, if you can share with us the results?

ROBERTO SCALESE: OK, and it looks like everyone who does have some cost savings to do need to save over 20 %.

NANCY JESSEN: Now that does not surprise me. When companies are looking for cost savings, they're looking for dramatic cost savings. And given the volume of dollars that are being spent on discovery, through truly critical management of those savings, we have seen many clients receive more than 20% savings, and for particular types of discovery related costs, we have seen upwards of 60% savings

And then one last polling question, Roberto. We're hoping to learn from the audience: Is this target for 2009 higher than the target for 2008? And once again, once those polling results are available, if you can share those with us?

ROBERTO SCALESE: OK Nancy, it looks like, of those people who had targets, it's actually split 50-50.

NANCY JESSEN: Interesting. You know as a lot of companies have started addressing discovery, like State Farm early in [1999], others [are] taking a more aggressive stance more recently. There does seem to be a critical mass that you hit in terms of the savings and that we're seeing then a more constant savings expectations for those companies that have been pursuing it for quite some time. For those that are newer into it, there's an expectation of a higher savings initially. And with the conclusion of this round of polling questions, we are going to turn it back to Chuck to talk through us with some of the corporate discovery trends.

CHUCK RAGAN: Thank you Nancy. On this slide, I just want to share with the audience; it's also another study that was done last year by inside counsel in the Lichtenstein Group in cooperation with Huron. And this slide represents the results of two questions in that survey. And the sample was 50 of the Fortune 500 companies.

The results show (on the left-hand side) that 46% of the companies seek to establish vendor relationships and expect their outside law firms to work with them, 21% leave that up to the law firms, and 33% have their own shop.

On the right hand side, only 35% of the responding companies had a discovery manager in place. The question that presents itself is whether this is truly realistic and representative of experience across the Fortune 500, or perhaps the result of the lower number Fortune companies dominating the responses. In my personal experience, I think and have found that more than 100 full—

NANCY JESSEN: Chuck, I think that we may have lost you.

CHUCK RAGAN: Can you hear me?

NANCY JESSEN: Chuck, I think we have lost your audio for just a moment there.

CHUCK RAGAN: OK, can you hear me now?

NANCY JESSEN: Shall we move on to the next slide? Yes, we can.

CHUCK RAGAN: OK. What I was suggesting was this might not be truly representative of all companies' experience, and that smaller companies might be—as you were suggesting, Nancy—be at the beginning of the learning curve.

On the next slide, what I'd like to talk about is it is clear that law departments are focusing, in light of the case law developments and the 2006 Rule amendments, on both reducing risk and creating sustainable long-term cost savings by return on investment. There is, however, no one-button solution and in the foreseeable future, there will not be a one-button solution, instead it will require a combination of people, processes, and technology.

The early wisdom was that the keys to discovery compliant were (1), communication and (2), the applying processes. More recently, because of the consistency of the right-hand side of the discovery processes, we find a growing trend towards quality control and assurance because of the many, many steps in those processes. Could we go to the next slide, Nancy?

Thank you. This trend is existent, or fact-driven, by—

NANCY JESSEN: Chuck, we seem to be having some problem with your audio. At this point we may want to go ahead and move on to the next polling question and then we can come back and perhaps your audio will have cleared itself.

Roberto, can you please go ahead and post our fourth polling question? And this question relates to: Who has the primary responsibility for deciding discovery vendors on your litigation matters? And we have certainly seen historically where corporate law

departments truly relied upon their law firms to act almost as a general contractor. They were the ones that were going to hire the painter and the plumber and the electrician. But, as we showed in the survey results previously, many law departments are now moving to create their own shop and move these kind of decisions in house.

And so Roberto, can you share with us the polling results?

ROBERTO SCALESE: I can, Nancy. We have 100% of respondents saying that they rely on outside counsel.

NANCY JESSEN: Very interesting. And this may be, as this audience looks through this presentation and takes away some of the learning from State Farm and experiences from Huron, may want to consider: Are there opportunities within their own department to take control over some of those decisions for both consistency and development of preferred-provider relationships that enable you to drive cost savings?

In our next question, we're asking the question—the next polling question Roberto—If outside counsel is deciding those discovery vendors, do you have a preferred vendor for counsel to use? In other words, has the law department determined who that outside counsel should be using or not?

And Roberto, when we have the results, if you can share that with us?

ROBERTO SCALESE: OK. All of our respondents say, no, they do not have a program for preferred vendors.

NANCY JESSEN: We have seen that as an evolving trend—and one may even say as a best practice—for departments with a significant discovery spend who are looking to drive those cost savings. As we move to the next slide, Tim from State Farm is going to talk with us about some of the challenges regarding traditional pricing models.

TIM CROUTHAMEL: And in the next series of slides, we're going to look at various numbers of problems with the discovery process, from cost to dealing with outside counsel to other issues. And the first one, of course, kind of the bottom line problem, is cost and the traditional pricing model.

When you look at all the things that make up the pricing model, if you're starting from scratch it's kind of hard to get your hands around everything and kind of eat this whole elephant at one time. But traditionally, each of the stages here have some cost associated with them. And really, it's thought of that costs are inflated; the more that you are putting into the top of that funnel—the more documents that you're putting into the top of that funnel—the more that you have to review, and the higher the costs are that you have in that whole process.

Legal holds and preservations are influenced by how well a company can manage its information. But I think we need to also recognize that there's other things, other than

cost, that you need to be concerned with. You know, the efficiency of your collection and how much it costs you can be affected by how well you know the relevant containers within each one of those processes, and how efficiently you can extract information. So, it's more than just cost, it's: How do you deal with these, and, as we would say, do you have a repeatable process to deal with these that might make it more efficient?

And I think that really leads into the next problem that we have, and that's the problem of qualified personnel. If you could go to the next slide? You know, if you are exporting this process out to your law firms, and you're using a variety of law firms, you may have a problem with getting qualified personnel that not only know the project management side, but also know you, as a client, and know your documents. Strong project management skills aren't necessarily a requirement for all paralegals—although a lot of them have excellent project management skills—but you need a project management skill at the project level and maybe at a higher level, like a discovery manager/coordinator kind of level. But you're looking for people that have project management skills and legal skills as well, so that can be a difficult thing to do.

So, one of the things that we do at State Farm, for example, is we have dedicated personnel that deal with a lot of our documents, and we have our own in-house organization, largely because we we're more familiar with our own documents and where they come from and what they are than some vendor that we would hire to do that. But you really need a kind of hybrid paralegal skill to do that completely from start to finish. You need some technical experience as well as paralegal skills. So, getting dedicated personnel might be a way to answer that problem.

The other problem that we deal with is there's various quality and tasks, as we say here, for outside counsel. Each outside law firm may have a slightly different approach to the discovery process than another one. So, you may see inconsistencies in the way that they handle it. You may see different costs, different ways to measure cost. And really across a number of different matters like we talked about with State Farm—across 150,000 different matters, for example, which is extreme I realize—you might see varied, disparate and different ways to deal with costs and litigation. Even if you're controlling costs with a single law firm, you might not have any way to compare it across your entire portfolio of cases. So, that can give you challenges in how you deal with it.

So, you need to ask yourself: What's your current system and how do you compare one law firm to another law firm, if you don't have each one of them in some kind of uniform platform to measure them?

NANCY JESSEN: Tim, thank you. Chuck, have you been able to rejoin us with your audio?

CHUCK RAGAN: I sure hope so. Can you hear me?

NANCY JESSEN: Yes, we can, thank you.

CHUCK RAGAN: Nancy, could I ask you to go back to the judicial expectations slide, where I think I was not available? Because I think that will tie to—before that.

NANCY JESSEN: I'm trying to get us there, Chuck.

CHUCK RAGAN: There we go, right before the poll. I'm sorry.

NANCY JESSEN: OK, here we go.

CHUCK RAGAN: What I was trying to say here—and I apologize to the audience—is that judicial expectations have evolved over this very short period, beginning shortly after the Sedona Principles were published. Courts were urging reasonableness and good faith. As the 2006 amendments came forward, they meant it as good faith discussions between counsel in connection with the Rule 26(f) Conference, and their drafters were clearly advocating transparency as between the requesting and the producing party.

Since mid-2008, there has also been a move in some of the case law urging what is called “cooperation.” And I want to make two points here. One, as the slide indicates, counsel can still zealously represent their parties and cooperation does not require capitulation, but it does require that counsel be prepared, and prepared to communicate fairly and reasonably. [It's] not asking for the sublime or giving hard-boiled answers; those would be, in the eyes of these cases that have been published in the last year or so, those would be considered violations of Rule 26(g), and the responses might be stricken, and production might be ordered.

Now, that having been said, what I think this argues for is some of the techniques to manage cost. If we can slide forward, Nancy, to the slide you had queued up a second ago.

NANCY JESSEN: It's catching up here. There we go.

CHUCK RAGAN: There we go. Thank you very much. So, what we'd like to talk about is some of the techniques that inside counsel have to manage cost. And as I said earlier—and I hope it was heard—for the foreseeable future, there's still going to be a requirement for a combination of people, processes and technologies. But some of the techniques that we're going to be talking about for the balance of the program will allow counsel to apply basically a standard or a similar process with what Tim referred to as “repeatability.”

Because the process talks about what is done, not why things are done, that can be shared with opposing counsel through visibility, through what is called transparency, and there will be internal accountability among the client or the corporation. That will, in fact, reduce cost. It will also reduce the prospect for some difficult inter-forum differences. In other words, as Tim was saying, there was some opposing counsel that might have a different approach; they might make representations believed by them to be fully good faith, but they might be inconsistent with what another outside counsel in another forum

is saying. That can cause great embarrassment and difficulty in motion practice and obviously cost of motion practice.

So, what's the first technique? If we go to the next slide, one thing we're seeing a lot of clients doing is preparing a litigation response plan, or a framework for dealing with all of e-discovery. And this addresses both the macro and the micro.

At the macro level, companies are trying to get a handle on staffing [and] on particular issues that might be costly if not defended against properly. And at the micro level, [they are] identifying the information stores or containers that are most likely to be at issue in litigation. Not necessarily all stores, but the most likely ones. That goes beyond e-mail, includes collaborative spaces, includes databases, the ones that companies rely upon for their important business information. And that might be a data map under the identification chielet in this slide.

Significant pro-active planning for discovery can put yourself on a footing that leads to long-term cost reduction. Tim, do you want to share some of your experiences with what State Farm has been doing?

TIM CROUTHAMEL: Sure. You know, I'd like to say that we woke up one morning in the late 90's and came across all the things that we're doing and just rolled it out all at one time, but unfortunately for us it was a sometimes painful process of going through litigation and seeing where the other side was pointing out our weaknesses, and realizing that we had to do something.

Basically, because State Farm is an insurance company and a lot of the focus of our lawsuits are suits against State Farm for say, bad faith, the bad faith explosion in the late 90's really led us to do a lot of the things that we do today.

So, focusing on efficiency: You know, some of the first things that we did, as I talked about in the earlier slide, was put aside dedicated staff to coordinate the handling of discovery, [and] seeking particularly enterprise-specific information. Not information that might be routine to a particular claim or to a particular case, but information that was truly the enterprise's training procedures, guidelines, things like that.

The other thing we did about at the same time was start consolidating the supervision of lawsuits that had enterprise implications. So, in the past we had, like I said, a disparate amount, spread all across the country with different law firms handling cases for us in different states and some of them may have had good databases to go back to and refer to on how they responded to particular questions and requests for documents. But overall, it was a patchwork kind of framework, and we found that the inconsistencies in our responses really got us into a lot of trouble when we were talking about enterprise litigation.

So, we began centralizing the supervision of these cases, and the collection and databases began being controlled by us here at corporate, so that we could get a better handle on

how we were responding nationwide on some of these higher-risk kind of cases. And we also did a little bit of outside counsel convergence on the more risky enterprise, “bet the enterprise” kind of cases.

You know, the other thing that we started down a road on soon after that was this transparency issue, and Chuck touched on it a little bit. You know, we began to realize that when we were getting discovery on discovery, we had to have a way that we could show how we got to where we got to in a certain response or a certain document production. So, we have a kind of internal subpoena process that we go through that the people that are responding to our requests—even if it is a request that we’ve seen a hundred times before—we still have somebody signing off on that response, so that if we have to go back and figure out how we responded to it, we have a trail, kind of an evidentiary trail, to go back to and figure out how we did it.

And we tracked those through a centralized document collection archive here. So, all our productions, over time, we have saved and we have a history of. And in going along with that: Repeatability. I mean, so we get lots and lots of the same questions every time. We have to make sure that, not just for our discovery compliance, but really for efficiency, do we respond the same way every time? Do we have a clear method? Are we reusing work product that we have used in previous responses? So, we have a master library of, kind of, our top hits, so to speak, in litigation that we go to, where we don’t necessarily have to collect the paper again, but we can go back and use that to populate our cases when we get a common kind of request for production or responses.

And we also have a whole group—and this kind of goes to the dedicated personnel issue we talked about earlier—we have a whole group of paralegals that are dedicated to doing nothing but working with the various departments here at State Farm to make sure that we’re up to date on the latest kind of procedures, manuals, guides, things like that, that we’re going to be producing. And over time we found that we could internalize our imaging and coding process here and be more efficient and more cost-effective than using a vendor that’s not familiar with our documents and doesn’t work with them every day.

Being an enterprise the size we are, we needed some kind of platform that was very scalable. And we have a scalable kind of multi-case platform where instead of outside counsel choosing what vendor they’re going to use, we basically provide the vendor to them. We provide the documents to them in a browser-based solution where they look at the folder and do the review that way. But we capture all the information about that review in this multi-case platform so that we can go into the measurability point; we can measure across all our cases in their various states, how people are doing, and how fast they’re reviewing documents. So, we’re probably an extreme example with the volume we have, but I hope some of these points you could take away with the clients you represent or the companies you work for. Chuck, what about Day One letters?

**CHUCK RAGAN:** Thanks, Tim. Day One letters are something that companies are adopting with a view that the best defense is to seize the offense and get out ahead of the

e-discovery curve in litigation. What do I mean by this? These companies are not waiting for the opponent to make a demand or to state unreasonable positions in the meet-and-confer. Rather, they are issuing Day One letters, in which they state their basic positions and their reasons for them in writing at a very early stage. This helps build a trail of substantive, good faith communications with opposing parties that courts generally recognize and appreciate as positive participation.

The Day One letter should include informed and reasoned positions on what will be disclosed, on what will be put through the discovery processes. This could include identification of containers or stores of information which the client believes in good faith are not reasonably accessible and will not be produced without a showing of specific good cause. It should address the kind of forms or formats that the company is willing to produce information in. And it may address some exotica, such as voice-mail or instant messaging, which, at least until very recently, were not major subjects for e-discovery, but are clearly within the definition.

Obviously, the preparation of a Day One letter requires advanced knowledge of key corporate data repositories; records and information management programs can assist. But when done properly, and with the appropriate advance work, it helps foster trust and establish the compliance that companies wish to have the courts see.

On the next slide, we talk about review and production cost management. And this really begins shortly after collection in the e-discovery process. If you hearken back to the early slide that I talked about, what we saw there was that review and processing costs can constitute fully 70% of discovery costs. Traditionally, when one wanted to attack costs, one tried to identify the outliers, which are the main cost contributors, and try to achieve efficiencies and savings there.

The problem with e-discovery is that, at least to date, not many companies are tracking the individual metrics on processing, hosting, review and production, especially if those responsibilities are left with outside counsel. Rather, what many companies see is simply a disbursement cost to vendor for these subjects in gross, without much detail. And because of the complexity of these processes, and the way different vendors have priced them until very recently, it's very hard to compare apples to apples. Instead, what you wind up with generally is something closer to fruit salad. Some companies, including Huron, are now providing unitary price solutions, so that situation may become easier for clients in the near term. Tim?

TIM CROUTHAMEL: Thanks, Chuck. One of the solutions that I referenced earlier was litigation repositories. When I go to conferences and talk to people from other companies, I see a lot of effort on the cost component. Controlling costs, by, for example, maybe getting some kind of competitive bidding process, and you can do a lot of work bidding out various portions of your work. But the problem is that if you don't have a process to see across your cases and across different matters you may be missing out on comparing what one firm is doing versus another firm, because maybe they're handling more document-intensive cases than another vendor is.

So, like I referenced earlier, we put something in place where we deliver a multi-case platform where we have a responsive document that potentially feeds many different matters. We leverage our sunk costs, which is, you know, it's a substantial investment to go with a multi-case kind of platform, but you leverage that cost, and then you reuse this data over many, many different cases. And so, it's hard for each law firm that holds discovery data for you in each case to do this. And it also increases the control that the corporation would have over each individual matter. And if the data is no longer needed for litigation purposes, then you file your own records and information management program. But we find it useful to reuse this data, and over time we have a lot of litigation that has tails on it that go back 10 years or so, which is not unusual, and we often find that we have use for older cases and documents contained in there, because so many of the cases we see are repeatable kind of cases.

The next solution is kind of, as I referenced it, building strategic relationships. As I am kind of inferring here, I think it's a good idea to stay away from one-offs. You can do a good job of managing the cost of that one-off, but are you really capturing the work product and comparing what that firm did against another matter that comes in down the road that's similar to it? Continually test your new data types in a provider environment. Don't wait to find out if something new is going to cause a stop in your process. You know, if it's a new kind of format that your vendor isn't dealing with, what is the capacity of your preferred provider? Can the vendor handle the volume or the geographic scalability that you need to be able to manage your litigation? How do they provide it to your various law firms or cases in different states? And can you collaborate with your vendor? I mean, really, actually the biggest reason that we picked our current vendor was their ability to customize and collaborate with us to make something that fit our work flow. So, I think collaborating with your vendor is very important. And do you work with a dedicated project manager? Or at least a project manager and staff that you have a relationship with that you can talk through ideas and problem-solve with them? Because you're going to come across things that you haven't dealt with before, [and] maybe, because they have a wider array of clients, it's something that they are experienced with. And can you identify quality and price points that are to your benefit in competing with vendors and trying to raise the standards of the preferred provider program that you use?

Chuck, what about ESI [electronically stored information] data maps?

CHUCK RAGAN: Thanks, Tim. Before we sum up, I'd like to touch on two additional points. One [is] data maps, and the other one records and information management programs.

What is a data map? I talked about it briefly before. It's getting a handle over your key containers and their subject matter experts. This is something that, in my mind, virtually every company that has a risk of having significant litigation, even if it is not repetitive litigation, should have in hand. And the reason for that is it's far better to prepare one of these maps in a non-fire-drill situation. If you wait until the litigation hits, you have to do everything yesterday, and you may talk with some people that appear knowledgeable, but

in fact they may not be the true subject matter experts within the organization. And subject matter experts within technology infrastructures change—rotate—and you have to make sure you have the most current information. The failure to do that led to some of those early disaster cases that we alluded to earlier in the program.

The second reason why a data map is important is: Only by understanding the different stores, their different retention policies, their different mechanisms for preservation and disposition, if you know that information you can avoid an accidental loss of information based upon an assumption that it would still be there. This kind of effort can pay huge dividends in litigation. It does provide a basis for that Day One letter we talked about earlier. It also substantially informs the Rule 26(f) conference process. So, you'll know more, but that doesn't mean you'll necessarily give up more. It gives you a baseline for those discussions.

The next slide we'd like to talk about is having a mature records and information management program. And here I'd like to emphasize two things. The first is that on the basic EDRM (Electronic Discovery Reference Model) graphic, that will be familiar to many of you, begins with records retention or management and it ends with presentation. But at the presentation part of the slide, there's a loop back to the information management program. And that's important, because not all organizations are situated as Tim's company is. Many organizations have substantial pieces of litigation that are not repeated, and at the end of the day it's important to cycle the information that's collected in that litigation back to its normal life cycle management. The failure to do that can inadvertently lead to surprise costs in future litigation, because that collection may be a repository which itself is subject to all of the electronic discovery processes.

The second thing is the Supreme Court has made clear that, absent unusual circumstances such as a legal hold triggering event, organizations can rely on retention programs established in good faith to dispose of information that has no business value or legal requirement to be kept. And lastly on this subject, I would like to emphasize that in the recent years a lot of focus on e-discovery has been on e-mail, but that is only the tip of the iceberg of what information exists in most corporate settings. And in fact, it's probably not where a lot of critical business information resides.

There is an effort by companies to cut costs by moving e-mail out of the distributed storage model—and by that I mean with the server and distributed work stations or laptops where they're may be PSPs, or, if Lotus Notes is used, NSF files, or archives that are resident on the local workstation—there is an effort to move them, either into an archive, or into what's referred to as the cloud, which are offsite managed data centers by various vendors. The risk that those transpose is that companies that do not have mature records and information management programs in place, and do not provide places for their users to put business critical information that may be important to hold on to for five or 10 years, without such alternative repositories, things will stay in the archives forever, and those archives will be much more readily searchable than historic backup tapes have been. So, a mature records and information management program is an investment in the future that can pay huge dividends to the organization in the short term, in terms of

different users being able to access information collaboratively, but also in the longer term, in terms of reducing or eliminating future e-discovery costs. Tim?

TIM CROUTHAMEL: So, what happens as a result of taking control of the discovery process? One thing that I think we need to mention, and we have been focusing a lot on costs, but really, from at least State Farm's perspective, we got in this business to really reduce our risk first. So, I think there's a lot of risk reduction things that happen once you get control of this process from the left-hand side of the EDRM model—the information management side—all the way through presentation. But I think to be able to do that, and to be able to have your companies make the investment that's needed, there's first got to be a recognition that this is a business process, and there are costs associated with it. Unfortunately for us, in a lot of circumstances, the plaintiffs kind of pointed that out to us as we were going through various phases of litigation and investigations. And you know, once you go through a process where you are preserving hard drives or doing a lot of forensic examinations because you may have not got all your document stores in order, the costs associated with those things really make it easy for you to get the top-down commitment you need from management and make them recognize that this is a business process and there is a lot of cost associated with it if you don't get it right.

And you also need to have clear commitment with your inside personnel on how you're working it, and also with your outside counsel and the various vendors that you use as we talked about earlier with strategic relationships and really think through, with your litigation, how it really should work, and what is the most efficient way for it to work. In that process, really, training has to be an ongoing process because, at least with us, we have different firms and different lawyers with those firms rolling on and off different cases, and with the turnover of associates out there, you know, many of them are new to the process. So, we have to have personnel, dedicated personnel, and also some kind of process to train all the parties on the technology that we're using. Same would go with any kind of technology that you have.

And really, managing outside counsel spend on a discovery process is, in my opinion, hard to do unless you have some way of comparing them across different matters. You can have a lot of control on the little segregated parts of each individual piece of litigation, but until you start having something where you can truly start measuring them across different litigation matters, you really aren't comparing them as well as you could.

And, of course, State Farm, I guess, is a good example of insourcing the discovery function. We have a large amount of personnel dedicated to this because of the litigation challenges that we have. We've gone all the way from, we have our own—of course we have an information management program that we work closely with—all the way through our own imaging and coding area, here. So, we have really bought in to the insourcing of the discovery function to get us more efficiency, and also to lower some of our costs. And, as I just stated, internal staffing of appropriate resources where it fits. Now, not all of what we do would be a takeaway from you, but maybe little pieces of that resonate with you and you can take that away. Chuck, what about some corporate client discovery trends? Maybe this is Nancy.

NANCY JESSEN: Actually, Tim, it is, and we're going to wrap up with this last slide and talk about some of these trends. And hopefully, many of you are in the happy situation not to have the discovery portfolio to the same extent and volume that Tim deals with. So, many of these things we need to think about: How can they translate from an organization with a very large litigation portfolio to maybe organizations that don't have the repeatability, or don't have the volume? And those are some of the things we want to hit on this slide as well.

So, the first step is: Moving away from that decentralized discovery process. As I mentioned before, historically, it really was allowing the outside counsel to act as general contractor and make their own decisions. And I will tell you that even law firms that purport to be e-discovery shops, and it seems like they have their house in order, we've done various assessments and worked with those firms, and continually find that individual partners and individual associates make their own decisions. So, even though you may be consolidating your litigation work to a singular firm, that does not ensure it's being handled in a singular fashion. So, that is step one.

Step two is: Increasing that in-house oversight of the outside counsel and other service providers, and in doing that, truly thinking about consistent department-wide processes. And I think consistent is sometimes a real challenge for law departments. How do we get everybody marching to the same drum and acting in the same way and making consistent decisions on how discovery is going to be handled? I think Tim hit on some very important points of that top-down commitment and the ongoing measurability. Taking those two things in combination can help you get that consistency from internal processes.

And then, if your discovery volume does warrant it, really looking at dedicated discovery teams. Let's use that to drive the consistency and drive down costs. We can apply those same processes that apply the same approach to whether it's collecting—or first preserving documents and then collecting—reproducing and reviewing those documents by having that dedicated team.

And the next couple [of points] really get into some management issues and thinking about: What are outside counsel's guidelines? Many companies still struggle with broad guidelines for their outside counsel; struggle in terms of documenting those, sharing them with outside counsel when they're retained on a specific matter, and then ensuring compliance and ensuring that their in-house personnel, when reviewing invoices, are comparing them up against the guidelines and enforcing that compliance. So, it's a challenge generically, [and] even a more difficult challenge as we're coming towards applying that towards discovery. That is certainly one of the trends we see happening.

And as part of that, when we're looking at managing outside counsel's role through the use of guidelines, art of that is thinking through: What strategic use can we make of non-law firms? As opposed to always assuming it must be a lawyer to do certain tasks, I think we're finding—and a lot of the comments from Tim and Chuck pointed out areas—it's

not necessarily a legal issue, it's a process issue [or] it's a technology issue, and leveraging non-law firms who truly specialize in those areas to compliment the outside counsel can truly give you that consistency and reduce costs.

And we are seeing departments more and more looking at setting budgets and enforcing compliance with those budgets, and using it as a tool for discussion on case strategy, and looking at it from an economic analysis perspective on where are we making decisions around litigation? How are we going to manage discovery? When are we going to pursue discovery, or do once we really have budgeting processes in place recognize the eventual total cost, and perhaps make a different strategic decision on how we're going to handle and potentially resolve the case? So, we're really using those economic tools. So now, in addition to legal and process and technology, we're bringing in financial skills and capabilities to really think about our discovery. And all of that being in the wrapper of "integrated information management."

Historically, I think records management was its own unique kind of function within a corporation. Many people now think of record management as litigation readiness. And thinking through, if we have our records in shape, what kind of benefit do we have in terms of a more streamlined preservation, a more streamlined collection and perhaps even a reduction of both of those by applying appropriate record retention and record destruction procedures?

And with that we are going to conclude the formal piece of the presentation and open it up for a question and answer session.

DAVID MUNN: Thanks, Nancy that was a great presentation.

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While we're waiting for any questions to come in from the audience, let me ask one thing that I was curious about. Nancy, you actually answered a couple of my questions in the wrap up, so thank you for doing that. You made an analogy to hiring a general contractor to manage a construction project, and for those who maybe don't have enough litigation to justify developing this kind of expertise in-house—and you also mentioned that you don't see any law firms doing a really good job of developing the expertise, or at least applying it in this area—are there other resources where those of us who aren't doing this on a day-to-day basis could look to for essentially that general counsel function? And I guess feel free to put in a plug for Huron, or other general, they are doing a good job.

NANCY JESSEN: I do want to correct one statement. I did not say there aren't any firms out there doing a good job, there are many law firms that have really taken strides to change their own internal processes to have more consistency, as opposed to each partner making decisions on their own and they're creating their own litigation response teams within the law firm. So, there are certainly some that are very good at that.

And that's something I've seen [with] smaller companies, smaller law departments that don't have either the scale of litigation or the internal resources—either because of funding or because of just the lack of qualified people in this area, and it's very much of a developing area—they are going out to two sources. One may be a law firm, and say “You are our discovery counsel.” They may not be lead litigation. They may not be, or excuse me, your lead litigation law firm or your trial law firm, but they are managing all discovery for you, regardless of what other firms may be managing the litigation. So, that's one alternative.

And, you know, thanks for that opportunity to plug Huron. Certainly, our practice, including Chuck, really guide companies not only on operationally how to set this type of program up, but on specific cases themselves, helping companies manage the discovery [and] helping them manage it in a very consistent and cost-effective way across the entire life cycle, from the early records to the preservation, to the collection, to the review and then on through productions.

TIM CROUTHAMEL: I'd like to echo that. I mean, like I said earlier, we didn't wake up one morning and just figure out how to do this. Along the way, we've had a number of different consulting firms talk to us about how to set some of these different pieces up, like information management and the multi-case platform that we deal with today, so we certainly haven't done it by ourselves.

DAVID MUNN: OK, great. I think that's very helpful. I don't see any questions in from the audience. I guess I have one more thing. There was a slide talking about the Day One letters. And I am just wondering if we could get a sample of a couple of those to post on the Web site?

CHUCK RAGAN: I think that would require a client review and consent.

DAVID MUNN: Just talking about a general sort of a framework, it wouldn't have to identify any specific company.

CHUCK RAGAN: Let me get back to you about that.

DAVID MUNN: We can talk about that later.

NANCY JESSEN: We certainly can. As part of our sponsorship of the ACC Law Department Management Committee, we have them providing a number of templates and forms and information for the membership to use, so we can certainly look into that, David.

DAVID MUNN: OK, that would be great. Well, that concludes today's webcast, and I would like to thank our panelists for their time and the excellent presentations. I also wanted to thank Huron Consulting Group for sponsoring our webcast today, as well as being a great sponsor of our committee. The slides for today's presentation are posted on the ACC website.

I also would like to thank our audience for attending the webcast. If you have any additional questions that we didn't get to or anything that comes to mind after we wrap up here, feel free to e-mail any of the people on the panel, whose e-mail addresses are showing up on the screen now. And please don't forget to complete the evaluation at the end of this webcast.

And then, if you are not a member of the law department management committee, I invite you to join the committee. In the current economic environment this committee's work is especially relevant. We have our committee conference calls the second Wednesday of every month at 1 p.m. eastern time. And our next call will be on September 9, when we'll have Nancy again presenting along with UnitedLex and Upside Software, and they'll be doing a legal quick hit on contract management strategies, which I am sure will be an interesting presentation. You can also check the committee's home page on the ACC site for additional upcoming meetings and webcasts

And finally, we want to invite people to join us at the ACC's 2009 annual meeting, which is October 18–21 in Boston. It is the largest industry gathering of the year, and it features more than 100 CLE sessions and plenty of networking opportunities to satisfy your professional needs. And one of those networking opportunities will be a casual cocktail reception and buffet with a lot of department management committees sponsored by Huron, our committee sponsor. And that will be on Monday, October 19 at 7:30 p.m.. And for those of you who are interested in whatever big game is on that night, there will be TVs. You can come and watch the game and stay for the buffet, drinks and networking with your ACC peers. And there will also be a chance to win a door prize, and I am sure it'll be a fabulous prize. So to learn more and to register, visit [am.acc.com](http://am.acc.com) as well as the committee home page. Thank you for joining us today, and Roberto, would you please close out the program?

ROBERTO SCALESE: Sure can, David. On behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thanks again for listening to today's program.

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And with that, today's program is now concluded. Thank you all again for listening, and have a great day.