

ASSOCIATION OF CORPORATE COUNSEL

TITLE: Taking Control of eDiscovery: Strategic Considerations

DATE: December 3rd, 2008

PRESENTED BY: ACC Law Department Management Committee

SPONSORED BY: Iron Mountain

FACULTY: David Bayer, Vice President of Marketing & Alliance Development, Stratify, an Iron Mountain Company
Michael S. Simon, Technology Counsel, Stratify, an Iron Mountain Company

MODERATOR: David Baumann, CEO & General Counsel, TechNexus

Operator: Welcome to this ACC Webcast. David, please go ahead.

David Bowman: Thank you very much. Welcome to the Association of Corporate Counsel Law Department Management Committee Webcast entitled "Taking Control of eDiscovery – Strategic Considerations." My name is David Bowman and I'll be the Moderator for today's presentation. I'm the General Counsel for TechNexus LLC, a consulting company that provides integrated business, technical, and legal solutions focused on IT and business process outsourcing, social sourcing networks, electronic content management, eDiscovery, and information architecture. I also serve as the Secretary for two ACC committees, the Law Department Management Committee and the ACC IT Privacy in eCommerce Committee.

Our first presenter today is David Bayer. David is responsible for Marketing and Alliance Development at Stratify. Before joining Stratify, David was Chief Technology Officer at gForce Systems, an eLearning and knowledge exchange company, as well as the technical lead responsible for automating the Baker Library at Harvard Business School.

Our second presenter for today is Michael Simon Esquire. Michael is an attorney and a former member of practice support and IT at a major Chicago law firm. Michael was previously CTO of an Internet automated legal research firm. He's spent more than six – he has more than six years of experience as a practicing trial attorney in Chicago. Michael has authored numerous articles on eDiscovery as well, and presented at many seminars and conferences.

This Webcast is being presented through ACC's updated Webcast page. Attendees may pose questions to Mr. Bayer or Mr. Simon by using the chat function on your screen. Type in your questions and then press send. Your question will not appear on other attendees' screens, but will – but will be visible to the panelists and myself. If your question does not get answered during the presentation today, answers will be posted by ACC at a later date on the Web site. If a question occurs to you after the close of this presentation, you can send it to Mr. Bayer at dbayer@stratify.com or to Mr. Simon at msimon@stratify.com.

Please note that this Webcast is being recorded. The audio file for this Webcast will be available for replay on the ACC Web site about three hours after the end of the presentation. It will also be archived on the ACC Webcast for about one year. During the course of the Webcast, you will see a satisfaction survey on your screen. Please take a moment or two to respond to the survey. It is

a very useful tool for ACC to organize and present Webcasts that are interesting and informative to ACC members.

And now let me turn the presentation over to Mr. Bayer and Mr. Simon.

David Bayer: Good afternoon, everyone. As we begin, what we'd like to do before we get into the content of the presentation is to do an initial poll to get a sense of our participants. So, if you will please just take a few seconds to fill out this initial polling slide that would be great.

Well, thank you so much. This is David Bayer speaking and it looks like overwhelmingly we have an audience coming out of the Office of General Counsel together with participants from the compliance and ((inaudible)) support universe. The – together with Michael Simon today, we're going to cover three core areas in terms of electronic discovery from a strategic perspective. We will begin with looking at available analytical tools for early case assessment, then move on to a discussion of approaches to reducing the total cost of review during electronic discovery, and finally identify and examine some strategies that are involved for unified (manner) management.

So, moving on, I will invite Michael Simon to initiate our discussion by looking at some of the trends in the history of electronic discovery.

Michael Simon: Thank you, David. This is Mike Simon, and I wanted to start with some history here in terms of trends in electronic discovery. Now, we've been in this area of eDiscovery for a while now. It seems pretty new, but there has been some history here. We started in the 80s with the simple concept of scanning – the ability to take paper, put it on a platen, and turn it into a picture. This reduced the number of boxes that you needed of paper to review, but you still needed to do a manual review and these systems were largely installed at an enterprise or a law firm.

This advanced through the 1990s with OCR technology, the optical character recognition, and allowed for keyword search of this material. You could type in potentially Boolean searches – ands, ors, nots, and the like. But it is important to note that all of (this or that) required a pre-understanding of the matter. You had to know what your keywords were. You had to know something about the matter and do a pretty good job of guessing what they would be. The installable systems adapted to this and as well some of the new and early ASP, the application service provider, the hosted systems as well used that model.

David Bayer: So, Mike, starting in the early several years of this century, a group of new technologies started to penetrate the eDiscovery marketplace. Some of these technologies allow for the organization of large document collections by concepts so that attorneys can quickly identify relevant groupings of documents as well as being able to access the native files and that is able to see documents in their native applications as well as examine imbedded metadata that can be important for doing early case assessment. This really started to raise the bar for the applications that are available in the market as well as provide the power to (reconceptualize) and rethink how those applications can be used.

One of the key areas was the impact that that had on search. So, let me turn this back to you to actually look at some of the challenges that search technology both had and continues to have and how some of these newer technologies started to address that.

Michael Simon: Well, starting with the challenges, it's really the question about the truth about search because there are those in our industry who hold search out to be the gold standard of how you do things, and it's – it really isn't. When you look at it, there are a number of well-known limitations, and in fact those who are experts in this area have been talking about those limitations for years.

First is what we already touched upon. You need to know what you're searching for before you know all the facts in the matter. If this is an early stage where you are filtering out information,

cutting out things based upon terms that you're taking your best guess at particularly unilaterally, there is a chance that you're going to miss things, there is a chance you're going to cut too much out. There's that good chance you'll do both. As well, you'll need to know all of those relevant terms.

This includes synonyms, abbreviations, plurals, acronyms, and even more so, misspellings. And people type things wrong at times, especially in something like a fast medium like e-mail. If you don't incorporate all of that, you're going to miss it. You need search expertise and the time to train on the system you're using. And this is a point – attorneys often love to think, "Hey, I used Lexis, I used Westlaw; I can do this."

And those who say that maybe should go back and read the recent case Judge (Grimm) in the – in the District of Maryland wrote about this, which is the fact that we – you know that we've used systems to research cases which are fairly structured data with fairly known points of where you can look into does not make us experts on selecting eDiscovery search terms. It truly doesn't. And the judges are starting to say that.

And finally even if, let's say you get it all right somehow. What you get back is a big pile. Here's the results of your search. You get back a big pile of stuff. So, what does that do for you? It doesn't help you make sense of the documents, it doesn't help you show the reveal – it doesn't help you show any patterns, it doesn't give you a leg up on getting that review done. You've now accomplished getting a big pile of documents you've got to start on.

David Bayer: And so you know one way, Mike, that when we work with our clients that you know we summarize some of these challenges is to the recognition that search, depending on the approach that you would take, will either provide results that are under-inclusive or results that are over-inclusive. And in many ways, giving back a list of documents based on whether it be a relatively simply keyword search or a more complex Boolean query doesn't provide a level of understanding that our clients, whether it be in the general counsel – Office of General Counsel or outside counsel, have to understand and comprehend at a deeper level the structure of the matter or the investigation that they're engaged on.

So, Mike, perhaps you might want to talk a little bit about what some of those requirements are as we've moved further into electronic discovery over the past several years.

Michael Simon: It is – it really, truly is about understanding. If you're looking at eDiscovery in the 80s or 90s, back to keyword search and the like, you're looking at probably data volumes in megabytes or a few gigabytes. Nowadays we're talking routinely terabytes of data. And this is the equivalent, if you were to take all those documents and print them out for those of us like me who sometimes still think in those terms, you would end up with piles of boxes miles high. So, you need more. And there are certain things that you truly need.

First is early case analysis, and studies have shown that early case analysis is critical to success in this area. It's about knowing what kind of case you have, it's about understanding what the case is about, knowing whether you've got the right custodians or not, knowing whether your search terms that you may be running are valid and figuring out where they're over-inclusive, where they are under-inclusive, fine-tuning them. The standard eDiscovery MO – you know play detective there for a minute – is to do the full review – get your search terms in, do your review, and months later, then figure out what the case is about.

And that's expensive. I know we've got a lot of general counsel or folks in the Office of General Counsel on the line, and my guess is that you just don't like seeing those kinds of bills for thousands or even millions to figure out what the case is about and then the advice on where you're at or how to proceed or whether even to proceed comes through.

So, what's important here is to get the senior counsel back in the game, to make the kinds of decisive calls they used to be able to make when it was possible to get your hands around the documents quickly for them to see what's going on in the case, and do the kinds of things that you've retained them for to be able to make those calls. You know so what are the kinds of things you want to look for in those types (of systems)?

Well, the ability to add something more to keyword searches, perhaps contextualizing it through organizational systems, getting you some idea of what your results are about. The ability to drill through folders, organize folders of documents that have the critical terms played out for you so you can say, "This looks interesting, this looks important," or the opposite, to say, "This doesn't look interesting, this is all garbage, this is about golf outings or spam or printers being out of ink, and that's just not important in the case we're looking at. We can ignore that and we don't have to spend a lot of money taking a look at it." The ability to test the assumptions – I mean you may have some guess about what this is all about, but let's make sure we're right.

And then finally, it's not just about the smoking gun. I think there're a lot of folks in this industry who want to focus on the smoking gun, and I recall from my days practicing, you don't find too many of those. What you do find is the real story on the matter. Who spoke to whom? You know does this support your defenses or contentions or vice versa and where are we at in this case?

David Bayer: So, Mike, let's look at two advanced technologies that can actually lead to increased comprehension and understanding in the context of electronic discovery. The first that I'd like to talk briefly about is the real use of this new concept organization technology. This is the ability of an electronic discovery system to understand and organize documents by concepts that are specific to the matter.

This comes very useful as a way to help search, as we talked about earlier. So, when a result – when somebody does a query, rather than simply getting a long list of documents, this system can automatically divide those up into conceptual groupings so that without doing any additional searching, the attorney can really hone in and zero in on a specific relevant groupings of documents and really dive in and do some additional analysis as well.

Likewise if there was an (issue folder) perhaps by custodians, the documents for that custodian would automatically be separated out into these concept folders so that once again the attorney can understand not simply that here is the complete global set of documents for that custodian, but here are those documents organized into the various concepts and issues so that they can then start to understand what is that structure of the matter or what are the issues that are driving analysis during my case assessment.

And finally, since this analysis – this concept organization is done during the processing of documents, attorneys also have the ability to look at a global concept hierarchy to understand the structure of the entire document universe, identify potentially issues or concepts that they might not have been aware of previously, dig down into them or identify custodians that they might want to look at, as well.

And speaking of custodians, e-mail analysis is another way that we've seen to really provide much greater insight (into matter). Perhaps you'd like to talk a little bit about that at this moment.

Michael Simon: In fact I would, and that's a great transition here. E-mail analytics – it's easy to look at e-mails and see the to and from lines and then figure out, "OK, who sent what from whom?" and when maybe. But when you're dealing with e-mails that have dozens of to and froms or you know of course, potentially millions of e-mails, that starts getting impossible. And there – it's – e-mail's very important. It plays a major role in a lot of cases. (You'd) also have to get an idea of what really happened because as we know now, e-mail plays a critical part in the communications flow.

So, why would you need e-mail analytics? Well, you want to be able to look past that first level of to and from and see really who was communicating with whom and about what. If you can do – there are systems out there that will take the e-mail, automatically organize it through the metadata that's provided, and allow you to start with a sender or receiver and then test out who got what and who was in the middle and finally come to a picture of how the communications flowed in a manner.

So, you're looking at let's say here.

David Bayer: Mike, does that actually include intermediary correspondence or does it just include direct communications between senders and receivers?

Michael Simon: Well, if it was only direct, you'd miss the big picture, and the big picture has to be the intermediaries because quite often you will find that people are communicating through intermediaries sometimes deliberately. Sometimes you will have communications through intermediaries that might break privilege or at times even create privilege. So, these are all critical things to see.

And hence, on the diagram we have up, you will see that you've got e-mails going from (James Smith) to (Susan Jones), but only a couple of them. But meanwhile there are other e-mails going out through those intermediaries, some through even secondary intermediaries. Some of those intermediaries have an Esq. after the name, meaning they're an attorney and there may be potentially some legal advice being provided. Some of that might be broken by those who it's being sent to after the attorneys.

But overall, this lets you not only help detect privilege, it also helps you (cast) in terms of whether you've got all of your custodians right because at the beginning of the matter, you may find, "(Oh), we'll pick these 10 people," or, "I'm guessing they had something to do with it." You may find that you may have missed someone and you don't want to wait to the end to do that, you don't want to wait two – three months down the road to go grab more e-mails from some – somebody, assuming they're still there you know because that may be gone.

As well, you may find that some of the folks that you thought were key custodians may not be. So, this lets you see past that first level of conversations, past the basic thread. People talk all about threads, but that's really a linear concept. And anybody who's had any experience with these types of e-mails and doing eDiscovery on them knows that – that's a very broad weave you see more often on things going back and forth. And to see who was involved and who wasn't and what their conversations were about and who was in them.

David Bayer: So, and Mike, I think two additional points to maybe wrap up about some of these advanced technologies. Specifically about e-mail analytics, one is that you know once again referring back to the search technology that many of our colleagues have grown up with and are familiar with, identifying intermediaries in large scale e-mail collections is almost next to impossible using traditional search technology, and to have an electronic discovery solution that automatically identifies the complete weave and set of pathways between direct correspondents and their intermediaries is you know – is a great discovery tool and a way to provide insight into that large-scale collection and to identify the – you know the custodians that an attorney might not have necessarily been aware of, as you – as you mentioned.

Second is as we've been talking about the technologies from a strategic perspective as they drive insight and facilitate early case assessment, the notion of having a visual e-mail map as opposed to a more traditional listing of custodians or a listing of documents really accelerates the use of that information and the ability to manipulate it and iteratively dive down and analyze it.

So, I think those, as people look at advanced technologies and their uses, on the one hand the – that you know ability to understand the universe conceptually, and now the other one to visually have insight into it from – in this perspective e-mails, are two key elements that people can keep in mind.

So, let's move ahead and start to look at how some of these, as well as associated technologies, can help reduce what we like to refer to as the total cost of review. And I would invite once again our participants to join us on an initial survey in terms of the approaches that they're taking today primarily to help reduce their cost of eDiscovery.

And as the blue lines align themselves in real time, surprisingly we have a large number of participants who are already familiar with you know concept and keyword searching and use that in addition to filtering and coloring. So, I think it's great to see that some of these technologies and approaches have started to make headway in the market.

So, let's move ahead and, Mike, do you want to perhaps talk about you know what are, as we you know look at eDiscovery, everybody has a different view of where the true cost lies. And you know where do – where have you seen that based upon some of the analysis coming out in the – in the industry?

Michael Simon: Well, it's funny. We see this all the time. We go somewhere and someone says ((inaudible)) "You cost too much. We're not going to pay this. We're not going to have you do the – you know X, Y, and Z." And I think there's a myth out there that somehow the partners, the vendors are the ones that cost all the money here. And the truth is – the reality is when you're dealing with a straight linear review, KPMG did a study on this just you know three years ago. They took what was then a big matter of a hundred gigabytes – nowadays you know pretty small, and looked at where would the cost be if you did a linear review. Run some keyword searches, get a big pile of documents, start with document one, go through the end you know document X. And the reality is – it's 90% of the costs were on the attorney review time. Why? Because attorneys cost a lot of money. I think we all know this.

But when you start plugging in some of the advanced features, some of the things you can do in terms of what we had on that poll there of the culling and filtering, the keyword searching, the ability even more so to do some organization of it through concept organization, you can see that it saves a lot of money. Yes, you may be paying more to do that to the eDiscovery vendor, but you are – you are reducing what you're paying out in a review and you're reducing dramatically by two-thirds an overall cost reduction on what it costs you to handle that matter.

David Bayer: So, Mike, let's just talk a couple of numbers without getting into complex spreadsheets during the presentation. But for our audience, if we were to you know think about a hundred gigabytes of data which at a rough estimate yields about 1,500,000 documents, different types of systems provide the ability to review at different rates. And so if you looked at a traditional search-based system very often that's in-house, they'll have a review rate of about 30 documents an hour, as we've seen historically, and to complete that review would require about 50,000 hours at a cost of \$10 million – fairly significant.

More the second-generation types of ASP systems provide the ability to increase that review rate to about 60 documents an hour. Once again, though, yielding a – about 25,000 hours and at the \$200-an-hour metric that we've been using in some of our calculations as we look at these numbers, yields a total cost of review of \$5 million. So, it's savings of 50%.

But the third generation of electronic discovery systems, utilizing some of the advanced technologies that we're talking about today, increase those review rates to approximately 200 or more documents an hour, cutting down the hours needed for that review to 7,500 hours and a total cost of review, including now attorney review time, of \$1,500,000 – a significant reduction from the original \$10 million that we had seen in the first-generation search-based systems.

Michael Simon: And these are the kinds of savings that have been seen – KPMG saw that in their study – and customers seen them nowadays. Courts talk about how much eDiscovery costs and the need to save money.

David Bayer: That's right. So, leveraging these technologies, we can look at some of the ways that our audience can take advantage of them, clearly as was seen in that polling survey, people are focusing on ways to filter and cull out the initial volume of data. And clearly they could do that based upon custodian, by date, file types, as well as more advanced searches using keywords or additional Boolean queries, or any combination of the above. This is one way to reduce the data volume and clearly will have a major effect in terms of that total cost of review.

One other way that we've seen is actually that the transition that this industry has been living from the systems that actually used TIF images of the original documents and then OCR'd those, as you had mentioned earlier on, allowing you to search, to now the use of native file review applications – that is, solutions that are able to interface directly with the files in their native applications, such as Word documents, Excel spreadsheets, CAD, diagrams, index them, organize them conceptually, and then allow people to see them in their native applications so that they could start to access what we like to talk about as that imbedded metadata, the – whether it be the properties of the documents, hidden columns, formula, comments, track changes.

All of the information which can be critical to an understanding of that document and to tagging it appropriately are now available, while at the same time reducing the cost that one incurs both in terms of dollars for the TIFFing as well as the time that's required to get that done. So, how do you see all of this actually helping accelerate the review?

Michael Simon: Well, the first step is this, and even let's say you don't want to use those advanced features for whatever reason, at the very least, what it does come down is pushing those pages, getting people to be able to see the pages, make the calls they need to make and make them correctly, and get through them. That's the most basic point.

And with advanced features, when those documents are organized and you've got reviewers who are seeing like documents together, that helps immeasurably. Why? Because you're able to see a series of spreadsheets that might be (updated), you're able to see e-mails related to the same subject, you're able to see Word documents that might have some minor changes to them and the like, or you're able to see with those documents mixed together, documents on those same subjects. If one set of documents – if one document is relevant, the other ones are far more likely to be – likewise privilege.

And the opposite – if they're not relevant and you've got a bunch of junk, you're going to be able to detect it faster. It means less noise, more information and the ability to make those calls faster, the ability to make more accurate calls, to make them together, to have a better understanding of what's going on. And some of the systems allow you to highlight those terms that you're looking for and you can jump from term to term, again looking for them or the absence of them to be able to make faster, better, more accurate calls.

David Bayer: You know and, Mike, we also like to point out to our clients and many of the attendees at our panels that we sponsor at conferences that advanced technology also allows you to really reduce the cycles in the discovery. And the first bullet here is very interesting because although we don't talk about it in detail during our presentation, clearly the increase in – increase of importance and the increased presence of multi-language documents has really had a major impact on electronic discovery.

The ability to auto-detect languages to be able to process them, once again, in their native documents but also in their native languages, whether that be you know three different character types in Japanese or you know simplified and traditional Chinese or Vietnamese or any of you

know some of the central European languages that – I know that we've seen in some of our matters, the ability, then, to handle those, to automatically segregate them, separate them out, get them to the right reviewers as we'll talk about in our workflow example in a few minutes, becomes very important.

And in the environment, whether you know using a combination of search, concept organization, e-mail analytics, multi-language capabilities, the ability construct the workflow that gets the documents to the right people faster and more efficiently really helps accelerate that matter and get to both an understanding of what's going on in the case as well as the what needs to get focused on much faster than previously possible.

Michael Simon: And, as well, give you the ability to what we like to call inform the review. What do we mean by that? Well you know if you're doing a review, and typically how it works whether you've got 10 reviewers, 20 reviewers, or 200, whether they're here in your office or somewhere 5,000 miles away, someone's got to give them some guidance on what they're looking for, what the matter's about. Well you know now we're back at that familiar problem of you know of searching. How do you know what the matter's about before you've looked at everything?

Well you know you can get an ability to better understand what that matter's about by using the concept organization, by using the contextualization of the documents, to get you back in that game to be able to see the key terms, to be able to look for those key terms, and better understand the story, to be able to see what is this case really about, what are the – what are the points you really need to hit, focus on the most important content.

If you've got folders, if it's (hard to be) organized and you've got a matter that's about due diligence and whether that was properly done and you've got a folder called "Due Diligence," and you've got folders about certain analysis spreadsheets, those are the place you probably want to start first. And you can probably skip the e-mails about golf outings or the printers being out of ink on certain printers on certain floors. You get to the most important stuff first and you get your best reviewers on it.

You can also avoid the do-overs. I mean it happens all the time. You start reviewing – you get your reviewers going and then somebody a week or two, or worse – a month or two later raises their hand and says, "Is this important? Did we want to know about this?" And all of a sudden then is when you know about what the matter's really about and you have to go back and start recoding. This is not good.

So, as well, one of the key things that people are talking about is the ability to do iterative reviews. It's not just about a bunch of keyword searches you came up with particularly if you did it unilaterally. You need to be able to make those defensible. You need to be able to tell the judge potentially months or even years later why you picked those keywords and why they were good, why they are defensible to show that you acted reasonably as is now required. This iterative review is important.

You need to be able to test against those keywords and you need to be able to do it without looking at every document that you haven't searched. And the way to do that is to be able to create that defensible process to use these concept organization structures to see where did these documents fall under. Run some reports. See that maybe in the most important folders that we think based upon the terms our searches hit 200 out of 300 of those documents, why didn't we hit the other 100? We'd better look at them. Are there key terms in there – in those documents that we missed?

Likewise, you may find search terms that are coming up with duds, only irrelevant documents. As well, you can use the e-mail analytics to see which custodians were really involved, did you miss any, are there any that you picked that really weren't involved. Create a defensible process by documenting these steps.

David Bayer: So, Mike, one thing I wanted to mention as you move on to how some of the courts are seeing this is that when we talk about native documents in all of these process, we have a fairly extensive notion of native documents. And I know that one question that came through was whether that would include (ODP PDF). Which, clearly, the answer is "Yes."

We, as well as I think the industry in general, view PDF as a standard document type. But from Stratify's and other leading vendors' perspectives, native file applications really encompass over 400 different file types that we, as well as others, interface with directly. And I think that's a criterion that you know should be held out that this is transparent, it's direct access for all of these various capabilities.

So, having said that and having looked at you know some of the ways that we can leverage this, what are some of the opinions that are now coming out vis-à-vis these advanced technologies?

Michael Simon: Well, there are some actually very interesting opinions. If you look at recently enacted Federal Rule of Evidence 502, which was just put into place, now effective, that deals with privileged documents and inadvertent waiver and it enforces a reasonableness test across the country, the question is, "What's reasonable?" And if you look at the committee notes, talk about what is you know reasonableness, the judges who wrote this say a party that uses advanced analytical software applications and linguistic tools and screening for that privilege (and) work product, may be a found – may have – may be found to have taken those reasonable steps to prevent inadvertent disclosure.

And the courts are seeing this, too. The (Victor Stanley) case talks about 502. Not quite there yet because this was before him. But we now have our first case on 502, the (Rhodes) case. Just about a week or so before Thanksgiving in the Eastern District of Pennsylvania talks about 502 and how it enforces a reasonable standard and it looks to this language in assessing did the party that's – that accidentally produced these documents take those reasonable steps and did they use the proper steps and technology to potentially find this information beforehand.

Operator: Hello, David?

David Bayer: I'm sorry. You know there we are going back and forth on the mute button and I forgot to unmute. My apologies.

So, we'll transition to our section where we start to look at how these advanced technologies impact on ((inaudible)) management. I'll – we'll invite our participants to join us on an instant poll in terms of how today they interact or they see their interactions with outside counsel and their eDiscovery solution providers.

And it looks like we have an even distribution amongst our participants which is interesting, so I think that some of what we will now be talking about will have relevance in different ways to the three different groupings that we have on the line with us.

So, Mike, what – you know based upon your experience over the last many years – right? – that you've been in eDiscovery, what – how do you actually see both the historical sense of relationships as well as where this needs to go based upon changes in the rules, changes in technology, and changes in the relationship between general counsel, outside counsel, and the vendors?

Michael Simon: Thank you, David. Let's start with the past – the history of this. The traditional way that eDiscovery was handled was that the client of the law firm got that law firm the documents and the lawyers would go out and find an eDiscovery provider. Quite often when we're dealing with you know way back when with OCRing and stuff, copy and scanning shops. And the law firm would handle everything. They'd handle the billing, they'd handle the interface, quite often and

quite – usually the client of that law firm would have no interaction with the eDiscovery provider. Sometimes they wouldn't even know who they were. It almost didn't seem to matter.

So, moving along you know where is it starting to happen? Well, what we're seeing more and more I suspect because of the costs, because of the complications, because of the fact that this can be such a tricky area is we're seeing much more of a triangle of the lawyers and their clients working directly with the service providers.

And they are indeed service providers. It's not longer just about how fast can you slap those documents down on the platens and get them scanned then and then OCR'd particularly when you're dealing with massive amounts of e-mails and the like.

And to be able to save that money what we really need to be able to see is what we like to call the ideal matter and for those of you who came back on the survey and said you're already there, thank you, because this is the way it really truly needs to be.

Everybody needs to be at the same table with the same goal which is reducing the costs here. E-discovery is – it can be so potentially expensive, it can drive so much of your case. We have seen surveys, we have seen studies that have indicated that discovery in matters can be 70% of the case costs. That there are GC's out there substantial numbers of them spending 30 to 50% of their total litigation budgets just on privilege review.

Everybody needs to work together here and that's the way it needs to be if we're all going to save costs and make this happen.

David Bayer: So, Mike, perhaps to actually illustrate the underlying motivation that we see driving this trend let's take a look at a work flow example. And we put this together based upon some of our experiences and the hypothetical being a series of regulatory investigations at a large New York City based financial institutions.

The interesting thing being that there are custodians residing both in the United States and Japan naturally these are high pressured, very tight time frame investigations utilizing large review teams at multiple locations and also requiring multiple productions to various regulatory agencies.

And if we now move through the workload that might be involved in that and we use as an example here just one of what could be hundreds if not thousands of custodians. As the documents are processed, so clearly there has been a collection, identification of sources, a collection of documents, and then the electronic discovery service provider would process the documents and then create what we call a document work pool, in this case organized by a custodian.

The document work pool of a set of documents for that custodian that with an appropriate set of tags that reviewers would use during this first level review. In this case, for instance, we've identified responsive, non-responsive, privileged, one multi-language. The interesting thing being is that in this type of scenario it's almost a self-help system.

By creating this document work pool the reviewers then pull documents for their review rather than requiring, right, the additional overhead of a case managers or litigation support personnel or attorney's needing to assign documents to them.

And the work flow is then managed off of what one can think of as a report manager. That is there can be real time productivity reports and validation reports as the reviewers pull their documents and move through them.

When they – as they do and one of the tags was the identification of documents perhaps from the Japanese custodians or that might have been going back and forth to Japan of documents that are multi-language.

And those documents could be tagged and then sent to an appropriate set of reviewers that are (facile) in Japanese. So they could review them in the native language and then after – I mean identifying documents then that are responsive could then initiate a translation cycle where those documents could be exported, would be translated using either machine or human translators and then re-imported into the electronic discovery review environment now tagged as a translated document.

The work flow manager then would allow the documents either in English or potentially that were in Japanese and then identified for ((inaudible)) review to be pushed over to a now responsive document work pool which the higher level attorneys would be able to pull their documents from whether it be based on custodian or additional tags and review them and identify potentially the – which investigations the documents would be pertinent to.

Based on upon that tag the documents could then be forwarded over to a set of individual work pools for each of the relevant agencies or in this case the Board of Directors would go through a final QC and then productions out to those agencies. This is, while it might seem complex, a fairly standard work flow that we're starting to encounter.

And the ability for the various parties for general counsel, for their outside counsel, as well for the various solution providers, that is the electronic discovery service provider that's managing the review and analysis environment, potential other parties such as a translation vendor for Japanese or other languages that might be involved.

And then the subsequent review teams and production all of this needs to be managed seamlessly, transparently and as efficiently as possible to meet those time frames. And to make sure that there is no waiver, and that the correct documents are going to the right agencies managing not simply the work flow but also the various security levels that are involved in these types of multi-party, multi-matter situations.

So having spoken now on the work flow I think we've covered a large amount of ground in the three sections of the presentation. Mike, let me invite you to maybe sum up where we've ended up today over the course of the last 45 minutes.

Michael Simon: Sure just some quick final points. First, early case assessment is indeed critical to develop effective legal strategies on handling matter, regardless of E-discovery or not you need to know how you're going to handle that case. You can't do that with yesterday's technology.

If you're trying to make an early case assessment on a pile of stuff and when we're talking about terabytes it would be the equivalent of a mile high printed pile of stuff. You just can't do that. You need something that can help you do that. As well, it is I mean it was even before our recent financial challenges companies were seeing that they were spending way too much money on E-discovery.

Now I don't even – ten-fold, a hundred-fold of that that companies are truly concerned about what they're spending on that. You must reduce the overall total cost of review. Now advanced technology can do this. And as well it can do it at the same time that it helps you control and even bring down the court attendant risk.

Because it's really just to think about hey let's just unilaterally come up with some terms and start filtering out stuff and throwing stuff away and not use that custodian or what have you. But the problem is then it has to be defensible. How are you going to defend it months or even years later to the judge to show that you took those reasonable steps?

That's why you need that advanced technology. And finally the overall way to reduce risk in the long run is through the types of unified matter management and advanced work flows that (David) demonstrated. And your technology has to let you do this.

If it doesn't empower it – if your technology and most importantly your partner – your E-discovery partner can't help you with this with everybody at the table it's not going to happen. It's just too much, it's too complicated. You need to kind of assistance. You need everyone together at the table with the technology helping them.

David Bayer: You know Mike before we got on the Webcast today you and I were talking and one of the you know things that we were talking about was how even you know taking a strategic perspective on electronic discovery with the recognition that electronic discovery now has become part of the normal course of business. And you know in terms of a lot of the tenacula it involves business critical if not at times admission critical situations.

And the – many of the capabilities that we're talking about today really start to require not simply the integration between the various parties but also a level of quality and of enterprise awareness from the solution providers from the applications that previously in this industry, right, was not necessarily recognized or available.

And I think that you know it's a trend moving forward that the partnership between general counsel, outside counsel and the electronic discovery service providers needs to hit a new set of service levels, a new set of understanding what it really requires, right?

Both in technology but also in terms of the service and integration, right, to make sure that nothing falls through the cracks and that everybody is on the same page. And it's – it's not simply a technology perspective as IT folks used to think about it.

Now it's a 360 degree perspective that each of the parties are involved in. But it's a philosophy that needs to drive them all. So with that (David Donovan) we'll turn it back to you and see if there are any questions.

David Bowman: OK, great, that was an absolutely awesome presentation. By the way I am still monitoring questions here. So if you have some more please just type them in your chat window and hit send.

And I'll bring them up to the extent practical. First off we would like – one of the questions is that someone would like to know whether this technology, in other words the concept organization, e-mail, analytics, and work flow engines is defensible in court. And as a second part to that is there a difference in defensibility based on whether the process is managed in-house or by an outside firm?

Michael Simon: Thank you, I'll take that. This is Mike Simon. In terms of the defensibility it's interesting. There is different ways to look at it. If you were going to say we're going to take this technology and let it make decisions for us or we're going to let things go without us ever reviewing documents you might be in an interesting place. And I don't know if that would be interesting or maybe the word is maybe bad.

But in terms of the kinds of technology that we are talking about that we use here at Stratify we have the technology – we give you the technology to do the thing that technology and computers do best which is organize things. Put them together, get them all set in ways that you can best look at the documents, and then go ahead and look at those documents, review those documents.

Let the people do what they do best which is make the judgement calls on those documents. We've seen it in some of the cases where documents are being turned over sight unseen that no it is hard to defend that. We're not asking you to do that. We're not expecting you anyone to do that and we're not suggesting anyone to do that.

It is in the end very much like what we used to have 10, 15 years ago when we had you know maybe 10 boxes, paper boxes of documents in a case and someone at a law firm would organize those documents and then people would start to review them. We're doing that but it's – when you're dealing with terabytes of data you need something that can do it a lot faster because you can't have people you know organizing those terabytes of data you'd never get done.

In terms of whether it's more defensible if done in-house or more defensible done from an outside provider I'm not sure – I don't think we've seen anything in terms of the cases that have said one way or the other. I think the one consideration I would make is that having somebody that comes in with the expertise potentially can be a big thing and there are companies out there that do have that expertise.

There are some that have gone out and got to the great expense and time that it takes to find people who have that. But a lot of companies aren't there yet. Or a lot of companies just can't find the number of very limited people who have the kind of – the expertise in the law and the technology to do this.

So when you get to that point it can potentially help to have an expert, someone who knows and can guide you through this process help.

David Bowman: That's great. Now we have three related questions here. I'll try to tee up all three for you. First one is how important is reducing the volume of data before a litigation such as reducing backup tapes, auto deletion of e-mail, et cetera on a related question is are there different approaches to de-duplication and does de-duplication create specific challenges for authenticity and chain of custody?

Michael Simon: OK, well the first one I think is real easy and we can make it real quick. Filtering, calling out the stuff that you don't need to review is absolutely critical. We are seeing now sometimes data volumes coming in five, six, seven, ten terabytes.

If you're loading all that up, if you're reviewing all that it's a bill no matter how fast, no matter how good your system is it's going to be crushing. So calling, filtering in the like is critically important. I think the second one I'll turn over to David.

David Bowman: I think in terms of the [inaudible] from our perspective we work with three different classes of duplicate documents. What we term exact duplicates and those are very much think of backup tapes as the metaphor.

What we call content duplicates where there has been a mitigator change, for instance, the location of the document but that the content is exactly the same. And then finally near duplicates where there have been minor variations or changes within the content as well as perhaps the mitigator of the document.

And the reason why we perform those three levels of analysis and the ability to work with each of them differently is because the use cases and the needs from a review perspective based upon the type of matter are different.

I mean sometimes I mean clearly you would want to call out exact duplicates but the roll of content duplicates for perhaps an HSR second request might not be necessary but for an investigation the ability to know who had access to what document, when that you would be able to perform using some of the advanced technologies that we were talking about today could

remain critical and as a result you'd want to be able to both recognize those documents but retain them within the review environment as well.

David Bowman: Well that's just a fascinating answer. So you're including with the metadata the location of the document on the disk so then you could use forensics to be able to authenticate it. Is that correct?

David Bayer: That's true. Actually – that's true and actually let's say from Stratify's perspective we work with approximately 80 different metadata fields. Generically and can expand that significantly based upon the requirements of a matter. It's the types of analysis that you can perform using that metadata which is available in search within an environment such as the Stratify Legal Discovery service.

As well as, during the review of the document becomes critical for some of the accelerants that we've been talking about in today's presentation.

Michael Simon: And I am going to jump on the third part of that because as I understand it you're really talking about defensibility because indeed when you're cutting out documents if you are taking things out based upon duplicates you are unilaterally removing documents from a review set and a production set.

And there could be questions about is this defensible and there have been some recent cases that have caused people to write articles with headlines like Does such and such case spell the end of De-Duping?

And one of the things that we've started doing here and we've you know it comes down to for that defensibility it comes down to documenting, being able to show what you did, to be able to show where these documents were. So it comes down to reporting.

We do this here. We run reports when we are de-duping across a whole range of documents it's not just taking them out but recording where were those documents found. Who had them? Who were the custodians for them? So you can show the other side, "Hey you know if that's an issue" that you may have had three people who had that document. You can show that and you're not going to be accused of defensibly spoliating out some documents from someone's collection.

David Bowman: Well guys I've got to tell you that was an absolutely awesome Webcast I would say personally. I thought that was one of the best answer on de-duplication I've heard in a long time. This concludes our Webcast for today. I'd like to thank our panelists for their time and excellent presentation.

I'd also like to thank Stratify for sponsoring our Webcast. Once again let me remind our audience that the audio file will be available on the ACC Web site. That's www.acca.com about three hours from now. It will be archived there for about a year.

I also want to thank our audience for attending our Webcast. Remember if you have any questions related to today's topic please send an e-mail to Mr. Bayer at dbayer@stratify.com or to Mr. Simon at msimon@stratify.com

Please don't forget to complete that survey. Keep those cards and letters coming. You may now log off.

END