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STRUCTURED DATA ILLUMINATES FACTS LIKE NEVER BEFORE

► **Jonathan Hurwitz, managing consultant at iDiscovery Solutions, talks about how structured data analysis is revolutionizing the process of discovery – even in cases where the client doesn’t realize how valuable it will be.**

CCBJ: How is structured data changing the litigation landscape?

Jonathan Hurwitz: First, it allows us to get to the facts a lot faster and with greater confidence. We used to have to go through this long process of discovery – gathering whatever documents you have, both paper and electronic, figuring out what was and wasn’t relevant, and getting them ready for production. Then the other side reviewed and read them, in a process that could often be very expensive, time consuming and prone to errors; and based on all of that information, we tried to figure out what the facts were and what really happened. But when working with structured data, we can take a step back and pull information out of digital systems that represents objective, unbiased facts. It’s not something that somebody wrote down. It’s something that was recorded by their phone or by a computer system: It’s data that has no vested interest in trying to make itself look one way or another. And in many cases, it’s done automatically. For example, your phone constantly records your location. You could write a text message to somebody and say, “Hey, I’m working late, I’ll be home around 10,” but that doesn’t actually mean you arrived home around 10. If we look at the actual structured data that’s associated with that person’s phone, it might tell a very different story. We might get a GPS entry from the phone that indicates that, no, you weren’t actually working late. You were down at the bar, for instance, or somewhere

else, doing something completely different. The data that’s being recorded by these structured systems isn’t going to lie. In this case, *context* becomes more important than content. That’s a significant change in the way that lawyers can look at litigation.

The second thing that is important to note is that we are now in a situation where it’s not just one side that has all of the data. Now both sides likely have data that’s relevant and producible. Historically, it’s always been big corporations that have had the resources to maintain and the burden to produce the bulk of responsive data for a given dispute. Whereas the other side, if the plaintiffs were individuals, they usually didn’t have a ton of data. They were not really too worried about all of the things that go along with having to review and produce electronic discovery or electronic data. But now we’ve actually seen cases where an individual’s mobile phone has been considered discoverable. Even if it was a personal phone, we’ve actually seen the court say that, well, you used it while you were working – so if you’re claiming that you should be paid for hours that you weren’t paid for, then for all of the time that you claim you were on the clock, your phone is discoverable during those periods. In this sense, increased data availability and accessibility has leveled the playing field a bit. Both sides have data that can be discovered. Both sides have to worry about things like *foilation* and production and the cost of electronic discovery.

The third point that’s interesting is that this data tends to help shorten the life cycle of litigation. We’ve had some cases where we’ve actually gotten structured data and presented some findings within the first few months of litigation and been able to go back to the plaintiffs and say things like, “You may not have a case here, your client may

Just by having a smartphone, you're generating an ever-expanding digital footprint that is being leveraged in ways you don't even realize.

be misleading you as to what happened. Here's what the structured data tells us, and this is where the deficiencies in your arguments are." And if you can get that information in front of a plaintiff early enough, they can make a quick decision before they've put a lot of time or effort or money into the case. If you can show them that they're actually going to lose because there is no merit there, and you can do it early, you can prevent long, drawn-out litigation. On the flip side, you might find out early on that the data is actually going to be in the plaintiff's favor, which would open up a different conversation. In either scenario, effective analysis of structured data can allow you to quickly understand the strengths and weaknesses of your case and make informed strategic decisions early on in the process.

How is all of this different than traditional discovery?

It's actually similar to traditional discovery in that all of the same rules apply from the law. Litigation still counts. We still need to preserve, produce and review data – except now the data we're looking at isn't just Microsoft Word documents, Excel spreadsheets or email messages. It's transactional items in a database, such as badge swipe records, computer access logs and GPS pings; and it gives a much more complete and defensible account of how things happened.

Say, for instance, when you walk into the office building in the morning, you have to swipe your

badge, which creates a record that indicates that at 8:46 a.m. a person – let's call him Jonathan Hurwitz – walked into the building and swiped his badge. Then he went to the third floor and swiped his badge on the reader there. Then he sat down at his computer and logged on to the corporate server. You can build what we've been calling a "day in the life" profile about an individual and really say that this is what their day looked like. They showed up at the building at 8:46 a.m. They entered their actual office at 8:53 a.m. Their computer was turned on and logged into the network at 8:57 a.m. So you can take that information and look at it in the light of whatever the merits of the case are. When we do wage and labor disputes, we often see people saying, "Hey, I was working off the clock and wasn't getting paid." And we can say, "Well, it looks like you didn't get to the building until 8:46, and your time sheet has you clocking in and getting paid starting at 8:53. So it took seven minutes for you to go from the front door to the office, where you clocked in. That seems like a reasonable amount of time."

On the other hand, maybe the data will tell us, "Yes, you entered the building at 8:46, but you didn't get to the office and clock in until 9:30. Maybe there is a problem there. Maybe that's something we need to investigate." So the difference is that we're not relying on subjective information or anecdotal evidence gleaned from interviews



Jonathan Hurwitz is a managing consultant with iDiscovery Solutions, Inc., with more than 15 years of industry experience. He specializes in applying leading data analytics methodologies to transform raw data into actionable intelligence, by leveraging a deep understanding of databases, data visualization and statistical modeling. Reach him at jhurwitz@idsinc.com.



and written accounts when we're trying to determine when a given event happened; instead, we're looking at actual traces of activity that were recorded in real time, and it has a very hard factual basis to it. When you swipe your badge, it's going to record when that badge got swiped on that specific badge reader. It's both objective and consistent. You're probably going to have a hard time getting into the building without

swiping your badge – so if we don't have a badge swipe for you, it's a good indication that you weren't actually in that building on that day.

How do you see data leveling the playing field?

In the past, electronic discovery has been fairly one-sided. It was the corporation that had a lot of

data, and the individual usually didn't. Especially with large class actions, you'd see corporations having to do a lot of work in terms of document preservation, legal hold, review, production. They'd be worried about spoliation, whereas on the other side, people would be saying, "I don't have any data. I'm just a person. I don't have anything. However, I typically arrived at work at 8:30 a.m. and regularly was forced to work evenings and weekends." But with the new structured data approach, both sides have a duty to preserve electronic data that's likely relevant. Most individuals have smartphones that are going to track a lot of their activity – social media accounts, email accounts, etc. It's very common now for individuals to have large amounts of data, even if they're not aware of it. So we find ourselves in a situation where it's not just one side that has this duty to preserve information and be worried about spoliation. Both sides are. So now maybe we come at things with a bit more of a sane approach as far as what's reasonable and what demands can we make, because those demands could very easily be turned around and applied to both parties.

What are some important considerations you make when staffing investigations?

You want to make sure that you have people who have the domain knowledge to understand the factual context of a case, but also the technical expertise to understand what data will be the most useful, while leveraging it to its fullest potential. People who can really dig into the data and figure out what it means – what's going on. Because one of the things we find with structured data is that it doesn't always mean what you think it means. You might get an individual's cell phone, look at the GPS location information on it and immediately say, "On the night

By allowing you to reach conclusions with greater confidence in less time, structured data analytics can actually make a case much less expensive than it would have been using more traditional methods.

of the murder, you were awake and walking around the house – your phone shows the GPS moving." But actually, what can happen with a phone with GPS is that if you place it in one location and don't move it, it might look like it's moving, because the longer it sits there, the more accurate its location information will get. So it looks like the phone is "moving," but actually it's just the GPS homing in and getting a better reading. Or when looking at time stamp information across different sources, we may see instances where an employee appears to be working very long hours on certain days. However, upon closer inspection, it appears that each system has recorded time stamps in a different time zone, and when we normalize these sources, the employee's working profile becomes much more realistic. Examples like these demonstrate the importance of having analysts who are both familiar with the technology and appropriately skeptical. Having people that are able to see through some of these biases or preconceived ideas about what the data means is crucial for eliminating the risk of false positives and improving the quality of your analysis. iDiscovery Solutions has a deep team of individuals with significant experience leveraging structured data in a variety of legal contexts, including investigations, discovery and expert testimony. We'd love to provide a free consultation on your project to discuss how structured data analytics might help. ■

ARBITRATION INSIGHTS

Arbitrators Provide Technical Expertise, Confidentiality

JEAN BAKER

AMERICAN ARBITRATION ASSOCIATION

► **Why alternative dispute resolution’s long history of effectively resolving business disputes may be ideal for the needs of technology companies.**

Anyone who has been involved in any kind of litigation knows that it can be extremely expensive and time-consuming. But for companies in technology fields, there is often another major concern: There is no guarantee that the judge assigned to your case will be knowledgeable about your particular product or industry. Fortunately, arbitration, also known as alternative dispute resolution, provides a highly appealing solution in these situations. Not only is it more efficient and cost-effective than litigation – it also gives the companies involved in the dispute a chance to select an arbitrator with a keen understanding of the specific technology at hand, giving all parties confidence that an equitable solution will be reached.

A Bit of History: Arbitration Over the Centuries

Arbitration’s origins trace all the way back to the Middle Ages. Italian merchants were looking for a way to settle their differences without getting bogged down in litigation and the court system. As a remedy, they set up merchant courts to handle their various business-related disputes. These were not just legal disputes; they also included conflicts involving industry standards and practices. Even then, the arbitrator’s goal was to award equity. They weighed standard business practices and procedures, which factored into their decision-making when rendering an award.

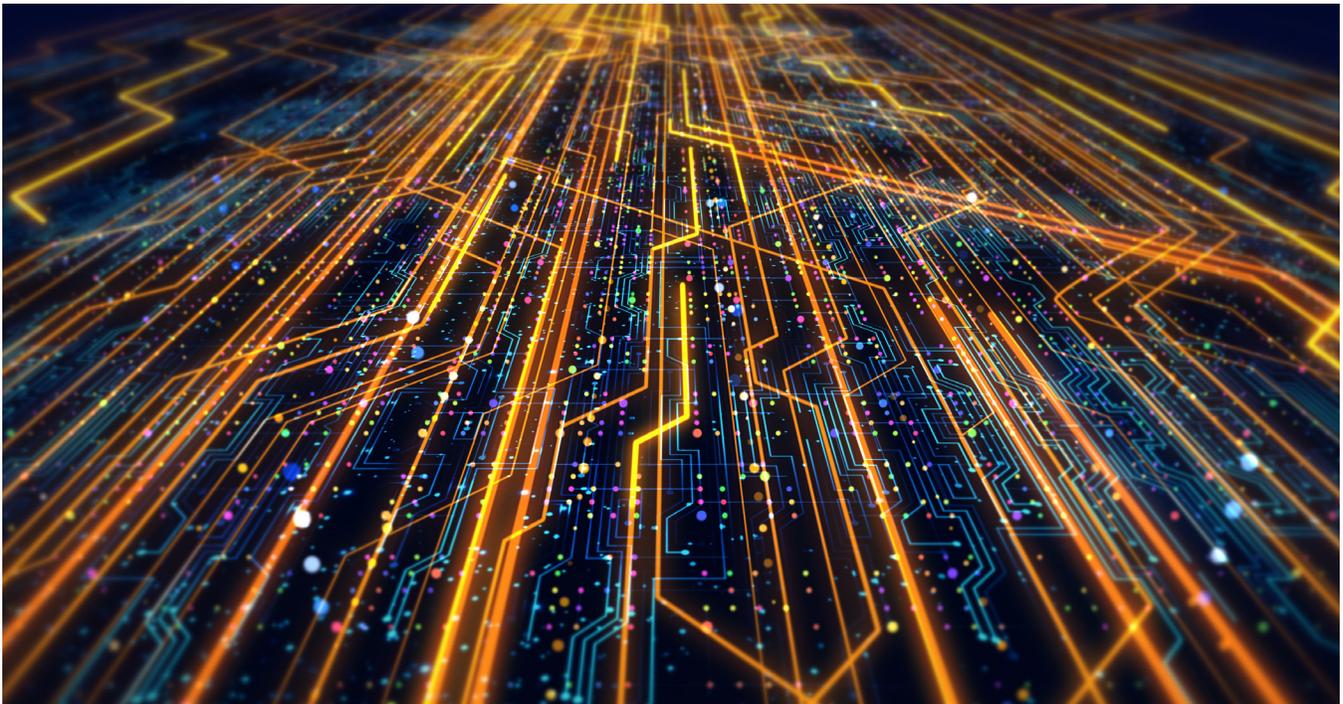
Those merchants in the Middle Ages also said, “We don’t want judges who are just learned in the law. We want people who truly understand how

business is conducted in different industries.” That approach was appealing to businessmen of the day, and it has remained appealing to like-minded people for centuries afterward. From that point on, arbitration has been used in a variety of ways – by the court systems, by private parties, by for-profit and nonprofit organizations. And people continue to use arbitration to this day; it is less costly than litigation, and many participants view the process as more fair in a fundamental way too.

Technical Expertise

Companies that are seeking arbitration often look for decision-makers who have specialized knowledge or expertise. Judges understand the law, of course, and are fantastic in many scenarios, but when it comes to complex disputes involving new fields of technology, understanding the nitty-gritty details of the underlying technology is paramount. Maybe the dispute involves a patent, or a business process, or a licensing agreement, and the companies involved want to ensure that the decision is rendered by someone who not only understands the law but also has in-depth knowledge of the underlying technology itself.

Disputes involving cutting-edge technology like blockchain are good example. Blockchain is a very fast, seamless way of processing transactions, designed to eliminate any third-party involvement. One of its key features is that the parties are not identified by name, but instead by a hash number or an IP address. In addition, blockchain operates via a decentralized network of computers that can be located anywhere in the world. When dealing with disputes involving a powerful new technology like this, it is imperative that the person making the decision be extremely knowledgeable about the technology itself. In an arbitration setting, the



If companies are looking for privacy during a business to business dispute, it is much easier to accomplish in an arbitration setting.

parties can specify exactly what level of technical expertise they want the decision-maker to have. This fact alone makes arbitration extremely desirable in disputes involving new technologies that are not yet widely understood.

Privacy

Many times, business disputes – especially those involving technology – involve some kind of proprietary or confidential information, in which case the companies want to protect those details from public exposure. If you go into litigation, the court proceedings are public, meaning anybody can sit in and view them. Arbitration, on the other hand, is

private. If a third-party administrator is involved, its Rules may also provide that arbitrators maintain the privacy of the arbitration.

Unless required by law, arbitration organizations will not reveal that they are conducting an arbitration. They will not reveal the names of the parties. And they will not reveal the outcome of any arbitration. That confidentiality extends beyond the arbitrators themselves to the staff as well. In addition to that basic level of privacy, for business to business disputes, confidentiality agreements can be agreed upon that bind the parties to the arbitration. For companies that are wary of confidential information getting dragged into the public sphere, an arbitration

process (with a mutually agreed upon confidentially agreement) is an easy way of avoiding that.

The Global Nature of Business Disputes

The world economy has become more global in scope than ever before. These days, disputes can arise between parties residing just about anywhere, and companies are looking for easy but effective ways to resolve them. Arbitration provides that. And once an award has been issued or a decision has been made, companies want an efficient way to enforce that decision. That's where arbitration has another advantage. More than 150 countries have signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. That means that if a country is a signatory to that treaty, its courts will review an arbitration award rendered in that country and once upheld, will enforce the award. That's a significant benefit to businesses that are conducting worldwide business transactions.

Why Choose AAA or ICDR?

The American Arbitration Association (AAA) was founded 1926, giving it 90-plus years of experience. The International Centre for Dispute Resolution (ICDR) was founded by the AAA in 1996 specifically to administer international arbitration proceedings.

The AAA is proud to be a nonprofit that has been drafting arbitration rules for nearly a century. Those rules have been tested by time and reviewed by innumerable courts. They are consistently viewed as fair and equitable, and both organizations have implemented numerous internal controls to protect the integrity of the arbitration process. The roster of arbitrators itself is extremely knowledgeable, and ongoing efforts are made to continually upgrade the expertise of the technology roster. (For instance, the AAA roster includes arbitrators with deep knowledge

In an arbitration setting, the parties can specify exactly what level of technical expertise they want the decision-maker to have.

of cloud computing, blockchain, smart contracts and other new and emerging technologies).

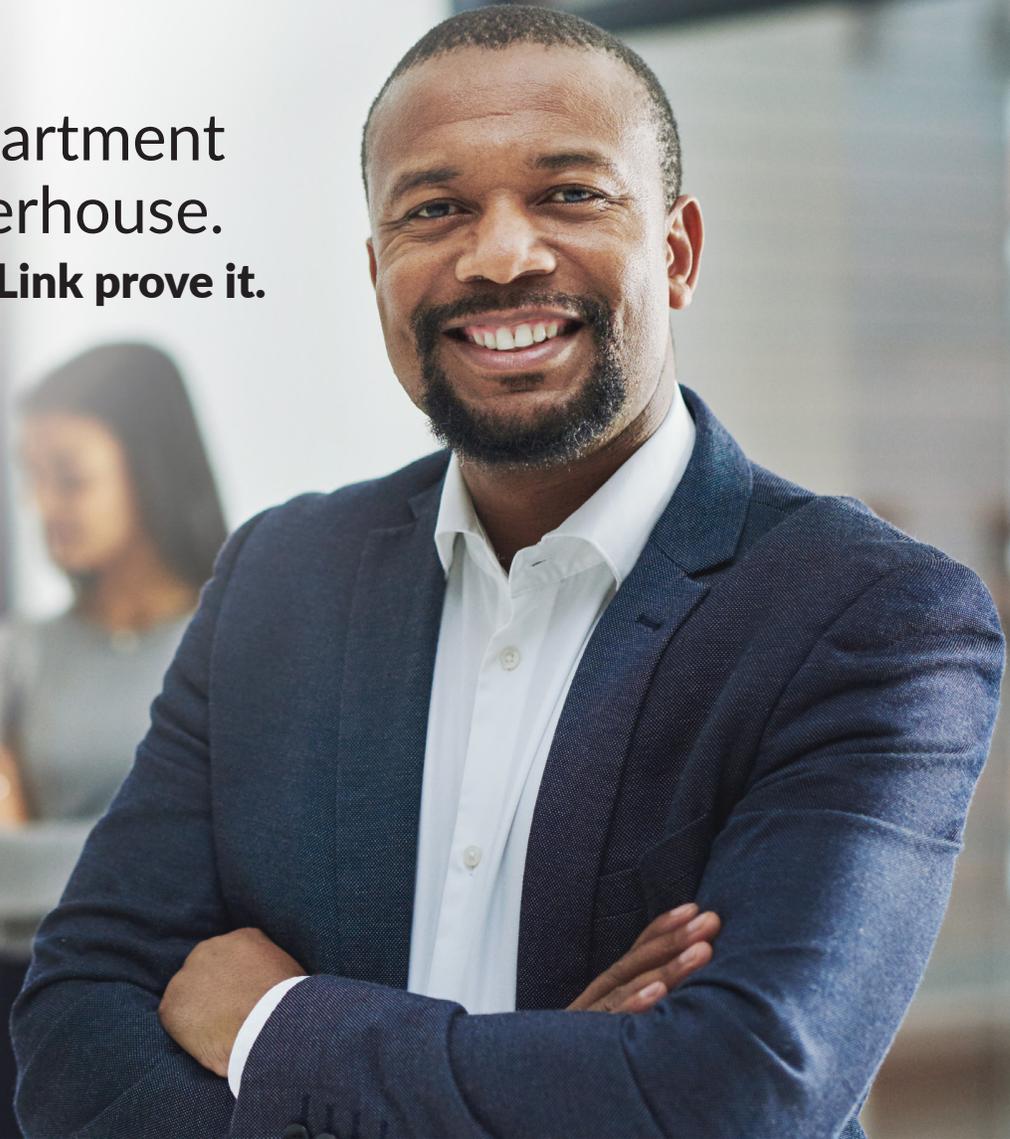
In disputes involving technology, especially those in which the parties want privacy, the participants also want to ensure that the proceeding itself doesn't get hacked. The AAA and ICDR have taken a number of steps to protect its internal administration of its cases and secure it against any type of digital incursion or data breach.

Choosing an arbitral institution like AAA or ICDR also allows the parties involved to specify an applicable set of arbitration rules. This includes, for example, commercial arbitration rules, international arbitration rules, construction rules, employment rules, etc. The parties can also customize the procedures. For instance, in business to business disputes they can include a confidentiality requirement that specifies that the parties participating in the arbitration must be bound by confidentiality.

Whether it's through the AAA or ICDR, the parties involved in the dispute can draft their own arbitration agreement, which will specify the governing procedure, the governing rules and substantive law, and where the arbitration is going to be conducted (this is especially important in international arbitrations). The parties also have to identify the legal seat of the arbitration. They can specify that a non-national neutral dispute resolution forum such as the AAA or the ICDR administer the proceeding, to ensure that it is administered in a neutral way. ■

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Data Privacy Implications of Cloud-Based Social Collaboration Apps

ROB WILLIAMS
CCBJ

► **Highlights from our recent webinar with members of FTI Consulting and Shook, Hardy & Bacon.**

As we enter the third decade of the 21st century, the business landscape has shifted in dramatic and unalterable ways, and those changes are likely to keep apace, or even accelerate, as technology continues to advance. In order to do the best work for their clients, it is imperative that lawyers and others in the legal profession stay up-to-date with the latest technological trends, both in terms of the way people work and how companies manage the massive amounts of data that are generated and stored via the modern workplace.

With that in mind, *Corporate Counsel Business Journal* recently hosted a webinar, “Data Privacy Implications of Cloud-Based Social Collaboration Apps,” with T. Sean Kelly, senior director at FTI Consulting, and Jason Ward, counsel at Shook, Hardy & Bacon.

As anyone who works in corporate America can attest, and Kelly points out, cloud-based applications are becoming increasingly prevalent, proliferating within the business enterprise and business network system with rapid frequency. It has become clear that simply having a well-developed IT policy and a white list/black list-type of approach isn’t enough anymore.

These days, employees often use a combination of computer devices (desktop PCs, laptops, tablets and smartphones) equipped with an array of office software, such as Microsoft Word, Excel, PowerPoint, Outlook, various PDF programs, etc. And businesses themselves usually use some kind of legacy network and/or rack storage locations, as they have for some years now. But even this “new” way of working is rapidly being supplanted by even more cutting-edge

technologies that promise further increases in connectivity and efficiency.

To meet these demands – whether from clients, customers or employees themselves – more and more companies continue to adopt bring-your-own-device (BYOD) policies, in an attempt to facilitate more flexibility, creativity and efficiency. This has led to the development and proliferation of an incredible number of applications, often with a cloud-based component, which workers are using to increase their own efficiency and/or take advantage of new ways of collaborating that eliminate unnecessary or undesirable steps, such as repeated emails or phone calls.

“These applications are being developed and downloaded faster than corporate legal departments and corporate governance departments are able to keep up with,” Kelly says.

However, despite this rapid proliferation of new apps overall, there are a few dominant players within the cloud-for-work space. In the last 12 months, about 70 percent of Fortune 500 companies have purchased or are adopting Microsoft Office 365. Google Apps for Work also has large share of the market, with 64 percent of Fortune 500 companies using its products. Kelly points out that one of the most appealing things about Google Apps for Work is that it allows IT departments to internally build bespoke applications that they can safely push out to managed devices. In the records storage and management space, Dropbox continues to enjoy a massive share of the market; it is used by 97 percent of Fortune 500 companies and is home to approximately 140 billion files.

For IT departments, who are trying to manage their companies’ data, as well as for legal teams, who often need that data for discovery purposes, this creates a new paradigm. “You have to make sure that you have directives in place for your staff, and for IT to use with folks that may be using these applications,”



Ward says. “Because if you don’t ... you’re going to have to, on the back end, figure out how to preserve the information and provide it as part of discovery.”

As more members of Gen Z enter the workforce and more millennials move up to management and C-suite roles, there has been a dramatic move away from desktop- and/or browser-based modes of working, in favor of smartphone- and app-based methods. Among these age groups, as well as with other workers younger than 65, Kelly says, “an overwhelming majority of time is being spent on their smartphone ... predominantly within an application.”

It would behoove legal departments to stay well informed about these demographic changes and the technical shifts that come with them, Ward says: “It’s a pretty clear indication as to the manner in which folks are working and communicating. [It should] get the folks that are working on these systems, as it relates to litigation, going and thinking about how we’re going to capture this, how we’re going to

preserve it, how we’re going to comply with discovery requests.”

Popular apps of the moment include those that are primarily used for internal communications, like Slack; efficiency and list-making apps like Evernote and Trello; and customer-relationship management (CRM) apps like those in the Salesforce suite.

“One of the challenges ... is that the way a lot of these third parties work with hosted data is proprietary,” says Ward, “so you get into a situation where you’re collecting from those third-party-hosted databases and you need a specific export, and in order to have that export you have to work with ... [those] third-party providers. Having that discussion up front and knowing what that’s going to take, in order to export information on the back end, is critical.”

The entire hour-long webinar, which includes a discussion of specific legal cases involving these topics, can be viewed here: <https://bit.ly/2Ztbm3U>. ■

BUILDING A TECHNOLOGY ROAD MAP THAT SUPPORTS THE LAWYERS OF THE FUTURE

NATHAN CEMENSKA
WOLTERS KLUWER ELM SOLUTIONS

► **As the demographics of law continue to skew younger, it's important to implement efficient tech solutions that reflect the world millennials grew up in.**

The demographics of law are changing. While less than one-quarter of lawyers – and only 2 percent of partners – were millennials as of 2016, 75 percent of the full workforce will be millennials by 2025. This is certain to be reflected in legal departments as well. With these inevitable demographic changes taking place, corporate legal departments must evolve in order to keep their employees engaged and satisfied.

The 2019 Millennial Attorney Survey report, published by Major, Lindsey & Africa, found that many younger lawyers are dissatisfied with the status quo. More than half of survey respondents said that they believe the legal industry is fundamentally broken, while 44 percent believe that the current generation of leadership “has overstayed their effectiveness.” Millennials came of age in a world where they had unprecedented access to technology, with many of them carrying the entire internet on smartphones in their pockets as teenagers or young adults. This generation is not likely to abide a workplace environment that doesn't keep pace with technology.

Sustaining Millennial Employee Engagement

Keeping employees happy is crucial in any industry, but it's especially important in demanding ones like law, where burnout is extremely common. Corporate legal departments need to anticipate, listen to, and respond to millennials as they demand a different work environment in years to come. In the workplace of the future, the increased use of data, analytics and legal project management will be nonnegotia-

ble. Fortunately, advances in legal technology – from e-billing and automation to tools offering data-driven decision-making – can help improve efficiency and empowerment dramatically.

In the case of legal technology, what's good for employees is also good for the organizations they work for. The same tools that provide legal department staff with streamlined workflows, increased efficiency, and greater confidence in their decisions also improve overall department performance and help legal teams deliver on corporate business goals.

It is important, however, to choose new tech carefully. Millennials, in particular, expect their tech and processes to be consumer-grade, emphasizing ease of use. Their more mature colleagues may be just as digitally savvy, but they are also more likely to have patience for technology that is still clunky. They remember what it was like before these tools were introduced, and therefore they see cumbersome tech as better than nothing. With millennials, however, there is little tolerance or room for technological error.

Take a Strategic Approach

How should legal departments begin the process of selecting and acquiring technology that will meet the needs of the organization now and into the future? As legal departments increasingly focus on the business, they should do what other



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corporate departments do: produce a formal plan that includes operations and business goals, then develop a specific technology strategy to achieve those goals. This strategy should consider how tech acquisitions will affect all stakeholders, plus basic business functions like finance, marketing, human resources and information technology, including whether the last two will offer the support needed to make the plan a reality.

Far too often, there is a temptation to simply jump to an easy solution to a particular problem, without taking the time to develop a plan and evaluate how the available options would fit into it. But making a one-off technology acquisition without having a broader technology plan is shooting blind. This can result in technology purchases that do not have the ability to adapt to changing legal needs and/or do not integrate well with current or future tech purchases.

A fully baked plan will have both a strategic vision and an understanding of how specific acquisitions fit into it. It will also outline and measure the impact of those acquisitions using relevant key performance indicators. While legal departments, especially smaller ones, are sometimes overlooked by the C-suite, risk management and cost-control measures are both impacted by the work of the corporate legal team and can significantly affect the bottom line.

Improving Business Results and Employee Satisfaction

E-billing and matter management, for instance, can streamline workflows, help forecast and analyze legal spend more accurately, and improve visibility into spend and operations. By choosing e-billing and matter management solutions that leverage artificial intelligence technology, legal departments can further increase efficiency and free up attorneys to focus on their most valuable tasks. Thus, these tools



should be part of any overall operational cost-control initiative – and millennial team members will expect them to offer excellent usability.

However, easy-to-use solutions will not be enough unless they can also deliver – or integrate with other tools that deliver – on the future needs identified in your strategic technology plan. Millennial users have high standards for technology, and they are unlikely to tolerate having to log into many separate solutions to complete their work. For example, if the team has identified contract lifecycle management (CLM) as an area where the department should improve automation and efficiency, choose a matter management provider that offers flexible options that integrate CLM.

Corporate legal departments are already undergoing an evolution, and with the right approach, they can ensure that their workforce remains happy over time. The millennials already on staff are a resource that legal departments should leverage. Organizations should take the pulse of these employees, with an eye on the future. Soliciting their input is a great first step toward understanding their expectations and providing everyone with a workplace where technology supports their success, and the success of the company, over the long term. ■

A New Era of Governance, Risk and Compliance

► **Bill Piwonka, chief marketing officer of Exterro, discusses the way the role of chief legal officer has expanded in recent years, as well as what organizations can do internally to stay ahead of changing regulations around data privacy and cybersecurity.**

CCBJ: Let's start with an overview of Exterro and your role there.

Bill Piwonka: Exterro was founded on the simple belief that applying concepts of process optimization and data science to the ways that companies manage digital information and respond to litigation would drive more successful outcomes at lower costs. The company's early history was focused on legal operations and helping companies manage the e-discovery process, but over time we've expanded our products and services to address a much larger set of business challenges, beyond just legal operations and litigation support to include things like privacy and compliance and information governance.

I'm Exterro's chief marketing officer, so I'm responsible for the company's brand positioning and messaging, as well as demand generation and working with existing clients. It's a pretty broad spectrum.

What are some emerging trends that you are seeing among your clients, as relates to their overall legal strategies?

Probably the biggest trend we're seeing is the way that the role of the chief legal officer (CLO), or general counsel (GC), has evolved over the last 10 years. Previously the CLO almost exclusively provided legal expertise. Now they are playing a

much larger role in terms of business strategy and have a broader scope of responsibilities. Much of the change, I would say, has been driven by regulations like the European Union's General Data Protection Regulation (GDPR) and the new California Consumer Privacy Act (CCPA) and the increased liability that comes with noncompliance. Then there are also the escalating costs and reputational risks associated with data breaches and cybersecurity attacks. And that's in addition to overseeing the legal operations of the organization. So today's CLOs must play a central role in ensuring that the company's compliance and data governance capabilities meet all of the various regulatory obligations. They must also understand other enterprise risks facing the company and be able to implement appropriate processes to, ideally, prevent negative outcomes from occurring, while also being able to efficiently address these issues if they do occur.

Take a cybersecurity attack or data breach for example. As the role of the CLO has evolved, so too has the organizational structure underneath that role. These days it's common to see legal operations, privacy, compliance and ethics all reporting to the CLO. Certainly there's also going to be tight cross-functional cooperation with security and enterprise risk. So, as the organizational units are changing in terms of their reporting structures, the distinct lines between these different organizational units are blurring as well. And it's because some of the really big challenges that companies are facing today can't be solved by one department.

Consider the privacy regulations I just mentioned, the GDPR or the CCPA. Both of those laws give consumers, and in some cases employees, the right to say to companies: "What data do you have stored on me? How is it being used? Who have you shared it with? I want to see all of it." And in some cases, they are



able to say, “I want you to delete all of it.” Normally, you would think, “Well, this belongs to the privacy group, because these are privacy regulations.” Now the privacy team is charged with having to take those

requests and use some kind of workflow to make sure that the requests get routed to the right person. To actually act on the request, you need to be able to connect to all of the different enterprise data sources

that reside within an organization in which that data is stored. You need to be able to identify the data, collect it, review it, redact anything that's not related to that particular requester, then produce it for the requester. That process is really what e-discovery is. Then, if the requester says, "I'd like you to have it deleted," you need to understand any kind of legal hold obligation or regulatory compliance retention obligation that the data might be under before you can simply delete it. You can see how now one business challenge – responding to these data subject access requests – spans privacy, compliance, legal operations and e-discovery. So organizations are looking for new approaches to solving these cross-departmental business challenges.

What shifts are you seeing in the way clients are approaching governance, risk and compliance issues?

Everything that I just described, we have labeled "Legal Governance, Risk and Compliance." It's a subset of the larger global risks to the enterprise, of governance, risk and compliance. But again, it's about asking, "What are the governance, risk and compliance activities and challenges that fall under the auspices of the chief legal officer?"

Let's go back to what I was saying about how these different departments are now all underneath the CLO, and how the distinct lines between the different departments are blurring. What our customers are saying is, "We want solutions that enable us to more effectively collaborate and communicate across each of these different organizational units. We want to have a workflow that spans each of these different

departments. We want to have, for instance, one data inventory where everybody in the organization can understand: Where is my data stored? What kind of data is stored in those applications, or on what hardware? Who has access to it? How do I ensure that when I'm doing something like a data minimization, or defensible disposition, or responding to data subject access requests, how do I orchestrate the workflow? How do I orchestrate the process across all these different people, and in some cases with third parties?"

Companies are coming to us and saying, "Help us, from a technology perspective, codify and implement our processes and leverage the people we have internally more effectively." So how do you solve this problem? It's a combination of people, processes and technology. And what our clients are saying is, "We need a single unified platform that is able to coordinate all of these different tasks and activities, as well as unify all of these different stakeholders in one common area, so that we can be more efficient."

What are the most pressing issues your clients expect to face in governance, risk and compliance over the next two or three years?

There are a number of big issues right now. First and foremost, our clients want to know how to comply with the existing privacy legislation and prepare for legislation that may not be ratified yet but is coming down the pike. Many companies that were multinational and did business in Europe scrambled to comply with the GDPR last year. This year, companies that do business in California are saying, "Oh my gosh, I have to ensure that I'm compliant

Most organizations in the U.S. today are unprepared for the privacy regulations that are about to be unleashed.

with the California law.” And there are something like 13 other states are planning to implement their own version of these privacy regulations that have legislation winding through the various states legislatures. So, one of the top challenges facing organizations right now is how they will comply with all of these new privacy regulations. Second, there is the ongoing threat and costs and reputational risks associated with data breaches and other cybersecurity attacks. And then finally, from a legal perspective, how can the legal department



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continually improve its operations? What we’ve seen over the last few years, and it’s absolutely a continuing trend, is that the legal department is under increased scrutiny in terms of their costs and how they’re doing their work. More and more of the work that previously had been outsourced is now being brought in-house. And as operations are brought in-house, companies start getting more visibility and transparency into what’s

happening. They’re much better able to control costs and predict future costs and run their operations more efficiently.

What are some key findings from your 2019 In-House Legal Benchmarking Report that our readers should be aware of?

Most organizations in the U.S. today are unprepared for the privacy regulations that are about to be unleashed. One of the key technologies that can help address privacy issues is an accurate, modern, enterprise-class data inventory. While pretty much every company will say that they have a data map, or a data inventory, the percentage of those inventories that are actually utilized is very, very low. So the first takeaway from the benchmarking survey is that most companies are not prepared to address these new challenges. They really need to look at their underlying technology and data inventory capabilities and determine whether what they have internally is actually helping them address these impending challenges, right now and in the future.

The second main takeaway is that, from a legal operations perspective, more and more of the e-discovery process is being brought in-house. Previously a lot of the e-discovery process that was done in-house was more on the preservation side. Now what we’re seeing is that in addition to preservation happening in-house, collection and processing are being insourced as well. ■

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DISPATCHES FROM OPENTEXT'S 2019 ENFUSE CONFERENCE

KRISTIN CALVE
CCBJ

► **Cybersecurity, legal and digital forensics experts gathered to discuss security in a zero-trust world.**

This past November, software company OpenText brought together leaders from cybersecurity, digital investigations, artificial intelligence and e-discovery for the Enfuse 2019 conference.

OpenText is a leading developer and seller of enterprise information management (EIM) software, including a number of popular and cutting-edge legal industry solutions that can address compliance issues, manage information, optimize processes, and minimize costs and risks. Its software products for the legal space include Records Management, Content Suite Platform, Contract Center, Decisiv, Axcelerate, Magellan, File Intelligence, Insight, Legal Hold, eDOCS and eDOCS Defense, and EnCase (including Endpoint Security, Risk Manager and eDiscovery).

Enfuse 2019 attendees had a unique opportunity to learn about the latest OpenText updates in information security, e-discovery, artificial intelligence and forensic investigations, as well as to update their skills with hands-on training at more than 100 labs. Areas of interest included mobility, the internet of things, information governance, forensics, e-discovery, legal document management and threat hunting. Speaking engagements by industry experts provided further learning opportunities, including discussions about the latest trends in EIM, as well as best practices and techniques.

At the 2019 event, the keynote address was given by OpenText CEO and CTO Mark Barrenechea, and the event was brought to a close by James Clapper, former director of national intelligence, who discussed the scope and scale of cyberthreats to U.S. national and economic security.

Enfuse, featuring a unique blend of technologies, disciplines and knowledge, brings together experts in the cybersecurity, legal and digital forensics fields to share ideas and shape a secure future.

“Conventional approaches are no longer sufficient to secure the modern enterprise in Industry 4.0,” said Barrenechea. “For information to remain a strategic advantage, it must be protected. Enfuse is our opportunity to convene leaders from the information security, legal and law-enforcement industries to share modern approaches to security that are effective in today’s zero-trust world.”

Indeed, Enfuse is the only conference featuring this blend of technologies, disciplines and knowledge—where experts in the fields of cybersecurity, legal and digital forensics convene to share ideas and shape the future.

CCBJ was proud to be in attendance at the 2019 conference, where we conducted a series of wide-ranging interviews with key members of the OpenText organization, including Hope Swancy-Haslam, senior director; Steve Davis, digital discovery group principal; Adam Kuhn, director of product marketing; Rachel Teisch, senior director of product marketing; and Andrew Teichholz, global industry strategist for the legal division.

The interviews are available online exclusively at ccbjournal.com.

Enfuse is an annual conference that will be part of *OpenText Enterprise World* in 2020, and CCBJ will be providing updates about the 2020 conference, and how our readers can take advantage of this unique opportunity, as more information becomes available. ■

A Powerful New Trend in E-Discovery Emerges

JIM GILL
IPRO TECH

► **Hybrid e-discovery gives corporations more flexibility when it comes to managing complex data and mitigating risk.**

Growing data sizes and new file types continue to be one of the biggest challenges for corporations, particularly for in-house legal teams that are tasked with mitigating the risk involved with enterprise data. To be successful, the ability to manage data in a flexible and scalable manner is key.

Gartner's 2019 Market Guide for E-Discovery Solutions identifies "hybrid e-discovery" as a future trend in e-discovery, pointing out that "organizations are looking for greater cloud flexibility where capabilities can be 'dialed up' and 'dialed down' as needed. Established processes, methods and technologies may not be enough."

This really shouldn't come as a surprise. For many years, people have touted end-to-end solutions, including the notion that an in-house legal team can handle anything that comes their way with the right software. But there are a lot of stakeholders involved in the e-discovery process, which makes the idea of a single team doing everything extremely complex. Consider the following:

- Corporate counsel and internal investigation teams need data to reach resolutions.
- Legal ops directors and e-discovery managers have to actually get that data and put it into a usable form so that attorneys can review it.
- Information technology (IT) has to work with all parties, collecting, managing and hosting the data in a secure way while the legal team does its work.

Similarly, there are a lot of components that go into ensuring e-discovery happens:

- Software is needed to process, cull, search, review and produce electronic information.
- Services are needed to do the work of e-discovery, either through utilizing in-house personnel or looking to outside service providers.
- IT infrastructure is needed to host the software and enterprise data in a secure and accessible way.

What Is Hybrid E-Discovery, and How Is It Different Than Current Models?

As a concept, hybrid e-discovery combines the best aspects of powerful in-house software, an outside service provider, and a specialized cloud environment and IT department dedicated to e-discovery and bundles them into a solution with a single technology partner. Hybrid e-discovery gives you the confidence that no matter what type of issue falls into your organization's lap, you will have the flexibility, scalability and support to handle it, either in-house or by utilizing your technology partner's services.

The Right Software

In a practical sense, it's a nonstarter when managing e-discovery if you don't have access to a robust e-discovery tool that can handle any type of data (including new file types), while utilizing the latest innovations in early case assessment, advanced analytics and artificial intelligence, in order to get to the facts as quickly as possible.

Some software in the industry claims to be "easier to use" than others – and there's no doubt that is an important quality – but what matters most is whether the software can handle the needs of high-volume, complex e-discovery. A drag-and-drop, single-click process doesn't mean anything if you're constantly having to send work out to someone else when things get heavy. It also gets costly. Add to that the flexibility to deploy software in whatever way works best for

you – on-premises, in the cloud, or switching between the two environments when necessary – and you have the foundation for a hybrid e-discovery solution.

More Than a Service Provider

Having a technology partner to help out when necessary allows your organization to increase or dial back resources depending on your workload and data needs. And unlike alternative legal services providers (ALSP), a hybrid e-discovery technology partner is the creator and owner of the technology, as well as a user of it, so they can adapt quickly to better support your organization. Whether they’re helping with strategy, doing data imports, setting up custom searches, or assisting with exports and/or productions, they can be as hands-on or hands-off as you’d like.

And because you’re partnering with the technology vendor – rather than a service provider – you’ll work with the same case managers, who will come to know your workflow and act almost as an extension of your case team, oftentimes giving around-the-clock support in order to meet tight deadlines. Long story short, they are prepared to handle the technical aspects of a matter, thus allowing the in-house legal team to focus on risk mitigation, investigation and other more pressing issues, rather than learning a new technology.

Hybrid E-Discovery in the Cloud

For corporate legal teams, the question used to be “on-prem or in the cloud?” But the answer to that question is more complex than it may seem. For starters, a lot of people think of “the cloud” as a singular place, but there are many types of clouds. Here are the three that are most often used in e-discovery.

Public Cloud (Amazon Web Services, Microsoft Azure):

- ▶ All infrastructure exists in the data centers of the provider.
- ▶ Users have a private environment within the larger ecosystem.
- ▶ Cloud host is responsible for data security, IT management and support.

Sounds good, right? The catch, however, is that these public clouds aren’t just used for e-discovery, and they may be high-profile targets for hacking. Public cloud providers are experts in data security and IT management, but they aren’t specialists in e-discovery.

Private Cloud (a.k.a. “On-Prem”):

- ▶ Provides more control over the data and the environment.
- ▶ Dedicated private network is located either on-premises or at a remote site.
- ▶ “On-prem” e-discovery deployment often means a private cloud.

In this scenario, control of e-discovery data is fully with the user, which is an added benefit from a security and control standpoint. But the burden of maintaining an in-house system is heavy: It requires managing hardware and software



Jim Gill has been writing about eDiscovery and legal technology for over 4 years and has been recognized by TechnoLawyer and as a three-time JD Supra Top Author. He joined the Ipro team in 2019.



upgrades, maintaining an IT team that understands the needs of the legal department, securing the environment against hacks and data breaches, while trying to recover costs and scale in the face of ever-growing data sets.

Hybrid E-Discovery:

- ▶ Provides the scalability of a public cloud with the data control of a private cloud.
- ▶ Hosting team speaks the same language as your legal team and acts as your dedicated e-discovery IT department.
- ▶ State-of-the-art data center, with limited employee access to sensitive data and a lower profile for targeted hacks.
- ▶ Hosting fees are a fraction of those of public clouds. And because you're charged flat rates only for the

data that's processed and hosted, the cost is not only reasonable but also predictable.

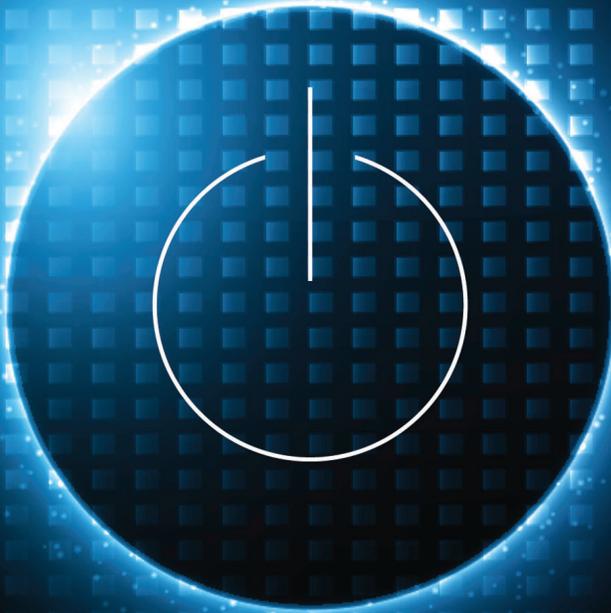
- ▶ If you choose to deploy on-prem, with a hybrid approach, you can scale up using your technology partner's cloud at any time, then scale back to avoid ongoing data-hosting fees.

A Growing Trend

As Gartner stated in its 2019 Market Guide, hybrid e-discovery will continue to be a growing trend in legal tech. Software alone isn't enough. Data continues to grow in size and complexity, and the need for that data in investigations and litigation is now a daily occurrence. For an agile response, innovative approaches to e-discovery are necessary, and rather than trying to go it alone, forward-thinking legal teams will likely look toward a hybrid approach. ■

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