

# A Fresh Perspective: Ten e-Discovery Predictions for 2012

by SFL Data CEO Christian Lawrence

A recent article in *Metropolitan Corporate Counsel* began with the claim, “The e-discovery industry is approaching maturity.” I couldn’t disagree more. In fact, the e-discovery industry remains in its infancy or childhood at best. Software that Gartner categorizes as “best of breed” is produced by companies five years old or less, and the quality of customer experiences with e-discovery remains inconsistent. With few established processes and best practices, many end-clients (corporations) are unsure which e-discovery methodology is best. Like a deer caught in headlights, litigators react to new matters with varying degrees of uncertainty, often relying on inefficient techniques to cull, review and produce electronically stored information (ESI).

Making predictions at such an early stage is never easy, but I’ve listened to our clients, learned from their challenges and reflected on their wins. Here’s a fresh perspective about where the e-discovery industry is headed in 2012:

## **1. ESI agreements will become increasingly powerful drivers of risk and cost reduction.**

An increasing number of law firm and corporate clients have sought SFL Data’s advice when drafting and reviewing ESI protocol agreements, which can dramatically reduce both the amount spent on e-discovery and the associated risk. These ESI agreements between parties govern the scope and protocols, yet the average quality of agreements is low for two reasons. First, corporations may not realize the power of an ESI protocol agreement. Second, experts from law firms or service providers/consulting firms are not included in the process. Both

scenarios leave money and risk on the table. This will change in 2012 as law firms and corporations begin to mandate these agreements as part of their e-discovery process. Although the model order has plenty of room for improvement, it’s a positive nudge in the right direction.

## **2. Search is not going away; it is evolving.**

While the most fervent predictive coding evangelists tout, “Ding dong, the keyword search is dead,” it’s simply evolving. Basic keyword search is deeply engrained in the meet and confer process, as well as production requests. In the future, effective keyword search will move away from the basic “run and review” method into an effective way to sample, iterate and use intelligent document grouping technology. As part of this new process, keyword search is strong basis for highly defensible, effective precision and recall results.

## **3. Predictive coding and automated review will become more pervasive, but will still have low adoption by year’s end.**

Predictive coding is compelling, especially when it comes to document review. Human reviewers get tired, charge an hourly (or even by-the-minute) rate and can produce inconsistent results. The Electronic Discovery Institute is scheduled to release a study in mid-2012 that is sure to put wind in the sails of predictive coding. While the industry is encouraged to use these methodologies, adoption to date has been slow – with corporations and law firms generally unwilling to be “first movers.” I estimate that this year, predictive coding techniques in mainstream review of substantially sized matters will increase from one review in 1,000 to one review in 100. While the prevalence of advanced

analytics at multiple stages of the e-discovery process is on a strong upward trend, we’re still pre-“Tipping Point” days.

## **4. Law firms will lose influence in e-discovery process definition and decision making.**

At a recent roundtable of General Counsel and Associate General Counsel of Bay Area companies, most panelists noted they were no longer willing to cede control of e-discovery processes and/or service provider selection to their outside counsel. Additionally, SFL Data recently met with a law firm partner who noted that, “On significant matters, it’s only one in ten times now that we drive the decision on service provider selection or high-level process.” This trend will surely continue in 2012 with some notable exceptions. Law firms have not effectively invested in e-discovery process development, talent and technology. Nor are they well positioned to do so, given their core business and economics. Accordingly, corporations are right to take control.

## **5. Managed services will become more pervasive for both corporations and law firms.**

Corporations and law firms will slowly begin to adopt a model in which a third party partner takes control of e-discovery with dedicated talent, repeatable processes and best-in-class technology. The alternative, setting up an internal e-discovery function, doesn’t make sense for most corporate and law firm clients because it takes the focus away from their core competency. Managed services is the obvious solution. However, one barrier to change is that lawyers typically favor conservative, incremental business decisions for fear of being “locked in.”

There are too few champions in corporate legal departments today who can visualize the powerful cost and risk reduction that comes from managed services. I predict that at least one significant corporation will downsize its internal e-discovery team and opt for the managed services method in 2012.

#### **6. Data security will be increasingly scrutinized and important.**

Corporations are taking more control over data storage decisions and risk mitigation. Consequently, security protocols will become more stringent as they learn data may reside in a multitude of locations. Service providers, consulting firms and law firms who are not investing in data security certifications and out-of-state backup risk some Wall Street Journal-esque headlines.

#### **7. Not only will non-standard data create headaches, cost and risk, it will also create opportunity.**

The volume of data found in social media (e.g. Twitter, Facebook) and collaborative workspaces (e.g. Sharepoint, wikis) is increasing, while traditional data (i.e., from a laptop, desktop, email share or fileshare) is decreasing. Even “location-based e-discovery” is on the rise, including GPS history data stored on a handset, cell tower data kept by carriers, near-field

communication to determine payments made with a smartphone, uplink time differential of arrival (UTDOA) and more. As we discussed in our 2011 Forensics Webinar, understanding how to handle non-traditional data sources will remain both a risk and opportunity in 2012.

#### **8. There will be more data re-use and cross matter management.**

As information governance improves, more data – such as ESI pertaining to a specific patent – will be collected once and repurposed during multiple litigation matters. This method leads to positive cost implications, and may prove especially beneficial in the area of early case assessment.

#### **9. Software companies will continue to adapt.**

It's fascinating to watch software companies serving the legal market address additional segments of the electronic discovery reference model (EDRM) to meet customer needs. This trend is sure to continue, as there is cost and risk associated with moving data in and out of their applications. Relativity and Clearwell are today's front-runners, and a clear “bronze medalist” is bound to emerge this year from the handful of companies vying for third place.

#### **10. Process building and customization will be king.**

I recently met with George Shaheen, the CEO who led Accenture's repositioning and tenfold growth into a \$9 billion technology services company. He noted that the keys to success were “the binders,” meaning the processes a company defines to support growth (e.g. ERP system implementations and management). The same rings true in our industry. Software and talent achieve optimal results when processes are well defined and implemented. In 2012, companies will compete based on how well they can customize and communicate workflows around best-of-breed tools in the marketplace.

Electronic discovery is an ever-evolving industry. When selecting an e-discovery partner, look for a company with a fresh perspective – one that stays efficient and cost-effective through the inevitable. This kind of nimble expertise is essential. For more information about how SFL Data provides defensible results, better control and visibility and reduced litigation costs, please visit [www.sfldata.com](http://www.sfldata.com), email [info@sfldata.com](mailto:info@sfldata.com) or call 415.392.2900.