**Kate Clark (KC):** [Complete introdcution not recorded] We call these the good old days because everything was a little easier back then from a technology point of view. Thankfully, these days we are a bit more techno savvy. And necessarily so given that in 2020 there were 306.4 billion emails sent and received every day. If we dig into that number a little deeper, there are approximately 149,513 emails sent every minute of every day. The average person sends and receives 121 emails per day. Hopefully for you, a lot of those will be junk emails and you can simply delete them. But if they're not, you have to get on and read them.

So having given you those numbers, working the old way is no longer an efficient option. At ELMS [Enhanced Litigation Management Solutions], we are finding that even on a smaller matter when a client hands you over their inbox with all of their emails, you can be left with thousands of emails with multiple attachments to be reviewed in a really short period of time. Litigation database technology can help you find the facts and review these documents faster.

I've worked with many of the barristers here at Level Twenty Seven over the last two decades, including working alongside them on the dreaded disclosure applications, and we've done many of them over the years. I can see a couple of faces smiling at me, Greg Richards, welcome. I also suspect that there's a couple of barristers here at Level Twenty Seven that think of me as their personal technology whisperer, to which I enjoy that role very much. So I'm delighted to be here with this great panel to discuss the joys of electronic litigation.

There's so much opportunity being left on the table in this space. Hopefully today's discussion will help you explore your relationship with legal tech more positively and find the joy in this part of the litigation process.

On our panel today we have four very different perspectives, a client, a law firm, a barrister and myself as an eDiscovery consultant.

Firstly, let's introduce our client. Kiri Parr is the ex-General Counsel of Arup. She comes from the perspective of paying the bills, extracting value of document management processes, and making sure that her IT team do not have a meltdown during this process, which I can vouch is a very hard thing to be able to do.

Next, we have Jane O'Neill who is a Partner in the insurance and financial services team at CBP [Colin Biggers & Paisley]. She and her team are really experienced in using eDiscovery software and process and they certainly do understand how to how to use that technology to their advantage.

Finally, we have Matthew Hickey, who is a barrister here at Level Twenty Seven Chambers and comes from the perspective of arguing over eDiscovery issues and is very experienced in eDiscovery having used litigation databases in previous roles as a solicitor. I can personally say that Matt is an absolute technical geek. He fully understands how to use technology to assist him in his role as a barrister.

Before I throw it open to the panel and ask them some questions. I'd like to just set the scene on the eDiscovery market so everybody understands what we're dealing with. In the Australian market, we are still pretty much dominated by two large litigation database technology providers, that being Newix Discover which was formerly called Ringtail and Relativity or Relativity One. Both of these companies are US owned. There are lots of other products in the market but these two are pretty widely used throughout the world. There is one product coming to the Australian market, hopefully in the next year, which is called Disco which will change the way that you look at how you analyse data and litigation database. We're hoping to bring that product to you sometime in the near future. These products are really powerful and historically have been very expensive to use in a litigation matter. But we're now seeing the price being driven down by the software as a service model so this technology is more affordable and accessible than it ever has been before.

It's still really complex to assess the value for money in the technology and consulting services because there is such a variety of costing models provided by the providers. You really need a savvy strategy to get this right and to know which bells and whistles you will need and are important for your matter.

Now at ELMS, we assess new products coming into the market nearly every week. What is emerging now are really simple and cost effective tools for eBriefing and tools to assist lawyers with chronology building. Yesterday we released a product to the market called Everchron which we believe is going to be a real game changer. Not only can you build a chronology, you can also generate advanced witness files in real time, instantly forming connections between documents, witnesses and issues. On the roadmap for this product in the future is a witness statement analysis tool which we're assisting Everchron to build and which should be available to the market in the new financial year. It's a really exciting time in the legal tech area.

**BEST PRACTICE SKILLS**
So let's now get to our panelists. Today, we're going to go through the discussion in themes. The first thing we're going to cover today is the best practice skills. So Kiri, can we please start by asking you a question. What level of expertise do you expect for your external legal teams to have around discovery processes or eDiscovery processes? And if we can break the question down a little to specifically look at identifying documents in your internal client

network and understanding the risks associated with those documents, and then more broadly, eDiscovery technology and processes.

**Kiri Parr (KP):** Thanks, Kate.

My first thought was on your introduction to Jane and the observation that she's built a team with skills around her. I know that Jane is the kind of lawyer, and Matthew is the kind of barrister, who leans into the technology, makes the decisions about what to use and sees that big picture. And that's actually a skills set that I look for. My big warning bell sign was "Oh, I've got a really keen junior lawyer who's into IT." To me, that's a sign that you're thinking it's below you or you're disconnected from the technology. Having someone who really sees the strategic value of it and a core element for me is finding the lawyers who are going to come in and collaborate and lean in to the technology. I don't expect anybody to know how to drive the software, the software is really complex, but to actually understand what it's going to do and how it's going to add value to the project, and for the Partners, the legal teams to be really capable of working with the clients and the eTechnology providers.

The interface point with a company, of course, is how you come into my organisation and work with my IT teams and start building that understanding of the records and how they're kept and how that company organises itself. And it's not straight forward at all. I can remember a scenario where the collection exercise got delegated down to too junior lawyer and suddenly a form that says "Can I please collect all the documents?" They just told the admin person inside the business "Oh, can you give this to everyone who worked on the project?" But there were over two hundred people working on that project and they're all asked exactly the same question. So actually just not doing things or delegating the job. So that strategic view to how that technology is going to be deployed, a strategic view to how to work with the client around this issue, because it can be really, really disruptive to come in and extract those records and to work with the people who have day jobs.

**KC:** So Kiri, it's really important, I'm hearing for you, is to have a team based approach where you have the legal team, their legal tech, the eDiscovery provider, your IT team, and potentially some of your legal team to all come together to understand the problems.

**KP:** Yeah, absolutely. I always like to have everyone around a table having that conversation because as soon as they…if you try and have a conversation that goes from IT team, to lawyer to lawyer to IT team, things, so many things get lost in translation. So for me, it's having everyone together, bringing those skill sets together, you need to work out what is the best approach.

**KC:** And Jane, you would agree with that premise that it's really important to have the right people doing the right jobs at the right time.

**Jane O'Neill (JO):** Absolutely. Following on from something that Kiri mentioned before, I don't expect the members of my team to have an intimate knowledge of how the software actually works. However, it is an expectation that I have and most of the other litigation partners in the firm have that people understand the sort of software, applications, potential uses that are available in the market, so that they can turn their mind to whether electronic document management, electronic ways of managing and producing documents is something that's appropriate for a particular matter. So I do expect that my team be familiar with what's out there, know what sorts of applications it can be useful in and turn their mind at all stages of a litigious and non-litigious process to whether there is a benefit that can be obtained. As far as I'm concerned, it's essential to have that sort of understanding to be able to provide excellent legal services in today's world.

**KC:** And Jane, what do you think about the idea of having a technology or eDiscovery provider sitting beside you when you're doing an identification of documents sources stage, because that doesn't really relate to technology but more relates to the consulting aspect of the project. I think you and I've certainly worked together a lot on that basis and it's been very effective.

**JO:** Absolutely. Again, this mirrors what Kiri mentioned before, a collaborative approach is always going to produce the most efficient and comprehensive outcome. We have dynamics where we have ELMS liaising with us and the client at the outset of a project. Then, we would be on the phone constantly when we're, I guess, particularly in the initial phases of a project, where we're discussing approaches, discussing maybe search parameters, structures. It is a very collaborative process because it's often the case that the software and the technology can do things that benefit both the client and ourselves that we need to be constantly educated about. So it is very much a collaborative process throughout the whole process.

**KC:** And Jane, is it sort of safe for me to say that sometimes when you're dealing with the IT team within your client, it is sometimes hard to communicate with those people because you simply don't speak the same language?

**JO:** Absolutely. Often it is the case that there is a communication barrier between us. Typically, IT professionals and the IT team who have a more comprehensive understanding of how documents, data is stored electronically. Often having a third party to essentially translate, mediate, facilitate is critical. All organisations are different in terms of their sophistication and their experience in in being involved in these sorts of projects. Having a third party to assist in

the communications and making sure that all relevant data is identified and captured to the extent that it needs to, again is critical.

**KC:** Kiri, just taking that a bit further. For your internal team, is it less frustrating for them to deal with an intermediary where they can say "Oh, this is the tech issue that we've got, this is the solution we're trying to find? And how do we now explain that to the legal team?" Because my experience is that IT people also have trouble explaining things in layman's terms to the legal people, and I think you really do need that person sitting in the middle to make sure it's all going smoothly.

**KP:** Yes. I think we just simply don't know what we don't know. We all have the language of our disciplines, don't we. We don't even realise that we're speaking in shorthand half the time. This is where the value is, having the people who speak the same language talk to each other. We talk about people who have multiple deep skills. So where Kate has both the technology skills set and then the legal skills set. Having worked with lawyers she knows what a statement of claim is, she knows how to look for evidence, she knows how the lawyers do their job. It's the combination of that with the IT skills that allows her to sit in that interface point. It's rare to find people who sit in that cross point between skills sets. But suddenly they're the people who understand what the lawyers are trying to achieve. Then can translate it and get the outcomes that they need in the IT teams. The IT teams like it because they're sitting there going "Someone's told me to copy this." But you need to talk to an IT person to go "Actually, I need you to copy it in this way because that will preserve the metadata, you know, the dates that come with the documents." Just the simplest of conversations or the simplest of points can have a lot of dollars attached to them. I know if I just said just "copy them" I wouldn't have the nuance to know how to instruct to do it in a good way.

**KC:** It's a simple process to copy them in a good way so you don't destroy the metadata. You might as well just have that conversation upfront so you save yourself some money down the other end.

Kiri, can I just push you on to another point. Do you expect your legal teams to be able to understand and interpret a cost estimate that is received from an eDiscovery provider? Because this is certainly an area in the past where, when I've been advising teams, and I've had to go to the market and get several products and the estimates come in and for me to understand them is quite simple and plain but then to get someone who's not trained in this field to do that, it's a very different thing.

**KP:** Yeah. It was always immensely frustrating because you, they'd go out to market, you get three tenders and you'd end up with a giant spreadsheet and they'd say they'll do the hosting at this rate, and they'll do the consulting at this rate, or this pot of data copying. I had no

capacity to know what actually drove the value or the cost. Because until you know what software they're using, what the business model is, what the collection exercise is, you're going put so much information together to actually know which one is the best value. The market has been a very lucrative, profitable area of business for the software providers and the consultants. It's a very expensive piece, it doesn't get analysed very closely. I think for a long time it's been easy for some very big numbers just to go through and everyone to go "The cost is the cost. I've been told this is what it is. And I actually don't have the skills to challenge that." This is without having that skill set at the table. I don't even have the understanding to challenge what's being brought to me and to actually make a good decision.

**KC:** Good point.

Matt, can we just throw you into this conversation now. Can you just let us know, of the matters that you get involved in, are you expected to actually get into a litigation database and do the work? Or are the law firms more feeding you the information, and then you analyse it once you receive it?

**Matthew Hickey (MH):** I think I'm increasingly getting into the database myself. I think that's probably because I've signaled a willingness to do that. I must say, my preference is to do that. I think there's real value in explaining to counsel how the database system you use works and giving them the ability to actually run strings of questions and filter out things that they're particularly looking for, particularly junior counsel. In my experience, it's often that a Silk will come to you and say "Find me all of the documents that are relevant to this." It just means that I can go straight to the database and do that and have the documents to him or her, sometimes within minutes rather than having to send correspondence to my instructor, wait for them to find the appropriate person at their end who can interrogate the database. But also, often in trial, once you're actually running something, there's real value in being able to, while sitting at the Bar Table, run a search string looking for a particular suite of documents or what have you. So yeah, I like to get my hands dirty in the database. I think that's quite helpful. But I think what's important to understand is that the difficulty of being at the Bar, I suppose, is that in the same way that through COVID barristers came to be quite proficient, I think, at using half a dozen different video conferencing systems. Similarly, we become adept at using a variety of different eDiscovery and litigation management tools. So it's important to remember that it might be some time since counsel has used the particular tool that you use. Of course, these things are being updated all the time. So it's helpful to explain to us, look, this is this new feature that you might not be aware of because it's been introduced since the last time you might have used it. Don't assume we necessarily know anything. I think I'm probably safe in saying you probably don't assume that for the most part. But I think the junior Bar in particular is quite receptive to being trained in these tools. We recognise that part of the service delivery that we can provide to instructors and to their clients is to get to grips with how this stuff works.

Increasingly of course, the court is requiring us to participate in electronic trials and the like. So the more opportunity we have to be brought into this stuff early on the better.

That's the other thing I would say, sometimes counsel is tagged on to these systems at the very end, even though you've been in the matter quite a long time. By that point, everybody else is familiar with the how the system works and you're trying to play catch up to work out well what search strings already exist, what filters already exist, what packets of documents exist, how are these things categorized, what are the tags that we've implemented. I personally find it's really helpful to be on top of that stuff sooner rather than later. I think more matters that I'm in than not now have some sort of tool of this kind sitting in underneath and there's an expectation that I'm able to come to grips with it.

**KC:** Yeah, that's great. We certainly see, and Jane I'll get you to pop in here. We train lots and lots of barristers these days, whereas probably five or 10 years ago we just didn't have the need to do that. But I would say, most of your barristers Jane certainly get involved within the database and are very familiar and really good at using the systems.

**JO:** Absolutely, it's just a sign of the times. I think in the last sort of two years or so, and very much COVID influenced. You've had no option but to get with the program and learn the software and learn how to use it. The Bar in particular, and I'm sure Matthew would say the same thing, has had to adapt to trials over AV, document production, including to the court, via electronic means. It just meant that everybody from those at the Bar that are actually appearing in the trial to the solicitors that support them. And the courts for that matter having to adapt and learn how to use new systems.

**Level Twenty Seven Chambers (L27C):** I just got a question from the audience which is "Should the profession standardise eTools for interoperability and learn how to use them, like the Court of Appeal books?

**KC:** That's a really good question. We often get asked when we're starting a matter should both sides use the same litigation database. And your protocol that you negotiate at the start deals with that in that we exchange data in a way that is consistent so you can put it into any system and it will still be effective for you in that system.

I think that certainly the lawyers, and the barristers to some regard, and sometimes the client, if they get into a database, they might be using say Newix Discover, because they like Newix Discover, the whole team has been trained in it. And they just enjoy working in that tool. You wouldn't want to then make them use Relativity One and have to learn a new system if that wasn't necessary. I suppose it would be good to have a basic level of understanding of all of the eTools available, and there's heaps of eBriefing tools now, there's chronology tools, there's

all sorts of software you can use along the way. Or you can just use Adobe Reader to get you searching across a document set. So I think it'd be good, maybe there should be a course run which just gives you some basic skills. I know I've certainly done a couple of courses up at Level Twenty Seven Chambers just to give them some basic skills, actually not basic, the barristers are pretty good at tech up there at Level Twenty Seven. We certainly do a lot of training up there. I think that would be pretty useful. We've done a stack of training for CBP from the eDiscovery process right from the start, from identification documents right through to trial. I think it's just a matter of educating yourself wherever you can. And if you don't know, just give us a call and we'll help you. Jane, would you agree with that? Your lawyers, they're pretty au fait in most of the tech now, and I think that really does help your firm.

**JO:** Sure, but it is an interesting theory, isn't it? You know, if there is some form of standardisation. On one view, perhaps that would encourage people to be particularly proficient. It might assist if the courts are going to continue to adopt a largely electronic/digital approach to hearings. It might provide that level of comfort to parties that are involved in the process to know and to anticipate exactly how it's going to work so that the firm's clients might be more inclined to invest in the technology if they know that that's how it's going to work. It may be that over time, and through this learning experience over the last two years, that the court starts to develop protocols. I know for us in New South Wales we have still a lot of scope for negotiation between the parties in terms of how they produce documents in electronic form. Yes, the Federal Court is quite prescriptive but in terms of the other courts there is still some flexibility. It will be interesting over time to see whether perhaps thought is given and consideration is given to actually developing practice notes, practice guidelines in terms of more specificity around how an trial might proceed electronically. It's interesting, I think it's a watch this space sort of concept.

**KC:** Thank you for that question.

## DIFFERENT USES OF LEGAL TECH
**KC:** Kiri, can we just move on to now, still talking about best practice, can you talk to us about how you've used litigation database for different purposes whilst you're an in-house counsel? For internal claims, investigations, fighting third party disclosure request, early claims type work, and potentially briefing barristers directly?

**KP:** It fits with that prior conversation, because this technology is constantly changing and emerging. We're early in the technological disruption of the world. The eDiscovery tools are a big beast, but the price point of those is actually going to change how we use them. It's the other tools that are coming through. I mean, we don't want to put ourselves in a box too early because I think there's so much more that will come in coming years. You don't want to be too slow to move. There's a big competitive advantage with being an early adopter and being

open to getting the right tool for your job. I was really trying to start exploring how I could use these tools differently. There's a couple of things I always did. One of the pieces of software inside the corporate cloud, and I took the hosting out of the external providers and brought it in-house, just because the corporate rate for data hosting is a completely different value to what a third party wants to charge you for it. Just a simple thing like that, and willing to take that risk on, I was able to completely drive down the costs of that litigation. It was only by actually going "I want to make discovery my problem" and actually go "How can I get value out of this?" was I willing to do something that just wasn't done in the market. That has moved on because we've now got the SaaS platforms, the cloud based platform, so you wouldn't do that solution again, but it was a really game changers option at the time. And that one was particularly interesting, I think, because we not only had our own corporate records, we had another party's records, and the costs were being recovered by an insurer. Number one, you can take a different approach with what's already out there.

The other thing that I absolutely use them all for was to resist a nonparty disclosure application. This was with Kate because Kate had got to the point where she knew Arup so well, I was able to just translate her skills in really quickly into another legal team just to go, we can argue really effectively what the disruption to our business is, of the scope of that request for nonparty disclosure and really make a convincing case very quickly about the sheer volume of documents that would be called by the request, and why it wasn't reasonable for us to produce them at that point in time. I think if I hadn't had that depth of skill to do that as quickly as we could, we might not have got the outcome that we needed.

The other area that I really see the opportunity is around that early investigation phase because three or four years ago you'd have a niggle of an issue playing through the business. You'd go "Okay, I need to go look at staff member X's inbox" and they could have left, they could have done a deal and you need to find out what happened. You know that you've got to have someone spend two or three days trawling through another person's inbox and building the story. The way I did it was that person was given access to that inbox, they would have been able to look at it through their email system. And I did, I gave the job to the young paralegal in the team. From my perspective, and I think I'm like Matthew, I like to get in and have a look at documents. I'm a firm believer in the lawyers who read the documents are the ones who know the case. So, because it was on somebody else's computer, they were doing the work in that system, occasionally they might flick me the odd thing, but I didn't ever get the ability to ever go into the documents to have a little sniffle around for myself, I didn't have very good oversight of that work. The game changer now…I just wouldn't do it the same way again. I would extract the documents, I would throw them into one of the products. It may be that that person still does the work, but I can actually go in and I can look at them and I can search them, I can look at how the records have been tagged. What would have been just

prohibitively expensive five years ago just isn't these days, and the efficiency of that piece of work, I think, has changed.

**KC:** I tend to agree Kiri. Certainly, it's fairly simple and easy just to throw a PST file into a database and analyse it fairly quickly. Jane, your team does that all the time, constantly over and over again. I can say you guys find that very efficient.

**JO:** There's multiple applications for this sort of technology. We use it in litigious and non-litigious matters, everything from at the very beginning of a matter where you have an impression that it's going to be document intensive, might have been a construction project that had a project life of some six years or so sometimes, you automatically know that if there's a dispute between contractors over that period of time, that you're going to have a document intensive matter. So right from the very beginning, we would be encouraging our clients to consider implementing this sort of technology so that all of the documents that are potentially relevant can be isolated from the very beginning. Then you have other matters, such as the ones that we've been involved before Kate, quite aside from just the usual sort of discovery/disclosure process, where something might come up in the course of a claim or a hearing where, as Matthew mentioned, you need to find the answer, or you need to make a really quick search to see if you have particular documents. Sometimes you just don't have the luxury of time, or the client doesn't have the resources to perform those searches itself, it's really good to get a third party to just go in and just pull PST files, pull share files, pull document management databases, and then run exclusionary or inclusionary searches. Those documents can be located in days or a day, rather than what would take someone weeks, months manually. When you're in an intensive litigation process, sometimes it's the only possible way to get the answer.

**KC:** Absolutely.

**VALUE OF EDISCOVERY**

**KC:** Let's now move on to the theme of value. Just to set the scene a little bit, let's talk about what drives value in eDiscovery and specifically with the eDiscovery providers. What you need to do is have a provider who can identify and understand the technology infrastructure within your client's network, which can be quite technical and sometimes there are multiple data sources, so they really need to understand what they're looking at. Then they need to identify for you any risks that are associated with those documents. For instance, if they've moved documents about in their network, and they've busted all the dates, it's going to cost you money to fix those dates. There might be a solution you can put in place at the client's network to rectify that issue before it gets into the litigation database.

Seminar transcript 6 May 2021: '**The Joy of Electronic Litigation**' Kate Clark (ELM Solutions, Kiri Parr (Kiri Parr Pty Ltd), Jane O'Neill (Colin Biggers & Paisley) and Matthew Hickey (Level Twenty Seven Chambers)

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Secondly, you need a provider who can understand all of the costs involved in the eDiscovery process and how you can reduce those costs for your clients. An example of that might be if you're hosting services, so if you can push down the cost of hosting your database, because that's going to be the monthly cost that exists over the life of the matter. If you can push that down as low as you can then that is a massive benefit for your client. In the scenario Kiri was talking about where she took the actual document management, it was Newix Discover back then, back in-house to run the matter she saved millions and millions of dollars in hosting fees. If you can think about little bits of the eDiscovery process and manipulate how that is run for you, then you might be able to save a substantial amount of money down the other end.

Then of course, this is a given, you need a technology provider who has a really in depth knowledge of the software that they're using, how that functionality can help you with your matter, that is an absolute given.

The one other thing I think is an absolute given is good client service. Jane O'Neill once said to me that "ELMS treats CBP the same way as they treat their client." That is her expectation of a service provider and I think everyone should expect that good client services are given, certainly from any eDiscovery provider or anyone who's providing services to you.

Kiri, can I throw a question to you now about what value do eDiscovery services and technology provide to you as a client.

**KP:** I want to throw one of the intangible values because, at any point in time, there are always multiple claims going on, multiple databases. I think one of the ways that we did end up driving value was through deploying the skill set across the board, rather than reinventing the wheel across the matter. This is, rather than the external lawyers working with their favorite system, I was the client driving "Here's my favorite system and this is why". Lawyers who've worked with me would probably know, I'd phone you and say "You're going to be working with Kate." For the lawyers who leaned in, I think we got some amazing outcomes. Over a long period of time, it ended up being a real circular set of benefits, not only did Kate know our business really well and how it was structured, and that drove efficiency with how she came into work with our organisation. It had a two way effect back in because it wasn't just helping my litigation, it ended up helping the IT team because we had at that point in time, because Arup writes its own software, it would be writing in software with the perspective of that at some point someone will need to extract this information out of the software, how do you write the code that makes the extraction process go well and quickly and without any processing costs? So it became a whole of life cycle where you could use the underlying knowledge that you've built up through your legal teams through your service providers, to drive that value from job to job to job. To me, that was the sweet spot that we were getting to.

**KC:** I think that's right Kiri. Even to the point of, I'm sure all of you will have experienced if you've used a litigation database, that sometimes the deduplication technology is not what you expect it to be. Typically, that is because of how your client handles the data at their end. So it's really important to understand that aspect so that when it comes into the database you can isolate the duplicates even though they're not technical duplicates. Then you've got to feed that information back through the client so they can adjust their systems to make sure that doesn't happen in the future. So the next time you put your next lot of claim documents into a database they do deduplicate because, obviously, if you don't it's going to cost more money for the legal team to review them and more money for the end client.

**KP:** We'll probably get to the next phase of offensive document management so you're not waiting for the claim. You're sitting there going "What part of my company carries what risks and where are my documents? How are they stored? What can I do to make this process work well when we get there?"

**KC:** I think that's right.

Jane, can you talk a little bit about how eDiscovery services drive value for your legal team and the services that you provide to your clients?

**JO:** Absolutely. I guess, what you would call the four pillars of efficiency, which are cost, resourcing, time and accuracy or completeness. A lot of tasks that had to be done manually in the past can now be done electronically, and that's where the efficiency is driven. But working in a profession that typically charges on an hourly basis, or at least on a time related basis, cost is often, I would say, the number one driver. Interestingly, a comment was made by one of the participants here about justice shouldn't depend on the sophistication of parties and their ability to afford this technology. But from my perspective, something's really wrong if the technology is not actually translating to an ultimate saving. That is the number one benefit of the technology that the work would otherwise have to be done in some other format, usually manual/hardcopy, and what you're actually receiving as a result of implementing the technology is an ultimate saving to the client. But look, there's also those other examples that I think I mentioned before where the technology can, or the availability of the resource of an external document management provider, to act as a facilitator with clients, to liaise with IT teams to translate, to interrogate a client's documents, in circumstances where sometimes those clients don't have the ability to understand the technology and access documents themselves. Ultimately, the value is driven, to me, from a cost efficiency perspective, taking manual tasks and converting them into much, much faster electronic means.

**KC:** That's right. It just saves you an enormous amount of time. It feels like the deadlines never get extended but there's just more data to shove into that deadline. I think it's a really good use of a piece of tech now to help you guys get to where you need to be a little bit faster.

Matt, can you talk to us about eDiscovery services and technology and how they add value to your practice as a barrister, not only from a litigation database perspective. I certainly know that you use a lot of PDF solutions and lots of eBriefing, and can you talk to us about how that adds value to your practice?

**MH:** The interesting thing about technology is that I think it permits you to marshal the facts in particular in a much more creative kind of way. There's something about the ability to manipulate information other than in its pure physical form which causes you to think about it in a different kind of way. To give but one example, if I'm given a hardcopy brief, a traditional looking lever arch volume, it sort of has its physical amount of space it takes up on my desk, and then its depth. Of course, there's something about the visceral aspect of that, that you have a sense of, well, I know this document is about an inch of the way through that particular volume. But if for instance, you're trying to form a case theory about a particular set of facts, a particular fact pattern, in the old way, it relies upon you reading the documents, your brain being triggered to the particular thing, and then having enough memory recall about where in the documents you saw these things, or having marked them up on the way through having recognised it was important as you do it, it doesn't really permit very effectively of reflective action, at least not in a very efficient way. What I like about working electronically, is that you can have these sort of middle of the night ideas, and you can then interrogate the documents to give you visual presentations of things. To try to put some specifics around what I mean, for instance, as a very simple example, the ability to be able to display on the screen that I'm looking at now one hundred pages, for instance, at the same time, and to search for a particular search string in not just one but many documents, and then be able to observe clusters of where information arises chronologically. So for instance, I might search for a particular term and see that it doesn't assume much significance early on in the piece, but at this particular point in time there seems to be a flurry of correspondence on that particular issue, and then it tails off. Now, that's a bit of information which isn't necessarily evident on the face of the documents. But when you layer over the top of it electronic manipulation it reveals some information that is in fact useful. To give a practical explanation of how I might use that, it might permit you to develop a line of cross examination which might not have been obvious at first instance.

The ability also to, of course, immediately search for a particular string and then highlight all of them. For instance, I know there's another Silk that I've worked with here, where what he will do with juniors is say "I want you to go through all of the cases that we're relying upon, search up

every instance of this particular phrase, and then mark it in that particular colour." And so, one sees clusters of information in a way that you don't necessarily see in hardcopy.

The other thing of course, is the ability to markup documents in a hyperlinked kind of way. There are these really interesting technologies emerging, which I'm quite interested in, where they are using AI to create automatic links underneath the things that you're working on. So you can feed documents in, markup particular things, and it will itself suggest "Ah, you seem to be interested in these kinds of things. Might you also be interested in these kinds of things over here?" Whereas when I started at the Bar, for instance, I was taking notes, you know, case notes in notebooks. Now, I'm marking them up in electronic databases which are using AI to cross reference automatically in behind the scenes things. So I might, for instance, load in a case about costs, but it might have a trust element that doesn't really occur to me. But when I go hunting for trusts, it might say "By the way, did you recognise that there was this case over here that you've marked up previously about costs but it's also relevant to this thing you're interested in trusts." So there's this kind of layer of technology that sits over the existing body of legal knowledge and also the way you navigate the facts that of course you're trying to advance to your client's best interest, which if you can come to grips with the technology that's beginning to develop around these things, I think can make you much more effective. Frankly, we're still in the early days of all of this stuff and I think it provides a forensic advantage to those lawyers who can manipulate these tools to their highest effect over those teams who are reluctant to engage with them, either because they think they're not useful or it's beyond their technical expertise. I think there is, at the moment, still a real forensic advantage in being able to use these emerging technologies in a way that perhaps aren't yet mainstream.

**KC:** That tech sounds pretty cool to me Matt. You've shown your geekiness again.

**EBRIEFS**
**KC:** Can you talk to us about eBriefs? Do you get hardcopies anymore or is it all eBriefing?

**MH:** You know, it's interesting, my son was here in my chambers the other day and for all of the years I've been in this room, over on the wall behind me, there's been shelves that have been full from floor to ceiling with lever arch volumes. He came in and said "What's going on? Have you not got anything to do?" It's because the hardcopy briefs have dried up. I think in the last twelve months I've had two lever arch volumes turn up here in chambers. Now, that's not to say I haven't received new instructions, for all the scallywags out there. I think COVID really forced everybody to it. For my own part, I've preferred electronic briefs for a really long time. But I think because we were all separated, it wasn't effective, feasible, for a period for people to be delivering things. We at the Bar really have been forced to electronic documents. Now it's remarkable for me to get a hard copy document. My experience seems to be that most instructors are saying that, typically people are asking "What would you prefer?" I think most

solicitors these days are preferring to work electronically. It's a rare thing to have somebody say "Well no, actually we prefer to work in hardcopy." I know somebody that instructs me recently said that their client won't pay for hardcopy briefs anymore, which I think is a really interesting development. I think that speaks about where the market is at. I think clients are saying "We're all working electronically, explain to us why you can't too." I frankly I prefer it.

That said, I think there are some real skill in providing a good electronic brief. That's a conversation worth having. I don't want to suggest that this is the modern version of a barrister complaining about his or her brief not being wrapped up in the right coloured pink ribbon, but there are some efficiencies to be had from the way you provide an electronic brief. It's worth having the discussion about whether the counsel you're engaging would prefer one big document with all of the documents sitting in it, and a hyperlinked index at the beginning, or separate PDF documents. The one thing I would say is universal, please, send us documents that have already had the OCR scanning done. If you don't know what I mean by that, PDF documents, I'm sure most of you do know this, but just in case for those of you who don't, PDF documents can be either photographs effectively, or they can be photographs accompanied by an underlying analysis of what the text on the page actually is. If you've done OCR two things flow from that: one, you can actually search the text that's in the document, you can't do that if it's just a photograph; but second of all, your ability to highlight it and manipulate the text and so forth is limited if it's not had OCR done on it.

Now, typically, if you send me a document that's not OCR'd, of course I can do that myself, but it's time consuming and I find it requires quite a lot of computer power to make it happen. So I'll set a document, go do something else and come back, particularly if it's many hundreds of pages long. Or alternatively, of course, if you're more senior than me you can just send it back and say "Dear instructing solicitor, would you let this be your problem, please." But of course, that takes time and you know time is money and all the usual kind of stuff. So yeah, eBriefs are the way forward, what particular platform you use, there are lots of bespoke services that some firms use. What I would say, a personal hobbyhorse…Sorry, you'll be sorry you asked Kate. You know, these kinds of systems where you have to log in and download documents, every firm seems to have a different kind of one. I like to think I'm technologically progressive but I find them really difficult to navigate, I find them really time consuming to get the documents down. Frankly, I would prefer, if possible, that you send me a USB with the documents that I can just plug it in and suck them across. We've got a superfast internet connection here. I know how those systems work, but for whatever reason, I find that really slow.

**KC:** Can I add to that Matt, if you're going to provide them a USB, please encrypt it before you give it to them. And please use a fresh USB each time because you can recover deleted items off a USB, so just a couple of safety tips there.

**MH:** Kate probably says don't send me a USB, but…

**KC:** You can have whatever you want.

**MH:** I'll take anything, I'll tell you that. I'm not precious, I promise. That's just my sort of observation from the coalface.

**KC:** Great.

Jane, can you talk to us about eBriefing in your firm and whether you do that as a best practice now, or whether you're still briefing some barristers in hardcopy.

**JO:** Sure. Our experience is very similar to how Matthew described it. It really comes down to the preference of counsel. But I would say nine out of ten times they're requesting an electronic brief only. It certainly makes it easier for us because typically we run an electronic file anyway. So it means that not only do we save the costs of printing, and the poor trees that are involved, but also we maintain an electronic record of what has been provided, which means it's very easily accessible to us. And I find it's also much easier to supplement. A lot of times there's a need to issue a supplementary brief or to substitute matters. That can be done quite easily if it's an electronic brief you can save the time and the costs of the paralegal having to go up to counsel's chambers with documents and inserting them in, changing pagination. This way it's very easy to just change, perhaps change an index electronically and send a newly electronically paginated or new electronic file or a new USB. It makes it easier for everybody. There seems to be general acceptance from the Bar that that's a preference for them too.

**KC:** Certainly, I know from my years at Mallesons, twenty-seven odd years ago, we were having so much trouble just talking to people about this and getting them to get on board with this. It feels like, nearly thirty years later, we've actually got there. Congratulations to you all.

Kiri, do you expect your barristers and law firms to utilise technology and specifically eBriefing to increase efficiency?

**KP:** Well, I'm convinced from what Matthew and Jane just said. There's no doubt in my mind. I was just going to say, for anyone who's struggling, Jane mentioned that there's a question that came through going "It shouldn't depend on your sophistication or your size, your ability to use this." The thing is, it's actually becoming really accessible. There is that sustainability point, and once you talk about litigation, arbitration and the impact of all that paper. it's no longer the domain of large entities. It's that early adopter piece, if you're interested you can actually you

can leapfrog against others, you can get that forensic advantage that Matthew was talking about, by knowing how this technology works. There's no barrier other than how you think about it.

**ETRIALS**

**KC:** We've only got a couple of minutes left, so quickly, moving on to eTrials. Matt, do you do any hardcopy trials anymore? Is it all electronic now?

**MH:** I was thinking about this. I think the only non eTrial I've been involved in in the last eighteen months was one that took place in a regional area where the court didn't, as best I can tell, have the facilities to use it. Typically, I expect that trials will be conducted in that way nowadays. It seems more and more unusual if there's not a direction to that effect, in my experience. It might just be a function of the particular areas in which I practice. My sense is the court is slowly boiling the frog, to use that analogy. They are moving us all towards that direction, whether we like it or not. Of course, it makes sense, for all sorts of reasons it makes sense. I must say in Queensland, here the courts' eTrial technology is, I think, by comparison to some of the other private providers that are around, pretty rudimentary. I don't mean that in a pejorative sense, I just mean it doesn't have a lot of bells and whistles functionality and it's not a particularly beautiful looking product, but it gets the job done. By comparison, I've been involved recently in arbitrations that have used private solutions, they tend to do the same thing. Some of them just do them better than others. But the courts are really quite good about it. I found the first time I had to run an eTrial they provided training and they send you up there for a session where a very nice set of educational IT peeps will sit you down and explain to you how it works if you don't know what to do. Frankly, the Bench seems to expect that you'll participate in that. There's not a lot of latitude given for an inability to engage with the technology, the Bench expects that you will embrace the tools and not waste the court's time by mucking about because you don't know what the Ringtail numbers are, or whatever. It's not just the way of the future, it's the way of the present. If you're not doing it yet, it won't be very long before you are.

**KC:** Do you have much experience with real time transcripts?

**MH:** Yeah, actually. I must say I find it terrific. I understand it's an expensive thing to engage. The courts don't have it, at least here in Queensland. Typically, I've seen it in royal commissions and private arbitrations. I think it's incredibly useful, particularly for large scale litigation. I can think of one matter in particular where we had, the parties had agreed to pay for real time transcript, and we had an in-court team of counsel. Then we had an army of juniors sitting back in chambers who were working on the real time transcript, preparing cross examination for the next day, and also simultaneously doing written closings and things like that. It is an expensive thing and it might seem like an indulgence, but it's one of those things that I think

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requires explaining and good education to the client as to why the cost is worth it in the ultimate result.

**L27C:** I wanted to ask the panel, because a lot of the actual communication platforms will be dictated by the court if you're going into litigation, but are there any supporting applications or software programs that you have had particularly good experiences of using or you find particularly powerful in terms of their versatility?

**KC:** That's a big question. In Australia, obviously, Relativity and Newix Discover are the two leading litigation databases. But if you don't have a matter that warrants that size database there are certainly products that you can use. Adobe Professional is very good at hyperlinking and gives you the ability to search across a document set, if you know how to do that. There are lots of other tools, a little tool called eBrief, which is a really simple, effective tool. If you search up eBrief, it's really cost effective. If you just want to look at a searchable set of documents, you can throw your documents in there and make them searchable and you can use that very effectively, not necessarily for an eBrief but for another purpose of searching across the documents set. I think there are lots of products out there, you just have to find the one that is suiting whatever you're trying to do. That might be a product that you use every day in your office, you just don't know how to use it to the way it could be used. By all means, if anyone's got any of those questions, just shoot us an email and we can direct you to the products we know. That's a really big question. If you've got a problem, tell us what it is, we'll find your solution. That's as simple as I can make that one.

Can I just go back to real time transcript and talk about the benefits of that with you, Kiri. I know we've done a couple of trials where we've had that and you've been able to sit in your office and review what's going on as we go as opposed to you coming into court every day.

**KP:** This was reflecting on what Matthew was talking about, which is how effective you could build the team and have that work being distributed across a broader group. Maybe not every client thinks about this, I think it's a more humane way of working. That old model where you sit down, you spend your day in court, and then your next day starts at six o'clock that evening and goes through to 2am to get ready for the next day. If you're collaboratively working with a team, that is striving the issues during the preparation, you're catching the issues as they go, the work is being constantly fed back into another team through the day, I really hope that you can take some of the intensity of trials out of that team. A good night's sleep is really, really important. I don't want a team that's up to 2am every night, it's just unnecessarily cruel. So for me, I think there's a human value that you can look after your client teams by using this technology well.

**KC:** Great. We're out of time. Are there any questions there that anyone would like it answered from any of the panel?

**L27C:** At the moment, those are the ones that have come immediately through the chat, but I welcome anything else from our guests.

**KC:** Great. While we're waiting for those questions to come straight, Matt, have you've got any final words of wisdom on eDiscovery and technology that you would like to share with the audience?

**MH:** I think my experience of it from the Bar is it's one of those things that repays the investment of time and working out how you can use it. It's a little bit like I remember when computers first started being a thing and I had to try to train my elderly parents that you've just got to try to use it and you can't really break it. Don't worry that you're going to muck it up. Just in the same way that children learn organically by playing, this is a tool which I think requires lawyers, who've many of us lost the ability to play very well, to just give it a go. It's one of those things that if you're forced to use the technology it will then begin to reveal to you how and why it's useful. It's one of those things that it's difficult to impress upon somebody else why something is useful, the best way to do it is to say "Look, just have at it." I'd really encourage people to just play with these tools. Once you begin to see what's possible you then go looking for other things that it would never have occurred to you that you could do. It's a little bit like someone said earlier in the session, you don't know what you don't know. Technology is a little bit like that, until you begin to realise what's possible you don't turn your mind to thinking about what else might this technology be capable of doing. So I really encourage people, especially if they're reluctant adopters, or they think "Well, I'm not, particularly technologically adept" or whatever. This stuff is really quite easy to use, it's just about taking the leap of faith and finding a workflow that works for your particular practice.

**KC:** Right. And, Jane, do you have any final words of wisdom for us?

**JO:** Yeah, have an open mind. Don't be intimidated by the technology. I've gone from *wow* to *go* in probably the last four or five years. Now, it's something that I consider on pretty much every matter that comes across my desk. Of course, there's going to be the little, you know, local court, perhaps magistrates court type matters that aren't document intensive, where there is little value to be added. But in other matters where there is documentation that's an issue I just think there's so much benefit to be gained, that I didn't know about. So educate yourself, and be curious about what it can do.

**KC:** Right. Over to you Kiri, what are your final words of wisdom?

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**KP:** It's very hard to add to what Matthew and Jane said. Make friends with your technology specialists, they are wonderful people.

**KC:** And we send gingerbread brownies every now and then don't we Jane.

**L27C:** One final question that's just come through. The attendee is aware that Relativity One is cloud based, is Newix? And are there other similar systems that can scan and use in-house servers that you can put files into and they get the OCR done?

**KC:** Both Relativity One and Newix Discover offer a SaaS platform which is an in the cloud type platform. But there are heaps of products that you can use to OCR documents. We would use Adobe Professional internally. But for instance, the new product that we're bringing to the market, Evercron, it has an OCRing feature so you could essentially throw your documents in there, OCR them, search across them and pull them out again. There are heaps of tools out there to do OCR. As Matt said, if you've got thousands and thousands of pages, it can take a long time. If you're trying to work on your computer at the same time it can slow you down because it's a fairly intensive process on your computer. But you know, even if you send out a whole stack of PDF documents to us, that actually will be quite cost effective for you to just get done and get them back really quickly. It is time intensive, you need to have a fairly decent computer to be able to do it and you need to have the right software. But there's heaps of software out there. eBrief again, you could chuck it in there, OCR it, search across it, get the documents out. You just have to use whatever system you've got. I know lots of the law firms have their own internal document management systems that OCR documents. One thing we do find is that if you are using searching in your inbox, or searching across a client's network, those documents might not be searchable. You have to make sure that everything you've got is searchable before you can search it. Keep that in mind because sometimes people use searching techniques at their client's premises to find documents, and you might not find everything you want to find. So OCRing is really important. If you need any specific advice just let us know and we can shoot you in the right direction.

Is that it?

**L27C:** In terms of questions, yes. Thank you very much. I think you've stunned the audience with your revelations.

**KC:** Well, thank you all for coming today. And thank you so much to our panelists. We've done this a couple of times now. Every time we talk it's a really good, interesting conversation. And thanks to Level Twenty Seven Chambers for allowing us to come and give this to your audience today. I hope you all have a great day. And we will see you next time.