

# FUTURE LAW OFFICE: Overcoming the e-Discovery Challenge

eDISCOVERY SERVICES

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# Introduction

Whether a company is conducting litigation preparation or simply trying to collect, store and manage hundreds of terabytes of documents, e-discovery is a complex, resource-intensive process. But it doesn't have to be. Although the introduction of successive technological innovations – from smartphones to social networking to cloud computing – have made discovery more complicated, taking a proactive approach to data retention and management can make the process more effective and considerably less overwhelming.

*Future Law Office: Overcoming the e-Discovery Challenge* was prepared by Robert Half Legal's eDiscovery Services practice to help law firms and legal departments better understand and manage e-discovery and its associated risks. It's part of the company's annual *Future Law Office* research program, which tracks important trends and developments in the legal field. The report offers a variety of strategies for proactively managing data, assessing e-discovery requests, assembling the e-discovery team and ensuring a smooth, efficient document collection and review process. It also includes the insights of Robert Half Legal's e-discovery professionals and features interviews with other well-respected professionals in the legal field.



# First, the Problem: The Proliferating Volume of ESI

In recent years, the process of responding to e-discovery requests has changed dramatically, arguably more than any other element in the practice of law. “In my early days as an associate, when we received a request for discovery, the question often asked was, ‘Who’s going to go through the 200 bankers boxes in the conference room?’” says attorney Charles A. Volkert, executive director of Robert Half Legal and executive managing director of Robert Half Legal eDiscovery Services. “Today, the question is, ‘Who’s going to sort through 50 million emails on multiple devices and hard drives?’”<sup>1</sup>

It’s not the e-discovery process itself that is becoming so complicated. Rather, it’s the exponential and continuing proliferation of electronically stored information (ESI) and the accelerating complexity of IT systems. In addition, the broader scope of legal obligations as e-discovery requirements have matured has left little room for excuses when it comes to exceptions or lapses in a company’s processes.

“In my early days as an associate, when we received a request for discovery, the question often asked was, ‘Who’s going to go through the 200 bankers boxes in the conference room?’ Today, the question is, ‘Who’s going to sort through 50 million emails on multiple devices and hard drives?’”

*Charles A. Volkert, Esq., executive director of Robert Half Legal and executive managing director of Robert Half Legal eDiscovery Services*



The worldwide e-discovery market is expected to reach \$9.9 billion by 2017. The United States is projected to lead the world market in terms of revenue, representing 73 percent of global e-discovery market share by 2017.

*Source: Transparency Market Research press release, Aug. 8, 2012.*

Although there is a trend toward awarding the costs of e-discovery, such as vendor and processing fees, to the prevailing party in a case, related expenses can quickly escalate as corporations and their outside law firms sift through millions of terabytes of ESI.<sup>2</sup> All of this is occurring at a time when corporate legal departments are being pressured (or taking the initiative) to control legal budgets, of which e-discovery can be a significant portion. As a result, both corporations and their outside law firms continue to seek solutions for reducing e-discovery expenses, meeting rising challenges and addressing risks.

## Leading Practice #1: Be Proactive About Data Management

Controlling costs requires a robust records management plan that is put in place long before a company receives an e-discovery request. It also demands effective execution of that plan, including strong compliance efforts.

“The ability to organize and properly dispose of unnecessary information and records, especially unstructured data, is key to preparing for the demands, costs and risks associated with future e-discovery requests.”

*Frank Wu, co-managing director, Robert Half Legal eDiscovery Services*

“Proactive data management strategies alone are not sufficient,” notes Steven J. Baron, vice president of Robert Half Legal eDiscovery Services. “It’s essential that companies develop workable document retention policies to help cut down on data size while adhering to the requirements of a court of law.”<sup>3</sup>

Effective data retention policies must specify which data to keep, as well as which data to get rid of, and most important, how to go about it, adds Frank Wu, co-managing director of Robert Half Legal eDiscovery Services. “The ability to organize and properly dispose of unnecessary information and records, especially unstructured data, is key to preparing for the demands, costs and risks associated with future e-discovery requests,” he says.<sup>4</sup>

“e-Discovery needs to be considered as a business function,” says Kenneth B. Leissler, a managing director of Robert Half Legal eDiscovery Services. “By implementing an in-house matter management technology process, corporations can gain a feeling of control over the data they produce on a daily basis.”

A strong records management policy with proper deletion of data is the most effective way to manage the process. Adds Leissler, “In many large corporations, this requires a significant cost to the company at inception, but the value in the future usually outweighs the upfront cost to assess and implement.”<sup>5</sup>

At Greenberg Traurig LLP, attorneys and shareholders Jeffrey W. Greene and David G. Thomas provide their clients with systematic, step-by-step guidance to record retention and management. Greene says they advise clients to first determine where and how they store information, and in what form. “We also request that clients identify the person responsible for maintaining the relevant sources of information, and note all those who have access to that information,” he says. Greene adds that once these points have been addressed, the firm advises clients to determine whether there is a business or legal need to retain that information for a period of time or whether they should adopt specific retention policies around those requirements.

“With regard to information that is retained, we advise clients to establish a team of ‘stakeholders’ from IT, legal, human resources and compliance functions within the business,” says Thomas. Clients are asked to create policies that these stakeholders will follow to determine when the duty to preserve information actually arises in the first place and how to implement a defensible litigation hold when it does.”<sup>6</sup>

**22%** of lawyers interviewed by Robert Half Legal eDiscovery Services said their company had increased its handling of e-discovery projects in-house within the last year.

*Source: Survey of 350 lawyers among the largest law firms and corporations in the United States and Canada. The survey was commissioned by Robert Half Legal and conducted by an independent research firm.*

# Responding to a Request for e-Discovery

Having an understanding of how business needs are related to operational and legal requirements, followed by establishing sound data retention and management policies, are the first steps in overcoming the challenges and difficulties related to e-discovery. Once data have been organized effectively, companies need to be able to accurately and objectively evaluate their ability to produce this data in order to respond to a request for production. Certain factors must be taken into immediate consideration – among them, the legal department's capacity to handle e-discovery in-house.

The process of e-discovery really begins long before a request is received, notes Wu. “When determining whether to handle e-discovery in-house, including developing capabilities, co-sourcing or outsourcing specific functions, companies should treat e-discovery like a real business process, vetting the business case as they would with any other organizational function,” he advises.

Whether they establish a formal or informal business case, organizations should make these determinations in a way that makes practical sense given current business priorities, Wu adds. “Establishing simple metrics and monitoring process execution and results will enable companies to ensure they have the right elements and controls in place,” he says.<sup>7</sup>

An *Argyle Journal* interview with Charles Volkert re-emphasizes the importance of having companies examine their internal processes, educating staff about e-discovery and providing guidelines to help manage data and reduce the costs related to a future e-discovery initiative.<sup>8</sup>

## *How Prepared Is Your Organization for e-Discovery?*

**27%** of lawyers interviewed by Robert Half Legal eDiscovery Services said their law firm or company does not have a standard operating procedure in place to handle an unexpected request for discovery.

**22%** of lawyers said they were not at all confident that, if faced with litigation or a regulatory request, their organization could efficiently respond to a request for information residing on social media sites.

**15%** of lawyers expressed a similar lack of confidence in responding to a request for cloud-based information.

*Source: Survey of 350 lawyers among the largest law firms and corporations in the United States and Canada. The survey was commissioned by Robert Half Legal and conducted by an independent research firm.*

## Leading Practice #2: Know When to Seek Assistance

Companies must objectively identify available resources, as well as evaluate the legal department's current and projected workloads, Baron recommends. "The legal department has to look at its own threshold of what in-house counsel can do themselves versus when to partner with an outside services provider," he says. "The deadline, volume of data or complexity of the case may impact this decision."<sup>9</sup>

In-house counsel must consider the potential pitfalls of handling an e-discovery request internally – namely, defensibility in court, says Volkert. "For example, if a case involves an SEC violation, and a company's IT director was in charge of some of the discoverable data, corporate counsel would have to testify in court about its e-discovery processes and procedures. It's not an ideal position to be in, testifying about the methodologies used in handling one's own data," Volkert comments, adding that the company's bias will be challenged.<sup>10</sup>

At Hyundai Capital America, the legal department looks at the scope of the case to decide whether to handle it in-house, says Timothy Collins, director of compliance. "Complex class action cases that will not settle quickly would be one example of when we would look for outside support [to handle e-discovery]," he says. "We've built a team and hired a vendor in anticipation of potential future needs."<sup>11</sup>

It's important that outside counsel are involved in the evaluation process and that they determine their own capacity to help the client with the e-discovery request. At Saul Ewing LLP, David S. Leone, Esq., director of litigation support services, describes his firm's approach as a "bifurcated" process.

"Like many firms, we examine the size of the data and make a determination as to whether we can handle the project internally or use an outside e-discovery services vendor," Leone says. "There's a cap to what we want to manage internally – probably around 50 gigabytes of data – but we also look at the project management time involved. We can rapidly scale our servers, but we can't easily scale people, so if the project management is extensive we may outsource for that reason, as well."<sup>12</sup>



# Defining In-House Capacity and Capabilities

Once an e-discovery project is in place, an essential next step is establishing teams with the necessary project management support and expertise. Since the e-discovery process requires a systematic approach to gathering, culling, reviewing, organizing and producing data, the activities of the team at each stage must be documented for defensibility at a later date.

## Leading Practice #3: Clearly Define Roles

Thomas and Greene advise their clients not to wait to create an e-discovery team. “The best way to approach setting up a team and establishing processes is to do so proactively before the need arises and to make sure that the stakeholders know the importance of their respective roles to the outcome of the e-discovery event,” says Thomas. “In doing so, it is important to identify the right stakeholders and confirm that their defined roles clearly fall into their respective bailiwicks,” Greene adds.<sup>13</sup>

“The best way to approach setting up a team and establishing processes is to do so proactively before the need arises and to make sure that the stakeholders know the importance of their respective roles to the outcome of the e-discovery event.”

*David G. Thomas, shareholder, Greenberg Traurig LLP*

Wu recommends that the duties, scope and purpose of each role be specified, as well as how that role relates to the rest of the team and the desired outcome. “There are many objectives and tactical approaches for creating high-performing e-discovery teams,” he says. “It’s important to tie functional roles to the expected results of the group, basing job functions on the business objectives for either protecting or enhancing enterprise value.”<sup>14</sup>

Ideally, the company and its outside counsel will together create a cross-disciplinary group of lawyers, IT experts, project managers, data specialists and financial staff that can interface with the litigation arm of the team. Rather than reinvent the wheel when it comes to assembling the team, Wu suggests that companies look to their existing organizational structure and culture.

“Many companies already have established high-performing teams within their organizations,” Wu says. “An obvious approach is to use the same formula for assembling an e-discovery team and defining project roles in a way that is effective in solving a common business problem that can disrupt or distract multiple business units.”<sup>15</sup>

Law firms that do not have a dedicated e-discovery team or department should start by forming a three-person committee made up of an IT specialist, a senior associate or partner and a litigation support specialist, advises Charles A. Intrigato, president and co-founder of the Association of Certified E-Discovery Specialists. “The team should be charged with coming up with a plan that includes budgetary elements and how to gear up in the short-, mid- and long-run to deal with e-discovery and best serve the client. The plan should take into account the law firm’s in-house e-discovery abilities and resources.”<sup>16</sup>



## Leading Practice #4: Establish Efficient, Effective Communication

If communication is poorly managed during the e-discovery process, several problems could arise, such as setting up an indefensible process, or providing opposing counsel with the wrong information or information that could help them win the case. It's critical that the team has an efficient, consistent and well-defined communication process in place during all phases of e-discovery.

"Generally, we try to get clients to designate a main point of contact for e-discovery initiatives and make sure that this point of contact not only has the requisite knowledge about e-discovery, but also has the requisite position within the company to be able to get the job done," says Thomas. "For example, although many in-house paralegals or counsel may very well have the necessary knowledge about the process, many times a higher-level position is required to make sure that the relevant stakeholders and custodians handle e-discovery correctly."

Greene adds that this main contact should be integrated into a cross-functional team so that all the key stakeholders, such as IT, legal, HR, and compliance, are well represented and can assist with the e-discovery communication process.<sup>17</sup>

**1/3** of law firms and companies surveyed by Robert Half Legal eDiscovery Services plan to increase spending on electronic discovery-related services in the next two years; 56 percent anticipate no change in spending.

*Source: Survey of 350 lawyers among the largest law firms and corporations in the United States and Canada. The survey was commissioned by Robert Half Legal and conducted by an independent research firm.*

# Partnering With an e-Discovery Services Vendor

e-Discovery matters are driven by a combination of people, processes, technology and controls. Effectively balancing these four elements is central to managing cost and risk, and producing the desired results. But the scope and complexity of e-discovery, as well as the lack of a standardized approach, may prevent some law firms and corporate legal departments from ever developing a sufficient degree of expertise, notes Intriago.

“By its very nature, e-discovery cannot be done by lawyers alone. Moving forward, fewer law firms and legal departments will be able to depend solely on their own resources to manage the e-discovery process, particularly in large cases,” Intriago says. “We are likely to see more law firms and legal departments partner with third-party e-discovery service providers.”<sup>18</sup>

Attorney Darren E. Nadel, a shareholder at Littler Mendelson, P.C., says, “Many of our clients have contracts with e-discovery services vendors at preferred rates, and they’ll ask us to work with those vendors. For clients who do not have agreements in place, we offer an e-discovery team of our own that can handle e-discovery tasks at competitive rates.”<sup>19</sup>

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Foley & Lardner LLP also uses third-party vendors or contract attorneys for clients’ document reviews, and in some cases, taps outside service providers for data processing, notes David W. Simon, a partner and member of the firm’s government enforcement, compliance and white-collar defense, securities enforcement and litigation, and antitrust practices. “We have committed resources to electronic discovery processing when it is important to keep data within our walls or the timeline is critical. We process about 10 to 15 percent of our clients’ data and use our preferred vendors for the remaining balance,” he says.<sup>20</sup>

At Saul Ewing, the decision to use an e-discovery service provider is guided by the vendor’s evidence tracking platform and whether it has the technological capability to conduct assisted review, says Leone. The firm also takes into account where the vendor will host the data, how it will be encrypted, who will have access to it and how it will be kept secure. When managed review is involved, Leone also wants to know how documents will be routed through the levels of review.

“When I’m evaluating potential e-discovery service partners, I’m looking at how they are going to show us the metrics on the case so we know we’re providing value to the client,” Leone says. “They can’t show this unless they have good metrics coupled with good technology workflow.”<sup>21</sup>

## Leading Practice #5: Engage Outside Specialists for Managed Review

In many respects, document review is the most fundamental aspect of e-discovery matters. It is often the most time-consuming, costly and labor-intensive aspect, as well.

Volkert notes that many companies and law firms are looking to outside vendors to oversee and manage the data flow or review rate among reviewers, and also to host the data. In this scenario, the law firm would manage the legal work in and around the review and render legal opinions and legal strategy. The e-discovery services vendor might offer a range of capabilities, such as document preservation and collection, preview and analysis, processing and production, hosting and document review.

“By engaging outside specialists, law firms and legal departments can implement processes that are repeatable and defensible, as well as cost-effective,” says Volkert. “A specialized vendor has the expertise needed to manage the people, processes and technologies involved in e-discovery initiatives.”<sup>22</sup>

“By engaging outside specialists, law firms and legal departments can implement processes that are repeatable and defensible, as well as cost-effective.”

*Charles A. Volkert, Esq., executive director of Robert Half Legal and executive managing director of Robert Half Legal eDiscovery Services*



# Using Emerging Technologies to Refine the Data Collection Process

More than one in 10 (12 percent of) lawyers surveyed by Robert Half Legal eDiscovery Services said that in the last three years, issues or problems with collecting or reviewing electronically stored information negatively affected a case or ruling for their law firm or company.\* Given the potential for such adverse outcomes, law firms and legal departments are using technological tools that allow them to narrow the scope of data that must be collected and reviewed during e-discovery.

Document management and retention software tools can help companies prepare for potential litigation, but such tools must be tested and deployed appropriately or the results will not be defensible, says attorney Joel Wuesthoff, a director with Robert Half Legal eDiscovery Services. “Although the tools make it easier for companies to get to the right documents quickly, companies must make sure that the process they’ve created puts technology into play properly.”<sup>23</sup>

Technologies related to e-discovery processes are dynamic and continue to evolve. Currently, there is no one-size-fits-all technological tool that can be applied to the e-discovery process from start to finish, observes Leissler. No technology has remained the same for more than a few years in a row, he notes.

“There is a growing thirst for technologies to handle e-discovery more efficiently, quickly and cheaply,” Leissler says. “However, as with any technology or device, you need to follow a systematic implementation process: Read the manual, train the people, apply the technology, review the results, and

test it again. We recommend a benchmark of testing the technology five times and then reviewing the results yet again. Having said all that, it’s important nonetheless to embrace technologies as they advance in their application and capabilities.”<sup>24</sup>

By the time this process is completed, a given technology may have been upgraded, which means the team will need to be retrained. Leissler adds that it also is important to make sure that the court approves of the process, technology and results.

All parties involved in e-discovery want alternative methods for performing reasonable, efficient and defensible data searches in the face of inordinate and increasing volumes of electronic data, notes Leissler. Review platforms are being widely used, while artificial intelligence tools such as predictive coding are gaining traction in the legal field.<sup>25</sup>

Predictive coding is a technology process using software that is applied to a data set identifying responsive documents. It utilizes a learning process that includes a mathematical algorithm to find identical or similar data deemed “hot” within a larger data population.

*\*Source: Survey of 350 lawyers among the largest law firms and corporations in the United States and Canada. The survey was commissioned by Robert Half Legal and conducted by an independent research firm.*





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For some firms, there is a lack of clarity about how and where predictive coding fits into the discovery process. And there are known risks, including inconsistent interpretations of data reviewed for the benchmark, over-production of non-relevant data and the possible disclosure of confidential or privileged legal data. Users need to consider both the substantial benefits and risks associated with any machine-enabled search and retrieval system. The ultimate success of technology-assisted review depends on situational understanding, a strong process and the guidance of experienced professionals.

It’s important to realize that many of the emerging technologies in the marketplace require that the data be taken to the technology company for analysis and processing, Leissler observes. “This adds another link to the data chain of custody in a matter – that the process for identifying and collecting data will need to be noted, documented and guided by counsel.” Other links include decisions and determinations

about which data to collect, the number of repositories to be searched, whether the data of issue are online or offline, whether offline data are in a reasonably accessible storage location, and who within or outside the company will conduct this process.<sup>26</sup>

Statutory requirements of the court and requirements of the individual jurisdiction, such as the Ohio Standard or Maryland Protocol, also must be taken into account.<sup>27</sup> “Many corporations are located in multiple jurisdictions, and the demands to produce data for a specific venue need to be addressed,” says Leissler. “When companies or counsel consider the use of technologies, this requirement becomes front and center from a legal perspective.”<sup>28</sup>

When corporations and outside counsel are introduced to new technologies, there is frequently an unintended lack of communication from legal to IT operations as to the internal controls that need to be in place to support discovery. In most cases, one-size technology does not fit all needs. Legal, technical and operations teams need to coordinate across all functions of a corporation to help ensure adequate identification and collection of data for the predictive coding process.

As corporations increasingly consider e-discovery an important business function, they are using new technologies to classify, identify, catalog, and store data for both business and legal purposes. By implementing an in-house matter management technology process, corporations are gaining a feeling of control over the data they produce on a daily basis.

## Leading Practice #6: Implement Predictive Coding Appropriately

When evaluating the use of predictive coding, law firms and corporate legal departments should:

- Ensure that lawyers and other predictive coding users understand the technology (limits and possibilities).
- Rely on professionals with specific technical knowledge of predictive coding (deployment and use).
- Establish a results-driven validation process that can be audited (application decisions and responsive document identification).
- Coordinate legal, IT and operations efforts across all functions of a corporation to help ensure adequate identification and collection of data for the predictive coding process.

With appropriate process, design and human oversight, predictive coding technologies can be used to increase the speed of identifying relevant documents and reduce the risks associated with first-tier document review.

## Leading Practice #7: Use Technology to Target Collections

Thomas and Greene often recommend that their clients implement litigation hold software that assists with issuing, tracking, updating and withdrawing legal holds. “Early case assessment tools can aid in identifying and segregating data based on a number of factors, including date ranges, responsiveness to keywords, uniqueness and file types,” Thomas says. Greene notes that this approach allows clients to quickly and efficiently understand their data at the early stages of litigation.<sup>29</sup>

## *A Suggested e-Discovery Checklist*

In its “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases,” the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG), an entity formed by the Department of Justice and Administrative Office of the U.S. Courts, recently published recommendations, strategies and a checklist for e-discovery. Although the focus is criminal cases, the JETWG made several universally applicable suggestions, including:

- ✓ *Strategic use of technology* – ESI discovery should be done “in a manner to facilitate electronic search, retrieval, sorting, and management of discovery information.”
- ✓ *Technical expertise* – The parties should employ experts with sufficient technological experience and knowledge to plan and conduct e-discovery.
- ✓ *Meet and confer* – The parties should, at the outset of a case, discuss the “nature, volume and mechanics of producing e-discovery.”
- ✓ *Security of information* – Because ESI is easy to reproduce and disseminate, the parties should take steps to prevent unauthorized disclosure or distribution.

The report goes on to outline strategies for receiving, handling, preserving and transmitting ESI in various formats (e.g., paper documents, TIFF, OCR, PDF) and for producing ESI from third parties. A checklist of questions at the conclusion of the report helps the parties ensure that they’ve addressed key issues related to e-discovery production.

*Source: “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases.” Department of Justice (DOJ) and Administrative Office of the U.S. Courts (AO) Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG), February 2012.*

## Conclusion

As e-discovery continues to evolve, the experiences of individual law firms and legal departments will point the way toward additional leading practices. By taking a proactive approach to data retention and management, developing detailed plans for responding to e-discovery requests, forming partnerships with e-discovery experts and strategically deploying available technological tools, law firms and legal departments can meet the challenges of e-discovery without becoming overwhelmed by them.

## About Future Law Office

The Future Law Office project is an annual research initiative conducted by Robert Half Legal that examines key trends in the legal profession. Future Law Office is based on interviews with experts in law firm and corporate legal department management, as well as our own e-discovery and legal staffing specialists throughout North America and other professionals in the field of law. Our findings also are based on information from state and national legal publications and associations.

Robert Half Legal regularly commissions surveys of lawyers on a variety of workplace and legal management issues. Relevant statistics from these studies, which include responses from lawyers among the top law firms and corporate legal departments in the United States and Canada, are cited throughout this paper. All sources, including experts and articles consulted by Robert Half Legal, are listed in the report.

## About Robert Half Legal

Robert Half Legal is the premier provider of highly skilled legal professionals for law firms and corporate legal departments on a temporary, project and full-time basis. The company also offers managed review and e-discovery services. We have built long-standing relationships with leading professional associations, including the Association of Certified E-Discovery Specialists, Association of Corporate Counsel, Association of Legal Administrators and Minority Corporate Counsel Association. Robert Half Legal was recently voted the "Best Legal/Litigation Support Staffing Firm" by readers of *The National Law Journal* (March 25, 2012). Robert Half Legal is a division of Robert Half International, which again was named to FORTUNE® Magazine's "World's Most Admired Companies" list (March 18, 2013).

# Experts Interviewed

**Steven J. Baron**, vice president, Robert Half Legal eDiscovery Services

**Timothy Collins**, director of compliance, Hyundai Capital America

**Jeffrey W. Greene**, shareholder, Greenberg Traurig LLP

**Charles A. Intriago**, president and co-founder of the Association of Certified E-Discovery Specialists

**Kenneth B. Leissler**, managing director, Robert Half Legal eDiscovery Services

**David S. Leone, Esq.**, director of litigation support services, Saul Ewing LLP

**Darren E. Nadel**, shareholder, Littler Mendelson, P.C.

**David W. Simon**, partner, Foley & Lardner LLP

**David G. Thomas**, shareholder, Greenberg Traurig LLP

**Charles A. Volkert, Esq.**, executive director, Robert Half Legal and executive managing director of Robert Half Legal eDiscovery Services

**Frank Wu**, co-managing director, Robert Half Legal eDiscovery Services

**Joel Wuesthoff, Esq.**, director, Robert Half Legal eDiscovery Services



# Endnotes

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