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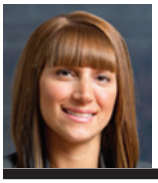
THE RECORDER

## IN PRACTICE

# Discovery Calls for a Liaison



**Neda Shakoori**

It should come as no surprise that most lawyers are not familiar with the intricacies associated with electronically stored information. Most of us did not attend law school due to a burning desire to learn about metadata or how to create a proper statistical sample for technology-assisted review. The modern day practitioner's lack of ESI knowledge can cause some serious confusion and anxiety, on a good day.

The reality of litigation in this day and age is that countless hours are spent by counsel on both sides of a dispute trying to explain to each other, or worse, to the court, the "what" and the "how" of their eDiscovery efforts. Despite attempts at explaining the methodologies used, there is a serious lack of confidence between parties in litigation involving eDiscovery. What may start off as just lack of confidence can soon snowball into eDiscovery battles throughout the litigation process, disputes that may ultimately require court interference. The consistent rise in the volume of data generated by individuals and companies has only made matters worse. There is, however, a positive takeaway here; the resulting shift in the litigation landscape has caused courts to not only take note, but provide guidance to practitioners.

On Nov. 27, 2012, the U.S. District Court for the Northern District of California published "Guidelines for the Discovery of Electronically Stored Information." The guidelines are available at http://www.cand.uscourts.gov/eDiscoveryGuidelines. Guideline 2.05 suggests the use of an eDiscovery liaison during litigation involving ESI. An eDiscovery liaison is identified as an individual who is knowledgeable about and responsible for all facets of ESI as it relates to the party whom the liaison represents.

Many law firms, and their corporate clients, fail to realize the practical significance of having an eDiscovery liaison on board throughout the litigation process. This failure can, and often does, lead to a number of disadvantages, which vary in degree and impact, during litigation. Examples include inefficiency, lack of organization, increased costs, missed opportunities in the discovery process, the necessity for court intervention or even sanctions for failure to abide by eDiscovery obligations. To avoid these pitfalls, someone from the corporate client's in-house litigation group, a lawyer with the outside counsel's firm or a third-party vendor (or all three), should be tasked with the role of eDiscovery liaison.

The role of the eDiscovery liaison is most effective when instituted early on in a case as this provides an opportunity for the creation of a plan. An eDiscovery plan should address, among other things, early data assessment, data preservation protocols, data collection, data processing, data filtering, data review and production of data. While the eDiscovery plan is likely to be a constantly-evolving document, it will allow the liaison to maintain efficiency and organization throughout the entire litigation process and amongst the various parties. This, in turn, helps keep costs down. The practitioner who is not well-versed in eDiscovery matters can expend countless hours in an attempt to understand the data, often times to no avail. Given that most lawyers are not familiar with the intricacies of eDiscovery, and that familiarity alone is less than ideal as compared to actual

*Neda Shakoori is an attorney with McManis Faulkner in San Jose. Neda is currently leading the firm's e-discovery initiative. Neda practices civil litigation with an emphasis on commercial and business law matters. Representing a wide array of clients from Fortune 500 companies and closely held businesses to individuals, she works to solve a variety of complex business disputes, intellectual property disputes, and federal and state antitrust class action matters. She can be reached at 408.279.8700 or via e-mail at nshakoori@mcmanislaw.com*

knowledge and understanding, a liaison can also keep costs down by addressing the often-complicated issues that almost certainly arise in litigation.

Efficiency and cost-savings aside, use of an eDiscovery liaison can provide practitioners with an upper hand during litigation. It is becoming increasingly difficult to cull, search and review data. However, with the help of an eDiscovery liaison, culling and searching recommendations can be made, technology-assisted review protocols can be put in place and the entire process can be monitored on a daily basis. These practices may, potentially, assist in finding that "hot doc," thereby decreasing the chance for missed opportunities in litigation. Bringing an eDiscovery liaison on board will also render the liaison familiar with and able to speak intelligently to all parties regarding the methodologies utilized throughout the process. Whether it is during initial client interviews, meet and confer sessions with opposing counsel or hearings where eDiscovery protocols are at issue, the liaison will be able to provide the necessary explanations and responses in a sophisticated and intelligible manner. The confidence that the liaison will impart on all parties will result in less confusion, fewer discovery battles and perhaps even abolish the need for court intervention entirely.

The guidelines do not specify who qualifies as an eDiscovery liaison; however, it is suggested that the liaison have a sound understanding of where the client's ESI resides, the various types involved, how to access it, the format that the ESI is in, how to properly collect it, how to conduct searches within the ESI and how to properly produce it. It is, thus, incumbent on individual law firms to seek out an individual, or a team, who possesses a veritable understanding of all things eDiscovery. This decision will likely be on a case-by-case basis given the diversity inherent in the practice of law.

There is no "one size fits all" approach to selecting an eDiscovery liaison, thus, the decision is one which should take into consideration factors such as the type of client, nature of the case, issues involved in the case and the firm's resources. For example, a solo practitioner defending an employer in a hostile work environment claim will have eDiscovery needs that differ in scope and degree as compared to a national law firm defending a Fortune 500 company in a class action age discrimination lawsuit. The former scenario might be limited to data preservation and collection for a handful of custodians and a minimal corpus of data that needs to be reviewed and produced. The latter scenario; however, might include data preservation and collection for dozens of custodians, technology-assisted review and a large corpus of documents to produce.

The selection of a liaison in the latter scenario will differ when taking into consideration the much more involved, and arguably more complicated, eDiscovery practices and protocols required. For example, in the latter scenario, the liaison might be the head of the firm's eDiscovery practice group and someone who has day-to-day hands-on interactions with the other members of the case team, the client's in-house team, as well as the third-party vendor. However, in the former scenario, the solo practitioner might not be as well-versed with the intricacies associated with eDiscovery and might not have the resources available to address the issues on a daily basis, thus it would be wise to enlist a third-party vendor as the liaison, with the practitioner taking on a more high-level role.

The topics addressed in the guidelines are of increasing significance in any jurisdiction given the consistent rise in the volume of data and the use of that data in litigation. Together with the help of the guidelines and the participation of a liaison, counsel will be better-equipped in approaching and discussing eDiscovery related matters in an efficient, organized, cost-effective and defensible way.

*In Practice articles inform readers on developments in substantive law, practice issues or law firm management. Contact Vitaly Gashpar with submissions or questions at vgashpar@alm.com.*