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## Complex Litigation & E-Discovery

### A New Breed of Attorney in the Mix

Possession of technical and legal knowledge is essential

By Irene Gamer

In an article entitled “E-Discovery Attorneys: Hot or Not?” published at law.com, a recruiter named Seth Davis contended that the recent technology boom has produced great demand on the part of corporations and law firms for a new kind of attorney — the e-discovery counsel. This article attempts to define the concept of e-discovery counsel by explaining the type of positions held by e-discovery counsel, and the responsibilities and skills required of them.

E-discovery counsel are attorneys who possess the technical and legal knowledge to understand and manage e-discovery. E-discovery is certainly not new. Attorneys have been involved in it from the moment records were produced through a computer system. However, the volume of electronically stored information (“ESI”) involved in litigation today, combined with the complexity and varieties of technology used to store and retrieve ESI, have created a need for attorneys who specialize in e-discovery rather than merely deal with it once in a while as an ancillary matter. E-discovery counsel are sought by law firms that find e-discovery

issues increasingly taking center stage in litigation and need a “go-to” person to resolve these issues. E-discovery counsel are also sought by organizations to serve as outside, in-house or national counsel.

Many attorneys who hold themselves out as e-discovery counsel engage in e-discovery as part of a complex litigation practice. However, there is a trend among larger law firms toward creating interdisciplinary groups dedicated to addressing e-discovery issues. Such groups are typically comprised of e-discovery counsel, paralegals and information technology (“IT”) personnel. They are responsible for helping other litigators resolve e-discovery issues that arise in the latter’s cases. Because e-discovery has become a pervasive issue in litigation, attorneys who practice in such specialized groups are likely to concentrate solely on e-discovery-related matters.

The prelitigation responsibilities of e-discovery counsel working in law firms may include any combination of the following: helping clients select and manage litigation support vendors; counseling clients on records management and litigation hold policies; assisting with the issuance of, and response to, litigation hold notices; providing litigation hold training; and assisting in tracking compliance with litigation hold notices. During litigation, e-discovery counsel may be responsible for: assisting clients with ESI preserva-

tion, collection, review and production; advocating on behalf of clients at discovery conferences; participating in preparation of discovery requests and responses; taking, defending or assisting with depositions likely to include e-discovery related issues; and providing trial support to other attorneys.

Few corporate legal departments possess the resources to conduct all e-discovery themselves. However, the current trend is definitely toward corporate counsel bringing more e-discovery work in-house. Larger corporate legal departments tend to be further along in this respect. Similar to private law firms, larger corporations are creating interdisciplinary e-discovery groups comprised of personnel from the in-house legal, compliance, records, IT, human resources and management departments, or any combination thereof.

The prelitigation responsibilities of in-house e-discovery counsel may include any combination of the following: designing, implementing and coordinating the company’s record management and e-discovery practices; communicating the duty to preserve to company personnel and ensuring compliance with preservation policies; and managing outside counsel and vendors. During litigation, in-house e-discovery counsel may be responsible for: working with outside counsel to ensure they take consistent positions regarding representations about the company’s data processing or storage practices, and the

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accessibility of the ESI; and assisting local counsel in addressing e-discovery issues with adversaries and in courts.

National e-discovery counsel are hired by organizations to handle or coordinate e-discovery issues in all of the organizations' cases. The retention of national e-discovery counsel is a new, but growing trend among organizations. The role of national e-discovery counsel is modeled on the practice of many organizations in retaining a "national coordinating counsel" to supervise the process of defending the organization in complex litigation. National e-discovery counsel may develop and coordinate uniform policies for producing ESI that ensure compliance with federal, state and local e-discovery rules, and case law; develop uniform procedures for data retention, backup and destruction; assist local counsel in addressing e-discovery issues with adversaries and in courts; and manage transactions with outside vendors.

While the responsibilities of e-discovery counsel vary depending on whether they serve as outside, in-house or national counsel, all must have certain skills. They must:

**Have a great grasp of the rules and case law governing e-discovery:** In New Jersey, this means knowing the applicable Federal Rules of Civil Procedure, State Rules of Civil Practice and Local Civil Rules of the District of New Jersey. However, while these rules guide counsel during litigation, they do not guide coun-

sel regarding their prelitigation responsibilities. Case law fills this gap.

**Learn information technology ("IT") terminology:** A good understanding of IT is indispensable. While corporate IT and third-party technology experts can and often do advise e-discovery counsel on technical aspects of the e-discovery process, counsel must have sufficient understanding of IT to interpret the technical information they receive into practical terms that other counsel, clients and courts will understand.

**Know how to deal with your clients:** E-discovery counsel advise clients on e-discovery matters during normal business operations and litigation. Counsel must be prepared to not only resolve their clients' e-discovery issues, but also train their clients on best practices to be implemented regarding record keeping and management.

**Know how to deal with the court:** Counsel must meet with their adversaries and be prepared to discuss any issues relating to e-discovery, including form of production. Counsel must also be prepared to enter into agreements regarding document production and privilege that courts will approve. Counsel must be able to present e-discovery issues in practical terms that judges who do not have a background in IT will understand.

**Know how to deal with your adversaries:** Counsel must know how to request information from their adversaries. This requires an understanding of what type of

ESI the counsel are looking for and where it is stored. Counsel must also know which information to produce and make sure that they are not overproducing by, for example, including metadata in their responses. Counsel must protect their clients from requests for ESI that is not reasonably accessible. Also, counsel must know how to protect their clients from paying unduly burdensome costs of production by negotiating cost-shifting agreements.

In sum, the e-discovery counsel are here to stay. Because e-discovery is involved in virtually any type of litigation, it is likely that sooner or later most attorneys will become competent in e-discovery. However, this does not mean that the need for e-discovery counsel will decrease. To the contrary, the enormous time commitment and effort involved in learning how to conduct e-discovery means that there will be a continuing need for e-discovery counsel in the future. This is particularly true in light of the fact that e-discovery practice is becoming increasingly complex due to the growing volume, duplication, and dispersal of ESI in current litigation, the mushrooming technologies associated with storage and retrieval of ESI, and the exponential growth of case law and rules. The good news for all attorneys is that anyone wishing to acquire the skills necessary to tap into this challenging area of concentration have access to a wealth of e-discovery education provided by law firms, bar associations and vendors. ■