

Litigation SUPPORT Guide

By ALAN DESSOFF

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With the volume of electronic data increasing and paper trails of communications and documents fading, discovery of materials that lawyers need in litigation has spawned a niche electronic discovery (e-discovery) industry that combines legal and technical functions and produces hundreds of software products.

About 155 billion emails were sent daily in 2011, according to the Radicati Group, a market research firm based in Palo Alto, Calif., that focuses on the computer and telecommunications industry. "The statistics are staggering. Almost all business is done through email, and e-discovery is a central facet of almost all cases of any size these days," said Diane P. Kilcoyne, an attorney at Lerch, Early & Brewer, Chtd. in Bethesda. The firm considers e-discovery "important enough to have an attorney dedicated to it," and she's the one, Kilcoyne said.

"There is very little civil litigation that does not involve e-discovery," James H. Shoemaker, who helps manage discovery of electronically stored information (ESI) as a paralegal at Miles & Stockbridge PC in Baltimore, said in agreement.

"It's growing in Baltimore," said Karissa Bridges, director of the three-year-old Baltimore chapter of Women in eDiscovery, which invites more than 80 local lawyers, paralegals, and e-discovery consultants and vendors to its monthly lunches. The growing e-discovery field "has traditionally been dominated by females," Shoemaker said.

Amendments to the federal Rules of Civil Procedure that took effect Dec. 1, 2006, introduced the phrase "electronically stored information" to acknowledge that such material is discoverable and includes any type of information that can be stored electronically. Maryland's Court of Appeals subsequently adopted e-discovery based on the provisions of the 2006 amendments.

Now it is a significant form of litigation support, although many lawyers "do not know how to do it very well," said M. Natalie McSherry, a principal in the firm of Kramon & Graham in Baltimore and chairwoman of the Litigation Section of the Maryland State Bar Association. "Electronic information systems can be very different. It's an education process for lawyers."

"You might be surprised by how much litigators in this market will attempt to avoid it," probably because they lack the expertise it requires, Shoemaker said.

"It used to be that we produced correspondence and documents all on paper. Now, so much is electronic. With e-discovery, there is the ability to discover drafts of documents that never could have been found before, because they're buried in the metadata in somebody's computer somewhere," McSherry said.

To discover those documents, some law firms have designated firm members like Kilcoyne or paralegals like Shoemaker as e-discovery specialists or



MAXIMILIAN FRANZ

As the litigation support coordinator at Lerch, Early & Brewer, Chtd. in Bethesda, attorney Diane P. Kilcoyne handles most of her firm's e-discovery questions and complex cases involving large volumes of discovery.

Keeping up with E-DISCOVERY CHANGES

Ever-evolving rules mean more work for support staff

created units in their offices to address e-discovery issues. Shoemaker said the most commonly used database platforms for the function are Concordance and Summation — "off-the-shelf, easily affordable supportive systems that most small to mid-size firms will use."

But many larger law firms with more resources replace those platforms with state-of-the-art systems, although "they might not be state-of-the-art tomorrow, because they are constantly evolving," Shoemaker said. Some firms have their own information technology departments to support the advanced systems, he said.

Their needs for e-discovery services have caused many firms to turn to litigation consultants like Jeff Parmet, a non-practicing lawyer who runs Jeff Parmet and Associates in Potomac. "I think lawyers are coming up to speed on what e-discovery is because it has become a standard way of exchanging documents," Parmet said.

With a career background in information technology in addition to his law degree, Parmet said his practice focuses on intellectual property software litigation, and e-discovery issues "come up all the time because everything is

stored electronically. We get involved in those issues because we need the source data in native file format to be able to do our job."

As an example, he cited a copyright infringement case in which one party alleges that another party "misappropriated" the first party's software, copied it, and is selling it. "Lawyers need technical experts who can prove the software was copied," he said. Because the software "is always stored electronically," e-discovery is necessary. "We get involved in helping the attorneys who usually don't have the technical background. Email has been around for a long time but attorneys don't know what to ask for or how to ask for it," said Parmet, who sometimes testifies as an expert witness in software cases.

What often happens in cases, said Mark Hirschfeld, an attorney and the president of Precision Legal Services in Silver Spring, is that attorneys on one side will ask those on the other side for all documents relating to an issue, and will take the other side's word "on face value" that they searched for the sought documents. "Maybe they looked through their mails a little bit, but it's not comprehensive," Hirschfeld said, and that's where vendors like him come in. "We do a comprehensive job of searching and collecting the emails forensically in a process that is defensible," he explained.

"I analyze a problem," he said. "If it's a fraud case, I suggest to the attorneys I am working for that they make a forensic copy of the computers involved so that nobody can come back down the line and say 'Hey, you deleted documents.'" E-discovery is a sophisticated process with "a lot of different pieces," he said.

The technology also is sophisticated, although "it continues to trend to creating efficiencies that can cut costs, because it can be really expensive," Bridges said. A non-practicing attorney formerly with a Baltimore firm, Bridges now is a consultant in Washington, D.C., with Excelerate Discovery, an e-discovery and document review management company.

Shoemaker said e-discovery has evolved as a niche litigation support industry with "people who have grown into it," as he did. Women in eDiscovery was launched nationally about seven years ago as a forum for women to "come together and discuss issues" related to the evolving legal-technical specialty, Bridges said. "It's a place to ask questions and learn more."

Members of the Baltimore chapter do it at monthly "Lunch and Learn" get-togethers.

While most of the Baltimore chapter's members are involved with local law firms, lawyers themselves appear to be "split" about e-discovery, Bridges said. "Some are very familiar with it, some are dabbling and learning more, and others don't want anything to do with it."