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LITIGATION | E-DISCOVERY

Who You Gonna Call?

Law firms and clients are increasingly relying on specialist-lawyers to probe the mysteries of electronically stored data.

By Irene Plagianos

THREE YEARS AGO, LITTLER Mendelson president Marko Mrkonich met with 11 of his partners to discuss hiring plans for a novel position: national e-discovery counsel—an expert who could help the firm’s attorneys and clients navigate the increasingly complex process of e-discovery.

Most partners at the meeting liked the idea, but senior litigator Kevin Lilly had some reservations. “I was skeptical,” says Lilly. “I wasn’t sure if he’d add to the firm’s bottom line; I didn’t know if we needed him.”

Despite Lilly’s misgivings, Littler hired litigator Paul Weiner from Buchanan Ingersoll & Rooney as its new e-discovery counsel. And within a month, Lilly had turned to Weiner for his advice. A client with a very complicated IT system had been hit with a putative wage-and-hour class action suit and needed help with preservation strategy. “I’m a convert,” says Lilly. “Paul’s been a huge success.”

Like Littler, many law firms have taken at least some new steps to grapple with the fast-changing world of e-discovery. Since 2006, when amendments to the Federal Rules of Civil Procedure placed greater responsibility on lawyers to preserve and produce electronically stored data, there’s been a boom in the number of e-discovery practice groups or task forces. According to a recent survey by The Cowen Group, an e-discovery staffing and recruiting firm, 87 Am Law 200 firms have an e-discovery practice group or task force and 16 have full-time e-discovery partners.

Several different models for tackling the e-discovery behemoth have emerged. Littler’s e-discovery practice group—three partners and two associates—only advises other Littler attorneys and their clients, while the firm has built a data center that brings e-discovery tools in-house. By contrast, Drinker Biddle & Reath’s e-discovery task force, which con-

sists of one full-time e-discovery partner and a few partners working part-time on e-discovery, is sometimes retained for e-discovery issues even when Drinker isn’t handling the underlying litigation. Daley & Fey—a boutique with two partners, one counsel, one associate, and a staff of four technology and legal analysts—focuses heavily on litigation preparedness, advising companies to get their data management in order before they’re sued.

As this diversity of approaches suggests, there’s no set paradigm for the best way to manage e-discovery services. Laura Kibbe, senior vice president of document review services at Epiq Systems, Inc., contends that despite marketing claims, lawyers who are true e-discovery experts are rare. Not every firm will be able to provide the best litigators *and* tech-savvy attorneys, she says. Others in the industry, like George Socha, an attorney who consults on e-discovery matters and the coauthor of



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son recruited
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the *Socha-Gelbmann Electronic Discovery Survey*, emphasize that just having an e-discovery practice group doesn't mean that the entire firm has a grasp on e-discovery. "The general goal for firms is to have a standardized approach to handling e-discovery," says Socha. "They don't just need a practice group, they need every lawyer practicing e-discovery."

Littler's Mrkonich, though, couldn't be happier with the approach his firm has taken. "I sleep better knowing we have Paul and our e-discovery team," he says. "I just know that [when] we go in to service a client, we have an advantage that we didn't have before."

LITTLER LIKES TO HAVE certain partners develop an expertise and then serve as what are known as "thought leaders" at the firm. Through word of mouth, shareholder meetings, and training sessions, it's understood that partners should contact these various experts whenever they're in need of specialized guidance. For instance, there's privacy expert Philip Gordon and Fair Labor Standards Act specialist Lee Schreter—and now e-discovery partner Paul Weiner.

Weiner says he couldn't have created a better job for himself. The New Jersey native first became interested

in e-discovery 15 years ago, before the term was ever coined. As a commercial litigator handling trade secrets and restrictive covenant litigation, he worked on a number of cases in which e-mail was increasingly becoming important. His mentor at Buchanan Ingersoll, Arthur Schwab, then the chair of the firm's litigation practice, encouraged Weiner to specialize in the fast-developing practice area.

At Littler, Weiner says, he found himself busy from the start. The case that the formerly skeptical Lilly pulled him in on was a putative nationwide class action against a large retail chain: Thirty-thousand assistant store managers claimed that they were misclassified as exempt from overtime pay. Weiner's first step was to build an effective preservation strategy, and he

immediately recognized the importance of the timekeeping data to this case. The client assumed that the punch data information—when an employee clocked in or clocked out—was being stored at the corporate level. Weiner discovered that the specific details of punch data were saved at the store level for just a week, while corporate was only sent a summary of how many hours an employee worked in a week. There was no way of analyzing whether employees took lunch breaks or worked past their allotted shift times, all information that would be critical to the case. The company quickly began saving the original punch data to its corporate systems.

That was only one of the steps Weiner put in place. It's the nitty-gritty details that can set up a case for success or failure, he says: "It's not just being tech-savvy. It's knowing what to look for, what to save to help limit the scope of discovery—and eventually win the case."

Weiner's team has grown to two partners and two associates, along with seven litigation support staffers and seven technology specialists. They usually work on ten to 30 cases a week, Weiner says. The team might be involved in any of the numerous stages of discovery, including meeting preservation obligations, arguing discovery motions in

court, leading meet-and-confer conferences, devising litigation holds—the notices sent to employees after a lawsuit begins to let them know what information needs to be saved—or working on strategy for the most cost-effective means of searching and producing large volumes of information.

Littler is one of a few firms that have made the decision to bring some parts of the e-discovery process in-house, instead of relying on outside vendors. Via its data center, Littler can now process its clients' data, which means uploading electronic information in a legally defensible way into a review tool for hosting. Weiner and his team know exactly how their systems work, so if need be, they can defend the process in court.

The firm has also invested in a new review

tool, kCura's Relativity, Web-based software for the review, analysis, and production of evidence. In a recent sexual harassment suit against one Littler client, the review tool helped show that an apparently damning e-mail was not quite so damning. The plaintiff had attached to her complaint a printout of an e-mail addressed to a human resources representative that included information about alleged harassment by her supervisor. "She had to show notice to others about the harassment, and that e-mail was her biggest piece of evidence," says Weiner. He requested the e-mail in its electronic form, along with the metadata about the e-mail. By loading the data into the review tool, and studying the metadata, Weiner found that the message had been drafted and saved—but never sent. The case settled for an undisclosed amount, he says.

"A lawyer's arsenal for authenticating evidence has expanded, but you have to have the expertise, both legally and with the technology, to know what to look for," says Weiner. "It's vital to every case."

The one part of the discovery process that Littler doesn't handle is collection—the actual mining of the preserved information from a client's systems—but Weiner or one of his team members can work with a client to choose a vendor. Clients can also use their own vendors for hosting or processing, if they choose to do so.

Building an e-discovery infrastructure can also be a revenue generator. Outside vendors can charge upward of \$1,000 for each gigabyte of data they handle. (Weiner declined to comment on what Littler charges, but says the firm's price for handling data is "set to be ultracompetitive with the market.") According to Socha-Gelbmann's annual survey of the e-discovery market, the growing industry of e-discovery service providers generated \$2.8 billion in 2009, up 43 percent since 2006. And clients can easily spend six or seven figures for discovery in large litigation, often between a half-million to \$3 million, says Weiner.

Still, expanding IT capabilities is a hefty investment, especially when many don't view those functions as the core competency of a law firm. "Ultimately, law firms are

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not in the IT business,” says Epiq’s Kibbe. “That’s massive in-house hosting of client information—that may be liability a firm doesn’t want to take on.” Weiner says that his firm hasn’t had to change its malpractice coverage as a result of handling large amounts of client data. Littler’s Mrkonich declined to say how much the firm has spent on the data center, but says he expects that it will pay for itself over the next three to five years.

LIKE WEINER, DRINKER’S David Kessler can handle discovery from the onset, or parachute in when there’s potential catastrophe. But, Kessler says, his practice is “more outward-facing.” While he spends about half of his time on matters brought to him by other Drinker attorneys, he also advises clients on e-discovery in cases where his firm is not handling the underlying litigation.

That was the case in a recent matter for a large national wholesaler involved in a commercial dispute. (Kessler declined to name the client or the other defense firm.) Another firm handled discovery, but Kessler—the company’s regular e-discovery counsel—was called in a few weeks before trial, after the plaintiffs proffered a new, potentially ruinous piece of e-mail evidence. Kessler brought in a forensic analyst to collect the e-mail from the plaintiff’s database, had another vendor process the e-mail, and finally analyzed it himself. His conclusion: The e-mail had been altered. After the president of the plaintiff company confirmed this at trial, Kessler says, the judge sanctioned the plaintiffs \$100,000, and Kessler’s client won the case.

Kessler, who says he’s always had an affinity for computers, joined the firm’s Philadelphia office as an associate in the IP practice in 1997. “When there was a computer question, I was usually able to answer it,” says Kessler. “So I relatively quickly became a point person for certain tech issues.” He’s evolved from a litigator into the firm’s only full-time e-discovery counsel. Three other partners and one counsel work on the task force on a part-time basis.

Unlike Littler, Drinker has not tried to

bring various e-discovery tools in-house. “We want to help clients invest in their own technologies, use the right vendors, and that’s case-dependent and client-dependent,” Kessler says.

E-DISCOVERY LAWYER M. James Daley, a self-described “technology agnostic,” shares the same philosophy. A former litigator and a founder of Shook, Hardy & Bacon’s e-discovery practice, Daley earned a master’s degree in management of information services in 2000 while practicing law. He left Shook, Hardy in 2005 to start a new e-discovery boutique to advise clients about long-term, legally defensible technology solutions

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and strategies to handle their data. Most law firms, he says, don’t want to give legal opinions related to technology because of the liability involved. He left that firm to focus more on what he calls the “proactive side” of e-discovery practice: trying to get a company’s information management in order before litigation strikes, and preparing for what happens when it inevitably does.

His current firm, four-lawyer Daley & Fey, is one of only three e-discovery-focused boutiques nationwide. (Washington, D.C.’s Redgrave was recently started by Jonathan Redgrave, who was Daley’s partner in his first e-discovery boutique; the other firm, McLean, Virginia-based Law Offices of Conor R. Crowley, was founded by a former securities litigator at Labaton Sucharow who had also worked with Daley in the past.) Daley is mostly hired by large companies and, he says, his work usually comes through referrals from previous clients. In 2008, for instance, he was hired by Baxter Healthcare Corporation to perform two of his major services: to create what he calls a targeted “data map” of all of the company’s electronic systems and then, using that information, to perform a legal risk assessment.

Daley and one of his firm’s technology specialists interviewed Baxter’s IT and records management staff to learn where and how Baxter’s data is stored, including e-mail, voicemail, Web content, and payroll systems. He also interviewed the in-house counsel about the company’s litigation history, and the regulations to which it’s subject. When he finished with his analysis, he gave the company what he calls “essentially the electronic equivalent of a three-ring binder”; it details Baxter’s systems and highlights how the information relates to an existing legal obligation or retention or preservation obligation. Knowing where the information lies means that in the event of litigation, Baxter’s counsel can more quickly and effectively prepare to preserve it. The data map also allows Daley to offer recommendations about ways to make the company’s systems more efficient.

The data map was road-tested a few months later, when the company retained Daley as e-discovery counsel in a large product liability case. Sarah Padgitt, senior counsel at Baxter, says Daley worked seamlessly with her outside counsel, putting together a preservation strategy for the case. “Jim knows our internal litigation policies and structure, and he’s fully aware of the rules, local and federal, so he’s almost welcomed by the outside counsel,” says Ferguson. “If need be, he can stand up in trial and defend our approach.”

Specialized e-discovery counsel like Daley will be facing more competition, suggests Epiq’s Kibbe. Ultimately, large firms won’t want to lose that business; they’ll aim to provide that expertise as part of their package of regular litigation services. “Generally, I just don’t think firms are there yet,” Kibbe says, “but there are varying levels of sophistication.” One thing is certain, she adds: “At firms, the ostrich days are over. Get your head out of the sand, because everyone is going to have to deal with e-discovery.” ■