Meeting of the Minds: Approach Discovery as a Multidisciplinary Endeavor

by Crista L. Whitman

Discovery processes are heavily reliant on the cooperation and participation of a client's personnel with access to and information about the electronic systems on which the company stores and manages its data. When planning for work in all discovery phases, it is important to anticipate the legal and practical impact of a client's internal processes and procedures on the electronic discovery process. Records management and IT personnel often act as a gateway to company data, holding the keys to system access and information. Often these employees are inextricably intertwined with the identification, preservation and collection of documents and data.

Advances in technology and the increasing volume of electronic data managed and stored on company networks present significant challenges, not only for attorneys involved in discovery, but also for the daily operations of a client's business organization. A glimpse at the Managing Electronic Records 2011 conference schedule indicates that changes in the digital landscape -- and the law's response to those changes -- have implications far beyond the legal arena. The agenda for the event, which is geared toward records and information management professionals, not attorneys, is filled with presentations by legal professionals on topics that highlight the interplay between records management, technology and the law.

Driving Factors
As these disciplines become more intertwined, attorneys engaged in discovery become more dependent on company resources to execute on discovery tasks, particularly in the realm of document identification, collection and preservation. If not managed effectively, this growing

Meet DSP

Janet Conigliaro Bridges Gap Between e-Discovery Law and Traditional Litigation

Although much of LeClairRyan's e-discovery work happens in the 411 East Franklin office in Richmond, Virginia, it would be unfair not to highlight the contributions of another member of the team, Janet Conigliaro, an associate based in the Firm's Dearborn, Michigan, office. Janet's practice is a mix of e-discovery law and traditional litigation in which she manages class action and products liability discovery for the Firm's clients.

Janet is heavily involved in the planning and strategy of the

dependency can be a nightmare for the client. Responding to urgent and sometimes burdensome legal requests can be taxing on a client, which may not have the time or resources necessary to respond appropriately. Effective counsel requires an understanding of not only the complexities of the case but also the unique inner workings of the client's business -- the people, processes and technology. As such, the need for direct interaction among outside discovery counsel, the in-house legal department and the internal technology team is drastically increasing.

These trends are not driven by practical considerations alone. Key e-discovery cases dealing with the issue of spoliation of evidence highlight the need to understand a client's IT and records management processes and procedures such as retention policies.[1] Others indicate it is necessary to inform records management and IT departments of discovery obligations and monitor departmental activities that impact these obligations such as the suspension of routine data destruction procedures.[2] Other cases require the participation of IT and records management in the discovery process if those departments impact the preservation of data when the duty to preserve has attached. Take for example Judge Scheindlin's opinion in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC, et al.,* in which gross negligence was defined to include the failure to "cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control."[3] Clearly, big corporations with complex record retention and data management procedures have no choice but to involve IT and records management personnel in discovery or else they risk the imposition of sanctions due to spoliation of data.

Viable Solutions

Although IT and records management departments should be involved in the discovery process, oversight and direction by those most experienced is necessary for success in positioning e-discovery experts to provide invaluable services to clients. As the integration trend continues, e-discovery attorneys and litigation technology experts will act as key advocates. In addition to offering traditional discovery services, e-discovery professionals can identify particular areas of risk in the discovery process to which a client is exposed and offer global solutions to recurring discovery issues and costs. These discovery response plans are informed by the law and intimately tied to a client's internal processes and procedures. An effective approach will necessarily involve a thorough analysis and understanding of the internal systems that impact the identification, collection and preservation of client data and company documents. Advice in this

planning and strategy of the discovery phase of litigation. She meets with trial lawyers and clients early on in a case to develop a reasonable and efficient discovery plan that is in alignment with overall case and client strategies. Janet also participates in the Rule 26 meet and confer process with opposing counsel to negotiate a discovery plan and manage e-discovery. As with all forms of litigation, there are many competing needs. Developing a sound e-discovery plan in the context of each case is critical.

Bridging the gap between traditional discovery and e-discovery, Janet recently collaborated with members of the Firm's Richmond-based Discovery Solutions Practice (DSP) to create a hybrid team to conduct a nontraditional, more analytical document review. This process fully utilizes the talents of Richmond's DSP document review team and DSP's traditional discovery group in Dearborn.

Prior to attending law school, Janet worked for 12 years as a paralegal in various corporate and law firm settings. Her interest in e-discovery first peaked when she worked as a paralegal at Ford Motor Company and spent time examining how the ESI Amendments to the Federal Rules would impact litigation, specifically the discovery phase. She has made it a goal to share how embracing e-discovery and understanding client needs and e-discovery strategies consistently leads to effective discovery plans. Be on the lookout for her article on this topic in next month's newsletter.

Outside of work, Janet enjoys

arena likely includes encouraging the client to consider process and technology improvements. For example, companies have the option to manage information using an enterprise-wide solution tailored to improve electronic discovery execution, such as an email archiving system designed specifically to respond to litigation holds. Other technology improvements include purchasing in-house applications that allow for advanced data filtering and keyword searching at the point of collection. These improvements, however, can be expensive and time consuming to implement. Therefore, companies may be reluctant to invest in the upfront cost of internal solutions to discovery management, particularly in times of economic downturn. Yet, the goal of a discovery response plan is to offset these upfront costs through a significant return on investment in the form of risk minimization and increased efficiency company-wide. Regardless of the discovery solution chosen for a particular client, one thing is certain. Effective solutions to e-discovery problems must be interdisciplinary. Attorneys and clients refusing to recognize and respect the important relationship between legal, records management and IT will continue to stumble over ineffective, burdensome and costly e-discovery processes.

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[1] See *Pastorello v. City of New York,* No. 95 Civ. 470, 2003 WL 1740606 (S.D.N.Y. Apr. 1, 2003).

[2] See *Doe v. Norwalk Cmty. Coll.,* 248 F.R.D. 372 (D. Conn. 2007).

[3] See *Pension Committee,* 05 Civ. 9016 (SAS) (S.D.N.Y. Jan 15, 2010), Amended Opinion and Order.

What's New at DSP

DSP Version 2.1 Addresses Need for Increased Staffing, Enhanced Space Management

In its continued effort to adapt to the rapidly changing legal services market, LeClairRyan's Discovery Solutions Practice (DSP) has "upgraded" its reorganization and redesign plan, DSP Version 2.0. The November issue highlighted Version 2.0 and noted that the next iteration of that plan was under construction and tentatively titled, not surprisingly, Version 2.1. DSP is proud to announce that the last few bricks of Version 2.1 are in place and a grand unveiling is scheduled for later this month.

Version 2.1 carries over a number of initiatives from Version 2.0 that DSP will further advance and polish, as well as a series of new ideas

that will help DSP continue to deliver world-class document review and e-discovery services. This article spotlights two Version 2.1 initiatives that are already underway -- increased staffing and improved space management.

As DSP's client roster and project list grow, and as DSP continues to expand its service offerings to include not only document review and traditional e-discovery services, but also consulting, data processing and forensic analysis, DSP must expand its staff in several services areas, from attorneys and paralegals to litigation technologists and specialized contract attorneys.

Accordingly, DSP is in the process of hiring several attorneys and litigation technologists, and will hire a squad of attorneys and litigation support personnel in the first two quarters of this year. Look for more information about new team members in coming issues of this newsletter.

As DSP increases its staff, it is also reorganizing how it uses office space. One of the underlying philosophies of DSP Versions 2.0 and 2.1 is the idea of continually increasing work quality while simultaneously lowering the cost of legal services. DSP is working to lower client costs in several ways, and one of them is reducing overhead so that LeClairRyan can pass on those saving to clients in the form of lower billing rates or lower unitized costs.

Space is one of the top three expenses most law practices incur, and DSP is no different. DSP is in the process of reconfiguring its space, as well as planning for future space, so that the practice uses at least one-third less space, per capita, and pays less per square foot for that space. In addition, a new space management plan will better enable collaboration among project teams, thereby enhancing communication, knowledge sharing and overall work product quality, while ensuring results are delivered in shorter timeframes.

DSP is excited about the launch of the full Version 2.1 plan later this month and is equally enthused to begin its staffing and space improvement initiatives a few weeks early. Look for more information about new additions to the DSP team in upcoming issues. And, of course, feel free to visit DSP's Richmond office and check out the new space design for yourself.

Relevant Keyword Searches Reduce Number of Documents Reviewed, Manage Discovery Costs

One of the challenges of litigation is keeping discovery costs in line with the *value* of the matter and client expectations. Large-scale document review can be expensive and, if not watched carefully, can become disproportionate to the cost of litigation. One way to lower the cost of document review is to reduce the number of documents reviewed.

Recently, a large consumer products manufacturing client faced the prospect of reviewing more than one million documents in a matter with a relatively low risk of exposure. The client looked to LeClairRyan's Discovery Solutions Practice (DSP) for help in developing a review plan and managing the cost associated with the review.

The first step was to load the collected documents into an early case assessment (ECA) tool, at which time exact duplicates were removed. Removing the duplicates, which is a standard document processing procedure, reduced the number of documents by approximately 16 percent. Then, the focus turned to keywords.

DSP attorneys analyzed the case pleadings to identify the scope of the document requests and understand the client's position with regard to production of certain categories of documents. DSP then worked with the client and merits counsel to identify a key company witness whose documents were representative of the overall document population. DSP reviewed these documents first and used those designated as relevant (as well as subject matter knowledge of the case gained during the document collection process) to develop an initial list of potential keywords. Next, searches for those keywords, including various iterations, were conducted in the ECA database to identify potentially relevant documents. DSP analyzed the results, which included testing the accuracy and validity of the keywords against the previously reviewed documents.

The search for the initial list of keywords returned approximately 30 percent of the document population set, meaning that this set of keywords reduced the volume of documents for review by 70 percent. However, when tested against the previously reviewed documents, the responsiveness rate for this initial set of keywords was only 21

percent. Therefore, DSP conducted more research and created revised lists, which further reduced the volume of documents for review while increasing the responsiveness rate. The search for the final list of keywords returned approximately 20 percent of the document population and maintained a responsiveness rate of approximately 76 percent.

Culling down more than one million documents to about 200,000 documents for review is no easy task, but at DSP, consistently achieving this type of result is a practice standard. Creative and efficient work processes such as relevant keyword searches are essential to providing clients with top-notch services at a fair price.

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