MID-TO-SMALL LAW FIRM ALERT:
Overcoming The Growing E-Discovery "Skill Gap"

*By Richard N. Lettieri, Esq.**

In the past two years, 87 of the top 200 AMLAW law firms have created E-Discovery Practices. Two years ago, that number was 6[1]. Within the next two years, it is estimated that nearly every large law firms will have their own E-Discovery Practice. What are the reasons for this dramatic development? First, large corporate clients understand the risks and the associated costs of e-discovery and have insisted that their outside counsel reduce the costs and mitigate the risks of e-discovery by having competent lawyers who can discuss the legal requirements of ESI with their corporate IT staffs. Second, larger firms with more experience in e-discovery, recognize the strategic importance of ESI in court and appreciate the competitive advantage to be gained from having experienced, knowledgeable, E-Discovery Counsel on their litigation teams.

Thus far, mid-to-small firms have not responded to the e-discovery challenge with the same urgency. Several reasons have been suggested for their slower response. First, they have fewer, if any, large corporate clients making the demand for e-discovery talent on their litigation teams; second, they appear to be generally unaware that larger firms are using this growing skill imbalance as a competitive advantage in litigation; and third, even if they do recognize that they are operating at a competitive disadvantage because of their lack of ESI skills, they lack the financial resources to add the specialized skills of an E-Discovery Counsel to their litigation teams.

The result: an ESI "skill gap" between large firms and mid-to-small firms has emerged and is growing rapidly, tipping the e-discovery playing field in favor of the larger firms and their large corporate clients.

This article addresses this growing ESI "skill gap" by 1) providing specific examples that demonstrate the negative impact that this growing skill imbalance is having on litigation in federal court, 2) outlining the options available to mid-to-small firms to combat this development and "level the e-discovery playing field", and 3) providing a "call to action" for mid-to-small firms to confront this new reality and take the appropriate action to protect their interests and those of their clients.

Real Examples

If you are a litigator in a mid-to-small firm, you may be asking: "Even if there is a growing ESI "skill gap", what impact does this development have on me and my litigation practice?"

Let's look at some real examples of trial lawyers from smaller firms who have been placed at a competitive disadvantage because of their lack of knowledge and experience when addressing ESI in federal court[2].

- An attorney from a small law firm representing a client in a personal injury case, is asked by E-Discovery Counsel from a large firm: "This is such a small case, do we really need the cost and aggravation of pursuing ESI"? The large firm attorney knows that his client's five custodians from this "small" case generated approximately 1-12 million emails based upon the fact that they are using five PCs, each holding 2-6 gigabytes (GB) of data representing approximately 100,000 pages of emails per GB. The small firm lawyer, unaware of these volumes of data, is unknowingly led to believe that the case is too small to warrant a consideration of ESI. The result is that the large firm attorney produced a small number of obviously relevant emails after her manual search of documents, instead of the thousands of potentially relevant documents that would have been expected from an electronic search of a dataset that large, if the small firm counsel had answered "yes"

[1] Cohen Group, October, 2010

[2] These are real examples. The names and specific circumstances of the cases have been changed to protect the confidentiality of attorneys and the clients

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only after balancing the facts and circumstances of the case. In performing the necessary balancing, there four basic considerations (1) prejudice or surprise in fact of the party against whom the witness would testify, (2) the ability of a party to cure prejudice, (3) the extent the calling the witness would disrupt the orderly and efficient trial of the case in question or other cases in the the court and (4) bad faith or willfulness. See Miller, 664 A.2d at 532 fn5 citing Feingold v. Southeastern Pennsylvania Transportation Authority, 512 Pa. 567, 517 A.2d 1270 (1986).

Fifth, as a second fall back argument you should be prepared to argue that even if the expert testimony is excluded, a non-suit should not be granted where expert testimony is not required to establish a prima facie case. This argument would apply in a case where there is an obvious injury which does not require expert testimony to establish causation. See e.g. Matthews v. Clarion Hospitial**,** 742 A.2d 1111 (Pa.Super.1999).

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when asked "Do we really need to pursue ESI?"

- At the suggestion of Defense counsel, counsel for a mid-size firm in an employment-related litigation agrees to receive production documents in a TIFF format. Later, Plaintiff's counsel discovers that he cannot search the production documents causing him to spend a great deal of extra time and resource on the review. Also, because he is unaware that metadata will not be available in this TIFF format, he unknowingly gives up the ability to verify the create dates of several critical emails. Later, he realizes that both searchability of the documents and the access to the critical metadata would have been available had he insisted the production format be in native instead of TIFF.
- Opposing counsel attend a Rule 26(f) "meet & confer" at which a small firm counsel indicates she believes there are 25 custodians whose emails need to be reviewed for the 5 year period in question in an important employment law case. The large firm attorney cites several relevant court cases from other circuits, the value of the case, and offers several costs estimates from e-discovery suppliers who have been asked to perform the preservation/collection/filtering/processing/review and production of the documents. Each of these estimates represents a large portion of the total value of the case. Insisting that there are only 7 key custodians and the relevant time period is only 2 years and that the principal of proportionality requires the lesser scope, he convinces the small firm lawyer to reduce the scope of her request to 7 custodians and the time period to two years. The tactic saves the large firm's client a lot of money, and reduces the number of potentially relevant documents to be searched and produced by two-thirds. In this instance, the small firm counsel's determination of scope had been proportional to the facts and the value of the case. However, she lacked the ESI knowledge and experience to successfully defend her initial request to opposing counsel, resulting in significantly less relevant documents to support her client's position.
- The designation of data as "not accessible due to undue burden and cost" protects a party from the cost of producing data that needs to be "restored" before it can be produced, when the same data may be found in an accessible format. But what happens when a company creates records retention policies that limit the "life" of ESI and eliminates the data in accessible format, only allowing it to be retained on inaccessible back-up media?
  In a recent case, a large law firm represented a client that had a 90 day email retention policy. A product liability lawsuit was filed six months after a triggering event occurred giving the client reasonable anticipation that the suit would be filed. A reasonably prompt litigation hold was initiated, but potentially relevant emails were destroyed on the PCs of key custodians because of the short retention policy. The data was still maintained on "inaccessible" back-up tape. The large firm lawyer argued that the back-up tapes were "inaccessible" due to undue burden and cost, and the less experienced mid-size firm lawyer acquiesced until it was suggested at the Rule 26(f) conference by the E-Discovery Counsel that he hired, the company's records retention policy might be construed as one designed to "downgrade" accessible data for the purpose of making it inaccessible. Insisting that the large law firm's counsel agree to produce the relevant data in question from the back-up tape at its own expense, the large firm's lawyer reversed his position and provided the inaccessible data at his client's expense, after reviewing the applicable case law.

These real examples demonstrate some of the ways in which the growing e-discovery skill imbalance is working against the mid-to-small firm counsel and their clients who are less knowledgeable and less experienced in ESI.

Exacerbating the ESI Skill Imbalance

At the same time the large firms have been increasing their ESI knowledge and experience by creating E-Discovery Practices within their firms to help their litigators and their clients address ESI issues, federal judges have also been taking action to enhance their ability to address the growing ESI challenge.

In the five years since the Federal Rules of Civil Procedure have gone into effect, the federal court system has seen a gradual but steady increase in the number, complexity, and depth of ESI cases. In the U.S. Court, Western District of Pennsylvania, federal judges saw a gradual increase in ESI occurring in cases coming before them, as well as ESI issues emerging in what had formerly been considered "smaller cases," so they initiated several changes to the Local Rules and court practices designed to address the growing ESI challenge.

First, they created a committee of local attorneys to recommend modifications to the Local Rules that were adopted in 2009 to include a "duty to investigate" the IT systems of clients, so that counsel could come to the Rule 26(f) "meet & confer" better prepared to discuss the important ESI issues that require resolution at that session. Another 2009 recommended change in the Local Rules required an IT resource person be designated to help facilitate the acquisition and exchange of relevant IT information with opposing counsel, expected to result in a more meaningful ESI discussion at the Rule 26(f) conference. Finally, modifications to the Rule 26(f) Report to the Court were adopted that specifically outlined the ESI issues that the Court expected counsel to discuss and decide at the session.

This Report to the Court is currently viewed as an "early warning system" to alert the Judges regarding the level of completeness and agreement between the parties on the important ESI issues early in the litigation process at the Rule 16 scheduling conference.

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In addition to modifying the Local Rules to assist counsel in conducting meaningful Rule 26(f) conferences, The Honorable Joy Flowers Conti has co-authored two articles designed to explain judicial expectations relative to ESI at the Rule 26(f) "meet & confer" conference and outline specific suggestions for how these judicial expectations can best be met[3].

The Judge's in the U.S. Court, Western District of Pennsylvania, have also created an E-Discovery Special Master Program in 2011. As the Honorable Judge Nora Barry Fischer indicated in a February 2001 article on this topic that she co-authored for *The Federal Lawyer*[4]*:*

> *"The challenge posed by the production and discovery of electronically stored information is not likely to go away or recede in the next decade. Instead, cases involving ESI are expected to increase in amount and complexity."*

Because the Judges recognize that more and more cases, both large and small, will involve complex ESI issues, they have created a panel of E-Discovery Counsel they can appoint to help counsel and the Court resolve these issues when they arise.

All the above actions taken by the federal judiciary to address the ESI challenge further exacerbates the disparity of the ESI skills between the large and the mid-to-small law firms.

In response to this enhanced level of ESI preparedness by large firms and the federal judiciary, what actions can mid-to-small law firms take to reduce the growing ESI "skill gap" and overcome the growing e-discovery skill imbalance?

"Crash Course" in ESI

Many mid-to-small firms have attempted to address the ESI challenge by designating a young associate as their ESI specialist and asking them to take a "crash course" in ESI. This approach is based upon the premise that ESI is a topic that can be addressed in a two-day or one week seminar. What they discover is information technology (IT) is a discipline with as many complexities and sub-specialties as there are in the law. Therefore, sending a novice lawyer to depose a software engineer responsible for corporate optical storage sub-systems, (the equivalent to sending an estate planning lawyer into court to litigate a class-action, employment law case), is fraught with risk. Since the credentials of a bona fide, E-Discovery Counsel at most large law firms are impressive, mid-to-small law firm partners are quickly learning that someone of equal skill and experience is required to go "toe-to-toe" against that level of skill.

Hire a Full-Time E-Discovery Counsel

A few mid-to-small law firms have considered hiring their own E-Discovery Counsel. However, while this approach might solve the growing E-discovery imbalance, it is impractical since a mid-to-small law firm generally lacks the financial resources and the volume of ESI matters to justify the cost of a full-time E-Discovery Counsel.

Hire an E-Discovery Counsel on an "As-Needed" Basis

Hiring an E-Discovery Counsel to augment the mid-to-small firm's litigation team on an "as-needed" basis has proven to be a successful and cost-effective approach for many mid-to-small firms. First, the approach counter-balances the large firm's ESI advantage and protects the firm and their client's interests in the current litigation. Second, if the mid-to-small firm insists that the "for-hire" E-Discovery Counsel provides substantial "knowledge transfer" to the firm and staff as part of the engagement, the firm gains the additional benefit of practical ESI training for their litigation team. Enough can be learned from these experiences to permit lawyers in the mid-to-small firm to routinely handle the ever-increasing number of small, similar matters involving ESI. The E-Discovery Counsel remains available on an "as-needed" basis to handle the complex ESI case that is beyond the evolving skill of the mid-to-small firm's in-house team.

Conclusion: A "Call to Action" For Mid-to- Small Firms

There is a growing E-Discovery "skill gap" between large and mid-to-small law firms and this skill imbalance is exacerbated by actions taken by the federal judiciary. Over the past two years, 87 of the top AMLAW 200 law firms have created E-Discovery Practices and this number was 6 just two years ago. It is estimated that almost every large law firm in the U.S. will have in-house E-Discovery capability within the next two years.

The federal judiciary in Western Pennsylvania and elsewhere have augmented their ESI capability through changes to their Local Rules and the increased availability and use of E-Discovery Special Masters to help resolve ESI issues in federal court.

It's time for mid-to-small law firms to respond to the growing ESI skill imbalance. Lawyers at these firms have a professional and ethical responsibility to themselves and their clients to do so without further delay[5].

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[3] Hon. Joy Flowers Conti and Richard N. Lettieri, *E-Discovery and Pre-Trial Conferences: A Primer for Lawyers and Judges,* 46 Judges J., no. 3,34 (2007); Hon. Joy Flowers Conti and Richard N. Lettieri, *In re ESI: Local Rules Enhance the Value of Rule 26(f) "Meet and Confer", 49 Judges j., no. 2, 29 (2010).*

[4] Hon. Nora Barry Fischer and Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court,* The Federal Lawyer magazine of the Federal Bar Association, February, 2011

[5] Richard N. Lettieri, *"How to Level the E-Discovery Playing Field", The Advocate,* Quarterly magazine of the Western Pennsylvania Trial Lawyers Association, Fall, 2010.