Discovery Practices Are Big Business

ABSTRACT: Our panel discusses the growth in law firm e-discovery groups, and what the future may hold for them.

Not long ago, e-discovery was just another step in the litigation process. Today, it plays an outsized role, as the amount and type of information stored electronically by parties to litigation has grown exponentially.

Modern litigators must be able to quickly understand where and how a wide range of documents and other files (from cell phone data to instant messages to video and audio recordings) are stored. And they must have the ability to adequately search, collect, review and make use of this information.

Successful law firm e-discovery practices combine sophisticated legal and technical expertise that bears scant resemblance to what was required even a decade ago. In this roundtable discussion, three lawyers with deep expertise in the field explore how e-discovery came to become a standalone practice area and what the future holds for this vibrant niche.

Our Moderator

Nicholas Gaffney (NG) is founder of Zumado Public Relations in San Francisco and a member of the Law Practice Today Editorial Board. Contact him at ngaffney@zumado.com or on Twitter @nickgaffney.

Virginia Ring (VR) is a senior e-discovery attorney at Kilpatrick Townsend & Stockton with more than 10 years of experience in complex litigation and e-discovery. She manages large-scale e-discovery matters as part of the firm's LitSmart® E-Discovery Team and serves as the single-point-of-contact for case teams, clients and experts.

Shannon Capone Kirk (SCK) is Ropes & Gray's e-discovery counsel, where she focuses exclusively on electronic discovery law. She leads the firm's interactive e-discovery training for attorneys and was designated as a "Leading Lawyer" by *The Legal 500 U.S. 2019* – one of only seven nationally ranked attorneys. In 2017, Shannon was honored as a Lawyers Weekly Top Women in Law.

Bobby Malhotra (BM) is e-discovery counsel at Munger, Tolles & Olson, where his practice focuses on navigating complex e-discovery litigation issues. Bobby develops innovative, cost-effective and defensible strategies for the preservation, collection, review and production of electronically stored information.

NG: What prompted your firm to start an e-discovery practice?

VR: In 2012 and 2013 Kilpatrick Townsend & Stockton LLP (KT) was looking to build a team to address e-discovery, cybersecurity and related areas of the law. At that time, KT already had some project managers in place that managed vendor relationships and acted as liaisons between vendors and the case teams at the firm, but there was not an actual e-discovery practice group, nor did the firm have the technology in place to provide full-service e-discovery work. KT saw an opportunity both to provide legal e-discovery services to its clients and to internalize potential revenue that was spent on e-discovery vendors, so

in 2013 KT recruited Craig Cannon, former Global Discovery Counsel for one of the world's largest financial institutions, to develop the team and practice, and the KT LitSmart E-Discovery Team was formed.

Since 2013, LitSmart has grown into a segment of the firm that generates substantial revenue, growing more and more each year. While it started with about 10 professionals, it now has more than 30 full-time employees, including 13 e-discovery attorneys, and between 50 and 100 contractors on any given day. It can provide a diverse range of services to clients of the firm, as well as to clients using LitSmart as their sole discovery counsel.

SCK: Discovery is not an ancillary skill, we view it as a standalone specialty. And we were finding a client need for that specialty.

To reach a level of excellence in the use of predictive coding, advanced technology, and advocate across all facets of e-discovery it's necessary to immerse attorneys and litigation technology professionals in this practice area on a day to day basis.

BM: Although MTO litigators have been counseling clients on complex e-discovery issues since well before "e-discovery" became a buzz word, we didn't have a formalized practice group until about five or six years ago. We realized that it wasn't realistic to expect all litigators to have a comprehensive mastery of both substantive legal areas and the intricacies of constantly changing e-discovery technologies, workflows and case law. With that realization and spurred on by considerations such as increasing data volumes, ethical duties and the desire to create a centralized knowledge management and e-discovery counseling hub, two litigation partners with significant experience in e-discovery came together with other seasoned e-discovery attorneys to form an e-discovery practice group to better serve our clients.

NG: What services do you provide to clients and do how do they differ what non-law firm e-discovery service providers offer?

VR: LitSmart's services are different than non-law firm (as well as most other law firm) e-discovery services because LitSmart offers full-service e-discovery support, including legal, operational (collection through production) and document review. This support is all provided under the umbrella of attorney client privilege. What does this mean?

In short, LitSmart handles both operational and legal e-discovery work, and as a practice group within a law firm, our work is protected by attorney-client privilege. Our e-discovery attorneys provide a wide array of legal e-discovery services, such as developing defensible data retention and disposition strategies, issuing legal holds, conducting custodian interviews to narrow data sets and target collections, advising on strategies to comply with international data privacy and cross-border data transfer laws, advising on ESI agreements and discovery motions, and conducting legal research pertaining to various areas of e-discovery law.

We handle document reviews for many firm clients as well, staffing contract attorneys and paralegals managed by LitSmart team attorneys, primarily at our dedicated document review center on KT's Winston-Salem campus. We also handle a variety of ancillary legal services for firm clients, such as bulk subpoena responses for financial institutions; notices of dispute and arbitrations for communications clients; cite checking for case teams across the firm; and data entry in a multitude of situations (such as transcribing handwritten personnel logs).

In addition to this work for firm clients, other clients engage LitSmart as their global discovery counsel. In this capacity, we provide the full suite of legal, operational and document review services to clients for a series of matters or for all their matters worldwide. In addition, clients benefit from a dedicated account team made of up legal and technical experts who become fluent in the client's internal data systems, processes and personnel. With this valuable institutional knowledge, we are able to tailor our work to support our clients' needs and develop enterprise level strategies that can result in real, measurable cost savings for our clients.

SCK: We have extensive experience negotiating e-discovery parameters at the meet and confer stage and navigating e-discovery disputes among counsel and, where necessary, during motions practice. We also are experienced in complex project management, that marries legal requirements and legal standards, on use of advanced technologies for investigative and production reviews. The practice also investigates and manages

the data side of data intrusions, and helps develop cost-effective data retention and destruction plans, policies, and guidelines. We provide full litigation readiness counseling and records management solutions.

BM: That varies from day-to-day, case-to-case and client-to-client, partly because there is no one-size-fits-all approach to electronic discovery and our clients have varying degrees of needs and available resources.

With that said, our clients turn to us for guidance with all aspects of electronic discovery from litigation readiness through trial. At the beginning of a matter, we are often involved with drafting legal holds, defining a defensible scope for preservation and performing early case assessments. At this stage, we also typically develop an e-discovery action plan that is in line with case strategy and our clients' discovery needs.

As the matter moves along, we continue to craft practical and defensible approaches to meet all discovery obligations. We prepare for and engage in discovery-focused meet and confers and/or pre-trial conferences, draft responses and objections to document requests, advise on offensive discovery strategy, and develop ESI protocols and case protective orders. We also advise our clients on collection issues (including from complex data sources such as cell phones, cloud data, IoT devices, collaboration portals and structured databases), search methodology, technology associated review workflows, document review strategy and management, deposition preparation, and e-discovery related briefing and motion practice.

In addition to matter-specific services, we assist clients with company-wide e-discovery vendor and software selection, best practices development, litigation readiness playbooks, and customized document review tool training and development of machine learning models. For example, I have assisted some of our largest clients in developing legally defensible and standardized company-wide e-discovery policies and practices for preservation, collection and review.

Unlike non-law firm e-discovery service providers, we are part of the litigation merits counsel team and the scope of our services is not limited to technology and/or software consulting. As lawyers, we provide legal advice on complex e-discovery issues while ensuring the technologies and workflows being employed are in line with the legal needs and strategy of the case. We advise on key legal decisions regarding the scope of preservation, the responsiveness of ESI and when and how issues should be teed up in

court. We act as zealous advocates on behalf of our clients on e-discovery issues throughout the matter lifecycle. Also, we have no agenda to promote a provider or technological tool. We keep up with the market and tools and can recommend to our clients the provider and tools best suited to their needs.

NG: What kind of lawyers do you think are best suited to join an e-discovery practice?

VR: In my experience, lawyers best suited to e-discovery practice are those that are eager to learn and develop new skills, good communicators, and able to multitask and organize multiple projects simultaneously. While an attorney joining an e-discovery practice does not necessarily need to be well-versed in all the latest technology (most of us attorneys certainly are not), the person should be willing to learn and interested in further understanding the technology utilized by the team.

For example, I interface daily with technical members of our team so that I understand the processes used and make sure matters are running smoothly and efficiently. For that reason, although it's not necessary to be a technology guru, it is important to develop an understanding of the systems used by your team.

Similarly, the ability to communicate—particularly with non-lawyers—is also critical to an e-discovery attorney's success. I have found that my role is very frequently as a liaison between attorneys on the case team/client and with the more "techie" members of LitSmart. It's very helpful to be able to facilitate communications and speak both the legal and technical language to bridge that gap.

And finally, I believe that organization and the ability to multitask are key to successful e-discovery attorneys. To me, organization is critical to successful multitasking, because we must organize multiple projects simultaneously. "To do" lists are an e-discovery attorney's best friend! Similarly, a good system of organization also helps with all the tracking and monitoring that attorneys on our team do daily. A strong method of organization helps you keep your projects, as well as everything that the technical members of your team are handling, on track.

SCK: Speaking of my own opinion and experience with litigators, I think that the best-suited to join an existing e-discovery practice are attorneys with at least some base experience in working overall beginning-to-end spectrum of litigation.

As e-discovery counsel, I find it tremendously helpful to understand where in the life of litigation discovery fits, how it impacts other strategies, and how it impacts budget. Does this mean you need to have attained partnership as a trial attorney? No. But some experience in litigation is useful.

Beyond that, the best attorneys I work with in this field are entrepreneurial in character, intellectually curious and, importantly, *creative*, willing to travel, and people who can (because you must) work well in a team environment. Obviously, an understanding in technology is needed, but not to the level of having to have a degree in computer sciences—that's what the experts are there for. And this is one of the great reasons why you must be a team player, you must know what you don't know and know when to reach out to the experts.

BM: To state the obvious, lawyers with an interest and/or knowledge in litigation technology are probably best suited to join an e-discovery practice. Yet, while knowledge of both the

law and technology is invaluable, that is just the tip of the iceberg. To be a successful e-discovery lawyer, you really need to have grit. You need to understand that you are in a practice that is inextricably intertwined with innovation, disruption and technological change. Legal rules constantly change, case law evolves to keep up with technological developments, vendors continuously consolidate, and data protection and privacy standards expand almost daily.

As such, you need to be able to roll up your sleeves and dig in, quickly pivot, learn new skills and technologies and be flexible enough to adapt to new realities. Lawyers who understand, appreciate and are cognizant about these issues are well suited to joining an e-discovery practice.

NG: How can law firms ensure they're employing the most cost-effective e-discovery strategies?

VR: To start, law firms should get multiple quotes and closely investigate potential vendor costs before entering any relationship with a vendor. In particular, law firms should pay close attention to potential costs that may not be outlined in a formal pricing sheet, but that the vendor will charge, like project manager hourly time, data storage and the cost of productions.

In addition to selecting a vendor who appreciates the need to manage costs and has processes in place to do so, it is important for law firms to work closely their clients to make sure measures are taken early on in litigation to decrease the potential future cost of e-discovery.

For example, by conducting custodian interviews to help narrow the potential list of custodians and target the collection to relevant data only, law firms can reduce the amount of data in play. Further, by including e-discovery professionals in negotiations with opposing parties regarding discovery obligations, including the content of any ESI agreements and protective orders, law firms can potentially further narrow their clients' discovery obligations. LitSmart also works with certain of its clients on their internal client data management practices to limit the data retained by the client to only what is necessary and cut down on storing duplicative data. Addressing the infinite amount of data that may exist but may not be necessary for a client to maintain or even relevant to any existing or potential dispute is a critical component to cost-effective e-discovery strategy.

SCK: They should capture and analyze metrics for every case and study them (I could write a whole paper on all the metrics and factors to track); keep abreast of changes in the rules and the law (a good example is the Amendments to FRCP 26 and the trend in some jurisdictions toward category privilege logs); and allow flexibility to move among vendors as the leaderboard on who may be the most cost effective choice may change over time as case needs vary and technologies evolve.

BM: As data volumes continue to exponentially increase and new data sources continue to emerge, it is no secret that e-discovery can be expensive. Unfortunately, there is no "easy button" when it comes to ensuring that you are employing cost-effective e-discovery strategies and you really need to put in the work. Whatever strategy is employed, it should generally take into account three important considerations. First, the strategy should minimize over preservation by taking proportionality and reasonableness considerations into

account. This ultimately allows for the reduction of data sent downstream into the processing, review and production workflow.

Second, the strategy should utilize defensible technological solutions to the maximum extent possible. These tools, whether it be the technology assisted review, sentiment analysis or e-mail threading of today, or complex neural network architectures of tomorrow, help to streamline and expedite the document review and production process, while also getting key documents into the hands of the litigators faster.

Third, the strategy should call for the selection of a vendor pricing model that fits the needs of the case. Pricing models among e-discovery vendors vary and each vendor usually has multiple pricing models to choose from. Making an informed pragmatic decision here is critical to a cost-effective e-discovery strategy.

NG: What changes would you like to see in the e-discovery process?

VR: I would like to see better integration of new technologies to streamline e-discovery processes and create efficiencies. For example, tools such as advanced analytics and active learning can greatly streamline document reviews.

On one case that our team manages, we developed an innovative workflow incorporating active learning to bucket documents by issue, reducing a data set of over 5 million documents to much smaller and more manageable groups for use in deposition preparation. As another example, technological advances in e-discovery tools such as comprehensive dashboard reporting can be used to provide better transparency into processes and costs, substantially decreasing the manual work associated with providing metrics and budget information.

Taking advantage of these types of technological innovations helps us serve our clients in a more efficient and accurate way.

SCK: I'd like to see more consistency among the states in approaching and enforcing rules related to e-discovery, and much shorter ESI protocols that allow for flexibility.

BM: First, I would like to see lawyers more frequently engage in after-action reviews or at least informal debriefing sessions after discovery projects are completed. All stakeholders can have candid discussions about what happened, why it happened, what worked well and how things can be done better and more efficiently. By engaging in these sessions, lawyers will naturally learn about methods that could potentially improve the discovery process and enhance efficiencies.

Second, I would like to see more frequent use of technology assisted review (TAR). Despite the effectiveness of modern TAR tools and the maturation of TAR workflows, TAR's rate of adoption has remained slower than expected across the legal industry. Finally, I would like to see e-discovery vendors dispose of old and stale pricing models and come up with new and innovative solutions which are more in line with clients' needs and discovery budgets. For example, even though data volumes have increased so rapidly over the years, most vendors still (and have done so for well over a decade) charge based on per gigabyte unit pricing. Simply put, this is a unit price that is easy to manipulate, artificial and not connected to anything material in the underlying legal matter.

NG: What can law firms learn about managing and protecting their own electronic data from the process of performing e-discovery?

VR: Law firms can learn quite a bit about managing their own electronic data from their work in e-discovery. One critical area where firms can apply their work in e-discovery is in their own data retention and disposition policies.

A lack of data retention policies and chaotic organization of data inevitably leads to the collection of much more data than is necessary in the e-discovery process. Relatedly, firms should be wary of over-duplication of data everywhere (like on shared drives, personal drives, document management systems, one-drives, and numerous other locations available to firm employees).

We regularly advise our clients to implement sound data disposition policies and streamline organization of their potential data sources. The same advice applies to law firms with their own electronic data.

Finally, law firms can learn from the diversity of thought and background that is critical to an e-discovery team's success.

Indeed, any successful e-discovery team brings together legal and technical minds to develop comprehensive solutions to every-day problems. Technical professionals provide valuable insight and solutions to issues that may not be apparent to those with a purely legal background. We have found that creating working groups made up of both legal and technical e-discovery professionals has led to great results for both LitSmart and KT.

SCK: Like any other company, law firms should have clear processes in place that are enforced related to information management.

BM: During the e-discovery process, lawyers rightly put much emphasis on data protection and disclosure standards.

We meticulously draft protective orders detailing which groups of people can see which documents and setting out encryption standards and data destruction obligations.

We place stringent security requirements in document review tools that prevent users from printing or downloading documents.

I think law firms can learn a lot about managing and protecting their own data simply from the practices that are employed during the e-discovery process. For example, law firms could employ similar processes over their own data by building in tight access control workflows (so only certain groups of employees can access data based on business needs), standard encryption requirements, and systematic data destruction practices pursuant to document retention policies.