

## Using “Special e-Discovery Counsel” To Gain A Litigation Edge

David R. Cohen

KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP

Discovery in commercial litigation is increasingly focused on records stored in electronic form. News reports of evidentiary “smoking guns” are plentiful, including a \$229 million punitive damages award against a pharmaceutical company whose employee estimated that amount of revenue would result from a delay in withdrawing from the market a drug alleged to cause heart problems in some patients<sup>1</sup> and a \$20 million punitive damages award in an employment discrimination case where employee e-mails suggested an attempt to cover up the reasons for the plaintiff’s discharge.<sup>2</sup> Results like these encourage plaintiffs’ lawyers (and some defense lawyers) to take the offensive with regard to e-discovery. The recent amendments to the Federal Rules of Civil Procedure and new procedural rules enacted or under consideration in many states, further underscore the increasing focus on e-discovery.

Unfortunately, most litigators are ill-equipped to deal with the nuances and technical complexity of e-discovery issues. No e-discovery courses are offered in law school and few litigators have extensive training or experience with regard to computers, information systems, or related fields. Some in-house and outside lawyers try to muddle through with the help of IT personnel. Others delegate the e-discovery issues to associates or paralegals who also

---

*David R. Cohen is a Partner in the Pittsburgh office of K&L Gates where he co-chairs the firm’s e-Discovery Analysis & Technology (e-DAT) Group.*

lack the necessary expertise. In some instances counsel turn to e-discovery vendors who may lack understanding of the legal nuances or may have financial incentives contrary to client desires to minimize data collection and processing costs. Any of these approaches can lead to costly mistakes, monetary sanctions, or worse.<sup>3</sup>

### The Special e-Discovery Counsel “Edge”

In the face of such problems, a number of forward-looking companies and law firms are enlisting the assistance of “Special e-Discovery Counsel.” There are at least three approaches available in this regard:

*1. Hiring Law Firms With e-Discovery Expertise.* In recent years, a number of law firms have established dedicated practice groups to address e-discovery and records management issues. The lawyers in these groups may assist other litigators at the firm to deal with the e-discovery issues arising in their cases. This can bring several advantages to the client:

- Focused attention to help ensure that e-discovery issues receive adequate attention.

- Application of “best practice” approaches to handling those issues.

- The potential for significant cost savings through properly managing record collection, filtering, review and production, including, where appropriate, selection and management of outside e-discovery vendors.

*2. Hiring Special e-Discovery Counsel to Assist Trial Counsel.* Choosing your lead counsel for a case based on e-discovery expertise smacks of the “tail wagging the dog.” More often, subject matter expertise, geography, or other factors will influence your decision. However, hiring the best lead counsel does *not* have to mean putting

the company at risk with regard to e-discovery issues. Where such issues are likely to become prominent, retaining Special e-Discovery Counsel to assist lead counsel offers each of the advantages identified above, plus several other advantages that you may not have considered:

- Judges, discovery referees, arbitrators and mediators typically do not know much more about electronically stored information (“ESI”) than most litigators and some know less. As a result, when they are asked to make decisions about e-discovery issues, those decisions are likely to be influenced by the knowledge and credibility of the lawyers on each side who are addressing the issues. If the decisionmaker knows that you have hired Special e-Discovery Counsel, and particularly as that counsel demonstrates his or her credibility, that typically will lead to better decisions with regard to e-Discovery issues.

- Conversely, a record of e-discovery mis-steps or mis-statements (both of which are more likely to occur with less knowledgeable counsel) reduces credibility with the court, often resulting in less favorable decisions and increased costs.

- Special e-Discovery Counsel will often pay for themselves in the cost savings that can be achieved through optimal practices including using tools that they have already licensed or developed, applying streamlined and cost-effective procedures for large-scale document reviews, judiciously using and managing e-discovery vendors, and even, on occasion, winning cost-shifting orders.

For example, in one case where K&L Gates served as Special e-Discovery Counsel, we obtained an order not only limiting supplemental e-discovery through court-ordered sampling, but also potentially shifting 100% of those sampling costs

*Please email the author at david.cohen@klgates.com with questions about this article.*

(including the costs of responsiveness and privilege review) to the requesting party. See: *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908 (N.Y. Sup. Ct. Aug. 17, 2006).

3. *Hiring National e-Discovery Counsel*. Some companies have hired National e-Discovery Counsel to handle e-discovery issues in all of their litigation matters nationally and/or internationally. Companies that have gone this route have discovered many additional advantages, including:

- Having one firm fully up to speed on the company's information systems so that they do not have to pay for the "learning curve" of multiple outside firms.
- Developing uniform practices and procedures, including procedures surrounding implementation and tracking of litigation holds, record collection, review and production, mandatory disclosures, and discovery responses in regard to ESI.
- Maintaining consistency of privilege determinations and other document decisions from one case to the next.
- Achieving cost savings by reusing ESI databases.

For all of the above reasons, hiring National e-Discovery Counsel may be the most progressive solution and the one most likely to yield the most benefits in terms of cost savings and litigation outcomes on a company-wide basis.

### The Multiple Roles Of Special e-Discovery Counsel

Some of the roles that Special e-Discovery Counsel can fill are rather obvious: assisting with record preservation, collection, processing, review and production; managing litigation support vendors; participating in discovery conferences with opposing counsel and the court where e-discovery issues are on the agenda or likely to arise; assisting with preparation of written discovery requests and responses; taking, defending, or assisting with depositions of IT people, record custodians, or other witnesses where the depositions are likely to include issues regarding storage or production of ESI; and briefing and arguing protective order motions, motions to compel or other discovery motions relating to e-discovery. Other roles may be less obvious: pre-litigation records management and litigation readiness counseling; maintenance of litigation hold databases; automated assistance with issuance of hold notices, litigation hold training, hold reminders and tracking; supplying primary counsel with deposition preparation packages; and even providing "24/7" trial

support to primary trial counsel.

Not every firm with an e-Discovery practice group, however, has the capability to fulfill all of these roles. Before hiring Special e-Discovery Counsel, it is worth investigating their resources and experience. Questions to ask include:

- How long has the firm had an e-Discovery practice group and what roles has the group served in the past? Have the lawyers handled e-discovery issues in situations similar to those you are encountering?
- What are the credentials of the lawyers in the practice group? Do the partners have substantial first-chair trial experience in record-intensive litigation, as well as technical knowledge and expertise?
- Beyond the lawyers and paralegals, what technical, IT and litigation support professionals has the firm dedicated to its e-Discovery practice?
- What databases and other resources does the firm maintain for its own use in counseling clients (litigation hold databases, record retention laws, e-discovery vendors, e-discovery forms, e-discovery caselaw, etc.)?
- Can and does the firm assist with collection, conversion, de-duping, filtering and/or hosting ESI? What software does the firm license for data collection, TIFF conversion, OCR conversion, data hosting, ESI review and production? When relying on vendors for forensic collections, restoration services, imaging, coding or other services, how does the firm select, contract with and manage the vendors to help ensure high quality at low cost?

• Does the firm only rely on traditional associates and paralegals for responsiveness, issue and privilege reviews or do they offer experienced and scalable lower cost alternatives?

• Does the firm have workstations, workflow processes, technical assistance, and quality control processes set up for large scale review operations? Do they use software to de-dupe and group records by concept to speed up reviews and identify key documents faster? Does the firm charge solely based on hourly rates or do they offer volume-based alternatives for lower costs and more budget predictability?<sup>4</sup>

### Keys To Success

In addition to choosing the right lawyers to be your Special e-Discovery Counsel it is also important to ensure that they work with your primary trial counsel as part of a seamless and integrated litigation team. That tends not to be an issue in cases where

you are using the same firm to supply trial counsel and e-discovery counsel, but you can also avoid it becoming an issue when using lawyers from separate firms to fulfill the two functions.

The key is that the lawyers from each firm must understand and accept their respective roles. In particular, Special e-Discovery Counsel need to understand that their job is to support primary counsel, make their life easier, and make them look good. Regardless of how much independent and successful trial experience Special e-Discovery Counsel may have, it is not their role to second-guess primary counsel on strategy issues, to compete for client approval, or to take any other action that would give rise to concern by primary counsel that e-discovery counsel is not a loyal and integral member of their team. If Special e-Discovery Counsel does their job well and earns the respect of primary counsel, in some cases they may find themselves being consulted by lead counsel on general strategy issues, or drawing assignments from lead counsel on issues that go beyond pure e-discovery. It is important, however, that any such decisions or additional assignments are driven by lead counsel rather than by the client so that there is no confusion about who is in charge of the case, and so that lead counsel has no cause to feel undermined or threatened by Special e-Discovery Counsel's involvement.

### Conclusion

The use of Special e-Discovery Counsel is an idea whose time has come. To fully appreciate the litigation edge and cost savings that can be achieved, consider retaining Special e-Discovery Counsel in your next case involving large volumes of ESI. If you follow the tips in this article, you should not be disappointed.

<sup>1</sup> See, *Walter T. Champion*, The Vioxx Litigation Paradigm: The Search for Smoking Guns, 31 *T. MARSHALL L. REV.* 157, 180-181 (2006).

<sup>2</sup> *Zubulake v. UBS Warburg, LLC*, 229 *F.R.D.* 422, 428 (S.D.N.Y. 2004). The case was subsequently settled on confidential terms.

<sup>3</sup> *Recent sanctions cases include*, e.g., *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2007 *WL* 1848665 (N.D. Cal. June 27, 2007) (evidentiary and monetary sanctions imposed where relevant materials may have been lost or destroyed as a result of "willful indifference") and *In re NTL, Inc. Sec. Litig.*, 2007 *WL* 241344 (S.D.N.Y. Jan. 30, 2007) (adverse inference and attorneys' fees awarded based on spoliation findings).

<sup>4</sup> For additional considerations see, *Evaluating the Electronic Discovery Capabilities of Outside Law Firms: A Model Request for Information and Analysis*, by *Jeffrey Ritter and Karen Worstell*, available from <http://storefront.bnabooks.com/epages/bnabooks.storefront/en/product/1679>.