ROLE OF THE E-DISCOVERY LIAISON

By Viggo Boserup, Esq.

With today's prevalence of electronic documents, e-discovery is easily the largest single line item in any company's litigation budget. It can often consume more than half the allotted funds and even exceed the actual dollar amount at issue in the dispute. Ironically, since more than 90 percent of all cases filed eventually settle, the budget for e-discovery can often approach 100 percent of the cost of a litigated matter.

With so much money at stake, the role of technical experts to guide parties through the e-discovery process is becoming more and more essential. The e-discovery liaison can play a significant role in helping parties and their counsel navigate a process that is often at odds with the typical adversarial system of litigation. Due to the unique quality of information that is contained in electronic form, transparency in the process of preservation, collection, processing, review and production is critical. That means that planning is critical and requires a high degree of cooperation among all parties, which is more easily facilitated by a technical expert.

The value of an e-discovery liaison is evident from the very first meeting between parties and counsel on discovery issues. Whether that meeting is the Rule 26 (f) meet-and-confer or its state law equivalent, it is likely the most critical event in the discovery process and should be approached with careful planning.

At a minimum, the agenda should include the following:

1. Initial disclosures versus later disclosures (custodians, non-custodians, timing)
2. Defining the appropriate subjects of discovery
3. Available approaches: phasing, limited, focused
4. Completion dates
5. Production format
6. Privilege and work product

The presence of an e-discovery liaison with technical knowledge is essential to a meaningful discussion of these agenda items. The greater the success of this meeting, the greater the possibility of avoiding costly sanctions later in the process.

The role of the e-discovery liaison goes far beyond initial planning and continues to the courtroom itself. Judges are increasingly demanding technical expertise from party representatives who appear before them on e-discovery issues. As the judges at a recent presentation pointed out, appearing before the court to argue compliance with discovery is not necessarily the province of trial counsel alone.[1] The judges emphasized the importance of technical expertise on the part of counsel. Judge Paul Grewal stated, "While lead counsel is critical in the few cases that do make it to trial, the e-discovery competency of the person

This article was originally published by LAW.COM and is reprinted with their permission.

making representations to me is going to have a far greater impact on your case and consume a far greater percentage of your budget [in the vast majority of cases that don't." He stated that far too often, the person making an argument regarding efforts taken in discovery is one or more levels removed from the person making the efforts and has only a superficial understanding of the integrity of those efforts. Another panelist in that presentation, Judge Donna Ryu confirmed this, saying, "We are frustrated with the paucity of information and who is bringing that information to the court."

The judges suggested selecting counsel withcompetence over seniority. The traditional notion of having lead trial counsel appear before the court in an e-discovery dispute often leads to testimony to the validity and good faith of the e-discovery efforts when such counsel, unfortunately, has no business swearing on personal knowledge. As Judge Grewal said, "I would much rather have a candid conversation with a professional who does this for a living in the cubicle than a polished argument from a senior advocate."

With e-discovery becoming ever more complex and expensive, and judges calling for interpretations from those with deep technical knowledge, the e-discovery liaison has never been more important. They should be part of any company's litigation strategy. The savings in time and money make this a solid legal and business strategy. ■

1. Judges Paul Grewal, Elizabeth Laporte and Donna Ryu of the U.S. District Court for the Northern District of California, speaking at the inaugural Corporate E-Discovery Summit of the Association of Certified E-Discovery Specialists in San Francisco, California, October 10-11, 2013.

Viggo Boserup, Esq., CEDS, *is a JAMS neutral based in Southern California. In addition to more than 20 years as a fulltime mediator and arbitrator, Viggo serves as special master and referee in a number of cases involving electronic discovery. He is certified as an Electronic Discovery Specialist by the Association of Certified Electronic Discovery Specialists (ACEDS). He can be reached at vboserup@jamsadr.com or for more information, please visit www.jamsadr.com/boserup.*