

The Legal Intelligencer

The New E-Discovery Lawyer: More Than Just a Practice Area

Now is not the time for e-discovery lawyers to take a victory lap. We are likely just emerging from the earliest stages of transformation in the practice of law.

By **Tess Blair and Tara Lawler** | March 12, 2020



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The first landmark e-discovery opinion was issued on May 13, 2003, in *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003). Looking back 17 years later, none of us could have imagined the breathtaking speed at which electronic discovery would evolve from an exercise left to young associates, paralegals and litigation support into a unique, complex, deeply enriching, highly relevant and extraordinarily diverse practice area led by a new kind of lawyer, the e-discovery lawyer.

On reflection, e-discovery is where the legal profession incubated some of its most important and enduring innovations of the last 20 years—alternative fee arrangements, legal project management, data analysis, operational discipline, metrics, data-driven decision-making and performance management, multidisciplinary teams, legal process outsourcing, the virtual law firm, the use of extranets and client dashboards, and more recently, predictive coding, algorithms, machine learning and analytics. These innovations have and promise to further transform the practice of law, not just in the data-rich e-discovery practice, but across the entire profession.

Now is not the time for e-discovery lawyers to take a victory lap. We are likely just emerging from the earliest stages of transformation in the practice of law. We've now accepted, as e-discovery lawyers learned early on, that the guild will not hold and the practice of law will depend on the business of law to succeed. This evolution will continue and the opportunities and challenges the profession is confronting will likewise continue apace. That affords the e-

discovery lawyer the chance to leverage her experience and lead the way in incubating the innovations that will define what the practice of law looks like in the future.

The E-Discovery Lawyer, a Jack of All Trades

The e-discovery lawyer is a jack of all trades. She is a tactician, a litigator and a technologist. She has deep experience in every aspect of discovery law and practice as well as strong functional knowledge of data science and legal technology. Beyond that, she has working knowledge and experience in law and practice across a broad spectrum of practice areas. She brings her discovery expertise to commercial litigation, torts, antitrust second requests and cartel investigations, employment litigation, FCPA investigations, IP matters and class actions. She knows the legal and factual issues in these practice areas and the data and information likely to generate discoverable evidence. Today's e-discovery lawyer is also a tactician, overseeing the mechanics of discovery, developing and executing litigation work plans that set out a strategy for defensibly preserving and collecting relevant data and information. And finally, she is a litigator, stepping into the litigation process to handle any aspect of a matter that relates to the evidence. This includes meet and confers, discovery-related depositions and any discovery related motion practice. Her work enables the development of an authenticated factual record, while ensuring that her client's interests are protected.

The E-Data Lawyer, a Jill of Even More Trades

The legal landscape is changing quickly. Law may not remain the exclusive domain of lawyers in law firms. Competition between law firms, accounting firms and law companies is intensifying. New data and technology laws and regulations are being implemented across the planet. Rational business practices related to data acquisition, use, storage and sharing are making basic legal concepts such as possession, custody and control fuzzy. And legal technology continues to evolve at a stunning pace as the volume and value of data continues to explode.

The e-discovery lawyer has spent the last two decades conjuring defensibility from her raw materials—people, process, technology and data. She has molded them into an efficient machine, wringing waste from the process to defensibly extract, analyze, and deliver data and information for use in a broad range of legal engagements. That is a pretty solid foundation from which to grow. To meet the challenges facing the profession, she'll now need to use everything she has learned from e-discovery and stretch her reach to become a Jill of even more trades, the e-data lawyer.

She should prepare now to succeed in a legal economy where data will be the currency and her clients will have obligations created by new laws and regulations of data. She will have to expand her technical skills to understand the enabling technologies and emerging business practices being built on them. And she'll need to expand her practice to include her ability to nimbly evaluate risk, balance competing interests and show her clients how to lawfully coax value from their mountains of data.

Develop Competency

In a global economy, the way a company structures itself, interacts with and shares IT and data resources with related entities and subsidiaries can affect the organization's legal risk. This

requires the e-data lawyer to understand basic corporate governance, legally cognizable corporate forms and operational ring-fencing. U.S. courts, for example, can look beyond formal corporate structure and form to evaluate the reach of lawsuits, investigations and discovery and may disregard it in order to extend jurisdiction to foreign entities for discovery obligations or to hold a parent company potentially liable for the actions of a subsidiary by piercing the corporate veil.

Every lawyer handling data or advising clients on how to handle data must be well versed in data privacy and information security as well. The number and reach of laws governing data privacy and information security continues to grow and will affect how organizations conduct business in the United States and abroad. At least 25 states have implemented data privacy and security laws. The law currently getting the most attention is the California Consumer Privacy Act (CCPA), which represents a landmark shift in consumer privacy protection in California and across the United States. But other states have enacted data and information security legislation that require different compliance regimes or apply to very specific use cases. For example, New York's Stop Hacks and Improve Electronic Data Security (SHIELD) Act addresses data privacy like the CCPA, but expands that protection to biometric data, and adds information security and data breach compliance mechanisms. Illinois' Artificial Intelligence Video Interview Act, in contrast, specifically regulates the use of AI in the hiring process. This patchwork of state and local data law is likely to grow more complex in the absence of federalization.

Stay on Top of New Technologies

As technology and the regulatory framework governing it continue to evolve, the e-data lawyer has to stay on top of the change. In 2012, Model Rule 1.1 of the ABA Model Rules of Professional Conduct, addressing competence, was updated to include technology. Comment 8 to the rule requires that "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." At last count, 31 states have formally adopted the comment, and other states have imposed a duty of technical competence by other means. One example is California. An ethics opinion from the State Bar of California (Formal Opinion No. 2015-193) makes clear that "an attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated into the practice of law."

In practice, the e-data lawyer should thoroughly understand legal technology, including machine learning systems, cloud-based platforms, new discovery applications, new and vastly improved approaches to KM, and data analytics. She should learn to speak the language of and work with data scientists and software engineers to develop and implement technology tools that enhance the delivery of legal services and extract value from data to benefit her colleagues and her firm's clients.

Offer Risk Management and Enabling Advice

Importantly, the duty of competence relates not just to the use of legal technology, but to competence in understanding her client's use of technology. The American Bar Association (in ABA Formal Opinion No. 477) addressed attorney competence arising from the client's use of electronic communication systems, making clear that technological competence means

“understanding the benefits and risks of relevant technology,” including how her clients use technology. It would be impossible to describe here the full extent of the requisite competence, but she should be vigilant in identifying new technologies, capabilities and platforms and new use cases for them in the practice of law and in our clients’ businesses.

With the current over-hyped focus on AI, for example, the e-data lawyer should develop working knowledge of machine learning and the use of algorithms, process automation and predictive analytics, to educate her peers and leverage this technology in practice. The e-data lawyer should likewise understand the business uses of new technology to counsel clients on potential legal or ethical risks involved in the development, adoption or implementation of these new technologies. For example, a client considering an AI platform for its HR department that screens job applications requires counseling on the legal risks associated with the use of that technology and how it might implement the technology in a way that reduces that risk without negating its benefits. The notable absence of regulation of artificial intelligence, despite broad calls for it, also offers the e-data lawyer the opportunity to advise clients on how this technology can advance business agility while balancing the web of legal, ethical and privacy risks associated with it.

The competencies above are no doubt a tall order for any lawyer. The e-data lawyer’s experience, however, uniquely positions her to take advantage of new opportunities to innovate. How to expand practice by leveraging that experience and skill will be the subject of the next two installments.

Tess Blair and Tara Lawler, partners with Morgan Lewis & Bockius, focus their practices on e-discovery, information management and data privacy.

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