

Controlling Legal Costs – Service Providers

Mary Mack: Litigation Prenups, E-Discovery ADR And The Campaign For Proportionality

The Editor interviews **Mary Mack**, Corporate Technology Counsel, Fios, Inc.

Mary Mack has more than 20 years' experience delivering enterprise-wide e-discovery, managed services and software projects with legal and IT departments in publicly held companies. Follow her on Twitter (@mackmary) and on her blog, *Sound Evidence*, on DiscoveryResources.org (www.discoveryresources.org). She is a co-author with Carole Basri of *eDiscovery for Corporate Counsel*, a publication of West, a Thomson Reuters Business.

Editor: What are some of the newer ideas about cost and risk reduction in e-discovery?

Mack: I think we're all aware of the efforts that will culminate in the Duke Conference to change the Federal Rules. If I could sum up Duke, it would be in the phrase "Campaign for Proportionality." We as service providers to our clients see the pressing need to control outsized e-discovery costs and feel that formalizing proportionality is the best way to achieve this. It is clear that e-discovery has to be more in line with the value of a particular case. The other cost control efforts that are new on the horizon relate to mediation and arbitration. Mediation and arbitration have been around for a long time, but they have not been applied on a large scale to e-discovery disputes. I'll talk a little bit later about why these particular tools have immense utility in risk and cost reduction. I'd also like to talk later about an interestingly titled solution called a "litigation prenu" that allows businesses to limit their e-discovery and other litigation exposure by contract.

Editor: Why do you feel that proportionality is the key to controlling the cost of e-discovery?

Mack: Proportionality involves keeping e-discovery costs in line with what is at stake in the case, either in dollar amounts, the impact of the principles involved or other factors.

Service providers like us can help in this area by providing metrics that are easily documented for budgets and affidavits. We can also be helpful in narrowing the scope of e-discovery by documenting the impact of various search terms and their date ranges. Estimates for proportionality purposes should be realistic and take into account sampling, deduplication, email threading and other data culling techniques and advances. The estimates need to be credible. It would be a freshman mistake to provide an estimate that is designed to be too high; it will not serve the clients to do that.

PD Villarreal was interviewed in your November 2009 issue about the CPR toolkit for complete early case assessment to reduce costs. That toolkit, with inputs from a provider like Fios, can support proportionality efforts. (See:



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<http://www.metrocorp.counsel.com/current.php?artType=view&EntryNo=10277>.)

Editor: Tell us about the mediation of e-discovery disputes.

Mack: Allison Skinner's articles advocate a Mediated E-Discovery Plan (MEP). Skinner worked as a litigator in automotive e-discovery, using mediation very effectively. She was able to narrow down hundreds of contentious production requests to a handful via mediation. She requested judicial intervention only on that handful of important issues. Her mediator acted as a facilitator and was effective because she understood e-discovery and therefore was able to cut to the quick of the dispute.

There is a great advantage in having the "meet and confer" take place under the cloak of mediation. It keeps the discussion and the written offers to compromise confidential. Mediation also provides a cloak of confidentiality for the IT people. This makes it possible for the IT people to talk more openly because they are not on the record. The mediator is under the control of the parties and is not reporting to the judge like a special master or magistrate.

I am hopeful that Allison's suggestions will be picked up by law firms that will see the advantages of offering the services of lawyers skilled in e-discovery as mediators to accelerate the promise of the meet and confer.

Here is a link to Allison's work via Peter Vogel: <http://ow.ly/1CpYV>.

Editor: What are the advantages of integrating e-mediation into the meet and confer process?

Mack: Where an e-mediation is set up as part of initial 26(f) meet and confer, the mediator can lay the groundwork to get agreement with sample documents. If there are e-discovery disputes down the road in the case, if there are production difficulties or surprises, the parties would go back to the e-mediator before going back to the judge to see if the

issues can be resolved. This process can reduce the cost of motion practice later in the litigation and speed the matter to trial, rather than being tied up on something that is not germane to the actual litigation.

Editor: How does e-mediation narrow asymmetric data issues?

Mack: In an asymmetric situation, one party doesn't have a lot of data but the other party does. There are few reasons for the parties to come to agreements. With e-mediation, there is a concerted effort – a good faith effort – to come to agreement.

There are many relatively non-contentious issues that can be easily disposed in the meet and confer. The issues that come to mind are handling of privileged material and its inadvertent production, the format of production and timing of production. Coming to agreement on these items can be more like scheduling dates on a trial docket than about strategic items like narrowing the scope of e-discovery. If these issues can be resolved by the parties, the smaller number of contentious discovery issues, like the scope of e-discovery, will be much less irritating to a judge.

Editor: You mentioned that each side can prepare written letters of compromise, which are well understood to be confidential, and the discussions are not on the record in the e-mediation, and I gather that you feel that that process is helpful in getting the parties together.

Mack: Yes, I do, and certainly service providers like Fios can participate in the e-mediation to provide our expertise with respect to costs and timing. The client's IT people can also contribute valuable insights with respect to cost and the difficulties in preservation and collection. E-mediation could be a valuable first step in reducing the costs of preservation, even prior to going to the judge for an order. Preservation would be more predictable and more under the parties' control in an e-mediation than with a judge.

Editor: Wouldn't the involvement of a service like yours lend credibility to the statements by a party?

Mack: Yes, because we are a third party. If the e-mediator engaged us, we would be viewed as neutral. If one of the parties engaged us, we would lend credibility to the representations of that party concerning the care with which its information was prepared.

Editor: Who would retain you?

Mack: There are four alternatives. We could be retained by both parties, by the judge, by one of the parties or the e-mediator.

Editor: Can e-mediation allow breathing room in case surprises are encountered in the discovery process?

Mack: Yes. For example, the Form 35 submitted to the judge at the scheduling conference could direct all e-discovery disputes to e-mediation before involving the judge. This would grant at least a week and perhaps more for a producing party to make good on a misstep, and to explain in a setting without the judge why the issue arose in the first place and what was being done to rectify it.

Editor: Does the role of a special master sometimes get blurred with the role of an e-mediator?

Mack: The special master actually has decision-making power on some of the procedural issues. The power derives from the judge, not the parties. The special master can introduce unpredictability in part because the discussions are on the record. For example, I've seen special master reports on *in camera* privilege reviews, scope, cost-shifting and on recommending sanctions. Special masters can be very helpful in reducing the burden on the court. However, an e-mediator is able to provide a similar function without the power of the court. Her power derives from the desire of the parties to solve a dispute. The parties' decision to use an e-mediator demonstrates good faith in solving matters and reduces the number of matters that the judge needs to attend to.

Editor: What is a "litigation prenu"?

Mack: Businesses can enter "model economical litigation agreements" or "litigation prenups" to limit e-discovery costs at the point of contract. Daniel Winslow, a partner at Duane Morris, developed the model agreement with help from the International Institute for Conflict Prevention & Resolution (CPR Institute). The model agreement includes provisions to govern the details of resolving disputes early and, if unsuccessful, provisions that govern the extent of e-discovery based on the value of the case. For example, there is no e-discovery for cases under \$400,000, and there is a sliding scale for larger disputes.

This is a splendid opportunity for litigation attorneys who understand e-discovery to train the transactional attorneys on the importance of limiting downstream litigation costs. Winslow's litigation prenu includes an e-discovery arbitrator to resolve issues with binding arbitration as well as mandatory mediation on the substantive issues before resorting to litigation. Like the e-mediation discussed earlier, the arbitration would be confidential. Unlike mediation, the decision of the arbitrator would be binding. See link to Litigation Prenup: <http://ow.ly/1Cq44>.

Proportionality, e-mediation, arbitration and litigation prenups are exciting innovations to reduce costs for clients and courts.

Please email the interviewee at mmack@fiosinc.com with questions about this interview.