



An interview with Tess Blair of Morgan Lewis; making outside counsel's e-data team effective for all

Jan 25th, 2010 | By Gregory P. Bufithis, Esq.

This interview is part of our new series “Data! Data! Data!” — *Cures for a General Counsel’s ESI Nightmares*”. For our introduction to the series [click here](#).



Stephanie A. “Tess” Blair (call her Tess, don’t call her Stephanie) is a partner in Morgan Lewis’s Litigation Practice and leader of the firm’s eData Practice. As leader of eData, Tess works with Morgan Lewis attorneys and clients to develop and implement strategies and cutting-edge processes for successfully managing complex litigation matters, with an emphasis on electronic discovery.

She is a nationally recognized thought leader in electronic discovery, and has developed industry-leading “best practices” designed to provide clients with state-of-the-art records and discovery management, knowledge sharing, and collaboration resources.

She received her J.D., magna cum laude, from the University of Miami School of Law in 1997, where she was named to the Order of the Coif. She is also a member of The Sedona Conference Working Group on eDiscovery, a member of the ARMA Electronic Discovery Advisory Group, and a member of The Electronic Discovery Reference Model Working Group. And she serves on the Editorial Board of the Scientific Council of the Journal of Legal Technology Risk Management.

Prior to receiving her bachelor’s degree, Tess studied industrial design at the Philadelphia College of Art, where she concentrated on product development, computer-aided design, and

marketing. She also gained invaluable entrepreneurial insight by founding and operating a small business before pursuing her law degree.

We caught up with Tess at The Masters Conference in October, and then at the Morgan Lewis offices in Philadelphia.

TPL: Tell us a little about the Morgan Lewis eData Practice and your focus.

TB: The eData team plays a large role in defending clients in corporate matters, including product liability, mass torts, labor and employment, antitrust, M&A, regulatory, white collar, compliance, construction, insurance coverage, IP, energy and complex commercial litigation. As partner, I counsel and defend clients primarily in the areas of product liability, mass torts, and construction litigation. A considerable portion of my practice involves the defense of clients in national serial litigation and class actions. For more detail here is a link to our [PowerPoint](#).

TPL: What is eData LawFlash?

TB: We issue LawFlashes to clients and members of our mailing list on important eDiscovery opinions, rule changes and similar events in an effort to keep our colleagues informed of the quickly evolving authority and rules that guide our practice and conduct of eDiscovery. Let me provide you a [link](#).

TPL: You have also lectured and written, yes?

TB: I lecture quite a bit, yes, on civil procedure and discovery management, and I have published articles on document management and eDiscovery in law journals nationwide.

TPL: And your involvement in e-discovery began when?

TB: From my very first case, actually! I had a series of matters with what we would now call an electronic discovery component. But of course we did not call it that at the time. But from the onset of my career I've been involved in massive litigations involving discovery of a very broad scope. My very first case was a product liability matter — 7 class actions, scores of individual actions. It was enormous. So we had a massive discovery effort in that case. But, of course, back then 500 boxes of paper was considered massive!! I mean today one mailbox might be the paper equivalent of something we considered huge back in the day. So that's how I got started.

TPL: When was the electronic discovery practice group started?

TB: I became our firm's eDiscovery "guru" early in my career and formed our formal eData practice group devoted to electronic records management and electronic discovery in 2004. This was because we sensed in our practice a real demand and a lack of knowledge in this area. At the time, the amended federal rules were still a concept and still winding their way through the approval process. And please note we were preparing our clients long before electronic

discovery became a formal practice area. We've grown into a workforce of about 150 folks who address all aspects of electronic discovery and records management.

TPL: Ok, so now we have a "tsunami of data" as Ralph Losey says. We have a new lexicon, funky technology — and not necessarily technologically astute lawyers. Are most lawyers technophobic or perhaps they don't see technology like we do?

TB: I'd say that lawyers are not, as a group, necessarily technophobic, but like everything else, tend to possess varying levels of sophistication and knowledge in this area. What is clear is that eDiscovery has become a specialty, a very challenging, very rich specialty. I'm less concerned about technophobic lawyers, because they will very often enlist the assistance of someone with expertise. The lawyers to fear are those who don't even recognize that eDiscovery is different and requires expertise. These folks think — "Its just discovery. I've been doing it this way for decades. What's the big deal?"

TPL: So it's really a lack of knowledge, a lack of familiarity?

TB: For the latter group, a little knowledge is indeed dangerous. I hate to generalize, but I see this too often. Some lawyers know a little lingo, but don't have the depth necessarily to truly appreciate the challenge and degree of difficulty involved. They tend to make incredibly burdensome demands and costly mistakes. They will often refuse to engage in meaningful negotiations on the scope of discovery. Sadly, many of these cases get derailed in discovery motion practice — a costly, futile exercise.

TPL: As we move into 2010 the volume and the cost of discovery seems to be exponentially greater by the minute. How do you help clients cope?

TB: My clients are typically large organizations that bear the disproportionate burden of ediscovery. For these clients, few opportunities exist to get control of the discovery process. Our focus is on those places where organizations can address the real problem — volume. For the longest time, labor costs were the only focus in driving down the cost of ediscovery, and so we saw an early trend away from traditional associate document review, to contract attorney review to LPO. In my view, you can only get your labor costs so low and frankly, when you are talking about exabytes of data, ediscovery will still carry an enormous cost, even at extraordinarily low hourly rates. Thus, we focus on volume reduction at every stage of the lifecycle — from creation and storage, to retention and disposition, to legal hold, collection, processing, review and production. Pre-litigation, we counsel clients on record management and work with them to develop sound policies, practices and processes for managing data in the ordinary course. For other clients, we conduct ediscovery audits, to identify areas of continuing risk and to recommend process improvements designed to enhance defensibility and reduce cost. During litigation, we develop strategies to control the process and where our team manages the discovery — we offer advanced technology solutions and all-in flat fee pricing for the entire eDiscovery process, including review and production.

TPL: You'll agree that the days of gamesmanship and overly broad demands are over. The courts, the cases, the commentators, people like us who do this for a living, are trying to find a

balance between the need for effective discovery and costs. But do you still find an opponent who comes in and wants the sun and the moon and the stars?

TB: Yes, that is still the norm. But I'm optimistic. As you note, the courts are taking a much more active role in controlling the discovery process and are less tolerant of outrageous demands. The emphasis is now on cooperation and reason. We've been successful by being transparent with the court and our adversaries about our data and our challenges, and by responding to outrageous requests with thoughtful, fact based reasoning. Its hard to argue with that.

TPL: You've been involved with Sedona for awhile. We attended our first Sedona conference last year in Barcelona and the founder/chairman of The Posse List became a member last year. Tell us about your experiences with the organization and what you think its true value is.

TB: Sedona is the first and best resource on eDiscovery. As we all know, Sedona was formed early and has become a source of authority on eDiscovery worldwide. The membership and leaders of Sedona work in concert across the typical party lines and offer excellent and practical guidance.

TPL: And what do you think is at the forefront of the discovery process, the most important thing, the biggest challenge?

TB: Volume. No question about it. Look, for most organizations, IT grew up organically and with storage costs low, most were not incentivized to focus on data management and volume reduction. Add to that the uncertainty of eDiscovery and threats of sanctions and many organizations understandably made the decision not to delete *anything*. So that is where we are today. Enormous stores of undifferentiated, constantly proliferating, widely dispersed data without effective means for search and retrieval.

TPL: So, strategies to reduce costs in this area. The problem with electronic discovery is everybody is looking to reduce costs. The problem is always volume. Even if you're paying a substantially less per hour for attorneys to review document, if you're still looking at terabytes of documents you're still going to sustain a significant cost. The new technologies and the new approaches will help. Your thoughts?

TB: The answer lies in effective data management on the front end and better technology tools on the back end. We've seen tremendous innovation on both sides and more to come. For eDiscovery in particular, the industry is moving away from linear review tools towards stronger analytic tools. This array of technology will have the greatest impact on cost.

TPL: Last year's Fulbright & Jaworski's 6th Annual Survey said that 26% of their corporation respondents reported that they were now using law firms with specialized e-discovery practices — sort of a wake-up call for law firms that don't have such practices. But obviously with your eData Practice you have that well covered.

TB: Well, yes. We've had a formal eData practice since 2004.

TPL: And yet, there is a feeling among in-house counsel (gleaned from the ACC meetings we attended) that direct relationships with e-discovery vendors is best, rather than through outside counsel. Do law firms (such as Morgan Lewis) see this as a threat to their business, and is this a reason why we see law firm units such as eData?

TB: No, we don't regard vendors as a threat. To the contrary, to effectively represent many of our clients, we need to work closely with and collaborate with vendors across the spectrum of providers. For some companies, particularly those with significant litigation portfolios, it makes sense for them to select preferred vendors for certain services. For others, the best solution is to bring portions of the process in house. For still others, we provide these services or fill in whatever gaps still exist. For clients who don't have other resources, we can provide those resources.

The process usually goes awry when there is no plan, but lots of service providers flying by the seat of their pants trying to grab at the available work. Without a clearly delineated plan that identifies roles and responsibilities, milestones and activities, and dare I say it – a budget – you'll see a lot of wasted activity and expense. No offense to you, but when cases are headed for disaster, the knee jerk reaction is often “throw more bodies at it.” That is almost never going to work.

TPL: But e-discovery vendors have also had much success the last 2 years moving into the e-discovery space across the whole EDRM model, especially in the area of document review, a success due to the continuing move by corporations to move EDD directly in-house. Document review is a nice piece of change. Is this move by vendors a threat to law firms?

TB: These vendors have gained traction in document review in part because outside law firms have been complacent. In the face of growing client demand for innovation and a solution to the extraordinary cost of discovery, most law firms have nothing to offer. But if you ask most savvy in house lawyers which they would prefer – a premier law firm offering comprehensive, high quality document review or a vendor at the same relative cost – they'll choose the law firm every time. We are that law firm.

TPL: Morgan Lewis recently selected Recommind's Axcelerate eDiscovery™ as the foundation for your e-discovery infrastructure. We have an interview with Craig Carpenter coming up later in this series but a few questions. You will become the first AmLaw 100 firm to offer clients full e-discovery services on an alternate pricing basis, correct?

TB: Correct. We selected Recommind after a thorough evaluation of numerous eDiscovery solutions. We knew we wanted to find the most efficient way to offer our clients comprehensive functionality — as opposed to separate tools for search, categorization, processing, culling, analysis, review, and production. Given our long-standing commitment to fee arrangements that meet our clients' needs, we are committed to offering our clients alternate pricing for these unparalleled e-discovery services.

TPL: As we understand it, the Recommind software (Axcelerate) uses a rather unique concept search and predictive coding technology. It automatically assesses document responsiveness,

privilege and issue relation before the review process begins which therefore reduces the amount of time required to prioritize ESI and conduct document review and analysis. The key benefit to you?

TB: Well, it increases review accuracy and consistency. The system also automatically identifies key documents, people, phrases and concepts of interest, giving our attorneys visibility into document collection prior to review. As a result, Axcelerate improves the speed and accuracy of document review and reduces the overall cost of e-discovery. You have to remember that Morgan Lewis has a long track record of excellence in client service and a commitment to investing in core services to advance their capabilities on behalf of our clients. We need to be proactive and therefore we realize we must invest in unique technology to keep pace and be competitive.

TPL: There is a myriad of software out there — review software, early case assessment software, ESI management software, etc. What process do you go through to evaluate your need (or a client's need) for software and choose Recommend?

TB: We engaged in an extensive vetting process and considered an array of possible solutions. In addition to working with outside consultants, we formed an internal advisory committee composed of a diverse group of attorneys and technologists from across our firm. This group developed functional specs. Each candidate application was measured against our specifications and run through a rigorous testing process. We ultimately selected Recommend.

TPL: E-discovery costs are skyrocketing. Yet much of EDD is now a commodity – and that has changed the structure of the market. Prices are — shall we say — more predictable and probably more realistic. E-discovery vendors have capped fees, set flat fees or worked with various forms of pricing estimators. Have you seen this new technology out there — and new pricing — really helping the bottom line at Morgan Lewis, and your client's bottom line?

TB: The challenge in 2010 is going to be to reinvent ourselves with new economic models. Our advantage is our experience. Over a number of years, we have developed statistics and a base of knowledge that has enabled us to move away from the billable hour to alternative fees for all aspects of our work, including our consulting and auditing work and eDiscovery. We are quite comfortable offering flat fees which essentially require us to share the risk with our clients. Our new business model reflects that.

TPL: The big “new new” thing all of last year — at every event we covered — was early case assessment and winnowing relevant data down to reduce the number of documents to review. As the stats bear out, it is the most expensive part of the process. Is the technology getting to the point where we can also winnow out the eyeballs — contract attorney reviewers?

TB: It is too early to tell, but if we get our arms around the volume problem in a meaningful way, then yes, the demand for contract attorney reviewers should decrease. That said, the need for expertise and the demand for those with the skill and ability to use more complex analytics tools has never been greater. Contract attorneys with this skill set will still find work.

TPL: Last year you wrote about one of the “biggie” topics of the year: **electronic discovery and social media**. You made a distinction between EDD 1.0 and EDD 2.0, that EDD 1.0 was composed of the “usual suspects” such as hard drives, laptops, cell phones, etc. but that EDD 2.0 is Facebook, Twitter, YouTube, etc. Can you elaborate on that?

TB: I can, but my answer isn’t necessary what you would suspect. In the near future, EDD 2.0, social media, will be a hot topic in eDiscovery. I expect to see lots of requests. Setting aside the question of what could be relevant from such sources, as a practical matter, however, there isn’t much there. More importantly, if we go back to the basic notion that parties to litigation have an obligation with respect to information in their possession, custody or control, much of the data in the EDD 2.0 world does not necessarily fit this definition. Its an open question who “owns” the data on Twitter, YouTube and Facebook, but its rarely if ever “owned” by an employer of a person with a Facebook page or a funny video on YouTube. That being said, as more organizations embrace viral advertising and develop company sponsored social media outlets, that will change. And the law will have to provide the answer.

TPL: The contract attorney/document review industry saw a rough patch earlier this year with a huge fall off in work because of the financial meltdown. Has Morgan seen an upturn in document review projects?

TB: We’ve never organized ourselves on a project by project basis. Many of the contract attorneys on our team have been with us for years and years and are integral to our practice. They are incredibly valuable to us and to our clients because they have the experience, dedication and skill that makes our process work so well. We simply don’t hire off the street to staff a specific engagement. We focus on keeping our team engaged across a variety of cases. Our focus in the past year has been just that.

TPL: Foreign language projects still rule the roost with a continuing stream of FCPA and IP litigation cases dominating the project/contract attorney market. Is that a high percentage of your work?

TB: We do a great deal of foreign language review, but our practice is quite diverse so no single practice area or case dominates.

TPL: Do you staff your document review projects directly, use a staffing agency, or is there a mix? How do you choose these agencies?

TB: As I mentioned, we do not staff on a project-by-project basis. We have a core team of experienced contract attorneys who work on a variety of matters and have been with us for a long time, some longer than we’ve even been a formal practice. When we do have a hiring need, we work with a short list of preferred agencies with whom we’ve worked for many years.

TPL: Do you provide clients document review capability in Europe or Asia?

TB: International discovery is one of our strengths. My colleague, Denise Backhouse, has been a thought leader in this area for some time and as a result, we have developed broad and deep capabilities to assist clients in navigating data privacy issues, including offshore review.

TPL: Tess, we greatly appreciate your time.

TB: Thanks, and I'm a big fan of The Posse List!

Postscript: Morgan Lewis will have a major presence at *LegalTech New York 2010* next week with Denise Backhouse presenting on two ERM Track (Email and Retention Management) panels. Both are on Wednesday, February 3rd, and the sessions are:

* ERM1: *Backup is for Recovery, Archiving is for Discovery: Legal and IT Considerations of Each* (10:30 – 11:45 AM). Denise will be presenting along with George J. Socha, Jr. (Socha Consulting LLC), Hon. Ron Hedges (Ronald J. Hedges LLC), Theodore Barassi (Group Product Manager, Symantec) and Nelson Martinez, Jr., (Division Director, Information Technology, City of Miami Beach)

* ERM2: *Emerging Trends in Archiving and E-Discovery* (1:45 – 3:00 PM). Denise will be presenting with George J. Socha, Jr., Hon. Ron Hedges, Jonathan E. Moskin (Partner, Foley & Lardner LLP) and Mikki Tomlinson (Litigation Support Manager, Chesapeake Energy Corporation)

For the full LegalTech New York 2010 schedule [click here](#).

Gregory P. Bufithis is the founder and chairman of The Posse List and its sister sites The Electronic Discovery Reading Room (<http://www.ediscoveryreadingroom.com>) and The Posse Ranch (www.theposseranch.com). He is also founder and chairman of Project Counsel (www.projectcounsel.com).