An interview with Mary Mack and Dennis Kiker of Fios: collaborative e-discovery technology and services, and putting it all in perspective

Feb 1st, 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*.

Mary Mack is Corporate Technology Counsel for Fios Inc. She is one of the leading speakers and authors on electronic discovery issues, technology and the law. She is co-author of the popular book, "A Process of Illumination: The Practical Guide to Electronic Discovery," which she has graciously provided to The Posse List as a free download (click here).   She also the author of "eDiscovery for Corporate Counsel," published by West, a Thomson Reuters Company, and hosts the blog, "Sound Evidence," featured on DiscoveryResources.org. Mary is regularly featured as an expert in the leading magazines and newspapers, and is "in the trenches" of e-discovery – investigative inquiry, second request or class action litigation. She has more than 20 years experience counseling clients on electronic discovery, managed services and software projects. Mary is a "hands-on" strategic advisor for some of the largest products liability class actions, government investigations and intellectual property disputes.

Dennis Kiker is the Director of Professional Services for Fios. His job is to help clients prepare for and respond to the demands of litigation. Dennis focus is on the business processes associated with efficiently and defensibly responding to discovery demands related to complex litigation and governmental investigation. He specializes in bringing together in-house counsel, business personnel, outside counsel and Fios resources to develop process-based discovery response solutions that lower cost, time and risk. Dennis is a frequent speaker and author and an

active participant in The Sedona Conference and the Defense Research Institute. He holds a J.D., Magna Cum Laude & Order of the Coif, from the University of Michigan Law School.

We caught up with both at the ACC Annual Meeting and the Georgetown University E-Discovery Institute and then again at their Portland, Oregon offices.

TPL: First of all, our thanks for the free download of your book, Mary, and for the "E-discovery Knowledge Center" on your site (*link*). We have had scores of Posse List members who have used it via our various posts.

MM: I think what you have created with The Posse List and with your companion site The Electronic Discovery Reading Room are fabulous resources for our industry. Fios prides itself on its ability to help guide and educate people on the important legal concepts in e-discovery and we are happy to make a contribution to The Posse List in that area.

TPL: Well, I think it is a reason why so many of our readers flock to the Fios E-Discovery Knowledge Center. It is one of the best resources on the web.

MM: Thanks. We publish articles and white papers and have scores of webcasts that provide training at multiple levels (legal and legal technology). Our e-discovery experts also participate in and present at various industry conferences and tradeshows. But more importantly we get on the phone with clients and prospects to help them better understand their electronic discovery issues and questions.

TPL: And that is a major element for you. We discussed this at length at the ACC Annual meeting last year: working with clients to facilitate a close working relationship between IT and legal, to understand the process.

MM: Exactly. We have experienced several situations where IT made a buying decision but didn't consider the legal requirements. IT had worked with all of the other business units to gather requirements. Because legal was not consulted, issues around legal holds, preservation and metadata were missed. Legal may be viewed as a reactive group, but to manage risk, IT must understand the legal requirements for retiring, migrating or deploying new systems to minimize impact on litigation.

TPL: And that's the reason we like chatting with you, your hands on experience. For instance, that "sound bite" you gave us at ACC about custody.

MM: Ah, yes. You mean the custody exercise we chatted about. Moving files from one physical disk to another. Many people interpret data movement like they would move a chair; however, when you move electronically stored information (ESI) from one physical device to another, it moves a representation of the original item. Critical things like data ownership, group security, created date and many other pieces of metadata (data about data) are changed when the data is "moved." with normal tools. The data needs to be moved with tools and processes that respect the evidence quality of the data being moved. This minor issue can become a major legal risk when authenticating chain of custody in court. Many of these tools are already in an IT

department's arsenal. They just need to be convinced 1) that there is a process or Standard Operating Procedure (SOP) they can use and 2) that it is really necessary to use it. Who would believe a create date would change without seeing it for themselves?

DK: If I can jump in here. One of the areas we educate clients on is in the application of technology for electronic discovery. New technology can be wonderful. It can also cause disaster. Companies will buy tools to reduce their review costs and exposure around discovery, particularly in the areas of early case assessment, collection, preservation and case management. The disaster comes from a lack of understanding how these technologies will impact scale, chain of custody and legal workflow, specifically on active litigation. Fios generally recommends customer who are buying new technology to pilot these applications on low profile and low risk cases.

TPL: Ok, I have jumped the gun a bit. I know Fios does a gazillion things and I don't want to clog up this interview with a full recitation since we'll have reports next week from LegalTech. So, in a nutshell, what do you guys do? And I'm timing you.

MM: [laughing] Ok, but I love to chat about what we do. But let me give you an overview of the electronic data services side, and then Dennis can jump in with the professional services side.

We have developed and honed our e-discovery technology and services for more than a decade to address any challenge, big or small. Our e-discovery services break out into five primary areas: (1) evidence collection, (2) data culling and processing, (3) evidence analysis and review, (4) evidence production and (5) project management services. Our goals — the "mantra" these days from everyone — is to provide e-discovery technology and services that help clients defensibly reduce data volumes. We have a lot of flexibility to meet a broad spectrum of matter sizes and issues.

Did I use up my allotted time?

TPL: Dennis, you're up.

DK: Wow. And you have a timer and everything! Ok, Fios brings a seasoned perspective to e-discovery that results in defensible, cost-effective, accurate results in even the most complex matters. We offer our clients a team of seasoned professionals and legal experts, including certified project managers, solutions design architects and professional services consultants who, together, tailor solutions to work in sync with our clients' requirements. That's the key to ensure success.

One of the areas we focus on is helping our clients limit scope and reduce data volumes in advance of "meet and confer" conferences and privilege reviews. The time and resources spent on the pre-discovery planning results in significant time and cost savings. And, when managing the e-discovery process, strategic and tactical choices made at every stage can significantly impact the defensibility of a production. All you need to do is read some of the recent e-discovery court decisions to see all the *faux pas* that can be made.

So in a nutshell (boy the sand in that hourglass moves fast) let me say that Fios team of experts can help create innovative and cost-effective solutions to any organization's electronic discovery challenges.

TPL: That was fine. So, a summary in my words: Fios has the ability to bring together the best in electronic discovery technology and expertise and provide it to those who need it most – law firms and corporations compelled to produce evidence in conjunction with audits, investigations, litigation … . anything.

MM: Precisely.

TPL: Ok, one of the themes in this interview series is "tsunami of data" (as Ralph Losey calls it): a volume of data plus a cost of discovery which both seem to be exponentially greater by the minute. In a nutshell, how do you help clients cope, get organized?

MM: This evolution in discovery, due primarily to the substantial growth of ESI retained by companies in the normal course of business, is bedeviling everyone. And as you have discussed in this interview series, the high cost of complying with litigation discovery requests. Add to that the growing number of cases where courts have entertained and granted motions for sanctions with respect to violations of rules governing discovery of ESI, the imposition of which have often resulted in extremely adverse outcomes to companies.

A far cry from the old days. Well, not so old. Just back in 2000 for instance. As I recently wrote on my blog, back in 2000 dial-up was still the norm for Internet connections, with T1 lines for corporations. Not everybody had BlackBerrys. Forensics was still done in DOS, mostly by ex-law enforcement. All but a few attorneys ignored electronic evidence and agreed not to produce it, or produced it by printing it out and hand-stamping a BATES number on it. Most electronic discovery was of the forensics variety for employment, white collar and trade secret cases. PCs were left open, so internal hard drives could be attached more easily.

Today, we are pushing the envelope of Web 3.0. We have Droids, iPhones, Twitter, Facebook and LinkedIn. For e-discovery, we have conceptual search and much more user-friendly forensics. And, according to the New York Times, Americans consumed, on average, 34GB of data per day in 2008.

So to help clients cope with the tsunami? We continue to provide the "glue" for collaboration and documentation for defensibility among inside and outside counsel, between IT and legal, among joint defense groups and during productions with opposition to allow our clients to litigate on the merits instead of the "discovery about discovery." We show our clients how to get control of the discovery process, how to tackle the volume, the whole lifecycle from creation to production. It's a process. And you know what? It is actually very simple.

And not to brag …. oh, heck. I am going to brag. In a profession dominated by words, suddenly a process flow document appeared, as if by magic, in every RFP response and in every e-discovery PowerPoint. After Fios announced the preposterous concept of "Litigation Readiness" in 2003, the rush to prepare was on. Assessments, data mapping, information policies and early

case assessments were suddenly in vogue. The left side of the EDRM was king…then came the bursting of the legal bubble and the financial meltdown. Discretionary dollars disappeared, and, like magic, the right side of the EDRM (processing, analytics, review and production) started getting its fair share of attention. Since 70 percent of a case's cost typically comes from the right-hand side, this captured immediate attention.

Fios has created tremendous tools for our clients to cost-effectively respond to e-discovery requests and, in this cost-conscious climate, includes them in all our engagements.

DK: And that's where our professional services come in. We work with clients to make sure they understand how to deploy technology, train their legal teams and develop practices and processes for managing the data.

TPL: We now have a new lexicon, funky technology — and not necessarily technologically astute lawyers. Are most lawyers technophobic or perhaps they don't see technology like those of us in the industry?

MM: No, I think more and more lawyers "get it". As I recently wrote, the AmLaw 100 law firms have suddenly sprouted e-discovery practices, with specialized counsel emerging at the case level. And this morphed into national e-discovery counsel managing across cases with the split between trial and pre-trial work more pronounced. And paralegals adopted more traditional litigation support responsibilities, litigation support added practice support. Plus more law firms named CIOs. But it is still an education process.

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

DK: Precisely. Back in 2000 education for e-discovery, to the extent it even existed, was really just all about forensics. Forensic exams were on those old-fashioned, really floppy, floppy disks. There were few articles and even fewer books. Take Mary's book *A Process of Illumination: The Practical Guide to e-Discovery*. Even she was astonished by its acceptance.

MM: Exactly, as were the faculty for our webcasts and contributors to the first e-discovery portal, *DiscoveryResources.org*. Carole Basri and I, and our 70 contributors, published the first and second edition of the Thomson Reuters West treatise, *eDiscovery for Corporate Counsel*. Jonathan Redgrave and Judge Scheindlin published a case book for law students, and Tom Allman published a comprehensive guide to e-discovery through PLI.

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 changed your pricing?

MM: Fios has always been flexible on pricing models. When we know enough about the case and/or client, we are able to share risk. Clients are working through how to get the benefit of fixed fees and still gain reimbursement from insurance coverage or bill back to specific business units. We are able to tailor reports for our clients to allow them to have the best of both worlds.

TPL: 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 (the "right side") and that success is due to the continuing move by corporations to move EDD directly in-house. You recently partnered with Ajilon Legal, one of the largest legal staffing agencies in the U.S. How did that come about?

DK: Well, it was a natural progression. The partnership blends Fios' leading e-discovery services with Ajilon's document review management expertise to deliver a single, "all-inclusive" solution from processing through production.

TPL: And the pricing? The document review world is moving from per hourly rates to per doc rates.

DK: It's a seamless, combined e-discovery service to clients, really, and we do it at affordable per gigabyte (GB) pricing that includes: evidence processing, advanced review technology (Fios Prevail®), highly qualified document reviewers, and litigation/project management services. The per GB pricing is much more predictable for our clients than a per doc rate, as some GB's can produce 100,000 pages (20,000 docs) and some GB's can produce 20,000 pages (5,000 docs). We also provide a single point of contact. With the Fios-Ajilon combined service, clients will be provided with a single point of contact for requests, communications, reporting and accountability for processing through production.

TPL: With this merging of the left side and the right side of the EDRM we know that the single-point of contact issue is major.

DK: Exactly. We've heard from countless clients — both law firms and corporations — that they want a single source for managing e-discovery from beginning to end. So by combining the core Fios and Ajilon competencies and expertise, legal teams now have a single resource for processing, review and production services. Additionally, our combined services will provide legal professionals with improved cost predictability and budget management for e-discovery projects. As we indicated in our pricing discussion above.

TPL: So, last point on this. As we have discussed in this interview series, 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. But now we have predictive coding, plus the work being done in computer assisted review as evidenced by Herb Roitblat, Patrick Oot and Anne Kershaw's study "Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review" (*link*), plus the work being done by Google and Microsoft on auto-categorization or auto-coding. Are we headed down the path to where machines can be statistically proven to be as accurate as human review? Is the technology getting to the point where we can also winnow out the eyeballs — contract attorney reviewers?

DK: No. I think there is too much value in humans to take us out of the equation. And technology is just a means to an end. But I do see document review teams getting smaller, focused and more tech-savvy.

TPL: Mary, Dennis — we greatly appreciate your time.

MM: I have enjoyed reading your updates. It is a service to all of us who cannot be everywhere that you send your reporters to bring us back the information and the flavor of our many conferences and gatherings. I also acknowledge your role in raising the level of education and information sharing amongst all stakeholders in ediscovery, particularly the contract reviewers. These are tumultuous times. Thank you for the work you do.

Postscript: Fios and kCura made a joint announcement today (***click here***) in conjunction with their participation at LegalTech NY.   Fios will be offering demonstrations of the new solution at Fios' booth at LegalTech (Booth #310). If you would like to see a demo or speak with one of of the Fios representatives contact Debbie Caldwell at ***dcaldwell@fiosinc.com***

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).