Giving Electronic Discovery a Chance to Grow Up

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"I see no hope for the future of our people if they are dependent on the frivolous youth of today, for certainly all youth are reckless beyond words. When I was a boy, we were taught to be discreet and respectful of elders, but the present youth are exceedingly wise and impatient of restraint." Hesiod, 8 B.C.

Discovery, like teenagers, is an easy and timeless target about which to complain. Dissatisfaction with the way discovery works is not quite as old as dissatisfaction with the younger generation, but recently it has been as direly worded. Electronic discovery, that frivolous, ne'er-do-well teenager of our justice system, is a ripe target for attorneys whose attitudes mirror that of the Greek poet. E-discovery is often referred to in vaguely threatening terms: "blackmail," a "storm" or combat on the "front lines." See M.H. Gruenglas, Robert A. Fumerton and Patrick G. Rideout, "A Proposal to Prevent Blackmail at the Pleading Stage," N.Y.L.J., Oct. 5, 2009, at S8; Canaan E. Himmelbaum and Leyda F. Mata, "Surviving the Perfect E-Discovery Storm," 28 No. 5 Legal Mgmt. 26 (2009); "Electronic Discovery: A View From the Front Lines," Inst. Advancement Am. Legal Sys., 5 (2008).

In March, through the collaboration of seasoned attorneys (with an average of 38 years of experience), the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System went so far as to release a report recommending radical changes to the Federal Rules of Civil Procedure, including eliminating depositions of experts when their testimony is limited to their report, cost-shifting and submission of a discovery budget for court and client approval. See Final Report on the Joint Project of the American College of Trial Lawyers' Task Force on Discovery and Institute for the Advancement of American Legal System.

However, if given the time to go to college, intern and mature on its own terms, perhaps electronic discovery — which Judge Shira Scheindlin describes as the only kind of discovery there is now — can become an upstanding citizen of which the protodigital attorneys can be proud, or at least be cut some slack. See "Electronic Discovery and Law School Curriculums."

What is a "protodigital attorney"? Kenneth J. Withers coined the phrase at Georgetown's Fifth Advanced Electronic Discovery Institute: "[T]here is a protodigital generation of litigators that is fully cognizant that we live in a digital world....But they are still thinking of the digital information system as a set of tools for producing information (the document, the email communication, the legal opinion or spreadsheet) that they will manage as though that information were paper-based....The massive mismanagement of e-discovery in the past few years by the protodigital generation has been grudgingly underwritten, to a large extent, by clients who had the resources to pay the bills and were never presented with alternatives." Kenneth J. Withers, "E-Discovery in the Next Decade: Finding a Way out of Purgatory," Keynote Address at Fifth Annual Advanced E-Discovery Institute (Nov. 20, 2009).

Mismanagement can extend beyond failing to put a litigation hold in place and getting sanctioned. It also includes spending $1 million of a clients' money when the same task could have been performed for $250,000. Many protodigital attorneys, managing discovery as if it still consisted of boxes and warehouses (just electronically housed), ignore available electronic discovery tools. Instead, they blame the Federal Rules of Civil Procedure for their own mismanagement and they advocate — just a scant three years later — for more rules changes.

Perhaps there is wisdom to be had in the old Sufi adage, "Blame the archer, not the arrows." Particularly in light of the educational curveball with which most attorneys have been hit when facing data maps, DDS4 backup tapes and hash values, perhaps the archers should be given more time to learn how to use the arrows.

There is a case to be made for letting more time elapse before making widespread and drastic changes to the Federal Rules of Civil Procedure. Such proposed changes often call for rigid boundaries to solve today's specific problems, but these boundaries would eschew the flexibility necessitated by technology. See Advisory Committee Notes to Rule 34(a), 2006 Amendments ("The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of ESI" (electronically stored information)).

SOME INTERIM STEPS

Surely, the present insistence on linear reviews and the refusal to implement widespread records management will at some point be looked upon as quaintly as we do the past controversy over the cost of paper title searches in the 1970s, now all but obsolete. Eventually, attorneys will think about data differently than do those attorneys who earned their litigation stripes armed with highlighters, bankers' boxes and Redwelds. Until the days of post-protodigital practice are upon us and electronic discovery has become an adult, perhaps interim steps such as those below — which do not require rule changes — could be practiced. Then, once we are past the ESI growing pains, Fed. R. Civ. P. changes can be more evenly evaluated and promulgated.

• Use technology to review technology. It is true that a terabyte of data can equal roughly 50,000 trees of paper. A protodigital attorney who believes that attorney eyes must linearly review each "page" of this data marshals an army of attorneys and charges the client to review each page. And in fact, each page is often actually reviewed multiple times in a linear review: for responsiveness and for privilege, followed by a partner review of the "hot set" created by the reviewers. However, the existence of "more" data isn't necessarily bad if there are "more" tools to efficiently extract, process and review that data. De-duplication, near de-duplication, linguistic analytics, data mapping, use of experts to determine collection protocol to avoid overcollection and sampling are all tools that counsel should use to winnow the amount of data to be reviewed.

For those advocating Fed. R. Civ. P. changes in response to the purported tsunami of data we now face, history shows that the estimation of volume is relative. In the Standard Oil Co. v. U.S. case of 1910, how quaint the justices seem when they remark that "[t]he record is inordinately voluminous, consisting of twenty-three volumes...aggregating about twelve thousand pages." Costs are similarly viewed through the prism of time: Eight years ago, vendors charged around $2,000 for one gigabyte of data to be processed, searched and exported to a tool for review; now this can be done for less than $400 per gigabyte. As tools and the market catch up, today's overwhelming volume and costs are likely tomorrow's piece of cake. Changes to the federal rules should reflect this reality. Patience, Hesiod.

• If your case were about e-discovery, you would learn it. A good antitrust lawyer with a case about polyester learns the economics of the textile industry, perhaps even hiring an industry expert. The same should be so for electronic discovery. Not every attorney on a case team needs to be conversant, but at least one does. And that attorney alone should, despite rank or prestige, be the advocate that speaks on behalf of the client on these matters. Only an attorney who understands what preserving "all metadata" means should be in the position to agree to it on behalf of a client. Only an attorney who knows what the current state of ESI common law decisions is should decide which motions should be filed (not every fight should be fought).

The protodigital attorney, however, thinks that a good attorney can convict a ham sandwich and can therefore handle any negotiation despite lacking any expertise in the area. How effective would Markman hearings be if clients used entertainment lawyers who boned up on patent law just for the hearing? Clients and the courts should be able to depend on trained advocates to smartly and efficiently guide the case through electronic discovery and not fight paper discovery battles of times gone by. If you cannot do this ably, Hesiod, please make room at the table for the attorney who can.

• Just the contested facts, ma'am. Protodigital attorneys who insist on preserving the chicken-and-egg nature of discovery should be prepared to pay for that choice. Both protodigital plaintiffs' broad-net approach ("You give me what you have first, then I'll tell you what I want") and protodigital defendants' "hide the ball" approach ("Just propound your discovery requests first, then I'll tell you what exists") can be counterproductive and lead to overcollection and overreview by both sides.

The Sedona Conference's Cooperation Proclamation encourages "a national drive to promote open and forthright information sharing, dialogue (internal and external), training and the development of practical tools to facilitate cooperative, collaborative, transparent discovery." The Sedona Conference, "The Sedona Conference Cooperation Proclamation," 10 Sedona Conf. J. 331 (2009 Supp.). If parties agree about what the relevant facts are, plaintiffs don't ask for irrelevant data and defendants don't have to preserve, collect or review it. If defendants make clear that relevant data are not on backup tapes, plaintiffs will agree that they do not need to be preserved. If plaintiffs understand the size of defendants' ESI architecture, they will have a hard time justifying a document request for "any and all documents" regarding a subject. Cooperate, Hesiod.

The debate surrounding electronic discovery is not new. In his 1906 speech to the American Bar Association, Roscoe Pound complained that "the sporting theory of justice...[was] so rooted in the profession in America that most of us take it for a fundamental legal tenet." Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 40 Am. L. Rev. 729 (1906), 35 F.R.D. 273. Thirty years ago, attorneys were grappling with the same thing: "The practice — in many areas of the law — has been to make discovery the 'sporting match' and an endurance contest. Is this a luxury which an overtaxed judicial system can afford?" See Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79, 107 (April 1976). Electronic discovery is just the latest of a series of battlegrounds. Before making Fed. R. Civ. P. changes again, perhaps we should let electronic discovery (and the attorneys who use it) mature first.

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