Ten Things that Trouble Judges about E-Discovery

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As counselor, consultant or court-appointed special master, my law practice revolves around electronically stored information (ESI) by seeking to salvage the wrecks others have made of e-discovery and helping parties to navigate unfamiliar shoals.

The goal is to resolve conflicts with judges incensed by parties' failure to fulfill e-discovery duties. Judges frequently doubt that electronic discovery is as difficult or expensive as the lawyers before them claim. For the most part, the judges are right. E-discovery isn't that hard and needn't be so costly.

That is, it's not that hard or expensive if counsel knows what she's is doing, and that's a big "if." Judges expect lawyers to know how to protect, marshal, search and produce the evidence in their cases or enlist co-counsel and experts with that know how. The judges are right about that, too.[1] Lawyers must master modern evidence in the same way that doctors must stay abreast of the latest developments in medicine.

The challenge to listing ten things that trouble judges about e-discovery is limiting it to *only ten* things. E-discovery exposes much that is not pretty about the state of the law practice, *e.g.,* wasteful, obsolete practices; poor management skills; conflicting interests between lawyers and clients; and unequal access to justice between the rich and the rest. E-discovery didn't create these problems, but like a hard rain on an old roof, it exposes failings too long ignored.

First and most intractable among these problems is:

1. **Lawyer incompetence**

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[1] Bar disciplinary committees concur. In 2015, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion Interim 11-0004 stating that "[a]ttorneys handling e-discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

- initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;
- analyze and understand a client's ESI systems and storage;
- identify custodians of relevant ESI;
- perform data searches;
- collect responsive ESI in a manner that preserves the integrity of that ESI;
- advise the client on available options for collection and preservation of ESI;
- engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
- produce responsive ESI in a recognized and appropriate manner." *[Footnotes omitted].*

The landscape of litigation has forever changed, and there is no going back to a paper-centric world. Too many lawyers are like farriers after the advent of the automobile, grossly--even stubbornly--unprepared to deal with electronic evidence.

As lawyers' duties to supervise and direct clients' preservation and collection of ESI have broadened, their grasp of information systems, forms of ESI and effective search hasn't kept pace. This knowledge gap troubles judges who rely upon lawyers to police the discovery process and stand behind the integrity of that process. Lawyers cannot defend what they don't understand.

No lawyer wants to be thought incompetent; yet the skills developed to collect, assess and produce paper records do not translate well to a world steeped in ESI. Digital is different, and neither clients nor the justice system can long afford the costly, cumbersome efforts lawyers employ to regress data to paper or images.

Other things that trouble judges about e-discovery are:

2. **Misstatements of fact coupled with a lack of reliable metrics**
   Perhaps because no lawyer wants to be thought incompetent, some resort to "winging it" when it comes to reporting the state of client ESI and status of discovery. The case law proves the folly of blind reliance on clients when gauging the true state of retention and collection. Lawyers must not parrot client claims without undertaking even minimal steps to establish their accuracy.[2]

   Often, the misstatements take the form of fanciful claims of burden or cost, advanced sans reliable metrics gained through measurement or testing. Judges expect more than histrionics and hand wringing. They demand competent, quantitative evidence of burden and cost supported by the testimony of knowledgeable people who've done their homework. It troubles judges to be asked to decide important issues on much less.

3. **Cost and waste**
   Judges are of one troubled mind about litigation today. They all feel it costs too much and worry that spiraling costs may crowd out legitimate cases or compel unjustified settlements. A distinguished panel of e-discovery experts surprised this writer by agreeing that about 70% of the money spent on e-discovery is wasted through poor planning and decision-making. Worse, they attributed about 70% of that waste to lawyer incompetence. If true, that suggests that about *half of every*

[2] See, *e.g.*, *Qualcomm, Inc. v. Broadcom Corp.,* No. 05CV1958-B, 2008 WL 66932 (S.D. Cal. 2008).

dollar spent on e-discovery is wasted because lawyers don't know what they're doing. *Half!*

4. **Delay in addressing ESI Issues**

   Over time, data tends to morph, migrate and disappear. Employees join and leave, and machines are re-tasked or retired. Memories fade. Active data migrates to tape. Tape moves to warehouses. Old media give way to newer formats, and old systems are discarded. With these changes, discoverable information grows more difficult and costly to access over time. It troubles judges when parties ignore ESI issues until little problems grow into big ones.

   Judges expect parties and counsel to think and act in timely ways, identifying and preserving potentially responsive evidence when they *anticipate* a claim or lawsuit instead of waiting until a preservation demand surfaces or a lawsuit is filed.

   Judges are also troubled when parties or counsel delay getting needed help from experts and vendors. When a lawyer waits until discovery is overdue to begin seeking such help, it's hard for a judge to impute good faith.

5. **Lack of communication and cooperation**

   One reason judges don't like discovery disputes is that they're often so unnecessary; that is, they concern issues the parties could have resolved if they'd simply listened and cooperated. It greatly troubles judges when parties and counsel exert little effort to resolve e-discovery disputes before filing motions and demanding hearings. It further troubles judges when lawyers mistakenly equate candor and cooperation with weakness, seeking to profit from pointless disputes and motion practice.

   Judges don't abide trial by ambush or gamesmanship in e-discovery. The bench expects parties to be forthcoming about the volume and nature of discoverable ESI and to be reasonably transparent in, e.g., detailing preservation efforts or disclosing automated search methods. Because judges never forget that all lawyers owe duties to uphold the integrity of the justice system they serve, judges are troubled when advocates let the desire to win eclipse those duties.

6. **Failing to get the geeks together**

   Communication presupposes comprehension, but judges daily confront how working through intermediaries clouds the court's understanding of technical issues. Like lawyers, information technologists employ a language all their own. They speak geek.

Because lawyers rarely know what IT personnel are talking about, lawyers are often fearful of allowing technical personnel from opposing sides to talk to each other. Instead, counsel for the requesting party conveys questions from their technical expert to opposing counsel, who passes them on to in house counsel, who has the paralegal on the case talk to the IT person. The IT person responds to the paralegal who speaks to in house counsel who tells outside counsel who passes on his or her best understanding to opposing counsel or the court. No wonder so much gets misunderstood.

Judges expect clear, accurate communication about technical matters, and it troubles them when knowledgeable people aren't brought together to foster transparency and trust.

7. Failing to implement a prompt and effective legal hold

Preservation is a backstop against error. Slipshod preservation pervades and poisons much of what follows, and the cost to resolve inadequate preservation is breathtakingly more than the cost of a reasonable and timely legal hold effort.

One need only peruse the opus opinions in *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.,*[3] or *Rimkus v. Cammarata*[4] to appreciate the signal importance judges place on a prompt and effective legal hold of potentially relevant ESI and documents. Lawyers appear to have only two settings when it comes to implementing legal holds: "off" and "insane." Either they ignore the need for a hold until challenged about missing data, or they issue so vague, paralyzing and impractical a retention directive, that responses run the gamut from doing nothing to pulling the plug and sitting in the dark.

It troubles judges when lawyers and clients fail to preserve information that bears on the issues. Judges rightly expect lawyers to promptly hone in on potentially responsive information when a claim or suit looms. Judges expect lawyers to identify fragile forms of information and take reasonable steps to protect the evidence against loss or corruption due to negligence or guile.

8. Overbroad requests and boilerplate objections

In the bygone era of paper discovery, asking for "any and all documents touching or concerning" a topic was accepted. Information was generally stored on paper,

[3] 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)
[4] 07-cv-00405 (S.D. Tex. Feb. 19, 2010)

paper was predictably managed and a company's documents were typically organized topically in a few easily-ascertainable locations.

But when information exploded into countless shards of messages and attachments strewn across a sea of accounts, servers, machines, media and devices, "any and all" became too many.

It deeply troubles--even antagonizes--judges when requests for information are unfocused and over-inclusive and when reasonable requests are met with a litany of boilerplate objections Both demonstrate a lack of care and judgment.

Judges want to see evidence that the discovery sought is proportional to the matters at issue. They expect objections to be asserted in good faith and narrowly drawn. Some judges are even exploring sanctions under Fed. R. Civ. P. 26(g) to address fishing expeditions and boilerplate objections. See*, e.g., Mancia v. Mayflower Textile Servs. Co*.[5]

9. Mishandling claims of privilege

Ask a judge what percentage of documents claimed “privileged” actually prove to be privileged when reviewed *in camera*, and you'll probably hear, "hardly any!" Yet, finding, fighting about and redacting privileged documents accounts for a sizeable share of the money spent on e-discovery. Litigants spend far too much money and time ginning the seeds of privilege from electronic evidence, even while overlooking privileged content through a paucity of quality assurance and control. *See, e.g., Mt. Hawley Ins. Co. v. Felman Prod., Inc.*[6] and *Victor Stanley, Inc. v. Creative Pipe, Inc.*[7]

Lawyers gravitate to error-prone tools, like seat-of-the-pants keyword search, to cull potentially privileged content, mischaracterizing much that's not privileged and much that is. Further, many lawyers forget or ignore their client's duty to generate a proper privilege log when material withheld as privileged happens to be ESI.

Finally, lawyers inexplicably fail to avail themselves of Fed. R. Evid. 502, which provides significant protections against waiver of privilege, including the near-impregnable shield of a R. 502(d) court order.

[5] 253 F.R.D. 354 (D. Md. 2008)
[6] 2010 WL 1990555 (S.D. W. Va. May 18, 2010)
[7] 250 F.R.D. 251 (D. Md. 2008)

Last, but not least, any list of things that trouble judges about e-discovery is sure to include:

10. Failing to follow the Rules

Judges value the rules of procedure, and they expect those who come to their courts to do so. So it troubles judges when the rules set forth a clear requirement that's ignored, especially when the failure to follow a rule triggers a superfluous motion and hearing.

A telling example is the Federal Rule of Civil Procedure requiring a producing party to object to a requested form of production and specify the form to be produced.[8] It's a rule observed more in the breach than in compliance; yet adherence to the rule would make many costly battles demanding alternate forms of production unnecessary. The rule sets out what to do--with the goal that conflicts be resolved *before* production in objectionable forms--but litigants just don't do it.

Heads in the Sand

Ironically, what most troubles judges about e-discovery also makes their lives easier: judges are astounded they don't see *more* e-discovery. The bench well understands that the dearth of e-discovery is indicia of incompetence. Though virtually all evidence today is digital, many lawyers still pretend otherwise and look where they've always looked for evidence. Increasingly, judges know this shouldn't be the case and that it can't last. They enjoy the calm, but are troubled that so few lawyers are prepared for the gathering storm.

[8] Fed. R. Civ. P. Rule 34(b)(2)(D): **Responding to a Request for Production of Electronically Stored Information**. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.