

Craig Ball



**What Every Lawyer
Should Know
About E-Discovery**

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***Progress is impossible without change,
and those who cannot change their minds
cannot change anything. --George Bernard Shaw***

We have entered a golden age of evidence, ushered in by the monumental growth of data. All who access electronically stored information (ESI) and use digital devices generate and acquire vast volumes of digital evidence. Never in the course of human history have we had so much probative evidence, and never has that evidence been so objective and precise. Yet, lawyers are like farmers complaining of oil on their property; they bemoan electronic evidence because they haven't awoken to its value.

That's not surprising. What lawyer in practice received practical instruction in electronic evidence? Few law schools offer courses in e-discovery, and fewer teach the essential "e" that sets e-discovery apart. Continuing legal education courses shy away from the nuts and bolts of information technology needed to competently manage and marshal digital evidence. Law graduates are expected to acquire trade skills by apprenticeship; yet, experienced counsel have no e-discovery expertise to pass on. Competence in e-discovery is exceptionally rare, and there is little afoot to change that save the vain expectation that lawyers will miraculously gain competence without education or effort.

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As sources of digital evidence proliferate in the cloud, on mobile devices and tablets and within the burgeoning Internet of Things, the gap between competent and incompetent counsel grows. We suffer most when standard setters decline to define competence in ways that might exclude them. Vague pronouncements of a duty to stay abreast of "relevant technology" are noble, but do not help lawyers know what they must know.¹

So, it is heartening when the state with the second largest number of practicing lawyers in America takes a strong, clear stand on what lawyers must know about e-discovery. In 2015, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued an advisory opinion in which the Committee sets out the level of skill and familiarity required when, acting alone or with assistance, counsel undertakes to represent a client in a matter implicating electronic discovery.²

¹ Rule 1.1 of the American Bar Association Model Rules of Professional Conduct provides that, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment 8 to Rule 1.1 adds, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology...*" Emphasis added.

² The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2015-193 (June 2015).

The Committee wrote:

If e-discovery will probably be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation. If an attorney lacks such skills and/or resources, the attorney must try to acquire sufficient learning and skill, or associate or consult with someone with expertise to assist. ... Attorneys 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.
- Advise the client on available options for collection and preservation of ESI.
- Identify custodians of potentially relevant ESI.
- Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan.
- Perform data searches.
- Collect responsive ESI in a manner that preserves the integrity of that ESI.
- Produce responsive non-privileged ESI in a recognized and appropriate manner.³

Thus, California lawyers face a simple mandate when it comes to e-discovery, and one that should take hold everywhere: *Learn it, get help or get out*. Declining the representation may be the only ethical response when the lawyer won't have sufficient time to acquire the requisite skills and the case can't sustain the cost of associating competent co-counsel or expert consultants. Most cases aren't big enough to bear the cost of two when only one is competent.

Each of the nine tasks implicate a broad range of technical and tactical skills. The interplay between technical and tactical suggests that just "asking the IT guy" some questions won't suffice. Both efficiency and effectiveness demand that, if the lawyer is to serve as decision maker and advocate, the *lawyer* needs to do more than parrot a few phrases. The lawyer needs to *understand* what the technologists are talking about.

To assess e-discovery needs and issues, a lawyer must be capable of recognizing the needs and issues that arise. This requires experience and a working knowledge of the case law and professional literature. A lawyer's first step toward competence begins with reading the leading cases and digging into the argot of information technology. When you come across an unfamiliar technical term in an opinion or article, don't elide over it. *Look it up*. Google and Wikipedia are your friends!

³ *Id.*

Implementing appropriate ESI preservation procedures means knowing how to scope, communicate and implement a defensible legal hold. You can't be competent to scope a hold without understanding the tools and software your client uses. You can't help your client avoid data loss and spoliation if you have no idea what data is robust and tenacious and what is fragile and transitory. How do you preserve relevant data and metadata without some notion of what data and metadata exist and where it resides?

Some ESI can be preserved in place with little cost and burden and may even be safely and reliably searched in place to save money. Other ESI requires data be collected and processed to be amenable to search. Understanding which is which is crucial to being competent to advise clients about available options.

At first blush, identifying custodians of relevant ESI seems to require no special skills; but behind the scenes, a cadre of custodians administer and maintain the complex and dynamic server and database environments businesses use. You can't expect custodians no more steeped in information technology than you to preserve backup media or suspend programs purging data your client must preserve. These are tasks for IT. Competence includes the ability to pose the right questions to the right people.

Performing data searches entails more than just guessing what search terms seem sensible. *Search is a science.* Search tools vary widely, and counsel must understand what these tools can and cannot do. Queries should be tested to assess precision and recall. Small oversights in search prompt big downstream costs, and small tweaks prompt big savings. How do you negotiate culling and filtering criteria if you don't understand the ways ESI can be culled and filtered?

Lawyers lacking e-discovery skills can mount a successful meet and confer on ESI issues by getting technically-astute personnel together to 'dance geek-to-geek.' But, that's can be expensive, and cautious, competent counsel will want to *understand* the risks and costs, not just trust the technologists to know what's relevant and how and when to protect privileged and sensitive data.

Competent counsel understand that there is no one form suited to production of every item of ESI and know the costs and burdens associated with alternate forms of production. Competent counsel know that converting native electronic formats to TIFF images increases the size of the files many time and thus needlessly inflates the cost of ingestion and hosting by vendors. Competent counsel know when it's essential to demand native forms of production to guard against data loss and preserve utility. Conversely, competent counsel know how to make the case for TIFF production to handicap an opponent or when needed for redaction.

Clearly, there's a lot more to e-discovery than many imagine, and much of it must fall within counsel's ken. Virtually all evidence today is born digitally. It's data, and only a fraction takes forms we've traditionally called documents. Lawyers ignored ESI for decades while information technologies changed the world. Is it any wonder that lawyers have a lot of catching up to do? Few excel at all of the skills that trial work requires; but, every trial lawyer must be minimally competent in them all. Today, the most demanding of these skills is e-discovery.

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Is it fair to deem lawyers incompetent, even unethical, because they don't possess skills they weren't taught in law school? It may not feel fair to lawyers trained for a vanished world of paper documents; but to the courts and clients ill-served by those old ways, it's more than just fair—it's right.

About the Author

Craig Ball of Austin is a trial lawyer, computer forensic examiner, law professor and noted authority on electronic evidence. He limits his practice to serving as a court-appointed special master and consultant in computer forensics and electronic discovery and has served as the Special Master or testifying expert in computer forensics and electronic discovery in some of the most challenging and celebrated cases in the U.S. A founder of the Georgetown University Law Center E-Discovery Training Academy, Craig serves on the Academy's faculty and teaches Electronic Discovery and Digital Evidence at the University of Texas School of Law. For nine years, Craig penned the award-winning Ball in Your Court column on electronic discovery for American Lawyer Media and now writes for several national news outlets. For his articles on electronic discovery and computer forensics, please visit www.craigball.com or his blog, www.ballinyourcourt.com.
