# MORNING KEYNOTE: E-DISCOVERY IN COMMERCIAL LITIGATION: FINDING A WAY OUT OF PURGATORY

*Remarks by Kenneth J. Withers, Esq.*

MS. GROSSMAN: Good morning. My name is Maura Grossman. I'm counsel at Wachtell, Lipton, Rosen & Katz where I'm a litigator and full-time e-discovery lawyer. I'll be moderating this morning's panel on electronic discovery.

It's my great pleasure to introduce our first keynote speaker, Ken Withers. I like to think of Ken as the father of e-discovery since he's been thinking, speaking and writing on this subject since 1989. Ken is currently Director of Judicial Education and Content for the Sedona Conference, an Arizona-based, nonprofit law and policy think-tank at the forefront of issues involving technology, civil justice, intellectual property and antitrust law. From 1999 to 2005, Ken was Senior Education Attorney at the Federal Judicial Center in Washington D.C., where he developed Internet-based learning programs for the Federal Judiciary, concentrating on issues of technology and the administration of justice. Ken has contributed to many well known FJC publications including THE MANUAL FOR COMPLEX LITIGATION, Fourth Edition (2004); EFFECTIVE USE OF COURTROOM TECHNOLOGY (2001), and the CIVIL LITIGATION MANAGEMENT MANUAL (2001).

If I were to list Ken's many, many publications and speeches on electronic discovery and electronic records management, we'd still be sitting here after lunch, so instead I am going to refer you to his bio in your materials, and you'll have

to take my word for it that Ken is an extremely knowledgeable and prolific author and speaker on this subject. Ken is a graduate of Northwestern University School of Law and also holds a Masters of Library Sciences from the Graduate School of Library and Information Science of Simmons College, where he graduated with a GPA of 4.0.

So, without further ado, Ken Withers, who will be speaking to you on "E-Discovery and Commercial Litigation, Finding a Way Out of Purgatory.

MR. WITHERS: Thank you. It's a distinct honor to be sharing the podium this morning with Chief Judge Kaye, whose leadership is well-known to us even in the deserts of the far west. But our topic today is commercial litigation and the issue that I'm going to be focusing on this morning is electronic discovery. I hope that my address acts as a bridge to this afternoon's topic, which is ADR because it's my belief that the problems we perceive are associated with electronic discovery can only be solved by replacing the costly and unproductive adversarial discovery process with a process that emphasizes proportionality and cooperation in discovery and mediation of discovery disputes. *Lawyers USA* caught me off-guard a couple weeks ago and quoted me this week in their publication as telling lawyers to cooperate or die, which sounds a little extreme. So let me step back.

Last June, National Public Radio's *Morning Edition* featured a special series of reports on the social burdens of e-mail. And Ari Shapiro, who's NPR's Washington correspondent, called me up to ask about the impact of e-mail on the law. I didn't mention any particularly embarrassing e-mail messages from any Wall Street executives submitted to the Supreme Court or anything like that. My concern is more global. It's the vast resources that must be spent to locate, preserve and review e-mail for production. Because, as NPR reports, daily e-mail volume is now at 210 billion a day worldwide and increasing.[1]

The central problem with e-mail is not the occasional smoking gun. It's the constant smoke. I told the NPR listeners

1. Ari Shapiro, *E-Mail, the Workplace and the Electronic Paper Trail*, National Public Radio Morning Edition, June 18, 2008, *available at* http://www.npr.org/templates/story/story.php?storyId=91363363.

that, "Today a young person graduating from law school and joining a large firm in one of our major cities can look forward to perhaps three or four years of doing nothing but sitting in front of a computer screen reviewing e-mail and other electronic documents for litigation."[2] Now, this vision of purgatory created something of a stir, including an e-mail, from a law firm recruiter here in New York City, who blamed me, tongue in cheek I hope, for the complete demoralization of her summer law clerks. I'm not the first person to note the ascendancy of e-discovery coincides with reports in a decline in civility and self-esteem in the legal profession. Just as the Industrial Revolution of the 19th century brought about the proletarianization of manufacturing workers, the information revolution is proletarianizing information workers, legal professionals chief among them.

The adoption of the Federal Rules of Civil Procedure in 1938 was intended to replace trial by ambush with a new system that depended on lawyers engaging cooperatively in depositions, interrogatory exchanges and document productions. This new system of discovery generated the requisite low-level grumbling about cost and delay by all parties right up through the late 1970's and 1980's, when the full impact of a minor revolution in the management of information was finally felt in the courtroom. And that was the invention of cheap high-speed, high-volume photocopying. Suddenly the case that involved a box of documents and maybe five depositions now involved a hundred thousand documents and 20 or 30 depositions of everybody in the business bureaucracy who received copies of the memos and business reports and meeting minutes. But while the volumes increased, they didn't increase so much that lawyers questioned the old ways in doing things, laboriously reading every document and taking good notes to prepare for those depositions or settlement conference or trial.

As these volumes increased, it became apparent to good lawyers that the percentage of documents that had any significant bearing on the case decreased significantly. But they still had to look at all the documents. And sometimes these docu-

2. *Id.*

ments did add color to the facts, not rising to the level of admissibility, but making for some very interesting depositions.

Now, back in 1983 and again in 1993, the Federal Rules of Civil Procedure were amended to acknowledge that discovery, and in particular document discovery, had grown tremendously, increasing the cost and often contentiousness of discovery overall. At the same time and for a number of reasons the number of cases that actually went to trial was decreasing. It's now less than three-percent of all cases filed, such that discovery went from being a means to an end to being an end in itself. The stakes were raised.

During the 1980's and into the 1990's, a second and much more consequential revolution occurred in the business world. As usual, it took about ten years for the impact to be felt on litigation. That revolution was distributed network computing and the desktop PC. So long as computers were great big machines in the basement protected by a priestly class answerable only to the accounting department gods, computer output could safely be thought of as just an extension of the paper business process. Even in the 1980's when computers were used for numbers crunching and word processing, there were little more than extensions of calculators and typewriters. But when people got the power to develop and manage their own business applications at their desktop, share them with co-workers and communicate through computer networks, the whole world changed. Digital business processes replaced business ones. Organizations flattened as secretaries, bookkeepers and file clerks disappeared. The new information worker supported by the new IT infrastructure became incredibly productive. Profits soared, but few people noticed that the floodwaters of digital information were rising. As long as you didn't print the stuff out and digital memory kept getting cheaper every year, no one cared.

We now live in a digital information world that is markedly different from the old paper information world. The differences are many, but they are all corollaries of two central principles about digital information systems that set them apart from paper-based information systems and make them impossible to manage using the techniques that were developed for a

paper-based world. These two characteristics are volume and complexity. Let's first look at volume.

Jason Baron and George Paul in their article for the RICHMOND JOURNAL OF LAW AND TECHNOLOGY paint a vivid picture of what this information explosion means in the context of litigation.[3] "Probably close to 100 billion e-mails are sent daily with approximately 30 billion e-mails created or received by federal government agencies each year."[4] Their estimate is a little lower than NPR's. They provide us with a concrete illustration.

"Litigation, in which the universe subject to search stands at one billion e-mail records, at least 25 percent of which have one or more attachments of one to three hundred pages."[5] Generously assume further that a model reviewer, junior lawyer, legal assistant or contract professional is able to review an average of 50 e-mails including attachments per hour without employing any automated computer process to generate potentially responsive documents, the review effort for this litigation would take 100 people working ten hours a day, seven days a week, 52 weeks a year over 52 years to complete. The average cost of such a review, at an assumed billing of $100 per hour, — remember they are writing for an academic audience in Virginia — would be $2 billion. Even if, however, present-day search methods are used to initially reduce the e-mail universe to one percent of its size, that's ten million documents out of one billion, the case would still cost $20 million for first-pass review conducted by 100 people over 28 weeks without accounting for any additional privilege review.

While simply doing the math as Baron and Paul did in their initial scenario sounds absurd to us, recent reported cases bear out their numbers. For example, all parties in the ongoing Intel microprocessor antitrust litigation agreed it may be "the largest electronic production in history," with Intel's production of "somewhere in the neighborhood of a pile 137 miles high." That's the volume problem.

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3. Jason R. Baron & George L. Paul, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10 (2007).

4. *Id*. at 12.

5. *Id.* at 20.

The complexity of digital information systems means it's virtually impossible for any one individual, or even a well-managed group of individuals, to fully understand where all the potentially relevant digital information may be located, how it can be preserved and retrieved and what its interrelationships are and how it can be presented.

Complexity itself is complex because digital information systems present us with various levels of complexity. Dispersion complexity refers to the fact that potentially responsive digital information is distributed far and wide, from obvious sources such as desktop PC's and network servers to storage media like backup tapes and thumb drives to non-obvious sources like printers and Ipods.

Operating system complexity refers to the fact that all digital information is created and maintained in an environment of operating systems and other software required to access, view and manipulate the information.

Administrative complexity refers to the human side of the operating system, the rules, the processes, the procedures that are in place, to run an information system from access protocols to directory structures and file-naming conventions to backup routines and deletion schedules.

Application complexity refers to the myriad applications in which data can be created and used, from the off-the-shelf word processing and e-mail that comes bundled with the computer that you might be buying next month at Walmart for Christmas to the hundreds of specialized or custom-generated applications that any major corporation is going to be running.

There's even complexity at the individual file level, as behind what you see on the screen or what gets printed out on paper could be embedded edits left by previous authors, comments by reviewers, nonvisible formatting and calculation codes and metadata information about the file created by the system so that the computer system can handle the file properly.

But perhaps the most complex complexity is the essentially ephemeral nature of digital information. This is its value to the business world and the root of so many of its problems in the legal world.

The glory of paper-based information systems is their relative persistence and immutability. The medium was the message. The physical artifact was the information. Information written on paper was inseparable. As long as the integrity of the physical artifact could be ascertained and protected, the information stayed the same.

On the other hand, the glory of digital information systems is that the information is ephemeral and mutable. That very characteristic of digital information that makes lawyers, and I have to confess, law librarians like myself, cringe, is what makes digital information so valuable to businesses, to government and in our personal lives.

Volume and complexity are the two characteristics of digital information that make it qualitatively different from the paper information world. The legal profession is ill-equipped to handle this information explosion. Traditional concepts of discovery, document preservation requests, review, production and presentation completely break down under the weight of the volume and the pressures of deadline and budgets. But the consequences go far beyond missed deadlines and budget overruns, as bad as those may be.

The information explosion threatens the legal profession and the administration of justice itself. The problems occur and recur in case after case, big and small, state and federal.

First is the problem of preserving this ephemeral information. As I've indicated before, all digital information is ephemeral to one degree or another.

The second, but bound up in the first problem, is the scope of information requests. Where do you draw the lines of relevance when all the information is interrelated and it's difficult to cordon it off into discreet things called documents.

Then you have the problem of accessing information from sources that may not be readily accessible, which is, by definition, a question of proportionality. Once you've identified the potentially relevant and reasonably accessible electronically stored information, you face the problem of accurately and cost-effectively reviewing the information for actual relevance or for privilege and the consequences, if privileged or confidential information is accidentally disclosed.

Document review is the single most costly phase of discovery. Once you've decided what is to be produced to the requesting party, questions arise as to what form or forms the information should be produced in. Now, in real life, this question should have been considered as part of the preservation and review decision-making process. And in the worst cases, we may end up with the problem of determining appropriate discovery sanctions—the degree to which lawyers should be held responsible for the decisions they make and the actions that they take in this complex and voluminous information environment. Those are a lot of predictable and recurring problems and they contribute to a perception, particularly in the legal and business press, that e-discovery is always bad news.

The media blitz at the end of the summer began with an article in *The Economist* dated August 28th entitled, "The Big Data Dump," in which the reporter posited that with the advent of e-discovery, the civil justice system as a whole threatens to get bogged down. The article quotes Supreme Court Justice Stephen Breyer expressing concern that with ordinary cases costing millions just in e-discovery work, "you're going to drive out of the litigation system a lot of people who ought to be so that justice is determined by wealth, not by the merits of the case."

The *Wall Street Journal* chimed in a few days later with an article dated September 6th entitled, "Digital Data Drives Up the Discovery Costs." The story began, "Lawyers who work on complicated civil trials say the system is too expensive, especially the handling of electronic evidence such as e-mails, voice mail and text messages."

Two days later, the *Los Angeles Business Journal* ran a story with what I thought was a more appropriate title, "Old School Attorneys Face E-Discovery of New World." And this flurry of press coverage was precipitated by a report released by the American College of Trial Attorneys and the Institute for the Advancement of the American Legal System, based on the survey of more than 1400 members of the American College, 87 percent of whom believe that e-discovery costs were burdensome and that the new rules had added to the problem. Seventy-six percent believed that judges don't understand the costs

and burdens they associated with e-discovery. That's right, blame it on the judges.

Ralph Losey, in his always informative blog called E-Discovery Team, looked a little closer at the survey and reported that only 60 percent of the respondents had actual experience with e-discovery, meaning that 40 percent were more or less parroting the buzz among litigators these days. But another statistic that Ralph reported from the survey was much more revealing. The average number of years in practice of the respondents was 38.

Now, I have great respect for members of the American College of Trial Attorneys. They represent the best of their generation. One of my mentors when I was a newly minted attorney in Bingham, Dana & Gould 25 years ago was an active member of the American College who later served on the Civil Rules Advisory Committee. We have several members of the American College in our Sedona Conference working groups.

But as I read the survey, especially the free-text responses of the respondents, an image began to develop in my mind—Old man shakes fist at clouds. "Hey, you kids, get off of my litigation and take your Internets and Googles with you." I know these people. I'm from Phoenix.

So imagine that. Thirty-eight years in practice, longer than most of the associates in their firms are old, at least 60 percent of them are conducting e-discovery in civil litigation and for the most part they are not approaching it smartly. They are not using the tools of technology and the social skills that technology requires to solve the problems of technology. This senior generation of litigators, and I'm on the tail end of it myself, is fully cognizant that we do 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 e-mail communication, the court case) that they will manage as though it were paper. They think that it is somehow appropriate to manage digital information and discovery by analogy to the paper world.

I call this "protodigital" thinking, akin to thinking that the problem with automobiles is that they don't behave like horses, and the solution is to make them behave like horses. They are throwing bodies at e-discovery as if digital information systems

were warehouses of paper documents. This failure of many litigation decision-makers to think beyond the protodigital, is having catastrophic consequences for the ability of our civil justice system to deliver the just, speedy and inexpensive determination of any action.

I always have to point out to lawyers, who tend to think on the dark side, that e-discovery is not all doom and gloom. There are reasons why business, government, and individuals have wholeheartedly embraced the digital information and communications world. It isn't because digital information is costly and burdensome. No. Digital information is cheap and useful. The IT revolution is at the heart of a tremendous increase in productivity and prosperity that we have enjoyed in the past generation. Digital technologies make it possible to manage vast amounts of information, transport them instantly at no cost and create new information and new value.

Every other profession, to one degree or another, has embraced digital information technology for all of its volume and complexity. It is only the legal profession, and chiefly litigators, who sees the complexity of digital information as a costly and burdensome danger or alternatively as an opportunity for tactical gamesmanship.

The predictable recurring problems associated with electronic discovery can be avoided, and the benefits of digital technology can be realized in litigation, by treating e-discovery in the same way that successful business enterprises treat their digital information—by identifying goals and problems, bringing the appropriate resources to bear and cooperating to find a solution. But this businesslike view of discovery does not come naturally to our legal culture.

Several years ago when I was at the Federal Judicial Center, we were involved in a study of e-discovery disputes, and we were studying the strategies of the United States Magistrate Judges employed to resolve these disputes. One of the tips that came out of the study was that if you can get the IT people from both parties together in a room, they will often solve problems that the lawyers thought were insurmountable. It's a strategy that works.

But let's step back and look at this to see if there is anything we can generalize about this and apply to all cases, even

those that don't have IT people, and perhaps even apply to the lawyers themselves. What is it about these IT people that they can solve problems that great legal minds can't solve and perhaps even created?

First, these people are younger. Maybe not in years, but certainly in spirit. They are members of the Internet generation, even if they have been in practice in their professions for 38 years.

Second, they do not see complexity and volume as problems but as their element, even as assets. Volume and complexity are opportunities. They live in a digital information environment, and they are perfectly willing to apply technology's tools to solve technology's problems. In fact, it wouldn't even occur to them to do otherwise.

Third, they are team players. They cooperate to find a solution, knowing that each own pieces of both the question and the answer.

What lessons can we learn from this? There are three: Pay attention to young people; use technology's tools to solve what we perceive as technology's problems; and three, cooperate.

First, pay attention to young people. Don Tapscott in his book, GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD[6], reports on a 12-nation study of 8,000 people born between 1978 and 1994. That is, born after the average respondent to the American College survey made partner. Net-Geners. Here's what he concludes from his survey:

Net-Geners are smarter, quicker and more tolerant of diversity than their predecessors.

By the time they are 20, Net-Geners have spent 20,000 hours on the Internet. Members of their parent's generation, that's us boomers, had spent 20,000 hours watching TV before we were 20. Think about that. Net-Geners care about justice and ways to improve society. They value freedom and choice. They love to customize and personalize. They scrutinize everything and value integrity and openness, to a fault sometimes, when it comes to our generation's concept of personal privacy. Net-Geners love to collaborate. They expect constant innova-

6. DON TAPSCOTT, GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD (McGraw-Hill 2008).

tion. They expect to give and receive constant feedback. These are the students in our law schools today. Actually, we have been graduating them from our law schools for about five years now. But they are not being taught digital information management in law school. The skills they possess they have developed on their own or from other course work. And from what I can see, in spite of their extraordinary ability for innovation, collaboration and openness, these skills are being beaten out of them if they have the misfortune to be drafted into a document-review project.

Why do we do this to our young people and our law students? These young lawyers trained in digital information management will lead us out of purgatory, not the old men shaking their fists at the clouds.

Not only are these young people coming into the legal profession, they are also becoming the business litigants. They will be making those decisions in a litigation based on their Internet-derived information seeking and management skills. They will look at the business practices of law firms and litigators, scratch their heads and say this is crazy. We are not going to pay for that. Let's figure out a better and higher use of intellectual capital and automate these review processes. Let's digitize it, distribute it, collaborate on it and apply some innovation.

Now, no keynote address can be delivered before any audience these days without alluding to the international financial meltdown, so let me make the obligatory observation that the Net-Geners are going to be driving business decision-making for the next decade and will likely be doing so, at least for the next few years, in the context of significantly reduced financial resources. The massive mismanagement of e-discovery in the past few years by the litigation generation has been grudgingly underwritten, to a large extent, by clients who had the resources to pay the bills and were never presented with any alternatives. Those days are over, and the Net-Geners will soon be paying the tab, figuratively and literally, and calling the shots.

Young lawyers will use technology's tools to solve what we perceive as technology's problems and so will young business litigants.

Just as this new generation sees the value in collaboration, we are beginning to wake up to the value of cooperation in e-discovery. The Sedona Conference Cooperation Proclamation,[7] which I believe is included in your materials and no doubt will be discussed this morning, points out that discovery is not designed to be an adversarial process, but rather the cooperative phase of an overall adversarial system.

It is an information-seeking and information-management process. And unlike past generations, Net-Geners know from experience that, when you have volume and complexity, the only way to get the information you need is to cooperate in the process.

About six weeks ago, Chief Magistrate Judge Paul Grimm of the District of Maryland was faced with a very routine case, one that will probably sound very familiar to all of you, *Mancia versus Mayflower*, in which six employees of a hospital laundry service sued their employers for back pay and overtime.[8] Counsel on both sides were behaving typically, treating discovery as an adversarial game. Cutting through the stack of discovery cross-motions, he ordered the parties to meet and confer, but with very specific instructions on how they are to behave, what they are to accomplish and what the court expects. And this is what he said:

> A lawyer who seeks excessive discovery, given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is . . . hindering the adjudication process, and making the task of the "deciding tribunal not easier, but more difficult," and violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve. The rules of procedure, ethics and even statutes make clear that there are limits to how the adversary system may operate during discovery.[9]

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7. THE SEDONA CONFERENCE, COOPERATION PROCLAMATION (2008), http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf

8. Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D.Md. 2008).

9. *Id.* at 362, citing Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1162, 1216 (1958).*

After ordering the parties to meet and confer, and providing them with a detailed agenda to guide their discussion, Judge Grimm concluded the opinion by saying:

> It is apparent that the process outlined above requires that counsel cooperate and communicate, and I note that had these steps been taken by counsel at the start of discovery, most, if not all, of the disputes could have been resolved without involving the court. It also is apparent that there is nothing at all about the cooperation needed to evaluate the discovery outlined above that requires the parties to abandon meritorious arguments they may have, or even to commit to resolving all disagreements on their own. Further, it is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs, cooperation will almost certainly result in getting helpful information more quickly, and both Plaintiffs and Defendants are better off if they can avoid the costs associated with the voluminous filings submitted to the court in connection with this dispute. Finally, it is obvious that if undertaken in the spirit required by the discovery rules, particularly Rules 26(b) (2) (C) and 26(g), the adversary system will be fully engaged, as counsel will be able to advocate their clients' positions as relevant to the factors the rules establish, and if unable to reach a full agreement, will be able to bring their dispute back to the court for a prompt resolution. In fact, the cooperation that is necessary for this process to take place enhances the legitimate goals of adversary system, by facilitating discovery of the facts needed to support the claims and defenses that have been raised, at a lesser cost, and expediting the time when the case may be resolved on its merits or settled. This is clearly advantageous to both Plaintiffs and Defendants.[10]

Now, to the lawyers of the Litigation Generation, Judge Grimm may be naive and impractical. But to the new business people, the Internet Generation, who are going to be paying the bills, Judge Grimm is hitting the nail on the head.

It's time for me to surrender the podium to the panel. We are going to be spending the rest of this morning discussing e-discovery and the tools that you as judges use to facilitate the cooperation needed to lead us out of purgatory.

Thank you again for inviting me to address you, and I look forward to a stimulating and productive dialogue.

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10. *Id.* at 365.