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A Modest Proposal to Resolve the E-Discovery Crisis

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Lawyers live for that "Aha! moment," when they find the smoking gun. But, as we well know, in most cases there is no smoking gun.

The implicit notion of much e-discovery (beyond that of core, substantive documents) is that if we can examine enough e-mails, text messages, instant messages, tweets, Facebook pages, etc., we will find that elusive smoking gun. It is as if one long-forgotten electronic message, written years before, will reveal the hidden but unequivocal truth.

So now, the commercial litigator's[1] quest for the "Aha! moment," the discovery of undeniable truth, has been, in many cases, a whole different crusade: The "Aha! moment" comes when the adversary is bludgeoned into submission by the cost of e-discovery or has to admit that it cannot produce electronic materials that once existed.

Increasingly, cases become battles between computer consultants who strive to ask for something the other side cannot produce, or who can discover that a particular electronic document has not been properly preserved or has been altered. And the scope of e-discovery keeps expanding. It's not just the e-mails any more: There is the whole new, ever-expanding universe of social media, text messages, instant messages, tweets, voicemails, phone logs, VOIP phone conversations.

And, it should not go unnoticed that every day the amount of electronic information, and the places to find it, grow. Home computers, telephone systems, cell phones, smart phones, tape backups, flash drives, E-ZPass records, the cloud. And how about those ubiquitous video cameras that seem to record every street crime and auto accident? All of these here today; and you can be sure there will be more tomorrow.

The *Zubulake* pentalogy[2] is perhaps the Bible of e-discovery production obligations. And Judge Shira Scheindlin added to the gospel with the *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* decision,[3] a definitive ruling on the preservation obligations in e-discovery.

Other "prophets" of the e-discovery landscape have been equally profound, and prolific: Judge Ira B. Warshawsky of Supreme Court, Nassau County,[4] and Chief Magistrate Judge Paul W. Grimm of the U.S. District Court for the District of Maryland,[5] to name but two.

The direct cost of complying with e-discovery production requests can be staggering. But the costs of non-compliance can be even greater. The capabilities of electronic storage have furnished a fertile ground for discovery sanctions applications.

A simple WESTLAW search for the term "spoliation" in the GENFEDS database returns 493 cases for the decade from 1991 to 2000, and an astounding 2,623 cases for the following decade. Despite some predictions that the number of sanctions applications is decreasing,[6] since the beginning of 2010 there have been 639 cases, with 161 so far in 2011 alone.

A recent article in the Duke Law Journal contains a more detailed empirical analysis, noting that sanctions applications and awards have increased over the past five years.[7] And that's without considering the burgeoning preservation issues that cloud computing will present,[8] or "vanishing text messages."[9]

The short history of e-discovery sanctions demonstrates that e-discovery is a high-stakes game. Go to the website of virtually every large law firm, and search for "e-discovery and sanctions" and you are likely to find a host of client bulletins reporting on damage awards and preclusion orders in myriad cases.

This past year, three decisions stand out: Judge Scheinlin's *Pension Committee*;[10] Judge Lee H. Rosenthal's *Rimkus Consulting Group Inc. v. Cammarata*, 688 F. Supp.2d 598 (S.D. Texas, Houston Div. 2010); and Judge Grimm's *Victor Stanley*.[11] In *Victor Stanley*, Judge Grimm held the individual defendant (president of the corporate defendant) in civil contempt and ordered him imprisoned for two years unless he purged the contempt by paying plaintiff's attorney's fees and costs.[12] The opening lines of Judge Rosenthal's opinion in *Rimkus* are particularly apt:

Spoliation of evidence—particularly of electronically stored information—has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.

688 F. Supp.2d at 607.

With such high exposure, it is little wonder the direct costs of e-discovery have increased, and why e-discovery has become a tactical weapon in litigation.

And let's not forget the indirect cost. How much (unbillable) time is spent every week reading articles about the latest e-discovery developments and e-mails about the CLE programs, newsletters, webinars and books (they still publish books in hard copy, don't they)? How many Sedona conferences, bar association committees and task forces, judicial panels and committees have been convened, all intended to beat back the savage e-discovery beast?

The Answer Is Not Software

The solution is not software.

Along with all those e-mails for e-discovery CLE programs and newsletters are the solicitations from technology vendors promising to streamline the search for responsive e-discovery documents. They promise the Holy Grail: accurate identification and segregation of responsive electronic documents and screening of privileged communications. Surely, the operating premise is that technology must hold the answer to this morass.

Maybe it will some day, but no one can seriously argue that today's e-discovery technology can accurately identify all the responsive e-mails, tweets, posts, etc. and only the responsive ones.

Fans of TV's Jeopardy saw how far technology has come in correctly interpreting human language and finding the proper responses from among a vast trove of data. To be sure, Watson, IBM's super computer defeated two all-time Jeopardy champions, Ken Jennings and Brad Rutter; but at what cost?

Watson's hardware alone was estimated to cost $3 million; with the other costs incurred during the four years of development, the price tag rose to an estimated $100 million, according to several sources, including CNNMoney.com. And with all that, when asked to identify the U.S. city with its largest airport named for a World War II hero, and its second largest for a World War II battle, Watson answered, "Toronto." Hardly an "Aha! moment" for IBM.

The answer lies in simplifying the question: Instead of trying to build a better mouse trap, maybe the mice should be ignored all together.

Not that long ago, the old-fashioned conversation, in person or on the phone, was the default mode of communication. When there were important enough business implications or consequences, there was an initial or confirming letter. Surely much of today's electronic communication is more like conversation than correspondence; it should be treated as conversation for discovery purposes.

A recent experience illustrates the point. In a case involving an international shipment, thousands of e-mails were produced. Among them were exchanges between the manufacturer and the transport company during the month prior to shipment. The clear context of those e-mails demonstrates that the manufacturer's employee was asking the transporter to send "dummy" or "mock-ups" of the bill of lading that would be generated at the time of shipment.

As each new detail regarding the shipment became available, a new mock-up was generated by the transport company, forwarded to the manufacturer (and then presumably to the manufacturer's bank for review to assure the form would be compliant with letter of credit requirements).

Unfortunately, in one of those e-mails from the manufacturer to the transporter, the request for a mock-up (the term used on other occasions) was, "Can you send me a fake bill of lading…" It was the adversary's "Aha! moment," with the concomitant arguments of fraud being presented to the court.

Of course, had the two individuals involved been deposed about their communications during the

month prior to shipment, it is unlikely that the word "fake" would ever have been used in testimony, as the context clearly revealed that there was no intent to defraud, but merely a request for successive "drafts" of the bill of lading as more information that would be included became available. But lawyers' time, clients' money and judicial resources were all expended on the notion that discovery of the e-mail furthered the search for truth.

A Proposed Solution

And so, a modest proposal: Without a showing of extraordinary circumstances by the requesting party, treat electronic communications like conversation and eliminate production of electronic communications in either electronic or hard copy format.

If P and D had a conversation that was relevant and material to a case, both would testify (in deposition and at trial) as to their best recollections. If that "conversation" were by e-mail, things should be no different: Let P and D testify to their best recollections. If the other party has kept the e-mail, she can confront the witness with it if the latter testifies faultily or falsely.

If e-mail is used to transmit a letter or other document, treat that embedded or attached document the same way we treated paper documents before the proliferation of electronic communications: The producing party made a diligent search for responsive documents and produced what was in her "custody or control." In the absence of truly compelling circumstances, the requesting party was not allowed to hire a forensic expert to search the adversary's file cabinets to make sure each document and non-identical copy was produced.

Surely the discovery police were never dispatched to the homes of employees of the adverse party to see if they had copies of documents hidden under their mattresses; yet now, requests that cover employees' home computers and cells phone have become routine.

For decades, thousands of cases were litigated without entering the black hole of electronic communication, and we were essentially satisfied with our litigation system for finding the ultimate "truth." For sure there were cases where there was a suspicion, or more, that an adversary had withheld, altered or destroyed documents (just as there are often answers at deposition, "I don't recall," that are inaccurate).

We have trusted our adversary system, and prided ourselves in our skills as attorneys, in ferreting out the truth and exposing deceit. Except in a few discrete areas (e.g., taxes), there were no requirements that paper business records be maintained a particular amount of time, and surely there was no requirement that once a litigation appeared inevitable, each party was required to record and preserve each conversation arguably related to the dispute.

Not satisfied with parties' recollections and the good faith of their (hard copy) document retention and production efforts, we have placed increasing reliance on electronic documents. But, as too many court decisions indicate, neither do we trust electronic documents: Too often they, perhaps even more than their paper counterparts, are not retained, or are altered or destroyed.

The quantity of electronic communications is ever increasing, as is the capability and capacity for

storing it all. And in a technological environment of rapid change, there is an expanding toxic wasteland of electronic communication created on legacy systems and stored in outmoded media. Too often the search for truth has become the search for that "Aha! moment," a strategy to obtain advantage, or victory, without regard to the ultimate truth. We need to take a step back before commercial litigation is beyond the economic reach of all but the wealthiest litigants.

Some will no doubt argue that if we recover and discover every bit and byte of electronic information we will be able to arrive at a more perfect truth at trial. The bigger questions are whether the search for more perfect justice by unearthing every bit of electronic data is worth the cost, and whether it is effective.

How many valid claims (or defenses) have failed because parties could not afford the e-discovery required of them? Cases should be decided on the basis of what the trier of fact believes transpired, not on which side does the better job of retaining and producing electronic communications. Surely, the efforts of the various judicial and bar panels that have been addressing the e-discovery issues have been well intentioned, and of value. But it seems that just as soon as a new solution is offered, a new technology emerges that blunts the impact of that solution.

So in the tradition of Jonathan Swift, we need to take drastic action to tame this savage beast: Eliminate all discovery of electronic communications in the absence of a showing of extraordinary circumstances.

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Endnotes:

1. Already, new and omnipresent technology has had a great impact on criminal and tort litigation. How many reports of crimes or auto accidents that are televised on the evening news are not accompanied by videos of the perpetrator and/or the event in progress? This article speaks only to commercial cases.

2. 217 F.R.D. 309 (S.D.N.Y. 2003); 230 F.R.D. 290 (S.D.N.Y. 2003); 216 F.R.D. 280 (S.D.N.Y. 2003); 220 F.R.D. 212 (S.D.N.Y. 2003); 229 F.R.D. 422 (S.D.N.Y. 2004); 231 F.R.D. 159 (S.D.N.Y. 2005); 382 F. Supp.2d 536 (S.D.N.Y. 2005)

3. 685 F.Supp.2d 456 (S.D.N.Y. 2010).

4. See, e.g. *Delta Financial Corp. v. Morrison*, 13 Misc.3d 604 (Sup.Ct. Nassau Co. 2006).

5. See, e.g., *Victor Stanley Inc. v. Creative Pipe Inc.*, 269 F.R.D. 598 (D. Maryland 2010).

6. See, e.g. Beck, "Judges Are Imposing Fewer Sanctions for E-Discovery Violations, Report Says," The American Lawyer, Jan. 19, 2011.

7. Willoughby, Jones and Antine, "Sanctions for E-Discovery Violations: By the Numbers," Duke Law Journal 60:789 (December 2010).

8. Austrian and Krolewski, "Basic Steps in E-discovery Continued: Legal Hold Policies Where Information Is Within the Company, in a Cloud or on a Social Media Site," The Metropolitan Corporate Counsel (April 2011); see also Lewis, "Courts Grapple With Discovery of Posts," New York Law Journal (Feb. 15, 2011).

9. Farrell and Serra, "Electronic Discovery and Vanishing Text Messages," New York Law Journal (April 14, 2011).

10. See n. 3, supra.

11. See n. 5, supra.

12. 688 F.Supp.2d. at 646; the court also imposed preclusion and default sanctions against the corporate defendant.