

Introduction

A TEAM APPROACH TO E-DISCOVERY

Electronic discovery is a new area of the law that some lawyers think is hopelessly arcane and obtuse, or even boring. This book aims to prove them wrong by providing a friendly and interesting introduction to e-discovery. Although this is a fast-evolving specialty known for complex legal and technical issues, it is still possible to make an accessible introduction. The e-discovery niche has a few very dark corners, but we will shy away from the more advanced topics.

This book—my fifth on the subject—is not intended to be an all-inclusive textbook, but rather a friendly, intellectually stimulating introduction. It is composed of a series of stand-alone chapters derived from the most accessible posts in my law blog, e-DiscoveryTeam.com. It begins with general introductory chapters giving a broad, upbeat overview. The book then goes into my favorite e-discovery topic, legal search, with several chapters pertaining to the ins and outs of finding relevant evidence. That is the heart of all e-discovery. A key chapter comes after that, Chapter 6, on the 2015 amendments to the Federal Rules of Procedure: *The 2015 e-Discovery FRCP Rule Amendments and a Goldilocks Era of Proportional Discovery*. Next, I address a variety of interesting issues and difficulties that

all litigators face in dealing with electronic discovery. The book concludes with a series of chapters on ethics. e-Discovery, more than any other field of law, is filled with ethical landmines. These chapters will help you to stay on the straight and narrow path and provide suggestions on how to deal with other counsel who do not.

Some attorneys try to avoid e-discovery entirely for fear of getting in over their heads and making horrible mistakes. Although there is some validity to this concern, it is overrated. There are both deep and shallow waters in this new field. Many areas of e-discovery legal practice are shallow, not deep, and they are not too difficult to learn. At this point in the stage of this field of law, most issues do not involve completely novel issues or complex data analytics, statistics, and arcane technologies. Instead, most e-discovery issues today can be solved using traditional legal reasoning. Common sense and good ethics will keep you out of the sanctions landmines that we often hear about in e-discovery.

My career path led me to becoming a full-time specialist in electronic discovery back in 2006. In 2010, I became the national e-discovery counsel for my firm Jackson Lewis, a labor and employment law firm with more than 800 attorneys, most of whom are litigators. In my role, I work daily with trial attorneys all over the country and have developed multiple e-discovery training programs. Most of the attorneys in our training programs have very little prior familiarity with e-discovery or computer systems. I know from experience that they can quickly learn how to handle most of the issues that arise. After some initial training, I still get calls from them, which is what I want, but they are typically only six-minute time entries. If the attorney or paralegal calling me has completed the firm's e-discovery training, they usually already know the answer. They call at first just to be sure that the answers they came up with are correct. Most of the time they are. Even with no prior experience or training, it is not hard to use traditional legal reasoning to come to the correct answers, especially if lawyers use the team approach that I advocate in my *e-Discovery Team* blog.

Most of e-discovery can be learned fairly quickly; however, like anything worthwhile, it requires hard work and persistent efforts. It is all challenging and fascinating, to be sure—especially if you enjoy

technology—but deep computer expertise is *not* required for most of the problems. Most litigators find that they can work through the common issues seen in this field, if they learn to use a *team approach* to legal practice. This is an approach to legal practice where you routinely work with experts from outside of the law. e-Discovery requires working with nonlawyer experts in computer systems, forensics, data storage (in the clouds or in the office), data analysis, statistics, many kinds of software, and social media environments of all kinds.

The interdisciplinary team approach is a new skill for many lawyers, but it is one that must be learned to perform e-discovery properly. It is essentially a communication challenge. Think of Abbot and Costello's famous "Who's on First?" This is a work challenge, to be sure, but it is a manageable one. This kind of communication challenge is within the ability of all good litigators. As a group, we are all pretty good at the communication of complex issues. The primary obstacle for many lawyers in dealing with technology is the reluctance to admit inadequate knowledge and trying to go it alone. The "fake it until you make it" approach does not work here; you need to rely on others to help you to do it right. They can be experts employed by e-discovery vendors, other consultants, or specialists like myself. The team approach makes it easy to learn what you need to know in a particular case to properly represent your client.

This book will cover most e-discovery issues where the waters are not deep. A trusted e-discovery vendor can often provide the team you need to understand the technical issues. In a rare case where you must sail into deep waters and hazardous storms, then you can always enlist other team players to help. You may even have to bring in another lawyer who specializes in e-discovery. Complex, technical topics such as predictive coding and international data import issues come to mind.

Although e-discovery has its deep waters—places where math and statistics reign—it is overall just a new type of document production. It is discovery, which is something that all litigation attorneys and paralegals must learn to do. We cannot only do paper discovery. We have no choice but to also discover computer-generated information because nearly all information today is electronic. The evidence is in vast clouds of data; paper is just an incidental printout. All litigators today must be

able to find this electronic evidence and perform e-discovery, but they do not have to do it alone.

An interdisciplinary team approach comes in here. In well-functioning teams, the lawyers are in charge, but other professionals play a significant role, including vendors and the occasional outside legal specialist. After years of working in this field, I am more convinced than ever that the best solution for most lawyers to the problem of e-discovery is to work with a team. Even if you only spend a couple of hours on e-discovery issues each month, you can still do an excellent job by using the team approach. You do not have to specialize, as I have done, but you do need the help and support of a team with technical skills and knowledge that you probably do not have.

Most attorneys need technology specialist team members to help them, typically engineers, not lawyers. Sometimes in very large-volume data cases, you may even need the help of data scientists who specialize in text retrieval. In every e-discovery team, a common language is the key to clear communication. The engineers and scientists have to understand the legal language, and vice versa.

Just like a sports team, a positive team spirit is also critical. Successful teamwork is always built on mutual respect, leadership, and goodwill. All team members must have a clear understanding of their role and the positions they play. Simply hiring the lowest-priced e-discovery vendor can be a recipe for disaster. It is also a big mistake (not to mention unethical) to simply turn everything over to a vendor to do it for you. You need a good working relationship with a vendor, but you do the law yourself. As mentioned, in rare circumstances, you may need help with the law too, in which case you should turn to legal specialists.

In some large law firms, all of the e-discovery team members are full-time firm employees, both lawyers and engineers. This is not necessary and can even be a mistake. Most lawyers and law firms, including my own, depend on e-discovery vendors to supply most of the nonlawyer members of their team. The law firm gives legal advice and leads the team, but relies on an outside company to provide the non-legal services. The team members outside of the law firm do not provide legal advice, but rather provide engineering advice and services. These team members work for e-discovery vendors outside of the law firm.

e-Discovery vendors cannot give legal advice; only law firms or attorneys in legal practice can do that. However, they can help in all other aspects of e-discovery, especially the very technical computer aspects. Law firms, even the largest, may also need to consult with various types of e-discovery specialist attorneys from time to time, but only for the most challenging tasks. Even specialists like myself need to consult with other specialists from time to time. For instance, I will not touch cross-border, international e-discovery issues. Conversely, because my e-discovery subspecialty is legal search and active machine learning, other specialists in the field ask me for help on that area from time to time.

e-Discovery is like a vast body of water. Most of it is shallow, as noted, and you should not fear to tread, but it does have a few deep, shark-infested areas. Stay alert and be ready to call in the Marines. Most e-discovery specialists are quite adept at helicoptering in and out of litigation war zones.

The key to all well-functioning professional teams is training and practice. e-Discovery team members, lawyers, paralegals, scientists, technicians, managers, and others must all learn a core body of knowledge on this new area of law and information technology. Competence is the key and competence comes through education and practice.¹ More information on this is provided in the concluding chapters of this book on ethics.

Education can take many forms, including books like this one, organized training by in-person programs (which I do a lot of for my law firm and its clients), and online training programs (see, for instance, the one I designed: e-DiscoveryTeamTraining.com). You can also avail yourself of traditional continuing legal education. Many education programs are very good, but do not expect too much from just listening to lectures or watching mock procedures. It takes time and effort to learn any legal field, including e-discovery, but I think you will find it is well worth it.

¹See *ABA Model Rule 1.1 Comment 8* (“To 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”).

Computers are here to stay, and so too are lawyers that need to find the evidence necessary to defend or prosecute their cases. More and more, critical evidence will be found in computers and other electronic storage devices, both in offices, homes, the cloud, pockets, even on wrists. In the not-too-distant future, we may live in a world filled with artificial intelligence and an Internet cluttered with smart things. The data will literally be everywhere, from body implants to your refrigerator. This book, and a good team, will help prepare you to meet the future with confidence—and hopefully, a bit and byte of good humor.