Girding for the E-Savvy Opponent

By Craig Ball

It's said that, "Generals are always prepared to fight the last war." This speaks as much to technology as to tactics. Mounted cavalry proved no match for armored tanks. Machine guns made trench warfare obsolete. The Maginot Line became a punch line thanks to the Blitzkrieg.

In e-discovery, we still fight the last war, smug in the belief that our opponents will never be e-savvy enough to defeat us.

Our old war ways have served so long that we are slow to recognize a growing vulnerability. To date, our opponents have mostly proved unsophisticated, uncreative and un-tenacious. Oh, they make feints against databases and a half-hearted efforts to get native production; but, for the most part, they are still fighting with hordes, horses and sabers. We run roughshod over them. We pacify them with offal and scraps.

Of course, we do not think of it that way. We imagine we are great at all this stuff, and that the way we do things is the way it's supposed to be done. Large companies and big law firms have been getting away with abusive practices in e-disclosure for so long that they have come to view it as a birthright. I have more than once heard a lawyer from a big firm defend costly, cumbersome procedures that produce what the requesting party did not seek and did not want with the irrefutable justification of, "we did *what we always do.*"

Tech-challenged opponents make abuse easy. They do not appreciate how the arsenal of information has changed; so, their salvos are obsolete requests from the last war, the paper war. They do not grasp that the information they need now lives in databases and will not be found by keywords. They demand documents, not data; files, not sources.

But, tech-challenged opponents will someday evolve into *Juris Doctor Electronicus*. When that happens, here are some actions to expect from e-savvy opponents:

E-Savvy Opponents:

1. **Demand competence, especially in search**
2. **Insist on native production**

3. Make you explore sources you ignore
4. Delve deeply into databases
5. Compel transparency of scope and process
6. Make you divulge and resolve exceptions
7. Shrewdly use sampling to expose failure
8. Push back on duplicitous cost projections
9. Leverage bad faith to probe state of mind
10. Do not overreach

E-savvy counsel succeeds not by overreaching but by insisting on competent scope, competent processes and competent forms of production. *Good*, not just what's always been done.

E-savvy counsel well understands that claims like, "that's gone," "we can't produce it that way" and "we searched thoroughly" rarely survive scrutiny.

Your most effective defense against e-savvy counsel is the Luddite judge who applies the standards of his or her former law practice to modern evidence. Your best strategy here is to continue to expose young lawyers to outmoded practices so that when they someday take the bench they will also know no better way.

Another strategy against e-savvy counsel is to embed outmoded practices in the rules and to immunize incompetence against sanctions.

But these are stopgap strategies-mere delaying tactics. In the final analysis, the e-savvy opponent need not fear retrograde efforts to limit electronic discovery. Today, virtually all evidence is born electronically; consequently, senseless restrictions on electronic discovery cannot endure unless we are content to live in a society where justice abides in purposeful ignorance of the evidence.

The e-savvy opponent's most powerful ally is the jurist who can distinguish between the high cost and burden occasioned by poor information governance and the high cost and burden that flows from overreaching by incompetent requests. Confronted with a reasonable request, this able judge will give you no quarter because your IG house is not in order.

It's not that no enterprise can match the skills of the e-savvy opponent. It's that so few have ever had to do so. Counsel for producing parties have not had to be particularly e-savvy because opposing counsel rarely were.

Sure, you may have been involved in the Black Swan discovery effort–the catastrophic case where a regulator or judges compelled you to go far beyond your normal scope. But, is that sustainable? Could you do that on a regular basis if all of your opponents were e-savvy?

You may respond, "But we shouldn't have to respond that way on a regular basis." In fact, you should, because "e-savvy" in our opponents is something we must come to expect and because, if the opponent is truly e-savvy, their requests will smack of relevance and reasonableness.

Remember, the e-savvy opponent about which I warn is not the lazy opponent with a form or the abusive opponent who's simply trying to inflate the scope of the disclosure as a means to extort settlement. They're no match for you. The e-savvy opponent to worry about is the one who can persuade a court that the scope and method are appropriate and proportionate because it's true.

About the Author

Craig Ball of Austin is a Board-certified trial lawyer who limits his practice to service as a court-appointed Special Master in computer forensics and electronic discovery. A founder of the Georgetown University Law Center E-Discovery Training Academy, Craig serves on the Academy's faculty and also 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. Craig has published and presented on forensic technology more than 1,650 times, all over the world. For his articles on electronic discovery and computer forensics, please visit www.craigball.com or his blog, www.ballinyourcourt.com.