President's Message for Circuits January 2016

By Craig Ball

We live at the dawn of a golden age of evidence, ushered in by the monumental growth of data. When we access electronically stored information (ESI) and use digital devices, we generate and acquire vast volumes of electronic 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. Lawyers, above all, should celebrate this boon; yet, many of our number bemoan electronic evidence because they've not yet awoken to its value.

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. It's become a crisis of competence, and we suffer most when standard setters refuse to define competence in any way that might exclude them. Vague pronouncements of a duty to stay abreast of "relevant technology" are noble, but don't help lawyers know what they must know.

So, it is encouraging when California, with twice Texas' number of lawyers, takes a strong, clear stand on what counsel must know about e-discovery. The State Bar of California Standing Committee on Professional Responsibility and Conduct issued a formal 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. Formal Opinion Interim No. 2015-193 (2015) states:

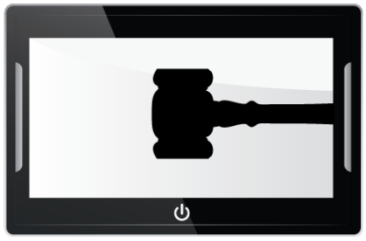
> Taken together generally, and under current technological standards, attorneys handling e-discovery should have the requisite level of familiarity and skill to, among other things, be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:
>
> 1. initially assess e-discovery needs and issues, if any;
> 2. implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence, like electronic information, potentially relevant to the issues raised in the litigation;
> 3. analyze and understand a client's ESI systems and storage;
> 4. identify custodians of relevant ESI;
> 5. perform appropriate searches;
> 6. collect responsive ESI in a manner that preserves the integrity of that ESI;

7. advise the client as to available options for collection and preservation of ESI;
8. engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
9. produce responsive ESI in a recognized and appropriate manner.

Thus, California lawyers face a simple mandate when it comes to e-discovery, and one we Texas lawyers should take to heart: When it comes to handling cases with electronic evidence: Learn it, get help or get out.

Our mission at the Computer and Technology Section is to help you learn it, not just in e-discovery but everywhere law and technology intersect. Your membership supports that mission. Thank you.

Craig Ball, 2015-2016 Chair of the Computer and Technology Section, State Bar of Texas



COMPUTER AND TECHNOLOGY SECTION