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# Electronic Information and the Civil Justice System

IN MARCH I had the honor and privilege of attending a discussion at Georgetown Law Center entitled "And Justice for All: How the Electronic Information Explosion is Transforming the American Legal System." The event was moderated by Harvard Law School Professor Arthur Miller and featured a distinguished panel of speakers, including Justice Stephen Breyer. Listening to the panel discussion, as well as remarks from the audience, helped me refine my thoughts on where we stand as a profession in terms of litigation in the digital age. I will use this month's column to share four of those thoughts.

**The legal profession is behind the curve when it comes to understanding technology.** Certainly many attorneys understand, at some level, that almost all the information that ultimately becomes evidence in civil and criminal cases is generated and stored in a computer. Far fewer attorneys have given much thought to the complicated issues of how to understand the many variations of technology there may be, how the information technology landscape is constantly changing, how to preserve electronic evidence (including what form or forms to preserve), and how to navigate the nearly endless amount of information available today. Few law school professors explain, much less stress, the reality of practicing law in the digital age. More should do so.

**Being behind the technology learning curve threatens the lawyer's ability to provide adequate representation.** It is axiomatic that if you do not understand where the evidence is, you may not be able to ask the right questions that will help you find it or maybe even understand what it means. Not having sufficient information to frame a claim or a defense is a detriment to representing any client. Beyond the obvious evidence preservation and production analysis, however, are other issues. For example, have you considered looking at whether witnesses have posted information on blogs that could help you understand if they have made statements relevant to a matter involved in the case? Have they provided such information on a YouTube video or something similar? Do you know where privacy rights begin and end, and how do you protect those interests in civil discovery and litigation?

**The complexity of issues, plus a limitation of resources, mandates a shift toward more collaborative discovery.** The issues involved in understanding the technology infrastructure of even a small company with fewer than 100 employees can be difficult. Multiply that problem by the changes in technology that occur every 12–18 months, add dozens if not hundreds of applications that can produce enormous amounts of data in multiple formats, and then add in the fact that some cases may require forensic-level data preservation and recovery while many may not. These and other factors cry out for meaningful dialogue at the outset of cases between parties to enable counsel to understand, as best they can, the nature of the likely universe of responsive data in light of their relevance to the dispute. Advocacy in discovery still has its place, but it should be reserved for meaningful disputes as to scope and other legal parameters—not as a way to obfuscate.

**Recognizing human limitations and technological abilities is a critical step in finding solutions.** Stated simply, there is no "easy button" for courts, lawyers, or parties. Understanding, documenting, and managing electronic information systems require continuous effort, time, and money. At the same time, the individuals involves must remember that no person or corporation—no matter how wealthy—can or will have a perfect system or an error-free way to produce needed documentation. Technology can be a great aid in searching for and retrieving information, and the use of technology should be welcomed as a tool that can help keep discovery manageable and affordable. At the same time, technology should not become a substitute for human judgment in terms of relevance, materiality, and prejudice when things go wrong. In short, there must be room for grace (e.g., understanding that mistakes will happen; accepting that preservation and production will not be perfect; only pursuing disputes when they are meritorious and make a difference to the ultimate resolution of the matter) so that all parties can have the hope that, if they act reasonably and in good faith, they will have a fair opportunity to litigate their claims and defenses even if there are flaws in the discovery process in any given case. **TFL**

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