

**Presented:**  
Page Keeton Civil Litigation Conference 2013  
October 24-25, 2013  
Austin, Texas

## **E-Discovery on a Budget**

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## **About this Collection**

I love lawyers. Most of my friends are lawyers. I'm married to a lawyer. I'd be proud if my kids were lawyers. Some of the best and brightest people I've ever known are lawyers.

I share my affection for my colleagues so you'll know where I'm coming from when I confess I'm chagrined by lawyers' steadfast refusal to acquire even the most basic competency in electronic discovery and digital evidence. Electronic evidence is fast becoming the most ubiquitous, probative and powerful proof extant; yet, the justice system abides a crisis of competence when it comes to discovery of electronically stored information. It's a crisis that carries an awesome cost—millions upon millions of dollars wasted on overbroad preservation and collection, purposeless processing and—worst of all—profligate document review efforts destined to turn courtrooms into country clubs and suck the souls from young lawyers.

The fault doesn't lie with e-discovery or the rules of procedure or even (greedy) plaintiffs or (greedy) defendants. I have seen the enemy, and it is us.

America's halcyon days of hammer and harness are behind us. We are all knowledge workers now; yet, even those who drive trucks or empty bedpans are tasked by pixels and tracked by bytes. The evidence of what we do and say, of when and where and how we go, of what we own and earn and spend is digital. *More than 99% of it will never exist as anything but electronically stored information*, and most takes forms that require special tools or expertise to see and interpret. This irritates and intimidates old school lawyers. At great cost to unwitting clients, the old school cling to what they know and disregard the rest. They print documents or convert them to paper-like formats like TIFF. They unleash armies of reviewers against hordes of irrelevant documents. They thunder that e-discovery is "out-of-control," extolling the merits of raw meat rather than learning to make fire.

A lawyer without the skills needed to properly preserve, collect, analyze and present electronic evidence is all-but-incompetent to manage litigation today, and visiting the cost to compensate for those shortcomings upon the client is an ethical minefield.

That's why you must make it your mission to master electronic discovery, and help staunch the hemorrhaging of money stemming from lawyer incompetence in e-discovery.

Now, let me tell you why you'll be *glad* you did.

Occasionally you'll win a case on charm, a good or bad judge, an appealing client, a hateful opponent or just dumb luck. But, without any of these things, you'll win most of the time *if you have the evidence proving your case*. Much of that evidence is digital. It's there. It's waiting for you--eager to tell its compelling story, ready to show your client was right and the other side should pay big or go hence without day. The lawyer who can get to the digital evidence--find it, understand it and use it ***in a cost-effective fashion***--enjoys an enormous competitive advantage.

The selected articles and columns that follow were chosen to help you identify ways to tame the cost of e-discovery. They are a small sampling of the articles I've written about electronic discovery and computer forensics, available at [www.craigball.com](http://www.craigball.com) and [ballinyourcourt.com](http://ballinyourcourt.com). I hope you find them to be a helpful, accessible introduction to the cost-saving side of electronic discovery.

Craig Ball, September 2013

## **Eight Tips to Quash the Cost of E-Discovery**

### **This really happened:**

Opposing counsel supplied an affidavit stating it would take thirteen years to review 33 months of e-mail traffic for thirteen people. Counsel averred there would be about 950,000 messages and attachments after keyword filtering. Working all day, every day reviewing 40 documents per hour, they expected first level review to wrap up in 23,750 hours. A more deliberate second level review of 10-15% of the items would require an additional two years. Finally, counsel projected another year to prepare a privilege log. **Cost: millions of dollars.**

The arithmetic was unassailable, and a partner in a prestigious law firm swore to its truth under oath.

### **This could have happened:**

On Monday afternoon, an associate attached a hard drive holding 33 months of e-mail for thirteen custodians to the USB port of her computer and headed home. Overnight, e-discovery review software churned through the messages and attachments indexing their contents for search and de-duplicating redundant data. The next morning, the associate identified responsive documents using keywords and concept clustering. She learned the lingo, mastered the acronyms and identified common misspellings. She found large swaths of irrelevant data that could be safely eliminated from the collection and began segregating responsive and non-responsive items. By lunchtime on Wednesday, the software started asking whether particular items were responsive. Before she called it a day, the associate ceded much of the heavy lifting to the program's technology-assisted review capabilities and shifted her attention to searching for lawyers' names and e-mail domains to flag privileged communications. She spent Thursday afternoon sampling items the computer identified as non-responsive to be assured of the quality of review. Before she called it a day, the associate tasked the software to generate a production set and a privilege log for partner review on Friday and wondered if it might be a good weekend to head to the beach. **Cost: 40 associate hours.**

These two scenarios contrast the gross disparity in review costs and time between lawyers who approach e-discovery in ignorance and those who do so with skill. The Luddite lawyer who knows nothing of modern methods misleads the court and cheats the client. The adept associate proves that e-discovery is fast and affordable when the right tools and talents are brought to bear. Electronically stored information (ESI) serves us in all our day-to-day endeavors. ESI can and should serve us just as well in our search for probative evidence and in the resolution of disputes.

### **You Must Make It Happen**

Finding efficiencies and avoiding dumb decisions in electronic discovery isn't someone else's responsibility. It's yours. If someone else must perennially whisper in your ear, articulating the



issues and answering the questions you should be competent to address, you aren't serving your client.

ESI isn't going away, nor will it wane in quantity, variety or importance as evidence. Each day you fail to hone your e-discovery skills is a day closer to losing a case or losing a client. Each day you learn something new about ESI and better appreciate how to request, find, cull, review and produce it at lowest cost is a day that cements your worth to your clients and makes you a more effective counselor and advocate.

### **Eight Tips to Quash the Cost of E-Discovery**

The following tips are offered to help you slash the outsize cost of e-discovery:

- 1. Eliminate Waste**
- 2. Reduce Redundancy and Fragmentation**
- 3. Don't Convert ESI**
- 4. Review Rationally**
- 5. Test your Methods and Know your ESI**
- 6. Use good tools**
- 7. Communicate and cooperate**
- 8. Price is what the seller accepts**

#### **1. Eliminate Waste**

The author once polled thought leaders in electronic discovery about costs. They uniformly agreed that about half of every e-discovery dollar is expended unnecessarily as a consequence of counsel lacking competence with respect to ESI. Half was kind.

Every time you over-preserve or over-collect ESI, every time you convert native data to alternate forms or fail to deduplicate ESI before review and every time you otherwise review information that didn't warrant "eyes on," you add cost without benefitting your client. It's money wasted. Poor e-discovery choices tend to be driven by irrational fears, and irrational fears flow from lack of familiarity with systems, tools and techniques that achieve better outcomes at lower cost. The consequences of poor e-discovery decisions prompt motions to compel or for sanctions, further ratcheting up the cost of incompetence.

#### **2. Reduce Redundancy and Fragmentation**

Many complain that electronic discovery has made litigation more costly because there is so much more information available today. Certainly, there are more channels of information available today, allowing an enlightened advocate more probative evidence. Much of what evaporated as a phone conversation now endures as a writing. There is more temporal, photographic and geolocation data to draw on, and more "persons with knowledge of relevant facts" who are privy to revealing information.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: eDiscovery on a Budget

Also available as part of the eCourse

[eDiscovery for Everyone; The Admissibility of Electronic Evidence; and 30 Tips in 30 Minutes](#)

First appeared as part of the conference materials for the  
37<sup>th</sup> Annual Page Keeton Civil Litigation Conference session  
"eDiscovery for Everyone"