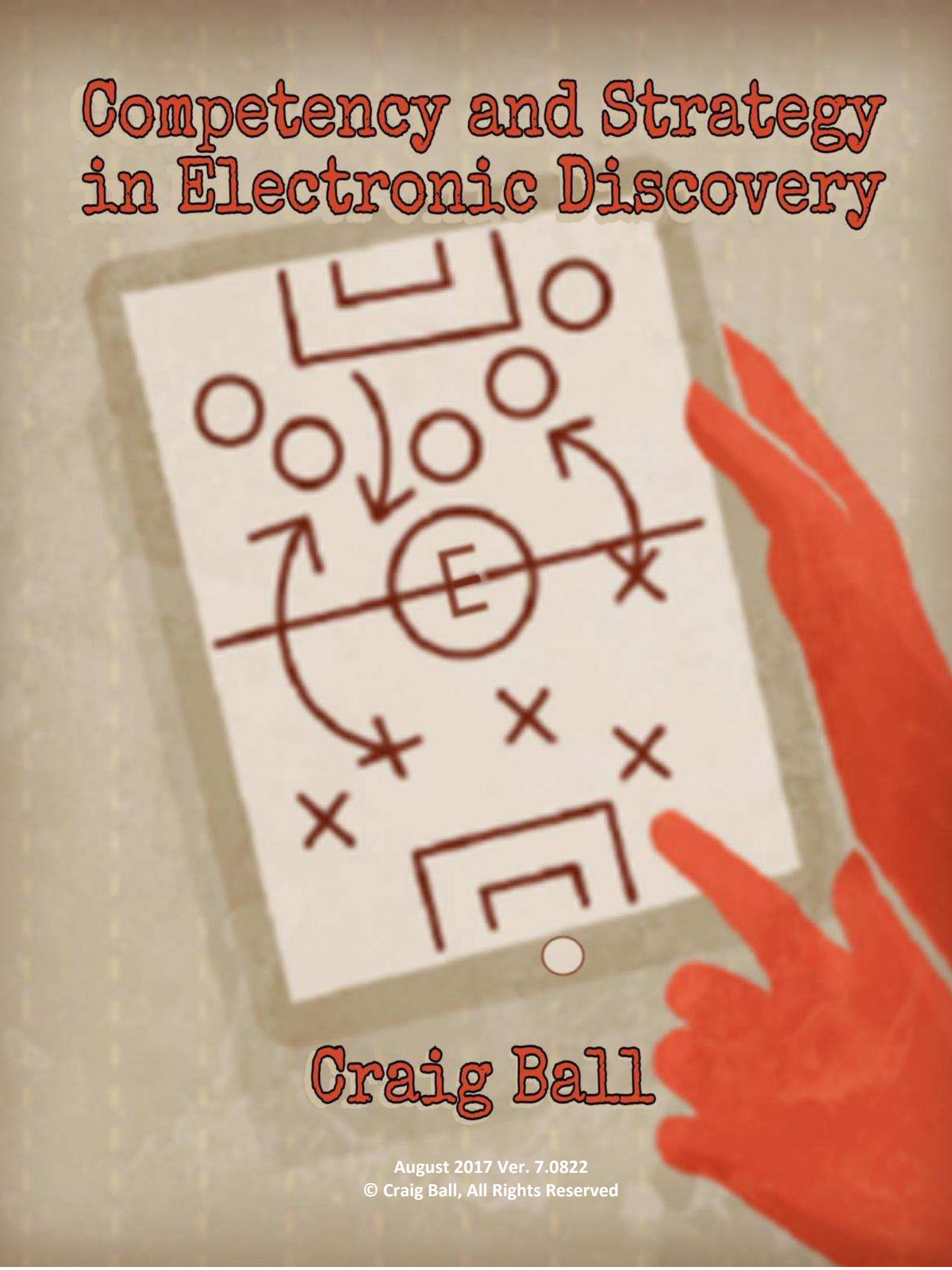
Competency and Strategy in Electronic Discovery



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Contents

Goals for this Collection

The goal of this collection of articles is nothing less than to completely change the way you think about electronically stored information.

In a world where less than one-in-one-hundred cases are tried, discovery strategy, particularly e-discovery strategy, is more often vital than trial strategy. Strategy isn't simply doing what the rules require and the law allows. Strategy requires we explore our opponent's fears, goals and pain points … and our own. *Is it just about the money? Can we deflect, distract or, deplete the other side's attention, energy or resources? How can they save face while we get what we want?*

Yet, strategic use of e-discovery garners little attention, perhaps because the fundamentals demand so much focus, there's little room for flourishes. As lawyers, we tend to cleave to one way of approaching e-discovery and distrust any way not our own. ***If you only know one way of doing things, how do you act strategically?***

Strategic discovery is the domain of those who've mastered the tools, techniques and nuances of efficient, effective discovery. That level of engagement, facility and flexibility is rare; but, you can be *more* strategic in e-discovery even if you've got a lot to learn. These readings are designed to get you thinking about the fantastic journey data takes from its simple, seamless existence as an endless stream of ones and zeroes to the seemingly-endless variety of documents, communications, records and formats that confound us in e-discovery. More, the goal is that you learn to use e-discovery strategically, making wise choices because you understand the sources and processes of ESI well enough to stand firm or compromise.

Craig Ball, August 22, 2017

E-DISCOVERY

Craig Ball

E-Discovery Update 2017

Never have lawyers enjoyed more ways to answer the questions, "what happened and why?" The world teems with sensor-laden, networked devices informing abundant apps. Once-ephemeral actions and communications are routinely recorded, ready to illuminate intent and serve as Boswell to behavior. Interaction and information on demand have changed us. We stand astride physical and virtual worlds, often more engaged with distal persons than with those at our table. Instant information gratification renders no question too trivial to Google and no attitude or experience insufficiently trenchant to share on Facebook.

Some despair that privacy is gone, the President tweets, and there's no "ducking and covering" from a cyberattack. But, as lawyers doggedly pursuing facts, we can rejoice. The digital universe is paying attention and stands ready to clue us in. All we must do is know where to look, ask the right questions and be tenacious seeking answers.

If you've paid close attention to e-discovery, then the landscape of e-discovery at the midpoint of 2017 looks much like it did a year ago, when the amended federal rules that kicked in at the close of 2015 were a source of uncertainty, particularly as to proportionality and sanctions. With a longer view, it's clear that proportionality is a blunt instrument, and not all courts are bowing to limits on their power to sanction spoliation of electronically stored information (ESI).

Proportionality

Proportionality describes the sensible proposition that the burdens of discovery shouldn't outweigh its benefits vis-à-vis the needs of the case. The 2015 amendments to Rule 26 of the Federal Rules of Civil Procedure shifted the elements of proportionate discovery—residing elsewhere in the rule for 30+ years—into the scope of discovery; *viz.*:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.**

FRCP Rule 26(b)(1), amended language in bold.

Proportionality is routinely (and inarguably) advocated as, "a $50,000 case shouldn't prompt discovery costing $100,000.00." Of course, it shouldn't; but, the parties rarely hold the same view of a case's value or their exposure. As well, the significance of a case cannot always be measured in monetary terms. Consequently, proportionality has manifested after the amendments as

(improperly) a boilerplate objection and as (usefully) an analytical framework by which courts issue protective orders according to their sound sense of fairness and discretion. The wise practitioner must couch objections and responses in the elements of the amended Rule, recognizing that courts will be prone to treat those elements as a checklist.

Texas' Take: Calling proportionality the "pole star" informing the exercise of discretion over electronic-discovery disputes, the Texas Supreme Court recently laid out the Texas proportionality factors and pronounced them "in line" with federal counterparts, stating, "[A]ll discovery is subject to the proportionality overlay embedded in our discovery rules and inherent in the reasonableness standard to which our electronic-discovery rule is tethered." *In Re State Farm Lloyds, Relator*, Nos. 15-0903, 15-0905 (Tex. Sup. Ct. May 26, 2017).

The Texas proportionality factors read a bit differently than the federal factors and are "certainly not exclusive." Per *In Re State Farm Lloyds,* Texas looks at:

1. Likely benefit of the requested discovery;
2. The needs of the case;
3. The amount in controversy;
4. The parties' resources;
5. Importance of the issues at stake in the litigation;
6. The importance of the proposed discovery in resolving the litigation; and
7. Any other articulable factor bearing on proportionality.

Spoliation Sanctions

Lawyers approach e-discovery with less enthusiasm than one brings to a root canal. Only the stick of sanctions has served to force litigators to preserve and produce ESI. Courts are loathe to issue sanctions and have done so in only the most egregious circumstances involving the intentional destruction of relevant ESI. Still, parties and counsel unskilled in e-discovery worried that their negligent destruction of evidence might serve as the basis for serious sanctions, like summary dismissal or an adverse inference instruction to the jury. A split between the federal circuits arose over whether serious sanctions could be grounded on negligence or required proof of prejudice and/or malevolent intent, *e.g.*, the Second Circuit required proof of negligence and prejudice where the Fifth Circuit required a showing of bad faith to underpin serious sanctions.

In 2015, the committee charged with drafting the Federal Rules of Civil Procedure sought to resolve the split by amending Rule 37 to limit the ability of judges to sanction the loss and destruction of electronic evidence unless specific requirements are met. FRCP Rule 37(e) now states:

Also available as part of the eCourse
[Answer Bar: Technology for Litigators]

First appeared as part of the conference materials for the
41st Annual Page Keeton Civil Litigation Conference session
"Strategic Use of E-Discovery"