

Electronic Discovery:

GENIE IN A BOTTLE OR PANDORA'S BOX?



MARTY ROSE



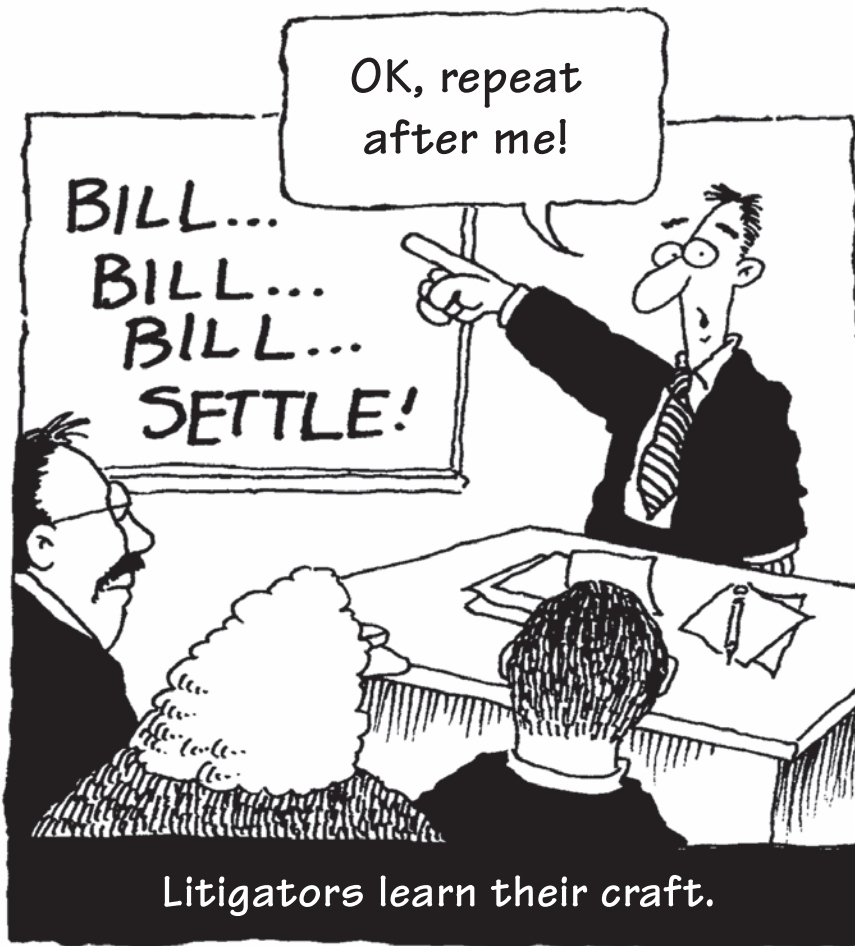
ROSS CUNNINGHAM



ANDREW COSTA



JUDGE CRAIG SMITH



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Three years after the Federal Rules, there have been many roundtable discussions about e-Discovery, but few have featured a panel consisting of law firm trial lawyers, an in-house counsel and a district court judge. Texas Lawyer's business department recently hosted an enlightening and educational roundtable discussion on the topic with just such a panel. The following transcript has been edited for length and style.

MIKE ANDROVETT, moderator: *Let's weigh into these topics a little bit. If I might ask you first, please introduce yourself and then talk a little bit about your work and the extent that you tie that back to e-Discovery.*

MARTY ROSE, partner, Rose•Walker, Dallas: Good afternoon, everybody. Thanks for coming. I would say we're a full-service boutique. We'll try any case you've got except a criminal case. We do a lot of commercial litigation, a lot of IP litigation, a lot of trade secrets and tort litigation for both sides of the docket. Our only ideology is winning. But one thing is interesting: Regardless of what kind of case it is, today the biggest challenge I think we face for our clients on either side of the docket is electronic discovery, if that's even the right word for it anymore. That's certainly the phrase we've all been hearing about the last couple of years since the rule changes. But over the last dozen years, increasingly, the ability or inability of a client to cope with discovery demands and electronic media is oftentimes the key and critical factor in success or failure in a lawsuit. And as I've heard several lawyers say in the past: Oftentimes a lawsuit becomes more about, "Did you comply with your obligations as a litigant in discovery," rather than, "What are the merits of your lawsuit?" We are going to field questions during this afternoon's session as we go, so don't feel at all shy about raising your hand and asking anybody in the panel a question that you think is important or relevant to your practice or this area in particular.

ROSS CUNNINGHAM, partner, Rose•Walker, Dallas: My practice over the last 7 to 10 years has been almost exclusively federal based. And as a result of the federal rule changes three years ago, I have had the privilege of delving head-first into e-Discovery, and my experience has been, whether it be a tort-based wrongful death lawsuit or patent infringement or a noncompete issue, really the single issue that has absolutely controlled, to the point of almost paralysis, the discovery process and the discovery game has been e-Discovery — from trying to work it out with the client to working it out with the opposing counsel, and then presenting the issues to the judge whenever we couldn't reach agreement. I would say 80 percent of discovery in the cases I've worked on in the last three years have been devoted almost exclusively to something e-Discovery-related, as opposed to the old type of going through some documents, taking your key depositions, getting your expert witnesses ready to go and then trying the lawsuit. Those days appear, at least for the time being, to be gone and there's a lot of consternation and a lot of time spent trying to figure out exactly what we will do and won't do in e-Discovery.

JUDGE CRAIG SMITH, 192nd District Court judge, Dallas: I'll try anything that Marty Rose brings. We're a civil court. We don't handle any criminal or family law. I've been on the bench just since 2007, January. Before that, I was a civil trial lawyer. I'm board certified in civil trial law and personal injury law since 1985. I had an eight-person law firm before I took the bench. We mostly did personal injury, but had quite a bit of business in commercial litigation in the last few years. E-Discovery for judges, especially at the state court level, is still a steep learning curve for all of us. It's a process that we're getting more comfortable with. I know you are more comfortable with it, and I look forward to discussing some of our parameters.

ANDREW COSTA, corporate counsel, NCI Building Systems, Houston: We're a manufacturer in metal buildings and metal building components. Before that, I was a litigator in criminal and in federal practice. Our e-Discovery issue is rather

unique in that even though we're slowly getting acclimated to the challenges of having to have a firm retention policy in terms of electronic data, by and large, a lot of our cases don't always implicate these types of issues, and when they do, they've been exceptionally jarring to both — more so to the business folks inside our corporation.

ANDROVETT: *Andrew, maybe you can help us kick off this conversation a little bit. Apparently, the trend out there is for companies, large and small, to start taking the e-Discovery process in-house. In a fairly shaky economy, that means a greater investment in the trained personnel who can do that kind of work and in some cases the technology, in order to store, collate, organize and analyze the information. Why are companies going that route and from your perspective, what are the advantages and disadvantages? And then maybe the rest of you guys can weigh in on that with your own perspectives.*

COSTA: I think, really the bottom line is, we have to. Even though by and large these issues don't come up that often in some of the cases we have, when they do, you have to have something in place that says, "Well, this is what we've done to preserve these types of materials. This is what we've done to track them down." And keeping them in-house is really just a way of reducing costs as opposed to having vendors do a lot of these things. One of the big challenges we have is that we have a very small legal department. There is no one person who is the person you talk to on e-Discovery issues. We all have to learn about them with each case that comes up or at least re-acclimate ourselves with those issues.

ROSE: It's interesting: we have clients who have run the gamut, from the software company who decided early on to go in-house entirely and contract with a major technology provider to do basically an enterprise database system at a great deal of expense with a great deal of stubbed toes and learned processing in the middle of a lawsuit, to the other extreme with clients who really don't want to have anything to do with it, want you to bring vendors in, and for some of those clients, they prefer the old-fashioned way, and others are focused on

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the dollar. And it's amazing, the breadth of approach by people to the problem. One of the universal problems that we have, that I think a lot of clients are seeing, is we are all being bombarded by vendors, either software or turnkey systems, all promising wonderful things, and oftentimes delivering very little of that which is promised. So we have found ourselves, as I'm sure many other firms have and businesses, through hard experience, trying to find out which vendors have a product or service that's at least reliable and will do some nominal percentage of that which is promised in an environment where at the end of day, you're going to be tested by your opponent, and perhaps your lawsuit compromised if the job was not done right in the first place.

...80 percent of discovery in the cases I've worked on in the last three years have been devoted almost exclusively to something e-Discovery-related, as opposed to the old type of going through some documents, taking your key depositions, getting your expert witnesses ready to go and then trying the lawsuit. Those days appear, at least for the time being, to be gone. . .

— Ross Cunningham

ANDROVETT: *Ross, I know, having the benefit of being on panels with you before, that you have a slightly different, or maybe more acute, sense about this notion of vendors and engaging them a little bit to learn more about them. This may be an appropriate time just to talk about: How do you pick a vendor and how do you know that what they're selling is what you want you want to buy?*

CUNNINGHAM: That's a great question. Vendors are all salespeople and they will tell you that they can deliver everything. I wouldn't say uniformly, but our experience a large percentage of the time has been that the one-stop shops – the ones that say they can do the data collection, the data filtering, the de-duping, the extraction, deliver to their own hosted review platform online, also do the end coding, the Bates

labeling and produce it to the other side – I found that the vendors that offer that kind of a one-stop shop service, often they're kind of like a jack of all trades, master of none. They're not real great at any one aspect. The clients I've worked with over the last few years, I have tried to focus, at least early on, either before a lawsuit, if they're going to be a plaintiff, or right when the lawsuit comes in the door as a defendant, the first thing you do is you get a vendor that specializes in data collection. There are lots of them out there that that's all they do — they will go in, they will harvest the data for you. A lot of companies are starting to try to do their own, and they want to do what's known as self-collection, because it saves money. You have an IT staff or an IT individual who's on the salary, on payroll. He can go out and he can collect what he thinks is everything. What we're finding out the hard way through hotly disputed discovery motions and when you bring in experts with pages-thick affidavits, you find out there's a lot of hidden data or unknown data out there. And these collection vendors have a real, real forte for making sure that they get everything. One of the vendors I use, I was just talking with him last week, and he said, "Yeah, we had a client that self-collected and they collected 300 megabytes

worth of information. The other side complained that it wasn't all there. We came back in and we collected from the exact same custodians, the exact same hard drives and servers, and we collected 1.4 terabytes." So the client tried to do it themselves. They got 300 megabytes. The specialists came in. They got four times that, serving just the same people, ostensibly collecting the same thing. They do a lot of the same thing. My big thing, being in court, going in front of judges like Judge Smith, I want to be able to say we did everything we possibly could. We collected everything we possibly could, and so that way there's no spoliation concern.

ANDROVETT: *Judge, when you talk with corporate officers about e-Discovery, they'll sometimes say, "My lawyers think it's the only thing I've got going on out there.*



I'm trying to run a business, right?" But then you've got the lawyers who look at cases such as Zubulake and they see these issues regarding data not found and the sanctions that could accrue. When these disputes come to you and there's any question withholding, what are you interested in finding out? What are you really looking for?

JUDGE SMITH: With regard to this e-Discovery, especially in the beginning of the case, I see the motions dealing with the "gotchas," where the opposition is trying to find areas that you haven't disclosed, where you've provided affidavits and provided discovery and you're saying, "That's all there is," and you've missed something. I think that's just the reality and that is what is happening and you have to deal with it on a judge-by-judge and case-by-case basis, because it is a steep learning curve and we're all learning this together. However, I deal with it as I've dealt with all discovery disputes in a traditional fashion, and that is, look at the candor and the good faith and reasonable course of the business, that there was a reasonable effort made or you're looking at trouble. Sign those affidavits. I think it was in *Zubulake* where the sanctions were applied. They weren't applied because some discovery was not given or provided. It was because the affidavit was a lie, and that's where you're going to get in trouble. But if you show a good faith effort, I think you avoid sanctions. If documents are being destroyed in the ordinary course of business before there's

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a real rifle litigation hold, I think you've got a good defense against spoliation, a good explanation against it. Sanctions are always dangerous, and we're looking for good faith efforts; reasonable actions will almost always secure the day.

ANDROVETT: *I'm aware the rest of you are not judges, but do you have a perspective?*

ROSE: Sometimes those of us who are just trying to get a lawsuit to trial or resolved on the merits get frustrated because a great deal of our brothers and sisters in the law do focus on the "gotcha" game, which I think is real counterproductive and expensive and silly. But it is important to be certain that you've been reasonable and you tried your darnedest, and before you sign that affidavit, be darn sure that it's accurate because that is a scary thing to do. But we had a case not too long ago where the other side said, "Well, gee whiz, there's an area we think you didn't produce." So we produced it and the response was to complain that we had overwhelmed them by producing it. So sometimes you feel that damned if you do, damned if you don't. But I think Judge Smith's advice for us lawyers and for the clients out here is advice well-taken. If you show a good faith effort and not try to hide the ball, I think, generally speaking, we're all going to be safe. And the goal really, again, is to try to do the best we can; some of these lawsuits have a great deal of complexity with e-mails and metadata and enterprise systems. Some companies have an enterprise server database. Many large corporations don't allow their folks to have individual hard drives that are not shared in a network. It seems hard to believe today, but that's true. And

then again, a lot of folks will carry work home on their laptop, on a zip drive, on a thumb drive, and you have to make reasonable efforts to find that stuff and get it, and it's not easy. And that's the problem.

COSTA: I think your point about kind of being careful what you ask for is a good one. Kind of reinforces the point, we have dialogue from a case with opposing counsel about what are the expectations. And sometimes there's nothing to lose in terms of asking for something that's burdensome and overly broad because you have nothing to give or offer. But once you get it back, you realize, well, I asked for it. I've got to wade through all this right now. And I think that's probably one of the first dialogues that need to happen. And I think the other one touched upon something Ross said, was that lawyers have to be IT minors, and some of your IT folks have to be sort of pseudo-attorneys, for lack of a better way of putting it — understand what's being sought and why the import. And also, I'm constantly educated about where things are, how much it takes to get them, and is it truly burdensome, or does it just take an hour of someone's day? And that's a conversation that has to be had with either your IT folks or your vendor up front, and then have it throughout the case, because cases change. Things that were not important when the suit was filed become important six months later.

ANDROVETT: *Andrew, you may have a perspective on this as well for the rest of the panel. Do you find now that generally companies, knowing all that they know, spend too much time or emphasize too much trying to get rid of information that either*



Marty Rose, a trial lawyer and founder of Rose•Walker, L.L.P. in Dallas, handles all manner of high-stakes litigation, working as plaintiff's or defense counsel in commercial disputes involving breach of contract, breach of fiduciary duty and fraud; intellectual property cases involving patent and trademark infringement and theft of trade secrets, and tort personal injury and wrongful death cases. Marty has extensive experience in the aerospace industry. He has won multimillion dollar verdicts and settlements for his corporate clients and his verdicts twice have made *The National Law Journal's* list of Top 100 verdicts. In 2002, *Texas Lawyer* named Marty a Go-To Lawyer. He has been named to the list of *Texas Super Lawyers* each year for the past four years and last fall was chosen to the Lawdragon 500 Leading Lawyers in America. In 2006, Marty was named to the inaugural class of top business defense lawyers by the *Dallas Business Journal*.



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is not relevant or is not nearly as damaging as they may think it is, or do folks have pretty stable and sound document retention policies now?

COSTA: I think it's the latter. Companies have to have them and they have to abide by them. And it's not something that is really a choice at the end of the day. In my past life, I've seen e-mails always hurt, at least when they come from my clients. It seems sometimes they always hurt. And people will say, "Why can't we get rid of it?" Well, that's not the standard. You can't just keep nothing at all. And so as a result, I think most companies are well-educated that the perils of not having a policy and not following it are worse than having some bad document.

CUNNINGHAM: I agree. I've always counseled clients and advised so long as you have a document retention, collection and destruction policy that is rational, relevant to your business and what you practice and how you practice, whether you make something or sell something or provide a service, so long as you have a policy that is rational and you follow it, you have a reason, you have an explanation for why you did what you did. If you say, "Hey, we're going to destroy e-mails every 90 days," if you follow that and it makes sense based on the size of your company. "Hey, we're a 200-person company. We don't have endless resources. We don't have backup tapes in the salt mines. Ninety days is really all we can afford with our storage." If that's set and you follow it, you have a real rational excuse for why something that is 140 days old is no longer available.

ANDROVETT: *Judge Smith mentioned litigation hold. When you read any of the surveys of in-house counsel, especially now in 2009, what comes out of those results is yes, we get it about e-Discovery. Yes, we've built a lot of platforms and systems for document retention, for data collection. But the area that in-house counsel still are a little nervous about is this litigation hold. Marty, what's the first thing you tell your client after he or she says to you, "I think we're going to be sued?"*

ROSE: Well, the first thing you have to tell them is to communicate corporate-wide a litigation hold. And I'm going

to discuss that in a little more detail, but I'm going to tee up Judge Smith, because he and I were having a conversation about this the other day and he has an interesting perspective as a trial judge that I would hope and wish that many of his peers on the bench would also share, but I would fear that they do not, which is a litigation hold has to be a realistic, pragmatic hold. If you've got a 10,000-employee business, and we're talking about a breach of a contract that affects 200 employees, do you really have to send out a litigation hold corporate-wide to make certain that you sweep everything and preserve everything? I would fear that if I didn't give a client that advice, we might end up in front of a judge who felt that anything less was bad faith. And so the first dilemma we have is, if it's a fairly narrow or well-defined lawsuit, or so it seems at first blush, do you really have to send out a litigation hold? While I've got the microphone, here's the real issue. Let's assume that you do have to send out a litigation hold because it involves your entire product line or service of your company. It's sufficiently broad. What we see time and time again is in the execution of that litigation hold and in the trenches, in the corporate offices, companywide, people making their own decisions about what that really means and deciding for themselves that well, that really doesn't mean what they say it means. They're just being ninnyes about it. We've seen in-house folks, in other words, members of the corporate legal team, make unilateral decisions relaxing the standard, as well as managers down the line and in the workforce. And the frightening thing always for outside counsel, and I think for general counsel, is how do I know that hasn't happened



and how can I be certain that this someone has decided that they have a better handle on it than their lawyers do, that they at least have the courtesy to pick up the phone or send an e-mail saying, "Here's what I really think we ought to be doing. Do you agree?" That is a real-life, pragmatic problem that can be a nightmare. But, Judge, if you'd talk about your perspective on litigation hold.

JUDGE SMITH: Well, litigation hold really sets in when you get anticipation of litigation, and that's where you have to start. And so it is the e-mail that comes across from your staff, says, "Wow, we could get sued for this." And is everything coming into play at that time? I don't accept that. That's enough to cause your whole retention system to have to change. Right now in *Zubulake*, I think the way some of the federal courts have handled that, it's awfully broad and it's awfully harsh. I believe that the trend is to balance the burdens regarding litigation hold in a more non-absolute and reasonable manner. And the statement, "Wow, could we get sued?"

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doesn't have to shut down the entire method of storage of a large corporation. Should it cause that type of disruptive cost when it truly may not even come into play? I think that state courts will soon have a process and rule such as what was incorporated under the rule, Federal Rule 26, and we have the conferences and the information is exchanged as what's available, what's there and what's not there. Then the requesting party has to put forth a demand or request that these items be held and that duty then arises and it's much more defined. There's a greater burden with regard to preserving that information. That's how I see the balance coming back, but it's not there yet. You're going to go on a judge-by-judge basis.

ROSE: Let me ask you a question, Judge

One of the universal problems that we have, that I think a lot of clients are seeing, is we are all being bombarded by vendors, either software or turnkey systems, all promising wonderful things, and oftentimes delivering very little of that which is promised.

— Marty Rose

Smith, in keeping upon your theme of reasonableness, if a corporation gets a lawsuit in and it appears to involve one piece of business, and that piece of business is, let's say, 10 percent of the overall business of the company, and so general counsel says, "We're going to do a litigation hold for the rational areas of the company that fit that piece of business and that area of business and we're not going to put a litigation hold on the rest of the company." Even if it later develops that perhaps there were people who were outside that narrow focus who perhaps should have been requested to retain, do you feel that if that's the initial response and it is set out in writing somewhere, even internal memorandum saying here's why we did what we did, and then address it later if the lawsuit seems expanded, do you think that keeps them out of trouble?

JUDGE SMITH: I think that hits

square on my example. The requester, the party wanting the discovery, can expand that. As that party gets more and more knowledge as to what's available, you expand it. If you don't come to agreement, you get a court to expand it for you. And that's exactly how I see the law developing on litigation hold. It seems much more reasonable, much less "gotcha." I see it working.

ANDROVETT: *Let's explore that a little bit deeper by way of a couple of scenarios. Judge, your example, I believe, is the person inside the company who maybe sends an e-mail to the general counsel and says, "We're going to get sued on this thing." Do we have a consensus one way or another? Does that activate the litigation hold?*

JUDGE SMITH: Probably not.

ANDROVETT: *What about the receipt of a demand letter?*

ROSE: It's almost akin to the old issue about when does a client's in-house investigation become a protected event because of the threat of litigation? I think the standard is very similar. And I think it's a reasonable person standard. If I take anything away from Judge Smith's comments it's, right or wrong, if there's a reasonable, rational basis for what you do, I think you're probably OK. In the face of a demand letter, is it reasonable or rational to do nothing? I wouldn't want to defend that answer. Is it necessary to do everything? I don't think so. If you can define and spend the time then in the crush of everyday business, spend the time then in corporate headquarters in figuring out rationally, "What are we talking about here? If we get sued, what's this going to involve? What can I do that's reasonable and rational that I can put it in writing right now, comfortable that two years from now if Judge Smith here is asked to weigh in on my conduct as an executive, have I done the right thing?" And so I think the answer is if you're reasonable, at least as a default start, you're not going to see sanctions ordered. Whether you were right or not may be challenged, but I don't think you'll get a sanction order. And what is your perspective?

COSTA: I think the earlier you get with some of these gray areas, it will necessarily be imperfect whatever the



Ross Cunningham, a trial lawyer and partner at Rose•Walker in Dallas, regularly manages issues relative to e-Discovery. His practice involves litigation of complex, high-risk cases on behalf of plaintiffs and defendants in matters such as aircraft disasters, patent infringement, misappropriation of trade secrets, products liability, construction defects, catastrophic personal injury, breach of contract, breach of fiduciary duty, fraud and covenants not to compete. His clients range from major corporations to individual inventors and even municipal governments. With more than a half dozen trials in the last two years, Ross has been on the front lines of managing how discovery, especially e-Discovery, can affect the outcome of a case. Ross has been repeatedly named to the list of *Texas Super Lawyers – Rising Stars Edition*, as published in *Texas Monthly* magazine, and speaks regularly on e-Discovery related topics. He received his law and undergraduate degrees from Southern Methodist University.

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response is. You're probably familiar with the adage, "You can't win for losing." So if you overdo it and nothing comes up, well, here you've wasted time and done something, whereas if you underdo it, then you pay dearly if it's something that really comes to a lawsuit. So I think if nothing else, the idea that you get a demand letter, however you respond to that will not cover the waterfront of what you will need if it goes to suit.

ANDROVETT: *For the most part, now we're discussing communication of some sort: the employee who e-mails the CEO, or you receive the demand letter. But just for a second, Andrew, let's say your company operated amusement parks, and you get a report somebody got hurt at an amusement park, and in the course of a year maybe 35, 40 people get hurt for various things and maybe four of them file lawsuits. When you hear this report that somebody got hurt, would it be your professional judgment that you need to start going down the road of anticipation of litigation? And I'd be interested, Ross and Marty and Judge, what your perspectives are, as we get more maybe into, at least in my mind, the grayer areas.*

COSTA: Even in my judgment, given the fact that not having that information again will hurt you more than not taking the steps you need to take to actually present information will hurt you — I think once you or someone gets hurt, that's the cost of doing business, and you will often have to deal with some sort of lawsuit.

CUNNINGHAM: Judge Smith's standard is so easy to work with. There

are always reasonable approaches you can do. Let's say someone gets hurt. Let's say that over the course of a year at your amusement park, five percent of the people file suit or even make a demand that you settle out of court. Just because someone gets hurt and you get a notice that there's someone hurt, you have to completely stop all routine document destruction or deletion? I don't think so, but should you at least quarantine the accident report and photograph and the e-mails that were taken in the four or five days after that incident and at least save those? That might be a reasonable approach. I don't think you have to shut down the entire e-mail system for the company and make an entire mirror image and save it in a vault. Once again, if I'm in front of Judge Smith, I'll say, "Judge, we tried to save everything we could find for the two- or three-week period that followed to make sure that we swept up everything, and then we kind of went back to our normal standard of routine document deletion."

ROSE: I want to change the subject a little bit before we leave this subject of initial response, because as a plaintiff, one of the smart things to do to foil what we just got done talking about for the last 10 minutes is to send, in that initial demand letter, a demand for a hold that is pretty specific while being broad, and I'm serious about that. In other words, if you want to make sure that your opponent cannot say, "Aw shucks, I just didn't think I needed to really save that, that didn't seem to be relevant to me." You can put the hurt

on them immediately by taking the time, sitting down with your client and your theory of the case, and shooting them a letter that says, "You'd better preserve all this and that and the other thing." And we've done that, and in any kind of case, whether it's a tort case or a contract case or intellectual property case, we try to do that as the plaintiff, because we want to prevent that reasonable defense that was really not that reasonable if you thought very long and hard about what the issues of the lawsuit ought to have been. So regardless of which side of the fence you're on, early focus on this issue can ensure your benefit and the other side's detriment.

ANDROVETT: *Let's talk about the cost for a second, because I'm guessing that dominates a lot of the decisions people reading this are forced to make or consider. You're the defendant. The plaintiff comes at you with the demand letter, and now they're going to come to you with the litigation hold letter. A lot of money is going to be expended to gather this information, review and analyze it, the whole issue of privilege that we haven't talked about yet. Is there a smart way to make those guys pay for it instead of the company having to pay for it?*

CUNNINGHAM: You're talking about the actual seeking cost shifting under the rules versus just trying to be smart about the costs that you just have to incur as a fixed cost?

ANDROVETT: *I was thinking about cost shifting, but I'm guessing this audience wants to hear any advice that you might have about ways to save. And if we need to*

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parse that, that's great.

CUNNINGHAM: The cost shifting that is built into the new federal rules, it's very rarely invoked, and it's a pretty high standard. It's akin to a sanction. You're basically telling the other side, "Look, your request is oppressive and burdensome, and frankly, either we can't afford to or we don't want to afford to have to comply with this, so if you'll pay for it, we'll do it." That's one part of it. The other side is you get a lawsuit or a demand letter with a demand to harvest all of your e-Discovery or EDD. One of the ways it's practical in trying to limit the scope of that is, under the federal rules, you do your Rule 16 conference. Under state rules, you just have a conference, basically meet and confer, and say, "Look, you're asking about this particular metal building company. We have 30 of them. So you're asking about this company. We've identified 24 custodians that we believe encompass the people that have relevant information. We've identified this time frame. We'll go back to January of '04. So we'll do

these 24 custodians, we'll go back these five years, and oh, by the way, we'll collect that data, and here are the 50 keywords that we will search against and we'll then deliver that to you." Trying to get to the other side and getting a reasonable time frame, a reasonable list of custodians and a reasonable list of keywords, is probably the single most cost-effective way of choking down what could be a limitless discovery process, from my view.

ROSE: I think Ross is right on. And the more you can do to reasonably seek the guidance of the Court early on, the more successful you'll be at that, because we have had a good deal of success and we've had others on the other side also be successful in sitting down and trying to really rifle-shot the lawsuit early with the approach of saying, "Look, this, as we sit here today, appears to be all that's really relevant. And that one company in Ross's instance. And so let's do that discovery, Judge. Let's just do that, and let's limit it to these custodians and let's see what happens. And if, in fact, they can prove that more is necessary, then, and only then, we'll spend the time and effort to do that." We've had good success with that, and I think that's a smart approach, because the cost can get out of hand just so quickly, it's frightening. It really is. So I think asking the Court — if you can't get cooperation from the other side — and we're, frankly, seeing more and more of the folks in our business who do regularly get involved in document-intensive cases are being real reasonable, because we all realized we've got clients on both sides of the docket, regardless of the case, who are having to shoulder these costs, and no one is benefitted by irresponsible shotgun discovery. It just isn't fair not to happen, regardless of what side of the case you're on. And so we're



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seeing more and more lawyers not trying to play the “gotcha,” at least not early on. I mean, you always assume they’re going to try to, but at least trying to be reasonable to start with. And if the lawyer won’t do that, we’ve had good success with going to the judge and saying, “Come on, Judge. Give us at least this additional salvo approach so that we’re not spending an inordinate amount of money.” We’ve also had some success getting the other side to agree if they want more, that they spend the money for the collection. We hire an independent third party, a collector and sifter, and the parties share that expense, or they spend the money, even though they don’t get possession, custody and control of the results until you have had a chance to go through them and determine what is or is not privileged and what is or is not relevant. So there are lots of innovative ideas you can try, and I don’t really think there’s any reason not to try anything and everything to try and hold the cost down.

ANDROVETT: *I fear this may sound like a flip question. I don’t intend it that way. But as I hear you talk about this level of cooperation, it sounds like you’re dealing with people who are as conversant as you are on e-Discovery. We all know that there are a lot of lawyers out there and a lot of companies that still are not as conversant in those topics. Here’s my question: do you find that this whole process goes better if you’re dealing with somebody who knows what they’re doing as opposed to someone who may think that they’re going to win their case just by burying you under discovery requests?*

CUNNINGHAM: Absolutely. It’s a lot easier to deal with someone who understands the jargon. And frankly, from an e-Discovery standpoint, you can send one request that will end up with 20 million documents in your office.

ANDROVETT: *Be careful what you ask for.*

CUNNINGHAM: Right. So you’re dealing with people that know what could happen if they are outrageous, if they are a lot more reasonable and easy to work with, at least in the beginning, before it starts getting nasty.

ANDROVETT: *Judge, I sort of teed this*

up for you in a way, because the logical follow-up is: how much of a premium do you put on litigants who have done their homework and who know the rules, and also cooperate?

JUDGE SMITH: The rules imply that you have to have counsel be familiar with what’s there, what’s available, who the key people are, what formats are available, what production can be done, what isn’t available. But it all comes down to acting reasonably, working together, conferring with each other. Let me tell you, it’s important for you to document your reasonableness with letters, with “this is what we need,” appearing reasonable and being reasonable. Think about how that reasonable letter will appear as Exhibit A on the production request to the Court and how it’s going to read, and that will give you a lot of help.

ANDROVETT: *Andrew, what about your costs from your perspective?*

COSTA: I find a lot of these costs are incurred up front. If you’ve got the right systems in place, the company sure will spend that money to retain a lot of these materials to begin. But then the real sticker shock is in the transactional costs. Each lawsuit you’re involved in, you go, “Wow, there’s more? We have to be able to look for this?” I’ve got to confess, I was asking Marty before about a way of cost-shifting or something like that. And I haven’t found a way to sort of minimize these things, even when sometimes conferring with opposing counsel. I mean, you’re in a fight for a reason and people just don’t go into egregious fight efforts to be reasonable.

ANDROVETT: *There was a fellow here at lunch with the Texas Center for Legal Ethics, and he was talking about perceptions of lawyers. It was humorous, and one of the elements that he had on*

his presentation was that many people don’t think lawyers contribute to the economy. Many corporate officers over the years have grumbled about how the sheer volume of discovery requests have forced them to really reconstitute how they collect and store their information. I’m wondering, Andrew, has there been any business benefit to that? Is there some benefit to a business to have its information house in order, if you will, that transcends the ability to succeed or get out of trouble in the courtroom?

COSTA: I’m sure there is. In my prison house of law, I only see how things develop, either with a lawsuit or a transaction, where you’re looking for documents, whether it’s for due diligence or something along those lines. And having things in place where you can find them and access them helps in those other areas of law through types of transactions. But in terms of sort of convincing business folks to realize there’s a real benefit or payoff for it in terms of dollars and cents and how they do business is often, for me at least, a tough row to hoe.



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ROSE: Andrew said something about five minutes ago that I thought was really an important thing that I want to emphasize and is really pleasant to hear a client say it. And he said something I've believed for years, particularly on the defense side, which is that documents almost never hurt you. Not having them can and generally does hurt you. And most

...especially in the beginning of the case, I see the motions dealing with the "gotchas," where the opposition is trying to find areas that you haven't disclosed, where you've provided affidavits and provided discovery and you're saying, "That's all there is," and you've missed something.
— Judge Craig Smith

businesses think exactly the opposite about that, and it's a highly controversial subject. It's hard to generalize because it is a specific kind of a topic based upon your business, and I'll say it doesn't apply to e-mails with a big asterisk, because e-mails still remain one of the best things you can find as a lawyer to bury your client. I mean, there are just so many bad e-mails out there, it's precious. It really is. It is amazing people still haven't figured out that people keep these things. But putting that aside, and this is only marginally on point, but I always keep my clients' files, whether it's a transactional case or a product liability case. I've had five instances over the last 20 years where clients have called me five, 10 years later that they've been through several sales, all the corporate records were tossed by the buyer, and then one got sued in a qui tam case, and nobody in the country had all their manufacturing records except Iron Mountain. I had all their files still, and they were able to defeat a qui tam case. I've had several involving mergers and acquisitions, exact same thing. The acquiring company tosses all the records. It's a housekeeping, and then they get sued on something, oftentimes arising out of the transition or transaction immediately before and they don't have the records. So the document retention thing, from my perspective, is almost always smarter, with the asterisk about e-mails, and corporate records are easy

to store online. They're easy to store off site. It's a business expense, but I think at the end of the day, you're always going to spend less money and have greater success defending yourself if you've got the evidence.

ANDROVETT: *Marty, you're talking about what I would consider sort of the linear electronic storage, but now you've got this sort of ambiguous, ubiquitous, social media component. Does that change anything in terms of responding to e-Discovery or building that into your platform or templates or your response teams, or how do you treat all the ever-increasing volume of social media information?*

ROSE: Well, depending on the kind of case you have, if it's a defamation case or personal injury case or an employment discrimination case, the social media, so-called, is a huge gold mine for counsel on both sides, usually more on the defense side than the plaintiff's side. But it's amazing what people will put in these social media sites. They're increasingly harder to get access to. They used to be very easy to get access to them if you were simply looking to mine, then you may actually have to, in litigation, get a release or serve a subpoena on the site. And we've heard about some of those in the press. But you may have to do some editing, because people are getting smarter about taking things down when they are discovered to have embarrassed them. But I think it's an area, as a lawyer, that you've got to consider, whether your case is a case where you might find some really juicy stuff, if you're being sued and you're a defendant or you're going to sue your opponent. It's amazing what people put on these Web sites. Another big area is a lot of people's phone systems nowadays have digital wave recording capability. And it's now legal in Texas for anybody to record anybody else, even lawyers, who I, personally, as a lawyer, find unbelievable, but our state bar says we can. And so you have to know whether your folks in your office, if you have that recording capability, are doing so and where are those things being stored. And you have to know, as



Judge Craig Smith presides over the 192nd Civil District Court in Dallas County. Before taking the bench in 2006, Judge Smith practiced civil trial law for nearly 30 years. He is one of the few Texas lawyers to be certified in both Civil Trial Law and Personal Injury Trial Law by the Texas Board of Legal Specialization. Judge Smith has published numerous articles on trial techniques and legal issues, in addition to holding leadership positions in local, state and national legal organizations, including the National Board of Trial Advocacy, American Board of Trial Advocates (ABOTA), State Bar of Texas, and Dallas Bar Association. A graduate of Texas Tech University School of Law, Judge Smith was named "Judge of the Year" by ABOTA's Dallas Chapter in 2008. In 2009, he received the Hartman Judicial Pro Bono Service Award from the Dallas Bar Association based on his participation and support for the Dallas Volunteer Attorney Program.

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a lawyer, to ask the other side, because you sure want to know if they recorded your chairman of the board telling them what-for in four-letter words. You'd like to know that before trial and figure out what to do about it. You have to know how many e-mail accounts somebody has. You have to ask people, "Do you just have a business e-mail account or do you have a Facebook page? Do you have a blog?" People have blogs, nowadays, that

laptop at home? Do you have zip drives? Do you have a MySpace page? Do you have a Facebook page? Do you text? Do you Twitter?" And if it's a "yes," then, "OK. Do you have anything relevant about this subject matter?" If the other side is smart enough to ask for it, you have an obligation to go find out if your custodians have put data on those media. I have my paralegal check for MySpace and Facebook pages for any personal injury plaintiff. That's just part of the program. You'd be amazed at what they are willing to tell the entire world on their Facebook or MySpace page. And if one of your employees has done it and you're a defendant, you don't want that to come out in a deposition, watch the color drain out of their face. You'd rather know about it ahead of time. So, the social media opportunities are exploding, and I'm sure by the time this transcript gets printed up, there will be three more areas.

AUDIENCE MEMBER: *Do any of you have any experience with instant messaging? On the page where it says, "Know where your data is," referencing instant messaging, our IT people said it's almost like two Dixie cups with a string in between. It*

connects the people so they can talk, but there's no recordation or keeping of it. We're not going to start keeping it or logging it, but I was just curious what your experience has been with instant messaging. It's truly not a new technology, but people don't seem to keep it. I know some people actually will cut and paste the message, the whole back and forth for their business purpose. I understand if you do that, you're stuck. But otherwise, any opinion on instant messaging?

CUNNINGHAM: Instant messaging is obviously one of the favored tools of the big companies. I have yet to run

across a platform that defaults to saving instant messages. It can be done. If you wanted to, you could tell your IT people to do it. But that is absolutely not the default. Once again, it gets back into the reasonable standard. If you have instant messaging inside your company and it is not saved and it is not logged and it never has been, and unless you're forced to, it never will be, that's a reasonable process. It is like a tin can between two people. That's fine. Like you said, if you cut and paste it and save it, you're stuck. You've made a record of it, but I have yet to see a platform at a company where instant messages are saved like e-mails.

AUDIENCE MEMBER: *With regard to the litigation hold letter and distribution, you mentioned that, to be on the safe side, you might want to send it to your entire company or division of the company. What about the little lawsuits you get all the time, like the disgruntled employee? Don't you want to keep those a little more contained, possibly because they contain personal information, things like that?*

ROSE: Absolutely. For example, a discrimination case, as a good for instance, obviously the only thing that's going to be relevant initially are personnel files, which you keep in any event, and information about that particular employee and perhaps that employee's immediate supervisor or whoever it is being the harasser or discriminator. And, no, you don't need to send it companywide. And I think Judge Smith has said it better than any of us, which is a reasonable response to a claim is always going to be, I think, a good, safe default. I really do. Now, again, they may then want to say, "Well, no, we think that Coca-Cola is discriminating against a class of people and we want everything." When it gets to that point, then that's a different issue, but I think you're always safe to — and ought not to — distract your folks from trying to make a profit for your company.

COSTA: One thing you had mentioned on litigation hold before, which I have had an issue, is really you want to be sure people are implementing them and not playing lawyer. I've heard people say, "Well, that's between you and me. You don't need that. That's privileged."



you wouldn't anticipate. So you have to be pretty creative in asking them what is out there, both from an offensive standpoint and as a defense lawyer getting ready to defend your client.

CUNNINGHAM: As a lawyer working with your client to capture and preserve EDD that you might have to produce, that goes into if you identify your 25 custodians that have relevant information, you need to have a questionnaire that you work with, that your IT person does and your in-house counsel individual will interview these custodians, and you've got ask them, "Do you have a

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That's not for you to decide. You have to give that to us. And that's one of the things about these hold orders I think is important — being very explicit. You don't decide what is too hard to get. You ask me about that or outside counsel, and even if it's a communication with us, counsel, you still have to give that to us. You can't be making these decisions yourself. And I think these lawyers almost require an express line, a sentence underlined in bold stating that, saying, "Let us make those decisions for you."

CUNNINGHAM: And for the small lawsuits or the sensitive lawsuits, if you will, that's kind of where you identify who your custodians are. Maybe it's a he-said/she-said discrimination suit and she has left the company, he is still there, you go to him to find out, "OK. You've got to stay, you've got to keep all your stuff or we're going to do a litigation hold on your files." Maybe you find out through investigation, internal investigation who the other custodians may be and you can go to them one at a time, find out if they have something relevant. If they do, then you hold it. So there's whatever is reasonable. That's the easy answer.

ANDROVETT: *Talk to me a little bit about that dynamic that occurs within a company. Everyone's working really hard to get a grasp on what the data is, where*

What we see time and time again is in the execution of that litigation hold and in the trenches, in the corporate offices, companywide, people making their own decisions about what that really means and deciding for themselves that well, that really doesn't mean what they say it means...

We've seen in-house folks, in other words, members of the corporate legal team, make unilateral decisions relaxing the standard, as well as managers down the line and in the workforce.

— Marty Rose

it's stored, what's available. And it seems like every company, they've got one person in the IT department whose mandate for many years is, "don't lose anything." Can a company be too clever in trying to train everybody about good e-Discovery practices, or is the point of this conversation today that you can never be too careful? Because

that story gets repeated over and over again about the one guy who they finally find who says, "OK. I can tell you where all that legacy data is and how to transfer it," and it could be traumatic to the case. What is the right approach within a company?

ROSE: You know a question is good when we all sit here with our tongues hanging out of our mouths without a ready answer. A red flag for me is if you discover that a business has one set of document-retention policies for business and a second set for litigation. And so I guess from my perspective, you do what is rational for your business. If you're in manufacturing, aviation-related products where it's important for you to have a paper trail for safety, both for regulatory requirements or manufacturing working requirements, apply those standards to your practices and it's different if you're in a service business and you get a thousand service calls a day for a leaky pipe, for example. To me, it's a rational issue, and I guess as to the IT guy specifically, if anybody here has not had an experience with their IT department doing something completely off the wall from the perspective of what you thought is rational. And we have great IT guys, but they do some stuff that just amazes me. So it's better to find that out first from a conversation you had with them yourself than when your opposing counsel gets in a deposition, and then you find out. So I guess that's the only advice I can say.

CUNNINGHAM: One of the easy ways to perhaps find out where those bodies are buried, if there are any out there, is to have a questionnaire and sit down as soon as you realize you need to sit down with in-house counsel, outside counsel, IT, and

then relevant managers or custodians or whomever, because, like we say, lawyers have to speak IT. IT has to speak some law, and you've got to make sure that the managers and employees are properly instructing their people to answer things. So having a real nice, extensive questionnaire that you



Mike Androvett is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience are essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. He can be reached at 214-559-4630 or mike@legalpr.com.

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sit down and you go over whenever it becomes important to do so. And you can do it as a group, you don't just send it out, ask people to send it back. You invest the time to do these face-to-face interviews or you get the control group together and everyone talks about where they think things might be. Then you can identify what is too burdensome to recover for cost-shifting purposes, or what is legacy data that is no longer actually accessible. If you just sit down and everyone says where everything is and you find out what it is and you put it in writing and you have a questionnaire that forces you to ask those questions, chances are you'll find what you need to find.

ANDROVETT: *I've always found it curious that Texas law predates the amended Federal Rules in this area of ESI. Yet throughout Texas, on any given day, you can hear a trial lawyer involved in some e-Discovery dispute sort of bemoan the lack of education/interest that they describe among judges who sit on the bench. Now, we all know that there are two sides to that story. So here are the questions that I'd like maybe to get some answers out of. One is: are there things that a lawyer can do to educate a judge in a way that will make them more responsive to their e-Discovery arguments? And then, Judge, maybe you can give the perspective from the bench of just what you'd like to see when someone comes to you and says, for example, "Oh, my God, this request is too burdensome," or, "Hey, Your Honor, we'd like for you to consider making these guys pay." Let's start with: Is this a mini trial? We've got an e-Discovery question, and we've got to educate the judge. How do we do that?*

ROSE: I really want to hear His Honor's comments, but you hit the nail on the head in terms of the mini trial. If you're going to preserve on appeal an issue about e-Discovery, you had better have an evidentiary hearing and convince the judge to do that. We've got a case going on appeal right now where the opponent destroyed three computers that I had actually identified by name and owner of the computer in a hold letter. And he did it well after the case had started, in

fact, after the chairman of the board of that defendant's company's deposition was taken. And we had an evidentiary hearing before trial and I proved it all up and the judge said, "So what? Tell me, Rose, what was on that hard drive that would have helped your case?" I said, "Well, Judge, if I had the hard drive, I'd show you, but I don't." And the judge was nonplussed, and so we're going to appeal that. And, thank goodness, I've got a half day of evidentiary hearing

Let's say that over the course of a year at your amusement park, five percent of the people file suit or even make a demand that you settle out of court. Just because someone gets hurt and you get a notice that there's someone hurt, you have to completely stop all routine document destruction or deletion? I don't think so, but should you at least quarantine the accident report and photograph and the e-mails that were taken in the four or five days after that incident and at least save those? That might be a reasonable approach.

— Ross Cunningham

that at least establishes that these things were deliberately destroyed. I would have been scared to death to be his lawyer. Apparently, I just don't ask very good questions on cross-exam because the judge wasn't concerned at all. So you have to have the evidence. And I think if you have a judge who has not yet had to deal with these issues, I think the smart thing is to gently and reasonably try to, in your papers, draw the background for it.

JUDGE SMITH: It's the lawyer's job to educate the judge. We're in a court of general jurisdiction. We handle malpractice, professional, corporation issues, e-Discovery issues, trademark issues, and it's fact-specific, case-specific, what the case is about, how you store your information, what your formats are, what your retention policies are. It is the lawyer's responsibility to educate the judge — both lawyers to confer and outline exactly what the issues are that the judge needs to decide, because most of the problems can be worked out between the litigants. It's only the hard questions that the judge has to answer

and deal with, and that's our job. But to answer those hard questions, we need to know the facts, the dispute, who, what, where, why you need it and why you can't produce it, or why it can be produced, and then you balance. But without that education from the lawyers, we can't get there, because there is not a broad brush that can be applied to every case that comes through.

ANDROVETT: *Judge, is there a way that you like to be educated on these issues? The range of possibilities seems almost endless, but what works for you? And I realize that you can only speak for yourself, but maybe through your perspective, you can provide some insights that can be applied elsewhere.*

JUDGE SMITH: We don't have the preconference requirement and that's set out in the federal rules, but I hope to have it soon, at least in the 192nd. I've seen the problems with them dealing with these disputes on a hot basis as they come in. Once again, each situation is different. Deal with it.

The lawyer is going to be instructed what they need to know, and from the key man to the information, what information is out there, what information can be retrieved, what is not being retained. And they need to come in and have enough information to inform us or we cannot satisfy the request or we can't get the producing party the protection it needs.

COSTA: I think it's a process that starts with the story you start putting together right when you're going through that questionnaire with your IT folks about, what am I going to have to explain and why we do or don't have certain things or why we can or shouldn't have to get certain things? And again, I think at the very outset you're putting that case together for that mini trial.

CUNNINGHAM: A lot of the lawyers, if not darn near all of us, are not IT professionals, and so we know what we're talking about to a certain extent and to a certain level. But if it's important enough, if the case is worth enough dollars or the issue is so critical that you have to have it, you can bring in an expert. You can put the vendor on the stand and say,

Let me tell you, it's important for you to document your reasonableness with letters, with this is what we need, appearing reasonable and being reasonable. Think about how that reasonable letter will appear as Exhibit A on the production request to the Court and how it's going to read, and that will give you a lot of help.
— Judge Craig Smith

“Dear Mr. Vendor, please explain to the Judge how long it would take, how much it would cost and what you would get if you were allowed to do so.” Or if you're on the other side, “Please explain to the Judge why what they're asking for is outrageous.” It's done, not all the time, but it is done and it can be a very effective way as opposed to affidavits or lawyers just getting up and saying, “Gee, Judge, it seems like we should get this.” If it's important enough, vendors are more than willing, more than capable, to come and offer their perspective.

JUDGE SMITH: And that's a good point, Ross. It's happened in my court and you need it. I need that insight. I need to be able to ask that vendor myself some questions that I might have that haven't been answered by the affidavit or the lawyer.

ROSE: Is it going to be more persuasive to you, generally, Judge, rather than a declaration from the lawyer, either having a declaration from that vendor or having that vendor there, live, to give you sort of that disinterested party kind of perspective — or is that overkill?

JUDGE SMITH: Every time I've had a vendor there, I sure did like it. But that may be case-specific that the lawyer thought, “Well, I can't explain this issue well, so I need the vendor.” But every time a vendor or the IT person has been there, it has helped me in answering my questions.

ANDROVETT: *Last question: When the federal rules were amended to include electronically stored information, there was a little bit of an upheaval and a lot of discussion about how things are going to*

have to shake out. Well, now, generally, I think there is an emerging consensus that things have shaken out, and there's a lot of conversation given to how this area is now evolving. Can you all just look in the crystal ball maybe five years and give us some sense for where you think e-Discovery is evolving to? What's it going to look like? Will it be much different?

CUNNINGHAM: I think the one thing I've seen is the Federal Rules specifically address the production or at least the potential for producing metadata, which is all of the hidden codes, who wrote something, when it was written, how many times it was edited, how many times it was printed. Kind of the default, at least our experience, has been the default, if you're not going to produce metadata. You'll collect it and keep it, but you won't produce it. It seems like more and more of the vendors are saying, “If you go get us the metadata, our neat little review tool could provide you with greater functionality.” And producing metadata is resisted because it is expensive and it's more intrusive. Perhaps it goes that way toward more metadata. That's my guess.

ROSE: I'm going to give a hope, not a prediction. My hope is that someone out there actually gets the technology right for AI, artificial intelligence, and for software which can really do the search and really do what the salespeople say they can do. None of them can so far that we've seen — which we've looked at all of them — and I'm not going to name any names, but if it's out there we've looked at it and used it for the most part with dissatisfied results. But my hope is that we bring the costs down through judicial action, as Judge Smith discusses, in becoming more reasonable, more results-oriented and with better use of technology and search capabilities. My concern now is that it is still outrageously expensive, and it impairs the ability of anybody, business world or otherwise, to have free and open access to our courts, which I think is absolutely critical for democracy that we have free access. And when it's too damn expensive for even a successful business to defend itself or to prosecute a worthwhile dispute, that is wrong. And that's where we are right now and we need to get away from it. ❖

TOP 10 E-SSENTIALS

1. Litigation Hold letter – to client
2. Confirm client's IT department implements Litigation Hold
3. Litigation Hold letter – send to opponent
4. Develop ESI (electronically stored information) interview form
5. ESI – identify custodians and locations
6. Protective Order – address all aspects of ESI
7. Ask for native files
8. Litigation Hold letters – to non-parties
9. Opponent's IT policies – interrogatories & production requests
10. Outside vendors to capture ESI



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