

BAR BULLETIN

Top 10 Don'ts and Do's To Avoid Bad E-Discovery

By **Larry G. Johnson**

When it comes to discovery of electronically stored information (ESI), it is not enough to talk about best practices.¹ Litigators should be equally aware of some ingrained “worst practices” that I see happening all the time.

These bad practices usually lead to predictable trust issues that in turn spawn all sorts of needless rancor, motions to compel and calls for sanctions. These are the sorts of things that can make the practice of law so unpleasant.

So, here are my “Top 10 don'ts and do's to avoid bad E-discovery,” not necessarily in order of importance:

1. Don't turn searches for potentially relevant ESI over to your client's employees. First, their involvement will cause the other side to be justifiably suspicious that employees could be motivated to not produce — or even delete — embarrassing or damaging information. Trust issues are the biggest cause of discord in e-discovery, so why invite that?

Second, the employees will most likely have no training or experience in knowing what evidence might be relevant, since relevance relates to both factual *and* legal issues. To do that right requires legal training. *Do perform ESI searches yourself*, with help as needed from a properly trained paralegal or e-discovery expert.

2. Don't assume your firm's or your client's IT people have any competence in computer forensics or e-discovery. Yes, they know a lot about computers and networks, but all their training and experience are geared toward keeping the

lifeblood of an enterprise's network and computer systems working and secure. But knowing how and where to look for digital evidence on computer storage devices entails specialized skills that are not usually taught to IT people.

An analogy: asking a traffic cop to do a full-scale homicide investigation where he/she never had any training or experience in forensics. *Do: Use an ESI expert to assist you in ESI strategies and scope.*

3. Don't expect to find more than a fraction of relevant ESI by using the “Find” feature in Outlook. Microsoft's Outlook/Exchange remains a predominant email application used by many enterprises large and small. And if you are one of those users, no doubt you have had occasion to look for an old email from so-and-so by using Outlook's “Find” feature.

But as a search tool for ESI, Outlook is almost useless. Among other drawbacks, the “Find” feature does not search the contents of files attached to emails. If “the smoking gun” is a Word document with all sorts of juicy text, but it's an attachment to an email, the Outlook “Find” feature will miss it entirely.

Do: Use software, with expert assistance as needed, utilizing robust text search capabilities.

4. Don't rely on the Outlook “Find” feature, Part II. It can't do Boolean searches. George Boole was an English mathematician who devised a logical system whereby, as used in e-discovery search engines, several reductive factors can be considered at once to produce focused results.

For example: “George” AND (“Smith” OR “Jones”)” used as search terms will produce hits for “George Smith” or “George Jones,” but not “George Anderson.” Boolean combinations can get far more complex and sophisticated, but you cannot do something as basic as the example given when using an Outlook “Find.”² *Do follow the advice in No. 3.*

5. Don't delegate e-discovery decisions to a service provider. I have already preached in previous Bar Bulletin articles about the need for lawyers to take charge of the e-discovery process in their cases and be directly involved.³

Vendors who offer to process and organize the ESI for your case are strongly motivated to include as much data as possible, since most of their revenue models depend on the volumes of data they handle and/or host. Another reason for their being over-inclusive: they usually have no understanding of the issues in your case, the rules of evidence or how the litigation process works.

Do: As the field commander in charge of the litigation workflow, get help as needed, but you make the decisions.

6. Don't use no stinkin' Bates stamps! Come on, Bates stamps are so 20th Century! Why do lawyers go to the expense of converting native electronic documents into PDFs just so a simulated Bates stamp can be superimposed on them?

There is a better, easier and cheaper way: hash values. A hash value is a number easily and quickly generated by computer that is an electronic fingerprint unique to that file. Thousands of

documents can be “hashed” in a matter of seconds, with the unique hash values exported into a shareable database or spreadsheet.

A hash value looks strange because it is written as a hexadecimal number that includes letters as well as numbers. Here is a typical hash value: e0d123e5f316bef78bdf5a008837577. That is an insanely big alphanumeric. If you have two files with the same hash values, then they are identical; they are “originals” indistinguishable from each other.⁴ *Do: Use hash values as a substitute for Bates stamps.*

7. Don't produce ESI in unsearchable format. Read FRCP 34(b)(2)(E) and the commentary to it.⁵ Producing non-searchable images instead of searchable native files is a certain recipe for Rule 34 noncompliance.

I was involved in a case where a lawyer had to explain to his client why his decision to produce documents as TIFF image files would now cost \$1.3 million in a do-over ordered by the judge. *Do: Produce files in native format.*

8. Don't drive the judges nuts. Trial lawyers should decide on some kind of “pre-nup” before the potential for things going sour in discovery becomes a reality. Judges for the most part hate e-discovery disputes, and you can see why there have been a number of initiatives by judges to curb abuse and discord in this area.⁶

Judges are really not equipped to decide technical issues in computer forensics and e-discovery. *Do: Propose to opposing counsel a special master or court-appointed expert in advance of any disputes.* Just knowing such a person is available might prevent actually having to use him or her to prevent shenanigans.

9. Don't let what you learn in one

case not apply in another. If you have clients who find themselves in litigation a lot due to the nature of their businesses, it is not that hard to set up a database of commonly requested documents that resurface frequently in every case.

Rule 26(a) initial disclosures are a lot easier if you already know what will be routine evidence in the case, and your database will keep tabs on what legal positions your client has taken as to each document. *Do: Save yourself and your client the embarrassment of arguing a document is privileged in Case B if it was previously produced in Case A.*

10. Don't wait until the last minute to do e-discovery. Lawyers frequently put off e-discovery in hopes of saving their client's money if the case can settle. That is a reasonable intention, but it has strategic drawbacks that can be even more expensive.

Do: Take the initiative at the outset of the case to take full advantage of Rule 26(f) opportunities to guide and limit e-discovery. You can do a lot to shape the case in ways most advantageous to your client.⁷ Further, service bureaus you may rely on to process, cull, search and analyze the ESI of importance to you cannot perform miracles. Those efforts take time, and they have other clients to serve as well. A last-minute scramble to catch up on everything on the eve of trial will often simply not work in the world of ESI.

So, there you have my biggest peeves and tips in a nutshell.

Do: Go forth and sin no more. ■

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served on the E-Discovery Subcommittee of the WSBA Escalating Cost of Civil Litigation (ECCL) Task Force. Besides being a litigator, for the past 20 years he has served as a consultant and expert witness in e-discovery matters. He does business as Electronic Data Evidence (www.e-dataevidence.com).

¹ For best ESI practices that judges grasp and promote, see the Western District of Washington's Model ESI Agreement at <http://www.wawd.uscourts.gov/sites/wawd/files/ModelESIAgreement.pdf>. It promotes proportionality by, for example, limiting initial e-discovery to five persons; ignoring computer-generated data types of unlikely value; limiting the number and scope of agreed-upon search terms; requiring specificity in requests (no more “kitchen sink” discovery); claw back of privileged information; and other positive features.

² Software commonly used in ESI searches has other search features such as “fuzzy logic” (words that are close in spelling are included in search results), thesaurus searches (synonyms included as search terms) or proximity searches (words in close proximity to each other, such as “George” within 5 words or less of “Washington”). The Outlook “Find” feature cannot do these kinds of searches either.

³ See my articles “Still the No-Brainer E-Discovery Tool,” January 2016, KCBA Bar Bulletin at 24: <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=01&Year=2016&AID=article6.htm>; and “Trust Yourself To Conduct Early Assessment of Electronic Evidence,” February 2016, KCBA Bar Bulletin at 14: <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=02&Year=2016&AID=article9.htm>.

⁴ For an in-depth discussion on substituting Bates stamps with hash values, see <https://e-discoveryteam.com/school/computer-hash-5f0266c4c326b9a1ef9e39cb78c352dc/>.

⁵ Especially this sentence: “If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.” Committee Notes on Rules—2006 Amendment.

⁶ In addition to the Western District's Model Order, the Seventh Circuit's “Pilot Program on E-discovery” and the Eastern District of Texas's model order on e-discovery in patent litigation are available for download at <http://e-dataevidence.com/Links.html>.

⁷ See my article, “Your Electronic Discovery Plan: Rule 26 – Hidden Nuggets for the Savvy Litigator,” June 2016, KCBA Bar Bulletin at 24: <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=06&Year=2016&AID=article20.htm>.