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ELECTRONIC DISCOVERY AND THE CONSTITUTION:
INACCESSIBLE JUSTICE

Jennifer M. Smith*

“Maybe -- maybe everybody else knows this, but what is the difference between a pager and e-mail?”⁴¹⁴

Abstract

Computers are the cynosure of American society. As a result, most information is stored electronically and only a small amount of

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⁴¹⁴ Transcript of Oral Argument at 29, *City of Ontario, California et al. v. Jeff Quon et al.*(2010) (No. 1332), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1332.pdf (quoting Chief Justice Roberts).

information ever becomes a paper document. This explosion of electronically stored information has affected every aspect of society, including the court system. Litigation is drastically different than a few years ago due to this onset of electronically stored information. The discovery of electronically stored information in litigation has become known as electronic discovery. For many, electronic discovery is expensive and complicated, and thus, litigants are settling frivolous cases to avoid the costs and complexities of engaging in discovery to exchange electronically stored information. Even now, many attorneys do not understand how to obtain and utilize electronically stored information nor do they have the resources to engage an information technology technician to assist them. Often judges are not educated in the exchange of electronically stored information either. The advent of electronic discovery in civil litigation is not only foreign to many attorneys and judges, but also unrepresented parties, and thus, impacting indigents' access to justice.

The United States Supreme Court has declared access to justice – including access to the courts – a fundamental right. The United States recognizes a right to counsel for indigent litigants in criminal cases, but not civil cases. Indigent civil litigants already are at the losing end when involved in the court system, even with the aid of the self-help centers and the handful of volunteer lawyers and legal aid societies. Poor litigants are usually self-represented in civil matters because of the inability to afford counsel. Yet, significant

rights – basic needs -- may be at stake in these cases, such as housing, safety, health, child custody or sustenance. Electronic discovery is significantly impacting access to justice because the costs and complexities of electronic discovery are further preventing poor and even moderate income litigants from accessing justice in the American legal system.

I. INTRODUCTION

Electronic discovery is currently the most popular topic in litigation.⁴¹⁵ In the last decade, the number of federal cases that were either dismissed or settled before trial rose from ninety percent to ninety-eight percent because of electronic discovery, establishing what is now referred to as the “vanishing trial.”⁴¹⁶ Electronic discovery also raises significant constitutional issues. Many companies, as well as other entities, store virtually all of their information electronically, and thus, civil discovery has moved from primarily traditional paper discovery to electronic discovery or “e-discovery.”

⁴¹⁵ SHIRA SCHEINDLIN, DANIEL CAPRA, THE SEDONA CONFERENCE, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE, 1 (2009); *see*, Dennis Kennedy, *Law Practice Today: A Gold Mine of Electronic Discovery Expertise: A Conversation Among Veterans of Electronic Discovery Battles*, LAW PRACTICE TODAY, July 2004, <http://www.abanet.org/lpm/lpt/articles/ft07041.html>.

⁴¹⁶ DAVID I.C. THOMPSON, LEGAL EDUCATION FOR A DIGITAL AGE 50 (2009); RALPH C. LOSEY, E-DISCOVERY CURRENT TRENDS AND CASES 2 (2008).

Civil discovery is the “[c]ompulsory disclosure, at a party’s request, of information that relates to the litigation.”⁴¹⁷ E-discovery involves “the subset of that compulsory disclosure that requires the identification, preservation, collection, review, and production of electronic records and information ‘stored in any medium from which information can be obtained.’”⁴¹⁸ Electronically stored information (“ESI”) comes from digital generating devices, such as computers,⁴¹⁹ “email, web pages, word processing files, audio and video files, images, computer databases, and virtually anything that is stored on a computing device – including but not limited to servers, desktops,

⁴¹⁷ Jason Fliegel and Robert Entwisle, *Electronic Discovery in Large Organizations*, 15 RICH. J.L. & TECH. 1, 3 (2008-09) (citing Black’s Law Dictionary 498 (8th ed. 2004)).

⁴¹⁸ *Id.* (citing Fed. R. Civ. P. 34(a)(1)).

⁴¹⁹ MICHAEL R. ARKFELD, *ESI PRETRIAL DISCOVERY 2*, Law Partner Publishing LLC (2008).

laptops, cell phones,⁴²⁰ hard drives, flash drives, PDAs and MP3 players.”⁴²¹

As a result of e-discovery, much of litigation has been significantly reduced to accessing and producing ESI, resulting in an increase in settled cases.⁴²² This is because e-discovery is costly and complex.⁴²³ “Anecdotal reports indicate that the

⁴²⁰ Daniel B. Garrie and Yoav M. Griver, *Mobile Messaging and Electronic Discovery*, 8 LOY. L. & TECH. ANN. 95, 96 (2008-09) (“Mobile phones are not simply phones any more. They are communication devices, PDA’s, cameras, entertainment devices, radios, media players and Dictaphones, all in one.... While the law around electronic discovery has been clarified in many respects in recent years, its application to mobile communications - which merges oral and data communications - is a new frontier that raises a litany of unique issues regarding privacy, eavesdropping, and data retention and production.”).

⁴²¹ SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2007), available at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.

⁴²² *Electronic Discovery: Of Bytes and Briefs*, THE ECONOMIST, May 19, 2007; Daniel B. Garrie and Daniel K. Gelb, *E-Discovery in Criminal Cases: A Need for Specific Rules*, 43 Suffolk U. L. Rev. 393, 399 (2009-10).

⁴²³ George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?* 13 Rich. J.L.& Tech. 10 at *10 (2007); see also *Electronic Discovery: Of Bytes and Briefs*, *supra* note 9 (noting one in house counsel estimates his company’s legal fees spent on discovery have increased by 25% because of e-discovery concerns, and that another lawyer had to employ 31 lawyers to spent six months searching through ESI to determine which documents must be produced

cost of reviewing information can easily exceed thousands of dollars per custodian, *per event*, for collection and attorney review.”⁴²⁴

The Federal Rules of Civil Procedure and Federal Rules of Evidence were amended to handle discovery of electronic information.⁴²⁵ ESI is now the most common source of evidence in civil litigation, requiring lawyers, judges and litigants to understand e-discovery, how to access ESI, the

to the plaintiff); see also Perry L. Segal, *The Cost of ESI*, CALIFORNIA LAWYER, 2009, available at <http://www.callawyer.com/story.cfm?eid=904481&evaid=1>.

⁴²⁴ BEST PRACTICES COMMENTARY ON THE USE OF SEARCH AND INFORMATION RETRIEVAL METHODS IN E-DISCOVERY, THE SEDONA CONFERENCE JOURNAL, Aug. 2007, at 198, available at http://www.thesedonaconference.org/content/miscFiles/Best_Practices_Retrieval_Methods_revised_cover_and_preface.pdf (“Compare \$1 to store a gigabyte of data with \$32,000 to review it (i.e., assuming one gigabyte equals 80,000 pages, and assuming that an associate billing \$200 per hour can review 50 documents per hour at 10 pages in length, such a review would take 160 hours at \$200/hr, or approximately \$32,000”).

⁴²⁵ Garrie et al, *supra* note 9, at 397; Justin P. Murphy and Stephen M. Byers, *E-Discovery in the Criminal Context: Considerations for Company Counsel*, White Collar Crime Rep. (BNA) No. 4, at 116-120(Feb. 13, 2009), available at http://www.crowell.com/documents/E-Discovery-in-the-Criminal-Context_Considerations-for-Company-Counsel.pdf. see Fed. R. Civ. P. 16, 26, 33, 34, 37, 45., Fed R. Evid. 502, 901.

methods of storage of ESI, and the admissibility of ESI.⁴²⁶

Although there have been numerous conferences and continuing legal education (CLE) seminars on e-discovery,⁴²⁷ discussions on the

⁴²⁶ Richard N. Lettieri and Joy Flowers Conti, *E-Discovery and Pretrial Conferences*, JUDGES' JOURNAL, 34 (Summer 2007); Ralph Losey, <http://e-discoveryteam.com/interviews/ethics-interview/> (last visited May 20, 2012) ("There can be no real justice without truth, and in today's world of civil litigation, no real truth without e-discovery. That is because writings are the key evidence in most cases and almost all writings today are electronic."). See also, *The Big Data Dump*, THE ECONOMIST, Aug. 28, 2008, available at <http://www.economist.com/node/12010377> ("And yet almost all information today is electronic, and there is ever more of it. 'Things that we would never have put in writing are now in electronic form,' says Rebecca Love Kourlis, formerly a justice on Colorado's Supreme Court and now the director of an institute at the University of Denver dedicated to rescuing America's civil-justice system. This system, she says, was already a 'sick patient'—with crowded dockets and understaffed courts—but electronic discovery now threatens a lethal 'spike in fever'. She has seen ordinary landlord-tenant disputes take three years, and divorce cases that might have been merely bitter, but are now digital wars of attrition. She sees cases that are settled only because one party cannot afford the costs of e-discovery: whereas in the past 5% of cases went to trial, now only 2% do. She knows plaintiffs who cannot afford to sue at all, for fear of the e-discovery costs.")

⁴²⁷ Richard L. Marcus, *E-Discovery & Beyond*, 25 REV. LITIG. 633, 643 (2006) ("To say that the CLE market has taken note of E-Discovery is an understatement. ... CLE programs on E-Discovery ...over a period of several years ...occurred at a rate of about two per week").

impact of e-discovery and access to justice have been missing.⁴²⁸ E-discovery has a grave impact on access to justice – a fundamental constitutional right.⁴²⁹ Even before the onset of e-discovery, many litigants cannot afford to sue or defend themselves. Now with the added burdens of e-discovery unrepresented litigants are even further disadvantaged because e-discovery costs can be prohibitive to litigation.⁴³⁰ That is, e-discovery negatively impacts the poor litigant particularly, so that “justice is determined by wealth, not by the merits of the case.”⁴³¹ Those few times when e-

⁴²⁸ American Bar Association, E-Discovery and Digital Evidence Committee, *E-Discovery and Digital Evidence Committee Information*, available at <http://www2.americanbar.org/sections/scitech/ST203001/Pages/Information.aspx> (last visited June 1, 2012) (“Will the complexity and expense of e-discovery make it more difficult for those with fewer resources to seek justice through litigation.”).

⁴²⁹ *Griffin v. Illinois*, 351 U.S. 12 (1956) (describing it as a fundamental right).

⁴³⁰ ; Thomas E. Stevens and Wayne C. Matus, *The National Law Journal*, *A Comparative Advantage to Cut E-Discovery Costs*, Sept. 4, 2008, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202424251053> (“There is a perfect storm brewing in the sea of discovery. The quantity of potentially relevant electronic information is increasing exponentially, law firms’ hourly rates are climbing, pressure to reduce costs is growing and, at the very same time, attorneys are beginning to face malpractice claims and ethical charges because of discovery-related failures.”)

⁴³¹ *The Big Data Dump*, *supra* note 13 (quoting Justice Stephen Breyer)

discovery and access to justice are jointly considered, the conversation usually concerns e-discovery's impact on mid-size cases or smaller companies, not the individual indigent litigant.⁴³² Thus, no group is focusing on e-discovery's impact upon low-income (and even moderate-income) persons, specifically the financial and educational barriers it creates to access to justice.

The focus of this article will be the impact that e-discovery is having upon those traditionally underrepresented in the legal system – the poor. The focus will primarily be on the American civil justice system, but will also shed some light on e-discovery's impact within the criminal justice system as well. As further addressed below, e-discovery is quite costly and complicated,⁴³³ and “[a]s law becomes increasingly crucial and complex, access to legal services also becomes increasingly critical.”⁴³⁴ This article will address the foreseeable issues surrounding e-discovery and the indigent, which includes the “courthouse poor.” The “courthouse poor” includes those individuals who are considered moderate to middle income earners, but cannot afford to dedicate or tie up their

⁴³² Felisa Cardona, “*Balance Sought on Rising Cost of Gathering Electronic Evidence*,” THE DENVER POST, Oct. 25, 2009 (“We’re not talking about indigent people, we’re talking about a different version of the access problem.”).

⁴³³ See Section III below.

⁴³⁴ DEBORAH L. RHODE, ACCESS TO JUSTICE, 8, Oxford University Press, 2004 (citing Lawrence M. Friedman, Total Justice (New York: Russell Sage, 1994)).

money in legal fees by hiring a lawyer. The very poor often have the benefit of representation from legal services charitable organizations. This article will also address the financial and educational burdens e-discovery imposes on access to justice. The main purpose of this article is to illuminate the miscarriage of justice that can occur with the poor, unrepresented litigant and electronic discovery – a problem that few in the legal community have addressed.

II. ACCESS TO JUSTICE FOR THE INDIGENT

The United States stands proudly on its claim of “equal justice under law.”⁴³⁵ “Equal justice” includes equal access to the nation’s justice system.⁴³⁶ “Equal access to the judicial process is the *sin qua non* of a just society.”⁴³⁷ Nevertheless, many Americans lack any access to the justice

⁴³⁵ Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1785 (2000-01); Jack B. Weinstein, *The Poor’s Rights to Equal Access to the Courts*, 13 *CONN. L. REV.* 651, 655 (1981)(“Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this foundational protection through the courts, most of the rest of our promises of liberty and justice for all remain a mockery for the poor and the oppressed.”).

⁴³⁶ Deborah L. Rhode, *The Social Responsibility of Lawyers: Equal Justice Under Law: Connecting Principle to Practice*, 12 *WASH. U. J. L. & POL’Y* 47, 48 (2003)(citations omitted).

⁴³⁷ Weinstein, *supra* note 22, at 655.

system, not just equal access.⁴³⁸ In reality, this national promise of “equal justice” is empty for the nation’s poor, and even for many moderate income citizens.⁴³⁹

The Equal Protection Clause requires that indigents be granted equal access to the courts in very limited circumstances. For example, the government may be obligated to furnish a lawyer,⁴⁴⁰ waive fees,⁴⁴¹ or pay litigation costs for those who

⁴³⁸ Rhode, *supra* note 22.

⁴³⁹ RHODE, *supra* note 21, at 4-5 (“It is not only the poor who are priced out of the current system. Millions of Americans, including those of moderate income, suffer untold misery because of legal protections that are available in principle are inaccessible in practice”).

⁴⁴⁰ Gideon v. Wainwright, 372 U.S. 335 (1963).

⁴⁴¹ M.L.B. v. S.L.J., 519 U.S. 102 (1997)(finding that even though this was a civil matter, the Equal Protection Clause required the state to waive the fees for the indigent parent so that she could have an adequate record for appellate consideration of her claim because the case directly implicated a parent’s fundamental interest in her relationship with her children). *See also*, Boddie v. Connecticut, 401 U.S. 371 (1971)(holding that the state was constitutionally required to waive court fees and costs for an indigent seeking to get a divorce because the state had a monopoly on adjusting marital relationships, thus, the fee requirement would operate as a direct infringement on the fundamental right to marry). *But see*, U.S. v. Kras, 409 U.S. 434 (1973)(upholding the fees for bankruptcy and thus denying indigents a right to access to bankruptcy courts because unlike Boddie, Kras did not involve any fundamental right at stake).

are unable to pay.⁴⁴² In fundamental rights cases, the determination is whether the individual statute constitutes a restriction on the fundamental right that violates the Constitution, not whether it is fair or unfair to indigents.⁴⁴³

With respect to a constitutional right to legal counsel for indigent defendants, the Sixth Amendment provided for that in federal criminal prosecutions, but in 1963 the Supreme Court unanimously declared in the historic case of *Gideon v. Wainwright* that the right to legal counsel for indigent defendants also applied to state criminal prosecutions pursuant to the Sixth Amendment.⁴⁴⁴ Almost ten years after *Gideon*, the Supreme Court decided *Argersinger v. Hamlin*, which extended indigents' right to counsel for all criminal prosecutions – misdemeanor or felony – where a jail sentence may be imposed.⁴⁴⁵ There is no civil counterpart to *Gideon* that mandates counsel for indigent civil litigants.⁴⁴⁶

⁴⁴² *Griffin v. Illinois*, 351 U.S. 12 (1956)(holding that indigent prisoners had to be afforded comparable appellate review as defendants with money to buy transcripts).

⁴⁴³ NOWAK AND ROTUNDA, *PRINCIPLES ON CONSTITUTIONAL LAW*, Thompson West, 480 (2007).

⁴⁴⁴ *Gideon*, 372 U.S. at 335.

⁴⁴⁵ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁴⁴⁶ Frederic B. Rodgers, *Court-Appointed Counsel in Civil Cases*, 40 *JUDGES J.* 22, 23 (2001); RHODE, *supra* note 21 at, 7 (“Unlike most other industrialized nations, the United States recognizes no right to legal assistance for civil matters and courts have exercised their discretion to appoint counsel in only a narrow category of cases.”); Rhode, *supra* note 22, at

Even without the advent of e-discovery, access to justice for many Americans, from the poor to the middle class, is left wanting. “[O]ur legal system is increasingly serving only the wealthiest interests or the very poorest ones: those who have great resources and those who are lucky enough to get help through legal aid, despite the serious underfunding of that system.... The problem of access is as much a middle class problem as it is a problem for the poor.”⁴⁴⁷ The most likely reason for the exclusion of these groups is cost (from attorney fees to court costs), although there are other barriers.⁴⁴⁸ Approximately eighty percent of

1787-88 (citing Access to Justice Working Group, Report to the State Bar of California 406 (1996) and Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199 (1994)).

⁴⁴⁷ Jeff Bleich, *The Neglected Middle Class*, CAL. B.J. (June 2008), available at

<http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=92107&categoryId=91968&month=6&year=2008>; See also, The Big Data Dump, *supra* note 13 (“This is overwhelmingly an American problem. In countries such as France and Germany that have an inquisitorial legal tradition, e-discovery tends to be proportionate to the case, because judges largely determine what information is relevant. By contrast, in adversarial common-law systems, it is the opponents in a case that decide how much information to peruse before picking out the evidence. But most countries within this tradition, such as Britain, Canada and Australia, have recently moved towards inquisitorial systems to minimise the threat from e-discovery.”)

⁴⁴⁸ Bleich, *supra* note 34 (noting other barriers, such as language, lack of mobility, and shortage of rural lawyers).

the civil legal needs of the poor and moderate income are not being met.⁴⁴⁹

The importance of counsel in civil litigation cannot be understated. Often there are critical issues at stake for the litigants: basic human needs. When lawyers appear on only one side in litigation, there is much abuse of the unrepresented party. “Counsel for more powerful litigants in landlord-tenant, consumer, and family law disputes have often misled weaker unrepresented parties into waiving important rights and accepting inadequate settlements.”⁴⁵⁰ Because the unrepresented party is unaware that this conduct is abusive or is not believed so does not prove it, lawyers who engage in such behavior are usually not penalized.⁴⁵¹

The recent economic crisis has spawned an increase in self-represented or *pro se* litigants. Self-representation often connotes choosing not to have counsel, but it often accurately reflects the inability to afford counsel.⁴⁵² “There were always a lot of self-represented litigants in the courts, but they tended to be in areas like family law, small

⁴⁴⁹ Robert Hirshon, *Providing All Americans with a Key to the Courthouse*, 40 JUDGES J. 5 (2001); see NC Equal Access to Justice Commission, Welcome Page, <http://www.ncequalaccesstojustice.com/>.

⁴⁵⁰ RHODE, *supra* note 21.

⁴⁵¹ *Id.* at 16.

⁴⁵² Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOYOLA LA. L. REV. 979, 985-86 (2009).

claims, or landlord/tenant.”⁴⁵³ Often, retaining counsel in civil cases is simply not economically feasible, no matter the amount of money at issue. But losing a civil case may deprive people of basic needs, such as shelter, food, health, safety, and child custody.⁴⁵⁴

III. E-DISCOVERY

⁴⁵³ Kathryn Alfisi, *Access to Justice: Helping Litigants Help Themselves*, Jan. 2010, available at http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/january_2010/access_justice.cfm (last visited June 1, 2012).

⁴⁵⁴ William Glaberson, *Top New York Judge Urges Greater Legal Rights for the Poor*, May 3, 2010, N.Y. TIMES, at A21, May 3, 2010, available at <http://www.nytimes.com/2010/05/04/nyregion/04court.html>. See also, Chief Justice Wallace B. Jefferson and Harry M. Reasoner, *Helping the Poor in Civil Court Cases*, CHRON, Apr. 4, 2010, <http://www.chron.com/dispatch/story.mpl/editorial/outlook/6944067.html> (noting some basic human needs that go unaddressed due to lack of a right to counsel in civil cases as: illegal landlord lockout of your home, spousal abuse in which a protective order is needed, or insurance denial for medical coverage for a sick child); Bradley A. Vauter, *Access to Justice – Unbundling: Filling the Gap*, Dec. 2000, available at <http://www.michbar.org/journal/article.cfm?articleID=159&volumeID=14> (reporting that a 1994 ABA report found that low- and moderate-income people had most civil legal needs in the areas of: family and domestic issues, housing and property rights, personal finance and consumer law, community and regional needs; to a lesser extent, needs in the areas of: wills and estates, health care, personal and economic injury, employment, public benefits, small business and farm needs, child schooling issues and civil liberties).

Litigation is just not litigation as it used to be.⁴⁵⁵ The digital age has fundamentally changed the practice of law perhaps more than almost any other institution.⁴⁵⁶ “E-Discovery could be the first big step into the world of digital litigation.”⁴⁵⁷ Documents have always comprised the bedrock of the law, and now what is considered a “document” is radically different than before when there were mainly paper documents.⁴⁵⁸ E-discovery is impacting the civil justice system in a significant way.⁴⁵⁹ More than likely, the “smoking gun” will be found in ESI rather than on a paper document.⁴⁶⁰

⁴⁵⁵ Jason Baron, *EDD Showcase: Discovery Overload*, Jan. 15, 2008 <http://www.eddupdate.com/eddupdate/2008/01/edd-showcase-di.html#more> (“[L]itigation today is a different animal”).

⁴⁵⁶ JAY E. GRENIG AND WILLIAM C. GLEISNER, III, *EDISCOVERY & DIGITAL EVIDENCE 4*, (Thompson West, vol. 1, 2005); LOSEY, *supra* note 3.

⁴⁵⁷ Marcus, *supra* note 14, at 641.

⁴⁵⁸ GRENIG ET AL., *supra* note 43 at 4-5.

⁴⁵⁹ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *URVEY OF EXPERIENCED LITIGATORS FINDS SERIOUS CRACKS IN U.S. CIVIL JUSTICE SYSTEM*, Sept. 9, 2008, http://iaals.du.edu/images/wygwam/documents/publications/Survey_Experienced_Litigators_Finds_Serious_Cracks_In_US_CJS2008.pdf; *Electronic Discovery: Of Bytes and Briefs*, *supra* note 9.

⁴⁶⁰ Cameron G. Shilling, *Electronic Discovery: Litigation Crashes into the Digital Age*, 22 *LAB. LAW.* 207 (2006) (citing Schendlin and Rabkin, *Electronic Discovery in Federal Civil*

Although the e-discovery explosion has focused primarily on civil discovery, e-discovery also significantly impacts the criminal justice system.⁴⁶¹

Yet, most lawyers are unaware of how to properly request electronic data, containing “metadata,” defined as “data about data.”⁴⁶² “Metadata may be totally innocuous, such as formatting instructions and margin determinations, but sometimes metadata provides crucial evidence that is not available in a paper document.”⁴⁶³ “Metadata may reveal who worked on a document, the name of the organization that created or worked on it, information about prior versions of the document, recent revisions, and comments inserted in the document during drafting or editing.... The

Litigation: Is Rule 34 Up to the Task? 41 B.C.L. REV. 327, 338-39 (2006).

⁴⁶¹ Murphy et al., *supra* note 12.

⁴⁶² GRENIG, *supra* note 43, at 11. *See also*, Steven C. Bennett and Jeremy Cloud, *Coping with Metadata: Ten Key Steps*, 61 MERCER L. REV. 471, 471 (2009-10) (“Definitions of metadata vary. *See Autotech Techs. Ltd. P’ship v. AutomationDirect.com, Inc.* 248 F.R.D. 556, 557 n.1 (N.D. Ill. 2008) (defining metadata as “all of the contextual, processing, and use information” associated with an electronic document). Such information may include “substantive,” “system,” and “embedded” metadata. *Aguilar v. Immigration & Customs Enforcement Div. of the U.S. Dep’t of Homeland Sec.*, 255 F.R.D. 350, 354-55 (S.D.N.Y. 2008); *see* John Wesley Hall, Jr., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 28:45.50 (3d ed. 2008)(defining metadata in part as “descriptive,” “structural,” and “administrative” information)).

⁴⁶³ Bennett et al., *supra* note 49 at 479.

hidden text may reflect editorial comments, strategy considerations, legal issues raised by the client or the lawyer, or legal advice provided by the lawyer.”⁴⁶⁴ Metadata may provide information that a paper document would not provide or information that differs from a paper document.⁴⁶⁵ Metadata may also reveal that a document has been changed or backdated.⁴⁶⁶ “A litigation attorney today who produces electronic documents but does not understand metadata is potentially committing malpractice.”⁴⁶⁷ E-discovery “equates to perhaps the biggest new skill set ever thrust upon the profession.”⁴⁶⁸

The federal courts, in particular magistrate judges, have taken the lead on e-discovery; however, some states are following the federal courts,⁴⁶⁹ developing their own rules,⁴⁷⁰ or still

⁴⁶⁴ 21 LAW. MAN. ON PROF. CONDUCT 21 Current Rep. (ABA/BNA) 39 (2004).

⁴⁶⁵ Bennett et al., *supra* note 49 at 479.

⁴⁶⁶ *Id.*

⁴⁶⁷ THOMPSON, *supra* note 3, at 52.

⁴⁶⁸ Paul et al., *supra* note 10, at *6.

⁴⁶⁹ See Thomas Y. Allman, *State E-Discovery Rulemaking after the 2006 Federal Amendments: An Update (as of Sept. 2, 2009)*, Nov. 3, 2008, available at <http://www.ediscoverylaw.com/uploads/file/State%20Rulemaking%20-%20Allman.pdf>. (setting forth a comprehensive summary as of September 2009 as to the states’ action on e-discovery rules); see also *State Courts*, http://www.applieddiscovery.com/ws_display.asp?filter=State%20Courts (listing a comprehensive state law guide on e-discovery rules); see also Joe Forward, *Supreme Court*

trying to define what e-discovery means for them.⁴⁷¹ Additionally, the National Conference of Commissioners on Uniform State Laws (“ULC”), which also drafted the Uniform Commercial Code and more than 250 other uniform acts, enacted Uniform Rules Relating to the Discovery of Electronically Stored Information (“Uniform E-Rules”) that were approved in 2007 for use by state courts⁴⁷² and approved by the American Bar Association’s House of Delegates in 2008.⁴⁷³ The Uniform E-Rules closely track the Federal Rules.⁴⁷⁴ The ULC hoped that all states would adopt the Uniform E-Rules, so that there would be uniformity

approves discovery rules to address electronically stored information, May 4, 2010, available at <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=%2FCM%2FContentDisplay.cfm&ContentID=92726> (noting that Wisconsin’s Supreme Court approved e-discovery rules to take effect in January 2011).

⁴⁷⁰ See e.g., TEX. R. CIV. P. 196.4 (2009) (noting that Texas adopted e-discovery rules even before the amendments to the Federal Rules).

⁴⁷¹ See, *State Courts*, *supra* note 56

(noting that The Florida Bar Association’s Civil Rules Committee’s Subcommittee on Electronic Discovery Rules is studying the e-discovery amendments to the Federal Rules and other states to determine how to draft e-discovery rules for Florida).

⁴⁷² LOSEY, *supra* note 3, at 106-07.

⁴⁷³ See, *State Courts supra* note 58.

⁴⁷⁴ LOSEY, *supra* note 3, at 106; SCHEINDLIN ET AL., *supra* note 2, at 13.

in practice in the state court systems.⁴⁷⁵ But that has not happened.

In comparable terms, e-discovery is actually cheaper than paper discovery; “it’s cheaper to collect, index, store, copy, transport, search and share electronically stored information (ESI).”⁴⁷⁶ But, it is cheaper for larger companies that store great volumes of documents. “When five television studios became entangled in a Justice Department antitrust lawsuit against CBS, the cost was immense. As part of the obscure task of “discovery” — providing documents relevant to a lawsuit — the studios examined six million documents at a cost of more than \$2.2 million, much of it to pay for a platoon of lawyers and paralegals who worked for months at high hourly rates. But that was in 1978. Now, thanks to advances in artificial intelligence, “e-discovery” software can analyze documents in a fraction of the time for a fraction of the cost. In January, for example, Blackstone Discovery of Palo Alto, Calif., helped analyze 1.5 million documents for less than \$100,000.”⁴⁷⁷ While large companies are still learning to cope with e-discovery costs, e-discovery remains costly and complex for the small

⁴⁷⁵ LOSEY, *supra* note 3, at 106-07.

⁴⁷⁶ Craig Ball (2006). *Ten Tips to Clip the Cost of E-Discovery*, LAW TECHNOLOGY NEWS, June 12, 2011, available at <http://www.craigball.com/BIYC.pdf> (last visited June 1, 2012).

⁴⁷⁷ John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, June 6, 2011, available at http://www.nytimes.com/2011/03/05/science/05legal.html?pagewanted=1&_r=1.

company, small case, and unrepresented litigant. Because e-discovery is very expensive and quite complicated, the advent of e-discovery is forcing settlements, and thus, denying litigants an opportunity to litigate the merits of the case.⁴⁷⁸

According to survey of American College of Trial Lawyer fellows, e-discovery is too costly and not well understood by judges.⁴⁷⁹ The survey found that:

- Over 87% of fellows indicated that e-discovery increases litigation costs;
- About 77% of fellows report that courts do not understand the complexities in providing e-discovery;
- More than 75% of fellows agreed that discovery costs, as a share of total litigation costs, have increased disproportionately as a result of the advent of e-discovery;
- 71% of fellows report that outside vendor costs have increased the cost of e-discovery without commensurate value to the client;
- 63% of fellows report that e-discovery is being abused by counsel; and

⁴⁷⁸ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *supra* note 46.

⁴⁷⁹ Allman, *supra* note 56, n.8 at 2.

- Fewer than 30% of fellows believe that even when properly managed, discovery of ESI can reduce the costs of discovery.⁴⁸⁰

The American rule for attorneys' fees requires each litigant to pay his or her own attorneys fees and costs (with some exceptions).⁴⁸¹ As a result, attorneys are less likely to take on *pro bono* or contingency fee cases where the lawyer often covers or advances costs, such as discovery costs, or even traditional billing hour fee arrangements unless the lawyer is certain that the litigant can pay.⁴⁸² This may further deter indigent representation with the advent of electronic discovery. Some even assert that e-discovery should be considered a "specialized substantive expertise," such as patent law, and argue that mishandling discovery may be a fertile ground for malpractice claims.⁴⁸³

⁴⁸⁰ See INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *supra* note 46.

⁴⁸¹ See, e.g., Jennifer M. Smith, *Credit Card, Attorney's Fees, and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win the Battle But Nevertheless Lose the War*, 61 MAINE L. R. 171, 187 (2009).

⁴⁸² See generally Smith, *supra* note 68, at 172.

⁴⁸³ SCHEINDLIN ET AL., *supra* note 2 (citing Janet H. Kwuon & Karen Wan, High Stakes for Missteps in EDD,

N.J.L.J., Dec. 31, 2007 at E2); Sally Kane, *7 Hot Law Practice Areas*, <http://legalcareers.about.com/od/legalspecialties/tp/Hotlawpracticeareas.htm>.

E-discovery is distinctive from traditional discovery in many aspects: (1) volume: it is easy to store multiple drafts or copies; (2) duplicability: emails can be easily circulate to numerous individuals; (3) malleability: emails can be easily amended and forwarded; (4) availability of metadata: information about a particular data set may describe when, how and by whom the data was sent, received, accessed and forwarded; and (5) durability: deleted electronic documents may be restored using forensic technology.⁴⁸⁴

E-discovery is not going to disappear;⁴⁸⁵ the computer is the cynosure of many aspects of life.⁴⁸⁶ Already many persons operate in a “paperless” office.⁴⁸⁷ Indeed, if the legal system had been paying attention, it would not be so overly burdened

⁴⁸⁴ Steven Bennett and Sam Miller, *Multinationals face e-discovery challenges*, 25 INT’L FIN. L. REV. 37, 37 (2006); see also SEDONA PRINCIPLES, *supra* note 8, at 2- 5; See also, GREINIG ET AL, *supra* note 43, at 128-134; MICHAEL R. ARKFELD, ELECTRONIC DISCOVERY AND EVIDENCE 3-10, LAW PARTNER PUBLISHING LLC (2008); Mia Mazza et al., “*In Pursuit of FRCP 1*”, 13 RICH. J. L. & TECH 11, 14 (2006-07).

⁴⁸⁵ SCHEINDLIN ET AL., *supra* note 2, at 14; Marcus, *supra* note 14, at 659.

⁴⁸⁶ Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 10 (2004-05); Sedona SEDONA PRINCIPLES, *supra* note 8; LOSEY, *supra* note 3; Paul et al., *supra* note 10, at *14.

⁴⁸⁷ Marcus, *supra* note 73, at 11.

and underprepared for this digital information explosion.⁴⁸⁸

Some forty years ago, a federal appellate court opined: “[I]t is immaterial that the business record is maintained in a computer rather than in company books.”⁴⁸⁹ Almost fifteen years later, a federal district judge stated: “Computers have become so commonplace that most court battles now involve some type of computer-stored information.”⁴⁹⁰ At that time, desktop computers were commonplace, and networking was added (email actually predated the internet).⁴⁹¹ Then, laptops became popular in 1990, and companies which had heretofore relied upon paper as the medium to document information now used technology.⁴⁹² The internet entered the scene in

⁴⁸⁸ SEDONA PRINCIPLES, *supra* note 8, at 5 (“The reliance upon discovery of electronically stored information has increased markedly in the last decade, although indications of its growing importance to civil litigation have been apparent since the early 1980s.”).

⁴⁸⁹ *United States v. De Georgia*, 420 F.2d 889, 893 (9th Cir. 1969).

⁴⁹⁰ *Bills v. Kennecott Corp.*, 108 F.R.D 459, 462 (D. Utah 1985).

⁴⁹¹ E-mail actually predates the Internet and was a crucial tool in creating it. E-mail began in 1965 to allow multiple users of a time-sharing mainframe computer to communicate. *Great Moments in E-Mail History*, THE RISKS DIGEST., Mar. 18, 1999, <http://catless.ncl.ac.uk/Risks/20.25.html#subj3> (last visited Apr. 27, 2006). Apr. 27, 2006.

⁴⁹² *Bennett et al.*, *supra* note 71.

1994 with the web and email.⁴⁹³ Google developed in 1998,⁴⁹⁴ and the Blackberry the next year.⁴⁹⁵ By, 2000, at least 51% of households were using a computer, and 80% of those households were utilizing the internet.⁴⁹⁶ Then social networking (e.g. Facebook and MySpace etc.) began in the mid-2000s.⁴⁹⁷ Notwithstanding, the first state e-discovery rules came in 1998 from Texas, and the Federal Courts amended the Federal Rules in 2006

⁴⁹³ “Following commercialization and introduction of privately run Internet service providers in the 1980s, and the Internet’s expansion for popular use in the 1990s, the Internet has had a drastic impact on culture and commerce. This includes the rise of near instant communication by electronic mail (e-mail), text based discussion forums, and the World Wide Web.” Wikipedia.com, *History of the Internet*, http://en.wikipedia.org/wiki/History_of_the_Internet#cite_note-e-41(last visited May 19, 2012).

⁴⁹⁴ STROSS, RANDALL, *PLANET GOOGLE: ONE COMPANY’S AUDACIOUS PLAN TO ORGANIZE EVERYTHING WE KNOW 1*, New York : Free Press (2008).

⁴⁹⁵ Elizabeth Woyke, *A Brief History of the Blackberry*, FORBES MAGAZINE, Aug. 17, 2009, available at <http://www.forbes.com/2009/08/17/rim-apple-sweeny-intelligent-technology-blackberry.html> (last visited June 1, 2012).

⁴⁹⁶ Stephen M. Cohen, *Electronic Data and Discovery: Nightmare or Opportunity*, The FLA. B.J., Vol. LXXVI, No. 2 (2002).

⁴⁹⁷ Martin H. Bosworth, *“What’s Inside MySpace.com?”* CONSUMERAFFAIRS.COM, Apr. 8, 2005, available at http://www.consumeraffairs.com/news04/2006/03/myspace_in_side.html; *The History of Facebook*, <http://www.webhostingreport.com/learn/facebook.html> (last visited June 1, 2012).

to include provisions relating to e-discovery, although the 1970 amendments did cover ESI, such as eight-track tapes.⁴⁹⁸ Thus, there was essentially a twenty year disconnect where nothing was done to prepare for the digital information age in which those who operate in our legal system are now entrenched.⁴⁹⁹

What or who is driving e-discovery? The easy answer would simply be the explosion of digital information.⁵⁰⁰ Ninety-nine percent of information is created digitally, and the remaining

⁴⁹⁸ Joshua C. Gilliland and Thomas J. Kelley, *Modern Issues in E-Discovery*, 42 CREIGHTON L. REV. 505, 506 (2008-09); Benjamin D. Silbert, *The 2006 Amendments to the Rules of Civil Procedure...*, 13 RICH. J. L. & TECH 14, 14 (2006-07).

⁴⁹⁹ SEDONA PRINCIPLES, *supra* note 8 (“While twenty years ago PCs were a novelty and email was virtually nonexistent, today more than ninety percent of all information is created in an electronic format.”); E-DISCOVERY BEST PRACTICES 9, Aspatore Books (2008) (noting that e-discovery has been around for years but the difference is that in 1997, emails would have been printed and produced in a paper format and now they are produced in their “original” or “native” format); Michael R. Arkfeld, *Litigation Readiness and Hold*, Law Partner Publishing LLC (2008), page 1 (“Prior to the 1990s, most cases involved the discovery of paper documents. It was, and still is to a large extent, the norm to obtain printed discovery material, then copy and recopy, categorize, Bates-number, and file hardcopy documents. However, in today’s legal world, most discovery consists of technologically-based information.”).

⁵⁰⁰ Marcus, *supra* note 14, at 634 (“E-Discovery, of course, directly results from the vast and growing importance of computers in our business and personal lives.”).

percentage never becomes a paper document.⁵⁰¹ Over seventy percent of information is never printed.⁵⁰² The sheer volume of ESI, along with its distinctive qualities, has changed the management of discovery in civil litigation.⁵⁰³ But there are other things also.

E-discovery is big business, and e-discovery vendors have convinced lawyers that “you can’t do this thing without me.”⁵⁰⁴ It is estimated that e-

⁵⁰¹ MICHELE C.S. LANGE AND KRISTIN M NIMSGER, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD NOW KNOW 2, American Bar Association Publication (2009); E-DISCOVERY BEST PRACTICES, *supra* note 86, at 17 (“[M]ore than 95 percent of all information is created and stored electronically, and much of this information will never be put into a physical form.”); THOMPSON, *supra* note 3, at 51-52.

⁵⁰² LANGE ET AL., *supra* note 88.

⁵⁰³ *Id.* at ix (Judge Shira Scheindlin, forward); Mazza, *supra* note 71, at 14.

⁵⁰⁴ Marcus, *supra* note 14, at 635; *Law Practice Today: Electronic Discovery*, LAW PRACTICE TODAY, Nov.2005, <http://www.abanet.org/lpm/lpt/articles/ft07041-6.html>; E-DISCOVERY BEST PRACTICES, *supra* note 86 (“In the fall of 2006, a large number of vendors started telling anyone who regularly litigated in the federal courts that the sky was about to fall on them because the Federal Rules of Civil Procedure had been amended to explicitly address electronic discovery.”); *see also* Anne G. Fort, *Rising Costs of E-Discovery Requirements Impacting Litigants*, March 20, 2007, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005554136> (“Because all litigators and in-house counsel have heard about the sanctions that are being imposed on parties who mishandle ESI, hiring an e-discovery consultant is starting to look mandatory (and running up litigation costs)”).

discovery vendors' revenues increased from \$40 million in 1999 to \$430 million in 2003,⁵⁰⁵ and today it is a billion dollar industry.⁵⁰⁶ Vendors are seeking big dollars, though, so often their information is targeted to obtain the business of large corporate clients with large pockets.⁵⁰⁷ In addition, many large law firms have created a position of an e-discovery chair or department to stay current on the law, be easily conversant with clients' or outsourced information technology staff, and to oversee and manage e-discovery in client matters.⁵⁰⁸

⁵⁰⁵ Marcus, *supra* note 14, at 645; SCHEINDLIN ET AL., *supra* note 2 (“The vendor phenomenon results from understandable worries that lawyers may be unable to handle this process without expert help.”); Sam Boykin, *Anything But Elementary*, MECKLENBURG TIMES, May 5, 2010 (reporting that one consulting company grew 44 percent during its first year of operations [2008] and the company anticipated a 20 percent increase in the remainder of the year).

⁵⁰⁶ Kevin Woo, *Million Dollar Words of E-Discovery*, LAW.COM, Dec. 15, 2009, <http://www.law.com/jsp/article.jsp?id=1202436326174>; SCHEINDLIN ET AL., *supra* note 2 (noting that the e-discovery industry will generate over \$4 billion in revenues in 2009); Garrie et al., *supra* note 9, at 398-99.

⁵⁰⁷ Fort, *supra* note 91. (“With electronic discovery consultant fees starting at \$275 an hour, and costs of collecting, reviewing and producing a single e-mail running between \$2.70 and \$4, experts in this market estimate that in 2007, litigants will spend more than \$2.4 billion on electronic discovery services, with no end in sight to this growth.”).

⁵⁰⁸ John Cleaves, *The Growing Role of the E-Discovery Attorney*, TX. B.J., (2009); LOSEY, *supra* note 3, at 3 (e-discovery practice chair at a national law firm noting that he

E-discovery is arguably a different language. “The basic problems of e-discovery relate directly to language itself.”⁵⁰⁹ The most common search method for ESI has been Boolean keyword searching, which uses keywords to pull results by using connecting words, such as “and,” or “or,” to find specific combinations and which is known to miss the majority of relevant documents.⁵¹⁰ But it reigned as the preferred search standard for ESI because of its defensibility in court.⁵¹¹ Keyword searching results in recovering only approximately twenty percent of relevant documents.⁵¹² However, when keyword searching was combined with other ESI search technologies, approximately seventy-eight percent of relevant documents were located.⁵¹³ Other search methods are:

- Fuzzy search, which refines searches recognizing that words have multiple forms;

was one of the first attorneys in Florida and the United States to nothing but e-discovery work); SCHEINDLIN ET AL., *supra* note 2 (noting that because of e-discovery, law firms have created special departments and staff attorneys to handle e-discovery issues).

⁵⁰⁹ Jason Krause, *In Search of the Perfect Search*, ABA J., (Apr. 2009), available at http://www.abajournal.com/magazine/article/in_search_of_the_perfect_search/. (last visited June 1, 2012).

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ *Id.*

- Algebraic search, which is based on the premise that mathematical models can figure out the meaning of a document and locate relevant documents by looking at the proximity of related words;
- Probabilistic search, which uses language models, including Bayesian belief models, which make inferences about the relevance of documents based upon understanding how concepts are communicated in a group;
- Alternative search, which usually involves complex mathematical and linguistic models, but take human training to “teach” the computers to recognize concepts and terms;
- Clustering search, which figures out which words are used in relation to a search topic; and
- Concept and categorization tool search, which uses a thesaurus to retrieve documents that use different words to capture the same thought.⁵¹⁴

Most recently, however, the courts have begun to approve the use of predictive coding as a search method.⁵¹⁵ Quickly, predictive coding is

⁵¹⁴ *Id.*

⁵¹⁵ See e.g., *Monique da Silva Moore et al. v. Publicis Group SA et al.*, 2012 WL 1446534 (S.D.N.Y. 2012 (finding that “Judge Peck concluded that under the circumstances of this particular case, the use of the predictive coding software as specified in the ESI protocol is more appropriate than keyword searching.”)); see also, *Global Aerospace Inc. et al. v. Landow Aviation, L.P. dba Dulles Jet Center et al.* (Consolidated Case No. CL 00061040 00,

moving to the head of the search methods because of its cost, speed and accuracy.⁵¹⁶ “The technology underlying predictive coding has been in existence for many years. For example, some predictive coding technologies employ Bayesian probability systems that “set[] up a formula that places a value on words, their interrelationships, proximity and frequency.”⁵¹⁷ Predictive coding is a generic term for computer-assisted coding, which has several steps: first, a lawyer reviews and codes a “seed set” of documents; next, the computer identifies properties of those documents to code other documents; then, as the lawyer (reviewer) continues coding more sample documents, the

(Circuit Court Loudoun Cty., Apr. 23, 2012) (J. Chamblin). (“Having heard argument with regard to the Motion of Landow Aviation ... it is hereby ordered Defendants shall be allowed to proceed with the use of predictive coding for purposes of processing and production of electronically stored information.”)

⁵¹⁶ , Memorandum in Support of Motion for Protective Order Approving the Use of Predictive Coding at 9, *Global Aerospace Inc, et al.*, <http://www.ediscoverylaw.com/MemoSupportPredictiveCoding.pdf> (“Today, the most effective and economical means of reviewing large ESI collections is a technology known as predictive coding.... “Predictive coding is an economical, efficient, and effective alternative to both linear review and keyword searching. Predictive coding will retrieve more of the relevant, and fewer of the irrelevant, documents than the other two culling methods, and it will do so more quickly and at a lower cost.”)

⁵¹⁷ *Id.*, (citing *The Sedona Conference Best Practices Commentary*, p. 218).

computer predicts the lawyer's coding; finally, when the computer's predictions and the lawyer's coding sufficiently collide, the computer has enough information to make confident predictions for the remaining documents.⁵¹⁸ That is, "[p]redictive coding type algorithms are designed to leverage the expertise of human input, preferably attorneys who are subject matter experts of the case at hand. A classification of one document by an attorney results in a recommended classification of hundreds, if not thousands of other documents that the computer identifies as similar. The computer examines the entire data set, the corpus, and predicts the probability of each document therein fitting within the same classification. The expert then tests and corrects the predictions in an iterative process."⁵¹⁹ Because of the volume of ESI in litigation now, "[t]he cost savings in [predictive coding] are obvious, particularly considering the high expense of attorney review time. Reviewers can break through the current linear review [manual review and coding of documents] speed barrier of approximately 100 files per hour, to 1,000, or even 10,000 files per hour. These supersonic review

⁵¹⁸ Andrew Peck, *Search, Forward, Will manual document review and keyword searches be replaced by computer-assisted coding?*, LAW TECH NEWS, Oct. 2011, available at http://www.recommind.com/sites/default/files/LTN_Search_Forward_Peck_Recommind.pdf (last visited June 1, 2012).

⁵¹⁹ Ralph Losey, *Predictive Coding Based Legal Methods for Search and Review*, Mar. 25, 2012, <http://e-discoveryteam.com/2012/03/25/predictive-coding-based-legal-methods-for-search-and-review/>.

speeds are what it takes to handle e-discovery today in an effective and economical manner.”⁵²⁰

The search techniques for ESI are rapidly changing. With these rapid changes, coupled with the complexity of e-discovery, vendors continue to reign in the world of e-discovery. “Right now anyone can say anything about search technology... You can say your search is 8 percent more accurate than the next guy’s, but there’s no common benchmark about what those claims mean. Right now it’s a marketing world; whatever marketers say goes.”⁵²¹ Clearly, for lawyers and judges, searching for ESI is a different language; this is even truer for the self-represented litigant.

The onset of ESI on the scene changes everything. Lawyers must revise their way of handling court cases. Judges must also be educated about the accessibility of ESI and admission of ESI in litigation. Finally, litigants – especially self-represented litigants – must be keenly aware of ESI because they are attractive prey in a forum with judges, who are encouraged to not litigate on behalf of or for the *pro se* litigant, and against counsel, who may be experienced in ESI.

“Information is fundamental to the legal system.”⁵²² Discovery is the foundation to civil

⁵²⁰ *Id.*

⁵²¹ Krause, *supra* note 96; *see also* Boykin, *supra* note 92 (“Everybody and their brother will tell you that they’re good at e-discovery... That’s something we’ve learned to be very careful about. We’ve thoroughly vetted our vendors. Some don’t know what they’re doing.”).

⁵²² Paul et al., *supra* note 10, at *1.

litigation in the United States.⁵²³ E-discovery affects both plaintiffs and defendants and those who will appear in either federal or state court.⁵²⁴ Generally, litigants cannot avoid dealing with ESI irrespective of the court in which they may find themselves. “[T]he integrity of the discovery process is essential to the healthy functioning of the civil court system.”⁵²⁵ And, judges should be the ones to ultimately ensure that justice is served,⁵²⁶ yet they are prohibited from doing so, even on behalf of *pro se* litigants.

Rule 2.9(C) of the Model Code of Judicial Conduct states:

A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

The comment to this section explains that “[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, *including electronic*.”⁵²⁷ Thus, the

⁵²³ Silbert, *supra* note 85.; MAZZA, *supra* note 71, at 14.

⁵²⁴ SCHEINDLIN ET AL., *supra* note 2, at 13.

⁵²⁵ THOMPSON, *supra* note 3, at 51.

⁵²⁶ Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 977-78 (2004); Russell Engler, *And Justice for All – Including the Unrepresented Poor Revisiting the Roles of Judges, Mediators and Clerks*, 67 FORDHAM L. REV. 1987, 2029 (1999).

⁵²⁷ MODEL CODE OF JUDICIAL CONDUCT R. 2.3 & cmt. 6 (emphasis added).

indigent plaintiff or defendant involved in a civil case in federal or state court who is seeking to advance or defend his or her lawsuit by using ESI, the most common evidence available, is a target for abuse in the nation's justice system.

IV. E-DISCOVERY AND THE INDIGENT CIVIL LITIGANT

A myth exists that e-discovery is really only necessary in million dollar cases with big law firms. E-discovery is still perceived by many lawyers and judges (even those on the local rules committees in federal courts) as a "rich person's problem" and not a "little guy's problem." Thus, a common misconception is that small cases in which self-represented litigants may appear will not need to involve e-discovery. This is incorrect. E-discovery is potentially critical in every case. As mentioned earlier, self-represented litigants tend to be more concentrated in the areas of family law, small claims and housing (landlord/tenant), but other areas where there are often self-represented litigants are consumer law, personal injury, and employment.⁵²⁸

"Electronic discovery is important regardless of the size of the case."⁵²⁹ "A lawyer, whether a partner in the biggest national law firm or a sole practitioner, who ignores e-discovery under the theory that the case is too small or opposing

⁵²⁸ See Vauter, *supra* note 41.

⁵²⁹ LAW PRACTICE TODAY, *supra* note 2, at 8.

counsel too unsophisticated is engaging in a game of high-stakes poker with opposing counsel and the court.”⁵³⁰ This holds true for any party irrespective of whether he or she is represented by a lawyer.

E-discovery has been employed in several kinds of small cases. “For prices ranging from \$3,000-\$10,000 total, [e-discovery has been used to prove] in small cases the theft of proprietary information, embezzlement, adultery, dissipation of marital assets, breach of fiduciary duty, tortious interference with business, violation of employment agreements, unfitness at a parent, possession/distribution of child pornography, creation of a hostile work environment, fraud, interception of electronic communications, unauthorized intrusion into computer systems, and identity theft.”⁵³¹ These cases -- divorce,⁵³² breach of contract, employment,⁵³³ child custody – are the types of cases in which poor civil litigants may be embroiled.

E-discovery has also been used in a worker’s compensation/wrongful termination case. In that case in particular, the plaintiff was

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² *Id.* (“Spouses in failing marriages often seek solace on the Internet or leave digital footprints of an affair”).

⁵³³ Rodney A. Satterwhite and Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation*, 14 RICH. J. L. & TECH 9 (2008) (“Employers usually have significantly larger volumes of ESI in their possession that may be relevant to the litigation”).

represented by counsel who, in a basic e-discovery request, found a deleted e-mail in which the plaintiff's former employer acknowledged that the cash register likely aggravated the plaintiff's carpal neurological problems, but chose to terminate her rather than to accommodate her.⁵³⁴ In another case involving medical malpractice, a physician represented that the CD-ROM produced was an authentic copy, but computer forensics showed that a clip had been deleted by an examination of the metadata; the case immediately settled.⁵³⁵ Both of these cases hinged on the ESI.

It may appear from the outset that a simple consumer law creditor-debtor case may not need to involve e-discovery.⁵³⁶ However, it is becoming increasingly common for credit card companies, mobile phone companies, credit monitoring companies, airline companies, and other potential creditors to communicate with customers (potential debtors) using email and mobile messaging (SMS).⁵³⁷ “The convenience and simplicity of SMS, combined with the evolution of pricing

⁵³⁴ LAW PRACTICE TODAY, *supra* note 2, at 10.

⁵³⁵ *Id.* at 16.

⁵³⁶ *Id.* at 3 (quoting Mark Sableman who said: “I don’t see a lot of electronic discovery popping up in collection cases”).

⁵³⁷ Garrie, *supra* note 7, at 97 (“Mobile Messaging” refers to your ability to send and receive short text-based messages via mobile phones using the Short Message Service (SMS) function offered by mobile network providers” (citing TruePosition, Inc. v. Andrew Corp., No. 05-747-SLR, 2007 U.S. Dist. LEXIS 62702 (D. Del. Aug. 23, 2007)).

models (especially unlimited SMS bundles) have contributed to a significant growth of the SMS market in the US and Europe over the past few years.”⁵³⁸ Further, credit card companies often open credit accounts over the internet or the phone in addition to by mail. If any emails have been exchanged, then the parties will want to seek the emails and any relevant metadata. Thus, the parties involved will need to understand what ESI is available and how to use it in litigation.

E-discovery experts have advised that those engaged in litigation involving family, personal injury and estate law need to be aware of the rules surrounding how and when to destroy digital information.⁵³⁹ With the advent of Facebook, Twitter, Craigslist, and other internet sites, this is even truer. Recently, a wife uncovered photos of her husband’s second wedding on Facebook.⁵⁴⁰

This also holds true for landlord and tenant cases in which ESI has been generated either between the landlord and the tenant, or within the landlord (management company) and its employees.

⁵³⁸ *Id.* at 98.

⁵³⁹ Rachel M. Zahorsky, *E-Discovery Can Create Big Hassle for Small Cases*, A.B.A. J., Mar. 27, 2010, available at http://www.abajournal.com/news/article/e-discovery_can_create_big_hassle_for_small_cases/.

⁵⁴⁰ Meghan Barr, *Wife finds photos of his second wedding on Facebook*, Aug. 6, 2010, <http://www.suntimes.com/news/nation/2571918,CST-NWS-wedding06.article>; see also Boykin, *supra* note 92 (finding ESI that helped get a wife in a divorce case larger alimony payments and a lawsuit settlement against the other woman).

Although the straightforward landlord-tenant case in which a tenant failed to pay rent may have no need for e-discovery, a case in which the tenant failed to pay rent for cause (*e.g.*, parties' agreement or damaged apartment) and the landlord and tenant communicated via electronic devices, such as mobile phone, electronic faxing, email and the like, then the case may hinge on e-discovery.

Even alternate dispute resolution, which is often used because it is generally a cheaper and simpler method of dispute resolutions⁵⁴¹ and where parties are often unrepresented, is impacted. Jurists warn that the costs of e-discovery will force all but the wealthy out of the court system into arbitration of simple pleadings,⁵⁴² but “[i]t is inevitable that dispute resolution will have electronic discovery as an element of the process.”⁵⁴³

However, e-discovery simultaneously may be a problem and a solution. For example, in a mortgage foreclosure case, the documents may indicate that they were signed at a particular time, but the metadata may reveal a different time. Or, in

⁵⁴¹ John Bace, *Cost of E-Discovery Threatens to Skew Justice System*, Apr. 20, 2007, http://www.akershaw.com/Documents/cost_of_ediscovery_threatens_148170.pdf (“[W]ith the escalating costs, there will be a movement toward alternative methods of dispute resolution, especially by small and midsize organizations.”).

⁵⁴² *Id.* at 1.

⁵⁴³ *E-Discovery as Part of the ADR Process*, THE METROPOLITAN CORPORATE COUNSEL, Apr. 2010, available at <http://www.metrocorpcounsel.com/pdf/2010/April/15.pdf> (last visited June 1, 2012).

an employment retaliation case, the terminated employee's supervisor may testify that he was unaware of the employee's confidential complaint to the company's complaint hotline at the time that he terminated the employee, yet the ESI may produce the metadata on an email that reveals that the supervisor received the company's correspondence about the employee's complaint. Thus, there may be tremendous disadvantages to litigants when they cannot obtain electronic discovery and great advantages when they can.

Often computer forensics is the beginning point for "electronic evidence in small cases as it 'captures' all of the electronics and not just that which is visible to the user."⁵⁴⁴ Computer forensic science "was created to address the specific and articulated needs of law enforcement to make the most of this new form of electronic evidence. Computer forensic science is the science of acquiring, preserving, retrieving, and presenting data that has been processed electronically and stored on computer media. As a forensic discipline, nothing since DNA technology has had such a large potential effect on specific types of investigations and prosecutions as computer forensic science."⁵⁴⁵

⁵⁴⁴ Sharon Nelson and John Simek, *Electronic Discovery in Everyday Cases: Practical Guidance Is An Antidote to Fear* (2008),

http://www.senseient.com/articles/pdf/ELECTRONIC_EVIDENCE_IN EVERYDAY_CASES.pdf.

⁵⁴⁵ Michael G. Noblett, Mark M. Pollitt & Lawrence A. Presley, *Recovering and Examining Computer Forensic*

Computer forensics explains the state of a digital artifact, such as a computer system, electronic document, or other storage medium.⁵⁴⁶

E-discovery experts suggest that smaller cases may not need computer forensics, and the litigants can just exchange e-discovery.⁵⁴⁷ However, a small claims case for a debt owed may hinge on ESI. In a recent small claims matter, a nursing home (plaintiff) sued a former client for unjust enrichment (equity) for less than \$5,000 in small claims court for a debt owed as a result of the former client (defendant) residing at the nursing home facility and receiving rehabilitative services.⁵⁴⁸ However, the defendant did not feel that she owed the plaintiff because the plaintiff represented to the defendant that the defendant's primary and secondary insurance policies would cover the defendant's full stay at the nursing home facility. This representation, said the defendant, lured her to choose to reside with the plaintiff when other facilities would have been fully covered under the defendant's insurance policies. At some point during the defendant's stay, the defendant claimed that the plaintiff realized that it had made a clerical

Evidence, FORENSIC SCIENCE COMMUNICATIONS (October 2000).

⁵⁴⁶ Alec Yasinsac, Robert F. Erbacher, Donald G. Marks, Mark M. Pollitt, Peter M. Sommer, *Computer Forensics Education*, 4 IEEE SECURITY AND PRIVACY, 15-23 (2003).

⁵⁴⁷ Nelson et al., *supra* note 131.

⁵⁴⁸ *Westminster v. Wesley*, No. 10-SC-2180 (Fla. Orange Cty. Ct. 2010).

error and that the defendant's insurance policies would not cover the defendant's full nursing home bill. The plaintiff relayed this to the defendant. At first glance, this case may appear to be a minor small claims matter not requiring e-discovery, but there are likely emails and other ESI discussing the fact of the clerical error and how and when such an error was communicated to the defendant. The plaintiff may have also deleted "smoking gun" emails, which would only be uncovered via computer forensics. Arguably, this case is too small to engage a computer forensic consultant, but at a minimum, defendant should seek all ESI related to the defendant's stay at the nursing facility, including ESI related to the plaintiff's efforts to obtain her as a client. Defendant's counsel requested ESI in discovery; plaintiff's counsel claimed that no ESI existed (not even emails); and after a bench trial, the court entered a judgment in favor of the defendant.

In 2004, several e-discovery lawyers, vendors and other experts had a roundtable discussion in which some of the panel members indicated that while the sole practitioner, who generally handles typical divorces, personal injury and non-white collar crime, would not engage in e-discovery then, but that within five years e-discovery "should be quite significant for many more lawyers as the average consumer starts to retain more and more records in electronic format."⁵⁴⁹ We are now past that five year mark

⁵⁴⁹ *Law Practice Today, supra* note 2, at 3 (quoting Mark Sableman); *Law Practice Today, supra* note 2, at 4 (quoting

and the average consumer is generating ESI on a daily basis – by email, internet, mobile messaging, electronic faxing, digital voicemail, and the like. About five years ago, these e-discovery experts had different opinions about whether e-discovery is critical in every case; some felt that it was and others felt that it was not.⁵⁵⁰ But the more that the average consumer generates ESI daily by use of electronic devices, the likelier the chance that ESI may be available and necessary to prevail in even very small cases.

With the advent of e-discovery, the need for legal counsel for indigent civil litigants is even more pressing. Lawyers in state and federal courts have to gain knowledge of ESI in discovery quickly. Lawyers who lag behind in their learning do so at the expense of their clients. The smaller the law firm, the greater the fear of ESI in discovery.⁵⁵¹ It is not just about the cost of ESI, however, it is also about the lack of education by lawyers, judges, and non-lawyers about ESI and its complexities. Many attorneys still do not know that you should and must get ESI as “[c]omputers are often the best, and increasingly, the only source of evidence in today’s environment.”⁵⁵² Further, they

Sharon Nelson/ John Simek: “Our prediction is that, in five years’ time, not even those lawyers who wish they had never heard of e-discovery will be able to avoid integrating it into their practices”).

⁵⁵⁰ See generally, *Law Practice Today*, *supra* note 2.

⁵⁵¹ Nelson, *supra* note 131.

⁵⁵² ARKFELD, *supra* note 71, at 1.

are unaware of how to get ESI and what to do with ESI if they do obtain it. For civil litigants without attorneys, the impact is even greater, and the opportunity for exploitation from lawyers familiar with e-discovery is great.⁵⁵³

Irrespective of the size of your case,⁵⁵⁴ or whether you are with a large firm or are a solo

⁵⁵³ See e.g., E-DISCOVERY BEST PRACTICES, *supra* note 86, at 17 (“E-Discovery is also important because some lawyers have realized that if their opponent does not deal with it properly, it can have a dramatic impact on the litigation and create opportunities for large sanctions awards.”).

⁵⁵⁴ Dominic Jaar, *E-Discovery Tips for Everyday Cases-How to Put the Process in Perspective*, ABA LAW PRACTICE, Mar. 2009, available at <http://www.abanet.org/lpm/magazine/articles/v35/is2/pg50.shtml> (last visited June 1, 2012) (“Most lawyers are not qualified to “play tech-savvy” about e-discovery. Here, however, is some general information that may be useful when dealing with the information custodians in smaller cases.”)

Identify relevant information using free or cheap search engines, such as these:

- Copernic, <http://www.copernic.com/>
- dtSearch, <http://www.dtsearch.com/>
- Google Desktop , <http://desktop.google.com/>
- X1, <http://desktop.google.com/>

Backups onsite could be created using basic tools, such as these:

- Reflect , <http://www.macrium.com/>
- SyncBack , <http://2brightsparks.com/>
- Second Backup, <http://www.backupsoftware.cc/index.htm>

practitioner, ESI issues will likely have to be addressed and resolved.⁵⁵⁵ “Justice is at stake in the sense that if the full body of evidence is not available, then the truth will be obscured, and facts will remain unknown. Information technology has created the problem of massive amounts of data that the court system must deal with.”⁵⁵⁶ “The sheer magnitude and diversity of ESI that must be dealt with creates significant difficulties and costs for lawyers and litigants.”⁵⁵⁷

For the self-represented indigent litigant, this is even more challenging. That a party is *pro se* or self-representing does not change the nature of

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- Truesafe , <http://www.qpointsoft.com/>

Paper documents can be scanned and run through optical character recognition software, such as these OCR programs which are free:

- Free OCR , <http://softi.co.uk/freeocr.htm>
- GOOCR , <http://jocr.sourceforge.net/>
- Simple OCR , <http://www.simpleocr.com/>
- Tesseract , <http://code.google.com/p/tesseract-ocr/>

OCR software can extract text from images. There are some low cost or free programs to convert other types of electronic files to TIFF or PDF, such as these:

- Omniformat , <http://www.omniformat.com/>
- VeryPDF, <http://www.globalpdf.com/>

⁵⁵⁵ ARKFELD, *supra* note 6, at 1.

⁵⁵⁶ Bace, *supra* note 128, at 3.

⁵⁵⁷ Mazza, *supra* note 71, at 14.

the best and most available evidence for his or her case. The more the average consumer engages in the daily use of ESI, the more likely even the smallest of cases will involve ESI, and thus, e-discovery. The lack of education on e-discovery by self-represented parties puts them at a further disadvantage in the court system that is already foreign to them, and the likelihood of lawyers volunteering to handle these small cases where e-discovery may be involved is slim, especially when lawyers are not well-versed in e-discovery themselves.

VI. E-DISCOVERY AND THE INDIGENT CRIMINAL LITIGANT

E-discovery is often associated primarily with civil litigation. There is a growing recognition, however, that e-discovery is just as critical in criminal cases – not only the content of the ESI, but also the context in which the ESI was ascertained.⁵⁵⁸ Thus, e-discovery is just as important in criminal litigation as it is in civil litigation, and criminal lawyers – defense lawyers and prosecutors -- must be as educated about e-discovery as their civil law counterparts.⁵⁵⁹ “[T]he

⁵⁵⁸ Garrie et al., *supra* note 9, at 393-94.

⁵⁵⁹ *Id.* (discussing all facets of criminal law); Murphy et al., *supra* note 12 (discussing white collar criminal law).

world of criminal e-discovery is evolving every day.”⁵⁶⁰

Some major differences exist with respect to the practice of civil and criminal law. Three that are relevant here are first that, as mentioned above, indigent criminal defendants are entitled to an attorney pursuant to the Sixth Amendment,⁵⁶¹ but this is not the case for indigent civil litigants. Second is that criminal defendants are entitled to limited discovery, in contrast to civil litigation where litigants are entitled to discover any information that is reasonably calculated to lead to admissible evidence.⁵⁶² Third, for civil litigants, the right to ESI is codified in federal and many state rules of civil procedure, but this is not so for criminal defendants.⁵⁶³

As technology becomes increasingly intertwined with the daily manner in which people communicate, thus creating ESI, criminal defendants will likely seek ESI from the government and third parties.⁵⁶⁴ However, indigent criminal defendants will not have the resources to

⁵⁶⁰ Murphy et al., *supra* note 12.

⁵⁶¹ CAROLINE WOLF HARLOW, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES I (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>.

⁵⁶² Garrie et al., *supra* note 9, at 399-400.

⁵⁶³ *Id.*; U.S. v. O’Keefe, 537 F. Supp. 2d 14 (D.D.C. 2008) (using Federal Rules of Civil Procedure to address ESI issues in a federal criminal case); Murphy et al., *supra* note 12.

⁵⁶⁴ Garrie et al., *supra* note 9, at 402.

engage e-discovery vendors to cooperate with the government and deter indictment.⁵⁶⁵ Even those whose indigence status qualifies them for the appointment of a public defender, which is often assigned post-indictment,⁵⁶⁶ do not have the financial resources to engage in e-discovery or employ e-discovery experts to demonstrate their involvement or lack thereof in criminal activity.⁵⁶⁷ “The reality is that a substantial number of defendants cannot afford legal counsel, and as technology becomes more involved in legal matters, those who wish to cooperate with the government in areas such as e-discovery may not know how to do so effectively due to a lack of financial and technological resources.”⁵⁶⁸ The criminal defendant may not be able to obtain the court’s permission to receive funds to engage in e-discovery because e-

⁵⁶⁵ *Id.* at 402-03.

⁵⁶⁶ Steven K. Smith and Carol J. DeFrances, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: INDIGENT DEFENSE 1 (1996) (“Although the U.S. Supreme Court has mandated that the States must provide counsel for indigents accused of crime, the implementation of how such services are to be provided has not been specified. The States have devised various systems, rules for organizing, and funding mechanisms for indigent defense programs. As a consequence, each State has adopted its own approach for providing counsel for poor defendants.”). *But see*, U.S. v. Stein, 435 F. Supp. 2d 330, 366 (2006) (finding “that the Sixth Amendment right to counsel typically attaches at the initiation of adversarial proceedings—at an arraignment, indictment, preliminary hearing, and so on”).

⁵⁶⁷ Garrie et al., *supra* note 9, at 403-04.

⁵⁶⁸ *Id.* at 404.

discovery is so expensive.⁵⁶⁹ The government, however, may have an unlimited ability to engage in obtaining ESI and thus forcing the criminal defendant to cooperate with the government.⁵⁷⁰ Or, asserts one e-discovery lawyer and consultant, indigent criminal defendants who do not have the financial resources to pay for e-discovery may potentially bankrupt the nation's judicial system.⁵⁷¹

In addition, government and private attorneys who handle criminal cases must be educated about e-discovery.⁵⁷² In particular, criminal defense attorneys must be aware of the potential uses of ESI by the government as well as be educated about ESI. For example, a client's admissions may be embedded in ESI by way of metadata, and thus, not readily apparent.⁵⁷³ Further, defense counsel and defendants need to be aware of why the government is seeking ESI through civil discovery tools or a regulatory proceeding to ensure that it does not form the basis of a criminal prosecution.⁵⁷⁴

As it stands now, "the criminal justice system as of yet has not expanded the Federal Rules of Criminal Procedure in a manner which would ensure that criminal defendants receive reasonable

⁵⁶⁹ *Id.* at 413.

⁵⁷⁰ *Id.* at 414.

⁵⁷¹ *Id.* at 396.

⁵⁷² Murphy et al., *supra* note 12.

⁵⁷³ Garrie et al., *supra* note 9, at 407.

⁵⁷⁴ *Id.* at 405.

access to ESI evidence sufficient for their counsel to advocate capably for the protection of their Fourth, Fifth, and Sixth Amendment rights.”⁵⁷⁵ Yet, e-discovery is clearly intertwined in today’s criminal justice system.⁵⁷⁶ And a defendant’s access to ESI in criminal prosecutions presently is an “unmitigated mess.”⁵⁷⁷ Thus, one e-discovery expert has recommended that “[a]t a minimum, the Federal Rules of Criminal Procedure must be amended to provide a procedural mechanism that reconciles what the court believes is ‘material’ to a defense in terms of access to ESI with what is ultimately required by the previously mentioned acts, or others, and the Fourth, Fifth and Sixth Amendments.”⁵⁷⁸

VII. CONCLUSION

The question now is whose obligation is it to train, educate and assist the self-represented litigant in our nation’s justice system? That is, whose obligation is it to ensure that litigation is fair among unequal parties?⁵⁷⁹ Who must ensure that there is “equal justice under law”? The answer must

⁵⁷⁵ *Id.* at 396.

⁵⁷⁶ *See e.g.*, U.S. v. Scarfo, 180 F. Supp. 2d 572, 574-76 (D.N.J. 2001); Murphy et al., *supra* note 12.

⁵⁷⁷ Garrie et al., *supra* note 9, at 412.

⁵⁷⁸ *Id.*

⁵⁷⁹ Eleanor Roosevelt (“Justice cannot be for one side alone, but must be for both”).

include a team approach with all those who impact the legal system; it is no one's individual responsibility, but everyone's collective responsibility. Society, not just the poor, benefit when poor people are able to obtain legal representation in civil cases.⁵⁸⁰ "For without the effective access to justice such a right would guarantee, poor people in this country today too often unjustly lose their housing, their possessions, their livelihood, their children, and nearly everything else that makes life worth living."⁵⁸¹

Prior to e-discovery, indigent litigants have had little success in accessing justice. With the advent of e-discovery, this access has narrowed. Some continue to assert that e-discovery is not relevant in the small cases and with the individual litigant, but it is. Thus, the court administrations, judges, legislators, vendors, lawyers, bar associations, legal aid organizations, and law schools must team together to ensure that the advent of e-discovery does not further impede the access to justice or broaden the existing gap of poor litigants. Doing so would only further hollow our nation's proudly proclaimed legal principle of "equal justice under law."

⁵⁸⁰ Laura K. Abel, *Civil Gideon*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 542 (2005-06).

⁵⁸¹ Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Melody?* 2 SEATTLE J. SOC. JUST. 201, 232 (2003-04).