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2023: An ESI Odyssey

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2023: An ESI Odyssey

2001: A Space Odyssey, traced the evolution of humans and had as one of its major themes and characters, the evolution of a computer, "HAL 9000," to a thinking, sentient being.

While this article will not address the evolution of humans, it does trace: the technological evolution of how litigants communicate in the electronic era; how the proliferation of computer records and computerized communication (electronically stored information, "ESI") has caused discovery-related data to explode in volume and complexity; how the legal system's evolution of dealing with these discovery challenges has necessarily lagged behind technology; how technology (like artificial intelligence, á la HAL 9000) is catching up to potentially assist in making the challenges of ESI more manageable; and why all those involved in significant litigation need to understand the evolutionary processes and the newest evolutions in play. If they don't, they risk sanctions, preclusion, extra cost, delay, strategic setbacks, lost strategic opportunities and all other manner of horribles.

The Stone Age – Looking Back Fondly

Historically, before the proliferation of ESI, in the seeming stone-age era of paper records, the litigation discovery standards were fairly well established. By and large, anything relevant or reasonably likely to lead to the discovery of relevant evidence was discoverable in litigation, even if it was burdensome and costly for a party to comply. Each party was usually left to its own devices as to how it went about finding, gathering and disclosing its responsive information, with the court only intruding in extraordinarily

burdensome or problematic matters or when a dispute arose. Except in very unusual circumstances, each party bore its own costs of discovery compliance. And courts rarely considered "proportionality" – whether the cost and burden of compliance could, in the context of the disputed issues, outweigh the seeking-party's entitlement to the discovery.

For construction-litigation discovery particularly, lawyers and clients gathered hard-copy records from job sites, corporate offices, off-site storage facilities, the trunks of employees' cars and occasionally scattered locations. But the documents were tangible and, with effort, could by and large be tracked down. Sometimes it was a few banker boxes of records, on major projects it was many hundreds of boxes documents. But once gathered, a group of lawyers, paralegals and consultants, again with varying degrees of effort, could in relatively short order look through the records, separate the relevant from the irrelevant, the privileged from the non-privileged, and make the records available to the other side(s) for review and copying. And go and look at the other side(s)' similar productions.

There were no computer-stored records. There were no e-mails, no texts, What's App or Slack messages. Drawings were rolls of paper, not extensive CAD files and BIM models. Job site photos were in sleeves in a three-ring binder, not tens of thousands of pictures on a server, hundreds stored on different people's phones, with video thrown in here and there for good measure.

In short, discovery, while burdensome at times, was comparatively manageable. The parties, by and large, managed their side of the discovery house independently and disputes, when they arose, were brought to the court for resolution. It wasn't all honky-dory, but compared to now, most lawyers of a certain age look back fondly on those days.

The Ascent of ESI (and the Ascent of Cost; the Ascent of ESI Technology; and the Legal System's Lagging Evolution)

Then, in the early 2000s, because of the increased use of computers to generate and store data of all sorts, but especially as e-mail became the standard of communication, volumes of data increased radically. From a construction project's dozens or hundreds of boxes of hard copy records, now the volumes of data, if printed, would have filled libraries, or for big projects, multiple Libraries of Congress. Multiple terra-bytes of information for just one construction project became not at all unusual.

Early on in this phase of evolution, it was recognized that ESI is much more easily and frequently destroyed than were hard copy records, often being deleted inadvertently as a matter of business routine or stored only on back up tapes or other not easily accessed media.

And much litigation ensued over this issue. *See eg, Zubulake v UBS Warburg,* 217 F.R.D. 309 (S.D.N.Y. 2003); *see also*, *In Re Keurig Green Moutning Single-Serve Coffee Antitrust Litig.*, 341 FRD 474 (SDNY 2022).

Thus, emerged the era of the "litigation hold" – court mandated directives from lawyers to clients and from clients to their internal resources to preserve all ESI relating to a likely or actual dispute.

And litigation ensued. At times, courts sanctioned lawyers and/or clients for not preserving that which should have been preserved. *Id.*

At first, lawyers tried to address discovery in the face of this data-bloom as they had the old hard-copy documents – reviewing them one by one. This was time consuming, very costly, inefficient and, in big cases, virtually impossible. Discovery costs, always a significant portion of litigation budgets, now became a line item that often dwarfed the other aspects of the budget.

Then, lawyers began to employ the technological tools that were available to them at the time – early iterations of litigation specific ESI management software that permitted search-term based review, sorting and selecting the data to try to home in on what was meaningful. Lawyers and consultants tried to create targeted search terms, customized to the dispute and the information in the data set, to attempt to separate the wheat from the chaff. But this was imperfect and necessarily improperly captured irrelevant documents and improperly excluded relevant documents.

Moreover, lawyers for the parties typically embarked on these exercises as they had in the past – on their own with their clients, without consulting with their adversaries. Lawyers argued about these issues, extensively.

And litigation ensued. *See, eg.*, *Hyles v. New York City*, 2016 WL 407714 (SDNY 2016).

In 2006, language inserted into six separate Federal Rules -- 16, 26, 33, 34, 37 and 45 – required lawyers and their clients to focus specifically on discovery obligations in the digital age. These new obligations included, among others, a mandate that adversary lawyers "meet and confer" to try to come to agreement regarding such things as: how the data would be gathered, stored, the technical means of its exchange; how many "custodian's" (aka people's) e-mails would be harvested, searched and exchanged; appropriate time period book-ends for likely relevant data; developing agreed-upon search terms and protocols for how the often complex series of searches would be implemented, among many other thorny discovery protocol issues. As one Magistrate Judge held, in *Mancia v. Mayflower Textile Services Co.,* 253 F.R.D. 354 (D. Md. 2008):

> … lawyers could produce more tailored discovery requests if they "approached discovery responsibly, as [FRCP Rule 26] mandates, and met and conferred before initiating discovery, and simply discussed what the amount in controversy is, and how much, what type, and in what sequence, discovery should be conducted so that its cost — to all parties — is proportional to what is at stake in the litigation."

Courts were actively requiring adverse lawyers to collaborate and cooperate regarding discovery – things that adverse lawyers often do not have in their DNA to do.

And much litigation ensued.

Of course, then (as now) lawyers were especially concerned about how to avoid disclosing attorney-client or other privileged information that is immune from disclosure which, if inadvertently disclosed, could be especially damaging. Using searches to try to identify privileged documents, rather than looking at every document, increased the chances of such inadvertent disclosure.

And litigation ensued. *See, eg, Victor Stanley, Inc v Creative Pipe, Inc,* 250 FRD 251 (USDC Md 2008) (holding privilege waived for inadvertently produced documents because reasonable efforts to avoid disclosure not employed).

Lawyers having inadvertently disclosed privileged documents sought to have them returned and ruled inadmissible. Lawyers on the other side tried to keep and use disclosed document to their client's advantage. In reaction to the increasing frequency of these issues, in 2008, the Federal Rules of Evidence were changed, codifying in FRE 502, that the inadvertent disclosure of privileged material does not result in a privilege waiver, provided reasonable steps were taken to prevent disclosure.

Also in 2008, the nonprofit legal research organization, The Sedona Conference, published its *Cooperation Proclamation,* encouraging parties and the courts to implement discovery cooperation requirements because: "The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of [ESI]. In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes — in some cases precluding adjudication on the merits altogether."

Rising Higher – the ESI Protocol Stipulation and Order

The outgrowth of the "meet and confer" was typically a written, agreed-upon, ESI Protocol Stipulation, that a court would often "so-order." At first, these were often relatively simple documents. Over time, however, they have become more and more

detailed and extensive, at times taking upwards of 20 single-spaced pages. They can address things including: appointment of party ESI-liaisons for each party; deadlines; encryption; how confidential information is to be handled; the formats for the different types of ESI data; bates numbering; metadata processing; redactions; de-duplicating; parameters for culling and reviewing documents; identification of custodians; use of search terms and TAR; cellphone, text message and social media discovery; claims of privilege and privilege logs; clawback protocols; among other issues. *See eg,* Order Regarding Production of Electronically Stored Information and Paper Documents, filed 8/15/17, *In Re Broiler Chicken Antitrust Litigation*, (Case No. 1:16-cv-08637) (ND Ill.)

As addressed below, a party's failure to follow an agreed-upon protocol can lead to further disputes and potentially serious consequences. Thus, there is an imperative that lawyers and clients meaningfully think through these issues early in a case, negotiate a workable and effective discovery protocol with the other parties, live by it and, if circumstances require changes to it, that they be done promptly and transparently.

The Dawn of a New Era – TAR (Technology Assisted Review)

While all of these developments in the evolution of the rules around ESI were progressing, in around 2010, TAR began to gain technical acceptance. We are now all familiar with at least some aspects of "machine learning." Pandora, Spotify, Amazon, Netflix, and many other websites track our preferences and, through the use of algorithms which divine the characteristics of the songs, books, movies, etc. that we select, analyze them and make predictions as to what other, similar, things we may like. The more data regarding our preferences the computer gathers, the better a predictor of our "likes" it becomes. This same type of technology began to be applied to ESI. As human reviewers electronically marked documents in the database as "relevant," or associated with a given issue, or "privileged," or any other designated association, the computer "learned" what the reviewers "liked," and could find other, similar documents in the database. Then, the reviewers could look at a selected sample of those predicted by the algorithm to be like-able, and the reviewers could further educate the computer by telling it which it predicted correctly and which it did not. And this process could be repeated a number of times to increase the fidelity of the predictions.

Studies began to demonstrate that, if done properly, the computers could do a more accurate assessment of the data than could human reviewers. And computers could do it faster and at lower cost when compared with paying teams of skilled people to do it.

By 2012, the first federal court decision officially approving the use of TAR to conduct e-discovery was issued. In *Da Silva Moore v. Publicis Groupe,* 287 F.R.D. 182 (SDNY 2012), the judge asserted, "Computer-assisted review appears to be better than the available alternatives, and thus should be used in appropriate cases." Thus, TAR received a judicial blessing; but it by no means became mandatory, or even the standard.

Of course, technology continued to evolve and different ESI vendors, with different TAR tools, continued to improve them. Over time, they offered even more functionality and potentially greater performance. But, lawyers are often slow to adopt new technology for a variety of reasons. Lawyers, as a group, tend not to be cutting-edge, first adopters of new technology. The tried and true is often the safest bet, especially when the courts lag behind in providing clear guidance. Currently, some lawyers still focus on search terms as the primary basis for their ESI protocols. Others prefer TAR as the tool of choice. Some use them in combination. Often, it is a case-by-case call, driven by the lawyers, clients and ESI consultants involved and the particularities of the case. But, as will be discussed below, forethought must be employed, especially because courts are requiring adversary lawyers to "meet and confer" and to jointly develop plans and protocols for how ESI will be managed in a given case.

Standing Taller – the Proportionality Mandate

Meanwhile, during TAR's rise and evolution, courts were also focused on making sense of how to balance the high cost of e-discovery with litigants' resources and the needs of cases – "proportionality." As some would ask, "is the juice worth the squeeze?"

In 2015, the Federal Rules of Civil Procedure were changed, modifying Rule 26(b), to limit discovery to what is "proportional to the needs of the case" using a six-factor test: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. Take note, expense is only one factor in the balance. All factors should be considered when making proportionality evaluations and arguments.

And, as with everything related to the discovery process … litigation ensued.

Where We Stand Now – the Hot Topics:

Over the past few years, all of these issues have been merging more than ever before. Lawyers routinely meet and confer (with varying degrees of effectiveness); they argue about protocols and when agreed-upon protocols have been violated; they employ TAR, but argue about its use; "proportionality" is discussed and litigated.

For example, in *In Re: Valsartan, Losartan and Irbesartan Products Liability Litigation*, 337 FRD 610 (DNJ 2020), the court opined, "the disputes illustrates the unfortunate avoidable consequences that occur when a party does not meaningfully and timely meet, confer and collaborate regarding complex and costly ESI discovery." The discovery dispute centered on one party's unilateral, non-disclosed, use of TAR, that violated the parties' ESI protocol and order, which only contemplated the use of search

terms, not TAR, for determining which documents would be produced. Teva, the pharma company, on its own, late in the game, decided that it would be too costly to solely use only search terms, as agreed upon in the protocol, to cull through the vast data it had to evaluate in this complex litigation and employed TAR in addition to search terms. But it did not disclose that it was doing so and did not re-meet and confer with the other parties to address this issue. Keying in on many of the themes discussed above, the court held: "The time to meet and confer in good faith is before a TAR protocol … is adopted or used, not after." *Id.* "The backbone of TAR's use is transparency and collaboration." *Id.* "In sum, the Court repeats its regret that an enormous amount of time and energy has been spent on a dispute that was avoidable if the parties were fully and timely transparent and collaborated as envisioned by their Protocol." *Id.* In responding to Teva's argument that proportionality justified its use of TAR, the court held that, while proportionality should have been a factor addressed during the meet and confer process that led to the ordered protocol; proportionality did not justify Teva's after-the-fact, unilateral violation of the protocol: "In the Court's view there is no legitimate question that the Court's Order [on the ESI protocol] trump's Teva's proportionality argument. If the protocol has been violated, the Court's task is to decide the relief to be granted, not to do a proportionality analysis under Fed.R.Civ. P. 26(b)(1).

While *In Re: Valsartan* focused on the violation of the court-ordered ESI protocol as governing over a proportionality analysis given the facts of that specific matter, that outcome by no means indicates that proportionality does not hold sway in many cases. It does indeed. For example, in two very recent cases, *Robinson v. De Niro*, 2022 WL 229539 (SDNY 2022) (yes, De Niro is *that* Robert De Niro), and *Kinon Surface Design v. Hyatt Intl Corp*, 2022 WL 787956 (2022 U.S.D.C. N.D. Ill.), federal courts emphasized that proportionality should be front and center in deciding parties' discovery disputes. In *Robinson*, a former employee of Mr. De Niro and his production company, were in a dispute regarding alleged theft and unpaid wages. De Niro and company contended that Robinson had a personal AOL account that contained potentially relevant documents. Robinson contended that the account was not readily accessible and the information on it was available more readily from other sources. The court held, "requiring Plaintiff to also recover her AOL account to look for the same [documents already] produced … is not proportional to the needs of the case." *Robinson v. De Niro*, 2022 WL 229539 at 3 (SDNY 2022). It went on to chastise, "The Court recognizes that there is distrust between the parties, which has led to particularly vigorous litigation on both sides. However, all parties appear to have lost sight of the fact that zealous representation does not require motions to be filed on every minutiae of discovery." *Id.*

In *Kinon,* an intellectual property dispute regarding, "wavy, olive-green line pattern … wall hangings, hanging behind beds in a Chinese hotel 200 miles from North Korea and 6500 miles from the Northern District of Illinois," where the case was being litigated, the court denied a last minute additional set of wide-ranging discovery demands

by plaintiff. The Court emphasized that "discovery has to not only be relevant, but 'proportional' to the needs of the case, including 'the importance of the issues at stake in the action... and whether the burden or expense of the proposed discovery outweighs its likely benefit.'" 2022 WL 787956 *3 (U.S.D.C. N.D. Ill. 2022). The Court went on to state that "[p]roportionality, like other concepts, requires a common sense and experiential assessment." Id.

Common Sense – Evolution Doesn't Guarantee It

So, it seems from the above sampling of cases where the courts have admonished lawyers and parties for not following the rules, not meeting and conferring when they should, not appropriately weighing need versus cost, that human, lawyer, nor technological evolution guarantees that common sense will be invariably employed.

But the rules and cases governing discovery continue to require it to be employed. There is little doubt but that the technology and rules will continue to evolve, and that courts will call out litigants when they transgress.