

*E-discovery and the Problem of Asymmetric Knowledge*¹

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Thank you for the very kind introduction. It is certainly a great honor and privilege to appear at Mercer Law School in connection with this Ethics symposium, and I'd like to thank Dean Floyd and Prof. Patrick Longan for extending the invitation to me to be here today, and for all the hospitality. It is also an honor to sit on a panel with Judge John Facciola and Ms. Chilton Varner; I trust that they will have any number of wise and savvy comments on the remarks that follow. It is also a special occasion to have Prof. Monroe Freedman in attendance at this Symposium; my aim is to be at least half as provocative as Prof. Freedman was in his after-dinner remarks last night – a tall order to be sure!

I have entitled this talk, “E-Discovery and The Problem of Asymmetric Knowledge.” What I wish to talk about here is one aspect of the enormous and growing problem lawyers face in having to confront previously unheard of volumes of electronically stored information (or “ESI”) as part of the pre-trial discovery process. Specifically, I wish to focus on what lawyers are doing and should do in the enhanced meet and confer process called for by revised Federal Rule of Civil Procedure 26, and some ethical issues arising in connection with negotiations over how electronic evidence will be searched for.

I refer to “asymmetry” because in the usual course, one party (usually a corporate or institutional defendant) has privileged access to its own enormous data set. This has always been true, even in the world of paper documents, but today there is a twist: given the impossibility of manual review to find smoking gun and other material documents, the only way parties will have access to vast collections of ESI is through making intelligent, reasonable requests for automated searches to be conducted. But now the stakes are higher in the framing of such requests, because small differences in request language make an enormous difference when using computers to search for strings of text. The aspirational goal first stated in 1946 in the seminal *Hickman v Taylor* case involving attorney work product remains the same however: “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”² So how is that to be accomplished? And what might be ethical limits to maintaining an informational advantage held by one side in this new digital age? With some trepidation in advancing arguments in the presence of Prof. Freedman and his clearly articulated views on lawyer zealotry on behalf of clients, I will nevertheless throw caution to the wind and proceed.

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² 329 U.S. 495, 507 (1947).

I wish to accomplish three things here today. First, I wish to set the stage by giving a real slice of life example of my own work life as government lawyer, and the kind of email databases I have to confront as part of e-discovery. Second, I will give the briefest of overviews on the current trend in e-discovery case law of greater involvement of the judiciary in making parties negotiate over how they propose to go about conducting automated searches for relevant evidence. And third, most importantly, I will pose a few hypotheticals to serve as kindling to spark what I hope will be further lively conversation amongst all the panelists here today and all of you in attendance. I will even try to answer at least some of the hypotheticals with my own not-so-settled views on ethical lawyering in this area, to head off at the pass anyone walking out of here thinking that I have ducked away from controversy, been too tentative, politic, agnostic, on the fence, or just plain bland.

I do have two housekeeping matters to state up front: first, I wish to acknowledge and thank two Sedona colleagues and friends, first, Ralph Losey, with us today; and Conor Crowley, a lawyer practicing in NYC; as well as another colleague of mine, Alexandra Chopin, a lawyer practicing in D.C., all of whom have been very generous with their time in allowing me to bounce off of them some of the ideas that I will be stating here today. Second, I wish to make clear that what I am stating here are my own, personal views on the subject of ethics, search and retrieval, and e-discovery, not anyone else's, and this talk does not purport to represent the views of either The Sedona Conference®, or any other institution, government or academic, that I have the privilege to be associated with.

As is perhaps evident from my bio, I have spent my career as a lawyer in public service, including acting as DOJ counsel of record in cases defending the White House and the Archivist of the United States in a series of lawsuits involving White House email, starting with a landmark case involving the preservation of backup tapes on which Ollie North's PROFS notes related to the Iran Contra affair resided. Every President since President Reagan has experienced a rash of lawsuits surrounding his official email, and such suits always seem to take on added import as the end of each Administration nears. But there is another extraordinary phenomenon that has been readily apparent over the last decade: the incredible, exponential growth of the number of email records that have been preserved. Back in the dark ages – 2002, 2003 -- as Director of Litigation at the National Archives, I had the unique experience of receiving a 1,726 paragraph long discovery request from the tobacco company defendants in the case of *U.S. v. Philip Morris*, that demanded of 30 federal agencies that all records related to tobacco be searched going back 50 years. For NARA, that meant searching records in our Presidential library holdings back to the Eisenhower Administration, and more importantly for this talk, searching 20 million presidential record emails of the Clinton/Gore Administration. I added the Vice President's name as it so happens that the VP did in fact personally create and receive emails related to tobacco policy both prior to and in connection with the lawsuit eventually filed by the Clinton Justice Department.

To conduct a search of 20 million emails, lawyers at DOJ and NARA constructed a set of keywords which in the first instance were not shared with opposing counsel representing defendants; this keyword search produced 200,000 "hits," representing emails and

attachments, which in turn had to be sifted through by an assembled team of 25 archivists and lawyers – who collectively took six months to go email by email, attachment by attachment, separating out responsive and non-responsive documents, and then making further cuts for certain categories of privilege.

My experience with the tobacco litigation led me to three simple conclusions: first, exponentially increasing volumes of ESI would render equivalent processes using keywords alone unworkable within the next decade. Indeed, I have estimated that there will be upwards of a billion cumulative White House emails to sift through by the end of the next Presidency eight-plus years from now. 200,000 hits represents 1% of 20 million; but 1% of a billion is 10 million documents, and there simply will be no way in which any manual review process could be assembled between the present time and the time when the Milky Way and Andromeda galaxies are to merge that we could possibly review that many documents, and that is even after an automated keyword search has taken place. There is simply too much ESI to review as evidence, and the current legal paradigm of document review is severely broken. Indeed, as my Dad liked to say about all things, it will probably get worse.

Second, based on my tobacco litigation experience, I became strongly of the belief that lawyers need to better understand what the limitations to keyword searching might be, and that we should explore what information scientists have to say about the efficacy of alternatives, including calling for benchmarking and evaluation as appropriate. My questioning led me to exploring the matter further through the auspices of the The Sedona Conference®,³ as well as my involvement with the NIST TREC Legal Track,⁴ in finding best thinking in the area of information retrieval: basically, are there ways to improve what lawyers do – which traditionally has been to arbitrarily dream up a few keywords to search databases against – to find relevant evidence both accurately and efficiently? In other words, to find as many relevant documents as possible, but without spending inordinate time sifting through junk, or ‘false positives’ as the PhDs would say.

The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval in E-Discovery outlines a variety of alternatives to simple keyword searching, including greater use of what are known as Boolean operators, to construct search strings resembling what lawyers are familiar with when conducting Westlaw and Lexis searches, as well as to use terms borrowed from fuzzy logic, to account for errors and misspellings and other arbitrary word choices in texts. But also urging that lawyers consider using various forms of what has been termed ‘concept searching,’ using more sophisticated statistical, mathematical, and language-based methods to find documents based on patterns of word-choices that might represent combinations of keywords and their synonyms, based on constructs of how documents relate to each other in an otherwise vast universe. These methods go by various fancy names, including vector space retrieval, probabilistic latent semantic indexing, use of ontologies and taxonomies, social network analysis and the like. Judge Facciola was the first judge to recognize

³ See www.thesedonaconference.org.

⁴ See <http://trec-legal.umiacs.umd.edu/>.

these possibilities in his published opinion in *Disability Rights of Greater Washington v. Washington Metropolitan Area Authority*,⁵ a 2007 decision, and since issuance of that opinion Judge Grimm has penned a more recent opinion in May of this year, in *Victor Stanley v. Creative Pipe*,⁶ that goes through this laundry list of alternative search methods in greater detail.

Judge Facciola has added to this discussion in his more recent opinion in *U.S. v. O'Keefe*:

Whether search terms or 'keywords' will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. * * * Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.⁷

And third, my tobacco lit experience convinced me of the importance and necessity of approaching search issues collaboratively and transparently. The up front decision on the part of government lawyers to make a six month commitment of time and resources largely based on unilateral, behind the curtain decisions on what keywords to use, was essentially placing a huge bet on the table that these decisions would not lead to collateral litigation, discovery about discovery, with attendant risk of a "do over" after a further frenzied round of motion practice. The fact that that didn't happen I believe was in part due to my insistence that a sample of some of the results of some terms be disclosed, which had the effect of increasing the comfort zone of the opposing counsel at least to the extent that no further motion practice ensued. In 2002, this was novel; in 2008, although perhaps now not a sea-change in thinking, it is still the unusual case where lawyers sit down to seriously contemplate negotiating search protocols, and few do so anticipating a structured, iterative process to the discussions, although that may arise naturally after the fact.

Most recently, The Sedona Conference issued what it has called its "Cooperation Proclamation," with Judge Facciola and two dozen plus fellow members of the Bench as signatories. The document begins by stating that "the costs associated with adversarial conduct in pre-trial discovery has become a serious burden to the American judicial system." As such, the document represents a clarion call for lawyers to cooperate in resolving technical e-discovery disputes, while further stating that greater transparency and collaboration is consistent with zealous advocacy. The document describes various methods to accomplish cooperation, including most relevantly for our purposes here,

- Parties exchanging information on relevant data sources, including those not

⁵ 242 F.R.D. 139 (D.D.C. 2007).

⁶ 250 F.R.D. 251 (D. Md. 2008)

⁷ 537 F.Supp.2d 14, 24 (D.D.C. 2008).

being searched; and

- Parties jointly developing automated search and retrieval methodologies to cull relevant information

At face value, these points seem to be a straightforward extension of existing case law, both pre- and especially post-the December 2006 rules changes. For example, in a leading case, *Treppel v Biovail*,⁸ defendant made an initial attempt to engage plaintiffs in stipulating which files would be searched and what search terms would be utilized; plaintiff however assumed that the responding party had an obligation to search the digital equivalent of every scrap of paper. The Court admonished plaintiff that defendant was under an obligation only to perform a “diligent” search, and that “defined search strategies are even more appropriate in cases involving electronic data, where the number of documents may be exponentially greater.”

The plaintiff’s refusal to stipulate was further described by the Court as a “missed opportunity” as “plaintiff might have convinced defendant to broaden its search in ways that would uncover more responsive documents and avoid subsequent disputes.” In more than a dozen reported decisions over the past two years, courts have shown increasing willingness in encouraging, if not forcing parties, to put meat on the bones of Federal Rule 26(f), to discuss search protocols as part of the meet and confer process. A typical state of the art case: *Clearone v Chiang*.⁹ There, where the parties agreed on at least a core set of keywords but disagreed on what type of Boolean operators in a search string should be used: i.e., either “AND” or “OR,” the Court made a Solomon-like decision in deciding that an AND was necessary to be used for (names) AND (the substantive technological reference), otherwise there would be an excessive number of false positive hits; whereas OR would be appropriate for a third category of (licensing terms) OR (technological references), otherwise the search would be excessively narrow.

Quite presciently, the Court stated there that the “search protocol is not the ‘last word’” on e-discovery in the case. The opinion holds that “The use of key word protocols is one step in the process which contemplates many more steps, including revisiting the search protocol,” and “if documents are discovered which suggest that other documents exists which were not identified as potentially responsive, or if a surprisingly small or unreasonably large number of documents is identified as potentially responsive, refinement may be needed.” Indeed, the court recognized that “much of the argument is now speculative, since there is no actual experience with a search. The first protocol may suffice, or it may in effect be a sampling which reveals the need for more or less or different key words.”

Although the *Chiang* Court failed to go on to discuss any alternatives to keyword searching that might exist, the Court’s result is fully consonant with the position I have been advocating and the *Sedona Search Commentary* advocates, namely: lawyers using an iterative, step-wise virtual feedback loop in discussions. This is where at a minimum

⁸ 233 F.R.D. 363 (S.D.N.Y. 2006).

⁹ 2008 WL 920336 (D. Utah. April 1, 2008).

the propounding party puts forth its desired search terms, the receiving party does a sample search and reports back results, and the parties meet again to confer on how to fine-tune the search string request so as to increase the amount of relevant evidence obtained while minimizing the noise or junk returned. This kind of early course or mid-course course correction contemplates multiple iterative rounds if necessary in the largest and most complex case.¹⁰ Like it or not, best practices in this area necessarily will mean spending more time with opposing counsel, even if they strike you as the last persons on Earth you would wish to be stuck with stranded on a desert isle.

A recent case decided just this past month out of the Northern District of Georgia lends an ironic twist to this discussion. In *Kipperman v. Onex Corporation*,¹¹ Senior District Judge J. Owen Forrester had previously held that defendants were to conduct a search of backup tapes to produce meaningful discoverable information; that plaintiff should be more “artful with its search terms and that plaintiff utilize a list of the people, provided by defendant, to review whether all mailboxes needed to be searched.” The court further granted defendants the opportunity to narrow plaintiff’s search terms; however, defendant neither narrowed the list of people nor did they narrow plaintiff’s terms; instead they agreed to search and restore all mailboxes with the terms provided by plaintiff—however, defendants subsequently moved for a protective order seeking relief from having to review and produce all the results of the required search. Defendants contended that plaintiff’s “broad search terms resulted in thousands and thousands of irrelevant hits. For example, plaintiff’s search terms including the word ‘republic.’ Plaintiffs wanted emails related to “Republic builders,” but “defendants claim that the search captured thousands of irrelevant pages due to one occurrence of the word ‘republic’ often related to business interests having nothing to do with [defendants] but due to the presence of the Republic of France,” Ireland and Czech republic. The court said it was not “unsympathetic to the massive amount of discovery involved in this matter, the considerable burden of working with it, and the overproduction that often comes with email production,” and that “therefore, the court gave defendants numerous tools by which to reduce the burden of email discovery, including an opportunity to limit plaintiff’s search terms,” but that “defendants did not take advantage of these opportunities. Defendants must now lie in the bed that they have made.”

If defendants had taken the position that they would produce all documents requested and merely dump them on plaintiffs, over the objections of hypothetical plaintiffs who desired discussions to narrow the framework of the request but didn’t have enough information to warrant excluding certain terms or documents without defendants sampling the database, would defendants position be in compliance with ethical obligations? In other words, is it fair to dump 1 billion emails on a party after refusing to negotiate a narrower search request using agreed-upon search string parameters?

It should come as no surprise then that my opening ethical proposition for present purposes here is that lawyers uphold their duty of fairness to an opposing party and

¹⁰ See George L. Paul and Jason R. Baron, “Information Inflation: Can the Legal System Adapt?” 13 RICH. J. LAW & TECH. 10, at ¶ 50 (2007).

¹¹ 2008 WL 4372005 (N.D. Ga. Sept. 19, 2008).

counsel in being willing to engage in the very type of negotiations called for in the meet and confer process, especially given the privileged access to ESI repositories that one side will inevitably enjoy.

Model Rule 3.4 calls for fairness to an opposing party and counsel. Under (a) a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully ... conceal a document or other material having potential evidentiary value. Under (d) a lawyer shall not in pretrial procedure make a frivolous discovery request or fail to make *reasonably diligent effort* to comply with a legally proper discovery request by an opposing party.

The Comment to Rule 3.4 goes on to say that "the procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Paragraph 2 of the Comment to 3.4 makes expressly clear that the evidence subject to possible concealment includes computerized information.

Refusing to exchange ideas or discuss varying approaches to the ESI search problem, while posturing that the only response will come in formal answers to interrogatories and requests to produce at a later stage of discovery, is, I submit, a form of passive aggression out of yesteryear's practice book, and it should be recognized for what it is: not just gamesmanship, but an unethical approach to lawyering in the technical age we're in. Given the volume of information present, it is as a practical matter impossible to get meaningful discovery if one side refuses to discuss the parameters of what should constitute a reasonable search, leading to unfair and oppressive results. The *Clearone v Chiang* opinion is a good exemplar case where a Court recognized this, and issued its holding on conjunctive and disjunctive terms with that view in mind.

On the other hand, Model Rule 1.6 states that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. Cooperation is fair and good but there are perceived limits where one may bump up against competing considerations.

So what in fact does it really mean to negotiate a search protocol? Does counsel have a duty to "assist" in the negotiation process if one side has made very poor requests for information in the form of search terms? If the value of the requests are poor because they are way over inclusive, then as seen from the *Kipperman* and *Chiang* cases courts will expect parties to engage in narrowing, so as to filter out thousands or millions of irrelevant documents. But what if the requests are on their face reasonable but counsel knows they are poor requests based on special knowledge? Under those circumstances, to what extent should a party be obligated to "reveal" – and I use that word conscious of the ethical prohibition on revealing client confidences in Model Rule 1.6 -- some aspect of its own side's electronic data set in the interest of furthering expedition of the litigation?

All is not so simple in the land of ESI, and the ethics of negotiating search protocols is very much an open area awaiting Judge Facciola and his brethren to weigh in.

Let me pose a modest hypothetical:

Assume that Corporation X is required to produce all documents on a certain fungicide named “Benlate.” Assume further that a specific request to produce documents asks for all documents from the CEO of Corporation X, whose last name is “Bartlett,” which in any fashion relate to the sale of the fungicide Benlate. Also assume that the General Counsel of defendant Corporation X has been on the job for the last 10 years, during which time she has been involved in 100 lawsuits involving e-discovery searches against Corporation X databases, including suits for CEO records, Also assume that although no suit specifically involved production of Benlate, the GC is extremely familiar both with the proprietary name Benlate and the generic name of Benomyl for the fungicide, as they are interchangeably and commonly used throughout the corporation. Finally assume further that the GC knows that there are 10 million OCRd documents – that is, documents scanned in using an Optical Character Recognition process with a known error rate, and that in the past there are many documents that have been uncovered scanned in with the name “Bartlet.”

Now, assume that plaintiffs’ counsel, without knowledge of prior litigation against defendant, proposes a set of keywords to be searched. Further assume that on plaintiff’s list of keywords is the term “Bartlett” (spelled correctly), as well as “Benlate.” Excluded from the list are either any variations on the name Bartlett, or any synonyms for the specific proprietary name “Benlate.” The parties are ordered by the Court to meet and confer regarding the subject of search protocols to be used to find relevant evidence.

Question 1: Does defendant’s counsel (here, I necessarily include Corporate X’s GC present sitting with outside counsel at a meet and confer) have an ethical duty to inform plaintiffs that searches of the term “Bartlett” would not necessarily produce all instances of documents related to the CEO, given the known presence of spelling errors in the collection? Question 2: does defendant’s counsel have a further duty to identify that a search for the term “Benlate” may be underinclusive, when she knows that a generic name for the fungicide, Benomyl, almost certainly exists in the collection?

I have an unequivocal response on Question 1: yes, it would be taking an advantage of a factual mistake to not “fess up” to prior knowledge in the form of saying that there should be a fuzziness to the keyword request, so as to capture all variations of Bartlett, with both one t and two t’s at the end. Failure to discuss expanding the search request to encompass known variations of the spelling of the CEO’s name would be tantamount to withholding a material fact from the other side during the negotiations.

On Question 2, the matter of Benlate vs. Benomyl, while I do not believe counsel has a general duty of hand-holding to make opposing counsel’s searches better, if the matter bore greatly on a material issue in the litigation, I believe it would also be a mistake to fail to proffer the synonym as part of negotiations. (That is, I believe the right answer is to provide one’s knowledge rather than wait for a later iterative cycle to reveal the term.) This is more controversial, but I say this because (a) it is almost certain to be found out anyway, and one gains credibility in being up front about it when there is no outcome determinative difference perceived; and (b) failure to do so greatly increases the risk of a

“do-over”—having to re-do discovery. Whether I would or should only do so *only* with a client’s consent – which I take it would be Prof. Freedman’s way out of this ethics conundrum -- is an issue that I would be quite interested in having my fellow panelists weigh in on, but with this caveat: in the real world, there is often precious little time to bring clients in to micro-manage litigation strategy, and so as a practical matter one may have to assume that the lead lawyer in the representation will be by default on his own in deciding what course of action to pursue.

The above is of course not so completely a hypothetical: although this type of ESI issue was not, to my knowledge, ever directly at issue in the *Dupont Benlate* litigation in Georgia, more traditional variants of improper discovery conduct in the form of the withholding unfavorable evidence were at the heart of the sanctions handed down in that case – leading directly to a consent order which is responsible for the very Symposium of which we’re taking part. It may be instructive to be guided by the wisdom of the Judge writing in that case, who stated:

It is the obligation of counsel under the rules, as officers of the court, to cooperate with one another so that in the pursuit of truth the judicial system operates as intended...The Federal rules require that counsel make a reasonable investigation and effort to assure that the client has provided all information and documents available to it which are responsive to the discovery request. It is also required that counsel certify that the responses to discovery requests are complete and correct.

The courts do not have the time to micro-manage discovery in every case. They must depend on their officers, the lawyers, to keep faith with their primary duty to the court as its officers, and so make the discovery system work by voluntarily making the required disclosures. Counsel should not be allowed to ‘sell out’ to their clients...¹²

As applied in this brave new world, my argument is that failure to disclose special knowledge of the relevant characteristics of the ESI universe of your client that would knowingly fail to optimize and thus impair an otherwise reasonable-sounding search protocol request is tantamount to the suppression or concealment of evidence in conflict with ethical obligations under Rule 3.4.

My argument here in the legal domain has a parallel in the world of statistics: to paraphrase a recent text on measurement, conventional statistics assumes that observers have no prior information about the subject of their observations, but the above assumption is almost never true in the real world. Bayesian statistics -- derived from a theorem of the good Reverend Thomas Bayes -- deals with the issue of how we should go

¹² *Bush Ranch v. Du Pont*, 918 F. Supp. 1524 , 1543 (M.D. Ga. 1995).

about updating prior knowledge with new information.¹³ I'd like to propose that judges and lawyers should apply a quasi-Bayesian analysis to the ethical issue raised here. That is, should lawyers in meet and confers act as if search issues have never been raised before, that they are working on a *tabula rasa* with respect to how searches are conducted? To what extent is it more ethical to approach the meet and confer as one of an iterative exercise over the course of the entirety of a representation of an entity, or over the course of one's own career—rather than an ad hoc, stovepipe transaction related only to the litigation at issue.

In calling for greater attention to the formulation of search protocols, I am not just rehashing the *Qualcomm v Broadcom* case,¹⁴ a case on every e-discovery blog top ten list of cautionary tales from this decade. In that patent infringement action, a raft of lawyers have been under threat of professional sanctions for a host of misdeeds, including most notably the failure to produce 200,000 relevant and material emails that could have been produced if only an electronic search had been conducted using obvious search terms under custodians and subjects. With *Qualcomm* has a low ethical bar to get over, raising issues of competence and intentional misconduct, I am arguing here for a more nuanced, higher ethical bar that lawyers should perceive when involve in meet and confer negotiations: that standard is one of acting reasonably in the face of knowledge and experience of the data set that your client has, as gained from prior litigation and prior searches conducted.

For those of you in need of additional persuasion, let me suggest that what I consider here as doing the right thing also makes good economic sense, and can be sold to clients under that banner if a hymn to higher ethical standards fails to move them. I trust Judge Facciola will indulge me a quote from a music icon other than his favorite, Bruce Springsteen, by my choosing a line from Bob Dylan: “ what price [do] you have to pay to get out of going through all these things twice?”¹⁵ Finding out late in the game, on the eve of trial (or in the case of *Qualcomm*, after a trial) that important emails and other forms of ESI were missed due to failures of the search protocol, means tremendously adding to the cost of discovery when a court requires that second and third passes thru the ESI universe now be conducted.

Professor Wendell, a leading commentator on ethics in discovery, has summed up counsel's discovery obligations by announcing three overarching principles. In his influential 1996 article “Rediscovering Discovery Ethics,”¹⁶ he states (and I am paraphrasing here): (1) The lawyer's primary obligation is to the discovery of the truth rather than to the advancement of the client's interest, unless some clear countervailing interest is recognized; (2) the discovery system is not bound up with the adversary system; partisanship comes into play only after all of the facts have been revealed to both sides; and thus (3), derived from one and two, it is a breach of the lawyer's duty as an

¹³ Douglas W. Hubbard, *HOW TO MEASURE ANYTHING: FINDING THE VALUE OF INTANGIBLES IN BUSINESS* (John Wiley 2007).

¹⁴ 2007 WL 2296441 (S.D. Cal.)

¹⁵ From “Stuck Inside of Mobile With The Memphis Blues Again,” *Blonde on Blonde* (1966).

¹⁶ 79 *Marquette L. Rev.* 895.

officer of the court to fail to disclose information that would assist the tribunal in determining the case on its merits.

I believe my quasi-Bayesian point builds on and incorporates Prof. Wendell's thinking as applied to ESI search protocol negotiations.

To sum up, I believe that the explosive growth of information is transforming the litigation system, and that the current paradigm is broken. As I have shown, new strategies involving automated search methods, cooperation, and the use of structured, iterative approaches are called for, and are fully consistent with the aspirational aims of the Model Rules. I also believe that counsel cannot reasonably fail to bring to the meet and confer table his or her prior knowledge, gained from experience in litigation, on limitations or deficiencies in proposed methods of search, and that given the hugely asymmetric nature of litigation as we near the end of the first decade of the 21st century, old 20th century ways of approaching these problems need to be rethought. Not every characteristic of a data set triggers a future duty of disclosure; this is obviously an area that will have to be worked out in future cases. But the notion that one should act oblivious to past knowledge acquired, in posturing that every meet and confer starts on a complete clean slate, does not, in my view, accord with our profession's highest ethical ideals and aspirations.

Of course, some of these ethical conundrums might in fact be alleviated if a level playing field of competence existed amongst members of the Bar, although random disparities and gaps in knowledge will always exist and are fact of life. I will leave to Ralph Losey and the next panel addressing some of those further considerations. For now, I trust I have given enough food for thought for one panel's discussion.

Finally, as a coda, I also believe that lawyers in the public service like myself owe a special duty of fairness in litigation, and so whatever doubts one may have on the extent to which counsel should engage in a spirit of cooperation on search strategies and search terms should be resolved in favor of openness and transparency, at least in the world I have had the privilege to travel in to date, for the job I hold is a public trust. I can tell everyone here that when I was a Justice Department attorney, there was no better feeling than to stand up in court to say that you are appearing on behalf of the United States of America.

I thank you again for the special honor and privilege you have given me to present my remarks here this morning.