H5

Revised for 2015!

2014

Five Resolutions to Help you Navigate the New Year

__2014__ was a year of continuing evolution in the legal realm and __2015__ is sure to be the same, as the pressing demands of electronically-stored information increase and the role of counsel continues to broaden to include more technological competencies. Here are five New Year's resolutions to help you navigate the shifting terrain in the coming year.

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Five Resolutions to Help you Navigate the New Year

1 Get a handle on technology-assisted review. It's up, running, and gaining momentum.

If we've learned anything by now, it's that if technology can be applied to something, it will be. Email on your wristwatch? Of course. A drone to deliver your Amazon selections? Why not? Google Glass mediating your walk through town? Absolutely.

Although technology-assisted review (TAR) may not be quite as sexy, it's just as inevitable. There is growing acceptance of the fact that the data populations targeted in litigation are simply too big to manage with the more traditional linear and manual approaches that have been used by most companies and firms for decades. And given the nature of electronic data, it soon will be inappropriate to handle this digital media with old-fashioned analog methods.

As a result, this past year saw vendors and firms more readily exploring electronic tools and processes for slogging through ever-growing volumes of ESI.

The dust kicked up in *Da Silva Moore* around the use of one TAR approach, "predictive coding," seems to have settled. The courts—apparently more concerned with "reasonable process" than types of tools—are holding to the proposition that the producer decides how to produce, generally maintaining a neutral posture around the technology used. Indeed, the conversation around TAR, once about defensibility, has been gradually replaced with more tactical war stories and cost-benefit analyses as matters where such tools have been deployed serve to shake out the benefits and hazards.

What's been demonstrated so far is that no technology applied to e-discovery and document review is a silver bullet. There is no "easy" button. Whether it's the seed sets and algorithms of predictive coding or the more deterministic approach of professional linguists leveraging sophisticated keyword tools, the effective application of technology in service of e-discovery is not for the novice. Expertise is required.

So where does that leave counsel for the upcoming year? Understanding available tools and technologies with the pros, cons and caveats of each is important. But even more important is ensuring that the process in which the technology is used is a reasonable one. That is what the court will ultimately evaluate. There is no escaping the fact that it is the responsibility of counsel to be able to consider and evaluate the "reasonableness" of whatever review process is implemented. But, first you've got to know a little something about the available technology. That's the reason you have to go all in for **Resolution 2**.

Update: *More of the same, here. TAR is taking hold, but slowly. Some firms are wading into technology-assisted waters, but learning curves, unanticipated costs, and, for some approaches, concerns about seed-set production to the opposition are still giving pause. It seems clear, however, that increasing data volumes, growing judicial awareness and enhanced processes that afford greater transparency will enable a growing number of clients and counsel to reap the benefits of technology-assisted review in 2015.*

2 *Keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.*

A great resolution, as it also happens to be the language addressing the "duty of competence" added to the commentary for Model Rule 1.1 of the ABA's *Model Rules of Professional Conduct*. Although the ABA kindly notes that the change "does not impose any new obligations" for counsel, it nonetheless seems to suggest that legal competence may be in question if counsel doesn't know a PDF from a BMW.

UPDATE: *This is a resolution that you should commit to, now, more than ever. Bench and bar alike are becoming more attentive to this topic. This past year, The State Bar of California Standing Committee on Professional Responsibility and Conduct, for example, issued a formal opinion[1] stating that attorney competence related to litigation generally requires, at a minimum, "a basic understanding of, and facility with…the discovery of electronically-stored information" and that, indeed, competency requirements for a given matter "may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI." What do they present as counsel's options? 1) Acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants of competent counsel; or (3) decline the client representation.*

Perhaps in reaction to this growing demand for technology competence, 2014 saw law schools becoming more proactive in getting up-and-coming lawyers up to speed. Benjamin N. Cardozo School of Law in New York, for example, has recently launched an initiative to place law students in data-oriented summer internships to learn technology, with the school's dean, Matthew Diller, noting in a letter to the New York Times that "preparing students for a tech-driven environment is a practical matter for law schools—one that will benefit society at large."

It also appears that the bench is increasingly demonstrating impatience with attorney incompetence and/or missteps on the eDiscovery front. See, for example, Brown v. Tellermate Holdings Ltd., an employment matter in which serious sanctions, including preclusion of the defendant's most likely defense strategy, resulted from counsel falling short of "their obligations to examine critically the information Tellermate gave them about the existence and availability of documents requested…" that resided in third party application platforms and apparently failing to acquire even the most basic information about a cloud-based database (salesforce.com) that clearly held relevant information. In addition, counsel's use of overbroad search terms, indicating a lack of expertise in the development of effective keyword lists, yielded a large number of irrelevant documents (a.k.a. a "data dump"), which could not be reviewed in the court-ordered timeframe.

[1] See "The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 11-00004"

On the face of it, knowing the "benefits and risks associated with relevant technology" shouldn't be that tough a nut to crack. But that simple phrase is deceptive; it pre-supposes a surprising amount of knowledge. The relevant technology in *Zubulake* when Judge Scheindlin spoke of counsel understanding a client's "data retention architecture" is far from the relevant technology in question when Judge Peck considered the use of predictive coding in *Da Silva Moore*. And to be sure, there is a whole lot of "relevant technology" in between.

Moreover, understanding associated benefits and risks, no matter what the relevant technology, means a significant amount of due diligence relative to context. Benefits and risks are value assessments that often require expert analysis; you can't just refer to your handy benefit-risk checklist and call it a day. All this to say: counsel's got a learning curve to climb, albeit one that's justified and necessary.

If you feel that your technical competence could use a lift this coming year, here are a few tips and resources that can keep even the most time-challenged lawyer in the know. (If you're totally in the dark, begin by exploring the basics provided by two well-known organizations, each of which is a veritable Mecca of information: The Sedona Conference®, a legal think tank, and the EDRM, a coalition of consumers and providers who create practical resources for enhancing communication about e-discovery and information governance.)

Here are a few other ways to keep Resolution 2 going strong for the upcoming year:

1. Take advantage of CLE's. A staple in the legal landscape anyway, CLE's provide a rich source of information for building on foundational knowledge and upping your technology IQ. But beware, not all CLE's are created equal. Seek those given or supported by experts with verifiable technology chops. If possible, obtain written materials in advance to see if the content speaks to your needs. The best ways to find relevant CLE's are through colleagues, local bar and professional associations and social media. Vendors and law firms also sponsor technology-focused webinars or can be called upon for in-person presentations.

2. Hit the legal technology watering holes. There's a mother lode of information being shared on any and all topics related to legal technology and e-discovery. Several magazines and journals (online or in print) have a technology focus. *Law Technology News* (a.k.a. "LTN"), is the go-to magazine for accessible information about the latest technology and e-discovery trends. The ABA Journal has a Legal Technology section. For more scholarly articles, seek out *Journal(s) of Law and Technology* (JOLT) such as those offered by Harvard and Richmond.

Social media and blogs provide a rich source of information as well. In LinkedIn Groups, for example, members share insights and questions about technology tools and methods as well as topical case information. Most law firms, e-discovery vendors and legal associations have blogs, and technology-related topics are common. Some law firms have e-discovery counsel who make it their business to blog on hot technology-related topics. The easiest way to locate a topical blog is via Google (or the search engine of your choice); enter your topic of interest with the word "blog" in the search string.

3. Check out Legal Tech. Although the digital overload at this event may render you comatose (and be sure to wear sensible shoes), a day at Legal Tech can be a real eye-opener when it comes to understanding the impact that technology now plays in the legal realm. Rife with techno-savvy members of the bench and bar, debates are usually lively and informative, and it's a good place to find collegial resources to answer questions. Buyer beware, however; go to learn, not necessarily to believe when you walk the floors that demo technology—this is essentially a sales event, after all. With practically every type of legal software and system platform on display, a day at Legal Tech will either snap you out of complacency or send you to a career counselor.

4. Chat with your lit support team or IT representatives—and ultimately your clients. (Better yet, take them to lunch.)

Often, what seem like technology hurdles are actually communication issues. Establishing relationships with folks who are likely to know more than you do can be an effective way to find out what you don't know; they can help you fill in the gaps or you can target those areas by the means listed above.

5. Last, but not least, seek out the experts. Lawyers know the value of expertise; they make their living by it. Technology used in the legal realm, especially for e-discovery, search, and technology-assisted review, is complex. It requires the input and analyses of those who are experts in particular aspects of the field. Find experts you can trust and work with them to sharpen your awareness and raise your level of knowledge. With that kind of help, who knows? You may find that for the coming year and beyond, your technology competence will be one step ahead of the law.

3 Get up to speed (and perhaps weigh-in!) on proposed changes to the Federal Rules.

UPDATE: *It's too late to weigh in, but you can certainly resolve to get up to speed. (Read further for the description of the changes.) During its September, 2014 meeting, the Judicial Conference of the United States approved the latest version of the proposed amendments ("Modified Proposed Amendments") which had been revised by the Advisory Committee on Civil Rules based upon feedback received during the public comment period. There was lively debate during the comment period; proponents of the changes argued that the new rules will help reduce the skyrocketing costs of litigation while opponents countered that the changes will benefit big business at the expense of plaintiffs with legitimate claims. The Modified Proposed Amendments will next go to the U.S. Supreme Court for consideration. If approved, they will take effect December 1, 2015 (unless Congress steps in to oppose the amendments or to make changes).*

Proposed changes to Federal Rules of Civil Procedure, especially those regarding presumptive limits on depositions and interrogatories, a sanctions standard for e-discovery violations, and a new emphasis on the "proportionality" of discovery demands, are generating increasingly heated debate in the legal e-discovery community, likely to grow hotter during the public hearings in early 2014. As state courts frequently adopt the Federal Rules as their own, the changes, if adopted, could have a far-reaching impact. What follows are some highlights to consider.

The amendments proposed by the Advisory Committee that relate to discovery primarily seek to limit cost and scope by reducing the number and length of depositions and interrogatories and enhancing the means of keeping discovery proportional to the action. The changes are intended to help do away with the "gotcha game" often played out in today's courtroom when large volumes of electronically stored information (ESI), costly to process, review and produce are in play for either or both parties.

Although current language addressing proportionality now exists in the Rules, namely in Rule 26(b)(2)(C)(iii), the Advisory Committee notes in its *Report to the Standing Committee* that prior Rules changes intended to address disproportionate discovery didn't realize the "hopes of its authors" in limiting the scope of discovery. They note that "discovery runs out of proportion in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate particularly contentious adversary behavior."

They have thus transferred the proportionality analysis required by Rule 26(b)(2)(C)(iii) to Rule 26(b)(1), which discusses *Scope in General*, amending the former to cross-refer back to the latter. The assumption is that appropriate limitations by the court on discovery will be more likely to ensue since "*the court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1)*." In additional support of the proportionality notion, the Committee recommends eliminating the current provision in 26(b)(1) that allows the court to order "*discovery of any matter relevant to the subject matter*" so that proportional discovery "*relevant to any party's claim or defense suffices*."

The proposed amendment to Rule 37(e) seeks to address concern for the cost and burden of preservation and the sanctions that sometimes result. The revision would prohibit sanctions for failure to preserve discoverable information unless the failure was "*willful or in bad faith*" and causes "*substantial prejudice*," establishing a more uniform national standard and rejecting the idea of sanctions for negligence if a party takes reasonable and proportionate preservation measures. If it functions as intended, the amendment would reduce both the costs associated with over-preservation that is done to protect against allegations of spoliation and the litigation that has occupied the counsel and the courts on that topic.

With the proposed reductions in depositions and interrogatories and limitations in scope, it becomes important for counsel to know more, earlier, in order to develop a discovery strategy. Proposed changes to Rule 34(b) would require any discovery objections not only to be stated "with specificity," but to be accompanied by information about whether any responsive materials are being withheld on that basis. It would be difficult to state specific objections without a fairly robust knowledge of documents and issues beforehand.

Not surprisingly, the defense bar, whose clients are generally more likely to have large ESI volume, supports these changes or thinks they haven't gone quite far enough to address the onerous e-discovery burdens their clients currently face. (See the public comment of *Lawyers for Civil Justice* reflecting those views). Plaintiffs, meanwhile, argue that the change to Rule

26(b) will make it more difficult to get essential discovery and will handicap their side in complex litigation and in cases where the defendant holds a disproportional amount of information.

Whether or not the proposed changes will fundamentally alter discovery if accepted in their current formulation is subject to debate on its own, but the impetus to address the issues that exploding volumes of ESI is certainly evident. The public comment period, which began in August 2013, will continue through early 2014 and is sure to add additional insight into the challenges currently faced by litigants and counsel on both sides.

4 *Learn what there is to "like"—or not—about social media.*

It's difficult to be a lawyer (or any other human, for that matter) without feeling the effects, for better or worse, of social media. Not just a milieu of the young (the 55–64 year age bracket on Twitter has grown 79% since 2012[2]); it has become an inescapable part of daily life for everyone and will likely impact you and your practice of law in surprising ways in the coming year.

UPDATE: *If you haven't yet resolved to get up to speed on social media, you best be getting with the program pretty darn quickly. Consider that collectively, Facebook, Twitter, Google+, Pinterest and Instagram now have billions of users, and US social-media ad spend will top $8.5 billion this year and reach nearly $14 billion by 2018.*[3]

The impact of social media on the legal profession hasn't been lost on the many bar associations taking steps to advise their members about the impact of social media on the profession. In 2014, for example, the Social Media Committee of the New York State Bar Association's Commercial and Federal Litigation Section issued Social Media Ethics Guidelines "to assist lawyers in understanding the ethical challenges of social media." The Guidelines set out 18 standards related to collecting evidence and researching witnesses, advising clients about social media content, researching prospective and sitting jurors, providing legal advice, and attorney advertising. The comprehensive rules highlight both the opportunities and the ethical pitfalls for lawyers using social media.

Echoing the advice of the comment in model Rule 1.1 about keeping abreast of the benefits and risks of technology (see ***Resolution 2****, above), the Guidelines advise lawyers to be "conversant with the nuances of each social media network the lawyer or his or her client may use." As we noted last year:*

Whether it's about jurors tweeting from the courtroom, the widening scope of e-discovery, or a corporate client's less-than-informed communications behavior (such as tweeting forward-looking information without the cautionary statement required by safe harbor rules), the fact that the digital era has essentially blurred any and all communications boundaries means that lawyers and their clients

[2] See http://blog.globalwebindex.net/Stream-Social

[3] Read more: http://www.businessinsider.com/social-media-advertising-spending-growth-2014-9#ixzz3Mk8M6jMm

may face new challenges from unexpected directions. It may thus behoove counsel to be not only personally sensitive to the dangers, but to put their clients on alert that social media can be a litigation minefield.

Reported cases involving evidence from social media are in the thousands (doubling every year) and they are increasingly targeted in search warrants and government subpoenas in criminal matters. It shouldn't be a surprise that the data repositories of social media are becoming impossible to resist when a litigation or investigation arises. When has there ever been a more fertile collection of information to explore? In terms of discovery, it's clear that there should be no expectation that privacy settings on sites such as Facebook will protect information. Courts appear to be treating "private" information contained in social media the same as a party's handwritten notes: if is relevant, it is discoverable, whether previously shared or not (absent any applicable privileges or privacy rights). Privilege alone may offer protection, but that might be difficult to establish for a Facebook post. How to go about getting the information and questions about preservation and spoliation are evolving questions as court decisions begin to pile up.

But social media concerns certainly go beyond the discovery aspect. Information is out there to be had by the mouse click, not just for and about litigants, but also lawyers, witnesses, experts, and even judges, adding an interesting and potentially outcome-changing dimension to the courtroom experience. Ethical issues around "friending" judges, jurors, or other parties to litigation have brought new communications vehicles to old thinking: the information to be found is vast, although rules of contact remain much as before. The authentication and chain of custody dilemma has yet to be fully vetted. Unwitting privilege waiver is always a looming threat as information boomerangs around various media. In addition, ignorance of the way in which certain social media sites might mine information for public consumption (such as contacts lists) may lead to unwitting exposure in ways that can be quite damaging to litigants and counsel.

For those with clients in the corporate realm, understanding the profound impact of social media is imperative. Privacy and security risks—both for company and employee—proliferate. Mobile media makes information sharing (and leaking) easy; balancing company mandates and employee rights is becoming more of a challenge. Employers have a legitimate interest in ensuring that social media communications by employees comply with policies prohibiting disclosure of confidential information and trade secrets; employees have the right to discuss information related to their employment, including criticism of various aspects of their employer's policies and behavior. Conflicts, not surprisingly, arise. Government agencies, including the National Labor Relations Board, FINRA and the FTC are becoming more and more involved in addressing social media in the workplace. It's not a bad idea for counsel to do the same.

To be sure, the use of social media comes replete with benefits, pitfalls and many ethical questions. The information repositories they create exist and continue to grow, oblivious to side of the "v" you

may care about. It's up to you to use it or defend against it as the situation warrants.

As with other aspects of technology, the resources described in **Resolution 2**, above, will provide a wealth of information about social media. But there is a broader consideration of data and technology to consider, which leads us to suggest you have a look at **Resolution 5**.

5 *Become (or help your firm become) an informed information governance advocate.*

Your inner voice may be saying "that's not my job," but if you've read the preceding resolutions, you may want to reconsider. Electronic information and the technology used to create and manage it is everywhere, impacting almost everything, and this resolution will likely bear fruit next year and beyond for both you and your clients.

"Information governance" will become even more of a catchphrase next year than it has been thus far due to growing threats related to electronic information held within in the enterprise and, more and more, outside of it. Companies can only benefit from the sage advice of counsel to raise their data and social media awareness, increase security precautions, and tighten up information-related policies and procedures. As social media and the risk of privacy and security breach put companies in danger, the mishandling of corporate data can have serious consequences, some of which will undoubtedly end up being addressed in the courtroom at great expense. It's good business to be an informed advisor to your clients on how to reduce risk, not to mention litigation and discovery costs, by appropriately managing data outside of the organization, especially when it's unnecessary or no longer needed.

By the way, because they share similar goals of searching, segregating and categorizing data, technology-assisted review tools and search processes developed for e-discovery are morphing into ones that can be used in the enterprise for information governance initiatives. Users beware, however: as with all complex data-related endeavors, expertise is required. It's important to know what needs to be accomplished and what kind of experts to seek. The tips and resources in **Resolution 2** will lead you in the right direction and give you that crucial head start in the New Year.

Update: *"Information governance" did indeed become the catchphrase we predicted in 2014 as ballooning data stores continued to plague the corporate enterprise and beyond. The C-suite is under growing pressure to comply with more and more mandates that define how their companies manage information. Meanwhile, the costs associated with data storage and management are skyrocketing as enterprise information grows at rates often exceeding 40% per year. The risks and costs associated with mismanagement are also growing, as evidenced by the legal penalties that have grabbed recent headlines. Several companies found themselves on the receiving end of a data breach, spreading the kind of fear about security concerns that leads to the creation of internal information governance and data security teams to take a harder look at the type and volume of data that is under the control of the enterprise. Data disposal efforts, often discussed, remain unimplemented for the most part as companies strive to control costs while*

seeking productive uses of so-called "big data." The more data a company has, however, the greater the risk of exposure and of costs for discovery, should a litigation or investigation arise. That concern is on the rise was indicated by an increase in information governance conferences, summits, and webinars in 2014, and this will likely hold true for the upcoming year. Whether information governance imperatives can entirely take hold in the C-suite remains to be seen.

2015 will undoubtedly hold some unwelcome surprises, and it behooves members of the legal and corporate communities to resolve to stay ahead of the curve and advocate for the kind of technological sophistication and internal diligence required to keep electronic information safe and secure while ensuring protection from the undue burdens that poorly executed or outdated e-discovery methods can impose.

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