

The Slow, Tragic Death of the “Swearing Match”

BY CLAUDE DUCLOUX

Ah, the good old days! Nothing provided more riveting theater than the exposition of a lawyer’s skill in catching a trial witness in a lie and carving the truth out of him like a dermatologist in a freckle factory. Perry Mason (my dad loved Perry Mason) had witnesses relieving their consciences of the truth at the top of their lungs, an inexorable result of Perry’s patient, spot-on deadly cross-examination: “All right! I did it! I had to do it! I couldn’t take it anymore!! (sob...sob...)” And we loved it. Nothing scratches our itch for justice better than catching a liar.

Often, I’d sit back in the rattan chair in the “TV Room” (as we called it—the sanctuary of our beloved black and white Admiral TV), and even at age 11, tearfully think about how I might get that chance someday. The tears, of course, were from the circulating blue smoke of my dad’s Winston cigarettes, which undoubtedly stunted my growth. Such courtroom skill is what every lawyer aspires to! Trap a witness in a lie, and shove it down his throat in front of the jury. “Your witness, Mr. Burger!” Perry would snort to the gape-mouthed District Attorney.

But now this courtroom drama is on the wane, especially in big civil trials. Such confrontation always depends on two conflicting versions of facts or conversations, and the individual credibility of the witnesses. Body language. Eye contact. Involuntary sweating. Yeah, you can see the bum is lying. The swearing match was often thrown to the jury, as no supporting documentation was ever available. Aye, there’s the rub. Now, our most privileged secrets are revealed by electronic snitches.

To me, the most un-fun development in our civil trial toolkit is not the prevalence of trial appliances, animations, and

other presentation tools, but the necessity to learn “E-Discovery.” Clearly, this is the castor oil of our profession. Yuck. But in this digital society, we are told there is always an email, text, or other digital message relevant to every factual dispute, as we create billions of digital footprints. They say that during 2016, 150 million emails were sent every minute. You see the problem, right? Lawyers are supposed to be able to cull through and find relevant missives as evidence. Double yuck. I hate it.

Nevertheless, in my role as the beacon of modern practice, I think I owe it to you to give you a primer on the skillful use of Electronic Discovery. So, pay attention as I teach you the basics. Having skimmed at least three CLE articles, I will do my best.

The steps you must take to competently pursue E-Discovery include:

Preservation of Evidence.

If your client has a passing thought that he might want to sue someone, you must bolt into action immediately. Using a serious font (I’m thinking Bodoni Bold), you send a letter to the oblivious wrongdoer, asking him to save every document which has ever come into his possession since birth. This should include books, letters, emails, Twitter feeds, Kleenex, hard drives, soft drives, drives in the country, high school yearbooks, warning tags on pillows, varsity letters, and, of course, ledgers. We can’t ever have enough ledgers.

Financial ledgers, sales ledgers, and Heath Ledgers. See? The other side is already exhausted and wants to settle. The technical name for

this missive is a “spoliation” demand letter. If written properly, it spoliates the underwear of the recipient.

Don’t pay to convert your ESI: Converting your ESI is a rookie mistake. Or so I’m told. I’m pretty sure that it has something to do with Episcopal Spanish Italics. I could be wrong.

Choose your Platform: This is how you view your data. I think you’d want it pretty sturdy for all the boxes of stuff you’ll E-Discover. I’m advised by the terrific articles of Craig Ball (www.craigball.com) that three well-known search assistants are called Relativity, Concordance, and Summation. Curiously, those are also the names of his children. Coincidence?

Be prepared to handle

Metadata: Metadata is extremely important, but few lawyers really want to mess with it because it is very high in cholesterol. Wear gloves and goggles when handling metadata. Never try to quash metadata without sufficient metrics. You can buy metrics at TIFF’s Treats.

Know your

Keywords: Keyword searches trigger results, but, as Ball advises, you must tailor your keyword searches as carefully as possible. Avoid words which will trigger too many unrelated emails and messag-

es. Personally, I avoid using the words “lipsauce” and “merlot” in my searches. That one rule speeds things up immensely.

Always ask for Native Files: Very simply, you want native files because they are the original electronic evidence. And never settle for alien files. They will be subject to deportation.

Final Advice: Whenever you can, you should incorporate de-duplication. Enable rudimentary redaction. Especially for curse words. No one wants to see curse words. And use a computer later than Apple II.

Of course, if you follow this simple, easy-to-understand checklist, you will certainly find the electronic evidence which supports truth and credibility. So, just between us, be careful what you ask for. As for me, I’ll miss the exhilaration of those Perry Mason moments. With lying so popular now, it seems a shame to let those skills go fallow.

Keep the faith. **A**

