

E-Discovery 'Command' Culture Must Collapse

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A dominant theme permeated Friday's fifth annual Colorado Association of Litigation Support Professionals' [E-Discovery Summit](#): To succeed, litigants must embrace the concept of e-discovery teams and jettison the traditional vertical hierarchies where a senior partner or general counsel channels General [George Patton](#).

"Command" models are doomed to failure, several panelists insisted. The time has come, they said, for true collaboration -- not only internally, but with opponents.

U.S. District Court (Colorado) Magistrate Judge Michael Hegarty kicked off the daylong conference, explaining his expectations from litigants. He served for 14 years as an Assistant U.S. Attorney with civil division in Denver, and was chief of the division for three years, before taking the bench in 2006. Hegarty surprised many in the office with his report that less than 1 percent of Colorado cases go to trial, and that very few litigators bring up electronic data discovery issues in early conferences, which "can be detrimental the the case."

Hegarty urged parties to adopt EDD protocols, and said he takes a hands-off posture in his court. "I believe in minimalist court intervention in how you want to try your case," he told the audience of approximately 160 paralegals, attorneys, and litigation support professionals at Denver's Grand Hyatt hotel. When asked if judges should raise issues about EDD if litigators did not, Hegarty said that basically, that was not the judges' responsibility.

Hegarty said he is skeptical about counsel's predictions about EDD costs. "I don't trust attorneys when they come in and tell me how much it will cost," he said. "I don't believe lawyers are lying," he said, by way of caveat, but went on to say that lawyers aren't properly estimating costs. He said he approves predictive coding in some cases, to help keep costs in check.

A key area of friction: getting opponents to agree on search protocols can be challenging. "When I hear 'Chicken Little' objections to discovery, I will hold a hearing." Hegarty isn't above ordering counsel to purchase software and use it, in order to expedite efficiency. "It's easy for a party to say, 'We can't do that,' but it's hard to image that something can't be done," he said. In some circumstances, he said, he will allow opposing teams to actually go into the other side's technology and files -- with protective orders in place.

Hegarty also pushes litigants to proceed quickly. "We can't afford to have discovery disputes sit around for months," he said. "Things are going to start happening even more quickly, perhaps even when you don't want it to." Hegarty said he encourages parties to call him when disputes arise to speed the EDD process. But he said he doesn't jump to sanction: "E-discovery is a subset of discovery, I am not going to sanction more in e-

discovery than in other cases."

The bottom line reflects back to that settlement statistic: "I think I have had 30 patent cases in conference, and 29 have settled. It is very expensive to litigate."

William Hamilton, a partner at Quarles & Brady, based in Tampa, Fla., addressed ethical issues that arise in balancing the roles of supervising attorneys and the litigation support personnel. His practice involves business litigation and intellectual property. Hamilton teaches "Electronic Discovery and Digital Evidence," as an adjunct professor at the University of Florida's Levin College of Law, and frequently serves as an international neutral, arbitrator, and mediator.

"Litigation support staff make life possible for attorneys," said Hamilton, who stressed the changing role of litigation teams -- with larger contributions from non-attorneys such as paralegals and technology staff. He focused on the need to stay mindful, as roles blur, of the fine line between functioning as a support professional versus crossing into the unauthorized practice of law.

Hamilton voiced a concern that some audience members also read into Hegarty's presentation: that too many cases still operate with a "don't ask, don't tell" mentality about EDD -- an "I won't if you don't" old-school gentleman's agreement that neither party will use e-discovery.

"Only 10 percent of lawyers 'get' e-discovery," asserted Hamilton, who is the new dean of Bryan University's [online program](#) that offers a graduate certificate in e-discovery, and has been chair of the advisory board of the [Association of Certified E-Discovery Specialists](#). "We need to change the culture of law firms ... and the 'command' environment," asserted Hamilton, who argued that a discovery team approach, where everyone's expertise is valued, is a more effective methodology. "Hierarchy culture disenfranchises everybody in the operation, and doesn't create a collaborative, collegiate environment."

(That theme was echoed in a subsequent panel, "Inside *Law Technology News*' 2011 Cover Stories," discussing e-discovery certification; insider trading; and other topics involving firm castes.)

But a new "paradigm" has emerged with the recent malpractice lawsuit filed against [McDermott, Will & Emery](#) by a client that asserts that the firm did not thoroughly review the work of its EDD vendor's contract attorneys, Hamilton observed.

Attorneys get queasy over the specter of unauthorized practice of law. "Attorneys get very anxious about making certifications about work," Hamilton said. The American Bar Association's [Model Rule 5.3](#) requires supervision of those to whom work is delegated, he explained.

Search is an especially touchy subject, he said. "How do I make a good faith certification about work done down the chain? How do I replicate that to the court?"

One answer is testing. Quality control, Hamilton argues, must be part of management. "We need to test and sample in search and review." You just can't hand files to paralegals and ask them to find relevant documents, he says.

Thorny issues, indeed. And complicated by the "technology gap" -- so few litigators really understand technology, he notes. "Here is where we need to rely on the expertise of vendors and litigation support, but avoid the unauthorized practice of law." Among the groups attempting to address these issues is the [Electronic](#)

[Data Reference Model](#) crowd, led by George Socha and Tom Gelbmann, he noted.

Warning signs for bad decision-making are choices made by: 1) habit, 2) reputation, 3) haste, and 4) "pure command decisions," he says.

Alternatively, firms must create an environment where "the best idea wins" -- that nurtures creativity and collaboration. Checklists also can be an effective tool, he argued, recommending "[The Checklist Manifesto: How to Get Things Right](#)," by Atul Gawande. "The medical practice has the same issues as legal regarding command structure," he said. "Pilots use checklists, we need checklists for all our cases -- that we go through, 1, 2, 3, 4, 5, and everybody participates." And, he says, "give the patient the checklist! It empowers the patient/client."

The checklist should contain "all elements of process, test results, samples, reports. Everybody signs off. People won't sign things if they don't believe it," he said.

Finally, echoing Hegarty, Hamilton stressed the need to be continually mindful of costs. But, he said, litigants must realize that e-discovery costs are "frontloaded, paying more money at the beginning -- but if it's a good case, you get facts, then the case can settle. When you slow down, it costs more money."

Hamilton's bottom line: "We have to reward [collaboration]. Look to Apple and Steve Jobs."

Among his tips for lawyers:

- Have your litigation support professionals help you select vendors.
- Talk to IT. Provide context, help them understand what is being done. "Empower them and make them part of problem solving."

As for the non-lawyer professionals:

- "Stick your necks out! Don't be passive-aggressive. Get out there. Interact with the dialogue."
- Sometimes you have to conquer with small steps. if you do it right, you increase lawyers' wins."

Monica Bay is editor-in-chief of Law Technology News magazine, and a member of the California bar. She worked her way through law school doing discovery before there was an e- in front of it. She was a participant in the COALSP E-Discovery Summit. [Send e-mail](#).

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