An interview with Jason R. Baron and Ralph Losey: putting the "tsunami of e-data" in perspective

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This interview is part of our new series "Data! Data! Data!" — Cures for a General Counsel's ESI Nightmares". For our introduction to the series <u>click here</u>.

Jason R. Baron and Ralph Losey do not need any introduction for those of us in the e-discovery "trade" but for our new readers a quick summary:

Jason has served since 2000 as Director of Litigation for the National Archives and Records Administration, and is an internationally recognized speaker and author on the preservation of electronic records. He was recently named Co-Chair of The Sedona Conference® Working Group on Electronic Document Retention and Production, and has previously served as Editor-in-Chief of The Sedona Conference Best Practices Commentary On The Use Of Search And Information Retrieval Methods In E-Discovery and Co-Editor-in-Chief of The Sedona Conference Commentary On Achieving Quality In The E-Discovery Process.   He is a founding co-coordinator of the TREC Legal Track, a multi-year research project evaluating search technologies used in e-discovery. Jason has been a trial lawyer and senior counsel with the Department of Justice, a Visiting Scholar at the University of British Columbia, and is currently an Adjunct Professor at the University of Maryland's Graduate College of Information Studies.

He also presently serves on the advisory board for the Georgetown Law Center's Advanced E-Discovery Institute and is a faculty member of Georgetown's E-Discovery Training Academy.

Ralph C. Losey is an attorney, educator, and author who practices law as a shareholder of Akerman Senterfitt*, an AmLaw 200 law firm with offices in Florida, New York City, Washington D.C., Los Angeles, Dallas, and Denver. Ralph is also an Adjunct Professor of Law teaching electronic discovery and advanced e-discovery courses at the University of Florida College of Law. Ralph has been practicing law since 1980 in commercial litigation where he has over 70 published opinions to his credit. Since 2006 Ralph has limited his practice to electronic discovery and IT law related issues and started Akerman's e-Discovery and IT Law practice group. Ralph is currently the most prolific author of e-discovery in the country, having written three books and three law review articles in the last three years. His books include the American Bar Association's two best selling books on electronic discovery: Introduction to e-Discovery: (2009); and, e-Discovery: Current Trends and Cases (2008). His latest book on e-discovery will be published by West Thomson in 2010 and is entitled: Electronic Discovery: New Ideas, Trends, Case Law, and Practices. Finally, Ralph is also the principle author and publisher of a popular weekly Internet blog on e-discovery, e-Discovery Team Blog, which now averages over 400,000 visits per year. For Ralph's full detailed resume please see:* **RalphLosey.com**.

*Jason and Ralph have been creating a movie entitled "e-Discovery: Did You Know?" which will be premiered in it's final form next weeks at LegalTech New York. We have seen several "beta" versions and discussed it before (**click here**).   It always seems to blow away the crowd. The guts of the presentation in a nutshell: e-discovery is expanding exponentially and Ralph and Jason speak in petabytes, and exabytes — not terabytes.*

I caught up with Jason and Ralph several times in the last few months and we asked them to put this "tsunami of e-data" in perspective.

TPL: How did the idea of the presentation come to you?

RL: This was Jason's idea, but he had no trouble talking me into it. He needed a technical person proficient at presentations and special effects to implement his idea, and he thought I filled the bill. When I understood what he had in mind, I thought I could probably do it. Besides, we had been looking for an opportunity to do a creative project together where we can both tap into our mutual sense of humor and do something really creative. It proved to be great fun, even all of the research we both had to do on the facts. Although I must add that the technical aspects of putting it together in movie form proved to be much more difficult that I had anticipated. I had to use both *KeyNote* and *Final Cut* software, and also ended up buying a new Mac so the final editing would go better. (It doesn't take much for me to be persuaded that I need a new, better computer!) But still, I ended up figuring out all the technical problems and we both reasonably satisfied with the results. It is also gratifying to see the tremendous response this little six minute video has generated in its two beta trial runs. It is even better now, and we look forward to its "premiere" at Legal Tech NY on February 3, 2010.   Jason and I will play the video before we begin our presentation *Let's Have A Debate: The Hottest Behind the Scenes Topics in Search and Retrieval Today.* Hopefully many of your readers will be able to join us. It starts at 12:15.

After that we will put it up on our web sites for the world to see (and would hope that someone will place it on YouTube).

JRB: I first saw the presentation "Did You Know" a couple years ago at a KM Conference in Sydney Australia, where I had been invited to speak. At the time, I was completely taken in by the mesmerizing facts the little movie presented. Sometime later, after speaking and writing a bit more on the subject of information inflation and problems lawyers encounter in search and retrieval, I thought doing a more focused movie on amazing e-discovery facts would be a way to really wake up an audience. I also knew that I needed help if the movie were ever going to get made. Having gotten to know Ralph first through his wonderfully creative blog, and then increasingly at conferences together and in guest teaching his course at U. Florida's law school, I just knew Ralph was the perfect person to collaborate with. I also knew I could get him to do most of the work in actually putting this together, once I came up with a good idea and once I supplied him with a few amazing facts. Ralph likes a challenge, and voila, we now have a movie!

TPL: We don't want to steal your thunder from LegalTech in a few weeks but can you quote us some of the numbers from your presentation?

RL: Well, one of my favorites is that far more information is stored in computers that has ever been spoken by humankind.

JRB: Back in the dark ages – the year 2002 — I only had to deal with searching through 32 million White House emails from the Clinton Administration in response to discovery requests in the US v. Philip Morris litigation. Come 2017, that number is expected to grow to 1 billion emails from all prior Administrations. Whomever is the Director of Litigation at NARA as of that time (and I can assure you it won't be me), will have that much larger set of issues to deal with, in responding not only to e-discovery, but also to future FOIA requests and other forms of government investigations and inquiries.

TPL: These numbers are astounding! You have any more scary numbers to share?

RL: Yes. Many, many more. But as my friends in the military like to say, if I told you I'd have to kill you.

JRB: Ralph did a great job of pulling together some astounding information about Google searches and what are staggering amounts of information in various social media.

TPL: You chose Darude's *Sandstorm* as the musical background. Is there a "backstory" to that choice?

RL: Jason's choice, but I love it. Well, I used to love it, but after hearing it 100 times to do the editing, my love for the song faded and my resistance to trance music has increased dramatically. I now seem virtually immune to hypnotism.

JRB: After we previewed the movie at the Georgetown conference, one person came up to me convinced that I must secretly hang out in dance clubs. (I don't.) Truth be told, I had never listened to "trance" music before – as my musical tastes and expertise stopped around 1975, circa Dylan's "Blood on the Tracks." But I started with the music for the original "Did You Know," by Fat Boy Slim, and using a combination of the Pandora music genome project for songs with similar attributes, and cross-checking those with genres of music on You Tube, I narrowed down what had been "hit" trance, techno and house music songs over the past 10 years, and made my recommendation to Ralph. (Apparently the song has also recently been a hit at certain college football games – go figure.)

TPL: Ralph, in a recent post you said *"before today's digital deluge, the last major litigation transformation was the introduction of discovery itself in 1938. Before the 1938 amendments to the Federal Rules of Civil Procedure, "discovery" required special bills, writs, and pleadings"*. Can you give us some more background on the transformation of litigation over the years and how it has morphed into this tsunami of data?

RL: Actually, I was not around in 1938, but do have personal experience from the late 1970s forward. Discovery used to be a minor part of a case and most cases were tried before a judge or jury. Now discovery is king and only 2% of the federal cases go to trial. That is a huge change. Further, requests for production of documents used to be simple work. Any good second year associate could do it. Now, it is very complicated and requires special training to do right.

Also, I remember the good old days when we wrote on dead trees, called paper. Writings on paper would not throw themselves away, move positions in a filing system, or store records inside themselves (metadata) as to who last read them, changed them, and the like. Now we've got ESI that throws itself away and self-replicates. Now, thanks to computers, we also have *Billions and Billons* more writings than before. For more on that, see our *Did You Know e-discovery* movie. Because of these many changes in technology preservation has become a huge issue and concern about spoliation and sanctions is present in most large cases.

In the 1980 and 1990s, up til near the end of the century, spoliation was not a significant part of litigation. Now it can be a game-changer and the first thing we have to do in most every case is send out preservation notices. That never used to be part of litigation practice and for some attorneys still isn't. When they read Judge Scheindlin's new opinion, *Pension Committee*, which I blogged about recently, they are going to be very upset. For this new opinion makes clear that the failure to send out written preservation notices is gross negligence.

TPL: Jason, in an article you co-authored titled "Information inflation: Can the legal system adapt?", you stated *"information is fundamental to the legal system. Accordingly, lawyers must understand that information, as a cultural and technological edifice, has profoundly and irrevocably changed. There has been a civilization wide morph, or pulse, or one might say that information has evolved"*. What is that morph/pulse?

JRB: Actually, those words were originally penned by my friend and co-author George L. Paul, a partner at Lewis & Roca in Phoenix, who is also the author of a pathbreaking book entitled "Foundations of Digital Evidence" (with a forward by Judge Facciola). The concept of an

information "pulse" is one that Ralph has touched on above, and that all lawyers of a certain age are (or should be) hyper-aware of, namely, the exponential increase in the volume of potentially relevant evidence, data, information and records that we are all experiencing and must cope with in litigation. This is largely due to the information being created and received on the highly networked, interconnected world we live in. Our wired world is something that seems taken for granted by my high school daughter (who is online virtually every waking minute of the day), but is really something very new. But recall that the Web went from 20 host servers in 1992 to 100,000 in January 1996 – after the introduction of the Netscape browser in August 1995. Now that's a pulse! At the end of my the information inflation article, I quote from the late astronomer John Archibald Wheeler, who said that tomorrow we will learn to express all of physics in the language of information. Although e-discovery requests haven't reached the far edges of our galaxy or of the known universe (yet), information overload and information overabundance on Earth is, I'm afraid, going to be the continued defining characteristic of our age – for lawyers and for everyone, for as far as our crystal ball can see.

TPL: At numerous presentations you have both stated that understanding how information is processed throughout its lifecycle is essential. It's a process. And that means change, especially as it relates to electronically stored information. How does a general counsel start to address these issues?

RL: They should start to address these issues by forming an interdisciplinary e-Discovery Team. That is the critical first step and thus is the name of my blog –e-discoveryteam.com. This new Team needs to be properly staffed, funded and coached. Otherwise it will probably sputter out and fail, or at least, not fulfill its full potential. Once the team is set up, one of the first tasks of the team should be to overhaul the company's information management systems for ESI, including preservation hold procedures. Then the team should move onto ESI collection procedures when faced with litigation. Of course, to collect, you have to know where it is, and so the map and information management are critical threshold steps.

JRB: I can only "second" what Ralph says here. As a career civil servant, I believe there is a real need for General Counsels or their equivalents in government to empower a select few attorneys across each component of a legal office, to work with CIOs, records officers, and heads of key business units, so as to jointly collaborate on such matters as retention policies, preservation and legal hold policies, IT procurement choices that have litigation consequences, and the like. The problem is that even in 2010, most organizations lack a person or persons who wish to serve as mediator and translator of the various languages and disciplines involved (i.e., to serve as a Rosetta Stone, translating between communities who approach aspects of information asset management in very different ways.) I do have one overarching recommendation to General Counsels, however: find the youngest, just hired lawyer, to lead the effort – she or he should have no conscious awareness of the Apollo space program and men walking on the Moon (if they do, they really are too old to make much headway!)

TPL: How can technology help?

RL: You have to fight fire with fire. The problems of   too much information, ESI complexity, dispersion, and chaos are all caused by technology. Inventions got us into this

problem and so inventions will have to get us out of it too. Software and hardware are part of that, but only part. We also have to invent new methods which use the software and hardware as tools. We have to use these tools in a smart way. New software systems alone with a new legal gestalt will not work.

JRB: Ralph is absolutely right. In the near term future (ten+ years from now), scientists hopefully will have developed sufficiently robust content analytics and other means of artificial intelligence so as to make us comfortable in automating much of present-day discovery, from preservation to collection to search and privilege review. There will always be a human element to lawyering, of course, but we have to move on beyond "everyone being their own recordkeeper" and "searcher" to more automated and sophisticated ways to tackle the growing problem of ESI volume.

TPL: Ok, a difficult question. We have seen how the judges have taken more control of the discovery process, or at least we have heard judges and pundits saying they should. Do you think the situation is now so overwhelming (data overload) we will see the rules changed this year as a result of the Duke Universirty conference this spring?

RL: I doubt it. The rules are not the problem, nor the solution. Education of the bench and Bar are the solution. From that you can infer what the real problem is.

JRB: I am not a fan of major rules changes so soon after the 2006 Rules amendments, although we can always do a better job wordsmithing.   I do believe that The Sedona Coference's Cooperation Proclamation, if rigorously adopted by courts and complied with by litigants, would go a long way towards narrowing problems caused by data overload. I'm honored to say that I have been invited to take part on one of the Duke conference panel,s and plan on talking about automation and technological solutions to rising e-discovery costs. I'm looking forward to the opportunuity to interact with like-minded colleagues on the bench and bar while there.

TPL: Jason, Ralph – many thanks for your time. We'll see you at LegalTech for the final version of *e-Discovery: Did you Know?*

RL: Hope to see you and your readers there. I see your blog, *The Posse* List, pop up on my *iPhone* each day, and encourage you to keep up the good work!

JRB: Thanks Gregory. I have become a big fan of The Posse List and urge readers of this column to check out the excellent reporting from past conferences.

Note to readers: we'll have a video interview with Jason and Ralph next week from *LegalTech New York 2010.* And for those of you attending LegalTech here is where they are presenting:

Monday, February 1, 2010 starting at 3:30pm   Ralph will be on a panel entitled *Ask The E-Discovery Doctors* and he will be joined by Craig Ball (attorney and president, Craig D. Ball, P.C.), George Socha (attorney and president, Socha Consulting, LLC) and Dean Gonsowski (VP of E-Discovery Services at Clearwell Systems)

Tuesday, February 2, 2010 starting at 12:45pm   Jason will participate in a panel entitled *Taking eDiscovery and Compliance to the Cloud.*   The panel will be moderated by Deborah Baron (Vice President, Legal & Compliance, Autonomy, Inc.). Other panelists will include Browning E. Marean (partner, DLA Piper), Wayne Matus (partner, Pillsbury Winthrop), Karla Wehbe (Senior Information Resource Manager, Risk Management, Bechtel) and Brian Weiss (VP eDiscovery & Information Governance, Autonomy)

Wednesday, February 3, 2010 starting at 12:15pm   Jason and Ralph will be playing the video *e-Discovery: Did You Know* before they begin their presentation *Let's Have A Debate: The Hottest Behind the Scenes Topics in Search and Retrieval Today.* Also on the panel will be the Hon. Paul W. Grimm and Jeane A. Thomas, a partner in the Antitrust Group of Crowell & Moring and Chair of the firm's E-Discovery and Information Management Group and a partner in Crowell & Moring's Antitrust Group.

Reported by: Gregory P. Bufithis, Chairman/Founder The Posse List

Gregory P. Bufithis is the founder and chairman of The Posse List and its sister sites The Electronic Discovery Reading Room (http://www.ediscoveryreadingroom.com) and The Posse Ranch (www.theposseranch.com). He is also founder and chairman of Project Counsel (www.projectcounsel.com).