

# State Court Judges' Perspective on E-Discovery

by Sharon D. Nelson and John W. Simek

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We recently had the pleasure of serving on a Fairfax Bar Association CLE faculty which included Circuit Court Chief Judge Dennis Smith, and Circuit Court Judges John Tran and Jane Roush. Their panel offering their insights on e-discovery in state courts was warmly received.

Judge Smith got the ball rolling by talking about the difference between digital immigrants and digital natives, terms coined more than a decade ago by author, educator and lecturer Marc Prensky.

Digital immigrants didn't grow up with technology and digital natives did. Many judges are digital immigrants. Some will "learn a new language" and immerse themselves in the new technologies - others never will.

Because of this, the panel of judge emphasized that it is important to explain e-discovery issues to the court in simple terms, avoiding acronyms and "geek lingo."

Most state court judges have been educated by the Sedona Conference and seem particularly struck by the commentary on proportionality. They are anxious to hear about that in each case.

On the other hand, Judge Tran described the phrase "unduly burdensome" as immediately inducing sleep. We might have said narcolepsy. No words contain, in and of themselves, so little help. Explaining factually why something is unduly burdensome is much preferred by the court.

And Judge Smith offered the strict observation that if all your objections to discovery requests are pro forma, hide the ball, non-specific objections, it is likely that the court will grant a motion to compel.

As all three judges noted, some of their best education comes from prepared counsel who can ditch the geek-speak and explain to them what they need to

know. Such counsel and their experts operate as instructors and the judges are avid pupils.

All the judge complained of fishing expeditions. As they noted, when they see a focused, narrowly tailored discovery request, they know the attorney is well-prepared.

Collaboration is another theme. Right from the start, judges prefer that the attorneys on each side collaborate and share search terms, bearing in mind that searches have to be defensible, tested and transparent. So often, discord in e-discovery seems petty to the judges, with both sides striving to portray themselves as the “good guys” who are reasonable and conciliatory. As Judge Smith noted, “this is a nuclear war you don’t want to have.” Far better to collaborate and have a joint plan.

While deciding these disputes is painful, John Tran (a recent member of the bench) notes that he prefers deciding those disputes to arguing them. All the judges lamented the scorched earth litigation they so often see. But they do acknowledge that some issues need airing – just not as many as come before the court!

Judge Roush noted how much evidence we create, with young people putting every stray thought in digital form. As she noted tongue-n-cheek, “technology has taken all the fun out of adultery.” The digital evidence is always there and comes out in discovery.

The state court judges are becoming used to rolling productions, which are sometimes needed by the sheer volume of evidence and which show continuing good faith to bring forth evidence as quickly as possible.

They have seen only a few predictive coding cases. They surmise that the document intensive cases, because of their subject matter, are more likely to be in federal court than state court. However, they have no objection to predictive coding and believe it is a logical advance in e-discovery, assuming that the costs become more affordable.

Perhaps most telling was Judge Smith's reference to the old adage, "What's good for the goose is good for gander." If one side asks for something and gets it, the court is likely to be receptive to a reciprocal request by the other side. Plaintiffs are always bemoaning what defendants have not preserved or produced but the truth is, plaintiffs often neglect to preserve and produce themselves, no doubt feeling themselves the aggrieved parties.

While we delight in the stories from the federal judges, the tales from the state court judges have a more small town, homespun feel. Not every case is a megacase and we applaud the commonsense approach of state court judges to "e-discovery writ small."

*The authors are the President and Vice President of Sensei Enterprises, Inc., a legal technology, information security and digital forensics firm based in Fairfax, VA. 703-359-0700 (phone)*  
[www.senseient.com](http://www.senseient.com)