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OPINION

■ ELECTRONIC DISCOVERY

Honest brokers are needed

By Nicolas Economou SPECIAL TO THE NATIONAL LAW JOURNAL

LAST YEAR, I participated on a panel at a summit at Georgetown University Law Center on how the explosion of electronically stored information (ESI) is transforming the American legal system. The star panelist was Supreme Court Justice Stephen G. Breyer, and the moderator was then-Harvard Law Professor Arthur Miller.

A focal point of the discussion was how exorbitant costs attendant to massive amounts of data are having a negative impact on society and the practice of law. Breyer expressed concern that steep discovery costs will threaten the judicial system by restricting access to the courts to only those who have the money to conduct costly searches. Likewise, defendants may feel compelled to settle a case irrespective of their exposure, simply to avoid the costly, time-consuming and onerous discovery process.

Some of my fellow panelists offered a rather utopian solution to this growing crisis, one of "healthy cooperation," of fostering a culture of collaboration and trust among adversaries in the discovery process. They insisted that this would benefit litigants and the justice system because it would enable discoverable information to be defined, reviewed and produced considerably faster and more economically than otherwise possible.

Although a collaborative approach may be good for the discovery process and the legal system, this vision of "healthy cooperation" among adversaries fails because it is inherently flawed and contrary to human nature. Extensive cooperation among adversaries assumes that suspicion and antagonism can be mitigated by institutionally mandated and culturally promoted good faith. But in high-stakes litigation, this is an ultimately untenable assumption. Simply stated, denial of human nature as a basis for improving our justice system is not reasonable.

The discovery process in litigation is analogous to the "Prisoner's Dilemma," in game theory, in which each of two players must decide whether to cooperate with or betray the other player. In this "game," the optimal aggregate outcome for the players considered as a pair is achieved if both players choose to cooperate. Because, however, for an individual player, betrayal maximizes payoff whether the player's counterpart cooperates or betrays, betrayal is actually the only rational strategy for each player. In a game like this in which the players only care about maximizing their own payoffs, the cooperative strategy is shown to be dominated by the strategy of betrayal: When the path of all decision trees is fully played out, both players, acting rationally, will choose to betray each other—i.e., not to cooperate. Faced with a similar litigator's dilemma, opponents in discovery will be prisoners of its implacable logic and choose not to cooperate. As British mathematician Ian Stewart put it: "Sometimes, rational decisions aren't sensible."

Gamesmanship in discovery and the litigator's dilemma can be effectively mitigated by entrusting the supervision or execution of electronic document discovery to a neutral intermediary—an honest broker of discovery. This entity would undertake certain elements of discovery under well-defined obligations toward the parties and the court, much in the way a court-appointed expert witness or special master serves the interest of all parties. Because the honest broker would not be a party to the litigation, it would not have any incentive to engage in gamesmanship in the discovery process and could, therefore, be trusted by the courts and tolerated by the litigants. The honest broker would not replace or trump cooperation among the parties but would bolster that cooperation and thereby serve as a vital component of the discovery process.

Today, and especially since the 2006 amendments to the Federal Rules of Civil Procedure addressing e-discovery, judges in federal and state courts alike have become more involved in e-discovery searches than ever before. But they also recognize that the discovery landscape in the new world of ESI is more complex than ever and that neither the parties nor the courts are equipped to deal fully with it. For example, in *U.S. v. O'Keefe*, No. 06-249 (D.D.C. Feb. 18, 2008), Magistrate Judge John M. Facciola acknowledged the complexity in the identification and production of ESI, and suggested that this is a matter best left to experts that can incorporate the necessary range of competencies (e.g., computer technology, statistics and linguistics).

Ensuring accuracy

An honest broker—an entity adept in e-discovery and complex information retrieval—would incorporate all the critical competencies necessary to ensure that the data that need to be discovered are produced. Also, it would serve as a reliable reporting mechanism by providing courts with assurances that the scope and methods of e-discovery searches—and the results—are accurate. It would be akin to the audit function that every public corporation is subject to in producing reliable financial information to all its stakeholders.

Admittedly, the honest broker system would have to address a number of practical questions: What would qualify an organization to serve as an honest broker? What authority and specific responsibilities would such an organization have? Who would pay for its services? These are significant questions, but they do not raise complexities that aren't already present in the discovery process today, or that the legal system hasn't resolved before. Ultimately, these practical considerations should not detract from the fact that an honest-broker system is consonant with the spirit and intent of the rules of evidence, that it would be of considerable benefit to the legal system and that it would contribute to the societal objective of unimpeded access to justice for all. NLJ

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