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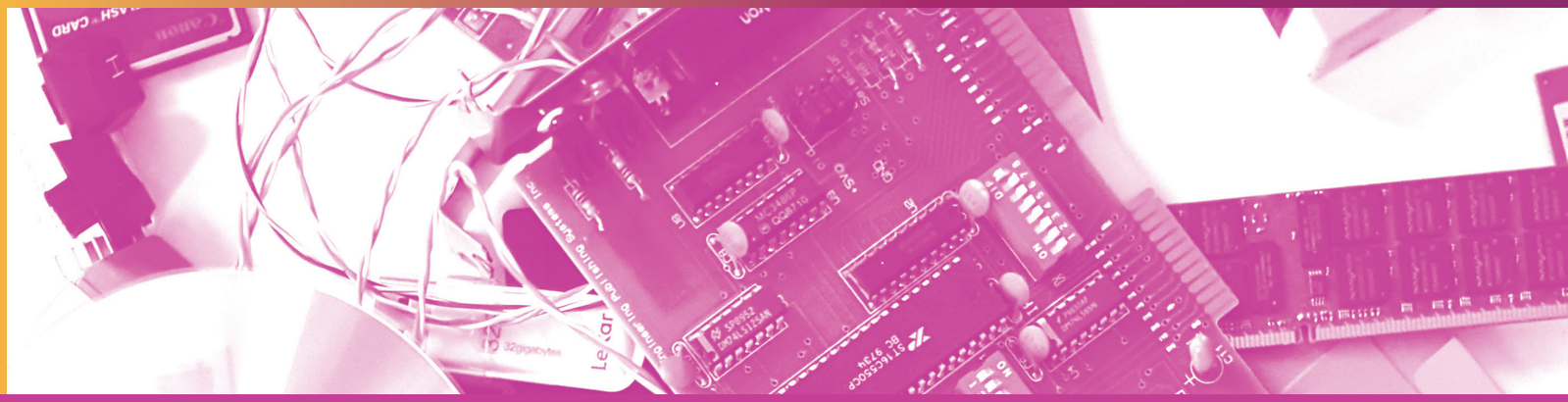
REDISCOVERING E-DISCOVERY



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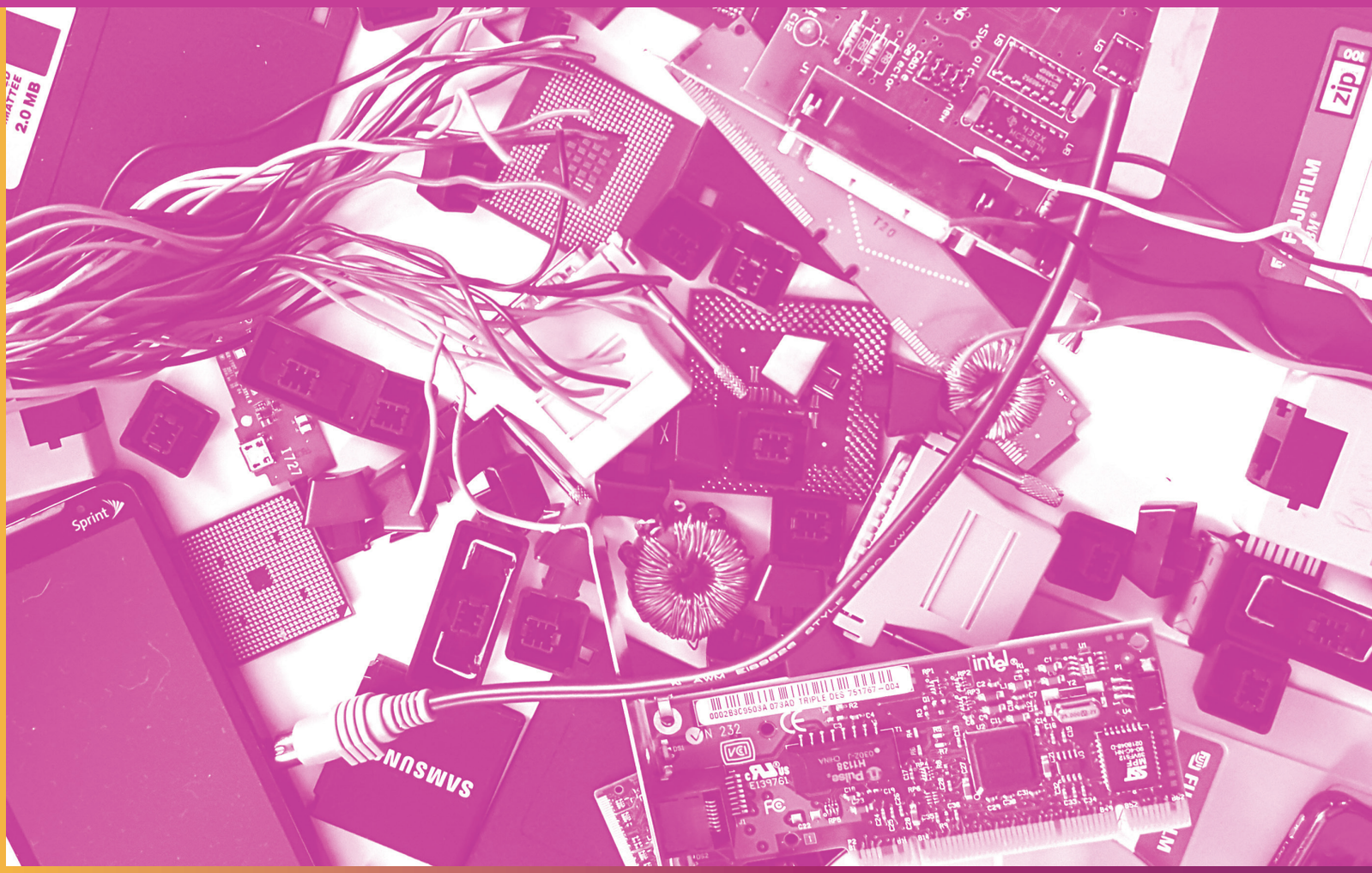
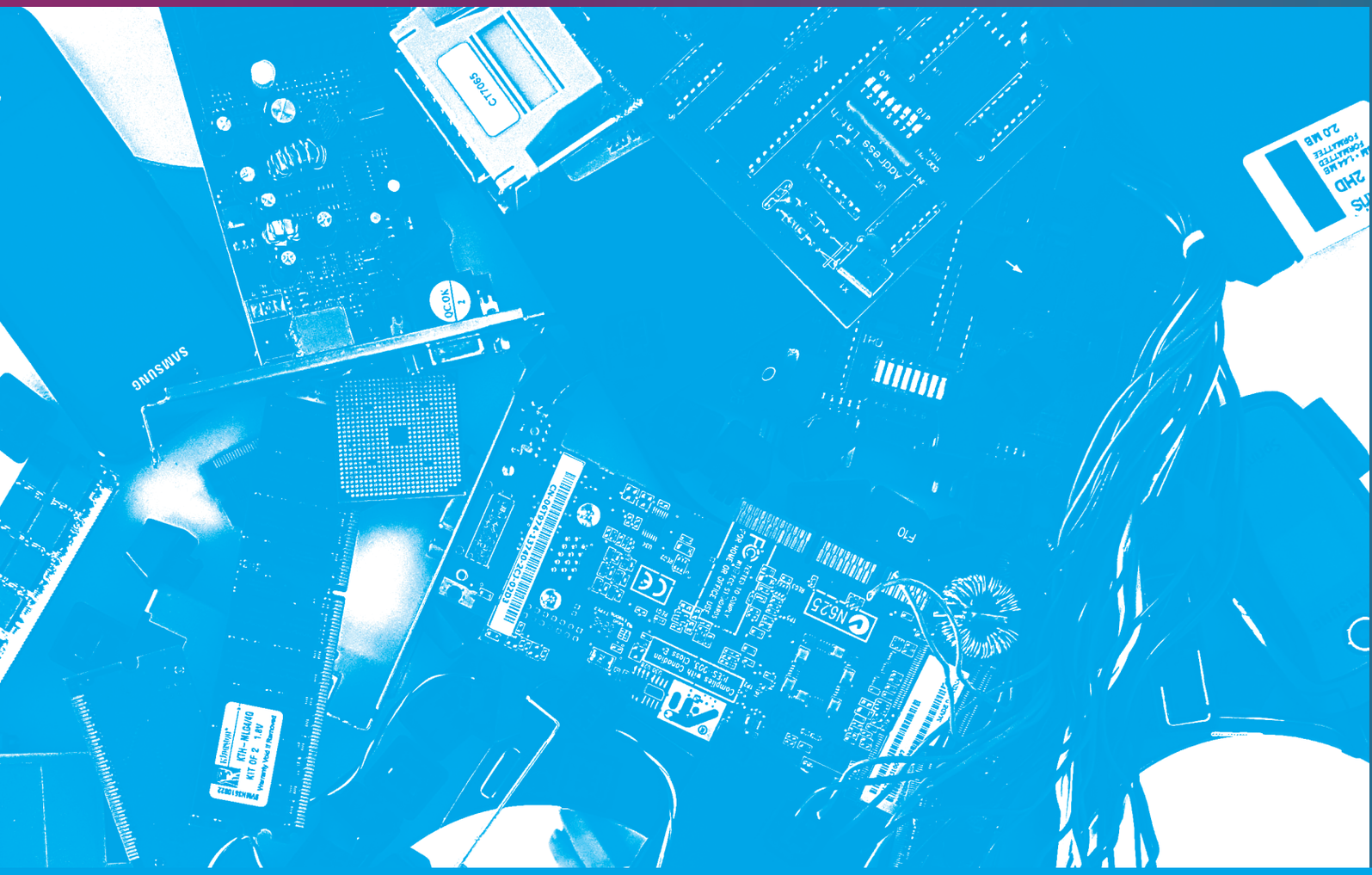
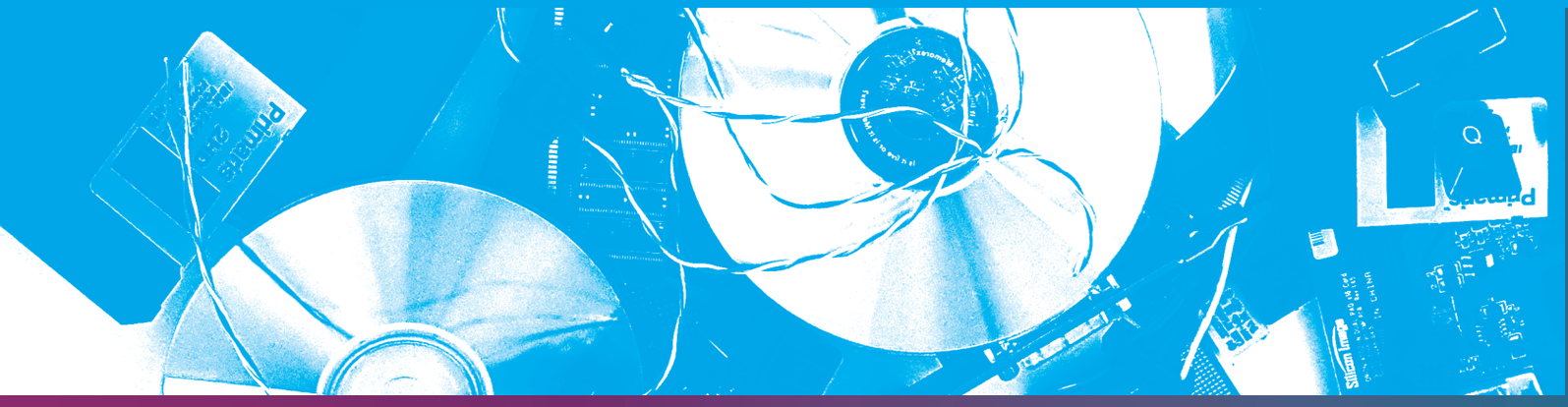




10 YEARS AFTER DIGITAL BECAME DISCOVERABLE, BENCH AND BAR WRESTLE WITH THE ISSUE

BY LAURAANN WOOD



Want to take a note regarding a hospital patient you have been seeing for a week? Write it down and clip it to the file. That patient gets discharged about a week later? Take the file folder and store it in a cabinet for later use. That former patient sues for medical malpractice? Dust the file off and produce it to the court for discovery.

Photographs? Leases? Service receipts?

Paper. Files. Physical.

Then computers came along, and they offered significantly more storage space than any file cabinet or dark storage room. People eventually began taking advantage of the fact that even the thickest file folder that occupied a third of one drawer may take up only a trace of available space on the smallest floppy disk.

But at the same time society was getting used to the efficiency computers offer, the computers were getting smaller.

And they were getting smarter.

These handheld computers, commonly called cellphones, started being able to send and receive voice calls, and they gained the ability to send quick text messages for sentiments that don't warrant a full chat. They became able to snap and store thousands of photos, hundreds of video and audio recordings and even a history of different travel destinations — as well as the directions to them — from several months back.

"If you said to somebody, 'Well, I have all those documents that you might be looking for. We have the last 20 years of documents, but they're stored at Iron Mountain in Ohio. Do you want to go there?' most people at this point would automatically recognize, 'That's not going to be worth my time. I am not going to physically spend the money to go to Ohio and to go spend God-knows-how-many hours in a warehouse looking at boxes,' " said Cook County Circuit Judge Kathy Flanagan, who presides over the Law Division's motion call.

"And yet, they won't hesitate for a second to ask for two terabytes of information — which is just electronic Iron Mountain."

Technology and social media have put our lives and businesses online. But the fact remains that information people post and store online may one day become relevant to a potential lawsuit.

And that digital nature doesn't make those texts and vacation photos any less discoverable.

Although computers aren't new to the legal landscape, court practitioners have been working to wrap their heads around the idea of e-discovery in the 10 years since the Federal Rules of Civil Procedure first defined a record as electronic.

"The greatest thing about our legal system, going all the way back, is its adaptability," Corboy & Demetrio partner Michael Demetrio said. "Technology is a great thing, and the law can utilize it in positive ways."

But beyond storage and file-transfer efficiencies, there's a significant — and sometimes costly — difference in the way electronically stored information, or ESI, gets extracted and produced for a case. Such an advancement has required the legal community to become at least fundamentally familiar with different servers, clouds and software to understand how the information sought is stored or displayed on a screen, a massive change in the practice of law.

A few months after e-discovery's 10th birthday, a full understanding of the benefits and issues is yet to be realized and slated into case law beyond a handful of federal and circuit opinions and rulings across the nation. A recent 2nd District Appellate Court opinion brought Illinois into the fray, finding a plaintiff in a personal-injury suit did not have to turn over his computer metadata so the defendant could check to see if the man had been looking up convincing-sounding symptoms or spent late nights playing video games.

Wading through the relatively uncharted territory has called particular attention to traditional discovery values such as relevance, proportionality and cost. And it's driving lawyers and judges to both figure out and inform others on how to apply these age-old principles to brand-new tech.

SIFTING THROUGH THE MOUNTAIN

When the Federal Rules of Civil Procedure were amended in December 2006 to acknowledge that discoverable records could be electronic, the legal community had to get used to considering computers and other electronics in discovering pertinent case information — and it had to acclimate quickly.

Electronically stored information can often be sorted in devices by particular tags, dates or key words that often require litigating parties identify search terms. We do this in our own lives when we type "pizza chicago" for dinner plans or where we hunt down that article we're sure we read in June.

As it relates to discovery, the idea is that honing search terms will effectively narrow the subjects of documents or communications for which a device is being searched. The "relevance" criterion of good discovery is built in.

"If the system works ideally, then the information exchanged in discovery is relevant to the unique issues of the particular case in question," Demetrio said. "And if particular people use the shotgun approach and bury you with thousands and thousands of documents, there are programs where you can search all that. This is all positive."

But depending on the type of document being searched, such as texts or e-mails, a search term as broad as "hurt" or "pain" could return hundreds of results. And while only a portion of those results could actually be relevant to a particular lawsuit, the amount of time spent combing through each document to produce relevant discovery adds up to at least one — but likely several — billable hours.

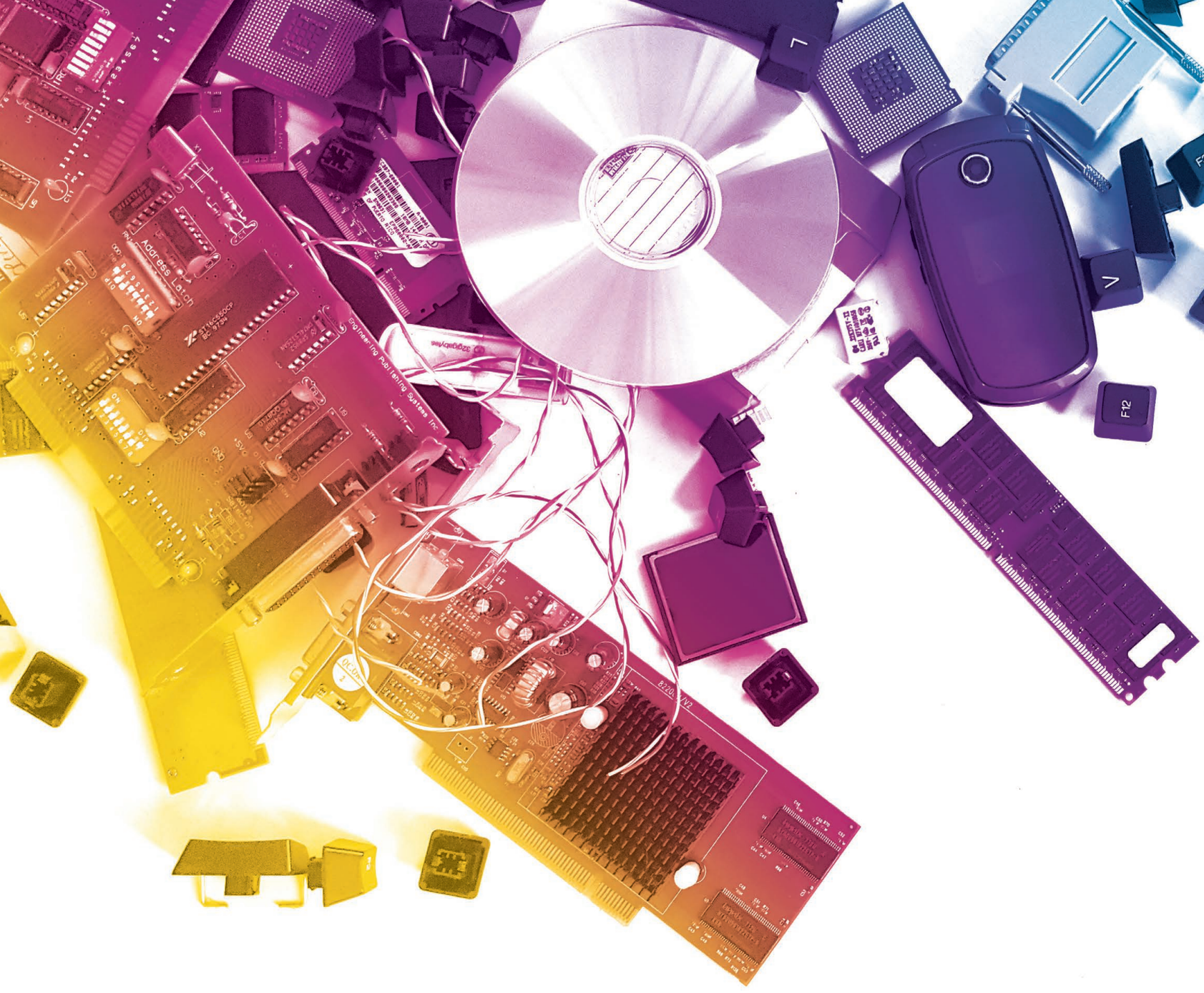
If the responsive electronic documents become too much to examine on one's own, clients and their lawyers can opt to hire experts or companies that exist solely to offer such help.

"It could be a solo practitioner. It could be a five-person law firm. If they have a matter that e-discovery is involved in, they would not have difficulty finding a particular person to hire just like I would hire experts for all sorts of matters," Demetrio said.

Some clients opt not to outsource resources, but that can become an issue when their money is spent mostly on a lawyer sifting through documents rather than proving or defending their case.

"To be honest, the billable hour is just not necessarily conducive to reviewing a lot of data," said Chad Main, a longtime commercial litigator who founded the e-discovery company Percipient in 2014. "Lawyers go to school to become lawyers, not to become scientists or software engineers."

Percipient primarily focuses on assisting clients in document review to identify what electronic information is relevant, responsive or even privileged as it pertains to a production request. A lawsuit could deal with anywhere between 10,000 and millions of documents depending on the discovery request, Main said. Percipient's services are typically called upon if a law firm might not have the staff or resources to handle such a large electronic undertaking.



Although e-discovery companies have currently found their role in the evolving tech world, Main said lawyers' increasing comfort with the technology could reroute some aspects of larger-scale e-discovery back to the average law firm.

"Through the use of algorithms and artificial intelligence, first-pass categorization of this information will kind of point lawyers where to look and where to start looking in their case, and it will give them data points or show trends that can inform them on case strategy," he said. "Once people get a handle on artificial intelligence and what it can do in the legal realm, I think there will be some cool software that will bring some of this work back in lawyers' hands."

Without rules guiding its application, e-discovery itself can become a tactic, said Hinshaw & Culbertson partner Steven Puiszis. If the other side chooses to bury you in e-paperwork, electronic discovery costs can become so burdensome a client would rather pay to get the case out of court than to prove or defend it.

"Part of the problem is that it can be abused, and it can be used in a fashion to drive up costs and make discovery so costly that, if it's not controlled, a party on the other side may want to settle a case that it has defenses to just because of the cost associated with discovery," said Puiszis, who has written a book chapter on e-discovery and worked to keep the legal community informed and current on the topic.

"This gets very expensive very quickly, and that's why proportionality is becoming more and more important."

TRUSTING YOUR FOE

Considering the volume of information that can come from an electronic discovery production, the Illinois Supreme Court amended its rules on discovery to highlight the concept of proportionality — which weighs the benefit of producing a particular piece or volume of information against the costs of doing so.

This change, which became effective in 2014, forces lawyers and judges to consider whether a particular request or production is legitimate and significant enough to bring the litigating parties closer to resolution. If that answer is no, it could mean an attorney might be over-litigating rather than properly investigating.

"There's a difference," the Law Division's Flanagan said. "Litigation means you know what to do procedurally, you know how to serve documents,

take depositions, do motion practice and turn that wheel about using every possible civil procedure device known to man," she said. "Investigating is knowing where to go to find out what you need to know or need to find out without having to litigate it."

Conducting a proper and thorough investigation leads to proportional e-discovery because it helps attorneys learn exactly what type of information they're looking for and the best way to obtain it, Flanagan said.

There have been some unintended consequences. For example, the storage devices are so small, lawyers can lose perspective on just how much information they're requesting, Flanagan said. It's easy to forget a thumb drive you can stick in your pocket is the equivalent of entire buildings of file cabinets.

Some judges, including Flanagan, say e-discovery request overbreadth is partly attributable to attorneys' inability to work with their opponent to hone desired information to be as specific — and therefore efficient — as possible.

That's not to cast blame on any lawyer or another, said Nan Nolan, a now-retired magistrate judge for the U.S. District Court for the Northern District of Illinois. Rather, she said, it just wasn't a part of the package in going to law school to learn how to represent a client within the confines of an adversarial court system.

"You can't really do e-discovery unless you talk about it — 'I'll show you mine if you show me yours,' " Nolan said. "I don't mean you have to love the other guy, but you have to talk about it."

That was part of the motivation behind a voluntary e-mediation conference program in the 7th Circuit, said Nolan, who helped launch the circuit's Electronic Discovery Pilot Program in May 2009.

A few similar programs have been instituted elsewhere in the country, some of which require payment, but the 7th Circuit's program is free and uses volunteer mediators who possess both communication and technological skills to help parties agree on what specific electronic information is discoverable and how to retrieve it.

Although Nolan said the "typical issue" doesn't exist in e-mediation, helping parties agree on the most effective search terms are a common hurdle mediators help parties jump.

When e-mediation was first implemented after the 2006 federal rules change, Nolan said, much of the first wave of participants were learning "the only way you can do e-discovery is to cooperate."

CASE LAW STILL EMERGING

Until recently, most of Illinois' guidance on e-discovery ethics came from federal opinions and rulings.

That was until the 2nd District Appellate Court issued an opinion in December in a case where the defendants in a Lake County personal-injury suit requested a mirror copy — or forensic image — of his four personal computers, his tablet and a work laptop he would take home as needed.

Their goal was to sift through the devices' metadata, which provides information regarding computer activity times, any edits to documents and even every place a document that has been moved. The defense wanted its expert to examine whether the plaintiff used the web to come up with convincing exaggerations of any of his alleged cognitive impairments following an automobile crash or had spent all night playing video games contrary to his claims the crash left him with concentration issues.

Although the Elgin-based state appeals panel in *Robert Carlson v. James Jerousek et al*., 2016 IL App (2d) 151248 denied the request, they found that searching a party's whole computer isn't completely off limits. It's allowed in particular circumstances where the computer is directly involved in the case or instances in which evidence exists of a responding party's prior discovery violations.

RELEVANT
E-DISCOVERY CITATIONS

ROBERT CARLSON V. JAMES JEROUSEK, ET AL., 2016 IL APP (2D) 151248 (DEC. 15, 2016)
In a personal-injury case, a 2nd District Appellate Court panel found that the complete metadata from a computer or laptop is discoverable, but it set guidelines on when it can be used.

IN RE GATEWAY LOGISTICS INC., 2013 CO 25 (CO S.CT., APRIL 15, 2013)
In a trade secrets case, the Colorado Supreme Court determined a trial court must determine the least intrusive means for collecting needed information before granting a motion to compel turning over computers and other electronic devices.

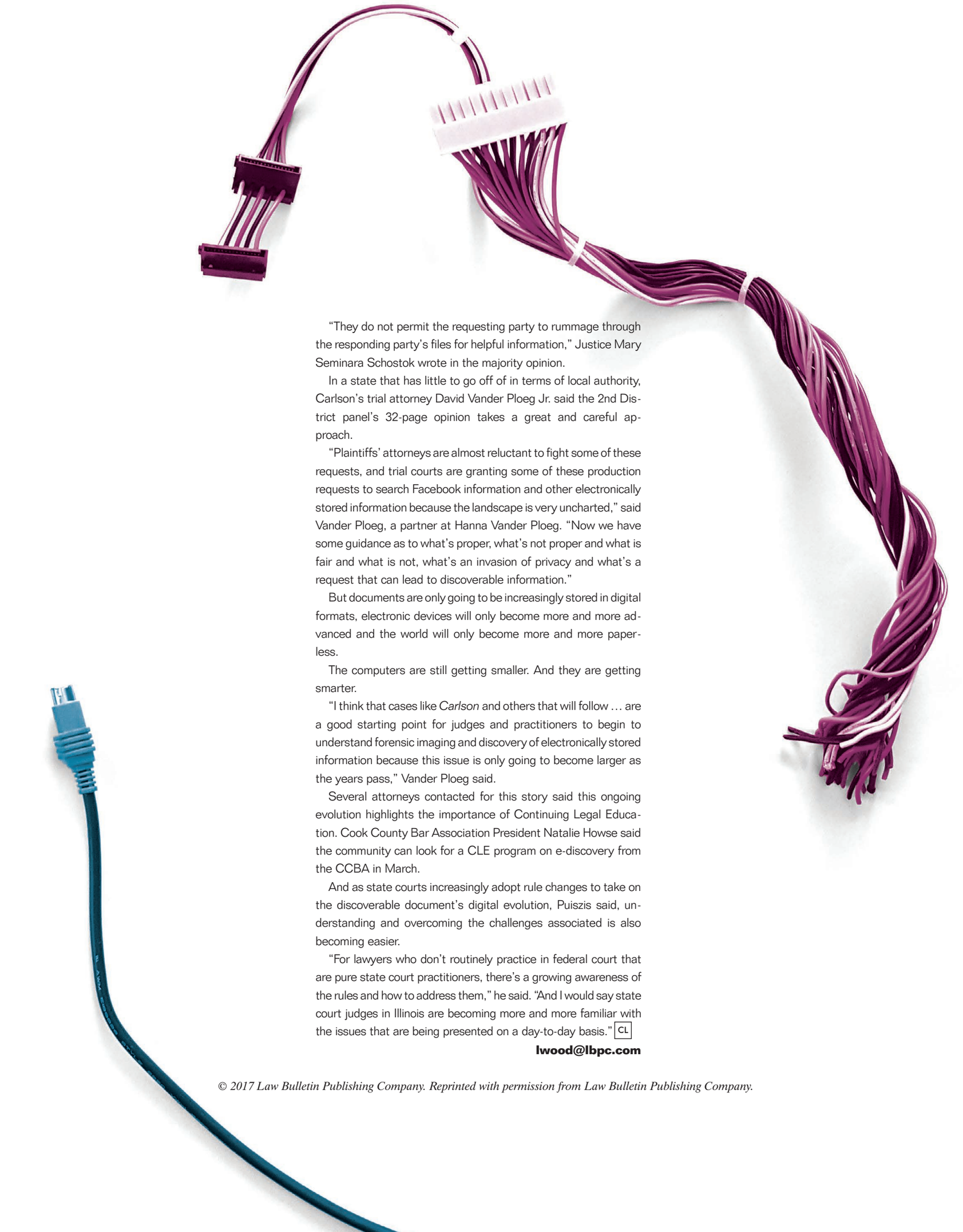
RILEY V. CALIFORNIA, 573 U.S. ___, ___, 134 S. CT. 2473, 2484 (2014)
The U.S. Supreme Court found that police had committed a warrantless search after charging a man with a recent shooting based on evidence they found on his cellphone after a drug arrest, determining digital evidence (the data accessible through his phone) must be treated differently than physical evidence (as if they had found a gun).

KLEEN PRODUCTS LLC, ET AL. V. PACKAGING CORPORATION OF AMERICA, ET AL., CASE: 1:10-CV-05711, DOCUMENT #412 (N.D. ILL. SEPT. 18, 2012)
In an outgrowth from an antitrust suit against cardboard box manufacturers, a Chicago-based U.S. magistrate judge issued a cooperation order requiring two parties work together to set the scope and burden of discoverable electronic materials.

COAST TO COAST ENGINEERING SERVICES V. ROOP, NO. 2-16-CV-00054-DBH (D. ME. NOV. 8, 2016)
A U.S. magistrate judge in the District of Maine wrote that "[t]he inquiring party's skepticism that the opposing party has produced all of the documents sought is not sufficient to warrant a forensic examination."

U.S. V. DISH NETWORK LLC, 2013 WL 1749930 (C.D. ILL. APRIL 24, 2013)
A Central District of Illinois federal court applied sanctions against "evasive, obstructive and willful" conduct for not producing requested information after multiple requests.

HYLES V. CITY OF NEW YORK, ET AL, NO. 1:2010CV03119 - DOCUMENT 97 (S.D.N.Y. 2016)
A 2016 U.S. District Court opinion from the Southern District of New York determined with "a decisive 'NO' " that New York City could not be forced to use one method of e-discovery (in this case, technology assisted review, also called predictive coding) over another (in this case, keyword searches).



"They do not permit the requesting party to rummage through the responding party's files for helpful information," Justice Mary Seminara Schostok wrote in the majority opinion.

In a state that has little to go off of in terms of local authority, Carlson's trial attorney David Vander Ploeg Jr. said the 2nd District panel's 32-page opinion takes a great and careful approach.

"Plaintiffs' attorneys are almost reluctant to fight some of these requests, and trial courts are granting some of these production requests to search Facebook information and other electronically stored information because the landscape is very uncharted," said Vander Ploeg, a partner at Hanna Vander Ploeg. "Now we have some guidance as to what's proper, what's not proper and what is fair and what is not, what's an invasion of privacy and what's a request that can lead to discoverable information."

But documents are only going to be increasingly stored in digital formats, electronic devices will only become more and more advanced and the world will only become more and more paperless.

The computers are still getting smaller. And they are getting smarter.

"I think that cases like *Carlson* and others that will follow … are a good starting point for judges and practitioners to begin to understand forensic imaging and discovery of electronically stored information because this issue is only going to become larger as the years pass," Vander Ploeg said.

Several attorneys contacted for this story said this ongoing evolution highlights the importance of Continuing Legal Education. Cook County Bar Association President Natalie Howse said the community can look for a CLE program on e-discovery from the CCBA in March.

And as state courts increasingly adopt rule changes to take on the discoverable document's digital evolution, Puiszis said, understanding and overcoming the challenges associated is also becoming easier.

"For lawyers who don't routinely practice in federal court that are pure state court practitioners, there's a growing awareness of the rules and how to address them," he said. "And I would say state court judges in Illinois are becoming more and more familiar with the issues that are being presented on a day-to-day basis." CL

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