

## Does Your CAR (“Computer Assisted Review”) Have a Full Tank of Gas?

**Ralph C. Losey**  
Jackson Lewis, LLP

Most lawyers today do not use computer assisted review methods to locate electronic evidence. They do not use the latest technologies available. They are in effect only walking, and only discovering paper documents, because they do not know how to drive today’s e-discovery CARs.



This is an unstable situation that cannot last much longer. It will either resolve by a widespread outbreak of serious education and specialization, as I have been **trying to promote** for years, or there will be a widespread outbreak of ... (wait for it) ... legal malpractice cases. I do not like this prospect, but it seems inevitable.

Fundamentally what we see going on is a battle between positive and negative motivators, between love of a learned profession, and fear of failure and disgrace. I used to be cautiously optimistic that education and pride in professional workmanship would win out, that lawyers would double-down and learn this stuff. Now I am not so sure. It is becoming increasingly likely that most lawyers will have to go down the hard way. Although I do not intend to help them, there are plenty

---

**Ralph C. Losey** is a partner of Jackson Lewis, LLP, where he leads the firm’s Electronic Discovery practice group. The opinions expressed in this article are his own, and not necessarily those of his law firm, clients, or University. Ralph can be reached at [Ralph.Losey@JacksonLewis.com](mailto:Ralph.Losey@JacksonLewis.com). Ralph is the author of five books on electronic discovery published by West Thomson and the ABA and e-Discovery Team, and is the publisher and principal author of the *e-Discovery Team Blog* at <http://e-discoveryteam.com>, where this article first appeared. Ralph has limited his legal practice to electronic discovery since 2006, with a special interest in effective and economical search and review of electronic evidence in large, chaotic ESI collections. Ralph is also an Adjunct Professor of Law at the University of Florida where he teaches introductory and advanced electronic discovery, both in-person and online. A practicing attorney who supports the 700 attorneys in his law firm in 48 offices around the country, Ralph has been involved with computers and the law since he began private practice in 1980. His full biography may be found at [RalphLosey.com](http://RalphLosey.com).

of under-employed plaintiffs' lawyers out there who will not hesitate to sue negligent lawyers.

### **Professional Liability**

The law requires a minimum level of competence in the rendition of legal services. An attorney must exercise adequate *skill, knowledge, prudence, and diligence*. The services must at least equal that of a *reasonably prudent lawyer in that jurisdiction*. Anything less is negligent. If an attorney is negligent he or she may be personally liable for damages caused to the client by that negligence.

I call legal services *good enough* if they just barely meet the minimum standards of care required under professional negligence law. When judges or juries determine legal malpractice, they look to the *skill, knowledge, prudence, and diligence* commonly possessed and exercised by a reasonable, careful and prudent lawyer in that jurisdiction. Determination of what is *good enough* is a grey area. The generally accepted professional standards in one locale are different from another. For instance, more skill, knowledge, and diligence will be required of a lawyer handling e-discovery in Manhattan than of a lawyer in Micanopy, Florida. The minimum standards of reasonability are different. That is one reason this border line of negligence is a grey area, not a bright line. But at some point, no matter what your local standard of care, a lawyer's services can cross below the minimum standard and into the red-zone of negligence.

### **Fear of Malpractice as a Motivator**

We have not seen a lot of malpractice cases in the area of e-discovery yet, but that is likely to change soon. The **few cases we have seen** involved mistakes made in review, in computer assisted review, or CAR (which some also call TAR "Technology Assisted Review").

See: *J-M Manufacturing Company, Inc. v. McDermott Will & Emery* (No. BC462832, Calif. Super., Los Angeles Co.) (Complaint alleging malpractice based on negligent



document review resulting in production of client's privileged documents.)

In view of the wide discrepancies in practice around the country, the severe challenges that technology and e-discovery present for most lawyers, and their stubborn refusal to go back to school, a dramatic expansion in these malpractice cases is likely. I expect to see many large CAR crashes in the future with a host of angry accident victims looking to share the pain. Most will take place in the larger metropolitan areas where the standards are higher. Micanopy is safe for another decade or so, but in Manhattan, well, you had better look out right now.

The fear of being sued is a powerful motivator. Even frivolous suits can be expensive to defend and embarrassing. It is worse if you in fact crashed the CAR because you did not know how to drive well enough. Over time, as legal malpractice cases become more common, as happened to the last generation of doctors, the legal profession, especially litigators, will have to do one of two things. They will either buckle down and really **learn e-discovery**; give up their horse and buggy paper document reviews, get a new CAR, and learn to drive it. Or, they will just avoid e-discovery and its CARs altogether.

### **Play It Safe – Don't Drive**

Most litigators are already strong into e-discovery avoidance. They use two basic strategies to keep from driving a CAR, and potentially crashing and burning that CAR. The smart ones hire trained drivers to race the CARs for them. They turn the e-discovery work over to specialists, just like they would turn over a complex estate and tax issue to a specialist. The trial lawyers remain in control of the rest of the case, where there is still plenty to do, but they leave the driving of complex e-discovery issues to lawyers with proper training. This trend will grow. More on that in a minute.

The other not-quite-as-smart lawyers will just keep using *the old horse they came in on*. They will continue to avoid e-discovery all together. They will ask for paper print-outs of emails and call it a day. They will do document discovery the same way as when they first started

practicing law, many years ago. But at least they will not delude themselves into thinking they can do real e-discovery on their own. In that sense they are still smart. They will avoid doing e-discovery and so likely will temporarily avoid the coming malpractice plague, at least until another Judge Learned Hand comes along, as I will explain later.

The lawyers with the big targets on their backs already are the ones who do e-discovery with skills and knowledge that are *not good enough*. They think that e-discovery is not really that hard. It is just discovery after all. They will just wing it, maybe spend a few hours of study and think they know it all. They are the ones likely to get into CAR wrecks. Most of the wrecks will be in small cases, mere fender benders. The clients may never even know. But wrecks are bound to occur in big cases too, ones with a lot of money involved. These will trigger the malpractice suit backlash. These suits will in turn reinforce the *old horse they came in on* types to keep on in their total avoidance strategies.

### **e-Discovery Specialists**

The first approach of delegating to a specialist is completely ethical and safe. The specialists will be there to assist other attorneys who do not take the considerable time and effort needed to learn to drive a new race CAR for themselves. The role of the e-discovery specialist is likely to expand dramatically over the coming decade, especially if I am right about a coming plague of malpractice cases.



The specialists will have the *skill, knowledge, prudence, and diligence* to do the job right. They should not only be *good enough*, they should be *better*, perhaps even use the *best practices*. It all depends on what the case is and who you can afford. The top licensed

drivers can save clients a lot of money. They can win cases by finding the key evidence, but they rarely come cheap. Still, the trial lawyers with the wisdom to use trained drivers for this part of their case will come out on top. But a word of warning, the drivers retained must not only be skilled, they must also be licensed. By law no lawyer can delegate their legal duties to anyone other than another licensed attorney. Vendors can help a lot, and should also be retained, but they cannot practice law.

**Has a whole generation of lawyers *unduly lagged*  
in the adoption of new and available devices for discovery?**

But what about the other lawyers who do not delegate e-discovery to specialists? The ones who are too busy or disinclined to learn this complex new practice area, but not too foolish to try to do it on their own. These are smart lawyers. They know full well they do not have the *skill and knowledge* to drive the complex CARs of today. They know they could wreck the car. They understand the dangers of professional liability. But they don't want to hire a professional driver either. Maybe the driver will make them look bad. Maybe the client who is paying for the limo will start to ask too many questions. Maybe they just do not like e-discovery. Many lawyers are like that.

Right now these old-horse-they-came-in-on lawyers are the silent majority. They find comfort in numbers. They joke about e-discovery and nerd lawyers like us who think it is important. Judges say that the vast majority of lawyers that appear before them are not doing e-discovery. If all lawyers in your jurisdiction are avoiding e-discovery, then it cannot be negligent. It meets the local standard of care. It cannot be wrong if it is the *prevailing practice* to avoid e-discovery. Right now the old paper lawyers find solace in their *common prudence*. But for how long? How long will it be before a modern-day Learned Hand comes along and points out the obvious?

**Remember the Hooper**

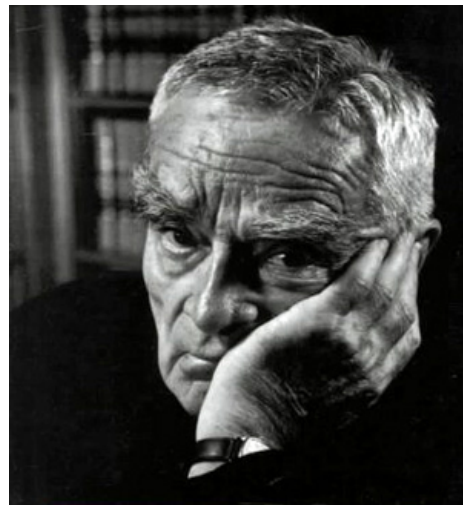
Remember *Torts 101* and the landmark *T. J. Hooper* decision? *T. J. Hooper*, 60 F.2d 737 (2d Cir.), cert. den., 287 U.S. 662 (1932). Remember how most tug boat owners in the 1930s all avoided the

latest technological advance of using radios? That was the prevailing practice. So the owners of the tugboat Hooper met the local standard of care, and were not liable when a barge they were guiding was destroyed in a storm, a storm they could have learned about and avoided if only they had a radio.



They thought they were not liable under the prevailing practice defense. Then along came Judge Hand who said it was negligent not to have a radio (a *receiving set* as it was then sometimes called). Judge Hand shook up the establishment by holding that owners of the Hooper were negligent, regardless of the fact that it was a prevailing practice not to have a radio. It did not meet an objective standard of reasonableness. Here are the words of the master Hand:

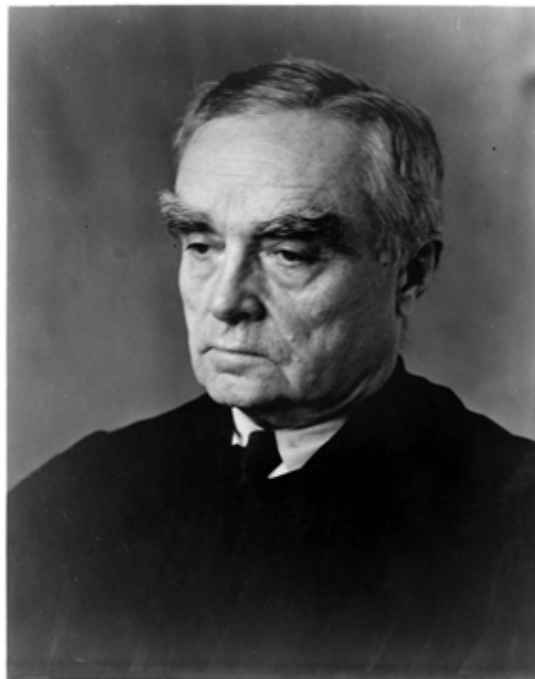
Is it then a final answer that the business had not yet generally adopted receiving sets? ... Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.



*Id.* at 740. These are important words. They are at the bedrock of our system of justice and accountability.

### **Coming Storm**

Could a whole generation of lawyers, my generation, have forgotten these words? A storm is approaching. *Common prudence* is not always *reasonable prudence*. Careers and fortunes may be lost if lawyers continue to *lag in the adoption of new and available methods* of electronic discovery. If lawyers do not change with the times, and either learn to drive a CAR or hire a driver who can, they will eventually go down. *Courts must in the end say what is required*. There are *precautions* in electronic discovery – like preservation of evidence, protection of privileges, and discovery of key evidence – that are *so imperative that even their universal disregard will not excuse their omission*.



A court will someday apply *Hooper* and hold that the failure to do e-discovery is in itself a negligent act, regardless of local prevailing practice. Plaintiffs will prove in a second malpractice case against their former lawyer that they would have won the first case but for the attorney's failure to do e-discovery. If the lawyer had not avoided e-

discovery, he or she would have found critical electronic evidence that would have changed the outcome of the original case. Plaintiffs' lawyers will begin to specialize in this booming new area of malpractice. Look out. It is only a matter of time. Learned Hand opened that door over eighty years ago.

If malpractice suits do not bring the avoiders down, the natural workings of the market place will. Why hire a tug without a radio to tow your barge when another tug has a radio that can keep your goods safe? Eventually clients, especially sophisticated corporate clients, will catch on to the firms who *unduly lag in the adoption of new and available devices*. They will insist that all of their lawyers be at least *good enough* in e-discovery to handle these issues in a reasonably prudent manner. Many will want their lawyers to be *better* than that, some will even insist on lawyers who employ the *best practices*. I know I would.



### Conclusion

Although I feel obliged to warn the profession I love of the approaching storm, I have no desire to enter that storm. I have no desire to focus my remaining time and attention on the grey areas of minimal competence. I do not want to be a malpractice lawyer, or even train them, or testify for them. I leave that to others and to future generations. My focus is and will remain on *Best Practices*, which are a long way from minimal standards of professional



competence, a long way from the grey world of *good enough*, or *not good enough*.

Towards that end my work is now focused on compiling **Electronic Discovery Best Practices** in a free public website: [EDBP.com](http://EDBP.com). The best practices listed include those developed by many key Bar groups with task groups devoted to this topic, including:

- New York State Bar Association's [Best Practices In E-Discovery In New York State and Federal Courts](#) (2011);
- Seventh Circuit Electronic Discovery Committee [Principles Relating to the Discovery of Electronically Stored Information](#) (Rev. 08/01/2010);
- Maryland District Court Committee, [Suggested Protocol for Discovery of Electronically Stored Information](#) (2007);
- Delaware District Court Committee, [Default Standard for Discovery, Including Discovery of Electronically Stored Information](#) (2011);
- Kansas District Court, [Guidelines for Discovery of Electronically Stored Information](#) (2008).

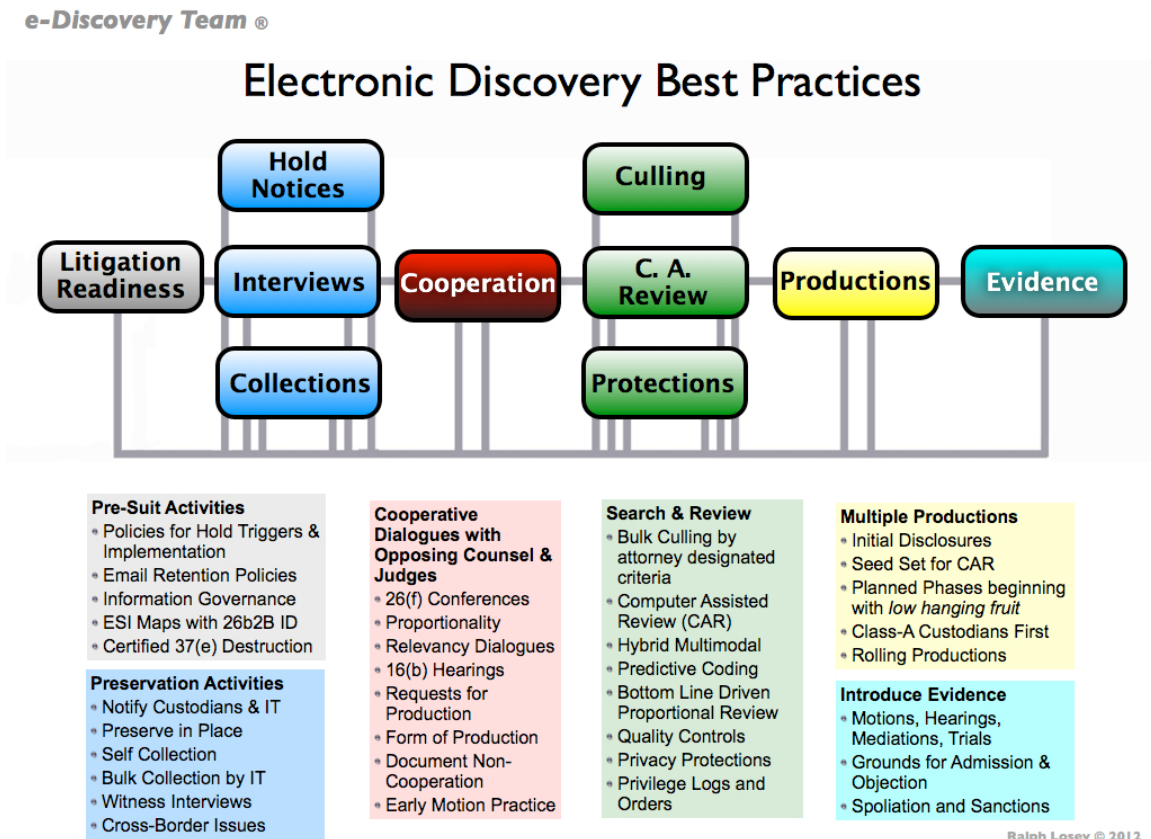
This is in addition to the many best practices established by the professional group that I am active in, [The Sedona Conference®](#), and by top e-discovery judges in the country in recent opinions and articles. A few also come from my personal experience since 1980 as a computer lawyer and trial lawyer, and experience since 2006 as an e-discovery only lawyer developing best practices for two major law firm.

My [e-Discovery Team®](#) will continue adding and updating these practices in the coming months and years. Please see especially the new materials we have added to the [Cooperation page](#) and its sub-pages, [26\(f\) Conferences](#), and [Proportionality](#). Also see the best practices we have collected directly on the point of driving the CAR, at [Review](#), and the sub-pages:

- [Culling in bulk by Custodian, Dates, Deduplication, DeNISTing, File Types, etc.](#)

- *Computer Assisted Review(CAR), aka Technology Assisted Review (TAR)*
  - Hybrid Multimodal
  - Predictive Coding
  - Bottom Line Driven Proportional Review
  - Review Quality Controls

Here is the basic chart summarizing the EDBP.



In the coming years I will continue in this *Electronic Discovery Best Practices* project as original contributor, amalgamator, gate-keeper, and editor. You are invited to join with me in this quest for excellence. See [Announcing EDBP.com, a New Website of Best Practices For Attorneys.](#)

It is my hope that the e-discovery specialists of the future, the indispensable discovery drivers for trial lawyers, will not only be

licensed drivers, they will be the best in the world. In this way I am confident that the CARs of tomorrow will lead safely to the gates of justice. They will do so even in the midst of sensational malpractice side-shows where countless old horses are put out to pasture. It may not be pretty, but the profession will eventually clean itself up and justice will prevail.

For questions or comments, please feel free to contact the author at:  
[Ralph.Losey@JacksonLewis.com](mailto:Ralph.Losey@JacksonLewis.com).