



# Ross Ipsa Loquitur

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## Head-On Collision: Tech Knowledge Inseparable from Substantive Law Practice

by

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"I'm completely computer-illiterate- my paralegal handles all of that technology stuff; you'll have to talk to him."

We've all heard it before. The voluntary admission of technology ignorance has been commonplace among lawyers, and in particular, among litigators since the dawn of the modern computer age. An outgrowth of "I'm a lawyer, not a secretary" mentality, one would think that in 2004, this functional shortcoming would be rarity. In the "Age of Electronic Discovery," it seems unlikely any lawyer could effectively litigate without base level technology comprehension. One would think so . . .

In the late 80's, it might have seemed "quaint" or "trendy" to proclaim techno.ignorance. Today, such a proclamation is likely to get a firm fired. No corporate client hiring litigators today will tolerate working with technology-ignorant counsel. Technology is no long about technology. Today, conceptual technology knowledge is inseparable from the front-office practice of law.

In modern law practice technology and substantive law are inextricably intertwined. We are well past calling this an "intersection;" it is a head-on collision. The days of senior lawyers blissfully proclaiming their technopeasant status are over. What were once considered "geeky" techno.topics are now just "law practice" issues.

Some examples. Electronic discovery in modern litigation is not a trend - it is the norm. We will only see a rise in the complexity of e-discovery issues, of the electronic information that can be discovered, the ongoing storage, archiving and destruction of corporate information that may exist primarily, if not solely, in electronic form. E-discovery is a subject for ANY lawyer, whether transactional counsel or litigators to understand right now. Failure to grasp the range of issues from the perspective of the "discoverer" or "discoveree" is a one-way ticket to the wrong end of a malpractice claim.

That doesn't mean lawyers need to understand every bit and byte, but it does mean that the overall technology underpinnings of the modern discovery process need to be understood. That means understanding, in no particular

order: (1) what is electronically discoverable, (2) evidentiary rules relating to preservation of electronic materials, (3) how to acquire electronic data, (4) what is reasonable to attempt to acquire and what will create too great a hardship on the part of the discoveree, (5) what processes can and should be used to capture and preserve electronic information, (6) the role of Special Masters to oversee electronic data acquisition and preservation, (7) the issues related to the costs involved in e-discovery and who should bear them, (8) how to evaluate and select electronic discovery and forensic experts, (9) what to do if you are representing the discoveree and how to advise clients regarding response to request, and (10) what do with electronically discovered information in terms of search, review, storage, retrieval and ultimately, presentation methodology.

These are issues that most certainly are NOT just for litigators - these are issues for all lawyers. An e-discovery crash course is a necessity today, not just something viewed as an obscure CLE offering for the pocket-protector crowd. Transactional lawyers - estate planners, corporate counsel, family lawyers - all may find their clients on the receiving end of an electronic discovery request. So to be clear, technology knowledge about e-discovery is NOT just for litigators - it is for every lawyer striving to competently advise and represent their clients.

E-discovery is not the only area where the lines between technology comprehension and substantive law practice are forever blurred. Consider HIPAA's privacy provisions. In order to comply with HIPAA's privacy requirements, counsel must understand issues related to the security and accessibility of electronic healthcare information. Further, understanding the questions related to transmitting documents electronically (which may contain information that falls within the scope of HIPAA). Failure to grasp these concepts will attract expensive penalties not only for law firm clients, but also for law firms themselves (malpractice actions, HIPAA violations for mishandling the firm's OWN employee healthcare information, etc.)

And then there is Sarbanes-Oxley. The technology implications run rampant for S/O compliance. Document retention, archiving and destruction policies need to be rewritten to account for new storage, maintenance and access requirements. Electronic "shredding" could be violative; lawyers are being asked more often to provide guidance in areas previously the sole province of professional records managers.

The bottom line is clear - there is no longer a boundary between understanding technology concepts and substantive law practice. For that matter, there isn't even a demilitarized zone separating the two any longer. Failure to recognize this reality and failure to seek rapid education will result in lost clients, malpractice claims and perhaps what lawyers fear most - an envelope with a return address from your state's Ethics Police.

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