

Taming E-Discovery: It's Complex, It's Pervasive and Never Going Away!



*Wyoming Bar
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- ◆ Marquette Univ. Law School, 1986 (Law Review)
- ◆ Founded MicroLaw, Inc. in 1985 – legal technology and law practice management consultancy
- ◆ Legal Technologist, Educator, Author
- ◆ Technolawyer Legal Technology Consultant of the Year 1999, Contributor of the Year 2001, 2002, 2005, 2006
- ◆ Founder/National Coordinator, HelpKatrinaLawyers.org
- ◆ Over 1200 law offices assisted across North America
- ◆ Frequent author and speaker nationwide on legal technology subjects
- ◆ Chair, Wisconsin Law & Technology Conference 2002-2007
- ◆ Co-Chair, National Solo & Small Firm Conference 2006-2008
- ◆ Listed as one of the 100 Global Legal Tech Leaders by the UK's CityTech Magazine (2007)
- ◆ Chair, Milwaukee Bar Association Technology Committee, 2002-2007
- ◆ Chair, ABA LPM Section Computer & Technology Division and Member, TECHSHOW 1997- 2001 Board, Co-Chair, LegalTech CLE Planning Board, 1998-2005
- ◆ Founder, Annual Legal Consultants & Technologists Dinner(www.thedinner.net)

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Discovery of Electronically Stored Information (ESI)

- A curse or opportunity – depends on your perspective
 - Electronic discovery is pervasive – it’s complicated, the rules are disturbingly grey and it’s never going away
 - Every practice needs to have a strong, top-down strategy for managing this potentially explosive element of ALL litigation
 - Fail to act, fail to strategize at your abject peril!



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The “Glowing Light Rule” – What Can be Discovered in Litigation?

- Anything and everything – I call it the “Glowing Light Rule”
 - If something plugs into an AC outlet or runs off battery power – in other words, if it has a “glowing light” it may contain discoverable data
 - In the healthcare world, this means virtually any and every device that can store data or track/log/audits its own function may contain discoverable information – it’s a veritable evidentiary treasure trove



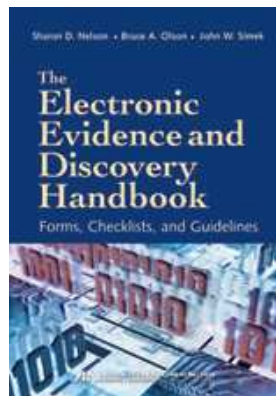
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Top E-Discovery Resource

- **The Electronic Evidence and Discovery Handbook: Forms, Checklists and Guidelines (the 2006 edition) by Sharon Nelson, John Simek and Bruce Olson**
 - www.lawpractice.org – an ABA Law Practice Management Section publicisin
 - \$129.95 or \$99.95 for ABA LPM members
 - Extremely practical resource with terrific forms and checklists



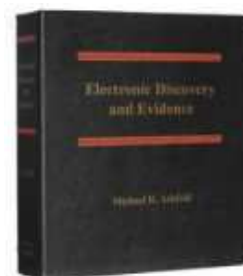
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New Rules – Top Recommended Resource

- **Mike Arkfeld's Electronic Discovery & Evidence (the 2008 edition)**
 - www.lawpartnerpublishing.com or lexisnexis.com
 - Latest addition addresses the new rules
 - Considered the seminal resource on the subject, we rate it as a “must read”



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Overview of Electronic Discovery

- **Why is E-Discovery an Issue?**
- **Widespread use of computers brought new technologies –**
 - **Email**
 - **Voicemail**

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Overview of Electronic Discovery

- **Information Explosion**
 - **Small percentage of new information is paper based**
 - **Recorded information – 97% created electronically**
 - **Corporate information – 80% or more now exists only in electronic form**
 - **Corporate communications – 30% or more never reduced to paper**

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Overview of Electronic Discovery

- **Scope –**
 - **Convergence of IT, Records Management and Legal personnel**
 - **Higher level of sophistication and understanding of cross-disciplinary issues**
 - **Requires greater collaboration and cooperation than in the past**

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Overview of Electronic Discovery

- **Scope -**
 - **What is included?**
 - **Paper managed electronically**
 - **Electronic information that never becomes paper**

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Overview of Electronic Discovery

- **Consequences of poor management:**
 - **SPOILIATION of EVIDENCE**
 - **Spoliation leads to:**
 - **DRACONIAN PENALTIES**
 - **Absence of key evidence at trial**
 - **Financial sanctions**
 - **Dismissal of case**
 - **Attorney malpractice**

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Overview of Electronic Discovery

- **Spoliation of Evidence**
 - **Inadvertent destruction**
 - **Intentional destruction**
 - **Inadequate document retention policies**



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Overview of Electronic Discovery

- **Good records management:**
 - **Anticipates litigation is inevitable**
 - **Has a heightened awareness of potential adverse consequences of improper management**
 - **Adopts an effective plan**
 - **Ensures that plan and procedures are followed, maintained and updated over time**

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Overview of Electronic Discovery

- **Who needs to be aware of these issues?**
 - **IT**
 - **Executives**
 - **Management**
 - **Key employees at all times**
 - **All employees when litigation is anticipated**

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Overview of Electronic Discovery

- **Difference between Traditional Discovery and E-Discovery**
- **Same basic legal rules and concepts**
- **What are we looking for – anything that is reasonably calculated to lead to**
- **Relevant evidence at trial**
- **Electronic information is content +**
- **Traditional information is simply content**

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E-Discovery Challenges for Lawyers and Legal Pros

- **Balancing an interdisciplinary team of professionals who need to understand the issues**
- **Lawyers, paralegals, litigation professionals, records management professionals, IT professionals**
- **This is the primer you need!**

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The Litigation Hold – An Impossible Challenge?

- Perhaps nothing any company faces will be more of a practical challenge than complying with a duty to preserve when there is a litigation hold on records
- Is it actually possible to respond reasonably in a large company?
- How do you communicate its meaning to all lay people?
- How do you react quickly enough to preserve subject data in a reasonable way?
- Do you even know where all the data is that needs to be preserved?
- Are your efforts coordinated between legal, IT and records custodians?

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Is it Possible to Adequately Communicate a Litigation Hold?

Are mistakes and gaps inevitable (and sanctionable?)



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Strategies and Solutions

Electronically Savvy Litigators or Technopeasants?

- The days of technopeasant litigators who proudly profess digital illiteracy are over
- How do you assess the technical prowess and comprehensive of yourselves and fellow litigation counsel?
- What to look for?
- What to avoid?
- Separating the Pros from the Amateurs

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Strategies and Solutions

- Familiarity of Counsel with Technology:
- Know what is out there
- Know how to use it
- Attorneys must use it regularly
- Not a staff function anymore
- Don't let them bluff you!

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Strategies and Solutions

- **Familiarity of Counsel with Technology:**
- **Know how to interact successfully with IT professionals**
- **Know how to work with and foster collaboration with IT and managers**
- **Know how to pursue and protect your information based on technologies in question**

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Emerging ED Concept: “National Discovery Counsel”

- **The concept is new, the need is real and pressing**
- **A new and emerging category of litigation counsel**
- **Specialist counsel who works with lead counsel bringing expertise in management of the discovery process**
- **Special expertise in electronic discovery including resource selection, techniques, processes, procedures, cost projection, interface with technical resources**

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Emerging ED Concept: “National Discovery Counsel”

- **Coordinate document production procedures and policies for consistency**
- **Work with firm's and even client's management to develop e-discovery procedures**
- **Develop legally sound document/data retention, backup, archiving and destruction policies**

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Emerging ED Concept: “National Discovery Counsel”

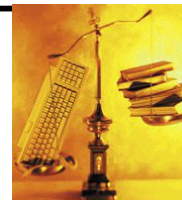
- **Handle motions to compel or motions for protective orders**
- **Handle relationships with outside referees, special masters**
- **Handle relationships with outside vendors**

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Electronic Discovery Primer (and Data Collections Methods and Risks)



- The Technical and Legal Aspects of Electronic Discovery Now and in the Future

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Recoverable (if not overwritten!)

- Deleted files and Metadata
- Internet history and “cache” files
- ICQ “conversations”
- E-mail
- Installed applications and data
- Computer activity timeline
- Files where extensions are intentionally modified
- PDA data
- Digital media cards



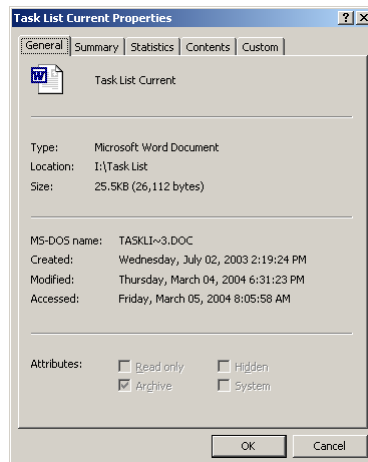
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The Metadata Threat

- Data About Data
- Word
- WordPerfect
- Excel
- PowerPoint
- Scrubbers
- Metadata Assistant
- Copy & Paste (Special)



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Technical

Where does evidence hide?

- Metadata
- Is data embedded in the file that details, describes, gives more attributes about the file.
- A Microsoft Windows computer typically has dozens of applications installed, each performing different tasks that save data to the hard-drive in different formats.
- Many applications have hidden embed data

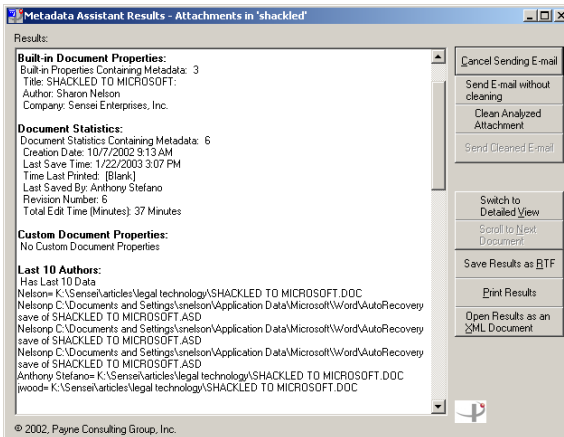
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Metadata Assistant

From Payne Consulting (www.payneconsulting.com)
 and available through MicroLaw, Inc. in Wisconsin



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Technical

Where does evidence hide?

- Metadata - Example
- The "GOOD MORNING" text file and the "GOOD MORNING" Microsoft Word file display exactly the same text when opened, yet these files are significantly different in size.

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Technical

Volume in drive A has no label
 Volume Serial Number is 18E8-0D50
 Directory of A:\

GOODMO~1 TXT	13	06-07-02 5:07p
Good morning.txt		
GOODMO~1 DOC	19,456	07-30-02 3:56p
Good Morning.doc		
GOODMO~1 PGP	575	06-07-02 5:25p
Good morning.txt.pgp		
GMLINK TXT	1,703	06-08-02 10:23a
GMLINK.TXT		
DEOFTXT TXT	462	06-08-02 10:36a
DEOFTXT.TXT		
DESLACK TXT	213	06-08-02 11:28a
Deslack.txt		
6 file(s)	22,422 bytes	
0 dir(s)	1,433,600 bytes free	

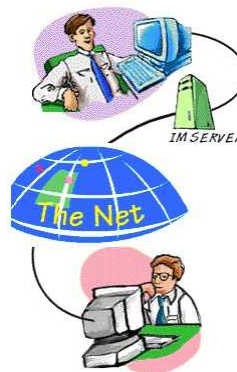
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Unrecoverable

- Wiped drive areas
- Instant Messaging
- Overwritten files (maybe . . .)
- Frequently, segments of files
- Encrypted files



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The Day You Learn Your Client May Be Sued

- Forward any Preservation of Evidence Letter or notice from the other side
- Write your own Notice to Client
- Prepare a memorandum to be circulated to all involved parties on your side
- Explain spoliation and its consequences
- Advise client not to look for evidence itself

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The Day You Learn Your Client May Be Sued

- Cease overwriting backup media
- If a particular machine or machines are in issue, unplug them and keep them under lock and key
- Advise client not to defrag, compact, load new applications, delete applications, or get rid of computers
- Warn client about peripheral devices
- Don't get rid of machines or swap out HDs

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Why Not Look Yourself or with Your IT Staff?

- Just booting a computer changes hundreds of file access times
- Potential compromise of timeline by changing date
- Shutdown and startup process vary by system configuration
- Overwrite swap file area
- Evidence may become suspect or rendered inadmissible

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Preservation of Evidence Letter

- Put other side on notice – avoid spoliation
- Specify all media
- Specify all locations
- Specify nature of evidence
- Specify particular individuals



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Preservation of Evidence Letter

- **No deletion, moving or modification of discoverable evidence**
- **Machines with discoverable data**
- **No defragging**
- **No new applications loaded**
- **No new data / no modified data**
- **No disk optimization**
- **No Metadata scrubbing/removal**

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Preservation of Evidence Letter

- **No overwrite of backup media**
- **No disposal of machines or media**
- **Obtain protective order if necessary**

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Protective Orders

- Enron shredding/Andersen deletions
- Protective Order by agreement preferable
- Likelihood that evidence will be destroyed
- Indicia of bad faith
- Prior history of spoliation
- Be very specific

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The Rise of the Special E-Master

- More and more judges, as well as litigants are retaining Special Masters to manage/oversee the electronic discovery process
- Often appointed as a neutral by the court with costs borne equally by the parties
- Effective way to squelch e-discovery-related disputes and issues

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Wiping and Scrubbing

- Evidence Eliminator
- Evidence Scrubber
- Disk Wiper
- All leave traces
- Spoliation is both damning and expensive



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Gaining Access to E-Evidence

- By agreement
- Request for Production of Documents
- Motion to Compel
- Identify what is to be accessed
- Narrowness and relevance of search
- Not unduly burdensome
- Subpoena to ISP

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Computer Protocol Agreement

- Where will acquisition take place? ASAP to avoid destruction/trampling. Dates?
- On-site Inspection
- Privilege? Producing party can screen first
- Non-waiver Agreement
- Can define terms of search – keywords, dates etc.
- Confidentiality Agreement
- Destruction at end of case – return to owner?
- Child Porn Protocol

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Depose Individuals

- Do they do their own backups?
- Do they make copies?
- Identify personal computing habits
- What applications do they use?
- Which machines at work do they use?
- Home computer? PDA? Laptop?
- Cell phone? Pager? Thumb drives?

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Data Collection

Computer Forensics

- **What is it?**
 - Computer forensics is the practice of identifying, preserving, analyzing, recovering, and presenting potential electronic evidence.
 - It involves supportive measures such as incident preparation, detection, response and remediation.
 - The principal function of computer forensics is the investigation of alleged computer-related policy infractions, abuses and crimes.

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Data Collection

Computer Forensics

- **What is it?**
 - Organizations use computer forensics to conduct investigations into both internal and external computer related incidents. A computer forensic investigation may range from tracking down a hacker on a system to recovering inappropriate emails to unearthing evidence of fraud.

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Data Collection

What is Computer Forensics?

- Litigation Support & Consultation
- Evidence Acquisition & Archival
- Forensic Analysis
- Expert Witness Testimony

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Data Collection

What can you find?

- Deleted information
- Hidden data
- Logs
- Internet cookies
- Sites visited
- Cached files
- Documents
- Spreadsheets
- Letters
- Memos

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Data Collection

What can you find?

- Encrypted data
- Metadata
- Within JPG (e.g. thumbnails), word docs (e.g. time/date stamps)
- Email
- Contact information
- Correspondence
- Temporary files
- Financial information and transactions
- Trojans
- Pirated software
- Graphics

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What a Forensic Technologist Brings

- Knowledge of multiple operating systems and procedures
- Hardware and software tools to recreate environment
- Lots of drive space
- Maximize evidence retrieval
- Case roadmap/next steps
- Expert witness credentials
- Proof of chain of custody/authentication

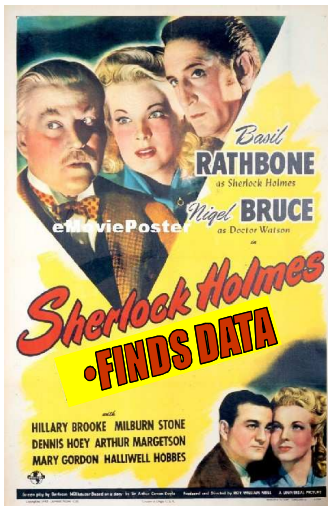
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Choosing a Forensic Technologist

- Technical certifications
- Forensic certifications
- Courts qualified
- Professional experience
- Referrals from clients



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Choosing a Forensic Technologist

- CV-get & ask questions
- Seminars & Publications
- Speaks English
- Knowledge of the Law



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Costs

- Who pays for computer forensics?
- Typically, producing party pays
- Party seeking discovery may offer to pay
- Courts consider resources of producing party and extent of burden
- Our costs, by way of example: \$1000 per HD imaged, \$280/hr. for analysis/testimony



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Cost Shifting: Zubulake v. UBS Warburg

- Cost must normally be borne by producing party
- New seven factor test established by court
- This decision appears likely to become the “gold standard”

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Zubulake v. UBS Warburg

- (1) Extent to which request is tailored to discover relevant info
- (2) Available from other sources
- (3) Cost of production compared to amount in controversy
- (4) Cost of production compared to each party's resources

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Zubulake v. UBS Warburg

- (5) Ability and incentive of each party to control costs
- (6) Importance of the issues at stake
- (7) Relative benefits to the parties of obtaining the information requested
- Zubulake III permitted “sampling” to limit costs

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Checklist: Working with Your Experts

- **Get them the pleadings**
- **Define the scope of their effort ASAP to limit costs**
- **Involve them in drafting pleadings, sitting in on relevant depositions**
- **Give them adequate notice of deadlines and court dates**

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Checklist: Working with Your Experts

- **Don't write their opinions**
- **Accept “the truth” as they report it**
- **Respond promptly to their messages/queries**
- **Do not discuss substantive matters via e-mail**
- **Don't write a “draft” report until discussed by phone**

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Overview of Electronic Discovery

- Why is E-Discovery an Issue?
- Increased use of computers generating electronic data that may or may not be reduced to paper at every level of society
 - Businesses
 - Governments
 - Individuals

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Overview of Electronic Discovery

- Spoliation of Evidence -
 - *“The destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence, in pending or future litigation.”*

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Electronic Evidence—Why Care?

- ***“Today it is black letter law that computerized data is discoverable if relevant.”***

Anti-Monopoly, Inc. v. Hasbro, Inc., 94 Civ. 2120, 1995 WL 649934 (S.D.N.Y., November 3, 1995)

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Electronic Evidence—Why Care?

- Document retention policies often don't exist
- Document retention policies often aren't enforced
- 10% of employees will ignore compliance orders
- If your servers/workstations won't kill you, your back-up may
- Preservation of evidence letters put you on notice and spoliation penalties increasingly severe

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Substantive Law

- ***A discovery request aimed at the production of records retained in some electronic form is no different, in principle, from a request for documents contained in an office file cabinet. While the reality of the situation may require a different approach and more sophisticated equipment than a photocopier, there is nothing about the technological aspects involved which renders documents stored in an electronic media “undiscoverable.”***

Linnen v. A.H. Robins Company, Inc., 1999 Mass. Super.
LEXIS 240 (Mass. Super. June 16, 1999)

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Substantive Law

- ***“Deleted electronic data is fully discoverable.”***

Dodge, Warren and Peters Insurance Servs. v. Riley, E031719, 2003 WL 245586 (Cal. App. February 5, 2003).

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Substantive Law

- ***“Computer records including records that have been ‘deleted,’ are documents discoverable under Fed.R.Civ.P.34”***

Simon Prop. Group LP v. my Simon, Inc., 194 F.R.D. 639 (S.D. Ind. 2000)

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Substantive Law

- **Rules 26(c), FRCP, allows the shifting of discovery costs to protect a respondent “from annoyance, embarrassment, oppression or undue burden or expense.”**

See *In re First Am. Corp.*, 184 F.R.D. 234, 239 (S.D. N.Y. 1998).

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Substantive Law

- **Cost Allocation - Under F.R.C.P discovery rules:**
- **Generally, each party bears its own discovery costs. Some courts will not hesitate to place the burden of production on the producing party.**

Linnen v. A. H. Robbins Company, 1999 WL462015 (Mass.Super. June 16, 1999).

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Substantive Law

- **Representative Case Law –**
- **Some courts have attempted to reach a compromise between cost allocation and cost shifting. The 7th Circuit, for example, allocated electronic discovery expenses equally among the parties in**

Sattar v. Motorola, Inc. 138 F.3d 1164 (7th Cir. 1998).

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Substantive Law

- **Preservation Directive –**
 - **When litigation is foreseen or commenced against a company, to avoid any claim of spoliation because of inadvertent destruction of documents, a high management official should notify and formally direct, in writing, employees not to destroy any documents that are potentially related to the litigation and to suspend corporate record retention policies that may relate to scheduled destruction of such documents.**

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Substantive Law

- **Preservation Directive -**
- **Additional preservative steps are particularly needed with respect to electronic records, especially e-mail, which may be subject to regular, routine, automated deletion. In some computer systems, if a computer with relevant evidence is even started up or “booted,” certain files (e.g. “temporary files” and “swap files”) may be destroyed.**
- **Carey Sirota Meyer and Kari L. Wraspir, *E-Discovery: Preparing Clients for (and Protecting them Against) Discovery in the Electronic Information Age*, 26 Wm. Mitchell L. Rev. 939, 961 (2000).**

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Substantive Law

- Preservation Directive
- **See also: United States of America v. Philip Morris USA, et al. , No. 99-2496 (D.C. D. Columbia July 21, 2004) (Court awarded \$2,750,000 as monetary sanction where Philip Morris and Altria Group deleted email over 60 Days old on a monthly, system wide basis for at least two years after the court had issued an order requiring preservation of "all documents and other records containing information which could potentially berelevant to the subject matter of this litigation.**

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•71

Substantive Law

- **SPOLIATION**
- **Failure to preserve e-mail and electronic documents (whether intentional or inadvertent) is sanctionable as spoliation of evidence.**

Metropolitan Opera Assoc. Inc. v. Local 100, 212 F.R.D. 178 (S.D.N.Y. 2003)

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•72

Substantive Law

- **SPOLIATION**
- Sanctions
- Default judgment
- Adverse inferences
- Monetary sanctions
- Criminal penalties



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•73

Substantive Law

- **SPOLIATION**
- See: *Zubulake V* and *United States v. Philip Morris, et al.*



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•74

ED Technology Solutions

- Electronic discovery solutions and services abound
- Companies who manage data capture, data production, data searching, document coding



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Litigation Support Tools and Non-Legal Approaches

- Litigation support tools abound for organizing documents, searching your information, managing document storage and retrieval



SUMMATION
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•76

Helpful Resources

- www.krollontrack.com
- <http://www.applieddiscovery.com/lawLibrary/eDiscoveryPrimer.asp>
- www.discoveryresources.org
- BNA, Computer Technology Law Report (electronic edition)
- Google News Alert - www.google.com/newsalerts
- [electronic+discovery](http://www.google.com/newsalerts/electronic+discovery)

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•77

The New U.S. Federal Rules of Procedure

- The new rules went into effect December 1, 2006
- The focus of the rule revisions are oriented to incorporating the realities of computer technology
- Many sources for detailed information about the new rules

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•78

New Rules – Summary of Changes

- The new rules incorporate what has already become reality for all of us – that discovery involves an increasingly high percentage of information that exists in electronic form
- The new rules elevate electronic discovery to the forefront of litigation, requiring a depth of computer understanding that many lawyers may not be prepared for (and which we certainly didn't learn in law school)
- It's time for all litigators, whether techno.savvy or a techno.peasant, to cram, learning as much as possible about electronic discovery

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New Rules – Summary of Changes

- **Mandatory Early Discussion of Electronic Discovery Issues**
 - Changes to Rule 16 and 26(f) require that as part of the part initial “meet and confer” to plan discovery, they must specifically plan electronic discovery, including the methodology for preserving information and the formats for production and exchange
 - *Implication: lawyers and judges need either significant knowledge of technology platforms and formats or need “discovery counsel” or “discovery consultants” to fill in the gaps*
 - *Further, judges are invited to incorporate electronic discovery methodology into their scheduling orders – woe to the unwary practitioner who walks in unprepared and then has to explain to the client why they were just obligated to the most onerous and expensive production process.*

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•80

New Rules – Summary of Changes

- Rule 26(b)(2) – The “Out” for Discoverees
 - This provision establishes procedure that allows parties not to have to produce certain information identified as “not reasonably accessible” (because of the burden of production or costs involved)
 - *Implication* – think of all the complexity involved in identifying each media type, the procedures involved in production, in determining the burden and costs, and then explaining this with enough specificity but in a way understandable to the court . . . wow . . .

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New Rules – Summary of Changes

- Rule 34 – The “Reasonably Usable” Provision
 - This provision requires that electronic information be produced in standardized and “reasonably usable” format
 - *Implication* – we’ll need case law to determine what constitutes “reasonable usable” information, but expect this to mean common data formats such as Word files, PDFs, JPGs, Access databases, HTML files. But how will they need to be indexed or organized to be “reasonably usable?”
 - *Sidenote* – the new rule does not address hidden metadata – expect this issue to be litigated extensively

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New Rules – Summary of Changes

- Rule 37 – The “Safe Harbor” Provision
 - This provision provides a safe harbor from spoliation sanctions where there electronic information is lost through “routine, good-faith operation” of the computer systems.
 - *Implication – what constitutes “routine” and “good faith” is open to question and in particular as computer technology rapidly changes. What might have been reasonable six months prior to the time of data loss, might no longer be*
 - *Sidenote – again, expect this issue to be litigated extensively as well*

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•83

Helpful Resources

- ***Electronic Discovery and Evidence***
 - Michael R. Arkfeld
 - LexisNexis Publishing 2008

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•84

Thank You!

◆ To help with your E-Discovery efforts, planning, policies and readiness/response strategies, please contact us – We're ready to assist . . .



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•85