

Why Students Should Study E-Discovery

By: Patrick Camuñez

Digital storage and information has exploded. Even seven years ago, back in 1999, more than 93% of all information was digital. *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 440 n.2 (D.N.J. 2002). The trend has only accelerated over the last decade. Rick Seabolt, the past Chair of the Litigation Section of the California Bar writes, “We now create data at a rate of approximately 5 exabytes (a billion gigabytes) per year. That translates to nearly one gigabyte per year (or the equivalent of 35 feet of books) for every man, woman and child on the earth.” This is a trend that is driven by the proliferation of emails. It is estimated that over 85% of all litigation today involves a trail of digital evidence. Training Reviews, <http://www.trainingreviews.com/Detailed/213.html> (last visited Apr. 8, 2009). The battle over legal issues related to the management and storage of electronic information- from e-mail, to web pages, to e-commerce, to personnel files- has grown exponentially over the last five years. This rapidly evolving area has caused headaches for lawyers trying to develop policies and procedures, to deal with the tidal wave of digital information. The Sedona Conference, a Phoenix-based law-oriented think tank, states that “The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information.” William Hamilton, a professor at the University of Florida Levin College of Law, recently blogged that “[L]aw schools must commence a campaign to teach e-discovery. These institutions have both the time and resources to teach e-discovery correctly as a unique combination of case book and practice course.”

E-discovery is important, in part, because some of the most highly publicized litigation disasters arise from electronic discovery issues. As future attorneys, law students must be prepared to deal with such a pervasive form of evidence. Students should learn about this process because electronic discovery presents one of the best opportunities to gain an edge in practice. With the advent of the new discovery rules in federal court, e-discovery has become more important than ever. Failure to properly conduct e-discovery may lead to legal malpractice cases against law firms which fail to conduct it or fail to do it properly with experienced computer forensic experts. Jason Vanacour, an attorney with Snell & Wilmer in Phoenix, says that a reason to learn about e-discovery is simply “To avoid malpractice. This is not to mention preservation and spoliation [of electronic evidence]. There is an affirmative duty, with the new federal rules, for attorneys to advise clients with respect to electronic evidence. Students need to be prepared to deal with this area that they are obligated to, but attorneys often avoid.”

E-discovery is important because the best evidence of what was done, what was said and what was known is often recorded as electronically stored information (“ESI”). Most litigators have long recognized that contemporaneously prepared predispute documents “don’t lie.” As computers and electronic devices have become ubiquitous, we (and our clients) leave electronic tracks of much of what we (and they) did, said, and thought. The review and production of ESI is much harder to manage because of its volume. Clients and their litigation adversaries frequently have vast quantities of ESI. ESI is very susceptible to unintentional deletion. It is difficult or impossible to permanently remove all copies of ESI. so that the data can often be recovered through special forensic techniques. Evidence of the recovery of deleted data obviously has its

own litigation significance and unique problems such as impeachment and loss of credibility. The review and production of ESI is, in other ways, easier. Emails, unlike paper, can be searched and screened through the use of word searches. Key words, such as the names of the plaintiffs, an involved employee, or a project can instantaneously segregate massive amounts of data and isolate potentially relevant data.

George Paul, a partner at Lewis and Roca and author of *The Discovery Revolution: E-Discovery Amendments to the Federal Rules of Civil Procedure*, says “Students need to be complete lawyers. They can not neglect areas of practice, especially e-discovery where there is an affirmative duty to advise your clients ahead of time. It is an important tool to have in your toolbox to make you a more complete and successful attorney.” It obviously makes sense for all students to make the effort required to become familiar with the legal issues associated with e-discovery. As a student, and future attorney, I would advise all my colleagues to seek out this vital area of law. While ours schools may not offer it, we should ask for classes dealing with e-discovery.