



2011
DISTRICT OF ARIZONA
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CIVIL LAW – MASTERING E-DISCOVERY

- *Practical Issues Encountered in E-Discovery*
- *Social Media Discovery*
- *Evidence Issues and Spoliation of Evidence*

Presented by

THE ARIZONA LAWYER REPRESENTATIVES
TO THE NINTH CIRCUIT



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WESTWARD LOOK RESORT
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Mastering E-Discovery

- A. Practical Issues Encountered in E-Discovery including:
 - 1. Overview of Federal and Arizona Rules
 - 2. Litigation Holds
 - 3. E-Discovery Planning, Searches and Costs
 - 4. Privilege, Protective Orders, and Claw Back Agreements
 - 5. Meta Data
 - 6. Ethical Rules and Issues
 - 7. Case Management Conferences
- B. Social Media Discovery
- C. Evidence Issues and Spoliation of Evidence

Social Media Discovery

Presented to the ABA Labor and Employment Section Seminar

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There can be no mistake that social networking sites have revolutionized the way people communicate personally and professionally. Facebook is ubiquitous, estimating that it has more than 500 million users. While naysayers may question the reach of social media, there can be little doubt that a significant number of employees regularly use some form of social media. For the uninitiated, the terms “social networking” and “social media” loosely describe a group of Internet-based applications that allow users to share content with one another and contribute to an environment that is created entirely by like users. Over time, social media’s primitive offerings have largely been replaced by commonplace tools such as email, instant messaging (“IM”), and web chat.

Thus, it is no wonder social media sites have become a fertile source of electronic evidence as attorneys canvas the Internet meet their discovery obligations and prepare their cases for trial. Yet, it should be noted the place to start in the quest for relevant social media information related to a party is generally a search of the Internet for publicly available social media posts followed by a timely discovery request to that party for production of documents. *See Infinite Energy, Inc. v. Thai Heng Chang*, 2008 WL 4098329 (N.D. Fla. Aug. 29, 2008) (court orders former employee to comply with discovery and retrieve emails from her Yahoo! account).

In fact, a subpoena is unnecessary altogether where a party has actual or constructive “care, custody, and control” over the information. *See O’Grady v. Superior Court*, 139 Cal. App. 4th

1423, 1446 (2006) (“[w]here a party to the communication is also a party to the litigation, it would seem within the power of a court to require his consent to disclosure on pain of discovery sanctions”).

More importantly, disclosure of a party’s “content” (e.g., emails, IM, etc.) by the Internet Service Provider (“ISP”) without the consent of the sender or recipient likely would violate the Stored Communications Act (“SCA”). *See In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 607 (E.D. Va. 2008) (court held plain language of the SCA prohibits production of email by an ISP in response to a civil subpoena). If the requested content relates to anonymous web postings, the subpoena may also prompt a series of unexpected, constitutional challenges.

The Stored Communications Act

The SCA is part of the Electronic Communications Privacy Act and is intended to bring a certain level of Fourth Amendment protection to cyberspace. The SCA regulates disclosure of communications stored by ISPs like Facebook, Twitter and MySpace. More specifically, the SCA prohibits, with limited exceptions that are not applicable in civil discovery, all disclosures of the content of stored communications held by an electronic communications service (“ECS”) absent the “lawful consent” of the sender or recipient, or by a remote computing service (“RCS”) absent the “lawful consent” of the subscriber.

An ECS provider gives its users the ability to send or receive wire or electronic communications, while an RCS provides computer storage or processing services to the public by means of an electronic communications system. While the distinction is easy enough to state, it can be very difficult to apply, although in many civil cases, it will not make a difference.

Today, social networking sites contain far more information and communication opportunities than Congress contemplated when it implemented the SCA in 1986. As a result, courts have struggled to apply the antiquated RCS/ECS dichotomy to the modern-day world of real time Internet status updates, “tweets”, email, live chat and IM. *See, e.g., Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 874 (9th Cir. 2002) (court held plaintiff’s employer may have violated SCA simply by viewing employee plaintiff’s password-protected website without authorization); *Crispin v. Audigier, Inc.*, 2010 U.S. Dist. LEXIS 52832, at *5 (C.D. Cal. May 26, 2010).

Nonetheless, in *Crispin*, the court held that Facebook, MySpace and another ISP were both RCS *and* ECS providers, thereby prohibiting the disclosure of private messaging and email communications. The court also found that Facebook and MySpace were RCS providers with respect to Facebook wall postings and MySpace comments, but noted that neither would be protected under the SCA if, depending on the user’s privacy settings, they were available for viewing by the general public. *Id.*

Social networking providers readily admit they are itching for a fight to define the boundaries of the SCA as it applies to both them and their subscribers’ content. Providers routinely refuse to release the content that is defined and interpreted broadly as “any information concerning the substance, purport, or meaning of” a communication. *See* 18 U.S.C. § 2510. This definition would include the information lawyers want the most – emails, chat conversations, and instant messaging communications. Instead, without consent to disclosure of content, ISPs have been willing to part only with basic subscriber information, including the account holder’s name and mailing address, IP address, connection records, and duration of account. *See* 18 U.S.C. § 2703(c)(2).

Understandably, when a litigant seeks information from a non-party, a subpoena is generally the only compulsive means of gaining compliance. Yet, a decision to issue a civil subpoena to an ISP should be weighed very carefully. In *Theofel v. Farey Jones*, the Ninth Circuit held that a subpoena request netting privileged and irrelevant personal non-party emails was so overly broad that the subpoena was invalid on its face. The court held the attorney responsible for serving the subpoena, and both the attorney and the client liable for discovery sanctions as well as potential civil liability for violating the SCA. 359 F.3d. 1066, 1071 (9th Cir. 2004). It may be wise to subpoena third parties directly, rather than their ISP. If third parties fails to comply with the subpoena, they can be called into court to explain their non-compliance.

The Rights of the Anonymous

In some instances, ISPs may object to releasing information related to unknown or anonymous posters. Such communications may not only involve the SCA, but also the U.S. Constitution. The Supreme Court ruled several decades ago that the First Amendment included the right to speak anonymously. *See Talley v. California*, 362 U.S. 60 (1960). That right has unquestionably been extended to a right to be anonymous on the Internet. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 (1997) (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”). Thus, to the extent that anonymity is protected by the First Amendment, a court must consider whether a subpoena should be quashed or modified to protect the “privilege or protected matter” of the poster. *See* FRCP 45(c)(3)(A).

While the protection is certainly not absolute and the hurdle far from boundless, many ISPs would rather the party issuing the subpoena clear these obstacles prior to identifying anonymous posters. For example, in *Doe v. Individuals*, a Yale University law

student brought a defamation action against several anonymous posters who posted derogatory and repulsive comments about her on a social media website specifically targeted to law school students. 561 F. Supp.2d 249 (D. Conn. 2008).

The ISP, AT&T Internet Services, refused to turn over the information and notified the anonymous party, who moved to quash the subpoena. The court upheld the subpoena, but only after plaintiff demonstrated that she had an appropriate right of redress that outweighed the defendant's right to speak anonymously. The court further stated that its balancing analysis ensured the First Amendment rights of anonymous Internet speakers were not lost unnecessarily, and the requesting party did not "use discovery to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Id.* (citing *Dendrite Intern. Inc. v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756, 771 (2001)).

Even when parties specifically seek only identifying information and not "communications," the court may be reluctant to decide the issue without a hearing on the merits. *See Columbia Pictures v. Bunnell*, 2007 U.S. Dist. LEXIS 46364 (C.D. Cal. 2007) (In determining the appropriateness of the party's request for preservation of electronically stored information, the court acknowledged the "minimal" First Amendment protection and ordered all IP addresses be masked).

What of the Right of Privacy?

There are also a growing number of cases where courts have specifically ordered parties to produce social media information and given short shrift to privacy concerns. *See Ledbetter v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 126859 (D. Colo. 2009) (court, without mention of the SCA, ordered production of email and other communications from Facebook, MySpace and

Meetup.com). This may be due to the prevalence of protective orders and the disclaimer of privacy buried deep within many social media website's ever-changing "terms and conditions." *See, e.g., Beye v. Horizon Blue Cross Blue Shield of New Jersey*, 2:06-cv-05337 (D.N.J. 2007) (because they may be relevant to the core issues in the case, plaintiffs in class action case ordered to preserve and produce "writings shared with others including entries on websites such as 'Facebook' or 'Myspace'"); *Romano v. Educational & Institutional Coop. Servs., Inc.*, 907 N.Y.S.2d 650 (Sept. 21, 2010).

In *Romano*, the court found plaintiff had no legitimate expectation of privacy in her online user profiles, in part, because MySpace warned users not to forget that their profiles and MySpace forums were public spaces. The court also noted that Facebook's privacy policy stated the following:

[w]hen you use Facebook, certain information you post or share with third parties (e.g., a friend or someone in your network), such as personal information, comments, messages, photos, videos . . . may be shared with others in accordance with the privacy settings you select. All such sharing of information is done at your own risk. Please keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos, marketplace listing or other items, this information may become publicly available.

Id. at 655. *Compare also McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. Sept. 9, 2010) (ordering plaintiff to provide his Facebook and MySpace user names and passwords to counsel for defendant reasoning that "no person choosing MySpace or Facebook as a communications forum could reasonably expect that his communications would

remain confidential, as both sites clearly express the possibility of disclosure”).

Given this seemingly reduced expectation of privacy and the adequacy of a protective order, it may be difficult to withhold production of relevant social media information based solely on a party’s expectation of privacy.

Preservation is Generally Not an Undue Burden

Even if a party believes it has a valid privacy objection, it must still take the necessary steps to timely preserve the information, which necessarily includes an instruction from counsel to the client not to delete, alter or modify the relevant portions of the profile. *See Vagenos v. LDG Financial Servs., LLC*, 2009 U.S. Dist. LEXIS 121490 (E.D.N.Y. Dec. 31, 2009) (court finds adverse inference instruction appropriate where plaintiff’s counsel neglected to tell plaintiff to preserve cell phone voicemail).

An objection to preserving and producing social media information because it is not reasonably accessible due to undue burden and expense under FRCP 26(b)(2)(B) may be an uphill battle. In fact, Facebook recently introduced a “preservation button” that enables the user to save their entire user profile to disc. The simplicity of preservation may actually be a relevant factor in determining the reasonableness of a party’s delay in preserving social media information. Arguably, timely preservation would coincide with the “trigger” date for the party’s litigation hold duty and not the time of the discovery request. *See e.g., Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 33 (D.D.C. 2004) (duty to preserve triggered well in advance of litigation when defendant’s ISP notified him of a copyright infringement complaint related to defendant’s website).

As millions more join Facebook, Twitter and the blogosphere, it is hard to deny the role that social media plays in the workplace, and, by extension, in labor and employment litigation. Given the sheer volume of potentially relevant – and useless – information transmitted each day, it is important to outline in advance precisely what you need for your case and the tools needed to get it. In most cases, it is probably best to start at the source, which will ultimately be the person or entity that created the information (electronic or otherwise) and not the one that simply stored it.

E-DISCOVERY SHOWCASE

Drama & DESTRUCTION

New York's Shira Scheindlin led a 2010 cavalcade of judges trying to define the proper way to preserve electronic data. By Cecil Lynn III

SPOILIATION — the destruction or alteration of evidence that may be relevant to ongoing or anticipated litigation — dominated judicial agendas during 2010. The year's most dramatic moment arrived when exasperated Chief Magistrate Judge Paul Grimm, of the U.S. District Court in Maryland, issued an unprecedented civil contempt sanction, requiring a defendant to either pay plaintiff's six-figure attorneys' fees and costs, or serve up to two years in jail — for "the single most egregious example of spoliation that I have encountered in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly 14 years on the bench." *Victor Stanley, Inc. v. Creative Pipe et al.*, No. MJG-0602662 (D.Md. Sept 9, 2010).

The tactics of defendant Mark Pappas, in the vitriolic copyright infringement case, included mass deletions, evidence destruction, and fabulism. Grimm found eight separate failures to preserve, with Pappas using at least four software programs to permanently delete electronically stored information (ESI) and claiming that he moved e-mails to his deleted items folder for "storage purposes." Grimm ordered that Pappas' acts of defiance be treated as civil contempt of court and that Pappas be jailed unless or until he paid all of plaintiff's attorneys' fees resulting from the spoliation, estimated at more than \$337,000.

Although the potential jail sentence was reversed in November by District Court Judge Marvin Garbis, Grimm's 89-page opinion was an instant classic, with its 12-page appendix

that included a chart analyzing sanctions and spoliation standards among federal circuits. Garbis affirmed the order requiring Pappas to pay plaintiff's attorneys' fees related to the spoliation.

As electronic data discovery (EDD) matures in the first years after the adoption of 2006 EDD amendments to the Federal Rules of Civil Procedure, the courts are not singing in unison as they shape the boundaries of e-discovery, and grapple with skyrocketing costs.

It is an evolutionary process, laden with conflict. As many influential judges noted during the 2010 Georgetown Advanced E-Discovery Institute, the emerging rulings always reflect the unique facts and circumstances of the case at hand, as well as precedent of the specific circuit. This year, the nation's judges propounded standards that conflicted with the decisions of others; ultimately, the appellate courts will have to try to create harmony.

Many 2010 decisions rest on principles established in 2003, when U.S. District Court Judge Shira Scheindlin of the Southern District of New York published the first of her five legal opinions related to a gender discrimination and wrongful termination lawsuit involving Laura Zubulake, a former equities trader. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003). *Zubulake* addressed the need to preserve electronic evidence, lawyers' duties to monitor client compliance, data sampling, cost shifting, and spoliation sanctions.

The case, and Scheindlin herself, established the foundation of EDD standards and influenced the 2006 FRCP amendments.

In January 2010, Scheindlin presented the year's first major EDD opinion in *Pension Committee of the Montreal Pension Plan v. Banc of America Securities, LLC*, where she sanctioned plaintiffs for numerous preservation-related acts and omissions. 2010 U.S. Dist. Lexis 4546 (S.D.N.Y. Jan 15, 2010) (as amended May 28, 2010). Scheindlin underscored that a plaintiff's duty to preserve is more

often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.

In *Pension Committee*, which she aptly captioned “*Zubulake* Revisited: Six Years Later,” Scheindlin provided a primer on the common law duty to preserve, and the consequences of a party’s negligent, reckless or willful destruction of relevant evidence. After she and her clerks spent 300 hours resolving the motion for sanctions, Scheindlin found the 13 plaintiffs negligent or grossly negligent for conducting discovery in an “ignorant and indifferent fashion,” warranting monetary sanctions, and an adverse inference instruction for those found grossly negligent. Scheindlin held that severe sanctions (such as an adverse inference instruction) were warranted for discovery misconduct, even where no willful or bad faith behavior was alleged.

Scheindlin provided a primer on the common law duty to preserve.

Moreover, Scheindlin declared that certain discovery duties were so “well established” — including the requirement to issue a written litigation hold after the duty to preserve has attached — that the failure to follow them constitutes per se gross negligence justifying severe sanctions.

Scheindlin was critical of the plaintiffs’ failure to “adhere to contemporary standards,” ruling that after her *Zubulake* opinion in July 2004, a party could be found grossly negligent for any one of the following failures: 1) to issue a written litigation hold; 2) to identify key players and to ensure their relevant ESI and paper is preserved; 3) to cease the deletion of e-mail or preserve the records of former employees that are in the party’s possession; 4) to preserve backup tapes when they are the only source of relevant information or if there are no readily accessible sources of relevant information related to key players.

One month later, in *Rimkus v. Cammarata*, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010), Lee Rosenthal, a U.S. District Court Judge for the Southern District of Texas, issued an adverse inference instruction as a sanction for defendants’ deliberate spoliation of obviously relevant data.

While the conduct at issue differed dramatically from that in *Pension Committee* (i.e., willful destruction, versus some degree of negligence), Rosenthal, who is chair of the Judicial Conference Committee on Rules of Practice and Procedure, engaged in a detailed examination of the spoliation laws of each of the 13 Circuit Courts of Appeal, distinguishing *Pension Committee* and other precedent along the way.

She ultimately held that in the 5th Circuit, a party must prove “bad faith” (as opposed to negligent or grossly negligent conduct) before severe discovery sanctions can be imposed.

Rosenthal also noted that most other circuits (including the 1st, 3rd, 4th, 7th, 8th, 9th, 10th, 11th, and D.C. circuits) also have held

that negligence is insufficient for an adverse instruction, and instead some form of bad faith and prejudice must be proven before such severe sanctions will issue.

For Rosenthal, in the 5th circuit, negligence absent bad faith does not justify severe sanctions.

She also underscored that proportionality and reasonableness — based upon the specific facts and circumstances in particular cases — are fundamental factors that must be considered in every sanctions analysis.

Rosenthal was not the only judge to sidestep or challenge *Pension Committee*. In *Orbit One Communications, Inc. v. Numerex Corp.*, 2010 U.S. Dist. 123633 (S.D.N.Y. Oct. 26, 2010), U.S. District Court Magistrate Judge for the Southern District of New York James Francis IV held that the plaintiff’s purging of electronically stored information subject to a litigation hold — including removal of the hard drive in his company workstation — did not amount to spoliation, absent evidence the ESI was actually relevant to the litigation.

Francis noted that a court must first determine whether destroyed information was likely to be relevant before assessing whether a party had breached a preservation obligation with a culpable state of mind. He acknowledged that some cases have omitted this requirement. “The implication of *Pension Committee*, then, appears to be that at least some sanctions are warranted as long as any information was lost through the failure to follow proper preservation practices, even if there has been no showing that the information had discovery relevance, let alone that it was likely to have been helpful to the innocent party. If this is a fair reading of *Pension Committee*, then I respectfully disagree.”

Participants at Duke University’s 2010 Conference on Civil Litigation, sponsored by the Advisory Committee on Civil Rules of the Judicial Conference of the U.S., recommended a new federal rule of civil procedure. The Advisory Committee is expected to draft a preservation rule to help define triggering events, the time period for preservation, and the types of information to be preserved. The proposed rule will likely include a list of factors to help the bench and bar ascertain the reasonableness of a party’s efforts to identify and preserve responsive information, considering proportionality requirements similar to the burden versus benefit analysis found in FRCP 26(b)(2)(C).

The need for more cooperation among counsel was another strong theme of 2010, as judges frequently cited the Sedona Conference Cooperation Proclamation. (The nonprofit think-tank addresses antitrust, complex litigation, and intellectual property law, and has focused much effort on the development of e-discovery principles.)

• In *Home Design Servs. v. Trumble*, 2010 U.S. Dist. Lexis 46723 (D. Colo. Apr. 7, 2010), Magistrate Judge Craig Shaffer cautioned that counsel’s role is not simply limited to that of an advocate on behalf of the client, but also must include a commitment to efficient and cost-effective case management.

• In *JSR Micro, Inc. v. QBE Ins. Corp.*, 2010 U.S. Dist. Lexis 40185, at *11 (N.D. Cal. Apr. 5, 2010), Magistrate Judge Elizabeth LaPorte

chastised parties for not meeting to agree on the meaning of the word “relationship.”

- In *Susquehanna Comm. Finance, Inc. v. Vascular Resources, Inc.*, 2010 U.S. Dist. Lexis 127125 (M.D. Penn. Dec. 1, 2010), parties’ agreement to forgo EDD does not “absolutely control” when such an agreement would foreclose discovery of relevant information.

Two years after the introduction of Federal Rule of Evidence 502, the courts are still attempting to clarify lawyers’ confusion about non-waiver “clawback” agreements, which are governed by FRE 502(b) and 502(d).

At issue is whether “reasonableness” under FRE 502(b) remains a factor.

In *Rajala v. McGuire Woods, LLP*, 2010 U.S. Dist. Lexis 73564 (D. Kan. July 22, 2010), Magistrate Judge David Waxse ruled that the clawback agreement trumped FRE 502(b). Waxse acknowledged the potential for abuse where a party uses the clawback as a shield for a “data dump” production with no effort to review for privilege, and said such action would be faith use and could subject a party to sanctions.

- In *DeGeerv. Gillis*, 2010 U.S. Dist. Lexis 97457, at *24-25 (N.D. Ill. Sept. 17, 2010), Magistrate Judge Nan Nolan found that the stipulated order incorporating a Rule 502(d) non-waiver provision prevented a ruling of waiver for certain e-mails.

- In *Board of Trs. Sheet Metal Workers’ Nat. Pension Fund v. Palladium Equity Partners, LLC*, 2010 U.S. Dist. Lexis 83362, at *12-13 (E.D. Mich. July 14, 2010), the court acknowledged the non-waiver agreement, but held that defendants took reasonable steps to protect the privilege.

- In *Mt. Hawley Ins. Co. v. Feldman Prod.*, 2010 U.S. Dist. Lexis 49083, at *37 (S.D. W. Va. May 18, 2010), the court found a waiver of privilege where the client and law firm failed to take reasonable steps to prevent disclosure.

Other cases further defined the boundaries of reasonable steps needed to protect the attorney-client privilege.

- In *Conceptus, Inc. v. Hologic, Inc.*, 2010 U.S. Dist. Lexis 109598 (N.D. Cal. Oct. 4, 2010), no reasonable steps were taken to prevent inadvertent disclosure when counsel failed to review documents.

- In *FSP Stallion 1, LLC v. Luce*, 2010 U.S. Dist. Lexis 110617 (D. Nev. Sept. 30, 2010), no recourse where counsel makes initial determination that documents are not privileged, then learns otherwise after production.

- In *King Pharmaceuticals, Inc. v. Purdue Pharma L.P.*, 2010 U.S. Dist. 54407 (W.D. Va. June 2, 2010), the fact that produced document had been reviewed and partially redacted does not prevent the disclosure from being inadvertent.

Rule 26 of the FRCP also was a tense topic in 2010. Courts warned lawyers who failed to cooperate in discovery that they were treading dangerously close to violating FRCP rule 26 subsections (h), (g), which require counsel to sign every discovery request, response, or objection — certifying that counsel made a reasonable inquiry to obtain the information and that the information is true and correct.

- In *Mezu v. Morgan State Univ.*, 2010 U.S. Dist. Lexis 113817,

at *6-7 (D. Md. Oct. 25, 2010), Judge Grimm instructed counsel for both sides to meet and confer in person. (See also *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 2010 U.S. Dist. Lexis 50769, at *12 (W.D. Pa. May 24, 2010).

- In *Grubb v. Board of Trustees of the University of Illinois*, 2010 U.S. Dist. Lexis 78485 (N.D. Ill. Aug. 4, 2010), District Court Judge Robert Dow wondered why the parties (and counsel) were pouring time, energy, and effort into what he considered a lost cause, where “the prevailing party’s bill of costs may well exceed any plausible award of damages.”

Forms of production were also at issue. One question that remains unresolved by the judiciary is when “native production” — reviewing files in their original format — is warranted, in the context of FRCP Rule 34.

Courts are still attempting to clarify non-waiver **clawback** agreements.

- In *Covad Comm. Co. v. Revonet, Inc.*, 267 F.R.D. 14, 20 (D.D.C. Mar. 31, 2010), Magistrate Judge John Facciola reiterated that “the rule itself permits production either in the format in which e-mail is ordinarily maintained, i.e. ‘native format,’ or another usable format.”

- In *Secure Energy, Inc. v. Coal Synthetics*, 2010 U.S. Dist. Lexis 13532 (E.D. Miss. Feb. 17, 2010), the court ruled that production of engineering drawings in a portable image format satisfied Rule 34.

- In *Chapman v. Gen. Bd. of Pension & Health Benefits of United Methodist Church, Inc.*, 2010 U.S. Dist. Lexis 66618 (N.D. Ill. July 6, 2010), the court ruled that Rule 34 does not require native production.

A key e-discovery issue is how to control costs so that EDD doesn’t cost more than what’s at stake in the litigation. Once again, the Sedona Conference has been influential in the development of standards. In October 2010, the conference published its “Commentary on Proportionality in Electronic Discovery,” which recommends that the burden and cost of preservation be weighed against the potential value and uniqueness of the information to be preserved.

The commentary features six principles, many identical to FRCP 26(b)(2)(C), recognizing that “discovery should generally be obtained from the most convenient, least burdensome, and least expensive source.”

It also recognizes that extrinsic evidence and data sampling may assist in the analysis.

Later in October, John Facciola, U.S. District Court Magistrate Judge for the District of Columbia, cited the Sedona treatise, when he denied a claim that producing documents pursuant to a government subpoena was unduly burdensome. *FTC v. Church & Dwight, Inc.*, 2010 U.S. Dist. Lexis 11505 (D.D.C. Oct. 29, 2010).

Even Shira Scheindlin addressed production of backup tapes.
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In *Pension Committee*, observing that when accessible data satisfies the requirement to search and produce relevant information, there is no need to save or search backup tapes.

The year's most important cost-shifting case came not from a federal court, but instead from Judge Eileen Bransten of the New York trial court. See *MBIA Ins. Corp. v. Countrywide Securities Corp.*, 2010 N.Y. Slip Op. 20043 (Sup. Ct. N.Y. Feb. 14, 2010).

Bransten denied a defendant's motion for a protective order allocating the costs for producing ESI, finding that New York's "requesting-party-pays" rule is only applicable to ESI that is not reasonably accessible due to undue cost or burden. Since the *MBIA* decision, other New York trial courts have followed suit.

In federal court, cost shifting for accessible data continues to be the exception rather than the rule, with courts generally denying requests related to e-mails. See, e.g., *Barrera v. Boughton*, 2010 U.S. Dist. Lexis 103491, at *13 (D. Conn. Mar. 19, 2010); *Helmert v. Butterball, LLC*, 2010 U.S. Dist. Lexis 60777, at *34-35 (E.D. Ark. May 27, 2010).

Nonetheless, consistent with FRCP Rule 26(b)(2)(B) and the Advisory Committee's notes to that rule, when inaccessible backup tapes were at issue, Magistrate Judge Henry Perkin, of the U.S. District Court for the Eastern District of Pennsylvania, ruled that some degree of cost shifting (50%) was appropriate. See also *Universal Del., Inc. v. Comdata Corp.*, 2010 U.S. Dist. Lexis 32158, at *23-24 (E.D. Pa. Mar. 31, 2010).

The number of criminal cases involving e-discovery continues to climb as judges apply the FRCP and civil precedent. Courts also continue to criticize the government's handling of ESI in both investigatory computer searches and discovery.

- In *United States v. Suarez*, 2010 WL 4226524 (D.N.J. Oct. 21, 2010), District Court Judge Jose Linares for the District of New Jersey, relying heavily on *Pension Committee*, granted defendants' request for an adverse inference instruction as a sanction for the government's destruction of text messages sent and received between FBI agents and cooperating witnesses.

- The 9th Circuit Court of Appeals in *United States v. Comprehensive Drug Testing, Inc.*, 2010 U.S. App. Lexis 19070 (9th Cir. Sept. 13, 2010) (as corrected Sept. 21, 2010), affirmed two judgments entered in the Districts of Nevada and Northern California, holding that the government overreached in its seizure and search of computer records containing drug testing results for Major League Baseball players. The court also dismissed the government's appeal related to an identical seizure in the District Court of Central Calif.

- In *United States v. Szymuszkiewicz*, 2010 U.S. App. Lexis 18815 (7th Cir. Sept. 9, 2010), the appellate court upheld defendant's conviction under the Wiretap Act for surreptitiously forwarding his supervisor's e-mail to his Outlook inbox.

What's in store for 2011? Some commentators have suggested that EDD "jumped the shark" with Mark Pappas' contempt citation

and possible jail stint. Admittedly, *Pension Committee*, *Rimkus*, and *Victor Stanley II* will be hard acts to follow. Nonetheless, we can expect more cases grappling with the preservation, production, and privacy rights related to social networking information. Courts will continue to rein in litigants who needlessly increase the cost of litigation through sloppy discovery requests or unreasonable demands for "any and all" electronically stored information.

Two years ago, Magistrate Judge Frank Maas affectionately referred to metadata as "the new black" with parties seeking it in every case. This year's distinction goes to "proportionality," with judges pursuing it with a vengeance. While the body of case law related to the undue cost and burden of producing ESI slowly builds, there is still little consensus from the courts on preservation.

In 2011, the FRCP Advisory Committee is expected to step up with a draft preservation rule for public comment. It is too early to predict whether that draft will become law before Mark Pappas pays Victor Stanley, Inc.'s attorneys' fees.

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George L. Paul is a Partner at Lewis and Roca, LLP, where he practices in its Phoenix office. Mr. Paul is an experienced business litigator and a nationally known consultant and author on digital evidence issues. Mr. Paul's recent litigation includes cases in the area of business torts; probate, estate and trust litigation; corporate control disputes; estate tax litigation; and copyright and other intellectual property litigation.

Mr. Paul has many months of jury trials under his belt; numerous bench trials; and trials in arbitration. He has lectured on the Arizona Rules of Evidence and trial techniques.

Mr. Paul recently authored the American Bar Association's acclaimed book, *Foundations of Digital Evidence* (2008). Before that he co-authored a book entitled *The Discovery Revolution: E-Discovery Amendments to the Federal Rules of Civil Procedure* (2006). Mr. Paul is the author of numerous articles, including the oft cited "**Information Inflation: Can the Legal System Adapt?**", 13 RICH. J.L. & TECH. 10 (2007), co-authored with Jason Baron, and *The Authenticity Crisis*. Paul was a Senior Editor for **The Sedona Conference® Best Practices Commentary on Search & Retrieval Methods** (August, 2007). In addition, Mr. Paul testified at hearings in Washington on both the E-Discovery Rules of Civil Procedure, and on the proposal to enact Rule 502, Federal Rules of Evidence.

Mr. Paul is currently Co-Chair of the American Bar Association's Electronic Discovery and Digital Evidence Committee, and is a frequent national lecturer on the topic of E-Discovery and its ethics, including recently in Washington, San Francisco, Chicago, Los Angeles, New York City, Salt Lake City, Houston, Philadelphia, and Phoenix. Twice in 2009 he was the featured Keynote Speaker at national conferences on electronic records. Mr. Paul has been frequently quoted in the *ABA Journal* about breaking topics, and has been interviewed by *National Public Radio* about digital evidence issues.

Mr. Paul attended Yale Law School and Dartmouth College.



Paul E. Burns, Senior Counsel

Practice Areas	Intellectual Property	Electronic Discovery
	Litigation	Internet Law
Admissions	Emerging Growth & Technology	Entertainment Law
	Licensing	Employment, Labor and Benefits
	Patent Prosecution & Counseling	Financial Institutions
	Trademarks & Copyrights	
	Trade Secrets	
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Professional Summary

Paul E. Burns concentrates his practice in intellectual property litigation, counseling and transactions, as well as commercial litigation, arbitration and mediation. Mr. Burns practices from Procopio’s San Diego and Scottsdale/Phoenix offices.

Mr. Burns has acted as lead counsel or co-counsel in patent, copyright, trademark, trade dress infringement, unfair competition, trade secret misappropriation and technology-related contract litigation involving Fortune 1000, Global 500, and public and private companies all over the United States, as well as Europe and Asia. Mr. Burns is also a registered patent attorney who (i) advises clients on intellectual property protection, enforcement and infringement avoidance, (ii) negotiates license, development, distribution and employment agreements, and (iii) engages in patent prosecution, federal trademark registration and copyright registration. Mr. Burns’ has handled matters involving computer hardware, software and all types of information technology, the Internet, entertainment (music, film, video, publishing, art, photography), gaming, semiconductors, electrical devices, chemical processes, manufacturing processes, mechanical devices, consumer products, franchising, medical devices, biotechnology, and pharmaceuticals.

Mr. Burns’ commercial litigation experience includes contract disputes, financial services (e.g. mortgages, loans, credit, securities, bankruptcy) disputes, creditors’ rights, franchise disputes, employee raiding, non-solicitation and other employment-related disputes, business torts, business break-ups, antitrust claims, securities fraud, real estate and construction disputes, regulatory matters and all categories of business and commercial disputes.

Mr. Burns has extensive experience with, and is recognized as a national expert in, Electronic Discovery. He designed and teaches one of the first law school classes in the country on the subject and was a contributor to the law school casebook *Electronic Discovery and Digital Evidence* (West American Casebook Series 2008). Mr. Burns is also General Counsel to, and a member of the Executive Committee of, The Sedona Conference®, the law and policy think tank that is universally recognized as the thought leader among practitioners and the judiciary in e-discovery matters. He is Co-Chair of The Sedona Conference Institute’s 5th Annual "Staying Ahead of the E-

Discovery Curve," the leading E-Discovery continuing legal education program. He has also been asked to speak on the subject of E-Discovery to the American Bar Association, the District Conference of the U.S. District Court for the District of Arizona, The Sedona Conference, Arizona State University's Sandra Day O'Connor College of Law, and several other business and legal organizations. Mr. Burns has handled numerous E-Discovery issues and disputes, and has been asked to serve as a Special E-Discovery Master in litigation and arbitration matters.

Mr. Burns' intellectual property and litigation expertise has been recognized by (i) his inclusion in Best Lawyers in America and Super Lawyers, (ii) his appointment as an Adjunct Professor of Law at Arizona State University's Sandra Day O'Connor College of Law, where he teaches Patent Litigation, Biotechnology Licensing & Litigation and Electronic Discovery & Digital Evidence, (iii) his appointment to leadership positions in the American Intellectual Property Law Association, Licensing Executives Society, Federal Bar Association, Copyright Society of the USA, and The Sedona Conference, (iv) his contribution to a law school casebook on Electronic Discovery and Digital Evidence, and (v) his nomination as a Fellow of the American Bar Foundation.

Mr. Burns has a substantial national arbitration and mediation practice focusing on technology, intellectual property and commercial disputes, including serving as a neutral for the American Arbitration Association and the International Institute for Conflict Prevention & Resolution (CPR). His arbitration and mediation expertise has been recognized by his appointment as an Adjunct Professor of Law to Pepperdine University School of Law's Straus Institute for Dispute Resolution and by his service as Chair of the American Intellectual Property Law Association's Alternative Dispute Resolution Committee. He has been a frequent speaker on alternative dispute resolution at national meetings of organizations such as the American Intellectual Property Law Association, the Copyright Society of the USA and Thomas Jefferson School of Law in San Diego, CA.

Representative Matters

- Representation of Asian-based semiconductor fabricator in preparation for preliminary injunction proceedings in trade secret misappropriation and patent licensing litigation
- Defense of a Fortune 500 health care management company in patent infringement case involving an alleged comprehensive health care management system
- Defense of several public companies against allegations of patent infringement involving bar code scanning technology
- Defense of a pharmacy benefit management company against allegations of patent infringement involving machine-vision technology
- Representation of a chemical processing company in patent licensing and inventorship dispute involving chemical purification process
- Representation of a casino game manufacturer in copyright infringement litigation against competitor
- Defense of a Fortune 100 insurance company against allegations of architectural works copyright infringement in an apartment complex
- Representation of a traffic control technology company in trade secret misappropriation case
- Representation of several companies in connection with allegations of breach of software development contracts involving enterprise-level systems in industries including health care, food services, retail products, and sports memorabilia
- Defense of semiconductor equipment manufacturer in software infringement litigation
- Representation of software developer in copyright infringement dispute against competitor
- Defense of specialty care product distributor in trade dress infringement case
- Defense of computer device manufacturer in trademark/Internet domain name dispute

- Defense of software development company against allegations of assisting in violating restrictive covenants by hiring former senior executives
- Defense of paper products manufacturer against allegations of unfair competition and intentional interference with employment relationships

Education, Distinctions & Community Involvement

Mr. Burns received his B.S. in Computer Science, *magna cum laude*, from Boston College, and his J.D., *magna cum laude*, from Boston College Law School, where he was a law review invitee. He has been listed in *The Best Lawyers in America* for Intellectual Property and *Super Lawyers* for Intellectual Property Litigation each year since 2007, and holds a Martindale-Hubbell AV Peer Review Rating. In 2009, Mr. Burns also received a prestigious nomination to be a Fellow of the American Bar Association.

Mr. Burns has served for over five years as an Adjunct Professor of Law at Arizona State University's Sandra Day O'Connor College of Law, where he teaches Patent Litigation, Biotechnology Licensing & Litigation and Electronic Discovery. He also serves as an Adjunct Professor in Pepperdine University School of Law's Straus Institute for Dispute Resolution, where he designed and taught its first course on Dispute Resolution in Intellectual Property.

Mr. Burns has held leadership positions in several national organizations. Mr. Burns serves or has served as (i) an appointed member of the American Intellectual Property Law Association's Professionalism & Ethics Committee, (ii) Chair of the Alternative Dispute Resolution Committee of the American Intellectual Property Law Association, (iii) President and Board Member of a chapter of the Federal Bar Association, (iv) Southwest Chapter Chair of the Copyright Society of the USA, (v) a Licensing Executives Society chapter chair, (vi) a member of the American Arbitration Association's Large Complex Case Advisory Committee and National Patent Advisory Committee, and (vii) Chair of the Intellectual Property Section of the State Bar of Arizona. He is Pro Bono General Counsel and a member of the Executive Committee of The Sedona Conference, the law and policy think tank addressing intellectual property, complex litigation and antitrust law, and the leading authority on electronic discovery. Mr. Burns is also a member of the Advisory Board of the Center for Law, Science, and Innovation at Arizona State University's Sandra Day O'Connor College of Law. He is a member of the Intellectual Property and Litigation Sections of the State Bar of California, State Bar of Arizona and the American Bar Association, and serves on the Alternative Dispute Resolution Committees of the International Trademark Association and the Intellectual Property Owner's Association.

News, Publications & Events

Recent Seminars and Speeches

- "Copyrights in the Cloud – Social Networking and Fair Use," Copyright Society of the USA Mid-Winter Meeting, 2010
- "The Ethical Minefields of Arbitration and Mediation – What Every Lawyer Needs to Know," American Intellectual Property Law Association Mid-Winter Institute, 2010
- "Special Considerations In Technology and Intellectual Property Arbitrations," American Arbitration Association, 2009
- "Patent Dispute Resolution," Thomas Jefferson School of Law, 2009
- Moderator, "Settlement Conferences and Mediation in Federal Court," Federal Bar Association, 2009
- "Recent Supreme Court and En Banc Patent Cases," State Bar of Arizona, 2008
- Moderator/Speaker, "Intellectual Property Issues Within the Employer/Employee Relationship," State Bar of Arizona Annual Convention, 2006
- "Copyright Under Pressure," Copyright Society of the USA Annual Meeting, 2006

- "Electronic Discovery," American Bar Association Annual Meeting, 2006
- "E-mail: The Silent Killer of Companies," Maricopa County Bar Association, Corporate Counsel Division, 2005, 2004
- "Managing Conflict in IP Cases," State Bar of Arizona Intellectual Property Law Section, 2005
- "Technology-Related Transaction Tips for Corporate Counsel," Co-sponsored by Association of Corporate Counsel and Licensing Executives Society, Arizona Chapter, 2005
- "Red Lights & Green Flags: Rules of the Road for Advertisers," State Bar of Arizona and Federal Trade Commission, 2005
- "Cost-Shifting in E-Discovery," Stafford Publications, 2005
- "Document Retention and Destruction in Arizona," Lorman Education Services, 2005
- "Alternative Dispute Resolution in Intellectual Property Disputes," State Bar of Arizona Intellectual Property Section, 2005
- "E-mail Risk Management," State Bar of Arizona Annual Meeting, 2004
- "Website Development Agreements," State Bar of Arizona Annual Meeting, 2003
- "Technology and Intellectual Property Issues for Non-technology Companies," Maricopa County Bar Association, Corporate Counsel Division, 2003
- "Knowing When to Pursue a Patent," Arizona State University, IEEE Student Chapter, 2003
- "Technology Entrepreneurship," Arizona State University, IEEE Student Chapter, 2001
- "The Napster Decision," Arizona State University School of Law, 2001
- "The Law of the Internet," NBI, 2001, 1997
- "Advanced Internet and Computer Law Issues," NBI, 1998.

Recent Articles/Publications

- Contributing Author, "Electronic Discovery and Digital Evidence," Scheindlin & Capra, West, 2008
- "Companies Need To Address New E-Discovery Rules," The Business Journal, 2007
- "Courts Need Balance in Patent Rights Cases," The Business Journal, 2006
- "File Sharing on the Web: A Case of Common Sense," The Business Journal, 2005
- Co-author, "An Introduction to Business Method Patents," NBI, 2001
- "Following Austin's Lead to High-Tech Future," The Arizona Republic, January 9, 2001
- co-Author, "Intellectual Property Law in Cyberspace," NBI, 1998
- "Special Problems of Trademark & Copyright Law of the Internet," NBI, 1997
- "The Long Arm of the Law of the Internet," NBI, 1997
- "Timing Is Paramount: The Impact of Paramount v. Time on the Law of Hostile Takeovers," 19 Fl. St. U. Law Rev. 761, 1992

The Honorable David G. Campbell

Born 1952 in Salt Lake City, UT

Federal Judicial Service:

Judge, U. S. District Court, District of Arizona

Nominated by George W. Bush on March 13, 2003, to a new seat created by 116 Stat. 1758; Confirmed by the Senate on July 8, 2003, and received commission on July 15, 2003.

Education:

University of Utah, B.S., 1976

University of Utah College of Law, J.D., 1979

Professional Career:

Law clerk, Hon. J. Clifford Wallace, U.S. Court of Appeals for the Ninth Circuit, 1979-1980

Private practice, 1980-1981

Law clerk, Associate Justice William H. Rehnquist, Supreme Court of the United States, 1982

Private practice, Phoenix, Arizona, 1982-2003

Adjunct professor, Arizona State University Law School, 1985-1986, 1988

Visiting professor, Brigham Young University, 1990